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**WHAT IS “GENERAL” JURISPRUDENCE?
A CRITIQUE OF UNIVERSALISTIC CLAIMS BY
PHILOSOPHICAL CONCEPTS OF LAW**

by

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What is “General” Jurisprudence?

A Critique of Universalistic Claims by Philosophical Concepts of Law*

*This essay compares two different types of general jurisprudence: one philosophical in orientation and the second with an empirical bent. These approaches are represented by two recent books: Scott Shapiro's *Legality* and William Twining's *General Jurisprudence*. I compare them along several axes, including their underlying theoretical assumptions, their concepts of law, the sources they draw upon, and their claims of general application. A deep tension exists between these two approaches: Shapiro claims to have identified the essential nature of law, which he grounds in state law, and he rejects sociological insights about the concept of law as irrelevant; Twining does not make essentialist claims, he encompasses various forms of law, and he incorporates sociological insights. According to the standards of the first type, the second type does not qualify as general jurisprudence because it does not involve the philosophical search for the essence of law. As this comparison will reveal, however, Shapiro's concept of law is identical in core respects to sociological approaches to law, and suffers from the same limitations. I argue, furthermore, that philosophical concepts of law tend to be highly parochial (despite their universalistic claims), and have potentially harmful real world consequences.*

Jeremy Bentham set out to construct a jurisprudence that applied around the world; his disciple John Austin labeled this project “general jurisprudence”¹ (legal science), which has been a part of the legal positivist tradition ever since. There is, however, an ambiguity in what qualifies as “general” jurisprudence in contrast to “particular” jurisprudence²—reflected in two distinct approaches that have an uneasy relationship.

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¹ For an account of the history of general jurisprudence, see William Twining, *Globalization and Legal Theory* (Northwestern 2000) Chap. 2.

² A version of this ambiguity was already present in Austin's work. As Brian Bix points out, Austin's legal science “could be as easily interpreted as description (this is what is true of all known legal systems) as conceptual (this is

The dominant approach holds that the central task of general jurisprudence is to produce a universally applicable theory of the nature of law. Philosopher Joseph Raz espouses this position:

It is easy to explain in what sense legal philosophy is universal. Its theses, if true, apply universally, that is they speak of all law, of all legal systems; of those that exist, or that will exist, and even of those that can exist though they never will. Moreover, its theses are advanced as necessarily universal....The general theory of law is universal for it consists of claim about the nature of all law, and about all legal systems, and about the nature of adjudication, legislation, and legal reasoning, wherever they might be and whatever they might be. Moreover, its claims, if true, are necessarily true....Suffice it to say that the truth of the theses of the general theory of law is not contingent on existing political, social, economic, or cultural conditions, institutions, or practices.³

In an article evaluating the progress of general jurisprudence over the preceding 25 years, Leslie Green remarked that “Whatever else it does, a general theory of law has at its core an account of the nature of law.”⁴ Scott Shapiro’s recent book, *Legality*, is the latest example of this kind of general jurisprudence.⁵

The second type of general jurisprudence does not focus on a theory of the nature of law—indeed several of those who engage in it deny that law has an essential nature—but rather on constructing a theoretical framework that addresses various manifestations of law around the globe. It brings within its compass state law, international law, transnational law, religious law,

necessarily true of any legal system).” Brian H. Bix, “John Austin and Constructing Theories of Law, “Canadian Journal of Jurisprudence (forthcoming 2011).

³ Joseph Raz, *Between Authority and Interpretation* (Oxford 2009) 91-92.

⁴ Leslie Green, *General Jurisprudence: A 25th Anniversary Essay*, 25 OJLS 565,567 (2005).

⁵ Scott Shapiro, *Legality* (Harvard 2011). Another recent work in this genre is Raz’s *Between Authority and Interpretation*, *supra*.

human rights law, customary law, and other instantiations of law. William Twining's recent book, *General Jurisprudence*, is an example of this version.⁶

These two types of general jurisprudence both claim to be *about law in general*, as H.L.A. Hart put it, "in the sense that it is not tied to any particular legal system or legal culture."⁷ (Work that focuses on a particular legal system is local, particular, or parochial jurisprudence.) But they mean this in quite different senses. The first type claims to produce essential truths about law that apply across the universe, for all times and places and all legal systems, existent and non-existent; while the second type claims to bring within its purview forms of law around the globe as they actually exist.

Both types of general jurisprudence are within the legal positivist tradition.⁸ They build on Bentham, Austin, and Hart, and they propound versions of the social sources thesis and the separation thesis. Their marked differences are explained by the contrasting orientations of their exponents: the former are legal philosophers who engage in analysis from intuitions to uncover truths about law, while the latter are legal theorists who freely draw upon sociological and anthropological insights in their effort to frame and understand law.⁹

⁶ William Twining, *General Jurisprudence: Understanding Law From a Global Perspective* (Cambridge 2009). Other works in this category include, Keith C. Culver & Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford 2010); Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford 2001).

⁷ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994) 239.

⁸ While this article focuses on the legal positivist tradition, it should be noted that non-positivists have also made essentialist and universalistic claims about the nature of law. For example, anti-positivist Robert Alexy writes: "Essential or necessary properties of law are those properties without which law would not be law. They must be there, quite apart from space and time, wherever and whenever law exists. Thus, necessary or essential properties are at the same time universal characteristics of law. Legal philosophy qua enquiry into the nature of law is, therefore, an enterprise universalistic in nature." Robert Alexy, "On the Concept and Nature of Law, 21 *Ratio Juris* 281,290 (2008).

⁹ For the sake of convenience, throughout this article I will use "sociological" to include all the social scientific approaches that study the concept of law.

Approaching as they do from different perspectives, one would think they are mutually edifying siblings, each offering something to the other. After all, Hart characterized his classic book, *The Concept of Law*, as “an essay in descriptive sociology.”¹⁰ Philosopher Jules Coleman acknowledges that “It is possible to read Hart’s argument in Chapter 5 of *The Concept of Law* as a kind of social-scientific/functionalist explanation of law.”¹¹ But that’s not the way contemporary legal philosophers see things.

An account of the nature of law is, according to leading analytical jurists,¹² *the* defining characteristic of general jurisprudence. As Fred Schauer remarks in a review of Shapiro’s book, Hart and Shapiro “and many theorists in between have thought it *definitional* of general jurisprudence to search for the essential features of law.”¹³ They take the position that “‘analytical jurisprudence’ is, by definition, general jurisprudence, which is, by definition, about all possible legal systems.”¹⁴ A work that does not purport to produce essential truths about all possible legal systems—only all existing legal systems—is therefore ruled out of general jurisprudence.

Another offending feature of the second type is that legal philosophers of the first type reject sociological insights about what law is for being too empirical, too contingent, too parochial—not abstract and universal enough. Raz, for example, writes that the “sociology of

¹⁰ Id. Preface.

¹¹ Jules L. Coleman, Methodology, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford 2002) 342.

¹² It is not entirely clear what qualifies one as an “analytical jurist,” although the label is often used. It appears to include mainly or exclusively legal philosophers in the legal positivist tradition. If this is correct, legal philosophers like Ronald Dworkin, Jeremy Waldron, and Robert Alexy, do not qualify as analytical jurists because they do not work in the legal positivist tradition; Frederick Schauer is a legal positivist and a legal philosopher, but he too seems to be excluded, perhaps because he does not believe law has an essential nature. All of these apparently excluded theorists engage in careful “analytical” work on topics in “jurisprudence,” so application of the label appears to be arbitrary. Not all analytical jurists reject the relevance of sociological insights (Guidice and Culver do not), but appears to be a broadly shared attitude in legal philosophy circles.

¹³ Frederick Schauer, *The Best Laid Plans*, 120 *Yale L.J.* 586,618 (2010).

¹⁴ Id. 615. See Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart 2001) 17-20.

law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.”¹⁵ Shapiro categorically denies any relevance of sociological insights about the concept of law:

Social science cannot tell us what the law is because it studies *human* society. Its deliverances have no relevance for the legal philosopher because it is a truism that nonhumans could have law. Science fiction, for example, is replete with stories involving alien civilizations with some form of legal system. These examples show that it is part of our concept of law that groups have legal systems provided that they are more or less rational agents and have the ability to follow rules. Social scientific theories are limited in this respect, being able to study only human groups, and hence cannot provide an account about all possible instances of law.¹⁶

When legal philosophers claim “universal” application for their truths about law, they mean this *literally*.¹⁷

In the view of analytical jurists who take this position,¹⁸ then, the second type of general jurisprudence has several fatal strikes against it. It covers only existing human societies, failing to reach all possible legal systems on all possible worlds, real and imaginary, at all possible times; it is too parochial, relying upon contingent sociological insights about law; and it fails to produce an account of the essential nature of law. An analytical jurist in a

¹⁵ Id., 615, quoting Raz, *The Authority of Law*, 104-05. ¹⁵ Jules Coleman acknowledges a stronger connection: “In the end, the purposes of philosophical inquiry need not, and probably will not, fully coincide with all of the purposes of the social sciences; but a satisfactory philosophical account should be continuous with these more naturalistic inquiries.” Coleman, “Methodology,” *supra* 337.

¹⁶ Shapiro, *Legality*, 406-407 (emphasis added). One must question Shapiro’s declaration of a “truism” about beings whose existence has not been, and might never be, established. It also bears noting that science fiction is written by humans who project our own practices onto imagined alien beings. What aliens might really be like, if they do indeed exist, is beyond our ken. His assertion is a tautology that does not support the point he uses it for: in effect his assertion is that, if aliens conduct themselves in ways that resemble what we call law, they would have what looks like what we call “law.”

¹⁸ I should clarify that not all analytical jurists take this position. For a contrary view, see Keith C. Culver and Michael Giudice, *Legality’s Borders: An Essay in General Jurisprudence* (Oxford 2010).

generous mood might grant that legal theorists of the second type can also use the label general jurisprudence. But if pressed to be frank they would maintain that this labeling is misguided if not flat wrong.

It is outlandish, however, to suggest that a jurisprudential framework that encompasses multiple forms of law around the world is not universal enough because it covers only existing legal systems, failing to reach systems that do not exist. Incredibly, this cluster of views is held by some of the most prominent legal philosophers in the Anglo-American legal world.

A weird inversion of reality has taken place through the alchemy of philosophical reasoning. In essential respects, as I will show, the first type is consummately parochial while the second type is truly cosmopolitan. To set up my critical challenge to the assumptions held by first type of general jurisprudence, it is necessary to note that all concepts of law are parochial in a way that cannot be avoided. Legal philosophers agree that “law is a human construction.”¹⁹ As such, every concept of law has social origins that link it to a particular conceptual background. Philosopher John Searle explains:

The idea of conceptual relativity is an old and, I believe, a correct one. Any system of classification or individuation of objects, any set of categories for describing the world, indeed, any system of representation at all is conventional, and to that extent arbitrary. The world divides up in the way we divide it, and if we are ever inclined to think that our present way of dividing it is the right one, or is somehow inevitable, we can always imagine alternative systems of classification....Because any true description of the world will always be made within some vocabulary, some system of concepts, conceptual relativity has the consequence that any true description is always made relative to some system of concepts that we have more or less arbitrarily selected for describing the world.²⁰

¹⁹ Coleman, *Methodology*, supra 341. See Frederick Schauer, “The Social Construction of the Concept of Law: A Reply to Julie Dickson,” 25 *Oxford Journal of Legal Studies* 493 (2005).

²⁰ John R. Searle, *The Construction of Social Reality* (Free Press 1995) 161.

While conceptual relativity cannot be avoided, this does not stop us from making truth claims. The point, rather, is that there are situations in which it is important to remember that statements are true relative to the system of concepts upon which one relies. As we shall see, this has significant implications for the universal truth claims uttered by legal philosophers.

ALTERNATIVE STARTING POINTS FOR ANALYZING THE CONCEPT OF LAW

“Conceptual analysis,” Shapiro tells us, “proceeds on the basis of our intuitions.”²¹ Shapiro begins by *assuming* what law is, whereupon he proceeds to engage in conceptual analysis to tell us what law is. He assumes that state law, the primary source of his intuitions about law, is the epitome of law. Hart proceeded the same way, asserting that “an educated man” thinks of law as the municipal legal system.²² Joseph Raz made the same choice, justifying his designation of the state legal system as the paradigm of “law” on the grounds that it is “our” concept of law.²³ Raz acknowledges the “parochial” nature our concept of law, and he recognizes (echoing the Searle passage above), furthermore, that “all concepts are parochial” because they are “the product of a specific culture.”²⁴

Despite its evident circularity,²⁵ there is nothing improper about the fact that a theorist must first posit what law is before engaging in conceptual analysis to tell us what law is. There is no other way to proceed.²⁶ What this underscores, however, is that *the* key move is the initial designation of the paradigm of law. Everything follows from this initial choice.

²¹ Shapiro, *Legality*, supra 17.

²² Hart, *The Concept of Law*, supra 1-17.

²³ Raz, “On the Nature of Law,” supra 1-5.

²⁴ *Id.* 5

²⁵ See Robert Alexy, “The Nature of Legal Philosophy,” 17 *Ratio Juris* 156,158 (2004)(acknowledging the circularity of this inquiry).

²⁶ This is explained in Brian Z. Tamanaha, “Law,” *Oxford International Encyclopedia of Legal History*, edited by Stanley Katz (Oxford 2009).

To supplement his intuition about law, Shapiro assembles a list of truisms about law. Truisms, he says, “are not merely true, but *self-evidently* so.”²⁷ These truths are “so unobjectionable that they hardly need mentioning.”²⁸ Among his proffered truisms, Shapiro asserts that all legal systems have judges who interpret the law, all legal systems have mechanisms to change the law, legal authority is conferred by legal rules, some laws impose obligations, in every legal system some person or institution has supreme authority to make certain laws, there are right answers to some legal questions, and so forth.²⁹ His truisms are obviously taken from the common institutional arrangement of contemporary Western state legal systems.

Shapiro then proceeds to engage in conceptual analysis to identify the necessary features of law. “To establish the identity of law,” he says, “the legal philosopher aims to determine what the law must be if it is to have the properties specified in the above list [of truisms].”³⁰ Following this procedure, after stripping away everything unessential to law, Shapiro announces that in essence laws are plans (or plan-like) and all legal systems are planning systems. He elaborates on this point by imagining a cooking club that begins as an informal affair among friends and evolves into a business company structured by rules;³¹ Shapiro’s cooking club cum cooking corporation is then transported to Cooks Island, on which they mature into a full blown society where laws are plans and the legal/planning system keeps it humming smoothly.³²

Based upon his thought experiment and analysis, Shapiro comes up with this theory of the essence of law: “what makes the law, understood here as a legal institution, *the law* is that it

²⁷ Shapiro, *Legality*, supra 13.

²⁸ *Id.* 19.

²⁹ *Id.* 15.

³⁰ *Id.*

³¹ *Id.* Chapter 5.

³² *Id.* Chapter 6.

is a self-certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, though alternative forms of social ordering.”³³ As for particular laws within the system, according to Shapiro, “what makes laws *laws* is that they are either (1) parts of the master plan of a self-certifying, compulsory planning organization with a moral aim; (2) plans that have been created in accordance with, and whose application is required by, such a master plan; or (3) planlike norms whose application is required by such a master plan.”³⁴

Simple societies, like hunter-gatherers, Shapiro tells us, do not have law (Hart likewise concluded that primitive societies lack law because they did not have secondary rules).³⁵ Law arises only in complex societies to help deal with controversies that cannot otherwise be solved without law. “A community needs law whenever its moral problems—whatever they happen to be—are so numerous and serious, and their solutions so complex, contentious, or arbitrary, that nonlegal forms of ordering behavior are inferior ways of guiding, coordinating, and monitoring conduct.”³⁶

In sum, according to Shapiro, it is necessarily true that legal systems are compulsory organized planning systems, and what law does is manage moral problems in complex societies. Armed with his planning theory, Shapiro elaborates on its implications for judicial decision making, the contest between legal realism and legal formalism, Ronald Dworkin’s challenge to legal positivism, and competing theories of constitutional interpretation in the United States—standard themes in American legal theory.

Now let us move to Twining.

³³ Id. 225.

³⁴ Id.

³⁵ Id. 172.

³⁶ Id. 173.

When reviewing previous efforts at general jurisprudence, Twining observes that “nearly all legal concepts, including many ‘fundamental legal conceptions,’ that have been the focus of attention of analytical jurists are folk concepts.”³⁷ That is to say, analytical jurists typically identify law in terms of their own assumptions about law. Analytical jurists would accept this characterization. Raz acknowledges that “In large measure what we study when we study the nature of law is the nature of our own self-understanding.”³⁸ As a result, Twining remarks, “their conception of ‘general jurisprudence’ is quite narrow in being largely confined to state law viewed from what is essentially a Western perspective.”³⁹

A general jurisprudence with genuinely global reach, Twining argues, must recognize the multiplicity of forms and manifestations of law that actually exist around the world today. Twining thus brings within his purview not just state law—heretofore the almost exclusive focus of analytical jurisprudents—but also global law, international law, transnational law, regional law, communal and inter-communal law, sub-state law, and non-state law.⁴⁰ Going beyond the law of the US (which Shapiro addresses) and the UK, Twining raises the law of the EU, *lex mercatoria*, Gypsy law, the unofficial law in favela’s (urban slums), Islamic law, various forms of customary law, and much more.

In contrast to Shapiro (Hart, Raz, and other analytical jurisprudents), who relies entirely on “our” intuitions about what law is, Twining collects a host of intuitions about what law is (“our” intuitions from many perspectives) and constructs a concept of law that accommodates them all. Like Shapiro, engaging in a close analysis of positivist accounts of law, Twining pares

³⁷ Twining, *General Jurisprudence*, supra 17.

³⁸ Raz, *Can There Be a Theory of Law?* Blackwell, 331.

³⁹ *Id.* 21

⁴⁰ See *Id.* 70.

away non-essential characteristics,⁴¹ and centers on a functional account built on Karl Llewellyn's law-jobs theory. According to the law-jobs theory, law takes care of certain essential tasks in society: resolving disputes, coordinating conduct, altering conduct to meet changing circumstances, allocating authority and specifying how decisions must be made, creating incentives for behavior (rewards and punishment), and creating an institutional apparatus to handle these jobs.⁴² Consequent upon his analysis, Twining offers this formulation of law: "From a *global perspective* it is illuminating to conceive of law as a species of *institutionalized social practice* that is *oriented to ordering relations* between *subjects* at one or more *levels* of relations and of ordering."⁴³

Twining identifies two important differences between his formulation and the approach taken by analytical jurists:

This formulation does not explicitly mention norms (or rules), systems (or orders), groups, or tradition. [Rules and systems are essential elements of law in analytical accounts.] This is not because they are unimportant as concepts or in practice. Far from it. They are all central to understanding law. They are not treated here as criteria of identification in order to make the formulation sufficiently broad to include some examples that arguably lack one or more of these elements.⁴⁴

This allows Twining to include as "law" what analytical jurists would exclude, for example, forms of Khadi justice that do not make strictly rule based decisions and forms of customary law that are not organized as systems. Although rules, systems, coercion, and other

⁴¹ His paring away is conducted through an extensive critical engagement with the argument in Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford 2001).

⁴² Twining, *General Jurisprudence*, supra 106-106.

⁴³ Id. 117.

⁴⁴ Id. 119-20.

aspects common to law are not necessary criteria of law, Twining brings them back in at the next level of analysis (of mid-range concepts) when examining various types of law.⁴⁵

The second difference relates to the status of Twining's formulation of law. While Shapiro claims to have produced eternal truths about the nature of law, Twining assumes a more modest stance: "Although it takes the form of a definition *per genus et differentiam*, this is not 'Twining's conception (or definition) of law.' I use different conceptions of law for different purposes in other contexts. Here the purpose is to provide some conceptual tools for viewing law from a global perspective, first in respect of constructing a broad overview or mental map of legal phenomena and, second, for describing, interpreting, analyzing, explaining, and comparing legal phenomena."⁴⁶

These two differences aside, their approaches are mainly separated by a crucial initial choice over what counts as law: Shapiro's concept of law is based solely upon "our" intuitions about what law is, whereas Twining's formulation accommodates a host of conceptions of law. The privileging of Western assumptions about what law is was ensconced early on in general jurisprudence by John Austin in the mid-19th century:

I mean, by 'General Jurisprudence,' the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction.⁴⁷

⁴⁵ A similar but distinct approach is taken in Tamanaha, *A General Jurisprudence of Law and Society*. In contrast to Twining, Tamanaha does not provide a formulation of law, but instead relies upon existing conventional identifications of law to identify what is seen as law within particular social groups. The mid-range analysis utilizes sociological concepts like "institutionalized dispute resolution," "institutionalized norm enforcement," etc., to examine the ways in which law (or more precisely certain forms of law) shares features with other social phenomena.

⁴⁶ Twining, *General Jurisprudence*, surpa 116.

⁴⁷ John Austin, *The Uses of the Study of Jurisprudence*, ed. H.L.A. Hart (London 1954) 367.

Austin held the view that the science of law must be based upon law in civilized countries. Following the spread of state legal systems in the course of the 20th century, many people came to see law as state law, but that was not the only conception of law in Austin's day and it is not the only conception of law now. To cite just one common example, around the world today there are thriving forms of customary or informal law, often lacking the organized qualities of state legal institutions, which are perceived by the populace as more powerful, efficacious, and legitimate than state law.⁴⁸

While every legal theorist must posit what law is to begin the analysis, no analytical jurist has provided an argument to establish that starting with a single conception of law (“ours”)—identifying its essential characteristics—is superior to starting with multiple conceptions of law—identifying the essential elements they share in common. Nor have analytical jurists considered a third alternative, which would eschew the search for a single concept of law, and instead identify the elements of various forms of law.⁴⁹ The failure of analytical jurists to even address the issue of the *choice* of starting point is a gaping omission in their philosophical analysis of law.⁵⁰ If they must resort to non-analytical reasons for choosing one starting point over another, as appears to be the case, a determinative contingency exists at the base their purportedly “necessary” truth claims about law.

FUNDAMENTAL SIMILARITIES WITH SOCIOLOGICAL CONCEPTS OF LAW

⁴⁸ A terrific exploration of these forms of law is Deborah H. Isser, editor, *Customary Justice and the Rule of Law in War-Torn Societies* (United States Institute for Peace 2011).

⁴⁹ This third alternative is proposed in Tamanaha, *A General Jurisprudence of Law and Society*.

⁵⁰ As Brian Bix observes, Raz does not seriously consider alternative conceptions of law. See Brian Bix Raz, *Authority, and Conceptual Analysis*, 50 *Am. J. Juris.* 311 (2005).

Now I will indicate the remarkable similarities between Shapiro's concept of law and standard sociological concepts of law. These similarities force us to question whether anything of substance distinguishes his philosophical theory of law from sociological concepts of law.

The function and place Shapiro identifies for law closely resemble standard sociological accounts. Here is a summary:

According to most accounts, the development of law is a key aspect of this [evolutionary] process. Talcott Parsons identified the emergence of an institutionalized legal system as the 'critical development' or 'watershed' in the 'transition from intermediate to modern society.' Law serves the essential functions of coordinating behavioral expectations, responding to disruptions of order, and resolving disputes....At the simplest stage of social development many of these activities are satisfied by customary mechanisms oriented towards the achievement of a consensus; but beyond rudimentary stages of social development custom proves inadequate to these tasks. Social theorists from Durkheim to Habermas have concurred that in differentiated societies, with their attendant value pluralism and increases in interactions between strangers, law serves the core function of integrating society.⁵¹

Shapiro's unique twist is to paint law as a planning system—sociologists typically portray law as serving a number of important social functions—but that overlay notwithstanding, the role he specifies for law in complex societies is indistinguishable from longstanding sociological accounts.

Identical to Shapiro's planning theory, furthermore, sociological concepts of law typically utilize form (or structure) and function-based criteria for the identification of law. Consider two influential sociological concepts of law,⁵² Max Weber's and Adamson Hoebel's (respectively):

The term 'guaranteed law' shall be understood to mean that there exists a 'coercive apparatus,' i.e., that there are one or more persons [or aliens] whose special test is to hold

⁵¹ Tamanaha, *A General Jurisprudence of Law and Society*, supra 54-55.

⁵² For an overview, see Brian Z. Tamanaha, "Analytical Map of Social Scientific Approaches to the Concept of Law," 15 *Oxford Journal of Legal Studies* 501 (1995).

themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement.⁵³

A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or groups [humans or alien] possessing the socially recognized privilege of so acting.⁵⁴

When devising their concepts of law, both Weber and Hoebel reformulated state law in abstract terms—as did Shapiro—by paring away its non-essential features. For Weber and Hoebel, law is the institutionalized application of coercion by a public authority to enforce norms; for Shapiro, law is an organized compulsory planning system. Their respective concepts differ because they have different intuitions about what is fundamental to law, but each involves an abstraction of the *form* of state law (institutionalized coercion/organized compulsory system) and each identifies its core *function* (enforcing norms/norm-based planning). These concepts of law are sub-variations of social ordering institutions which fasten upon different features.

As the brackets added to the above quotes suggest, Shapiro is wrong to assert that sociological concepts are limited in application to humans: sociological concepts of law can be applied to any *social* group (human, animal, alien) with the requisite form and function. (Sociobiology studies the social behavior of all animals, including humans, and by extension aliens if they exist.) Although sociologists are not prone to utter assertions about nonexistent or unknown beings, philosophical and sociological concepts have precisely the same potential application; both are abstractions from human societies, with no logical or empirical reason to limit sociological concepts more narrowly than philosophical. Ronald Dworkin (who is skeptical of the philosophical search for the nature of law) acknowledges the universal reach of sociological concepts of law when remarking, “We—experts and non-experts alike—do share a

⁵³ Weber, *Weber on Law in Economy and Society*, ed. Rheinstein (NY: Simon and Schuster 1954) 13

⁵⁴ Adamson Hoebel, *The Law of Primitive Man* (Harvard 1954) 28.

rough sociological concept of law: we would all make certain assumptions if astrozoologists reported that a group of intelligent non-human animals they had discovered on a distant planet had a kind of legal system,”⁵⁵

Moreover, Shapiro takes on the same task all sociological concepts must confront: how to delimit law from other forms of normative ordering. “When asking about the nature of law” he begins, “we want to know which properties law necessarily possesses in virtue of being an instance of law and not a game, social etiquette, religion, or some other thing.”⁵⁶ Sociological concepts of law similarly ask “what makes a particular structure of governance a legal system rather than some other form of social control, such as morality, religion, force, or terror?”⁵⁷

And Shapiro’s concept of law is bedeviled by the same inability to draw sharp lines between law and non-law. When laying out his criteria of legality, Shapiro remarks that the “United States Golf Association...straddles the line between law and nonlaw [because it is a compulsory planning organization that enforces rules]....The best we can say about the USGA...is that it is like a legal system in some senses, but not in others, and leave it at that.”⁵⁸ For an analytically derived account that purports to be necessarily true, the application of Shapiro’s theory of law to actual rule oriented planning organizations is notably fuzzy, but social scientists would sympathize because they too ended up in *exactly* the same place. Sociological concepts of law assert that law exists “in a variety of institutional settings—in universities, *sports leagues*, housing developments, hospitals.”⁵⁹ After a host of unsuccessful attempts to identify a

⁵⁵ Ronald Dworkin, *Justice in Robes* (Harvard 2006) 3.

⁵⁶ Shapiro, *Legality*, supra 9-10.

⁵⁷ Ronald Dworkin, “Hart and the Concepts of Law, 119 *Harv. L.Rev. F.* 95, 95 (2006). In contrast to Shapiro, Dworkin remarks that this inquiry does not have much philosophical interest because he believes law, as a social construct, does not have an essential nature.

⁵⁸ Shapiro, *Legality*, supra 224.

⁵⁹ Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law,” 19 *Journal of Legal Pluralism* 1, 17-18 (1981)(emphasis added). For an argument that it is a mistake to view law in terms that would include sports leagues and other similar rule enforcing institutions, which also applies to Shapiro’s account of law,

clear delimitation between legal and non-legal forms of institutionalized norm enforcement, many sociologists have come to accept that “the conclusion must be that law covers a continuum[.]”⁶⁰

As their common inclusion of sports leagues exemplifies, Shapiro’s philosophical theory and sociological concepts of law have the same implications for what qualifies as “law.” Shapiro observes, for example, that “if a criminal organization presents itself as dedicated to solving serious moral problems (think of Robin Hood and his Merry Men), it too might be eligible to be a legal system. The fact that others consider it to be mere organized crime does not change the reality of the situation.”⁶¹ Likewise, social scientists who study law have for decades asserted that the mafia or criminal gangs in favelas—which, in addition to drug dealing and extortion, often fulfill social ordering functions in the community—are “law.”⁶²

This highlights a problem for Shapiro’s planning theory of law that is distressingly familiar to social scientists—and arguably fatal to Shapiro’s theory—the problem of distinguishing among functional equivalents.⁶³ Here, again, is his core theory of law: “what makes the law, understood here as a legal institution, *the law* is that it is a self-certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, though alternative forms of social ordering.” Shapiro relies upon a negative criterion in that he pegs the identification of law on the *inadequacy* of “non-legal”

See Brian Z. Tamanaha, “A Non-Essentialist Concept of Legal Pluralism,” 27 *Journal of Law and Society* 296 (2000); Brian Z. Tamanaha, “Socio-Legal Positivism and a General Jurisprudence,” 21 *Oxford Journal of Legal Studies* 1 (2001).

⁶⁰ Gordon R. Woodman, “Ideological Combat and Social Observation: Recent Debate About Legal Pluralism,” 42 *Journal of Legal Pluralism* 21,45 (1998).

⁶¹ Shapiro, *Legality*, supra 424 n. 20.

⁶² Boaventura de Sousa Santos, “Law of the Oppressed: The Construction and Reproduction of Legality in Pasargarda,” 12 *Law & Soc. Rev.* 5 (1978).

⁶³ For a discussion of the problem of functional equivalents in connection with the concept of law, see Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Clarendon 1997) 105-07.

forms of ordering⁶⁴—claiming that law solves the insufficiency of “alternative forms of social ordering.” Notice that this way of putting it, because it refers to the failure of non-legal forms of ordering, *presupposes the capacity to distinguish legal from non-legal*—but that is precisely what his theory of law is supposed to provide.

This move papers-over a lacunae in his analysis. A fairly common view among anthropologists and archeologists is that early chiefdoms (or strong man rule) often had institutionalized ordering systems which resembled extortion gangs that were religious-moral-legal in a way that cannot be separated (relying upon divine sanction as well as physical force).⁶⁵ It is not clear what Shapiro’s theory of law would say about these mixed forms: if these gangster-like run religious/moral compulsory systems were effective in ordering social behavior (as they typically were), then (per his negative criterion) it follows that they are *not* “law”; or, perhaps they qualify simultaneously as law *and* as religious/moral compulsory systems (which would throw doubt on the operation of his negative criterion). This problem arises for Shapiro because functional equivalents that share the same form—like institutionalized norm enforcement, or compulsory planning systems—can be distinguished from one another only through resort to additional identifying criteria which are not based upon the designated form and function alone.⁶⁶ Weber used *public authority* and *coercive force* to help distinguish religious and moral norm enforcement from law.⁶⁷ Shapiro, who denies that coercive force is a necessary element of law, offers no additional criteria. As a consequence, Shapiro’s theory of law irresistibly includes

⁶⁴ Shapiro, *Legality*, supra 173.

⁶⁵ See generally See Ian Morris, *Why the West Rules—For Now* (2010).

⁶⁶ This is explained in Tamanaha, “A Non-Essentialist Conception of Legal Pluralism,” supra.

⁶⁷ His approach generated a number of objections, including that public-private distinction is hard to pin down, and not all forms of law rely upon coercive force. Things get especially tricky when one considers the ubiquity of belief in divine sanctions, ordeals, and the like. For a analysis of the objections, see Tamanaha, “An Analytical Map of Social Scientific Approaches to the Concept of Law,” supra.

as “law” all functional equivalents that possess the same form—including sports leagues and criminal gangs.

Social scientists, on their part, have been unable to solve these self-same difficulties despite many valiant attempts. Their failure to find a solution led to a seminal insight: every concept of law based upon form and function suffers from over-inclusiveness and under-inclusiveness. Over-inclusiveness results because various social institutions can possess the same basic form and function as law yet not be typically thought of as law (like the USGA or criminal gangs); under-inclusiveness follows because certain social phenomena which are seen as law will be excluded owing to a lack of the required form or function (like customary law). (Twining constructed his formulation of law as broadly as possible to reduce its under-inclusiveness.) Here is the crux of the problem: form and function-based criteria work fine on their own terms to produce categories for analysis, in this case generating the useful lesson that there are many kinds of institutionalized norm enforcement or compulsory planning systems, one of which is law; sociologists and philosophers get into trouble when they make further, separate assertions that the posited form-function *is* law (creating over-inclusiveness), and anything without the posited form-function *is not* law (creating under-inclusiveness).⁶⁸

Two possible solutions can solve over- and under-inclusiveness: a theorist must use the conventional identification of law as a criterion to supplement the specified form and function (this would rule out USGA and criminal gangs), or a theorist must use the conventional identification of law as the initial criterion for law—thus recognizing multiple versions of law—and use form and function characteristics to identify sub-species of law (state law, customary law, international law, etc., would have their own defining features).⁶⁹ All sociological concepts

⁶⁸ This is elaborated in Tamanaha, A Non-Essentialist Concept of Legal Pluralism,” *supra*.

⁶⁹ *Id.*

of law have been confronted by over-and under-inclusiveness, and Shapiro's philosophical concept is no exception.

In light of these fundamental similarities, the most pressing question is not why Shapiro so confidently declares that sociological concepts of law have "no relevance" for legal philosophers, but rather, whether there is any real difference between the two.⁷⁰ One set is produced by "philosophers" and the other by "sociologists," of course. But if field of origin determines the status of the concept, this implies the odd proposition that had a sociologist come up with the very same "planning theory of law," it would be deemed sociological rather philosophical. That cannot be right.⁷¹

Jules Coleman declares that "there is absolutely no reason to believe that the facts that interest us as philosophers and social theorists are the facts that social and natural scientific theories are interested in addressing or are designed to address."⁷² Although he is correct that these fields have different interests and orientations, Coleman is wrong about the shared central question "What is law?" As the preceding analysis shows, philosophers and sociologists have taken up the same issues surrounding the concept of law, have suffered from some of the same problems, and have addressed them in the similar ways.⁷³ The fact that law is a human social construction inexorably draws the analytical back to the empirical because the philosopher's

⁷⁰ While I approach from a different direction, my position is compatible with Brian Leiter's naturalism. See Brian Leiter *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford 2007). My main hesitation about his argument is that I do not believe social science addresses or can answer the full range of issues that occupy analytical jurisprudence (although I fully agree with his skeptical arguments against analytical jurisprudence).

⁷¹ If a sociologist *adopted* or utilized a philosophical concept of law, Shapiro could argue that it is no less philosophical in his construction of it. My argument is that, had a sociologist *invented* the identical planning theory of law (which is conceivable), it would be odd to conclude that, owing to its sociological heritage, the selfsame planning theory would instead *be* a sociological concept of law.

⁷² Jules Coleman, *Methodology*, *supra* 350.

⁷³ I am not asserting that all legal philosophers take up these same issues, only that Shapiro's approach is representative of other leading analytical jurists (particularly Raz).

posited intuitions and truisms about law have cultural sources, the very same sources that sociologists take as their starting point.

The thoroughgoing identity of philosophical and sociological concepts of law, the inseparable penetration of the analytical by the empirical, casts doubt on the assertions of analytical jurists that their accounts of law are *necessarily*, because *analytically*, true⁷⁴—rather than, at most, contingently true. An analytical jurist who shares their approach explains that their theory of law *must* “consist of propositions about the law which are *necessarily* true, as opposed to merely contingently, true,” because “only necessarily true propositions about law will be capable of explaining the nature of law.”⁷⁵ Since their theories of law appear to be indistinguishable in substance from sociological accounts of law, suffering all the same limitations, what makes philosophical concepts of law necessarily true beyond their dogged insistence that it is so?⁷⁶

Their confident insistence prompts another objection, one put by Dworkin and others: “Legal systems are not natural kinds, like bismuth and centipedes, that have essences. They are social kinds: to suppose that law has an essence is as much a mistake as supposing that marriage or community has an essence.”⁷⁷ Like all social institutions, marriage is understood differently in different cultures (monogamy or polygamy, a matter of love or an arrangement between families, etc), and marriage can change over time (from disallowing interracial marriage to allowing it, from exclusively heterosexual marriage to same-sex marriage). The same holds for

⁷⁴ These strong claims are at odds with Quine’s famous critique of the analytic (philosophical truths)/synthetic (empirical truths) distinction, showing that they cannot be sharply separated, William van Orme Quine, *Two Dogmas of Empiricism*, 60 *Philosophical Review* 20 (1951). Clear explanations of this can be found in Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford 2007) 175-79; Coleman, *Methodology*, supra 344-45.

⁷⁵ Dickson, *Evaluation and Legal Theory*, supra 18 (emphasis added).

⁷⁶ The critique that Dennis Patterson, building on Quine, raises against Robert Alexy’s necessity claims applies full force to Shapiro and Raz. See Dennis Patterson, *Alexy on Necessity in Law and Morals*, *Ratio Juris*, forthcoming 2011.

⁷⁷ Dworkin, “Hart and the Concepts of Law,” supra 95. See also Brian Bix, *Raz on Necessity*,

law. As Fred Schauer remarked, “Because concepts are liable to change, and may change over time, it would be a mistake to assume that the concept of law must always be what it now is.”⁷⁸

THE PARADOX OF MULTIPLE, INCONSISTENT YET TRUE CONCEPTS OF LAW

Pointing out the striking similarities in their concepts of law is not to deny that Shapiro and Twining have undertaken different projects, both of which have value. Twining’s conceptual analysis is richly informed by detailed information about a variety of examples of law from around the world; Shapiro analyzes puzzles and thought experiments, which are useful techniques to isolate on important features of law. This critique is aimed at the soundness of Shapiro’s methodological stance. And it applies not only to Shapiro but to all legal philosophers who claim to have identified universal truths about the nature of law.

The paradox arises in two forms, one based on time and the other on culture or place. Since law is a social institution, as Raz acknowledges, “the concept of law changes over time.”⁷⁹ Analytical jurists maintain, nevertheless, that the essential characteristics of law remain unchanging and eternal (across time and space). They reconcile these two seemingly inconsistent propositions by asserting that concepts of law are abstractions unaffected by time, and hold good regardless of whether the social form of the legal institution upon which the concept was initially based undergoes change.⁸⁰ What this entails is that theorists working at different times will produce different concepts of law. Consequently, legal philosophers working at different times can identify eternal, unchanging truths about the nature of law which are

⁷⁸ Schauer, “The Social Construction of the Concept of Law,” *supra* 497.

⁷⁹ Raz, Joseph., 2005, “Can There Be a Theory of Law?,” in *The Blackwell Guide to Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson (Oxford: Blackwell Publishing) 331.

⁸⁰ An elaborate articulation of this position can be found in Raz, *Between Authority and Interpretation*, *supra* Chap. 2. See also Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart 2001) 1-25.

inconsistent with other equally true accounts produced by philosophers at other times (assuming each is correct).

Think of a European legal philosopher living during the Middle Ages, before the Westphalian state system developed, when it was normal to have coexisting, intersecting bodies of law operating in the same place (e.g. Roman law, Germanic law, customary law, canon law, manorial law, guild law, *lex mercatoria*).⁸¹ A concept of law abstracted by a legal philosopher from intuitions about law at the time would almost certainly differ from a concept of law produced today because their core truisms about law would differ. And the same could be said of a concept of law produced by a legal philosopher ten centuries from now, and so on *ad infinitum*. Imagine, if you will (in the spirit of philosophical analysis), a time warp that places twenty of these legal philosophers together in a room, each claiming to have come up with the essential nature of law, but each with a somewhat different theory. When the initial clamor subsides and they start to listen to one another, it will dawn on them that their essential elements of law differ because they have abstracted from intuitions about law based upon the social construction of law as it existed at the time and place from whence they came. The realization-reconciliation they come to is that each concept of law is true in relation to its own time and place. We thus end up with twenty inconsistent, universally applicable concepts of law—and each legal philosopher goes home in happy vindication.

Strangely, they could each apply their own concept of law to evaluate the actual legal systems of each of the other philosophers (consistent with the universal application of their concepts), each concluding that none of the others have “law” because their legal systems lack some element required by their own necessarily true concept of law. And they would all be

⁸¹ See Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global, 30 Sydney Law Rev. (2008).

right! Here is the paradox: each concept of law is necessarily true, by its own criteria, yet necessarily false according to the criteria of the others. This does not entail a logical contradiction, for each is merely applying his or her own (true) concept. But it reveals that the claim by legal philosophers that they have discovered necessary truths about the nature of law with universal application, while pronounced with gravitas, produces absurd results.⁸²

Shapiro and Raz might respond that only one legal philosopher is right (or that none are right), that law has an unchanging core which makes it what it is, and the legal philosophers must simply figure out what it is. But this would seem to be inconsistent with their assertion that each philosopher rightly begins with his own intuitions and truisms, and their acknowledgment that law is a social construction which changes over time. The former indicates that no particular account is privileged over all others, and the latter implies that no unchanging core of “law” necessarily exists over time. Let’s assume, for example, that law at some future (or past) date is conventionally seen to inherently include an element of right or justice; while at other times law is not understood to include an element of justice. Legal philosophers from these different periods, working from their contrasting intuitions about law, will produce fundamentally different theories of law—one including justice and the other not—with no way to reconcile the two.

This is not just a fanciful thought experiment, for intuitions about law are not constant over time. Consider this claim by Shapiro: “in every legal system, there are individuals or bodies that have *supreme* authority, which is to say their authority trumps the authority of all other

⁸² In response to an earlier draft, Brian Bix correctly pointed out that there is a crucial distinction between “universally applicable” and “universally true.” Raz makes the former claim, not the latter, holding that a theory of law that is necessarily true relative to “our” concept of law (hence not universally true) can be applied to evaluate other systems (hence universally applicable). As I will demonstrate in the final section, however, this distinction is easily lost because the very claim of universal application carries the connotation that the concept of law is true universally (such that it provides a valid standard against which to evaluate other systems).

subordinate members.”⁸³ This assertion best fits state legal systems. But the existence of a supreme authority is not true of every form of law that existed during the Middle Ages (certainly not of Germanic folk law⁸⁴ and mercantile law⁸⁵); it is especially doubtful when one recognizes that the coexisting and interpenetrating systems with sometimes competing jurisdictional claims made legal supremacy within a system a matter of ongoing dispute.⁸⁶ In contemporary Europe, uncertainty on the issue of supremacy remains, though for different reasons. It is unclear whether the European Union and individual member states should be considered separate or unified legal systems, and it is far from evident that there is a supreme legal authority on all legal matters within each system (assuming lines can be drawn to delimit discrete systems).⁸⁷ As a prominent theorist noted, “For the most part national courts have not accepted that EU Law is the supreme law of the land. But nor have they simply assumed that national constitutional law is the supreme law of the land;”⁸⁸ EU and national courts sometimes take contrary position on the same issue, without a supreme legal authority to reconcile the matter. Constitutional pluralism is a hotly debated topic among European theorists for these reasons.⁸⁹

The undeniable reality that social manifestations of law change—hence intuitions and truisms about law change—means that every concept of law is a product of its time.

⁸³ Shapiro, *Legality*, supra 55.

⁸⁴ See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard 1983) 49-88.

⁸⁵ *Id.* 346-56. The fair courts head cases on a day to day basis and “Often appeals were forbidden.” *Id.* 347. There is no supreme authority in a system like this.

⁸⁶ It is not the case, in Shapiro’s understanding, that a single legal system must be (or claim) supremacy over all others in a territory, so coexisting legal systems with competing claims are not a problem for him; his claim is that *each* legal system must have a supreme person or body. The doubt I raise here is whether we can treat these as discrete systems, for if not the notion of supremacy within a particular system cannot hold.

⁸⁷ For a detailed analysis that reveals the contested and uncertain lines of legal authority, see Fritz W. Scharpf, “The Asymmetry of European Integration, or Why the EU cannot be a ‘social market economy,’” 8 *Socio-Economic Rev.* 211-250 (2010).

⁸⁸ Mathias Kumm, “How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law,” in *Political Theory of the European Union*, Jurgen Neyer and Antje Wiener, eds., (Oxford 2011) 127, 111-138.

⁸⁹ See generally Martin Loughlin and Petra Dobner, *The Twilight of Constitutionalism* (Oxford 2010); Jeffrey Dunhoff and Joel P. Trachtman, *Ruling the World: Constitutionalism, International Law, and Global Governance* (Cambridge 2009).

Another version of the same paradox arises in connection with contrasting place- or culture-based intuitions about law. As Raz observes (without recognizing its debilitating implications for his own universalistic posture), “Different cultures have different concepts of law. There is no one concept of law, and when we refer to the concept of law we just mean *our* concept.”⁹⁰ It follows from this that a legal philosopher abstracting from a different cultural concept of law would produce a concept with different essential characteristics, yet be entitled to the same universal truth claims. Imagine a legal philosopher who worked alongside Bronislaw Malinowski, devising a concept of law based upon the customary law of the Trobriand of Melanesia. Malinowski denied that law consists of “central authority, codes, courts, and constables”⁹¹ (none of which were present), and he identified law in “a class of binding rules which control most aspects of tribal life.”⁹² His legal philosopher companion would doubtless identify a different set of truisms from those announced by Shapiro and, consequently, would produce a concept with different essential characteristics. Shapiro presumably must accept the truth claims the legal philosopher of customary law (assuming he is correct), given that, identical to Shapiro’s concept, it is built on a set of intuitions grounded in an existing cultural notion of what law is.

The same implications follow from a legal philosopher who builds her concept of law with the European Union or with international law in mind, or, to offer more exotic contemporary examples, Romani law or various forms of village or informal law; she would likely reject Shapiro’s truism that all legal systems have a supreme legal authority because that is

⁹⁰ Raz, Joseph., 2005, “Can There Be a Theory of Law?,” in *The Blackwell Guide to Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson (Oxford: Blackwell Publishing) 331.

⁹¹ Bronislaw Malinowski, *Crime and Custom in Savage Society* (New York 1926) 14.

⁹² *Id.* 66.

not self-evident with respect to any of these systems.⁹³ International law is notoriously fragmented, with multiple tribunals having overlapping jurisdiction over the same matters and no final overarching authority to reconcile all possible inconsistencies.⁹⁴ Romani law governs the affairs of gypsies in many countries across Europe, but these autonomous bodies of law, in which most disputes are resolved by informal tribunals, lack a supreme legal authority.⁹⁵ Similar questions about supremacy, as well as a number of Shapiro's other "truisms" about law, can be raised with respect to customary law in many societies today, which handle the overwhelming bulk of social disputes (dealing with rape, domestic violence, theft, fights, murder, and witchcraft).⁹⁶

As with the time-based paradox, we are once again left with multiple, inconsistent conceptions of the essential characteristics of law—each true on its own terms—taken from different manifestations of law.⁹⁷ Shapiro can deny the truth of competing concepts of law derived from other culturally-based intuitions of law only by insisting, as a threshold matter, that their intuitions don't count. But analytical jurists have offered no arguments to that effect.

Once a legal philosopher acknowledges that law is a social construction, that there can be different cultural concepts of law, and that law changes over time, it necessarily follows that more than one concept of law can exist. The second stream of general jurisprudence encompasses them all. Most analytical jurists, in contrast, focus only on one: their concept of law in the here and now. That choice is legitimate. Trouble arises only when they

⁹³ Shapiro cannot lightly discard this truism because it is central to his planning theory of law that definitive resolution of complex problems is produced by law, which the supremacy postulate delivers.

⁹⁴ William W. Burke-White, "International Legal Pluralism," 25 *Mich. J. Int'l. L.* 963 (2004); Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands," 25 *Mich. J. Int'l. L.* 903 (2004).

⁹⁵ See Walter O. Weyrauch, *Gypsy Law: Romani Legal Traditions and Culture* (Berkeley 2001).

⁹⁶ See Isser, *Customary Justice and the Rule of Law in War-Torn Societies*, *supra*.

⁹⁷ Shapiro can deny the legitimacy of these competing concepts of law only by insisting that customary law and international law do not qualify as "legal systems"—but this would beg the question of what a legal system is, which he cannot answer using his own theory of law to the exclusion of others.

make universalistic claims, which in effect (if not intentionally) boosts their particular concept of law to serve as *the* standard for all others.

WHY IT MATTERS

To appreciate why it is important to refute the methodological claims of analytical jurists who espouse these views, we must return to the notion of conceptual relativity set forth by Searle—that any set of descriptions is relative to some vocabulary and system of concepts. Because there is no escape from this, in most contexts the fact of conceptual relativity doesn't matter: assertions about truth can be stated without reservation because it goes without saying that these assertions are relative to a background conceptual scheme. Sometimes it matters a great deal, however.

When Shapiro applies his theory of law to an alien civilization, he can correctly proclaim that any social institution on Planet X that meets his criteria for the legal planning system constitutes *law*. That's not the end of the discussion. It is also correct—nay, it is more precisely correct—to assert that they have law according to *our* conception of what law is.⁹⁸ Shapiro might respond that the second formulation is unnecessarily wordy because it comes to the same thing; since we recognize conceptual relativity, which is unavoidable, nothing is added by making it explicit.

But that depends upon *why* we are asking whether aliens on Planet X have law. Let's say that we are trying to decide whether the alien society has law because we have determined that if not we will be justified in imposing our own (superior) legal system upon them. In this scenario,

⁹⁸ The most narrowly correct statement is that the alien civilization has a compulsory planning system.

the reminder that we are not talking about “law” in universal terms, but rather are applying our own (conceptually relative) concept of law upon hapless aliens, will have real bite. (For anyone still unmoved, perhaps the scenario would feel more compelling if places were switched: the alien colonizers have landed on *our* planet with *their* concept of law, which we fail to satisfy; say the aliens had solved the problem of legal indeterminacy, making our legal system primitive by comparison.)

There is no need to contemplate far-fetched scenarios about alien civilizations. Exactly this situation has already occurred here on earth. In an 1836 case deciding what law would apply to the murder of one Aborigine by another, Justice Burton concluded that British law must apply because Aborigines were “too primitive to have laws or sovereignty.”⁹⁹ The Privy Council found, in *In re Southern Rhodesia* (1919), that aboriginal land titles should not be recognized in British law because “Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.”¹⁰⁰ We might explain these decisions away as an exercise in colonial domination under the guise of law, but that cannot account for the more recent Australian case, *Milirrpum v. Nabalco Pty, Ltd.* (the “Gove land rights case”),¹⁰¹ which took up whether Australian Aborigines had property rights in land they occupied (land which was now being mined). Justice Blackburn concluded that, while Aborigines had what could be considered law, their customary law did not accord their clans property rights in the land; because the Aborigines had no recognizable title, it was *terra nullius* (land belonging to no one).

⁹⁹ See Bruce Kercher, Recovering and Reporting Australia’s Early Colonial Case Law: The Macquarie Project, 18 *Law & Hist. Rev.* 659,660 (2000); R. V. Murrell [1936] 3 *Austl. Indigenous L.R.* 414, 415-16;

¹⁰⁰ See *In re Southern Rhodesia* [1919] A.C. 211, 233-34; see also *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399.

¹⁰¹ *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 14.

Justice Burton, the Privy Council, and Justice Blackburn would find ample support for their respective decisions in Shapiro's concept of law. "Those who live in bands," Shapiro flatly declares, "don't have law."¹⁰² Shapiro (as well as Hart) asserts that primitive societies do not have law because law is a special form of social organization that arises only in complex societies. Blackburn was actually wrong in his appraisal, for according to Shapiro's universally applicable concept of law the Aborigines had no legal system at all. Raz's position also leads to that conclusion:

Naturally, the essential properties of the law are universal characteristics of law. They are to be found in law wherever and whenever it exists. Moreover, these properties are universal properties of the law not accidentally, and not because of any prevailing economic or social circumstances, but because there is not law without them....When surveying the different forms of social organization in different societies throughout the ages we will find many which resemble the law in various ways. Yet if they lack the essential features of the law, they are not legal systems.¹⁰³

The above examples demonstrate why it is so problematic to make such assertions. Conceptual relativity must not be forgotten. Nothing of moment in the real world appears to be at stake when legal philosophers claim that their universally true theory of law applies to alien civilizations and non-existent systems. But it is imperative to get it right because real consequences can follow from such claims. The correct assertion is that, according to criteria drawn from the philosopher's own culturally generated intuitions about law, the particular institution being examined does not qualify as "law." This more explicit phraseology provides full notice, highlighting the fact that beneath it all the philosopher is asserting that his intuitions about law trump others. The confident insistence by analytical jurists that they have

¹⁰² Shapiro, *Legality*, supra 35.

¹⁰³ Joseph Raz, "Can There be a Theory of Law," 328.

identified necessary truths about the nature of law has the effect of clothing a parochial conception of law in universalistic dress to serve as a standard for all times and places.

Another indication that their conception of law is parochial can be found in Australia's subsequent treatment of customary law. After the Gove land rights case, the Attorney General asked a Law Reform Commission to examine "whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines."¹⁰⁴ The Australian high court held in *Mabo II* (1992) that the common law recognizes native title that "reflects the entitlement of indigenous inhabitants, in accordance with their laws or customs, to their traditional lands."¹⁰⁵ The Native Title Act was passed in 1993 protecting Aboriginal title.¹⁰⁶ These various examples demonstrate that the notion of customary law is broadly acceptable in societies and legal systems which are familiar with it; the Western legal philosophers who firmly deny its existence as a form of law have less exposure to it as a reality on the ground.¹⁰⁷

Twining's formulation, it must be said, has no difficulty recognizing that Aborigines have law because he purposefully constructed his account to encompass various conceptions of law, including customary law. His account thus has broader application, while still incorporating theories of law based upon state law, and it is not normatively problematic because he issues no universalistic assertions.

¹⁰⁴ 1 Austl. L. Reform Comm. Report No. 31: The Recognition of Aboriginal Customary laws (1986). My discussion of Australian treatment of customary law is indebted to Brynna Connolly, *Non-state Justice Systems and the State: Proposals for a Recognition Typology*, 38 Conn. L. Rev. 239, 253-56 (2006). Other examples of customary law can be found in this article.

¹⁰⁵ *Mabo v. Queensland II* (1992) 175 C.L.R. 1,15 (Austl.).

¹⁰⁶ Native Title Act, 1993, s. 223 (3)(Austl.).

¹⁰⁷ An interesting aspect to these examples, from a legal positivist perspective, is that they are positive legal acknowledgements that customary law exists apart from and prior to its official recognition by the state legal system.

Analytical jurists are tough-minded folks for whom the pursuit of necessary truths is untouched by normative concerns or potentially lamentable consequences: philosophical truths must be found, come what may. I should emphasize, therefore, that my argument does not rest on the squishy assertion that philosophers should respect conceptions of law that circulate in other cultures. My critical argument challenges them on their own terms, showing that universalistic truth claims lead to paradoxes when applied to socially constructed (time and culture-bound) phenomena like law.

WHAT IS GENERAL JURISPRUDENCE?

There is no evident justification for defining general jurisprudence in terms of the search for the nature of law, not least because this hinges the coherence of the field on a doubtful, undemonstrated proposition. As Dworkin remarked, “Though positivists now write...about laying bare law’s essential structure by showing what is constant to that intuition over time, they have said nothing to defend the mysterious idea on what this is all premised, which is that law *has* an essential structure that can be exposed purely through description...Until someone redeems that claim through an intelligible account of the ‘nature’ or ‘essence’ of law, it will remain only a comforting mantra: positivism’s phlogiston.”¹⁰⁸

The two streams of general jurisprudence elaborated on in this essay share a core baseline, as demonstrated by the striking similarities between sociological and philosophical concepts of law. A theoretical approach which does not assume that law has a nature, and which strives to accommodate the variety of legal forms in circulation around the globe, is an

¹⁰⁸ Dworkin, *Justice in Robes*, supra 215-216.

informative type of general jurisprudence that can undoubtedly inform the work of analytical jurists.