

THE DISUNITY OF LEGAL REALITY

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ABSTRACT

Take “legal reality” to be the part of reality that actual legal thought and talk is distinctively about, such as legal institutions, legal obligations, and legal norms. Our goal is to explore whether legal reality is disunified. To illustrate the issue, consider the possibility that an important metaphysical thesis such as positivism is true of one part of legal reality (legal institutions), but not another (legal norms). We offer two arguments that suggest that legal reality is disunified: one concerns the heterogeneity of different entities that are part of legal reality; the other concerns variation within legal thought and talk. We then show that taking the possibility of the disunity of legal reality seriously has important upshots for how we think about the positivist and antipositivist traditions, the debate between them, and their relation to other parts of legal theory, such as critical legal theory and legal realism.

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INTRODUCTION

There is a range of thought and talk that most of us take to be recognizably “legal.” This is, put roughly, in the sense that such thought and talk deals with legal matters. For example, consider claims about what the law is in a given place and time, beliefs about what legal obligations a person has, or statements about how courts operate. At least *prima facie*, such legal thought and talk seems to be *about* certain distinctive things—such as legal content, legal obligations, or legal institutions. Take “reality” to be the totality of what there is. In what follows, we will use the term ‘legal reality’ to refer to the part of reality that actual legal thought and talk is distinctively about; in other words, the totality of things, relations, properties, etc. that legal thought and talk is distinctively about.¹ In this paper, we explore the thesis that legal reality is *disunified* in an important way and consider what implications this would have for the philosophy of law.

The basic kind of disunity we are interested in is this: an important thesis (e.g., legal positivism) is true of one part of legal reality (e.g., legal institutions) but not another (e.g., legal obligations). We explore two different arguments that, put together, suggest we should take seriously the possibility that legal reality is disunified. The first argument starts by emphasizing the heterogeneity of different entities that are part of legal reality, given a range of plausible understandings of the boundaries of “legal reality.” The second argument stems from the fact that we demarcate the boundaries of “legal reality” by considering what legal thought and talk is distinctively about. We put forward linguistic observations that suggest there might be a significant degree of variation within legal thought and talk, such that some of this thought and talk refers to things for which a given thesis (e.g., positivism) is true but other parts refer to a subset of legal reality where the same thesis fails. We then consider four lines of argument that one might use to resist the claim that legal reality is disunified, and argue that none of them are compelling.

In this paper, we don’t aim to show that the thesis that legal reality is disunified is correct. Instead, our aim is to argue that the thesis is plausible enough that it warrants being taken seriously as a live option. This has important upshots for philosophy of law. We explore implications in two main areas—the debate between positivists and antipositivists, and the relations between that debate and ideas animating other traditions in legal theory. Within each area, we suggest that the thesis that law is disunified in our

1. Our way of talking about “legal reality” draws from David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 128 *ETHICS* 137 (2017) and connected discussion about parallel accounts of “ethical reality” and “normative reality” in Tristram McPherson & David Plunkett, *The Nature and Explanatory Ambitions of Metaethics*, in *THE ROUTLEDGE HANDBOOK OF METAETHICS 1* (Tristram McPherson & David Plunkett eds., 2017). We provide more details about how we understand “legal reality” in the first section.

sense may play several important roles. Four of the most important are as follows. First, it potentially offers a way to fruitfully reconcile ideas or insights from different theoretical traditions. Second, it helps us diagnose bad patterns of argument against certain theses, or against certain theoretical traditions more broadly. Third, it opens up new theoretical space to explore. And, finally, it can help us better locate background disagreements about the normative and explanatory importance of theoretical questions concerning different parts of legal reality.

Before we begin, however, it is worth discussing what motivates this project, and its relation to existing work in philosophy of law. This is particularly important since our project is more exploratory than adversarial. So readers may well wonder why they should undertake this exploratory voyage before getting on the boat.

On this front, we'll make five points. First, we think the promised destination is worthwhile. It's true that we're not arguing for the conclusion that legal reality *is* disunified. As such, some might think we are just arguing that it *might be* disunified, which may be too weak or too tentative to be interesting. But we intend to show something stronger than that. We don't think the disunity of legal reality is a mere epistemic possibility that cannot be excluded by our evidence, like the possibility that we're brains-in-vats. We think it's a *plausible* position to hold, in light of the evidence in its favor. In that respect, we think the position we adopt is quite like views held in established debates about the unity of other philosophical domains (such as science, consciousness, causation, as well as the examples we discuss below). Moreover, we think the fact that there are similar debates about unity in these areas but not in philosophy of law is a good reason in itself to undertake our exploratory voyage.

Second, while our project is not adversarial, we don't think that's because it's obvious that no one does or would disagree with our conclusion. It's primarily because questions about the unity of legal reality are significantly undertheorized. But some work in philosophy of law, taken at face value, at least suggests that legal reality is unified. For example, take Michael Moore's article-length discussion of the ontology of legal reality.² Moore starts with the following broad and open-ended account of legal reality: "Prima facie, our legal ontology seems to include: particular entities, such as laws; properties (qualities, sets, classes), such as legal validity; and relations, such as legal obligations from one person to another."³ Moore considers a range of theories that concern all of legal reality, as he characterizes it.⁴ Moreover, Moore explicitly discusses whether such theories can explain the unity of legal reality, noting that it cannot be explained

2. Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 LAW & PHIL. 619 (2002).

3. *Id.* at 620.

4. As Moore characterizes "legal reality," it might be narrower than our account of what "legal reality" is. Nonetheless, his characterization of it is still quite expansive, and thus, if it turned

by the mere use of “a unitary label”⁵ and arguing that it should also not be explained by positing a form of “legal dualism” on which there is “a separate legal world where legal things like duties, corporations, domiciles, and (legal) obstructions exist[.]”⁶ For Moore, facts about the function of law are what explain the unity of legal reality, on the model of how functionalists approach the unity of consciousness.⁷ On this view, there are basic legal kinds that are functional kinds, and they are “part of the best explanation of five sorts of phenomena: (1) legal truths other than the one doing the explaining; (2) individual behaviors of judges, lawyers, and citizens; (3) larger social developments, such as the rise of a capitalist economy; (4) the beliefs about what is and what is not legal; and (5) certain macro characteristics of legal propositions ‘in the large,’ such as the fact that no group is infallible about the truth of such propositions.”⁸ We think these passages from Moore suggest that at least some prominent philosophers of law think that legal reality is unified. And if we’re right, that view may well be mistaken.

Third, our project is exploratory, but it is not entering entirely uncharted waters. The idea that certain theories in legal philosophy might not be in direct conflict, despite initial appearances to the contrary, is something that comes up in many discussions in legal philosophy. But many of these discussions tend to be fairly granular—focused on a given set of theories, and their details—whereas our goal is to shift to a higher level of abstraction that allows for a more synoptic view of the question of unity itself. Only by switching to that level of abstraction can we evaluate whether this recurring theme signifies something about the nature of legal reality, rather than whether each one-off argument is right about the particularities of the relations between particular theories (e.g., between Thomas Hobbes’s and H.L.A. Hart’s theories, or between Hart’s and Ronald Dworkin’s theories, etc.). If legal reality is disunified, then we might well expect there to be different theories talking about different parts of it.

Fourth, leaving aside the intended destination, we think the journey itself is worth undertaking. Put less metaphorically, even if you’re already inclined to agree with our conclusion, and indeed even if all philosophers of law tacitly assume that legal reality is disunified, an important question needs to be addressed. Namely, what, if anything, makes it *justified* to believe that legal reality is disunified? Since the issue is underexplored at the level of abstraction at which we address it in this paper, explicit general arguments for the disunity of legal reality have not been widely advanced or subjected to sustained critical scrutiny. This is why the first four sections of the

out that “legal reality” (as Moore defines it) is unified, then it would yield the result that a large swath of “legal reality” (as we define it) is unified.

5. Moore, *supra* note 2, at 684.

6. *Id.* at 659.

7. *Id.* at 684–693.

8. *Id.* at 689–690.

paper are devoted to considering two such arguments and the objections they face. (And indeed, it is one reason why we only argue that the thesis that legal reality is disunified is plausible but not conclusively favored—that is, we think there is plenty of room for reasonable parties to disagree on this issue.)

Finally, even if you are thoroughly uninterested in the issue of disunity itself—perhaps you think the issue is too obtuse, or too obvious, or what have you—the journey may be worth undertaking because of how it bears on other issues in philosophy of law. In other words, taking seriously the thesis that legal reality is disunified has significant *implications*. And these implications are also undertheorized. This is unsurprising. If a thesis is not subject to sustained critical scrutiny, its implications are unlikely to be well appreciated (even if the thesis itself is or would be widely accepted). As such, we devote the fifth section of the paper to the implications of taking seriously the disunity of legal reality for the debate over positivism, and for its relationship to other important traditions in legal theory such as legal realism and critical legal theory. Of course, we think that the issues of *whether* and *why* one should think that legal reality is disunified are intrinsically interesting, but we hope that those who don't share this sentiment can be derivatively motivated to explore the connection between these issues and other areas of philosophy of law.

I. WHAT WOULD IT MEAN FOR LEGAL REALITY TO BE DISUNIFIED?

Our first task will be to explain the thesis we will be exploring. What does it mean for legal reality to be “disunified” in the relevant sense?

Let's start by considering again the notion of “legal reality.” On the account of “legal reality” we work with in this paper, we take “legal reality” to be a subset of “reality” overall, which, for our purposes here, we take to be the totality of what there is.⁹ In particular, we take “legal reality” to be the part of reality that actual legal thought and talk is distinctively about.¹⁰ We now briefly unpack what this account of “legal reality” involves.

By ‘actual’ legal thought and talk, we mean legal thought and talk that employs the words, concepts, or whatever other linguistic/mental items one associates with existing (and past) legal thought and talk.¹¹ This is

9. We should flag that this account of “reality” is somewhat more committal than that given in Plunkett & Shapiro, *supra* note 1, and McPherson & Plunkett, *supra* note 1, which our account here draws on. Those papers understand “reality” in an even more schematic way, where this understanding of “reality” is one of the salient possibilities.

10. This understanding of “legal reality” draws from Plunkett & Shapiro, *supra* note 1. *See also* connected discussion about parallel accounts of “ethical reality” and “normative reality” in McPherson & Plunkett, *supra* note 1. All of the main clarifications we make below in this section on our understanding of “legal reality” draw from these two papers.

11. In this paper, we use single quotation marks (e.g., ‘guitar’) strictly to mention words, and double quotation marks (e.g., “guitar”) for mixes of use and mention, scare quotes, quoting

meant to contrast to the kinds of legal thought and talk—or “legal”-ish thought and talk—that one thinks we *should* have.

By ‘distinctively’, we don’t mean ‘uniquely’. Take a paradigmatic bit of legal thought and talk, such as statements about what agents (in a given jurisdiction, at a given time) are legally obligated to do. Such statements concern agents and actions, which many parts of thought and talk also concern. What’s distinctively “legal” about these statements is that these claims are about agents’ *legal obligations* to perform certain actions. This illustrates the relevant sense of “distinctive” that we have in mind here.¹²

The sense of ‘about’ we have in mind here is a thin, intensional one, in the sense that the name ‘Pegasus’ is about a winged horse. We take it that legal thought and talk is (at least *prima facie*) “about” certain things, such as legal obligations, legal institutions, and legal content. In this paper, we work with the assumption that this is so. However, there is nothing in our definition of “legal thought and talk” that builds in that this is so: it leaves open for the theoretical possibility that legal thought and talk isn’t even “about” anything in our thin, intensional sense of ‘about’. Our formulation of “legal thought and talk” is thus very noncommittal. It leaves room for the possibility that error theory, on which legal thought and talk is distinctively about things that turn out not to exist, is correct. It is compatible with the idea that error theory is true of some parts of legal thought and talk, but not others, such that legal reality is narrower than what legal thought and talk is distinctively about. (It should be noted that, for much of our discussion in this paper, we assume that there is at least some “legal reality,” and thus that (at least some parts of) legal thought and talk are “about” parts of reality and that those parts of reality exist.)

Finally, our account of “legal reality” is intentionally schematic with respect to what exactly that reality consists in, as well as with respect to what reality more generally consists in, and how to best theorize about it. For example, it is compatible with more “inflationary” or “deflationary” ways of thinking about ontology and reality, and meta-metaphysics more generally.¹³

Our way of demarcating “legal reality” relies on a demarcation of *legal* thought and talk. So how, exactly, should we demarcate *legal* thought and talk from (say) *ethical* thought and talk? This is a difficult issue, and how one answers it will matter a great deal for our project. After all, if we start

passages from other people’s work, and other informal uses. We use small caps (e.g., GUITAR) to designate concepts.

12. This point draws from McPherson & Plunkett, *supra* note 1, making a similar point about ‘ethical reality’.

13. For example, we take it to be compatible with both the kind of broadly “inflationary” view in THEODORE SIDER, *WRITING THE BOOK OF THE WORLD* (2011) and the broadly “deflationary” view in AMIE L. THOMASSON, *ONTOLOGY MADE EASY* (2015). On this front, we want to emphasize that we have appealed to legal thought and talk to *demarcate* parts of reality (which part of reality is *legal*), but not to give an account of *what that reality consists in* (which some might take to suggest a more metaphysically deflationary stance).

with a broader account of legal thought and talk, we'll end up with a broader account of legal reality; and the broader legal reality turns out to be, the more heterogenous, and arguably disunified, it may turn out to be. This follows from the fact that, as we are discussing it in this paper, "legal reality" is defined as that part of reality that legal thought and talk is distinctively about.¹⁴

This issue ties into how one further develops the notion of "aboutness" we introduced above. For example, it is likely that a distinction between *de dicto* and *de re* senses of "aboutness" (or a similar distinction) might well need to play a role here. For instance: "Izzie's favorite entity" could be about a legal rule (a paradigmatic part of legal reality), just as it could be about the number seven. But it's not plausible that we would thereby want all thought and talk about "Izzie's favorite entity" (including both *de dicto* and *de re*) to thereby count as part of *legal* thought and talk. How one navigates this issue is going to bear on how broad "legal reality" turns out to be.

There are also other issues that more directly bear on how broad legal reality is. Some may prefer to adopt very theoretically committal approaches to demarcate "legal" thought and talk, which would affect the breadth of legal reality. For example, one such approach would be to hold that there is some distinctive concept that is used in all legal thought and talk—a conceptual "mark of the legal."¹⁵ Relatedly, one could attempt to demarcate legal thought and talk by positing that it requires a distinct semantics.¹⁶ (Similar approaches could be adopted in demarcating any domain of thought and talk, such as normative or mathematical thought and talk.)

Our approach will be less theoretically committal, but—given our exploratory ambitions—also more schematic. We think that there are paradigmatic instances of legal thought and talk: claims about legal institutions, rules, obligations, officials, jurisdictions, and so forth. For our purposes, whether something falls within the ambit of "legal" thought and talk can

14. A related concern is that, as John Gardner puts it, 'law' and cognate terms are also used to describe things such as "laws of nature and laws of logic." John Gardner, *The Legality of Law*, 17 *RATIO JURIS* 168, 168 (2004). Legal philosophers do not standardly take such uses of 'law' and cognate terms to pick out parts of reality that are their core concern. This means that, plausibly, the words that one associates with distinctively "legal" thought and talk are either homonymous or polysemous.

15. See Daniel Wodak, *Who's on First?*, in 15 *OXFORD STUDIES IN METAETHICS* 49 (Russ Shafer-Landau ed., 2020) for related discussion of metaethicists who commit to there being a "mark of the normative." For some, like ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1990), this involves such a commitment about the distinctive concepts involved in normative thought and talk.

16. This approach faces some obstacles. For example, on Angelika Kratzer's influential framework (as in ANGELIKA KRATZER, *MODALS AND CONDITIONALS: NEW AND REVISED PERSPECTIVES* (2012)), there is no distinctive semantics for the legal 'ought'; there is just one general semantics for 'ought'. See Jennifer Carr, *Deontic Modals*, in *THE ROUTLEDGE HANDBOOK OF METAETHICS* (Tristram McPherson & David Plunkett eds., 2017) and Daniel Wodak, *What Does 'Legal Obligation' Mean?*, 99 *PAC. PHIL. Q.* 790 (2018) for discussion.

be settled by its similarity to those paradigmatic instances. This will leave some penumbral cases about which there may be reasonable disagreement. To illustrate the approach, here is one such penumbral case that will be of particular interest going forward: claims about what decisions legal officials (such as judges) will reach, and why. Such claims are made both in everyday contexts (predicting that a client will lose their case given that it has been assigned to a particular magistrate) and in areas of legal theory inside and outside of analytic jurisprudence (including discussions about critical legal theory and legal realism). Why say that such discourse should fall within the ambit of “legal” thought and talk? It uses legal concepts to state propositions that can be true or false, and whether they are true directly affects individuals’ legal rights and duties. Further, as John Gardner notes, law includes distinctive “artefacts” as well as a distinctive “practices”: it is “the genre to which legal systems and legal norms belong but it is also what lawyers and legal officials do.”¹⁷ We also think the theoretical issues about such predictions implicate questions about legal indeterminacy and the nature of legal adjudication that core figures in the positivism/antipositivism debate (such as Ronald Dworkin) have taken a stance on while theorizing about the nature of law.¹⁸ So we think there are strong reasons to view such claims as falling well within the ambit of legal thought and talk. We don’t try to settle this issue conclusively in this paper, but return to it briefly again in Section V.B.

As this case illustrates, we can at least glom on to distinctively “legal” thought and talk via ostension to paradigm cases, and use what it is distinctively about to settle the parameters of legal reality. Of course, some may deny this starting point. And if one denies either that we can individuate distinctively legal thought and talk or that we should use it to settle the parameters of legal reality, then one might wish to get off the boat quite close to the shore. But we still think the trip is worth undertaking in light of such skepticism, in part for the following reason. If how we think about the disunity of legal reality is significantly hostage to how we demarcate legal reality, then *that* issue turns out to warrant more scrutiny than it has received.

So that’s our initial way of demarcating legal reality. Now we can ask what it would mean for legal reality to be “disunified.” Again, considering an example will help. Take the positivist’s core thesis. There are different ways of formulating it.¹⁹ Here’s one example: positivism states that, necessarily, facts about legal content are ultimately grounded in social facts alone, and not moral facts.²⁰ This thesis is about one part of legal reality

17. Gardner, *supra* note 14, at 174.

18. See RONALD DWORKIN, *LAW’S EMPIRE* (1986).

19. See David Plunkett & Daniel Wodak, *Legal Positivism and the Real Definition of Law*, JURISPRUDENCE (2022), <https://doi.org/10.1080/20403313.2022.2037344>, for discussion.

20. This formulation draws from Mark Greenberg, *How Facts Make Law*, in *EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 225 (Scott Hershovitz ed., 2006), SCOTT

(facts about what the law is, in a given jurisdiction). We can now ask: Is a thesis like this also true of *other* parts of legal reality? For example, are facts about the existence of legal institutions necessarily also ultimately grounded in social facts alone, and not moral facts? We think that if positivism turned out to be true of facts about legal content, but the parallel thesis about another part of legal reality (such as facts about legal institutions) turned out to be false, then legal reality would be “disunified” in an important sense. This is the kind of “disunity” we are interested in.

What we think this example illustrates is that there might not be one general, “unified” account of all legal reality.²¹ Understanding all of legal reality might instead require a patchwork of theories. The theories in this patchwork could all be broadly positivist, or broadly antipositivist. It could be that some fragments of legal reality (but not others) are explained in terms of theories akin to *inclusive* or *exclusive* (or *Hartian* or *Austinian*) positivism; others, in terms of ones akin to *Dworkin’s* antipositivism. And it could also be that some parts of legal reality are understood in terms of metaphysical theories that are quite different from those that animate the debate over positivism.

That said, we have focused so far on examples from the positivism debate for two reasons. First, one potential upshot of considering whether legal reality is disunified is that the answer may either challenge or clarify the terms of that debate. It’s not always clear whether positivism and antipositivism are meant to be understood as *global* or *local* theses with respect to legal reality. If they are *global theses*, they’re about all of legal reality. If they are *local theses*, they only purport to be true of some narrower part(s) of legal reality—which may or may not be explicitly specified, and which may be vague or ambiguous. Notice that on the second interpretation, there’s no clear *ex ante* reason to think that positivism and antipositivism are mutually exclusive and jointly exhaustive options: one could believe each is true (with respect to different parts of legal reality); and one could accept an

J. SHAPIRO, LEGALITY (2011), and David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139 (2012). One moving part in our account here is the idea of formulating legal positivism in terms of “grounding,” as opposed to other metaphysical notions. For defense of this idea, see Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109 (Bob Hale & Aviv Hoffmann eds., 2010), Plunkett, *supra*, and Samuele Chilovi & George Pavlakos, *Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence*, 25 LEGAL THEORY 53 (2019). For connected discussion (including of the idea of formulating legal positivism in ground-theoretic terms), see Plunkett & Shapiro, *supra* note 1. In Plunkett & Wodak, *supra* note 19, we argue that, in a number of contexts in legal philosophy, where a certain degree of philosophical precision matters, the thesis of legal positivism is best understood as one about the real definition of law, where the kind of formulation of positivism we are working with in this paper is embedded in a claim about what “lies in the nature of law.” However, given our aims in this paper, this extra qualification isn’t crucial, so we leave it to the side for ease of presentation.

21. This is subject, of course, to some constraints on the general account. If one simply disjoined the theses that are true of each part of legal reality, that would provide an account of all of legal reality, but we do not think legal reality can be unified so cheaply, in the relevant sense of “unity.”

alternative to both (with respect to some other part of legal reality).²² If we take the first interpretation, the view that legal reality is disunified would turn out to be deeply revisionary with respect to commitments in general jurisprudence. If we take the second interpretation, the view that legal reality is disunified is clarificatory of something that is perhaps implicitly accepted, but not articulated, investigated, or defended. And there is also then the gradational question of how local these theses are—they could be about just one small fragment of legal reality, or about almost all of legal reality.

To some extent, which of these two interpretations of positions in the positivism debate we adopt may depend on how broadly or narrowly we set the parameters of “legal reality.” If “legal reality” is construed narrowly—say, to just consist of legal institutions and legal content—it will be more natural to construe positivism and antipositivism as global theses. We take that to be an implausibly narrow way of thinking about “legal reality” (which is part of why we don’t favor the “global” reading of the theses of positivism and antipositivism). That being said, we don’t think the issue is wholly determined by the scope of “legal reality.” Some might adopt ambitious auxiliary theses that, if true, link conceptually distinct parts of legal reality. One such thesis is that facts about legal obligations are grounded in facts about legal norms. Another such thesis is that what it is to be a legal norm depends on that norm being related in certain ways to legal institutions. The more one accepts such auxiliary theses, the closer positivism or antipositivism will seem to being global theses, or at least to having relatively global implications.

There is a further reason why we have focused on examples from the positivism debate. It is common for positivists and antipositivists alike to construe that debate as concerning what determines the legal facts (in some metaphysical sense of “determination”). There are different versions of such formulations. But you may well think that, on any such formulation, we get a nice way of stating what it would be for legal reality to be disunified: it’d be for different parts of legal reality to be determined by (e.g., grounded in) different nonlegal facts. We mention this in part because we’re not sure that this should suffice for legal reality to be “disunified” in a deep sense. To put our point simply, we shouldn’t equate monism with unity. For example, physical reality might be ultimately explained by facts about particles *and* forces, and indeed by facts about many very different particles and four different fundamental forces. Like many others, we think that whether physics is “unified” depends on whether there is a so-called “Theory of Everything”: a single, coherent, exhaustive theory

22. Note that if we take this second interpretation, then, strictly speaking, the disunity of legal reality might involve, for example, positivism being true of one part of legal reality and a parallel thesis being false of another part of legal reality. This is because positivism would, by definition, only concern one part of legal reality. For ease of presentation, we won’t always stress this caveat in our main discussion.

that fully explains all the different aspects of physical reality. We don't think a Theory of Everything is ruled out from the get-go by the observation that there is a plurality of fundamental physical particles and forces. Likewise, we think the test for whether legal reality is disunified is whether there is a single legal Theory of Everything, which there arguably could be even with multiple grounds.²³

Here's another analogy to consider. Some think that what we morally owe to persons is explained in terms of a contractualist framework, which cannot be extended to explain moral obligations to nonpersons (such as non-human animals). This raises the question of whether one single moral Theory of Everything cohesively explains all of our moral obligations (and rights, privileges, and so on). If we have contractualism for persons and utilitarianism for nonhuman animals, do we have one single theory that explains how these cohere?

To put this last point differently, we won't assume from the outset one highly committal model of what it takes for a domain like legal reality to be "unified." It is common for philosophers to talk as if there is just one model for unification: a domain is unified if and only if it is a genus, such that every species shares an essential feature.²⁴ But other models might appeal to higher-level functions (allowing for multiple realizability), or interrelated networks, or determinates and determinables, or analogical relations.²⁵ Some of these models might make the relevant kind of "unity" here largely an epistemic phenomenon. Others will make it largely a metaphysical phenomenon. This shouldn't be surprising, since we find a similar split in accounts of "explanation" and other related things. To briefly illustrate what we have in mind here, consider Scott Shapiro's account of legal norms in *Legality*. For Shapiro, legal norms are *either* plans *or* certain other norms (such as norms of custom) that are "plan-like" in key respects.²⁶ In a sense, then, on Shapiro's theory, legal norms don't turn out to be just one thing, as a monist might have supposed. But arguably, they still turn out to be *fairly* unified on this picture, given the important similarities between plans and "plan-like" norms.

We just alluded to one upshot of some models for unification that will also be important for our purposes. On some models, unity is *binary* (e.g., a domain is unified if it is a genus, and disunified if it isn't). On others, unity is *gradable*. On the latter approaches, law could be *more* or *less* unified or disunified. Our core question is then more aptly stated as concerning whether legal reality is relatively disunified; it is open to the reader to interpret our bare claims about disunity this way generally, though we will at times explicitly focus on questions about relative disunity.

23. For related discussion, see Wodak, *supra* note 15.

24. For references and objections to this line of thinking, see Wodak, *supra* note 15.

25. These models are discussed in Wodak, *supra* note 15.

26. SHAPIRO, *supra* note 20.

With this understanding of what it would be for legal reality to be “disunified,” we are now in a position to turn to the question of how seriously we should take the possibility that it is. In the next two sections, we present two arguments for why we think this is a possibility worth taking seriously.

II. DIFFERENT PARTS OF LEGAL REALITY

The first argument that we consider on behalf of the idea that legal reality is disunified is as follows. The different entities that make up legal reality turn out, on a range of plausible understandings of the boundaries of “legal reality,” to be highly heterogeneous. And this heterogeneity suggests that legal reality is disunified, insofar as the dissimilarity between the entities in the domain suggests that no single, coherent, exhaustive theory will fully explain all the relevant entities.

We don’t need to settle the exact parameters of legal reality here. There are a range of plausible understandings of the boundaries of “legal reality,” such that a single legal Theory of Everything would need to explain most of the following:

- What the law is (in a given jurisdiction, at a given time)
- Legal norms
- Legal statutes and constitutions
- Judicial decisions
- Legal obligations, rights, duties, and privileges
- Legal institutions
- Laws and legal systems
- Practices of legal adjudication
- The behavior of legal officials
- Legal systems or jurisdictions
- The function(s) of laws and legal systems

Of course, a single cohesive theory might fully explain many of these entities, including perhaps all those that we consider to be at the “core” rather than the “penumbra” of “legal reality.” Indeed, it might also be that we can’t fully explain some such “core” entities without fully explaining others, because their natures are intimately tied together. For example, on some ways of understanding facts about “what the law is” (in a given jurisdiction, at a given time) those facts are defined in terms of facts about what legal obligations, rights, duties, and privileges obtain in a given jurisdiction, at a given time.²⁷

However, we think reflection on the heterogeneity of the entities in this list suggests that legal reality will be disunified. If legal reality involves very different kinds of entities—from institutions to norms to behaviors—then

27. See, e.g., Greenberg, *supra* note 20, and Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014).

the unity of legal reality does not seem like a plausible starting assumption. At best, it seems like an ambitious and perhaps surprising hypothesis that one must vindicate.

If that is right—that is, if there really are a range of quite different kinds of things that make up legal reality—it suggests a straightforward argument for taking seriously the possibility of the disunity of legal reality. Taking it seriously could amount to treating the disunity of legal reality as the default position. But the more minimal claim that we’re defending is that the heterogeneity of legal reality should make us *open* to the possibility that legal reality is disunified, until a strong argument shows otherwise.

Before moving on, we want to note a two-step way of pushing back on this argument from the start. The first step is to argue that the list of entities we’ve used in motivating the argument is overly inclusive. Some might be inclined toward this idea based on the fact that core debates in philosophy of law—say, the debate over positivism—focus on some of these entities, and not others. The second step is to argue that once we exclude some items from the list, the remainder is unified.

We think this response is natural, but both steps of the argument seem questionable. Take the first. Theoretical claims about almost all of the entities on the list above have appeared prominently in the debate over positivism. And besides, the boundaries of “legal reality” are not set by the boundaries of the debate over positivism, or even by the boundaries of debates within philosophy of law. Rather, those boundaries are set by the boundaries of legal thought and talk. It might be that legal anthropologists, or legal sociologists, for example, help us see parts of legal reality that legal philosophers haven’t focused on. If legal philosophers focused on them, they might ask questions about those parts of legal reality that are different from the ones anthropologists or sociologists ask—such as, for example, asking questions about the metaphysics of those parts of legal reality, or the epistemology of learning about them, or the semantics of our talk about them. But the fact that the questions that philosophers might ask might be different from those that anthropologists et al. ask doesn’t settle what is or isn’t part of legal reality. In light of that, we view the list above as nonexhaustive, and arguably quite conservative.

Now turn to the second step. We don’t think it’s obvious that the narrowest subset of legal reality that is most discussed in the positivism debate is unified; in the next section, we’ll offer some reasons why disunity might emerge even here. But our main response, for now, is to underscore that taking seriously the possibility of the disunity of legal reality writ large is compatible with holding that some subset of legal reality (e.g., legal norms and legal obligations, rights, permissions, etc.) is unified. Establishing some kind of unity within some subset of legal reality doesn’t establish unity across the board, or in every subset of legal reality.²⁸

28. That is, there may be heterogeneity *within* some entities on this list, taken on their own. Consider, for example, the variety of practices that fall under the ambit of legal adjudication.

III. THE DIVERSITY OF LEGAL THOUGHT AND TALK

The second argument we consider for taking seriously the thesis of the disunity of legal reality stems from the fact that, on our way of thinking about things, what it is to be a part of “legal reality” is tied to the issue of what legal thought and talk is distinctively about. In this section, we put forward linguistic observations that suggest there might be a significant degree of variation within legal thought and talk. Given this variation, it is plausible that some of this thought and talk refers to things of which a given thesis (e.g., positivism) is true, but other parts refer to a subset of legal reality where the same thesis fails.

One kind of heterogeneity in legal thought and talk simply reflects the kind of heterogeneity we discussed in the last section. Sometimes people talk about “legal obligations,” while other times they talk about “the law” or “legal institutions.” The observation of this kind of heterogeneity doesn’t add much to the observation we put forward in the last section. This is because it is essentially just the representational-level reflection of the object-level diversity we have already noted.

Other kinds of variation within legal thought and talk are more interesting here, and potentially more consequential for our theorizing about the potential disunity of legal reality. First, note that a given legal thought or claim can be thought or uttered in very different contexts. For example, the claim “Jonah is legally obligated to ϕ ” might be uttered by a judge making a ruling in a case where Jonah is on trial, an anthropologist reporting on the law of a jurisdiction whose laws apply to Jonah, a lawyer advising Jonah on what to do, or a friend talking with Jonah’s parents about Jonah’s situation. It might well be that the same claim means different things in these different contexts.²⁹ For example, some legal philosophers have thought there is a serious difference between “internal” statements of law (roughly, those uttered by an engaged participant in a legal system) and “external” statements of law (roughly, those uttered by an outside observer of a legal system), such that each kind of statement means a fundamentally different thing.³⁰ For example, Kevin Toh has argued for an expressivist account of internal legal statements, but not external ones.³¹ We do not accept Toh’s expressivism.³² But

Or on some ontological views, legal obligations, taken on their own, might turn out to be disunified.

29. If one wants to go in for a fine-grained view about the individuation of “claims,” and thus deny that it really is the same claim in these different contexts of use, we can then switch to talking about related, homophonous claims (or something along those lines) and preserve this main line of thought.

30. We are here drawing roughly on Hart’s cut between “internal” and “external” legal statements in H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

31. See Kevin Toh, *Legal Judgments as Plural Acceptances of Norms*, in 1 *OXFORD STUDIES IN PHILOSOPHY OF LAW* 107 (Leslie Green & Brian Leiter eds., 2011).

32. For some of why, and for an alternative view that aims to be responsive to many of the same data points as Toh, see Stephen Finlay & David Plunkett, *Quasi-Expressivism About*

what concerns us is the broad possibility it presents, which need not involve any appeal to expressivism in particular—it could also be, for example, that legal claims express “thick” normative concepts in some contexts, but not in others.³³ We think that broad possibility should be taken seriously given the strikingly different features of how people make the same legal claim in different contexts (or, if certain theses about the individuation of “claims” are correct, one might put this as concerning how they make *different* claims using the same string of words in different contexts).³⁴ And that broad possibility can support the conclusion that legal claims in different contexts are about strikingly different parts of reality, such that legal reality turns out to be metaphysically disunified for similar reasons to those we discussed above.

We can see another kind of diversity in legal thought and talk by looking at the range of theories on offer in general jurisprudence, and the kinds of data that are marshalled on their behalf. Consider, for example, the contrast between Hart’s positivist account of law in *The Concept of Law* and Mark Greenberg’s antipositivist “Moral Impact Theory” of law. Put roughly, according to Hart, the law is a union of primary and secondary rules (the latter being rules about rules). Among the secondary rules is the rule of recognition, which sets the standards for what it takes to be a law in that jurisdiction (i.e., the standards of “legal validity”). According to Hart, facts about both the existence and content of the rule of recognition are set by social facts, including, centrally, facts about the converging behavior of legal officials applying that rule. In turn, the law (in the relevant jurisdiction, at a given time) consists of all those rules that are validated by the rule of recognition.³⁵ In contrast, Greenberg argues that the law (in a given jurisdiction, at a given time) consists in a subset of the “moral profile” that exists in a certain social context.³⁶ The “moral profile” is the full set of (general) moral obligations, rights, powers, permissions, etc. that obtain in that context. According to Greenberg, legal obligations are a subset of the moral obligations in the moral profile: namely, those that were produced by the “impact” of the operation of legal institutions (operating in “legally

Statements of Law: A Hartian Theory, in 3 OXFORD STUDIES IN PHILOSOPHY OF LAW (John Gardner, Leslie Green & Brian Leiter eds., 2018). See also the objections in Wodak, *supra* note 16.

33. On the idea that some legal concepts are “thick” ones (including perhaps the concept LEGAL), see David Enoch & Kevin Toh, *Legal as a Thick Concept*, in PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 230 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

34. Some of Dworkin’s work in RONALD DWORIN, *JUSTICE IN ROBES* (2006) suggests a similar idea (which Dworkin then uses as the basis for a theory on which there are multiple different concepts tied to ‘law’). See also David Plunkett, *Negotiating the Meaning of “Law”: The Metalinguistic Dimension of the Dispute over Legal Positivism*, 22 LEGAL THEORY 205 (2016).

35. We are here glossing the view in HART, *supra* note 30, using the basic model for that view put forward in Finlay & Plunkett, *supra* note 32. There are obviously many different existing interpretations of Hart’s view, including ones (such as Kevin Toh, *Hart’s Expressivism and His Benthamite Project*, 11 LEGAL THEORY 75 (2005)) that push it in a direction of not even taking a stand on the question of what explains or determines legal content. We don’t want to wade into these interpretative debates in this paper.

36. Greenberg, *The Moral Impact Theory of Law*, *supra* note 27.

relevant” ways). And *mutatis mutandis* for legal rights, powers, permissions, etc. Hence, the law is a subset of moral obligations, rights, powers, permissions, etc.

It is standardly thought that Hart’s positivism and Greenberg’s antipositivism are rival theories about the same part of legal reality. It is not hard to see why: taken at face value, they offer different constitutive accounts of the same part of legal reality (namely, what the law is, in a given jurisdiction, at a given time). Furthermore, in addition to looking at their developed theories, we can also look to the data that Hart and Greenberg appeal to most. Both theorists point to a range of patterns involving legal thought and talk that (prima facie) support their theories. For example, Hart places comparatively more emphasis on patterns of ordinary legal thought and talk (by nonlegal actors, using our ordinary legal concepts) than Greenberg, and Greenberg places comparatively more emphasis on certain aspects of judicial practices involving statutory interpretation than Hart. Part of the game in general jurisprudence—as many of us play it—lies in trying to reconcile different strands of thought and talk such that there really is a unified, theoretically illuminating account of “the law” that shows these strands to be about the same thing. Insofar as that is the game that Hart and Greenberg are playing, this gives us additional reasons to think that they are offering rival accounts of the same part(s) of legal reality. At the end of the day, we think that conclusion is correct: that is, we think that Hart and Greenberg do offer us rival accounts of the same part(s) of legal reality. Or, put somewhat more carefully: we take it that at least much of their theories are in conflict in this way.

With that more careful formulation in hand, we can then ask: How much of their theories are in conflict in this way, as opposed to just being about different parts of legal reality? Consider that we could look at the situation here with respect to the kinds of evidence Hart and Greenberg both marshal on behalf of their theories in a different light. If there are seemingly conflicting patterns of usage with central legal terms, maybe different people in different contexts use legal terminology differently, to pick out different parts of reality. If those parts of reality are different enough from each other, it might well be that those parts of reality turn out to be metaphysically disunified for the same basic reasons we put forward in the previous section. Indeed, this is not a new line of thought. Toward the end of *The Concept of Law*, Hart suggests that there might be two concepts “of law,” one of which, as Gardner puts it, captures “the genre of law that lives up to whatever moral ideal law should live up to.”³⁷ Similar views have been suggested by some contemporary antipositivists, especially John Finnis.³⁸

37. Gardner, *supra* note 14, at 180, discussing HART, *supra* note 30, at 206.

38. See references in Brian Flanagan & Ivar R. Hannikainen, *The Folk Concept of Law: Law Is Intrinsically Moral*, 100 AUSTRALASIAN J. PHIL. 165, 166–167 (2022). See also their distinction between “strong” and “weak” neoclassical natural law theories, *id.* at 169, and their references on whether there is a unified concept of law, *id.* at 175.

(Some have even recently attempted to bring interesting empirical evidence to bear on whether there is a single folk concept of law.³⁹) So if there are two concepts “of law” (or perhaps, put somewhat differently, two “legal-ish” concepts), Hart could be right about one, and Greenberg could be right about the other. Or, to take another example of this line of thought: Dworkin could be right about one concept of “legal obligation,” and Greenberg could be right about a second concept of “legal obligation.”⁴⁰

To further this line of thought, consider that legal philosophers are not unique in having views about the nature of law. Many legal actors (e.g., judges) have implicit or explicit views about that topic too. Some might be convinced of antipositivist views like Greenberg’s or Dworkin’s. Others might be convinced by positivist views like Hart’s or Joseph Raz’s. Others might endorse other views entirely. Many of these people might well be mistaken—and many would need to be if they are all holding rival theories of the same thing. Their being mistaken needn’t be surprising—practitioners of X are often mistaken in their theories about the nature of X, regardless of whether X is law, or science, or art. But consider this possibility: a group of legal actors being convinced of a theory might nonetheless lead them over time to think and talk in ways that make their thought and talk best interpreted to refer to a part of reality for which their theory is true. For example, Dworkinian judges might think and talk about one part of legal reality, while Hartian judges think and talk about a different part of legal reality, despite both using the same terminology.

Why would the heterogeneity of legal *thought and talk* suggest that legal *reality* is disunified? Legal reality is whatever actual legal thought and talk is distinctively about. So if legal thought and talk is heterogenous in some of the important ways we sketched above, then legal reality will plausibly turn out to be fragmented in an important sense—for broadly the same reason we sketched in the last section. This could amount to different parts of legal reality having different real definitions, or being grounded in different kinds of facts, and so forth. But we prefer to adopt a broader framing: it amounts to there being no single, cohesive, exhaustive theory of all of legal reality that is “unified,” in the sense that this one theory fully explains all the different entities that legal thought and talk, in all of its diversity, is distinctively about.

IV. POTENTIAL REASONS TO DISMISS THE DISUNITY OF LEGAL REALITY

We’ve now given an initial case for taking seriously the potential disunity of legal reality. In the following section (V) we will explore some of the

39. *See id.*

40. For discussion and references, see Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1200–1201 (2015).

upshots of this. Before we do so, we will consider four arguments against taking this idea seriously, and respond to each. These are, in effect, arguments for the unity of legal reality. We think there is something to each argument, and legal reality *might* turn out to be unified in the way they suggest. However, our basic response to these arguments is that they can't be assumed to be sound and used as a starting point for legal philosophy. In other words, they don't offer us anything like debate-structuring assumptions that all of us should be operating with. If that is right, we're still left with good reasons to take seriously the thesis that legal reality is disunified.

A. Argument One

Here's the first argument:

There must be something in virtue of which it's all *legal* thought and talk, and all *legal* reality. We might not know what that thing is. But whatever it is, we know it keeps legal reality unified to some degree.

We think there's something to this argument; and indeed, we think it's especially promising when we keep in mind, as we noted above, that there are different models for what it would take for a domain to be unified: it could be a genus, be a determinable, form an interrelated network, have an analogical structure, and so on.

But we still think the argument is far too quick. For one thing, the mere fact that we taxonomize reality in a certain way does not entail that the categories we use are in any deep sense "joint-carving" or unified. Consider Jorge Luis Borges's taxonomy of animals in the Celestial Emporium of Benevolent Knowledge: those belonging to the Emperor, embalmed ones, trained ones, suckling pigs, mermaids, fabled ones, stray dogs, those included in this classification, those that tremble as if they were mad, innumerable ones, those drawn with a very fine camel hair brush, miscellaneous, those that have just broken the vase, and those that from afar look like flies.⁴¹ We can coin names for the categories in this taxonomy. But we don't think that suffices to make them unified in any interesting or important sense. So to demonstrate that legal reality is unified requires work: one can't suppose from the onset that it must be unified simply because it's part of a taxonomy we use. After all, we could use the taxonomy for reasons *other* than it picking out a deeply unified part of reality.

For another thing, as we noted earlier, on some models the unity of a domain is not binary, but gradable, and if we think of unity gradably this first argument has even less force. Perhaps something must keep legal

41. JORGE LUIS BORGES, *The Analytical Language of John Wilkins*, in *SELECTED NONFICTIONS* 229 (Eliot Weinberger ed., 1942/1999). Here we're mainly emphasizing a point made by Moore: that the unity of legal reality cannot be explained by the mere use of a unitary label. See Moore, *supra* note 2, at 684.

reality unified *to some degree* for it to form a category at all. But the degree of unity that entails may be minimal, and perfectly consistent with the possibility that (for example) positivism is true of some part of legal reality and antipositivism is true of some other part of legal reality. After all, there is obviously something that the category of animals included in Borges's classification all have in common (namely, all being included in the classification). So there is some minimal sense in which that category is unified. But that degree of "unity" is minimal, and can hardly be taken to reflect any deep metaphysical similarities between the things in that category.

B. Argument Two

Here's the second argument:

Surely the different parts of legal reality are all linked, such that there are connections between (say) legal norms and legal institutions? And if this is right, legal reality will turn out to be very different from the categories in Borges's taxonomy.

Unlike the first argument, this argument doesn't insist that the fact that it's all "legal" thought and talk guarantees anything about the unity of legal reality. Instead, it aims to establish that unity by starting with different links between different parts of legal reality, and then generalizing from there.

We are sympathetic to the idea that there will be connections between *some* different parts of legal reality. For example, with Shapiro in *Legality*, we think there is strong pressure to think that what makes something a *legal* norm is tied to what makes something a *legal* institution.⁴² We also think, along with many others involved in the debate over positivism, that there is strong pressure to think that there are important explanatory links between facts about the nature and grounds of legal *norms* and legal *obligations, rights, permissions, etc.*⁴³ But, even if there are indeed such connections between some parts of legal reality, we think this argument moves too quickly. For one thing, one must defend the auxiliary theses that link the different parts of legal reality. Such theses can't just be assumed. They need to be argued for. For another, such theses may link some portions of legal reality (legal institutions to legal norms, for example), but not *all* portions of legal reality (legal norms to the behavior of legal officials, for example). In other words, the broader the scope of "legal reality," the more ambitious one's set of auxiliary theses would

42. See SHAPIRO, *supra* note 20. For a similar line of argument, drawing on Shapiro, see Plunkett, *supra* note 20.

43. This is not to say that everyone in this debate agrees on *what* those connections are. They obviously do not. (For example, compare Greenberg, *The Moral Impact Theory of Law*, *supra* note 27, and SHAPIRO, *supra* note 20.) Rather, it's just to emphasize the fact that many agree that there are *some* important explanatory connections here of some kind.

need to be to link it *all* together, and the less plausible it is that we can assume some complete set of theses like that from the get-go in theorizing about legal reality.

C. Argument Three

Here's the third argument:

Surely our legal terms are univocal? And if they are univocal, then when those terms are used in different contexts or by different speakers, they'll be about the same things. So the unity of legal reality will follow from the univocality of legal terms.

We think that there's something to this argument too. Indeed, one of us (Wodak) has argued that there is some pressure to think that terms like 'obligation' are univocal, and this generates problems for a number of views about legal thought and talk (including Toh's expressivism and the now-popular "moralized" semantics for 'legal obligation').⁴⁴ But we think this argument also moves too quickly, for three reasons.

First, the costs of giving up on univocality depend on which alternative is offered: appealing to polysemy and/or the idea of "metalinguistic negotiation" may capture much of what makes univocality an attractive thesis.⁴⁵ To put this otherwise, we think there are good reasons to resist certain ways of denying the univocality of legal terms; but those reasons may not require us to assume univocality.

Second, many philosophers of law are not well placed to offer this argument about univocality—at least not across the board for *all* of our legal terms, let alone all of our central ones. Consider Raz's and Shapiro's views about legal language. On their views, what does 'legal' mean? That is, what does it contribute to the meaning of a phrase like 'legal obligation' or 'legal institution'? There is no single answer; 'legal' is not univocal on their views. When 'legal' modifies 'obligation', its contribution is to take us to a perspective or point of view, which can be mistaken. On their views, that you have a legal obligation to act just means that according to a certain point of view you have a moral obligation to act, and since this point of view is fallible, you may have no obligation to act whatsoever.⁴⁶ What has not been sufficiently appreciated, however, is that neither Raz nor Shapiro thinks 'legal' modifies 'institution' in the same way. If it did, then "there is a legal institution" would mean that there is an institution

44. See Wodak, *supra* note 16, and Daniel Wodak, *Expressivism and Varieties of Normativity*, 12 OXFORD STUDIES IN METAETHICS 265 (Russ Shafer-Landau ed., 2017). For Toh's expressivist account that is being criticized, see Toh, *supra* note 31.

45. For more on the idea of "metalinguistic negotiation" (which we discuss more later in this paper), see David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, 13 PHILOSOPHERS' IMPRINT 1 (2013).

46. For critical discussion of and references for these views, see Wodak, *supra* note 16.

according to a certain point of view. And further, since this point of view is fallible, it would not follow from the fact that there is a legal institution that there is any institution whatsoever. This view is implausible, so it's no surprise that Raz and Shapiro don't adopt it. But in another sense, this *is* surprising, for it entails that 'legal' is at least polysemous, and that matters a great deal, for what could be more central to *legal thought and talk* than the term 'legal' itself?

Third, we're not sure that the univocality of legal terms entails the unity of legal reality, at least not in any interesting sense. The terms in Borges's category "innumerable animals" are plausibly univocal. But the category of things that the term 'innumerable animals' is about might only be unified to a fairly minimal degree. So while establishing the univocality of legal terms may undercut *some* of the pressure toward thinking that legal reality is *disunified*, it doesn't generate much pressure toward thinking that legal reality is *unified*.

D. Argument Four

Here's the fourth argument:

People disagree about legal reality. We should prefer models that vindicate the hypothesis that people have different, rival theories about the same part of legal reality, rather than compatible theories about different parts of legal reality. And if so, we shouldn't take legal reality to be disunified.

We have two main responses to this argument. The first is that this argument is invalid as stated. After all, people might well have rival theories about a part of a reality that is disunified. So even if one could vindicate the idea that *all* of legal thought and talk fits this model, this wouldn't show that legal reality is unified.

Second, we want to emphasize that the model on the table here shouldn't be taken to be a good model of *all* of legal thought and talk. We grant that many people (including many legal philosophers) have rival theories about the same part of legal reality. Nothing in our arguments for the *prima facie* plausibility of the thesis that legal reality is disunified requires rejecting that. And, indeed, we don't reject it. However, the observation that this model is correct *some of the time* doesn't support thinking that it must *always* be true. In other words: this may be a good model for some aspects of legal thought and talk, without being a good model for every aspect of legal thought and talk. To support this line of thought, consider the following. With some parts of thought and talk, there is strong pressure to think that two people are thinking and talking about the same part of reality. For example, suppose one person says that "the shoes that Nico is wearing are size 9" and another says "no, the shoes that Nico is wearing are size 12," and they are both looking at the same person (Nico) who is wearing one pair of shoes. In this case, at least *prima facie*, it seems there is good reason to

think these speakers are talking about the same part of reality—and doing so explicitly, via the literal content of what they say. But it's not as if every part of our thought and talk best fits that model. There is not the same kind of pressure to think that when one person says “legal institutions are X” and another says “legal content is Y” they are explicitly talking about the same thing. Moreover, it might be that in some cases the best model for disputes that (at least to some theorists, or some participants) *appear* to express straightforward disagreements about the same part of reality—and to do so via the literal semantic content of the utterances of what speakers say—turns out to best be one on which speakers are interpreted as talking about different things.⁴⁷

E. Summing Up

In this section, we have canvassed four arguments in favor of the unity of legal reality. These four arguments don't exhaust the possible reasons why people might find the unity of legal reality to be an attractive hypothesis. But we think two important points are worth keeping in mind about how these arguments bear on our goals. The first is that once you need an ambitious argument to support the hypothesis that legal reality is unified, you're playing our game. Our goal, after all, is to show why the possibility of disunity is worth taking seriously. And second, the common fate of these arguments suggests that defending the unity of legal reality will require substantial work. That some might want legal reality to be unified does not absolve them from the task of vindicating this hypothesis.

V. EXPLORING THE POSSIBLE CONSEQUENCES OF THE DISUNITY OF LEGAL REALITY

If what we have argued so far in this paper is correct, then the thesis that legal reality is disunified is a possibility that should be taken seriously by legal philosophers. By itself we think this idea is a relatively modest one. But importantly, it is not without bite. Once we have the idea of the potential disunity of legal reality clearly in view, we can use it to fruitfully orient ourselves to a range of debates and ideas in the philosophy of law. We'll briefly discuss how this is so in two main areas—the debate between positivists and antipositivists, and the relations between that debate and ideas animating other traditions in legal theory. Within each area, we suggest that the thesis that law is “disunified” in our sense may play several important roles. First, it potentially offers a way to fruitfully reconcile ideas or insights from different theoretical traditions. Second, it helps us diagnose bad patterns of argument against certain theses, or against certain theoretical

47. See Plunkett & Sundell, *supra* note 45, and David Plunkett & Timothy Sundel, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, 19 *LEGAL THEORY* 242 (2013) for a model of “metalinguistic negotiation” on which this is true.

traditions more broadly. Third, it opens up new theoretical space to explore. And, finally, it can help us better locate background disagreements about the normative and explanatory importance of theoretical questions concerning different parts of legal reality.

A. The Positivism/Antipositivism Debate

First, the disunity of legal reality provides potentially fruitful ways of combining strands of the positivist and antipositivist traditions in general jurisprudence. Here's a simple way to put this point: if positivism and antipositivism can be true of different parts of legal reality, then they need not be in conflict with each other, as they need not be trying to occupy the same "real estate." Positivists and antipositivists have little reason to be hostile to the possibility that legal reality is disunified—at least not solely in virtue of their commitment to positivism or antipositivism. This is easiest to see for antipositivists. If one is an antipositivist about some part of legal reality (e.g., legal obligations), one holds that facts about legal obligations depend in part on moral facts. However, one need not think this is true of all parts of legal reality (e.g., legal institutions). The same basic idea is also true of positivists. Some positivists are error theorists or skeptics about morality.⁴⁸ As such, they may view accepting antipositivism about *any* part of legal reality as a cost. But many positivists are nonskeptical realists about morality (which is a stance we recommend, but won't defend here). As such, they don't face the same general pressure to resist the idea that moral facts play some role in determining some part(s) of legal reality.

How, exactly, might combining strands of the positivist and antipositivist traditions be fruitful? Consider the following illustrative example. In *Legality*, Shapiro argues for a positivist view about both legal institutions and legal content.⁴⁹ Put roughly, on his Planning Theory of Law, legal institutions are a particular kind of organization involved in the activity of shared planning, and laws are the plans (or "plan-like norms") that those institutions have. This is a form of positivism insofar as Shapiro endorses these theses: (a) that facts about both the existence of planning organizations and the existence or content of plans ultimately depend on social facts alone, and not moral facts; and (b) that which of the relevant plans are laws is independent of their moral merit. Shapiro provides an argument to link his positivist account of legal institutions and legal norms; this is why his positivist account of legal institutions helps support his positivist account of legal norms. Perhaps due to Shapiro's confidence in that argument, he defines the terms 'positivism' and 'natural law theory' (which, in *Legality*, he uses broadly to mean what we mean by 'antipositivism') as theories about legal institutions and laws. Many positivists take a different route, in

48. This is true of some exclusive legal positivists, such as KENNETH M. EHRENBERG, *THE FUNCTIONS OF LAW* (2016).

49. SHAPIRO, *supra* note 20.

which they define ‘legal positivism’ as solely about laws or legal content, and *not* about legal institutions. For example, this is how Gardner understands positivism in his influential account in “Legal Positivism: 5 ½ Myths,” as well as how Greenberg defines positivism and antipositivism in “How Facts Make Law.”⁵⁰

Whichever definitions of ‘positivism’ and ‘antipositivism’ one is working with, now consider how the issues here intersect with the possibility of the disunity of legal reality. If one takes seriously the possible disunity of legal reality, we should be open to the idea that positivism and antipositivism cover some parts of legal reality, but not others. We should be open to arguments like Shapiro’s that link them, but we shouldn’t take the unity of these (or other) parts of legal reality for granted. That might well mean taking more seriously the possibility of a split view between legal institutions and legal content, in terms of whether positivism is true of each. For example, suppose one thought that designating something as a specifically “legal” institution was a sort of honorific, such that ‘legal’ functions partly as a kind of “thick” term akin to ‘brave’ with a mixture of normative and descriptive application conditions.⁵¹ Depending on how one develops this idea, it might well yield the result that the existence of specifically “legal” institutions is grounded in moral facts (e.g., facts about the moral achievements of those institutions, that warrant use of the honorific), as well as social facts. This idea could then be combined with the further thought that whatever norms *those* institutions produce count as the law, which would yield antipositivism across the board. But one could also think that “legal institutions” are just whatever institutions play a certain kind of functional role in society (whether they deserve an honorific or not), but that then calling certain things produced by those institutions the “law” involves the use of a kind of honorific (e.g., reserving it only for those norms that meet a certain standard of moral merit). In such a case, we might then end up with a kind of positivism about legal institutions, but a kind of antipositivism about legal content.

Perhaps more interestingly, take discussions of “legal content” in particular. On one way of thinking about legal content, it consists of the full set of legal norms (i.e., laws) that obtain in a given jurisdiction, at a given time.⁵² On another way, it consists of the full set of (general) legal obligations, rights, privileges, etc. that obtain in a given jurisdiction, at a given time.⁵³

50. See John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199 (2001) and Greenberg, *supra* note 20.

51. For a helpful overview of the idea of “thick” concepts in ethics, see Debbie Roberts, *Thick Concepts*, in THE ROUTLEDGE HANDBOOK OF METAETHICS 211 (Tristram McPherson & David Plunkett eds., 2017). For exploration of the idea that ‘legal’ might sometimes function as a thick term, see Enoch & Toh, *supra* note 33.

52. See David Plunkett, *The Planning Theory of Law I: The Nature of Legal Institutions*, 8 PHIL. COMPASS 149 (2013) and David Plunkett, *The Planning Theory of Law II: The Nature of Legal Norms*, 8 PHIL. COMPASS 159 (2013) for discussion.

53. See Greenberg, *supra* note 20.

There are many reasons to think these two parts of legal reality that one might use the term ‘legal content’ to pick out are closely linked. After all, one might think that for them to be genuinely *legal* obligations that obtain in a given jurisdiction (at a given time), these must in some way be tied to facts about *legal* norms (as opposed to moral norms, epistemological norms, etc.), such as by being grounded in the existence of those norms.⁵⁴ But still, *prima facie*, these seem to be conceptually distinct parts of legal reality. So taking the disunity of legal reality seriously should leave us open to the idea that they are less closely linked than initially appears to be the case—or perhaps linked in ways that yield quite different accounts of each of their grounds. Perhaps laws (which one thinks of as a kind of “legal norm”) are fully grounded in social facts, but legal obligations are not. Perhaps legal obligations are those genuine moral obligations that obtain because of the laws (along the lines of Greenberg’s Moral Impact Theory), but laws are fully grounded in social facts.⁵⁵ Or, with a nod to some of our earlier discussion, perhaps that is *one* kind of obligation some people pick out when using the term ‘legal obligation’.

If we start by taking the possible disunity of legal reality seriously, one begins to see how establishing this Greenberg-style thesis about “legal obligations” is potentially compatible with a range of core things many positivists want to say about other parts of legal reality. To see this, start by conceptually distinguishing three things: (1) what moral obligations (and rights, powers, etc.) we have *in virtue of* the law (or in virtue of legal institutions), (2) what moral obligations (and rights, powers, etc.) we have *according to* the law, and (3) how possible actions (or other things) stand in relation to the norms that make up the law, which we might describe using the terminology of ‘obligations’ (and ‘rights’ and ‘powers’) in some way other than the first two options. Most positivists tend to go for something akin to the second or third options here in thinking about our actual thought and talk about “legal obligations” (and “legal rights,” “legal powers,” “legal duties,” etc.). But does the positivist need to take a stand on which of these three options is correct, given her commitment to positivism and the core concerns that motivate her to accept positivism? Plausibly not. Suppose that a Greenberg-style view is correct and that some people sometimes—or even all of us, all of the time—use the terminology of ‘legal obligation’ to refer to what moral obligations (and rights, powers, etc.) we have *in virtue of* the law (or in virtue of legal institutions). By itself, that would not thereby show anything in particular about the nature (or normative status)

54. See Plunkett, *The Planning Theory of Law I*, *supra* note 52, and Plunkett, *The Planning Theory of Law II*, *supra* note 52, for discussion.

55. For work that is relevant to discussing this kind of possibility, see Ezequiel H. Monti, *On the Moral Impact Theory of Law*, 42 OXFORD J. LEGAL STUD. 298 (2022). Monti argues that Raz (one of the leading contemporary positivists) is best read as endorsing a version of Greenberg’s “moral impact theory” about legal obligations (of the kind that Greenberg defends in Greenberg, *The Moral Impact Theory of Law*, *supra* note 27).

of *laws* or the *legal norms* themselves—for example, whether they are “authoritatively” normative, or bear the same kind of connection to authoritative normativity that many take morality to have. To illustrate: we might use the term ‘fashion obligations’ to refer to the moral obligations people have in virtue of the norms of fashion, without thereby endorsing the thesis that there is some kind of intimate relationship between the norms of fashion and authoritative normativity (or morality), or anything about how normatively important the norms of fashion are. This illustrates the following: insofar as the core concerns driving positivists concern issues about the nature of *laws* or *legal norms*, it’s not at all clear why they can’t take on a wide range of views about the nature of a range of other things, including things picked out by our current ways of using bits of legal terminology such as ‘legal obligation’.

The broader lesson here is simple. If we look at arguments for positivism or antipositivism on their own terms (about the particular part of legal reality they concern), we might find that they are on point about *that* part of legal reality, but not about other parts of legal reality. This opens up space to potentially reconcile arguments and insights from a range of discussions by positivists and antipositivists. Exploring that space might of course not allow us to do much reconciliation at all, once we get down to the serious work of exploring it in detail. Our point is just that, if we take the possibility of the disunity of legal reality seriously, we have good reason to take seriously the activity of exploring that space—in terms of our thinking both about existing views (and their possible combinations) and new ones.

In some respects, this point has precursors in the existing literature. As we noted at the start of this paper, the idea that certain theories in legal philosophy might not be in direct conflict, despite initial appearances to the contrary, is something that comes up in many discussions in legal philosophy. This is certainly true in discussions about legal positivism and antipositivism. To take a salient recent example, consider the following. In “The End of Jurisprudence,” Scott Hershovitz argues against “the supposition that there is a single entity called *the law* to which all such talk [about what the law requires] refers”⁵⁶ and emphasizes that “we characterize the legal domain in different ways for different purposes.”⁵⁷ Drawing on this, Hershovitz partly aims to reconcile seemingly rivalrous theories within the debate over positivism. As he puts it, “[t]he ambition to characterize just one set of things as *the law* of our community requires that we cast lots with Greenberg, or Dworkin, or someone yet to come.”⁵⁸ Without that ambition, he argues, there might be more compatibility between these theories than we initially think. These points all resonate with ideas we have been discussing in this paper.

56. Hershovitz, *supra* note 40, at 1201.

57. *Id.* at 1202.

58. *Id.* at 1202.

That being said, we can appreciate the importance of the generality of our discussion by comparing it to the intervention that Hershovitz makes (as an illustrative example of similar interventions in debates within general jurisprudence). This is, as we noted in the introduction, one of the things that makes our discussion different from standard ways in which possible forms of disunity in legal reality come up in discussions in legal philosophy. To underscore this point, consider the following four differences between our discussion of disunity and Hershovitz's.

First, Hershovitz's claims are primarily directed to possible disunity within *certain* parts of legal thought and talk—roughly, those about legal obligations, legal rights, legal permissions etc., and associated ideas about “what the law is” tied to those. We have a broader focus, including (for example) considering thought and talk about such things as legal institutions and legal actors.

Second, Hershovitz chiefly focuses on possible disunity tied to different antipositivist theories (and ones of a certain kind). By contrast, we are emphasizing possible disunity that would result in positivism being true of some parts of legal reality and antipositivism being true of others.

Third, Hershovitz casts his claims as part of a broader, “anti-metaphysical” stance with which he aims to dissolve the positivism/antipositivism dispute. Our discussion of disunity does not require such a stance. We focus on the “object-level” of legal reality (which is compatible with more or less metaphysically “inflationary” ways of understanding what it consists in), and do not seek to dissolve metaphysical debates between positivists and antipositivists.

Fourth, important parts of Hershovitz's discussion of disunity in “The End of Jurisprudence” involve normative claims about how we should think or talk, such as in abandoning talk about “legal content.”⁵⁹ Our focus is on a descriptive question about the parts of reality that actual legal thought and talk is distinctively about, rather than normative questions about what our thought and talk should be like.⁶⁰

B. Situating the Positivist/Antipositivist Dispute Within Legal Theory More Broadly

We now want to suggest that the thesis that law is disunified offers fruitful ways of reconsidering the relationship between, on the one hand, the

59. Because of this, we might well think of Hershovitz as partly engaging in arguments in “conceptual ethics” in the sense of “conceptual ethics” discussed by Alexis Burgess & David Plunkett, *Conceptual Ethics I*, 8 PHIL. COMPASS 1091 (2013), Alexis Burgess & David Plunkett, *Conceptual Ethics II*, 8 PHIL. COMPASS 1102 (2013), and Herman Cappelen & David Plunkett, *A Guided Tour of Conceptual Engineering and Conceptual Ethics*, in CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS 1 (Alexis Burgess, Herman Cappelen & David Plunkett eds., 2020).

60. For more on the kind of contrast we are drawing here, see Tristram McPherson & David Plunkett, *Conceptual Ethics, Metaepistemology, and Normative Epistemology*, INQUIRY (2021), <https://doi.org/10.1080/0020174X.2021.1930147>, and Tristram McPherson & David Plunkett, *Metaethics and the Conceptual Ethics of Normativity*, INQUIRY (2021), <https://doi.org/10.1080/0020174X.2021.1873177>.

debate over positivism and antipositivism, and, on the other, debates within other important traditions in legal theory. The other traditions we'll focus on are legal realism and critical legal theory.

We'll start by exploring how the key insights of these debates can be fruitfully reconciled. As we have discussed, there are ways of viewing positivists and antipositivists as being concerned with different parts of legal reality. But insofar as they are concerned with the *same* part of legal reality, it most plausibly includes legal content. And insofar as questions about the nature and grounds of legal content are key questions in the debate over positivism, we think there's much to be learned from that debate about the nature of legal norms (where "norms" are understood in a broad sense to include all standards to which things can conform or not).⁶¹

We also think there's a way of viewing the core tenets of legal realism and critical legal theory such that they intersect with, but do not compete with, these insights. Here's a tentative sketch of this interpretation. Legal realism and critical legal theory can be construed as ultimately concerned with the extent to which law operates as the kind of rule-governed activity that it purports to be (or which at least some people take it to be, or which at least certain legal officials present it as being). Legal realists hold that the legal norms (or at least, the "paper rules" from familiar sources such as statutes and precedents) often *massively* fail to determine legal outcomes.⁶² Critical legal theorists also accept widespread legal indeterminacy, though for a different reason: they hold that the legal norms conflict on so fundamental a level that these norms offer no coherent answer in *many* important legal cases.⁶³ These are obviously rough glosses of core ideas from rich and nuanced intellectual traditions. But, we think, they help get across some ideas that animate each tradition, and set up our discussion.

How do these core ideas intersect with positivism and antipositivism? Consider the question: What explains legal outcomes? That is, what explains which judicial decisions are in fact made, which then alter our legal rights, duties, powers, etc.? There's no single answer according to legal realists or critical legal theorists, obviously, but theorists within both traditions offer views on which there is a significant departure from how law is presented (i.e., judges learning about and applying legal rules determines legal outcomes) and how law operates (i.e., legal outcomes are explained by something very different from judges learning about and

61. This broad understanding of "norms" draws from SHAPIRO, *supra* note 20, Plunkett & Shapiro, *supra* note 1, and McPherson & Plunkett *supra* note 1. Given this understanding, we take "legal norms" to encompass both legal rules and legal principles, insofar as one wants to draw a distinction of some kind between the two, in the vein of RONALD DWORIN, *Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1978).

62. See Frederick Schauer, *Legal Realism Untamed*, 91 *TEX. L. REV.* 749 (2013) for discussion.

63. For example, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976). For discussion (and further references), see Jeremy Waldron, *Did Dworkin Ever Answer the Crits?*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORIN* 155 (Scott Hershovitz ed., 2006).

applying those rules, such as judges' political ideologies, social biases, or personal idiosyncrasies).

We think this discussion reveals two points of intersection. The more obvious one is whether and to what extent law is indeterminate. Prominent figures in the positivism/antipositivism debate—especially Hart and Dworkin—have taken stances on the extent to which law is indeterminate. So too have many in the literature in jurisprudence around law and language (such as, for example, Hrafn Asgiersson in recent work).⁶⁴ But a crucial point is that endorsing neither positivism nor antipositivism *as such* commits one to a view on this issue, or associated issues about adjudication. After all, just by saying that the law is (or is not) grounded in certain kinds of facts doesn't itself settle how determinate those facts are—or even commit one to anything about how determinate the grounding facts are (e.g., how determinate moral facts are). Furthermore, as many positivists have noted, positivism is *not* best construed as a theory of legal adjudication.⁶⁵ Neither is antipositivism, when it is understood as a theory of what ultimately grounds the facts about what the law is (in a given jurisdiction, at a given time). To illustrate, consider Dworkin's influential antipositivist view of the nature of law in *Law's Empire*. On that view, put roughly, facts about what the law is (in a given jurisdiction, at a given time) are grounded in facts about what best justifies the full set of relevant legal practices.⁶⁶ That view is arguably consistent with the kind of indeterminacy that critical legal theorists defend. Dworkin did not embrace such indeterminacy. But Dworkin's reasons go beyond his core antipositivist view of legal content that we just glossed.⁶⁷

We want to suggest an additional, less obvious point of intersection: whether and to what extent the way law *operates* departs from its *manifest image*. This framing hinges on thinking that positivists' and antipositivists' insights about *the nature of legal content*—and tied to that, the nature of *legal norms*—may be compatible with legal realists' and critical legal theorists' insights about *how those legal norms operate* (especially in adjudication), given what legal actors actually do with those norms. We think this point of intersection matters a great deal. It is deeply theoretically and politically important to know whether, and how, the way legal norms *operate* differs

64. See HRAFN ASGEIRSSON, *THE NATURE AND VALUE OF VAGUENESS IN THE LAW* (2020). Cf. Daniel Wodak, *Hrafn Asgiersson, The Nature and Value of Vagueness in Law*, 131 *ETHICS* 777 (2021) (book review).

65. See, e.g., Gardner, *supra* note 50, and Shapiro, *supra* note 20.

66. Our gloss here on Dworkin's view draws from Greenberg, *supra* note 20. Note that there are other ways of developing Dworkin's ideas, such as in Herskovitz, *supra* note 40, that push Dworkin's views in a different direction. One strand of Herskovitz's thinking, for example, can be understood as involving the idea that Dworkin's views (especially as later developed in RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011)) involve denying the very idea of "legal content" or the "content of the law."

67. For critical discussion of Dworkin's engagement with ideas from critical legal theory, see Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *PHIL. & PUB. AFFS.* 205 (1986) and Waldron, *supra* note 63.

from how they are made *manifest*.⁶⁸ And in one sense, it shouldn't be too surprising to suggest this point of intersection, since both realists and critical theorists are often in the business of arguing that how things operate is very different from how we take them to operate. But we want to emphasize one way in which taking legal reality to be disunified opens up an attractive way to accept this intersection. If we accept or are open to the hypothesis that legal reality is disunified, then these traditions need not compete for the same real estate. We need not assume that (say) if how law operates departs from its manifest image, then its manifest image is chimerical. Instead, we can think that *what the legal norms are like* is one part of legal reality, and *how the norms operate* is another. Each tradition is analyzing something real. And this allows the distinct traditions to be complementary, rather than competing.

Opening up space for these traditions to be potentially complementary can also thereby help us avoid bad arguments. For example, it can help us avoid arguments that take a form of antipositivism to be defeated solely in virtue of knocking down a disconnected, optional thesis (e.g., views about the nature and content of morality, or about the extent of legal indeterminacy) that is also endorsed by the relevant philosopher who endorses that form of antipositivism. Appreciating the space here can also help us avoid arguments that tacitly slide between different uses of the term 'the law' (or other legal terms) that are (at least plausibly) used to refer to different parts of legal reality.⁶⁹

We also think this way of framing the relationship between positivism and antipositivism, on the one hand, and the ideas animating legal realism and critical legal theory, on the other, can help us identify potential background disagreements about what matters in legal reality. For many philosophers working in general jurisprudence, positivism and antipositivism take center stage. But if these theories concern only one part of legal reality, an important question becomes salient: *Why* focus mostly or solely on *these questions* about *that part* of legal reality? Two obvious reasons would concern explanatory importance and normative importance. But, for either, we think the importance of these questions about that part of legal reality might be context-specific. For example, for most people who interact with the law,

68. This kind of cut between the "operative" and "manifest" aspects of practices, or of thought and talk, plays an important role in various strands of "critical social theory" and work on "ideology critique." See, e.g., RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* (1981) and Sally Haslanger, *What Are We Talking About? The Semantics and Politics of Social Kinds*, 20 *HYPATIA* 10 (2005). We briefly draw on these kinds of connections in what follows, in discussing the potential ideological functions of focusing on certain parts of legal reality over others.

69. For connected discussion about issues about "implicit switching" in arguments involving normative or evaluative terminology (e.g., 'rational'), and associated concerns concerning other forms of unreliable inference generated by (put roughly) lack of attention to conceptual diversity in relevant philosophical discussion, see Tristram McPherson & David Plunkett, *Conceptual Ethics and the Methodology of Normative Inquiry*, in *CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS* 274 (Alexis Burgess, Herman Cappelen & David Plunkett eds., 2020).

the question of whether legal outcomes are rule-governed may seem more explanatorily and normatively important than the question of what the content of the law *really is*, let alone what determines that content. Whether legal outcomes are “rule-governed” is more relevant to understanding and predicting what will happen to them or their loved ones as they navigate a legal system that can protect or threaten their interests.

With this in mind, consider Oliver Wendell Holmes’s views in “The Path of the Law” that Hart famously criticizes in *The Concept of Law*.⁷⁰ Hart criticizes the view (which he attributes to Holmes) on which claims about what the law is are identified with claims predicting the behavior of legal officials. Hart gives us strong reasons to think that this view can’t provide a good account of what legal content is; if this view were true, then when judges deliberate about what the law entails in a given case they are engaged in a complicated prediction about their own behavior (along with the behavior of other legal officials). That fits poorly with all sorts of data about the activity of legal officials. As Hart discusses, the view also fits poorly with how many ordinary people orient themselves to the law when they take the content of the law to have a kind of normative significance in guiding their behavior.⁷¹ These points suggest that Holmes’s view does not capture all important parts of legal reality. But, it might be a promising account of *some* aspect of legal reality, and one that ordinary people often care a great deal about. To take a mundane example, someone trying to figure out how to navigate real estate law when building a home might consult a lawyer because she cares a lot more about what is likely to happen with her home—given how judges are likely to rule, what legal consequences she is likely to face, and so on. Knowing what the law actually is might (at most) be instrumentally important in such contexts, insofar as the facts about the behavior of legal officials might well in part be determined by facts about what the law actually is (and their forming correct beliefs about that, and then acting based on those beliefs). But whether it is instrumentally important in this way can’t be settled from the armchair. If that is right, then it might well be that Holmes’s theory is helping illuminate *one* aspect of legal reality, and an important one at that, even if it fails as an account of other parts of legal reality for exactly the reasons Hart articulated.⁷²

70. HART, *supra* note 30, criticizing OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1897/2014).

71. This later criticism is tied to Hart’s idea that Holmes’s theory misses what Hart thought of as the “internal point of view” that many people take up with respect to the law. For discussion, see Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 197 (Steven J. Burton ed., 2000).

72. Our thinking here resonates with certain parts of the sympathetic discussion of Holmes in William Twining, *Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973). Twining argues that “When Holmes advised his audience to adopt the standpoint of the Bad Man, he was . . . suggesting that they look at law from the perspective of a citizen who is concerned with predicting the consequences of his actions. He was in effect saying that as intending private practitioners

So far, we've been suggesting that there can be ways in which positivist or antipositivist views about "the law" and views about "the law" from legal realists and critical legal theorists might well be less in conflict than one might initially think, since they might well be best understood as about different parts of legal reality. But we want to close by noting a few ways in which these views might still come into conflict, even if they are indeed about different parts of legal reality.

First, as we noted above, there might well be reasons for some philosophers defending a form of positivism or antipositivism to take on board certain commitments about the core issues that animate discussions about legal indeterminacy or other issues that matter to legal realists and critical legal theorists. For example, this could be because the best defense of the form of positivism someone favors relies on a premise about the extent of legal indeterminacy, or has implications for that issue. The same kind of point is also possible in reverse: a certain kind of legal realism may turn out to rely on a commitment to positivism.⁷³

Second, it's possible that, as a matter of sociological practice, an extensive focus on one issue might be a way of "crowding out" reflection on a second issue. Thus, for example, it might well be that extensive focus on the nature of legal content may, in certain contexts, crowd out reflection on facts about the way legal norms operate, which in turn might (in an ideologically objectionable way) occlude people grasping their actual operation.⁷⁴ The same possibility could be true in reverse, of course, where an extensive focus on the operation of legal norms crowds out consideration of the nature of legal norms. Such "crowding out" might well play a certain kind of "ideological" function in certain contexts by helping to stabilize an image of legal reality that obscures important aspects of legal reality.

Third, although different theorists might be focused on different parts of legal reality, they might *have* those focuses *because of* background disagreements. To illustrate, suppose Anand focuses on theorizing about topic A, and Beatrice focuses on theorizing about B, and each one does so because each one thinks that their preferred topic is the one that is more explanatorily important for answering such-and-such question. They then have a

of law they should put themselves in the shoes of the legal adviser of citizens, good or bad. From that standpoint their main concern should be with prediction." *Id.* at 283. Twining argues that what Holmes focuses on picks out one thing that matters, from one "standpoint" of engaging with the law, even if it not all standpoints. We take this idea to be closely related to what we are arguing here, though it is beyond the scope of this paper to explore all the connections (or differences) in depth. For another sympathetic discussion of Holmes that also connects in interesting ways to our discussion, see William H. Wilcox, *Taking a Good Look at the Bad Man's Point of View*, 66 CORNELL L. REV. 1058 (1981).

73. See Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001) for connected discussion.

74. For an example of how this might go, consider Leslie Green's idea that focusing on the *manifest* functions of law (e.g., to guide behavior) may in practice occlude grasping the *latent* functions of law (e.g., those arguably identified by Marxist and feminist legal theorists). See Leslie Green, *The Functions of Law*, 12 COGITO 117, 118 (1998).

background disagreement: namely, what's more explanatorily important for the question at hand (which, we can note, might be either a descriptive or normative question). Such background disagreements about the relative explanatory or normative importance of different parts of legal reality might drive more disagreements in legal theory than legal theorists standardly appreciate.

Furthermore, this kind of background disagreement about relative normative or explanatory importance we introduced above might be implicitly part of many disputes in legal theory, even if it is not part of the literal content of what legal theorists say. Consider people making claims about what X "really is" or what "real Xs" are, even if both sides agree that each one uses 'X' to refer to something that exists (e.g., each uses 'law' to refer to some part of legal reality). That kind of dispute might, in certain cases, be best understood as a form of "metalinguistic negotiation," wherein speakers appear to use (rather than mention) a given term to put forward a view in "conceptual ethics" about how that term should be used in a given context.⁷⁵ These conflicting normative views about the word in question might well be tied to different views about which properties we should focus on in a given context (each picked out by a conflicting use of that term), which in turn might be based on different views about the relative explanatory or normative importance of one property vs. others. In this way, claims about what "law really is" might (in certain contexts) be best understood as indirect ways of expressing disagreements about which aspects of legal reality have a given salient feature, such as which aspect is more explanatorily or normatively important.⁷⁶ If we focus explicitly on those disagreements, we might better locate the disagreements that underwrite conflicts in theorizing about the law, and then work to make progress on them.

CONCLUSION

In this paper, our goal has been to explore the idea that legal reality is disunified, and why that matters. In so doing, we hope to have helped pave the way for more systematic exploration of whether legal reality *is* in fact disunified or not, and then for the exploration of the implications of that, one way or another.

75. See Plunkett & Sundell, *supra* note 45, and Plunkett & Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, *supra* note 47. On the idea of "conceptual ethics," see Alexis Burgess & David Plunkett, *Conceptual Ethics I*, 8 PHIL. COMPASS 1091 (2013) and Alexis Burgess & David Plunkett, *Conceptual Ethics II*, 8 PHIL. COMPASS 1102 (2013). See also Herman Cappelen & David Plunkett, *A Guided Tour of Conceptual Engineering and Conceptual Ethics*, in CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS 1 (Alexis Burgess, Herman Cappelen & David Plunkett eds., 2020).

76. For connected discussion, see David Plunkett, *Which Concepts Should We Use?: Metalinguistic Negotiations and the Methodology of Philosophy*, 58 INQUIRY 828 (2015), Plunkett, *supra* note 34, Plunkett & Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, *supra* note 47, and David Plunkett & Timothy Sundell, *Antipositivist Arguments from Legal Thought and Talk: The Metalinguistic Response*, in PRAGMATISM, LAW, AND LANGUAGE 56 (Graham Hubb & Douglas Lind eds., 2014).