Special Issue
The Many Fates of Legal Positivism

Comment on Simmonds—Legal Positivism and the Limits of the Contemporary Legal Theoretical Discourse

By Mátyás Bódig [*]

A. Introduction

The editors called for papers that help us assess the current state of legal positivism. Although Nigel Simmonds's paper is not a direct answer to that question, I will use it as a starting point to bring into focus a few issues concerning the character of contemporary legal positivism. I will seek to show how Simmonds's legal theory can be seen as a useful diagnosis of problems with legal positivism—and methodological positivism in particular. I will seek to go beyond the immediate implications of Simmonds's claims but my conclusions will be limited to the Anglo-Saxon discourse on legal theory.

My comments on Simmonds's essay paper are of a slightly odd kind. This is not a critical comment in the usual sense. I am nowhere near a critic of Simmonds's efforts. My work here is very much driven by the conviction that his work is systematically undervalued and widely misunderstood by many. I will try to highlight certain characteristics of the contemporary legal theoretical discourse that may show his works in a better light. Part of the reason for me to think that his is a particularly promising account of law is that he is a *neo-Fullerian*, and I find it important to keep some features of Fuller's account of law alive in the legal theoretical discourse. I will put particular emphasis on pointing out why I think Fuller's legacy can be a guide for anti-positivist legal theory.

My paper will be odd in another sense as well. Although I will characterise Simmonds as offering a good starting point for an anti-positivist legal theory and a successful critical attack on legal positivism, I will assume all along that it is not possible to refute legal positivism by mere legal theoretical arguments. It will be one of my main ambitions to make sense of this odd position.

My analysis will be organized around three clusters of issues. In section B, I seek to highlight the main arguments Simmonds uses against legal positivism. Then, in section C, I assess the prospects of the kind of anti-positivism highlighted by Simmonds. It will be based on an account of the discursive characteristics of contemporary legal positivism and, more generally, conceptual legal theory. In section D, I turn to discussing some of the

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underlying methodological and philosophical assumptions of Simmonds's theory. It will help me bring into focus the problem of *interpretivism*. That will lead to a few critical remarks about Simmonds's project in section E.

Although my paper is written as a comment on Simmonds's essay published in the present volume, I do not restrict myself to reflecting upon it. I will assume that the essay published here is in line with the theoretical position that Simmonds developed in his recent book, *Law as a Moral Idea*.[1] I will rely on the book whenever I feel that we need to have a more complete understanding of his views. But I will refrain from involving in my analysis other works by Simmonds.

I will not try to provide a full analysis of Simmonds's legal theory. That would deserve more than I can provide in a comment like the present one. There are aspects of Simmonds's legal theory that I seek to set aside here. For example, Simmonds's book puts emphasis on the problems of doctrinal legal scholarship.[2] Although this is the aspect of his theoretical initiative that is the most important to me, and it may even provide ammunition for an attack on legal positivism,[3] my analysis is not complex enough to treat that issue adequately here. I also set aside the debate that has been going on between Simmonds and Matthew Kramer for a number of years. It may seem strange as the debate directly concerns Simmonds's quarrel with legal positivism, and many people have learned about Simmonds's theoretical initiative from this very debate.[4] But I am afraid that the quarrel with Kramer has a tendency to overshadow important features of Simmonds's account. By setting it aside, we have a better chance of having a fresh look at his anti-positivist initiative. I will also try to avoid making extensive comments on Simmonds's

[1] *See* NIGEL E. SIMMONDS, LAW AS A MORAL IDEA (2007) [hereinafter SIMMONDS, LAW AS A MORAL IDEA].

[2] *See id*. at 164–168. This is also reflected in the essay I am commenting on. *See* Nigel E. Simmonds, *The Nature of Law: Three Problems with One Solution*, 12 GERMAN LAW JOURNAL 2, 604 (2011) [hereinafter Simmonds, *The Nature of Law*].

[3] Attacks on legal positivism could proceed from the remarkable fact that positivists tend to shy away from raising issues concerning the role and methodological character of legal doctrinal scholarship. One could say that they more or less consciously seek to drive a wedge between conceptual legal theory and legal doctrinal scholarship (as it is actually reflected in Simmonds's analysis; see Simmonds, *The Nature of Law*, *supra* note 2). By the way, this feature of positivism goes back way beyond the emergence of the Hartian account. An extreme version of this "detachment" can be found in Kelsen who sought to purge the "pure theory of law" of doctrinal aspirations, and condemned the work of doctrinal scholars as an illegitimate exercise of political influence. *See* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 3–4 (1992).

[4] The main documents of the debate are the following: MATTHEW KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS ch. 2 (1999) [hereinafter KRAMER, IN DEFENSE OF LEGAL POSITIVISM]; Matthew Kramer, *On the Moral Status of the Rule of Law*, 63 CAMBRIDGE L.J. 65, 65–97 (2004); Nigel Simmonds, *Straightforwardly False: The Collapse of Kramer's Positivism,* 63 CAMBRIDGE L.J. 98, 98–131 (2004); Nigel Simmonds, *Law as a Moral Idea,* 55 U. TORONTO L.J. 61, 61–92 (2005); SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at ch. 3; Matthew Kramer, *Once More Into the Fray: Challenges for Legal Positivism*, 58 U. TORONTO L.J. 1, 1–38 (2008); Nigel Simmonds, *Freedom, Law and Naked Violence: A Reply to Kramer*, 59 U. TORONTO L.J., 381, 381–404 (2009).

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"archetypal" concept of law. I do not set it aside, as it constitutes the heart of his account of law. Leaving it unmentioned would result in a terribly distorted analysis of Simmonds's views. But I am more interested in focusing on the implications of his theory for the debate over legal positivism, and that requires me to bring other aspects to the fore. I want this comment to be mainly about Simmonds's *interpretivism*. I do believe that it gives me a better chance to indicate how Simmonds is relevant to the discussion that the editors wanted to ignite.

Criticising legal positivism is a complex and daunting task, and not simply because legal positivism has grown into a complex, multi-faceted theoretical tradition. Legal positivism is the dominant approach in contemporary conceptual legal theory. Its dominance is due to the decisive impact of legal positivists like Herbert Hart on the agenda and the internal norms of the contemporary discourse on legal theory. (I will have more to say about the characteristics of the contemporary discourse below—in section C.)

Attacks on legal positivism that are not based on a careful clarification of their specific target are bound to be defeated by the complexity of positivist theorising. And, if we want to make good sense of Simmonds's anti-positivism, we will have to figure out what Simmonds's arguments are directed at, and in what respects they are capable of posing a challenge against positivists. There are four possibilities of anti-positivist initiatives that I reckon with here. The anti-positivists can seek (1) to refute *core positivist claims* (like the "separability thesis"), (2) to undermine *methodological assumptions* allegedly shared by all positivists, or (3) to show that some important legal theoretical challenges *cannot be handled* by positivist accounts of law. And, of course, (4) anti-positivists can try to refute the *main positivist conceptions* one by one. Simmonds's essay can be read, first and foremost, as specifically directed against an individual conception: Hart's positivist legal theory. We will have to consider Simmonds first as an anti-Hartian. But there are other layers in his anti-positivism: he can be read as making a more general claim about the methodological deficiencies of legal positivism. As we dig deeper, we glimpse the outlines of a more comprehensive attack on legal positivism. In section C, I will consider the prospects of targeting the core legal positivist claims. That will allow me to consider the viability of Simmonds's account as a challenge against methodological assumptions underlying many versions of contemporary legal positivism. That will help me bring into focus Simmonds's vision of jurisprudence as a philosophical inquiry.

B. Simmonds's Attack on Hartian Legal Positivism and its Implications

As I have indicated, we will first read Simmonds's arguments as an attack on Hartian legal theory. Seen from this angle, Simmonds's anti-positivism revolves around a claim concerning the inability of legal positivism to handle some of the issues that are central to legal theory. Hart and those who follow him are incapable of accounting for the way the

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law is used to *justify official action*.[5] Hartians fail to explain how adjudicative reasoning can be offered intelligibly as a justification for imposing sanctions on citizens.

I. The Attack on Hart

I take this central claim to be an aspect of the issue of *normativity* in legal theory—the issue of law's ability to guide human action. It is definitely relevant for a critical assessment of Hartian legal theory. The issue of normativity was particularly important for Hart, and he definitely played a crucial role in clarifying the character of the problem.[6] As Simmonds puts it, Hart sought to capture the "prescriptive, action-guiding character of propositions of law."[7] Hart was convinced that only legal positivist jurisprudence had the theoretical resources to tackle this issue. It is because law's normativity was not to be grounded in morality. We need to maintain the conceptual distinction between law and morality if we do not want to misconstrue the conceptual character of law and its normativity.

The key to Hart's account of law's normativity was the idea of a non-moral "ought," and the theory of "social normativity" that it gave rise to.[8] The Hartian account of normativity is manifested in one of his most characteristic conceptual devices: the *rule of recognition*. The rule of recognition is a conventional rule (generated by the convergent practice of officials) that sets out the *criteria of legality* for a particular legal system.[9] Norms can only be regarded as being legal (being part of a legal system) if they meet the criteria of legality set out by the rules of recognition. The insistence upon the conventional character became the very foundation of the Hartian version of the commitment to the separability of law and morality (*separability thesis*).[10] If the rules of recognition are strictly conventional in character, their existence and content will not be a matter of moral correctness: it will be a matter of facts—facts of "acceptance" by officials, facts of

[5] This was an important theme in Simmonds book. *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 130, 135.

[6] This is what makes his analysis of the "gunman situation" so important. *See* H.L.A. HART, THE CONCEPT OF LAW 20–25 (2nd ed. 1994).

[7] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 608.

[8] *See, e.g.*, HART, *supra* note 6, at 254–57. He made sense of the idea of non-moral "ought" (pretty successfully) by pointing to the way in which normative claims figure in conventional practices (like games) that offer reasons for action not reducible to moral reasons. *See id.* at 56–57, 140–41. *Cf.* Simmonds, *The Nature of Law*, *supra* note 2, at 608–9.

[9] *See* HART, *supra* note 6, at 100–10.

[10] *See id.* at 185–86.

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convergent behaviour in the context of a social practice.[11] We will be bound to conclude that there are possible legal systems where the rule of recognition does not involve any moral criterion of legality for any norm.[12]

For obvious reasons, the Hartian strategy to establish a positivist account of law can only work if we are led to believe that the rule of recognition is the sole determinant of the criteria of legality, and that the legality of the rule of recognition itself cannot be called into question. As Simmonds puts it, "[Hart's theory] invites us to regard the normative or justificatory force of the rules as entirely a function of their derivability from the rule of recognition."[13]

Simmonds attacks the Hartian account at this very point. He challenges its claims about the rule of recognition on both counts: legality is not entirely a function of derivability from the rule of recognition,[14] and one can ask meaningful questions about the legality of the rule of recognition.[15] It is important that Simmonds's position does not involve the rejection of the idea that being guided by a basic rule of recognition plays a vital role in the operations of a legal system.[16] What Simmonds denies is that "the basic rule of recognition is an outer bounding limit on juridical thought, beyond which lie factual and moral questions, but no juridical questions."[17]

But what is wrong with the Hartian account of the rule of recognition? As we have already indicated above, Simmonds challenges the Hartian account of normativity and the rule of recognition because he finds it incapable of accounting for the reliance on law in justifying the application of sanctions to citizens. The basic consideration can be easily identified by asking the following simple question:

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[11] For this reason, the so-called "conventionality thesis," as formulated by Coleman, seems the best attempt to capture the core idea of Hartian legal positivism. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 71 (2001).

[12] *See* Jules L. Coleman, *Negative and Positive Positivism*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 28, 30 (Marshall Cohen ed., 1983).

[13] SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 129.

[14] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 611; *see also* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 50, 128.

[15] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 612.

[16] I have to admit that I would be more inclined to try another strategy that claims that the rule of recognition, in the sense specified by Hart, does not even exist. *See* MÁTYÁS BÓDIG, JOGELMÉLET ÉS GYAKORLATI FILOZÓFIA 292 (2004). But I set that issue aside for now.

[17] Simmonds, *The Nature of Law*, *supra* note 2, at 613.

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> Suppose that a judge sentences me to prison, citing a certain rule as the justification for my punishment. I protest and demand to know how the existence of the rule serves to justify sending me to prison. The judge explains that the rule is a valid rule in so far as it is derivable from the rule of recognition, a rule that he and his fellow judges accept. I continue to protest: why should I care about what rule he and his colleagues accept? What does that have to do with me?[18]

This is supposed to make us realize that Hart can offer only a stunningly inadequate answer to a perfectly appropriate question about the legal practice (an answer that does not even seem fully intelligible). If the criteria of legality that confer legal normativity upon the laws applied to the citizens (and, for that matter, the laws that confer legal powers upon the officials who make the decisions) are to be traced back to a conventional rule generated by official action, one has to admit that invoking the rule of recognition in explaining the justificatory force of laws boils down to little more than saying: "That is just how we [officials] do things around here."[19] That does not really sound like an answer at all. If we actually get this answer, we may have the impression that the Hartian did not really understand our question, or she politely indicated her unwillingness to answer it.

I do believe that this is a solid argument. But it does not really come as a surprise: it belongs to a family of standard anti-positivist complaints about the Hartian theory. More or less similar arguments have been made repeatedly against Hartian legal positivism for over forty years. Perhaps it was Lon Fuller who could claim the credit for levelling a version of it against Hartian positivism for the first time,[20] and many have followed him.[21] The argument can be developed and contextualised in a number of ways: some of them are more similar to Simmonds's argument[22] than others.[23]

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[18] *Id*. at 610.

[19] SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 133.

[20] Lon L. Fuller accused positivists of perceiving law as a "one-way projection of authority." LON L. FULLER, THE MORALITY OF LAW 215–16 (2nd ed. 1969).

[21] *See, e.g.*, Michael Payne, *Hart's Concept of a Legal System*, 18 WM. & MARY L. REV. 287, 287–319 (1976); R.A. Duff, *Legal Obligation and the Moral Nature of Law*, 25 JURID. REV. 61, 80–82 (1980); Gerald J. Postema, *The Normativity of Law*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 92, 92–93 (Ruth Gavison ed., 1987); Jeffrey D. Goldsworthy, *The Self-Destruction of Legal Positivism*, 10 OXFORD J. OF LEGAL STUD. 449, 456–57 (1990); ROGER SHINER, NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT 160–61 (1992); T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 64–66 (2001).

[22] "The notion of acceptance [by legal officials] does not enable Hart to distinguish between a legal system based on power and a legal system based on authority." Payne, *supra* note 21, at 318.

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I will not provide here an analysis of the merits of the argument (although I will return to some of its methodological implications in section C). I have tried it elsewhere, and I have already concluded that it poses massive problems for Hartian legal positivism.[24] Simmonds would not be important for us just because he made this argument. It makes more sense to concentrate our attention on how he uses this argument to develop his own account of law, giving his anti-positivism its unique identity.

II. Simmonds's Anti-Positivist Initiative

What makes Simmonds's criticism really significant is his rejection of the standard solution anti-positivists tend to offer at this point. At first glance, the question of the justificatory force of law must be settled by throwing in a *moral and political justification* of law's normative claims. Simmonds refers to this (borrowing a term from MacCormick) as relying on "underpinning reasons."[25] Its application would look something like this: "Imposing legal sanctions is justified because the official practice is supported by good moral reasons." The legal mechanisms in our society have a plausible claim to moral and political *legitimacy*.

The trouble is that we do not have to think very hard to realize that going down this route is likely to lead us into a theoretical conundrum that never worked in favour of the critics of legal positivism. If we derive the normative force of law directly from extra-legal moral or political principles, it may force us to settle for a lack of independent or, at least, *distinctive* normative force for law.[26] The law may end up looking like a mere institutional manifestation of the normativity of morality. And it can have uncomfortable implications. If the normativity of law is derived directly from extra-legal principles, it is hard to resist the conclusion that the pertinent principles set limits to the normative competence of legal institutions. That may encourage a moral or political "second-guessing" of legal

[23] Many prefer to formulate the arguments against legal positivism in terms of the ability of law to establish obligations. As legal sanctions are invariably justified by the alleged breach of legal obligations, that issue also revolves around asking questions about the justificatory use of legal propositions.

[24] *See* Mátyás Bódig, *Interpretivism and Conventionalism: Contributions to the Critical Assessment of Contemporary Methodological Legal Positivism*, *in* LEGAL POSITIVISM: CONCEPTUAL APPROACH 152, 167–70 (Asifa Begum ed., 2008) [hereinafter Bódig, *Interpretivism and Conventionalism*]; *see also* BÓDIG, *supra* note 16, at 65–69.

[25] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 610–11.

[26] The requirement that the law must have distinctive normative force is often formulated as the "practical difference thesis" by legal positivists, and they think it strengthens their position. *See* Scott J. Shapiro, *On Hart's Way Out*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 178, 178–79 (Jules Coleman ed., 2001); COLEMAN, supra note 11, at 69; *see also* Scott J. Shapiro, *The Difference That Rules Make*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY (Brian Bix ed., 1998).

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requirements: we must make sure that the decisions of legal officials are truly supported by the underpinning reasons before we accept them as binding upon us. This may be appealing for some but it would make almost impossible to account for some of the familiar features of our legal practices. Some of our legal mechanisms were specifically designed to rule out this moral second-guessing of law. We would end up with an unattractive account of the authority of legal institutions.[27] We know that the claim that anti-positivism is incapable of making sense of the distinctive normativity of law (its ability to override at least some of our moral reasons), and that it tends towards undermining the authority of law is a powerful motivation behind positivist jurisprudence.[28] If anti-positivism pins its hopes on the reliance on "underpinning reasons," it is more than likely to generate a positivist backlash.

The challenge is to provide an anti-positivist alternative that avoids such pitfalls. Simmonds attempts to meet the challenge by trying to figure out how the rules of law can have a justificatory force "not because they are just or wise or otherwise desirable" but "precisely because they are law within the relevant jurisdiction."[29] He seeks to make sense of the ordinary assumption that "judges do not justify the imposition of sanctions by reference to their own moral or political views, but by reference to what they claim to be the law."[30]

The solution Simmonds offers is manifested in the idea highlighted in the very title of his book: we must treat *law as a moral idea*. If we set out to understand the conceptual features of law, our inquiry will give us access to a *moral ideal* that a society can only realise by maintaining legal mechanisms. As I have indicated, I have no wish to provide an extensive analysis of Simmonds's own account of law—I would like to focus on his philosophical vision and its implications for the prospects of anti-positivism. But I need to highlight here three elements of Simmonds's account before I can move on. First, he argues that the conceptual features of law are to be understood in light of an "intellectual

[27] I do believe that that is what happened with Moore who insists that "only morality can obligate." Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 188, 224–25 (Robert P. George ed., 1992). For his account of authority, see Michael S. Moore, *Authority, Law, and Razian Reasons, in* EDUCATING ONESELF IN PUBLIC (2000).

[28] This idea is one of the central features of Kelsen's criticism of the natural law doctrine. Kelsen claimed, pretty unfairly, that natural lawyers cannot explain the need for a legal system alongside a system of moral norms. *See, e.g.*, Hans Kelsen, *The Natural-law Doctrine before the Tribunal of Science*, *in* WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE 142–44 (1960).

[29] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 610.

[30] *Id*. at 612–13.

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archetype."[31] Secondly, he is convinced that the moral core of the ideal the law embodies is an aspect of *freedom*: "freedom as independence from the power of another."[32] Thirdly, he links up his methodological commitment to the "archetypal view" with the moral ideal of "freedom as independence" by way of an analysis of the eight *desiderata of the rule of law* that Fuller identified in his *The Morality of Law*.[33] Those desiderata (or principles) help us understand the depth of the ideal of law.[34] They facilitate an understanding of the moral significance of law.[35] Simmonds's anti-positivist legal theory claims an inherent connection between the concept of law and the ideal of the rule of law.

> There is, therefore, no sense of "law" in which law can be detached from the value that we call "the rule of law", or in which legality is reduced to a simple matter of derivability from a rule of recognition. For, if it were so detached or reduced, legality (the status of a rule of law) would be incapable of intelligibly being offered as a justification for a judicial decision.[36]

Why would this be all that different from most other forms of anti-positivism? Well, the key claim that makes Simmonds's initiative distinctive is that the law is *reflexive*. Although I will have more to say about the implications of this claim in section D, a brief clarification must be provided here. It is impossible to appreciate the character and significance of Simmonds's theoretical initiative without seeing clearly what he means by *reflexivity*. The underlying idea is rooted in Simmonds's vision of philosophical inquiry. He believes that distinctively philosophical problems tend to lead us to ask fundamental questions about

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[31] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 51–56. The idea is turned into the following conceptual claim about law by Simmonds: "The status of rules as law depends on the approximation of the system of rules to an abstract idea of law." *Id*. at 130.

[32] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 617; *see also* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 158–63.

[33] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 615–17; *see also* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 64–68. The desiderata are the following: (i) there must be rules; (ii) which are published; (iii) prospective; (iv) possible to comply with; (v) intelligible; (vi) free from contradiction; (vii) reasonably stable through time; and (viii) there must be congruence between the declared rules and the official action.

[34] "Fuller's theory becomes interesting when he proceeds to demonstrate that the eight desiderata (identified as minimum conditions), when taken collectively, be regarded as a guiding ideal for legal thought: the ideal that we usually label 'the rule of law.'" Simmonds, *The Nature of Law*, *supra* note 2, at 616.

[35] "The eight requirements are not principles of efficacy, but (when taken together) represent a moral ideal for legal systems. Considerations of efficacy would, at best, give one good reason to comply with the eight requirements to a limited extent." Simmonds, *The Nature of Law*, *supra* note 2, at 616. This is the "entry point" of Simmonds's debate with Kramer.

[36] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 191.

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the intellectual and moral criteria we rely on in our understanding of the world around us.[37] For example, philosophy makes us realise that we may need to get clear about the *idea* of truth before we can determine the truth value of a particular claim. Or we may need to get clear about the idea of reason before we can choose between reasons. If law is reflexive in this sense, it would imply that, at least in a number of strategically important cases, we cannot determine what the law requires of us without getting clear about the *idea of law*. Therefore, legal thought must be seen as guided by reflection upon the idea of law (and the methodological character of legal theory, as a philosophical inquiry, will be determined by this insight).[38] A proper understanding of law involves more than just becoming familiar with the mere facts of a social practice: it must be organised around an ideal that is not detached from our moral understanding.[39] (And it makes the philosophical character of law similar to that of justice.)[40]

It is because of the reflexivity of law that anti-positivist jurisprudence does not need to derive the normativity of law directly from extra-legal principles. We do not need to impose on the law external moral and political principles to clarify the normative significance and justificatory force of legal institutions. By reflecting on what the law is and the practical conditions under which it can become a working institutional mechanism, we gain insights about a moral ideal *inherent* to law.

III. Fuller's Legacy

We have to get a bit clearer about the methodological "profile" of this account of law. It is an anti-positivist conception with obvious sympathies towards a form of natural law doctrine.[41] But Simmonds is nowhere near an orthodox naturalist or a standard anti-positivist. His account concentrates on the reflexivity of law in a way that one can hardly find in the works of most naturalists. One could say that it is largely due to his reliance on Fuller's legal theory that becomes particularly explicit in Simmonds's analysis of the principles of legality.

It may not sound very promising. One could hardly say that Simmonds follows a popular trend when turning to Fuller for inspiration. The Fullerian account of law has not been at the forefront of the debate over legal positivism for a long time. What can we hope from

[37] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 602.

[38] *See id.* at 613.

[39] *Cf.* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 4.

[40] *See id.* at 1.

[41] "Another response . . . postulates "natural laws" that are made by no one but that ground the authority of the supreme law-maker. . . . Once we scratch the surface of the position and start to examine it closely, however, it begins to look more convincing." Simmonds, *The Nature of Law*, *supra* note 2, at 603.

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an attempt to renew it? An answer to this question could start from highlighting what made Fuller's account rather unpopular among anti-positivists. Fuller was one of the first to appreciate the significance of Hart's legal theory, and the critical edge of his anti-positivism (in the last couple of decades of his career) came to be specifically directed against Hartian positivism.[42] As is well known, Fuller's central claim is that there is an inherent connection between the desiderata of the rule of law (or the "principles of legality") and the concept of law. Fuller argued that the principles of legality constitute the "internal morality of law," and that this rules out the separation of law and morality that positivists like Hart argue for.[43]

Unfortunately for Fuller, positivists have never been particularly worried about his criticism.[44] Hart developed an argumentative strategy against the Fullerian challenge in the 1960s, and positivists are happy to resort to it whenever Fullerian considerations are raised against them. Hart's response is built on the combination of two ideas. The first is that, although we must grant that that the "principles of legality" are inherently relevant for any rule-based mechanism for guiding human action, it does not make them inherently moral. They are "unfortunately compatible with very great iniquity."[45] As Simmonds aptly put the Hartian claim, the moral quality of law is wholly contingent upon the law's content.[46]

The second idea that positivists tend to rely on against Fuller comes from the realization that the Fullerian account can only make sense in the context of a *teleological* approach to law. It is a *functional account*: it seeks to characterise the law in light of morally relevant human purposes.[47] Famously, Hart made a mockery of this feature of Fuller's account in his book review of *The Morality of Law*,[48] and it became an article of faith for most legal

[42] *See* FULLER, *supra* note at 20, at 133–51; *see also* Lon L. Fuller, *Positivism and the Fidelity to Law*, 71 HARV. L. REV. 630, 630–72 (1958).

[43] *See* FULLER, *supra* note at 20, at 33–34.

[44] For a recent example of positivist confidence about handling the Fullerian challenge, see KRAMER, IN DEFENSE OF LEGAL POSITIVISM, *supra* note 4, at 37–77 (2003).

[45] *See* HART, *supra* note 6, at 207; *see also* H. L. A. Hart, Book Review—*The Morality of Law*, 78 HARV. L. REV. 1281, 1284–87 (1965) [hereinafter Hart, Book Review].

[46] Simmonds, *The Nature of Law*, *supra* note 2, at 616.

[47] "Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of sustained purposive effort." FULLER, supra note 20, at 106. *Cf.* Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. OF PHIL. 697, 697–705 (1956).

[48] "The author has all his life been in love with the notion of purpose and this passion, like any other, can both inspire and blind a man. I have tried to show how it has done both to the author. The inspiration is so considerable that I would not wish him to terminate his longstanding union with this *idée maîtresse.* But I wish that the high romance would settle down to some cooler form of regard. When this happens, the author's many

positivists that the conceptual features of law cannot be revealed in light of a particular function, point or purpose. The law serves to tackle a wide variety of social problems and challenges—it is characterised by an irreducible functional plurality. It does not have a specific purpose. Instead, it has distinctive ways to serve human purposes: there may be distinctively "legal" ways for tackling practical problems.[49] Therefore, if we want to clarify the conceptual character of law, we have to concentrate on the *structural features* of a social phenomenon.[50] The main elements of the Hartian account (the difference between primary and secondary rules, the rule of recognition, etc.) must all be seen as elements of such a "structural" account of law.

Hart's answer to Fuller is one of the best expressions of the spirit of *methodological legal positivism*.[51] It is driven by the conviction that one needs to be a positivist for *methodological reasons*—to have an adequate grasp of the nature of law. Positivists are the ones who got clear about the methodological requirements for an adequate conceptual account of law. They are the ones who do not *mystify* the law.[52] They know that one of the characteristic ways of messing up conceptual inquiries can be found in functional or teleological accounts of law. When we try to elucidate the law in light of its moral point or function, we tend to overlook the fact that the central problem for conceptual legal theory ("what is law?") is *descriptive* in character. We mystify the law instead of clarifying it. Legal positivists are there to warn us against this mistake.

Of course, the positivist counter-attack did not scare off the anti-positivists who still preferred to provide accounts of law in light of morally relevant functions. But it convinced most of them that they should distance themselves from Fuller's strategy. Nowadays, they are more likely to follow Dworkin, and insist that law is to be characterised in light of its

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readers will feel the drop in temperature; but they will be amply compensated by an increase in light." Hart, Book Review, *supra* note 45, at 1296.

[49] *See* Leslie Green, *The Political Content of Legal Theory*, *in* 17 PHILOSOPHY OF THE SOCIAL SCIENCES 1, 12–13 (1987); Jules L. Coleman, *Methodology*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 311, 337–38 (Jules Coleman & Scott Shapiro eds., 2002).

[50] This is what came to the fore in Hart's replies to Dworkin. He insisted upon the fundamental importance of the theoretical task of answering "important questions to which the existence of law has always given rise, and which are not questions of moral or political justification but concern *the structure or constitution and interrelationship of legal phenomena*." H.L.A. Hart, *Comment on Dworkin*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 37 (Ruth Gavison ed., 1987) (emphasis added); *see also* HART, *supra* note 6, at 240.

[51] I took the term from Stephen R. Perry, see Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CANADIAN J. OF L. & JURIS. 2, 361, 361–81 (1996); see also Stephen R. Perry, *Hart's Methodological Positivism*, 4 LEGAL THEORY, 427, 427–67 (1998). For my account of methodological positivism, see BÓDIG, *supra* note 24, at 158–61.

[52] This commitment to demystification is what Hart admired in Bentham. *See* H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 21–39 (1982); *see also* H. L. A. Hart, *Bentham, Lecture on a Master Mind*, *in* MORE ESSAYS IN LEGAL PHILOSOPHY: GENERAL ASSESSMENT OF LEGAL PHILOSOPHIES 18, 27–33 (R. S. Summers ed., 1971).

point because law is an *interpretive concept*.[53] Or they may follow Finnis in trying to revive the classical tradition of the natural law doctrine, and claim that a moral function makes it *practically reasonable* for a community to have a legal system.[54] Or they may put their faith in Michael Moore's claim that law is a *functional concept* by virtue of its semantic character.[55]

However, there is a stubborn problem with all these attempts to make the anti-positivist position more resilient (and it happens to be closely related to the difficulty involved in relying on "underpinning reasons" in explaining the normative force of law). All these accounts end up being distanced from an important aspect of Fuller's effort: Fuller sought to establish a connection between law and morality by remaining within the realm of ordinary *legal experiences*. Fuller tried to reveal the internal morality of law by reflecting on uncontroversial features of governance by rules in general, and the alternative strategies gave up this aspiration. By contrast, Dworkin requires us to impose upon law political values that are formulated by moral and political reflection—in the process of developing one's own moral and political theory.[56] It is even more obvious in the case of Finnis whose key claim is that the legal theorist cannot find the proper point of view to grasp the conceptual characteristics of law without figuring out the principles of practical reasonableness.[57] His methodology requires us to leave the field of jurisprudential reflection right after clarifying the methodological character of legal theory. We have to lay the foundations for a whole practical philosophy (including a complete theory of values), and arrive at an account of law at a later stage: by way of a specification of our moral and political philosophy.

The trouble is that such a long detour towards moral and political philosophy is likely to commit any account of law to a particular political perspective, thereby generating a suspicion of political partisanship. It gives rise to the recurrent complaint that mainstream versions of anti-positivism tend to be terribly *ideological*.[58] That can be unappealing for

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[53] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 87–89 (1986).

[54] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 16 (1982) [hereinafter FINNIS, NATURAL LAW]; *see also* John Finnis, *Law as Co-ordination,* 2 RATIO JURIS 97, 97–104 (1989).

[55] *See supra* note 27; *see also* Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2424–533 (1992).

[56] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105–07 (1978). The tendency of imposing political values on law is visible in the way the analysis of "integrity" leads Dworkin into a political philosophical discussion. *See id.* at 176–224.

[57] *See* FINNIS, NATURAL LAW, *supra* note 54, 14–15.

[58] Finnis and his disciples (like Robert George) are the most obvious targets of such criticism. For them, a conceptual account of law is inherently linked to laying the foundations for arguing about controversial political issues (like abortion, euthanasia, or homosexual emancipation). *See, e.g.*, John M. Finnis, *Law, Morality, and Sexual Orientation*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 11–39 (1995); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality,* 106 YALE L.J. 2475, 2475–504 (1997). But Dworkin can also be

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legal theorists who are worried (like me) that, by channelling conceptual inquiries through a conception of substantive moral and political principles, we turn conceptual legal theory (and legal theory in general) into just another battleground for fighting out our moral and political differences.

Once again, it gives a considerable advantage to legal positivists. Although legal positivism (especially in its early forms) was often formulated in support of partisan politics (Bentham is an obvious example), it later gained much of its credibility as an intellectual movement by seeking to resist external ideological pressures. It is damaging for anti-positivism if it is seen as facilitating unwanted ideological influences on legal theory.[59]

This is why one may think that the Fullerian initiative deserves another chance. It may turn out to be an advantage at the end of the day, that it was not an attempt to clarify how the constitutive principles of one's moral and political outlook are reflected in law. Instead, it was an attempt to reveal the morality that is *internal* to law. If we can renew the Fullerian initiative in some way, we have a chance to undermine the common misconception that the only effective guarantee of the integrity of law and legal thought is the positivist separation of law and morality.

Of course, the Fullerian account must be strengthened and reconstructed in many respects. We have to acknowledge the problem that, in terms of the quality of his philosophical reflection, Fuller was constantly on the back foot in his debate with Hart. There is a need here to ground the Fulleran ideas in a more appealing philosophical methodology, and to relate them to a better understanding of morality and moral reflection. It is this particular "overhaul" of the Fullerian account that Simmonds seeks to achieve.[60]

I will return to analysing some of the philosophical characteristics of Simmonds's legal theory in section D. But, before that, we must come to terms with some other aspects of the quarrel between Simmonds and legal positivists.

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vulnerable to accusations of political partisanship; see Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1637–717 (1998).

[59] Of course, the issue for legal theory is not finding ways to make accounts of law non-ideological. That is unrealistic as legal practices (just like any other human practice) have their ideological features. But it can be realistic (even important) to try to avoid imposing on law ideologies that are *external* to legal practices—that are not inherently connected to the professional culture of lawyers. Giving up resistance on this point would imply giving up the claim of the legal profession and legal scholarship to integrity. And the claim to professional integrity is dear to the heart of lawyers and legal scholars. They are unlikely to sympathise with theories of law that deliberately give it up.

[60] "Nevertheless, it must be conceded that Fuller never really succeeded in giving a clear explanation of the moral status of his eight requirements. It is here that I feel my own work clarifies matters and contributes positively to the debate." Simmonds, *The Nature of Law*, *supra* note 2, at 617.

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C. Legal Positivism and the Contemporary Legal Theoretical Discourse

In the previous section, we considered Simmonds's legal theory as a challenge against Hartian legal theory. It emerged as an attempt to show that Hartian legal theory is incapable of handling a vital aspect of law: its normativity, or, more specifically, its justificatory potential. Of course, Simmonds's central argument about justificatory potential is limited in its scope in a number of ways. It is designed to challenge a form of methodological positivism, and it puts heavy emphasis on the Hartian concept of the rule of recognition which happens to be based on a form of jurisprudential *conventionalism*. For such reasons, it may not be effective against normative positivists (like Waldron and Tom Campbell).[61] It may not work against Kelsenian normativists who do not rely on conventionalism. Raz may also be ruled out as a legitimate target: he is one of those who called into question the ability of the Hartian account to clarify the normativity of law. Raz criticised Hart for not realising that officials must be able to think that their decisions are supported by a justification that generates practical reasons for the ordinary citizens.[62]

Shall we accept that Simmonds can lay claim only to attacking a particular group of positivists? Or is there an aspect to his anti-positivism that can be turned against at least some other positivists who did not follow Hart's path? In order to figure that out, we will need to consider whether some of Simmonds's arguments work on another level, as a different type of challenge against legal positivism. I do believe that Simmonds has the resources to pose a more general challenge to legal positivism. And we glimpse that aspect to his theory if we begin to think about the way contemporary positivists tend to react to critical challenges.

When it comes to defending legal positivism in general, positivists tend to resort to a distinctive argumentative strategy: they determine the identity of legal positivism by formulating *core conceptual claims* that the positivists are supposed to agree upon (like the "separability thesis," the "sources thesis,"[63] or the "limited domain thesis"[64]).

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[61] *See* Jeremy Waldron, *Normative (or Ethical) Positivism, in* HART'S POSTSCRIPT, ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 410 (Jules Coleman ed., 2001); TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM (1996); *see also* Tamás Győrfi, *Normatív pozitivizmus*, *in* NATURA IURIS: TERMÉSZETJOGTAN ÉS JOGPOZITIVIZMUS ÉS MAGYAR JOGELMÉLET (Miklós Szabó ed., 2002).

[62] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 56–57 (2nd ed., 1990); Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. OF LEGAL STUD. 123, 130 (1984). For Raz's ideas on how this limits the force of certain anti-positivist arguments against his account, see Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment*, 4 LEGAL THEORY 1, 19 (1998).

[63] *See, e.g.*, JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 194 (1994).

[64] *See, e.g.*, Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1914–15 (2004).

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The question for us may seem to be whether Simmonds can be successful in undermining those core positivist claims. But that is not really the case. As I will try to show, no one can be successful in demolishing the positivists' core conceptual claims. But one can try to call into question the argumentative strategies that generate them, and the discursive constructions that facilitate the reliance on them in the legal theoretical discourse. It may be that arguing against legal positivism has become particularly tricky in the contemporary legal theoretical discourse but it is also possible that it is not exactly a sign of the strength of the positivist position. In some respects, it may be a sign of serious *discursive dysfunctions*. I believe that Simmonds has a claim that deserves particular attention in this context: the point he makes about the "fragmentation of inquiry." So the questions that help us assess the anti-positivist challenge Simmonds raises are like this: How can the strategy of defending core conceptual claims make sense in a discourse? What does it tell us about the discourse of legal theory? Do we have a chance to challenge the discursive constructions that facilitate such argumentative strategies? These are the issues to be pursued in this section.

I. Core Conceptual Claims and the Defence of Legal Positivism

If we want to assess the significance of Simmonds's anti-positivist initiative, we need a deeper understanding of the positivist strategy of defending legal positivism by insisting upon the plausibility of core conceptual claims. It is no surprise that the strategy is really popular amongst legal positivists: it simplifies the task of the apologist who does not have to defend legal positivism as a complete account of the conceptual character of law or a complete conception of law. More importantly, the core claims are so modest that they are bound to be true in some sense. They also prove to be frustratingly elusive for the critic. The critic is forced to go against particular formulations of the core claims (to provide a serious analysis with properly set objectives) but, naturally, they do not have canonical formulations. Even if the arguments are successful against certain formulations of the core claims, it is hard to imagine that the positivists cannot salvage them in some revised and qualified form.

The way this legal positivist strategy works can be seen particularly clearly in Coleman's classic rejoinder to Dworkin, "Negative and Positive Positivism." Coleman's negative positivism revolves around a core conceptual claim: the separability of law and morality.[65] It is formulated as a very modest claim that is very hard to dispute (in fact, Coleman believes that its truth is more or less beyond doubt).[66] It is designed to make us accept

[65] *See* Coleman, *supra* note 12, at 30–31.

[66] Here is what Coleman defends as the specification of the separability thesis: "[T]here exists at least one conceivable legal system in which the rule of recognition does not specify being a principle of morality among the truth conditions for any propositions of law." *Id*. at 31. Although I am not sure that that this particular formulation is beyond doubt, I am ready to admit that the separability thesis is true in some (pretty unimportant) sense.

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that the positivist has a plausible point of departure—unlike the anti-positivist who will have to struggle with the burden of making sense of a claim (the denial of separability) that looks pretty implausible from the outset. It gives the impression that, whatever they say in the end, positivists remained faithful to an otherwise true claim all along. Of course, negative positivism is not even close to a full account of law. It becomes an important thesis for legal theory only if we see it as a component in a broader set of claims—in versions of what Coleman calls "positive positivism."[67] Naturally, a decent positivist will seek to develop a form of positive positivism. But, when it comes to defending legal positivism against the critics, she can always rely on the "safety net" of negative positivism.[68]

The positivist strategy tells us a lot about the character of a legal theoretical discourse that was very much shaped by legal positivism. I will try to highlight some of its implications by providing an illustrative analysis of the separability thesis. (I opt for the separability thesis because it will allow me to make use of what I have said in the previous section.) We know that the thesis concerns the conceptual relationship between *law and morality*. Of course, one can speak of the separation of the two in many senses: the positivist has a wide variety of ways in which she can specify the thesis for legal theoretical use. And the specification will fall somewhere between an (indefensible) strong and an (uninformative) weak understanding.

The indefensibly strong understanding would make the claim imply that the law has nothing to do with morality: we can explain every conceptual element of law without ever making a reference to morality, and we can practice law without ever taking moral considerations into account. Positivists are unlikely to make this strong clam.[69] They are happy to admit that law and morality "meet" at several points.[70] At the other end of the spectrum, we find a thesis that would only imply that law and morality are not the same: they both have conceptual features that the other lacks. Obviously, the claim in this form

[67] *See id.* at 32.

[68] The confidence in this strategy often generates a form of triumphalism among positivists. Many of them think they won the debates with anti-positivists long ago. It justifies the dominating position of legal positivism in legal theory. The current problem of legal positivism is that it is becoming the victim of its own success: it needs to find a new function for itself. Brian Tamanaha provides a good example for this attitude. He quotes, with genuine sympathy, a speech by Brian Bix: "[L]egal positivism is orthodoxy in desperate need of dissent." Brian Z. Tamanaha, *The Contemporary Relevance of Legal Positivism*, 32 AUSTRALIAN J. OF LEGAL PHIL. 1, 1–2 (2007).

[69] It is not that positivists are never tempted to make a strong claim of separation. Kelsen went pretty close to it when he denied the possibility of any real conflict between law and morals. The perspectives of morality and law mutually exclude one another. "[J]udging from one point of view excludes the other . . . . It is evident to any jurist—that is, when the cognition of legal norms is involved—he must disregard the moral aspect. No moralist would think of letting considerations of positive law interfere with the validity of norms which he has recognized from his point of view." HANS KELSEN, GENERAL THEORY OF LAW AND STATE 410 (1949).

[70] *Cf.* MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET (2004).

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is way too weak: it could not confer upon legal positivism a theoretical identity. It would be impossible to present this claim as something that anti-positivists are bound to deny. The thesis in this form is eminently true as law (in all its incarnations) is a social artefact,[71] and is built around institutions (legislatures, courts, regulative agencies, law firms) in a way that is alien to morality (in all its incarnations). Everyone in her right mind would accept this, including the classics of the natural law tradition. Hence, legal positivists are equally unlikely to formulate the thesis along these lines.

The positivists need a specification of the thesis that can be taken as more or less straightforwardly true but not without important substantive implications. They will insist on the separability of law and morality in a more specific way.[72] Typically (at least in the Hartian camp), they tie the claim about separability to the concept of *legal validity*. They are likely to claim, in some form, that it is a conceptual truth that the moral properties of a norm are not necessarily responsible for its status as a *legal* norm.[73]

At first, it sounds like an important claim that is capable of conferring upon legal positivism a distinctive theoretical identity. It says something important about law, and it seems to define the challenge for the anti-positivist critic very clearly: she must argue that the criteria of legality must have something to do with morality in any legal system. But it cannot be the end of the story. If we leave the thesis like this, it will be a relatively easy prey for the anti-positivist critic. In fact, Simmonds's argument concerning a justificatory aspect of law (that we have analysed in section B), can fulfil that task pretty neatly. The critic may point to the inherent connection between the validity of law and its justificatory force. The fact that a legal pronouncement is valid is relevant for the officials exactly because it is a prerequisite for its use in justifying legal decisions. Valid law is supposed to gain practical weight (to become able to guide human action), and that will not happen if the valid law cannot interact with the citizens' own reasons for action—moral reasons amongst them.

The positivist must neutralise this argument. Luckily for her, she can try to exploit the elusiveness of her core claim. She may add further specifications that meddle with the conceptual connection between validity and justificatory force. An intelligent positivist will see clearly that her problem is rooted in our settled intuition that the practical relevance of the criteria of legal validity lie in their ability to identify for us normative propositions with legal force (that is, the force to justify official action and legal claims upon fellow

[71] *See* Eleni Mitrophanous, *Soft Positivism*, 17 OXFORD J. OF LEGAL STUD. 621, 622 (1997).

[72] *See* John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 222–24 (2001).

[73] *See* Coleman, *supra* note 12, at 30.

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citizens).[74] Then, the obvious solution seems to be severing the tie between validity and normative force. And the positivist can try to achieve that by redefining her own theoretical ambition, setting for herself a more modest task concerning the clarification of law as a normative phenomenon. She may claim that the issue of normativity has several *aspects*, and only some of them fall within the remit of conceptual legal theory that legal positivism should care about. She can argue for a need to separate out the features of normativity that cause problems for positivism, and declare them issues to be handled by substantive moral and political philosophy.

Once again, Herbert Hart leads the way in developing this strategy. A cunning way of severing the ties between the validity of law and its practical weight is right there in the arguments he deployed against Fuller and Radbruch.[75] Legal validity identifies for us the rules of the law—the substantive normative claims that law makes on its addressees. But validity is not inherently linked to obedience, justificatory force or practical weight. One can meaningfully say that "I recognize this provision as valid law but I refuse to obey it." It seems to indicate that that the issue of determining the actual practical weight of law is completely separate from the issue of its validity. And, to complete the argument, the positivist only needs to show that conceptual legal theory must concentrate on the issue validity rather than the issue of reasons for compliance[76] (and to imply that consideration in the separability thesis).

The way this develops into a coherent strategy in support of legal positivism can be seen pretty clearly in Coleman's works. He distinguishes three steps in a complete account of the normativity of law.[77] First, one must point out what normative guidance actually consists in. It requires no more than an abstract characterisation of the "meaning" of normativity. Secondly, one needs to figure out how the law in particular seeks to guide behaviour (how the law seeks to make a practical difference to our behaviour). It is still a matter of specifying the "meaning" of normativity, and it does not require us to say that the law actually manages to guide human action. Thirdly, one must explain how the law can motivate people to obey it. It is only in this third step that we encounter the issue of the actual practical weight of law. If we accept that the explanation of normativity involves taking those three steps, and that the first two can be independent of the third, we can

[74] By the way, this is the very intuition that makes Simmonds's rejection of identifying the criteria of legality with derivability from a rule of recognition work.

[75] *See* HART, *supra* note 6, at 207–12; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615–21 (1957) [hereinafter Hart, *Positivism and the Separation*]; *see also* Frederick Schauer, *Positivism as Pariah*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 31 (Robert P. George ed., 1996).

[76] And this may not sound implausible at all. For a legal theory, the issue of validity seems more important. Lawyers and legal scholars, in the context of professional discourses, are more likely to raise issues of validity than issues of obedience.

[77] *See* COLEMAN, *supra* note 11, at 69–73.

hardly object to accounts of law that restrict themselves to answering the first two questions—leaving the third one to moral and political philosophical reflection. And then, the positivist can say to a critic like Simmonds that his question about the law's ability to justify official action or legal claims made upon fellow citizens should not be addressed to the legal theorist—it should be addressed to the political philosopher.[78] As a matter of conceptual legal theory, the positivist account is adequate and plausible. The separability thesis is saved.

II. What Is Wrong with the Reliance on Core Conceptual Claims?

I emphasise that I have provided only an illustration. But it may be enough to indicate how the positivist strategy of relying on core conceptual claims works. And I believe that one really has to admire it. Against this strategy, the critic faces an uphill battle. It would be ineffective (and possibly disingenuous) to insist that the positivist has chosen the easy path by setting aside aspects of conceptual issues that are difficult to handle within her account. Everybody relies on similar ways of regimenting issues to her own favour. And the complaint that the positivist deliberately made her account of normativity incomplete is also unlikely to cut much ice. Nothing prevents a theorist from picking out aspects of more complex problems for closer analysis.[79] Conceptual legal theory is about clarifying preliminary issues anyway. We can hardly think that there is something in the character of law that excludes the positivist strategy of separating issues of validity and actual normative force on the one hand, and issues of conceptual legal theory and substantive practical philosophy on the other.

So why not admit that this is not simply a cunning strategy but a proof that legal positivists are right? Why not accept that they can defend their core claims successfully because those core claims are actually true? It may take some time before they find the best way to formulate them, but positivists are definitely on to something, and that explains the staying power of their theoretical outlook.

Well, I am ready to admit that, as a matter of propositional truth, legal positivism (if it is defined in terms of core conceptual claims) cannot be refuted. But it is not enough to accept that we should give in to legal positivism. What follows from the apparent success of the positivist strategy is that we should not carry on struggling with the core conceptual

[78] *Cf. id*. at 118. I had a personal experience that serves as a nice illustration of this point. A few years ago, I had a conversation with a prominent positivist theorist. I outlined for him a few familiar arguments about the inability of legal positivism to account for the ability of law to establish obligations. He answered that he agreed with me as a political philosopher but not as a legal theorist.

[79] Gardner admits that legal positivism is "not a whole theory of law's nature, after all." Gardner, *supra* note 72, at 210.

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claims.[80] The anti-positivists have a much better chance of making progress if they try to point out how hollow the success of positivist defence of core claims really is.

One may think that the best way to do it is by pointing out that the positivist strategy often resorts to twisting the character of key legal concepts to make the positivist account look plausible. The concept of validity is a case in point. As we have indicated, the validity of law figures in the professional discourse on law as an eminently practical concept. The fact that a statutory provision is valid (or, more exactly, that it is in force) means for the practitioners that it establishes duties and rights, and that it has direct justificatory implications.[81] There is not much room here for separating the issue of validity from the practical weight of legal propositions. What lawyers say about validity does not really allow for dithering about the issue of obedience.[82] The positivist account may provide a misleading picture of law. It does not seem to be designed to explain certain features law as we find them—it looks carefully tailored to make a particular theoretical approach look plausible.

But this is hardly the best way to go about the task of developing an anti-positivist argument here. There is no conclusive argument that rules out the positivist accounts of validity. Perhaps, a bit of twisting of legal concepts is tolerable in the interest of revealing truths about law. The critics must do better. They should pay more attention to the discursive characteristics of contemporary conceptual legal theory, and the factors that allow the legal positivists to play a central role in it. They should try to show that the cunning strategy of meddling with the issues of conceptual legal theory to the legal positivists' favour may serve to maintain the influence of legal positivism in a particular discourse but it is likely to be detrimental to conceptual legal theory as a scholarly discourse with a claim to intellectual credibility. The positivist strategy runs the risk of pushing the conceptual debates about law towards petty quarrels revolving around a handful of elusive claims with very limited explanatory force.[83]

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[80] I must admit that I have fallen for the temptation to target the core positivist claims several times. *See* Bódig, *Interpretivism and Conventionalism*, *supra* note 24, at 161; *see also* Mátyás Bódig, *A jog és az erkölcs közötti viszony*, 2(2) MISKOLCI JOGI SZEMLE 5, 5–32 (2007).

[81] This understanding of validity is actually reflected in the works of earlier positivists like Kelsen who were less concerned about anti-positivist challenges, and did not try to sidestep a whole dimension of the issue of the normativity of law. "Validity of law means that the legal norms are binding, that men ought to behave as the legal norms prescribe, that men ought to obey and apply the legal norms." KELSEN, *supra* note 69, at 39; *see also* Kelsen, *supra* note 28, at 257. Most anti-positivists would agree that this is the proper way to formulate the question of validity: it captures the inherent connection to normative force.

[82] And where the issue of obedience actually takes centre stage, like in the case of civil disobedience, it is hardly decoupled from the issue of validity. Where the law is not thought to be worthy of obedience, there is a challenge against its claim to validity (or the scope of its validity).

[83] It is easy to find scholars (even positivists) who also worry about this. "[T]hese analytical discussions tend to be flat and repetitive in consequence, revolving in smaller and smaller circles among a diminishing circle of acolytes."

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We must see the core claims from another perspective. We know that legal positivists are capable of making informative and challenging claims about law. This is what happened when some of them claimed that all laws are ultimately the commands of a sovereign, or that the validity of law must be traced back to a hypothetical basic norm. Such claims gave massive stimulus to the legal theoretical discourse. They were worthy of serious debate and extensive analysis. But the core claims are very different to them. They occupy a broad "grey zone" between inconsequential truths and bold (and potentially revealing) conceptual claims. In that grey zone, we find claims that are true in some sense because they can be associated with uncontroversial truths about law.[84] But they are too general, too weak and too modest to be able to elucidate sufficiently any conceptual feature of law. When critical challenges put the positivists under pressure, they tend to react by pushing those core claims deeper into the grey zone, making them even more elusive.

This is what actually happened with the separability thesis in the past few decades. Under critical pressure, it drifted away from stronger substantive claims, and became ever more modest and subtle. But it was actually a drift towards the uninteresting commonplace that law is not the same as morals because it is institutional in a way that morality is not. The separability thesis was rescued by formulating the issue of legal validity as a more or less technical problem about an institutional practice: identifying membership in a set of institutionalised rules.[85] And it became unclear who can make any use of such a diluted concept of legal validity.

III. Discursive Dysfunctions

Many legal theorists know and readily admit that the debates revolving around the core conceptual claims have a tremendous capacity to make legal theory boring. But is it not an exaggeration to talk about serious discursive dysfunctions here? How can the positivist strategy that exploits the slipperiness of the core claims be detrimental to a discourse?

Well, we may begin to see the problems if we realise that deriving the theoretical identity of legal positivism from a commitment to core conceptual claims alters the position of the anti-positivist critic. When legal positivism is seen as representing bold substantive claims

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Jeremy Waldron, *Legal and Political Philosophy*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 381, 381 (Jules Coleman & Scott Shapiro eds., 2002).

[84] For me the best example for an elusive but somehow true claim is that "we have to distinguish what the law is from what it ought to be."

[85] No doubt, validity has this technical aspect. And the criteria of validity are always developed in a practice that has a particular sociological profile. There should be ways of making sense of issues of validity within the context of a sociological understanding of the practice. But the fruitfulness of such an understanding in throwing light on normativity is a more dubious matter.

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(like all laws are products of state legislation) the anti-positivist can stand for a negation of them. That is nowhere near the case with the core conceptual claims. The anti-positivist is likely to be the one who accepts that they are true to a certain extent, but objects to the way they are formulated, and denies that they should have a foundational role in conceptual legal theory.[86] That generates a different, more slippery kind of debate between positivists and their critics—a debate that easily loses its focus, and generates mutual misunderstanding.

And it is not simply the discursive relations between positivists and anti-positivists that can become confused. Similar problems are likely to beset legal positivism itself. The core claims confer on legal positivism a strange kind of identity. It renders positivism organized around claims that many great positivists never made explicitly. The elusiveness of the core conceptual claims inevitably generates a kind of uncertainty around the implications of being committed to legal positivism. This uncertainty blurs the boundaries of legal positivism, making self-identification the sole most important factor in determining who is positivist. And it ignites all sorts of debates on how different theoretical initiatives fit together to create an intellectual tradition, and who is capable of capturing the identity of legal positivism. For positivists, the price of their alleged success in defending their core commitments lies in generating endless theoretical bickering around petty issues of demarcation.[87] It looks like a massive discursive dysfunction to me.

If discursive dysfunctions plague legal positivism, it is bound to have a pervasive impact on conceptual legal theory more generally. It is guaranteed by the central role legal positivism plays in what I like to call the *mainstream conceptual discourse* on law. Conceptual legal theory revolves around clarifying *basic juridical concepts* (like "legal rule," "legal right," "obligation," "legal validity," and "legal system") and some related concepts ("normativity" and "authority") that are helpful for the analysis of juridical concepts. But conceptual legal theory is not simply a set of abstract problems: we can make sense of its agenda only within the boundaries of an actual discourse. Just like in any other theoretical field, issues of conceptual legal theory are impossible to handle without contextualising them: without ordering them by the rules and agenda of a discourse—bringing individual theoretical efforts to a common "hermeneutical horizon."[88]

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[86] For an example of trying to accommodate and re-contextualise core positivist claims, see John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 195 (Robert P. George ed., 1996).

[87] Even some positivists worry that legal positivism is losing its ability of turning its attention to issues that matter. *See* Frederick Schauer, *Legal Positivism and the Contingent Autonomy of Law*, *in* JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM 216 (Tom Campbell & Jeffrey Goldsworthy eds., 2000); Brian Bix, *Patrolling the Boundaries: Inclusive Positivism and the Nature of Jurisprudential Debate*, 12 CANADIAN J. OF L. & JURISPRUDENCE 17, 25 (1999).

[88] *Cf.* HANS-GEORG GADAMER, TRUTH AND METHOD 198–304 (2004).

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Conceptual legal theory has a long history, and it went through a series of discursive transformations. As it happens, in its present construction, at least in the Anglo-Saxon world, the mainstream conceptual discourse was organized around Herbert Hart's agenda. It took shape after Herbert Hart's reconsideration of the fundamental problems of conceptual legal theory in the 1950s.[89] That put the "problematics" of *methodological positivism* at the centre of the discourse—leaving to others (including normative positivists) the position of "challengers" (or even "insurgents") who make attempts to modify the agenda.

I do not want to conceal the fact that my own theoretical efforts are very much driven by the conviction that, without a reformulation of its agenda, the dysfunctions generated by the recent developments of methodological positivism has the potential of slowly disintegrating the mainstream conceptual discourse on law. The question for anti-positivism is not how we can refute familiar legal positivist claims but how we can find a way to reshape the conceptual discourse. In my eyes, Simmonds theory must be measured, first and foremost, by its ability to offer some kind of guidance towards a reconstruction of the legal theoretical discourse.

IV. Fragmentation of Inquiry

Naturally, it would be foolish to pin our hopes on Simmonds if we could not be sure that he is aware of the discursive dysfunctions we were talking about. Promisingly, he seems to be very much aware of them. In fact, one of the best available diagnoses of these problems can be found in his works. As I have indicated above, he criticises the positivists for their "fragmentation of inquiry."[90] "Many theorists have sought to detach inquiry into the nature of law from the broader domain of political philosophy, where we might reflect upon justifications for the use of force."[91] He also notes the positivist strategy of "disentangling" the criteria of the general characteristics of legal systems, the specific criteria of validity for individual legal systems and the moral considerations concerning the justifiability of enforcing the law.[92] "According to the positivists, the nature of law and legality cannot be understood so long as we search for a single set of criteria that both confers upon a rule the quality of being law and gives that rule its justificatory force."[93]

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[89] The symbolic discursive event that indicated the emergence of the new discourse is the Hart-Fuller debate in 1957–1958. *See* Hart, *Positivism and the Separation*, *supra* note 75; Lon Fuller, *Positivism and the Fidelity to Law*, 71 HARV. L. REV. 630, 630–72 (1958). The other decisive discursive event is the publication of Hart's *The Concept of Law* in 1961.

[90] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 21–25.

[91] *Id*. at 124.

[92] *See id.* at 170–71.

[93] *Id*. at 170.

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I do not claim that Simmonds's diagnosis is the same as mine but I do believe that they are compatible. And Simmonds's diagnosis has the potential to point out how pervasive the discursive dysfunction is in a discourse driven by the Hartian theoretical initiative. It is nowhere near limited to generating a problematic contrast between validity and "ought to be obeyed."[94] Separating out certain conceptual issues and transferring some of them to different disciplines is a direct consequence of the methodological positivist vision for conceptual legal theory. It is manifested in many ways. Simmonds glimpses it in the contrast that is drawn between the external viewpoint of the observer and the internal point of view of the participants,[95] between questions about the nature of law and its content, and between legal doctrinal questions and jurisprudential questions.[96]

Simmonds also realises the positivists' undeniable success in fending off critical challenges, and the futility of embarking on a direct denial of core positivist claims.[97] Anti-positivists have fallen too often for the invitation to step up to the level of meta-theoretical debates about the character of legal theory.[98] That meta-theoretical debate was shaped by the positivist picture of legal theory, and works systematically in the positivists' favour by sidelining substantive issues about the content of law and about the way legal mechanisms actually work. The "fragmentation of inquiry" serves to secure the dominance of meta-theoretical considerations over substantive inquiries in the conceptual discourse.

This leaves us with the real question that my analysis must address: Does his diagnosis of the deeper problems with legal positivism enable Simmonds to go beyond the positivist agenda for legal theory? Does he provide an attractive vision for revising the agenda for the conceptual discourse? This is the issue that I will turn to in the following section.

D. Interpretivism

Simmonds's solution to all the problems we have identified in the previous sections is a revised philosophical vision for legal theory. As we have seen in section B, he is looking for a philosophical vision that does not lose contact with ordinary legal experiences. Simmonds is well aware that that cannot be achieved if we allow for a rapid collapse of inquiries concerning the nature of law into meta-theoretical debates about the nature of

[94] *Id*. at 126.

[95] *See id*. at 22.

[96] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 612.

[97] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 41–42.

[98] *See id*. at 43.

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legal theory.[99] That would lead to a drift towards methodological and meta-theoretical debates that work against anti-positivism (and that is a characteristic feature of the contemporary conceptual discourse).

This may not sound very promising. How can we reach the level of genuine philosophical reflection if we are committed to remaining tied to the ground provided by legal experiences? As we have seen in section B, Simmonds's answer to this worry is his insistence on the *reflexivity of law*. Even in the context of our ordinary experiences, the concept of law has an intriguing reflexive depth. "Once we have seen this point we start to appreciate the extent to which the concept of 'law' is not one that simply *describes* a familiar social phenomenon: the concept also plays an indispensable role *within* that phenomenon."[100] The reflexivity of law invites philosophical reflection because, as a consequence of it, we simply cannot account for our ordinary legal experiences without getting to grips with an abstract idea (with complex moral implications). "That is to say, legal thought is always guided and informed by reflection upon the *idea* of law, and it is the task of jurisprudence to investigate that idea."[101]

I. Hart and the Denial of the Reflexivity of Law

This link between the claim about the reflexivity of law and a philosophical vision for legal theory is supposed to provide an opportunity to recontextualise the critical attack on legal positivism. We may glimpse that the real reason behind all the problems with methodological positivism may be a deep misunderstanding concerning the philosophical issues that legal theory is supposed to address. Hartian legal positivism failed to provide a proper philosophical vision for legal theory.

As we have already seen in section C, Hart was committed to an account of law that is restricted to elucidating the common structural features of legal systems and their conceptual implications. He thought of this as a major breakthrough in clarifying the methodological conditions for a plausible conceptual theory of law. And this led him to an attempt to turn all the problems of conceptual legal theory into descriptive issues.[102] This required him to transfer the issues that did not fit into his descriptivist framework beyond the boundaries of conceptual legal theory.[103] This is the very origin of the 'fragmentation

[99] *See id.*

[100] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 613–14; *cf.* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 10.

[101] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 613.

[102] *See* HART, *supra* note 6, at 240.

[103] For an example of the Hartian rejection of the relevance of certain issues for conceptual legal theory, see *id.* at 107–08.

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of inquiry' that we talked about in the previous section. Other methodological positivists were happy to follow Hart down that path.

But there is a problem with this strategy. It is not obvious how this vision of a descriptive account is to be accepted as a *philosophy of law* at all. It does not seem to identify a genuine philosophical problem at all. "Describing how one thing resembles but also differs from two other things is not, without more, a philosophical enterprise."[104] Hart's account turns out to be surprisingly flat as a philosophical inquiry, and Simmonds offers an explanation of why this is so. The methodological legal positivist initiative is not viable as a theoretical project if we acknowledge the reflexivity of law. If reflexivity is one of the conceptual features of law, Hart's descriptive account can never clarify it for us. His methodology forced Hart into *denying the reflexivity of law*, thereby "obscuring, and leading people to forget" the problem that should be at the heart of the philosophy of law.[105]

What can we make of this strong claim? Simmonds himself insists that it means that Hart failed to identify any real philosophical issue for jurisprudence.[106] But that is an exaggeration. The Hartian agenda is continuous with an important philosophical tradition: analytical philosophy. It seems more reasonable to claim that the Hartian agenda (that is still the very background to the contemporary conceptual discourse) is based on a methodological vision that is not adequate for the philosophical analysis of a normative social practice. I am ready to subscribe to Simmonds's claim under this interpretation.

II. Simmonds's Interpretivism

What is the alternative philosophical agenda that Simmonds offers? Simmonds's own philosophical vision for legal theory is based on Collingwood's views on philosophical reflection. It seeks to bring reflection into "conformity with an idea of what it ought to be."[107] The reference to Collingwood may give the impression that Simmonds seeks to establish here a connection with a philosophical tradition that has not been particularly influential in legal theory. That is not far from the truth but, in fact, the key idea is not as unfamiliar in legal theory as it might seem. What Simmonds offers can be seen as a version of what I call *jurisprudential interpretivism*. If we are to clarify whether Simmonds can provide a viable alternative to legal positivism, we have to assess the prospects of his distinctive interpretivism in legal theory.

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[104] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 602–3.

[105] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 172–73.

[106] *See* Simmonds, *The Nature of Law*, *supra* note 2, at, 602.

[107] *See id.* at 614.

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It is useful to start that assessment with a clarification of what interpretivism is.[108] I prefer to associate the fundamental idea with a methodological challenge facing any legal theory. Each legal theory needs to rely on a "background epistemology" that concerns the ways in which the theorist can reveal theoretically relevant facts and ideas that are to be organized into a viable theoretical account. The background epistemology provides the methodological basis for the truth-claims of the theory. This is what makes the theory intelligible for others—enabling them to figure out what counts as justification of the theory or as a challenge to it.

Interpretivism is one possible background epistemology for legal theory. Interpretive theories of law gather the "data" that underlie their conceptual claims from *participant communication* about the legal practices they want to understand. Such theories construe law as a social practice in which participant communication gives rise to juridical concepts. The theorist seeks to clarify the conceptual features of law by *interpreting* those concepts and their characteristic uses in the relevant social practices.

Interestingly, it was Herbert Hart who made interpretivism the characteristic background epistemology for legal theory.[109] It was a pivotal aspect of his methodological vision that the analysis of legal concepts must be interpretative ("hermeneutic").[110] For him, the task of conceptual legal theory was to elucidate the conceptual implications of our familiar ideas concerning law and our ways of communicating legal claims.

Naturally, Hartian interpretivism was developed as an integral part of a methodological positivist enterprise, and most contemporary methodological positivists embrace it today. But interpretivism became attractive far beyond the boundaries of legal positivism. Over the past few decades, various versions of interpretivism emerged from the legal theoretical debates, some of which are designed for the purposes of anti-positivist theories.[111] Dworkin's interpretivist methodology is probably the best known among

[108] For my account of interpretivism, see Bódig, *Interpretivism and Conventionalism*, *supra* note 24, at 155–58; *see also* BÓDIG, *supra* note 16, at 446–55.

[109] Before Hart, other types of background epistemology were prevalent, even among positivists. Kelsen, for example, relied on a version of Kantian *transcendentalism* that seeks to elucidate concepts by reducing them to their transcendental presupposition. See, for example, the way he characterises "ought" as a transcendental category in KELSEN, *supra* note 3, at 23–25. But *empirical reductionism*, that seeks to reduce legal phenomena to their empirical grounds, is a more familiar alternative to interpretivism. Scandinavian realists kept it influential even in the first half of the 20th century. For an example, see KARL OLIVECRONA, LAW AS FACT (1st ed. 1939).

[110] *See* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 13 (1983).

[111] Even John Finnis accepts the interpretivist starting point for legal theory. *See* FINNIS, NATURAL LAW, *supra* note 54, at 3.

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them.[112] Although there is a committed anti-interpretivist strand in contemporary legal theory,[113] I do believe that the spread of interpretivist methodology is a positive development.[114] This is actually the good thing that came out of the Hartian initiative. Anti-positivism must find ways to attack methodological positivism without undermining interpretivism.

The interpretivist element in Simmonds's account is pretty conspicuous. He seeks to provide a theoretical clarification of our "ordinary understandings" of legal practices,[115] and his philosophical vision aspires to "assemble these understandings into a coherent picture of law's nature."[116] Actually, Simmonds is one of those who think that interpretivism is not simply one of the methodological options for legal theory: the law has certain features that call for an interpretive approach.

> An account of the nature of law must be judged by its ability to yield insight and make coherent sense of our more settled understandings and beliefs about law. For law is not a phenomenon with a nature wholly independent of our beliefs about it, but one that is constituted by our understandings and expectations.[117]

The interpretivist element determines the way Simmonds unpacks the implications of the methodological ideal he borrows from Collingwood. The call for bringing reflection into "conformity with an idea of what it ought to be" could mean a lot of things. But Simmonds makes it clear that what he has in mind is not a turn towards metaphysics but "a reconstruction of the ideas and conceptions structuring the form of association that we think of as a legal order."[118]

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[112] *See* DWORKIN, *supra* note 53, at 12–14. Some argue that interpretivism itself is to be identified with Dworkinian jurisprudential methodology. *See* Nicos Stavropoulos, *Interpretivist Theories of Law*, STANFORD ENCYCLOPAEDIA OF PHILOSOPHY, *available at* http://plato.stanford.edu/entries/law-interpretivist. I think such claims are misleading and simplify the character and development of interpretivism in legal theory.

[113] *See* Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?,* 41 STAN. L. REV. 871, 871–957 (1989); Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 LEGAL THEORY 329, 329–30 (1998).

[114] For my commitment to interpretivism, see Bódig, *Interpretivism and Conventionalism*, *supra* note 24, at 156–57.

[115] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 610.

[116] *See id.* at 614; *see also* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 23.

[117] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 55.

[118] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 614; *cf.* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 58.

III. Linking up Legal and Moral Inquiries

What makes Simmonds's interpretivism distinctively anti-positivist? Usually the anti-positivist element in interpretivist theories is the claim that the interpretation of the conceptual implications of participant communication necessarily involves handling justificatory issues or embracing value assumptions. This is what we see in the most familiar version of anti-positivist interpretivism, Dworkin's legal theory. He argues that law is an interpretive practice, and one can only develop an interpretive theory of practice by attributing a moral point to it.[119] It might seem that Simmonds offers us something very similar. He says that our social practices must be seen as expressing values, and we can only understand them by their orientation towards those values.[120]

But we should not be misled by this apparent similarity. In fact, Simmonds's philosophical vision is quite different from Dworkin's.[121] An important clue that can help figure out the character of Simmonds's philosophical programme is that he is remarkably unsympathetic to the analytical philosophical tradition. It indicates a deeper layer in his objections to methodological positivism. Simmonds believes that the Hartian methodological vision could become dominant partly because it "chimed with the spirit of an age"[122] in which analytical philosophy set the tone for philosophical reflection.

Simmonds criticises analytical philosophy because he finds it incapable of providing an adequate account of how values figure in our practices (and generate moral experiences). In practical philosophy, analytical philosophy was the culmination of a "modern" approach that seeks to understand our intuitions about values in isolation from the practices that shaped them. "[W]e are encouraged to believe that our particular moral perceptions must be interrogated in the light of articulable principles before they can be given any weight in our deliberations."[123]

I do believe that Simmonds's analysis of the development of this modern approach[124] and its impact on the methodological conundrum that we are struggling with is one of the

[119] *See, e.g.*, DWORKIN, supra note 53, at 50–52.

[120] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 176.

[121] Simmonds puts real emphasis on making that difference clear. *See id.* at 33–34. In fact, Simmonds implicates Dworkin in his criticism of "fragmentation of inquiry." "Dworkin's view seems to be that there is no general philosophical question to be asked about the nature of law as a distinct type of social structure." *Id.* at 27. This is one of the reasons behind his insistence that his anti-positivism is different to Dworkin's. *See* Simmonds, *The Nature of Law*, *supra* note 2, at 607–8, 622.

[122] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 173; *cf. id.* at 151.

[123] *Id.* at 150.

[124] *See id.* at 150–55.

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great strengths of his theory. He is right that the "modern" approach to reflecting upon moral experience is favourable to the positivist position. If the issue of the conceptual relationship between law and morality is raised as a matter of abstract moral principles, it is difficult to resist the positivist conclusions. If we try to measure up the moral implications of law by resorting to abstract moral values, the relation of law to morality will always look contingent at best. It is really ironic that modern naturalists like Grotius and Pufendorf played a pivotal role in laying the foundations for the "modern" approach.[125]

Anti-positivism has a much better chance of regaining the theoretical initiative if it challenges the idea that philosophy must capture the elements of morality in terms of abstract principles. The morality that is relevant to law must be seen as immanent in our practices, "somehow grounded in what we do."[126] Once again, Simmonds does not perceive it as a matter of choice: for him, this is the proper way to make philosophical sense of our own understanding of pivotal moral concepts.

> When detached from our ordinary understandings the notions of justice and morality can quickly come to seem no more than empty illusions. . . . If our moral understanding is to be seen as real, it must be bound up with our grasp of the commonplace world, forming part of the realm of socially sustained knowledge that renders us mutually intelligible.[127]

It is in his context (in light of this construal of morality) that conceptual legal theory should ask whether our experiences of law have genuine moral significance: whether we can learn something about morality by our engagement in legal ("legalistic") practices.

This is, obviously, *interpretivism about morals*, not simply about law. And although it still may not sound all that different to Dworkin,[128] it is at this point that the two accounts become markedly different. The analysis of the relevant philosophical developments leads Simmonds to relying on a distinctive philosophical tradition that has not really made an impact on Anglo-Saxon legal theory, and that is pretty alien to Dworkin. Simmonds

[125] *See id.* at 152–53. The impact of the "modern" approach may be even reflected in the "fragmentation of inquiry"—"in the attempt to divide jurisprudence into a neutral and a normative inquiry." *Id.* at 147.

[126] *Id.* at 7.

[127] *Id.* at 141.

[128] Dworkin also takes an interpretive attitude to values in general. *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHILOSOPHY AND PUBLIC AFFAIRS 87, 87–139 (1996); Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. OF LEGAL STUD. 1, 5–9 (2004). For Simmonds, however, Dworkin is not really detached from the "modern" approach. I accept this even though I can imagine how one can challenge this reading in light of what Dworkin says on "integrated values." *See id.* at 14–16.

sympathises with a kind of Aristotelian practical philosophical perspective that revolves around the practical wisdom inherent in our practices and morally significant experiences.[129]

Simmonds's philosophical orientation has a far-reaching implication that is important for us now. On this account, the connection between interpretivism about law and interpretivism about morality becomes particularly intimate. It is not that jurisprudential reflection runs parallel to moral reflection—jurisprudential reflection is actually incorporated into moral reflection. Interpretivism about law becomes an aspect of our efforts to come to terms with the values that our lives and practices come to be associated. "Jurisprudence is, at its best, an integral part of this process of deepening by reflection our grasp of the values implicit in our forms of association."[130] Without the effort of coming to terms with values in light of our practices the theorist cannot find the right perspective to engage in jurisprudential reflection.[131]

It may look like an unduly long overview of Simmonds's distinctive kind of interpretivism. But I needed to go this far to make an important point. Although what Simmonds provides is undoubtedly a neo-Fullerian account, it fundamentally changes the philosophical character of the Fullerian initiative. It can be seen pretty clearly in the way Simmonds integrates the analysis of the Fullerian desiderata of the rule of law into his account.

For Simmonds, the principles of the rule of law provide a paradigm for the way principles can be developed from our experiences of social practices. They provide a starting point that is wholly uncontentious[132]—not even the positivists are likely to challenge it. The principles are firmly grounded in our experiences and intuitions about what it takes to make a legal system work. What makes them morally relevant is that their further analysis leads us to an understanding of how the law needs to have "a certain fit with existing forms of life, habits of conduct, settled expectations and shared moral sentiments."[133] That makes us realise how the organizing ideal behind the idea of law must be a moral one.[134] But we also realize that the attempt to come to terms with the conceptual features of law is also about (or really about) learning something about moral values.

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[129] For Simmonds, Gadamer is the guide to the way the Aristotelian perspective can be used in a contemporary philosophical context. *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 146–48.

[130] *See id.* at 8.

[131] "Jurisprudence can only properly be understood in the light of the possibility that moral insight might be derived from historically informed reflection upon our practices and institutions . . . ." *Id.* at 147.

[132] *See* Simmonds, *The Nature of Law*, *supra* note 2, at 615.

[133] *See* SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 163.

[134] *See id.* at 100–01, 142, 163.

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When we try to handle the possible conflicts between the principles of the rule of law, we realize that "an abstract knowledge of principles will not help us."[135] In the course of reflecting upon law, we gravitate towards gaining a deeper understanding of the moral parameters of ways of life in actual, historically constituted communities. And we come to realize that the experiences and intuitions that ground the seemingly technical principles of the rule or law are "inchoate moral insights rather than (as they might at first seem) semantic intuitions."[136]

E. A Few Critical Remarks

This may be enough for me to be able to provide the foundations for an assessment of the plausibility and the prospects of Simmonds's theoretical initiative. I have already indicated that I am sympathetic to his project. I do believe that Simmonds helps us understand at least some of the discursive dysfunctions that plague the contemporary discourse on conceptual legal theory. His theoretical initiative offers one possible way to reconstruct the legal theoretical discourse.[137] His diagnosis of the connection between the legal positivist "fragmentation of inquiry" and the "modern" approach to making philosophical sense of our moral experiences is a great strength of his account. Simmonds is right that we have very little chance of moving forward in conceptual legal theory without deepening the reflection on morality and moral inquiry. In that respect, recent legal theoretical debates have often proved frustratingly impoverished. They are too impoverished to be able to clarify the conceptual connection between law and morality.

But I also have some doubts about the direction Simmonds's account takes. It tends towards subordinating the agenda of conceptual legal theory to the needs of gaining a deeper understanding of the values that our lives and experiences are associated. It seems to turn conceptual legal theory into an exercise in moral inquiry. That may prove to be too narrow as an account of the concerns of conceptual legal theory. It may underestimate the complexity of the ways in which conceptual legal theory can and must respond to genuine epistemic concerns.[138] This is an important point but I will not pursue it here. It would be a mistake to jump to a hasty judgment on this issue. Simmonds's account is sufficiently complex to allow for several readings. What he argues for can boil down to a

[135] *See id.* at 145.

[136] *See id.* at 68.

[137] There are other attempts to reconstruct the discourse. Waldron's can be very important as it comes from within legal positivism. It is based on reconsidering what we should mean by "general jurisprudence." *See* Jeremy Waldron, *Can There Be a Democratic Jurisprudence?,* 58 EMORY L.J. 675, 675–712 (2009). Twining also has a proposal that would be based on assessing how globalisation changes the agenda. WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (2009). I find Twining's initiative somewhat less promising than Waldron's.

[138] For my account of the character and functions of conceptual legal theory, see BÓDIG, *supra* note 16, at 435–42.

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version of the claim that conceptual legal theory must be taken as an integral part of practical philosophy, and I am one of the advocates of that claim.[139] For such reasons, I cannot substantiate my doubts without an extensive analysis, and I cannot provide that analysis here.

I. The Limits of Interpretivist Theorising

Instead, I would like to say more about a smaller point here. It concerns an aspect of Simmonds's interpretivism. As we have seen, he assigns to legal theory the task of integrating our understanding of law into a coherent whole. It is to provide a "single intelligible picture of law's nature."[140] I am worried that this task may be too demanding for an interpretivist account of law. I tend to believe that it sits very uneasily with the methodological characteristics of interpretivism. We are not supposed to think that there is some methodological guarantee that the elements of our ordinary understanding of law can fit together into a coherent whole.

Even if we admit that "[l]aw exists only in so far as a great many people share certain understandings and expectations,"[141] those common understandings are likely to be complex and multi-faceted. And they may not provide a consistent set of ideas that the theorist can easily organize into a coherent account. The methodological implication of this simple (perhaps even commonplace) observation is that interpretivism is exposed to the contingent character of the interpretive data that participant communication provides. It has to settle for the fact that interpretive analysis will provide, instead of one particular account, a number of competing, not wholly consistent accounts of law that have different advantages and disadvantages. A bit surprisingly, this does not seem to be reflected in Simmonds's legal theory.

There are a number of ways to unpack the implications of this methodological observation about the contingency of interpretivist accounts of law. One could point to the fact that different participants have different practical orientations towards legal practices, and their communication provides different interpretive data. It may actually mean that different (but similarly plausible) interpretive theories will be able to account for the understanding of law by the professional lawyer and the revolutionary critic. I have discussed this issue elsewhere,[142] and I will not pursue it further here. It seems more reasonable (and accessible) to concentrate on another aspect of the same methodological challenge.

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[139] *See id.* at 478–506.

[140] SIMMONDS, LAW AS A MORAL IDEA, *supra* note 1, at 23; *see also id.* at 36.

[141] Simmonds, *The Nature of Law*, *supra* note 2, at 615.

[142] *See* BÓDIG, *supra* note 16, at 486–90.

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No doubt, we can often rely on an implicit or explicit agreement on the set of interpretive data that legal theory has to work with. (Mainstream legal theory tends to gather its interpretive data from the way legal professionals communicate about law, and Simmonds seems to be no exception.) But even then, there are various pathways open to us that lead to different accounts with different theoretical advantages and disadvantages. The issue of normativity that we discussed in section B is a nice case in point.

When we talk of normativity, or, more exactly, the normative impact that official decisions or statutory provisions have upon our behaviour, our intuitions reflect two basic aspects of normativity. The first concerns the justificatory force of legal propositions that are communicated to us. This is the aspect of normativity that comes to the fore when we ask questions about the way rules are capable of guiding our behaviour and shaping the conditions under which we can justify what we do. The other aspect of normativity concerns the status of the officials who have the normative competence (authority) to turn simple normative claims into legal pronouncements—making them elements of an institutional practice. This is the aspect that we concentrate on when we ask questions about the source of the distinctively legal authority of judges or legislators.

The two aspects seem to fit together nicely: without institutionalised legal pronouncements, there would be no normative guidance, and, without officials who have authoritative competence, we would have no legal pronouncements. But it is not that simple. Depending on which aspect of normativity is at the forefront of our analysis, we are likely to go down markedly different pathways towards an account of law's normativity. If we start from asking questions about the normative capacity of pronouncements to guide action, we are very likely to be guided by one of our fundamental intuitions about law: law is a matter of guidance by rules, and law is to be taken as a *system of rules* or norms. We are likely to treat as fundamental a particular interpretive data: a connection between the concept of rule and the concept of law in the participants' understanding. That leads us to an account of law via a clarification of rules and rule-following, the preconditions of a working system of rules, and the type of social control that revolves around formally enacted, institutionally guaranteed rules.

On the other hand, if we start from the issue of the normative competence of officials, our path is likely to lead us towards noticing that rules may not be all that central to the conceptual character of law. The normative competence of the institutions (whose practice underlies legal pronouncements) is more fundamental.[143] Substantive rules may not even be necessary conceptual features of law. The necessary element is the institutional framework within which someone gains authority over others and makes

[143] For an account like this, see Mátyás Bódig, *A normativitás és a jog sajátos normativitása*, *in* ÉRTÉKEK ÉS NORMÁK INTERDISZCIPLINÁRIS MEGKÖZELÍTÉSBEN (Katalin S. Nagy & Annamária Orbán eds., 2008).

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decisions. It is a matter of contingent institutional arrangement whether those decisions are based on rules (or constitute rules). The conceptually necessary elements are what I would call "political office" and "authoritative decision." Rule-based decision-making becomes a feature of law in the process of rationalizing the operations of political offices. This account would put heavier emphasis on another set of interpretive data: participants see law as a matter of human decisions, manifestations a distinctive form of social power that is stabilised by institutions. Law is not so much a system of rules but a *social practice*—a system of institutions, a web of interrelated political offices.

The two accounts are markedly different. The first puts the concept of "rule" at the very heart of the concept of law. For the other, the concept or "rule" gains much less conceptual significance, and figures in at a much less fundamental level. But both accounts are firmly grounded in established interpretive data. When we talk of the legal system of a particular community, we sometimes refer to the rules and doctrines that constitute the content of law there. But sometimes we mean the system of institutions: courts, legislative bodies, regulative agencies, etc. I do not see a way in which one could decide which account of law is "more true" than the other.

The choice that one makes at this point and its implications are reflected in Simmonds's analysis. When he outlines the issue of normativity, both aspects of it are highlighted.[144] But as he develops his arguments, the issue of the justificatory force of laws comes to the fore, and we lose sight of the other aspect of the problem. When, at a later stage, he arrives at formulating the issue of normativity in the context of his attack on positivism, only the justificatory aspect of laws remains in focus.[145] The question he raises is why judges think invoking the law justifies their decisions, and not why judges think they are the ones to decide.

II. Embracing Interpretivism

I do not hold it against Simmonds. All this follows from his emphasis on accounting for law as a mechanism that revolves around guiding human behaviour by rules. It is perfectly justified by the interpretive data he relies on. And it provides the proper background to his reliance on the theoretical implications of the eight principles of the rule of law. But we have to realise that it makes his account limited as a conceptual inquiry. It leaves open the possibility of an alternative approach that could yield no less plausible results. In that alternative approach (that sees law as revolving around the actions of officials who claim

[144] Simmonds raises the issue of grounding the authority of decision-makers (i.e. legislators). *See* Simmonds, *The Nature of Law*, *supra* note 2, at 604. For highlighting the justificatory aspect of laws, see *id.* at 605.

[145] "Suppose that a judge sentences me to prison, citing a certain rule as the justification for my punishment. I protest and demand to know *how the existence of the rule serves to justify* sending me to prison." *Id.* at 610 (emphasis added).

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specific normative competence to make decisions), Simmonds's arguments concerning the eight principles of the rule of law would not work in the same way, and would look far less fundamental. They would work only in light of the conceptual relevance of a legitimacy issue—after establishing a link between the decision-makers' needs for legitimacy and the potential of the eight principles to make the practice better able to provide normative guidance.

It does not call into question the Simmonds's truth claims but it definitely narrows down the scope of his account. To be more exact, his remarks on the problems with the contemporary discourse (and the "fragmentation of inquiry" in particular) have a more general appeal and significance, but those constitute only a series of negative, critical claims. As Simmonds develops his positive arguments, and brings together the elements of his own account of law, they become answers to very specific epistemic concerns about law. Simmonds's account becomes a theoretical reflection of a particular dimension of our experiences and intuitions about law. It becomes limited in its ability to address other epistemic concerns. We have seen the signs of this in our analysis. Its reliance on the problem of normativity turns Simmonds's account directly against methodological positivism, but leaves the issues of the viability of a normative positivism out of focus. It shares the perspective of interpretive legal theories, limiting its ability to address the issues involved in the agenda of other positivists, like Kelsen. And his account is an inadequate response to the epistemic concerns of a positivist, like Joseph Raz, who put authority relations at the centre of his account of law. Of course, that does not leave him without an abundance of legitimate "targets."[146] But it leaves him with the challenge of explaining how this theory is capable of capturing the ambitions of conceptual legal theory on a more general level, and setting the agenda for conceptual inquiries.

I do believe that this not at all a minor problem for Simmonds. In many respects, the attractiveness of his philosophical vision depends on his ability to handle it. Without a proper understanding of the methodological background issues, it may seem disappointing for a theorist facing Simmonds's arguments that his own account remains narrow in its epistemic concerns. If we accept Simmonds's suggestion that we should resist the fragmentation of inquiry characteristic of contemporary methodological positivism, we rightly think that the ultimate justification of his initiative lies in offering a viable alternative to positivist accounts of law. We wonder how a theory that does not "fragment" the inquiry would look like. Then it may be confusing to get an account that is

[146] I do not simply mean Herbert Hart here (who is singled out in the paper I am commenting upon). I do believe that Simmonds's arguments work very well against Jules Coleman, Matthew Kramer, Wilfrid Waluchow and Kenneth Einar Himma as well. These are mostly the prominent figures of what we tend to call "inclusive legal positivism." *See* COLEMAN, *supra* note 11; KRAMER, IN DEFENSE OF LEGAL POSITIVISM, *supra* note 4; MATTHEW KRAMER, WHERE LAW AND MORALITY MEET (2008); WILFRID J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994); Kenneth E. Himma, *Law's Claim of Legitimate Authority, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 125 (Jules Coleman ed., 2001).

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a reflection of only one dimension of our legal experiences—with limited validity claims and explanatory power.

I mean it is confusing until we realise that this is the inevitable consequence of a commitment to interpretivism. All interpretivist theories are reflections of a particular dimension of our experiences and intuitions about law. And, if interpretivism happens to fit the epistemic character of law, the limits of theoretical outlooks are the inevitable consequence of the fact that our theories deal with law. If we clarify this methodological situation, we are better positioned to understand the significance of Simmonds's efforts. We will know that no one is likely to be able to come up with accounts of law that have a broader scope. What we are involved in is not a competition to provide one legal theory that clarifies the conceptual character of law once and for all, but an effort to create a legal theoretical discourse where we accept the need to develop a multiplicity of interpretive perspectives to be able to account for the different dimensions of our legal experiences. Simmonds's legal theory would look even stronger if it was bolstered by further efforts to clarify the methodological conditions of interpretive theories of law, and their impact on the agenda of conceptual legal theory.

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