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Can We Please Stop Doing This?
By the Way, Postema was Right

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I. Introduction

While legal philosophy has its own unique set of questions and problems, one activity it shares with many other areas of philosophy is the urge to find the essence of 'law'. Whether expressed as 'essence', 'necessary and sufficient' or 'nature', the enterprise is finding the features of law that set it apart from other normative phenomena.

Many philosophers have abandoned the search for the essential features of many things. The conventional wisdom now seems to be (roughly) that the world divides into natural kinds and other (social or artefactual) kinds.

Legal philosophers have not given up the search for the essence of law. In this way, they are rather different from philosophers in many other areas of the discipline.

In this chapter, I will consider three attempts to identify the essence or nature of law. I will argue that each attempt fails for different reasons. If these attempts to identify the essence of law fail, what are we to make of these failures? Are they simply three different failed attempts or do they indicate something more?

I will then consider Gerald Postema's effort to point to a different way of thinking about law and what legal philosophers ought to be doing when we do jurisprudence. Postema's work is a model of how to do legal theory: it is methodologically sophisticated and it solves problems not otherwise amenable to resolution.

II. Joseph Raz

Raz's account of authority is an essential feature of his view of the nature of law. He maintains that the law necessarily claims to be a genuine and not merely de facto authority. For law to fulfil the mediating role that it claims for itself, on Raz's view, the law must issue dictates that can be readily understood and acted upon. More specifically, people need to be able to grasp legal norms (ie identify those norms as valid) independently of their identification and consideration of the (dependent) reasons for those norms. It is for this reason that Raz's position can be characterised as exclusive legal positivism. Exclusive legal positivists insist that the content of law must come from social sources alone. Raz articulates the sources thesis as follows: 'All law is source-based … A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument'.[1] Although some read him as making a moral argument,[2] I think it more accurate to read Raz as making a conceptual or metaphysical claim about the nature of law. In this regard, Raz himself has been somewhat equivocal on the matter, sometimes speaking of 'the' concept of authority, 'our' concept of authority, or 'concept(s) of authority'.[3]

The problem with Raz's position is that he makes no arguments directly in support of his claims for necessity. This is no small omission, for the success of Raz's account of law's authority depends upon the strength of his claim that the concept of law is special in that its meaning is not (solely) a function of linguistic usage and, further, that the content of the concept is (at least in part) dictated by something other than conventions for the use of the word.

I believe that Raz needs to answer the question of the nature of law with an account of concepts. To answer the question of the nature of law, we need to know what sort of concept law is. Once we have identified what kind of concept law is, we can move toward answering what sort of conceptual analysis is necessary for a concept like law. In short, an account of concepts is a necessary preliminary to answering the question 'What is the nature of law?'

The conventional metaphysical wisdom is that concepts divide up into at least two categories: natural kind concepts and artefactual kinds. Natural kind concepts are those whose essence is dictated by a microstructural element, such as atomic formula or DNA. Artefactual kinds are products of human invention. These social constructs are the stuff of John Searle's 'Institutional Facts': their existence depends upon our attitudes or intentions.[4] Where does Raz's account of the nature of law fall into this divide? It is not at all clear.

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[1] See Raz (1994: 210–11).
[2] See Perry (2001).
[3] See Raz (2006: 1005–6, 1008, 1010–11).
[4] See Searle (1995: 31–52).

On the one hand, Raz says this about the nature of law: 'A theory consists of necessary truths, for only necessary truths about the law reveal the nature of the law'.[5] But Raz also maintains that '[i]n large measure what we study when we study the nature of law is the nature of our own self-understanding'.[6] It is difficult to see how necessary truths can arise out of the self-understanding of participants in a practice. Raz seems to want an account of the nature of law that identifies necessary truths at the same time it identifies something seemingly contingent about law (ie our self-understanding of it). Putting together necessity and contingency seems to me to be the next step in the development of exclusive legal positivism. Until Raz accomplishes this task, his claims for law's authority are unconvincing.

III. Robert Alexy

Robert Alexy argues that the concept of law has 'necessary' features. Alexy eschews talk of natural kinds, arguing instead for 'necessary' features of law. Alexy is wholly unclear about what he means by 'necessity'. For this reason, his claims regarding law's necessary features are unconvincing. Here is Professor Alexy's own description of his enterprise:

> Enquiring into the nature of something is to enquire into its necessary properties. Thus, for the question 'What is the nature of law?' one may substitute the question 'What are the necessary properties of law?' Necessary properties that are specific to the law are essential properties of law. Essential or necessary properties of law are those properties without which law would not be law. They must be there, quite apart from space and time, wherever and whenever law exists. Thus, necessary or essential properties are at the same time universal characteristics of law. Legal philosophy *qua* enquiry into the nature of law is, therefore, an enterprise universalistic in nature.[7]

Every sentence in this paragraph raises more questions than it answers. Let us take them one at a time.

(1) 'Enquiring into the nature of something is to enquire into its necessary properties.' This is merely definitional: identifying the nature of something is identifying what is essential to it.

(2) 'Thus, for the question "What is the nature of law?" one may substitute the question "What are the necessary properties of law?".' This seems to be the previous question but now with a focus on law. The nature of law is what is necessary to law.

(3) 'Essential or necessary properties of law are those properties without which law would not be law.' This is just a restatement of the previous sentence. If there

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[5] See Raz (2005: 328).
[6] ibid 331.
[7] See Alexy (2008: 290).

were necessary properties to law then, by definition, law would not be law if it lacked those necessary properties.[8]

(4) 'They must be there, quite apart from space and time, wherever and whenever law exists.' The previous sentence is extended with the assertion that the necessary features of law are 'there' quite apart from space and time. But this is just a bald assertion. No argument has been provided and it certainly does not follow from the previous sentences, which were merely definitional or mere logical transformations.

(5) 'Thus, necessary or essential properties are at the same time universal characteristics of law.' The word 'thus' implies that this sentence states a proposition that follows from the previous sentence or sentences. I fail to see how this is the case.

(6) 'Legal philosophy qua enquiry into the nature of law is, therefore, an enterprise universalistic in nature.' This sentence is question-begging because we have no idea what a 'universalistic enterprise' consists in.[9] It has something to do with enterprises and activities that are 'necessary' but more detail is needed.

Alexy identifies two features of law that he deems 'essential'. These two features are what make law what it is. He writes:

> Two properties are essential for law: coercion or force on the one hand, and correctness or rightness on the other. The first concerns a central element of the social efficacy of law, the second expresses its ideal or critical dimension. It is the central question of legal philosophy to ask how these two concepts are related to the concept of law and, through it, to each other. All—or at least nearly all—questions of legal philosophy depend on the answer to this question.[10]

For Alexy, law has two necessary features, coercion and correctness/rightness. One question we might ask is whether Alexy uses the word 'necessary' in the same way when he refers to both coercion and correctness. It seems he does not. Consider:

> To include coercion in the concept of law is adequate to its object, the law, for it mirrors a practical necessity essentially connected with law. Coercion is necessary if law is to be a social practice that fulfils its basic formal purposes as defined by the values of legal certainty and efficiency. This practical necessity is the reason why the conceptual necessity implicit in the use of language is based not merely on a convention but also on the nature of the thing to which the concept refers. It is, in this sense, an absolute necessity.[11]

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[8] In the first passage I quoted, Alexy appears to be distinguishing between (a) necessary properties of law and (b) essential properties of law, namely essential properties are those necessary properties that are specific (unique?) to law. In the current passage, he seems not to be distinguishing—or perhaps just not emphasising in this passage—between the two. This could be characterised as a form of Aristotelianism: 'Man is necessarily an animal, but essentially a rational animal, because although animality and rationality are both necessary properties, rationality is a specific—unique—property of man'. My thanks to Hans Oberdiek for this point.

[9] Grant that X is a necessary feature of law and Y is both a necessary and essential feature of law so that law has universal and necessary features: How does it follow that an enquiry into law is a 'universalistic enterprise'? Thanks again to Hans Oberdiek for this point.

[10] See Alexy (2004: 163).

[11] See Alexy (2008: 293). Alexy also draws a distinction between 'practical' and 'conceptual' necessity: 'Including coercion in the concept of law is adequate to its object, the law, because it mirrors

In this passage, Alexy characterises coercion as a 'practical necessity' of law. This contrasts with a far more rigorous form of necessity, which Alexy characterises thus:

> The possibility of defining the concept of nature as it appears in sentences of the form 'What is the nature of φ?,' namely, by means of the concept of necessity, allows for the substitution of the question 'What is the nature of law?' by the question 'What are the necessary properties of law?' This question leads, by means of the concept of necessity (and its relatives, analyticity, and the a priori), to the specific character of law. The question of what is necessary turns, when connected with the question of what is specific, into the question of what is essential. This is the area of the specific character thesis.[12]

It seems that coercion is 'practically necessary' to law but not necessarily conceptually necessary. If this understanding of Alexy's position is correct, two points are salient. First, the claim that coercion is a necessary feature of law has been the subject of widespread commentary and is, to say the least, problematic.[13] There are all sorts of normative practices that are recognised as 'law' but which lack the coercive aspects of municipal law.[14] For example, the claim that international law is not 'really law' because of the lack of coercive enforcement has been severely criticised. I will not rehearse the arguments here. I will only say that the claim is hotly contested.

The second point is that if Alexy is claiming that coercion is a 'practically necessary' feature of law, then his claim is far softer than the use of the word 'necessity' implies. As he himself says, his claim for coercion is 'teleological' and not, it seems, conceptual. In short, Alexy seems to say that without coercion, law would not be efficacious. This is not a conceptual but a practical claim. Whatever its merits, the claim will be sustained at the level of facts and not in the nature of concepts.[15] Alexy's claims for the dual nature thesis are far stronger and do, as he himself says, implicate deep philosophical issues (Alexy mentions analyticity and the a priori).[16] It is here that Alexy substantially raises the stakes for his deep philosophical claims about the nature of law. Before turning to Alexy's arguments in detail, a little stage setting is in order.

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a practical necessity necessarily connected with law. Coercion is necessary if law is to be a social practice that fulfills its basic formal functions as defined by the values of legal certainty and efficiency as well as possible. This practical necessity, which seems to correspond to a certain degree to Hart's [1994, 199] 'natural necessity' … is mirrored in a conceptual necessity implicit in the use of language. This shows that language, which we use to refer to social facts, is inspired by the hermeneutic principle that each human practice is to be conceived of as an attempt to carry out its functions as well as possible. Unravelling this connection between conceptual and practical necessity makes clear in what sense coercion belongs as a necessary property to the nature of law' (Alexy 2004: 163).

[12] Alexy (2004: 162–63).

[13] Think of Hart's discussion of power-conferring rules in Hart (1994).

[14] For example, soft law, *lex mercatoria*, ADR, the law of indigenous peoples and Internet law (eg ICANN and UDRP).

[15] I would add that the claim to 'universality' is undercut as well.

[16] See Alexy (2004: 162–63).

Alexy wants to show that the claim to correctness is part of the very idea of 'law'. That is, he wants to show that it is analytically true that the claim to correctness is a constitutive feature of law. To do this, he has to show that the distinction between analytic and synthetic statements can be maintained. It was precisely this claim that Quine put in question. Quine argued that the difficulty with analyticity was demonstrating any principled difference between analyticity and co-extensionality.[17] Consider the predicates 'creature with kidneys' and 'creature with a heart'. These two predicates are true of the same objects (ie people, animals, etc). Compare this with 'bachelor' and 'unmarried man'. These two predicates are true of exactly the same objects (ie some men). We intuitively think the difference between these two cases is a matter of contingency in the first (ie a 'trick of nature') and 'necessity' in the second. So what explains the difference? This is where Quine's criticism bites.

We intuitively want to say that 'bachelor' and 'unmarried man' are equivalent in meaning, that is, that they are synonyms. But what do we mean when we say that two terms are synonymous? We mean they are interchangeable *salva veritate*. But this will not work because it embroils the notion of synonymy with the very necessity it was meant to explain! Without a prior account of the notion of analyticity, there is no hope of making sense of the distinction between co-extensionality and synonymy.

Let us consider Quine's point by comparing sentences. Consider the following two sets of sentences:

Set I

(1)   Some doctors who specialise in eyes are ill-humoured.
(2)   Some ophthalmologists are ill-humoured.
(3)   Many bachelors are ophthalmologists.
(4)   People who run damage their bodies.
(5)   If Holmes killed Sikes, then Watson must be dead.

Set II

(1)   All doctors who specialise in eyes are doctors.
(2)   All ophthalmologists are doctors.
(3)   All bachelors are unmarried.
(4)   People who run move their bodies.
(5)   If Holmes killed Sikes, then Sikes is dead.[18]

Most people, indeed almost all, would see real differences between the sentences in Sets I and II. The sentences in Set I are claims that may or may not be true. To know

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[17] This discussion of Quine has benefitted from Hanna and Harrison (2004: 270–74). For an excellent introduction to the issues, with a wide-ranging tour of the history of the debates, see Juhl and Loomis (2010).

[18] This discussion is taken from Rey (2008).

whether these sentences are true, one would need to investigate the underlying facts. The same cannot be said of the sentences in Set II. These sentences seem to state truths that are 'true' but in a different sense than the sentences in Set I. The sentences in Set II are true in the sense that a denial of any one of them would, in some sense, be unintelligible. Philosophers say that the sentences in Set I are 'synthetic' and those in Set II 'analytic'. It is this distinction that Quine disputes.

There is little doubt of the felt sense of truth in the sentences in Set II. How could one deny that all ophthalmologists are doctors? An ophthalmologist is a 'doctor for the eyes'. Here Quine and Ullian introduced the metaphor of a 'web of belief' to illustrate this sense of inevitability and truth.[19] They argued that the only reason we regard sentences like those in Set II as 'analytic' or 'true independently of reality' is that such sentences express thoughts or beliefs that are central to our world view. This centrality in no way makes such beliefs unrevisable. On the contrary, just as Kant mistakenly thought about geometry, even our most cherished beliefs can be revised in the face of recalcitrant evidence.[20]

How does Quine's work connect with Alexy's claims about the nature of law? Alexy wants to use the power of necessity, analyticity and the a priori to underwrite his claims about the nature of law. That is all well and good. But he owes us a complete account of what he means by 'necessity'. He has yet to provide one. Not only that, he needs to provide an account that at least addresses Quine's criticisms. Doing so is, pardon the pun, necessary for his project.

IV. Ronald Dworkin

I will argue that Dworkin's incorporation of natural kinds semantics into his jurisprudence is problematic for three reasons. First, I attack the fundamental premise of Dworkin's argument; to wit, the claim that the meaning of natural kind terms such as 'gold', 'tiger', and 'water' is a function of the deep structure of the things to which these terms refer. Proponents of natural kinds make two claims. Metaphysically, natural kinds are identical with their underlying natures. Semantically, natural kinds are directly referential; that is, the meaning of natural kind terms is a function of direct reference cashed out in terms of microstructure. I grant, arguendo, the metaphysical thesis but deny the semantic thesis. In short, my claim is that there is no necessary relationship between natural kinds and the meaning of natural kind terms. If this argument is successful, then the premise from which Dworkin's argument proceeds necessarily fails.

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[19] See Quine and Ullian (1978).
[20] On Kant's account, geometry is unrevisable in virtue of being synthetic a priori. Quine also pointed out that many unrevisable beliefs do not seem analytic (eg 'The earth has existed for more than five years' and 'Some people have eyes'). See Quine (1960); Rey (2008).

My second argument grants, arguendo, the premise that there are natural kinds. But Dworkin's argument for hidden essences for political and legal kinds fails because, unlike science, in matters of value there is no agreed way to adjudicate disputes over the existence and features of such essences. Without epistemic or methodological confirmation, debates about the 'real' meaning of political and legal concepts will not be resolved by appeals to 'the hidden nature of things'.

My final argument also grants, arguendo, that there are natural kinds. But if Dworkin is to be taken at his word about similarities between natural kind and legal concepts,[21] then there is a material—indeed, significant—shift in his general jurisprudential position. If legal and political concepts are best understood as akin to natural kinds, then judges should ignore precedents whenever those precedents fail to reflect the judge's sense of the (natural kind) meaning of the term in question. In Dworkin's terminology, the 'fit' side of the fit/justification picture of adjudication becomes superfluous. In short, adjudication would be 'justification all the way down'.[22]

V. Gerald Postema

Gerald Postema's article 'Protestant Interpretation and Social Practices'[23] is the single best work devoted to the mature thought of Ronald Dworkin. The reason it is the best is simply stated: unlike all other commentators, Postema uncovers the deep philosophical presuppositions of Dworkin's approach and shows why they are implausible. In addition, and in the course of making his critical points about Dworkin, Postema articulates an approach to jurisprudence that is singularly clear and persuasive. It is this aspect of the article that marks it as a major contribution to legal theory.

Postema's central contention is that law is an intersubjective practice. When you remove the intersubjective element, you lose the explanatory power needed to

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[21] I am mindful that Dworkin says that there are 'instructive similarities' (Dworkin 2004: 12) to be drawn between natural kind concepts like 'water', 'tiger' and 'gold' and political concepts like 'democracy', 'liberty' and 'equality'. It is difficult to discern just how far Dworkin intends to take this comparison. Michael Green has recently argued that Dworkin commits a 'fallacy' (Green dubs it 'Dworkin's Fallacy') by grounding an interpretive theory of law in an interpretive theory of meaning. See Green (2003: 1909–10). Dworkin describes Green's account of his argument as a 'surprising misreading', see Dworkin (2006: 226). Additionally, Dworkin states that legal concepts are 'interpretive concepts' and not natural kind concepts. ('I explicitly rejected a natural kind interpretation of any of the concepts of law' (ibid 227). One is left to wonder just what Dworkin means when he states there are 'instructive similarities' to be drawn between legal and natural kind concepts. The essence of natural kind concepts is necessity, specifically metaphysical necessity; see eg Kripke (1980). If legal and natural kind concepts are not similar in terms of metaphysical necessity, it is rather unclear in just what sense Dworkin thinks they are 'similar'.

[22] I owe this way of making the point to John Oberdiek.

[23] See Postema (1987: 283).

understand law. Before we get to Postema's account of how best to understand law, let me review his treatment of Dworkin.

Law is an interpretive concept. The best way to understand the practice of law is as an exercise in constructive interpretation. As for the nature of law, Dworkin argues:

> (1) that his theory fits legal practice as we know it at least as well as (or better than) other viable general interpretations, and (2) that it commands our allegiance because it portrays the law as serving a fundamental political ideal to which we are properly committed, namely, integrity.[24]

In sum, 'Dworkin's philosophical account of law … is built on two fundamental notions: interpretation and integrity'.[25]

As he says in the article, Postema focuses on Dworkin's core idea of law as an exercise in (constructive) interpretation. The problem is with the 'protestant' dimension of Dworkin's account.

For Dworkin, there are three stages of interpretation in law. Postema explains:

> At the *preintepretative stage* the interpreter collects the rules, standards, and descriptions of characteristic behavior and activities of participants which are widely agreed among participants to be elements of the practice in question. This provides the 'raw data' of the interpretive theory. Dworkin admits that this 'data' is never, strictly speaking, 'uninterpreted', (LE, 66, 422) but, as we will see later, it must be 'raw' or 'uninterpreted' relative to the practice. That is, it is behavior (or rules) abstracted from its meaning in the practice.[26]

> At the *interpretative stage*, the interpreter 'proposes a value for the practice by describing a scheme of interests or goals or principles the practice can be taken to serve or express or exemplify' (LE 52). This interpretation must both fit ('enough' of) the practice and show the practice to have normative appeal, i.e., it must provide a justification of its main elements and of participation in it. This interpretation, at least in the ideal case to which actual interpretations approximate, will take the form of an abstract or general theory (LE 90), a systematically ordered set of explicitly articulated general purposes, aims, or principles from which the various more concrete elements of the practice can be seen to 'follow' (in some suitably wide sense of 'follow').

> Finally, with this theory in hand, interpreters at the post-interpretive or 'reforming' stage may adjust their views of the requirements of the practice so as better to serve the justification outlined in the theory. Note that, on this view, it is misleading to describe the activity at this stage as 'changing the practice'. What the 'reforming' interpreter regards as requirements of the practice may appear, from the pre-interpretive stage, to be substantial changes of (deviations from) accepted practice. But if the interpretative attitude has taken hold in a practice, consensus requirements collected at the preinterpretive stage have no

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[24] ibid 284.
[25] ibid.
[26] This is how I understand Dworkin's reference to 'raw behaviorial data' at Dworkin (1986: 52) and in personal conversation with him. I believe he is committed to this view of the 'data' by his assumption, central to his account of the possibility of controversy in social practices, that the 'data' are common, but the interpretations or theories of them are not. See below.

final authoritative status. They are, relative to the practice, as yet (virtually) uninterpreted, a collection of actions, decisions, and even rules in search of an interpretation. Once the interpretive task is undertaken, views about what the practice requires may (and, when the practice is healthy, will) differ substantially. But these differing views must, on Dworkin's view, be regarded not as proposals for changes in the practice, but as conflicting views about what the practice as presently constituted really is and what, as a result, it really requires of participants. In this respect, theory drives practice, for the practice is what the (best) general interpretive/justificatory theory says it is: claims about what in concrete cases the practice requires, permits, or sanctions are true in virtue of their following from the best such theory of the practice.[27]

It is in his treatment of the third stage of interpretation that Dworkin sows the seeds for the failure of his position. In interpreting the practice, each participant 'is trying to discover *his own intention* in maintaining and participating in that practice … in the sense of finding a purposeful account of his behavior he is comfortable in ascribing to himself'.[28] Postema notes that Dworkin 'explicitly portrays social interpretation "as a conversation with oneself (LE 58)"'.[29] While the object of interpretation is the same for every participant, 'interpretations are private'.[30] Theory precedes practice.[31] And what is common in interpretations? Postema answers: 'That which appears common in the practice is merely the overlap of extensions of the (more or less explicit) interpretive theories of individual participants'.[32]

The root of the problem with Dworkin's theory of law lies in his approach to interpretation: 'it makes interpretation of social practices insufficiently practical, insufficiently intersubjective, and thus (at least in the case of law) insufficiently political'.[33] In Dworkin's hands, participants in law are reduced to 'windowless social monads'.[34] Thus, Postema challenges 'Dworkin's theory of law only indirectly, by challenging the general theory of interpretation on which it rests'.[35]

The interpretive attitude is rare. Although he does not put it this way, Postema rejects the Heidegger/Gadamer view that interpretation is a fundamental feature of everyday existence. Rather, Wittgenstein got it right: interpretation is a second-order activity one engages in when understanding breaks down. Postema makes this point indirectly in this passage, citing Wittgenstein:

> to understand a practice is first of all to grasp 'how to go on', and that involves neither merely acquiring a repertoire of routine reactions to routine situations, nor grasping a general proposition (let alone a systematic theory) logically independent of the practice

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[27] Postema (1987: 291–93).
[28] Postema (1987: 287). See Dworkin (1986: 58).
[29] Postema (1987: 287).
[30] ibid 300.
[31] ibid.
[32] ibid.
[33] ibid 301.
[34] ibid.
[35] ibid.

activities. Rather, it involves learning a discipline or mastering a technique. It involves the capacity to relate different items in the world of the practice and to locate apparently new items in that world, to move around with a certain ease in the web of relationships created by it. This is interpretation, in the straightforward sense that it involves a sure grasp of the 'meaning' of the various actions in the repertoire in question through their places in the practice, and a grasp of how the practice fits together, how it makes sense.[36]

It is virtually impossible to find a practice exemplifying Dworkin's claim that the point or purpose of a practice can be stated independently of the rules and particulars of the practice.[37] Worse, even if we grant Dworkin's claim, it is not clear that the object of competing interpretations can be identified independently of any interpretation.[38] The real business of interpretation is 'uncovering together the meaning of our common action'.[39] Interpretive activity is 'essentially interactive'.[40] We now shift to Postema's positive position.

Postema's first example is friendship.[41] When we 'interpret' what friendship means, we do not focus on what our culture means by 'friendship'. Rather, we give our attention to 'what our friendship, our relationship, means or requires'.[42] Sharing a friendship, Aristotle noted, is not like two cows sharing a field. Rather, it engenders 'common perception, a common perspective, and common discourse. Friendship is characterized … not by sympathy or consensus (*homonoia*), but by common deliberation, and thought'.[43] The same interactive process is exemplified in the work of courts, lawyers and citizens.[44] 'Far from being "a conversation with oneself", such interpretive activity is, when properly understood, essentially a conversation with other participants.'[45]

Postema's conclusions:

(1) Understanding a practice is mastery of a discipline.[46]
(2) To learn a social practice is to become acquainted through participation, wherein one comes to grasp the common meaning of the practice.[47]
(3) The common world of the practice is not constructed out of individual interpretations of it. Rather, 'we have expectations of the behavior and expectations of others because we recognize that we participate in a common world'.[48]

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[36] ibid 303–4.
[37] ibid 305.
[38] ibid 306.
[39] ibid 308.
[40] ibid.
[41] ibid 308 ff.
[42] ibid 309.
[43] ibid.
[44] ibid 310.
[45] ibid 312–13.
[46] ibid 313.
[47] ibid.
[48] ibid.

A final and all-important point: conflict (interpretation) presupposes consensus. Although he does not put it this way, Postema's point comes directly from Wittgenstein. All interpretation (a second-order activity) presupposes understanding (how to go on in a practice). The need for interpretation is rare.[49] But when it arises, consensus is the background against which interpretation takes place.

Postema's final point: Dworkin is part of the very tradition he criticises. The unity of law does not depend on some structure. Rather, it involves a shared capacity to move within a web of practice.[50] Postema was the first person to make this point. He was right. But many in the analytic legal philosophy simply ignore the position and the arguments.

References

Alexy, R (2004) 'The Nature of Legal Philosophy' 17 *Ratio Juris* 156

—— (2008) 'On the Concept and the Nature of Law' 21 *Ratio Juris* 281

Dworkin, R (1986) *Law's Empire* (Cambridge, MA, Belknap Press)

—— (2004) 'Hart's Postscript and the Character of Political Philosophy' 24 *OJLS* 1

—— (2006) *Justice in Robes* (Cambridge, MA, Belknap Press)

Green, MS (2003) 'Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law' 89 *Virginia Law Review* 1897

Hanna, P and Harrison, B (2004) *Word and World: Practice and the Foundations of Language* (Cambridge, Cambridge University Press)

Hart, HLA (1994) *The Concept of Law*, 2nd edn (Oxford, Clarendon Press)

Juhl, C and Loomis, E (2010) *Analyticity* (London, Routledge)

Kripke, SA (1980) *Naming and Necessity* (Cambridge, MA, Harvard University Press)

Leiter, B (2009) 'Explaining Theoretical Disagreement' 76 *University of Chicago Law Review* 1215

Patterson, DM (2006) 'Dworkin on the Semantics of Legal and Political Concepts' 26 *OJLS* 545

—— (2012) 'Alexy on Necessity in Law and Morals' 25 *Ratio Juris* 47

Perry, SR (2001) 'Hart's Methodological Positivism' in Jules Leslie Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford, Oxford University Press) 311

Postema, GJ (1987) '"Protestant" Interpretation and Social Practices' 6 *Law and Philosophy* 283

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[49] See Leiter (2009: 1215).
[50] See Postema (1987: 318).

Quine, WVO (1960) *Word and Object* (Cambridge, MA, Technology Press of the Massachusetts Institute of Technology)

Quine, WVO and Ullian JS (1978) *The Web of Belief*, 2nd edn (New York, Random House)

Raz, J (1994) *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, Clarendon Press)

—— (2005) 'Can There be a Theory of Law' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Malden, MA, Blackwell)

—— (2006) 'The Problem of Authority: Revisiting the Service Conception' 90 *Minnesota Law Review* 1003

Rey, G (2008) 'The Analytic/Synthetic Distinction' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy*, Winter 2015 edn, available at plato.stanford.edu/archives/win2015/entries/analytic-synthetic/

Searle, JR (1995) *The Construction of Social Reality* (New York, Free Press)