

Michael Giudice

UNDERSTANDING THE NATURE OF LAW

A Case for Constructive Conceptual Explanation

ELGAR STUDIES IN LEGAL THEORY

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Edward Elgar
PUBLISHING

Cheltenham, UK • Northampton, MA, USA

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Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2014959485

This book is available electronically in the **Elgaronline**
Law subject collection
DOI 10.4337/9781784718817



ISBN 978 1 78471 880 0 (cased)
ISBN 978 1 78471 881 7 (eBook)

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire
Printed and bound in Great Britain by T.J. International Ltd, Padstow

Preface

Analytical jurisprudence became popular almost instantly in 1961 with the publication of H.L.A. Hart's *The Concept of Law*, but as readers familiar with this classic text know all too well, Hart included no sustained discussion of the particular method he employed to arrive at some of the most distinctive claims discussed in contemporary legal theory today. Many have supposed that Hart was simply engaged in conceptual analysis, a common philosophical technique of discerning necessary and sufficient conditions of some concept by *a priori* reflection on possible instances to see where our linguistic intuitions lie. On the basis of this method, we learn about the concept of law by making explicit what is already implicit in our knowledge of law. No new experience or neutrality-compromising interests are invited or required.

It might have been possible for legal philosophers working during Hart's time to follow him in assuming rather than explaining the use and goals of analytical jurisprudence, but this is no longer possible for the current generation. The association of analytical jurisprudence with conceptual analysis of law, and the persistent attack on conceptual analysis both within and outside legal philosophy, have forced analytical legal theorists to make plain the nature of their method, and investigate any connections it might (or might not) have with familiar forms of conceptual analysis. This book offers some initial steps towards this objective. I aim to demonstrate that the challenges often levelled against analytical jurisprudence, and especially its perceived use of conceptual analysis, help to show – perhaps surprisingly – that conceptual theories of law such as Hart's are *not* in fact best understood as the results of *conceptual analysis*, but instead of *constructive conceptual explanation* of law. While conceptual analysis concerns itself with elucidating or making explicit what is already implicit in some particular culture's self-understanding of law, constructive conceptual explanation attempts to correct, revise or improve on what might be mistaken, distorting or parochial in that self-understanding when tested against observable social reality. More precisely, I shall argue that it must be acknowledged to a much greater degree than ever before that (a) conceptual theories are and should be responsive to shifts in the phenomena of law and social reality, (b) philosophical assessment

of conceptual claims about law has a crucial critical dimension, and (c) conceptual explanation of law can and does often proceed by means of identification of necessary as well as contingent features and relations of law. These acknowledgements should not be seen as lamentable signs that the time of analytical jurisprudence has come to an end. Quite the opposite. Constructive conceptual explanation is inescapable, valuable and still properly philosophical in many ways. Further, responsiveness to facts, the constructive aspect of conceptual explanation, and recognition of contingent features and relations show a hitherto unnoticed but powerful potential for continuity between conceptual explanation, moral evaluation and social scientific investigation of law, three diverse methodological approaches whose competition has too often been assessed as a kind of winner-take-all contest rather than an opportunity for mutual learning and interaction. While winner-take-all debates can be exciting and ambitious, they can also be misleading and downright counter-productive. Instead, the account of continuity I shall develop in this book offers the chance for conceptual theorizing of law not just to survive but to thrive again. The key will be to situate rather than isolate the role of conceptual theory in legal theory.

Acknowledgements

This book was prepared over several years, during which I have accumulated many debts to those willing to read or discuss parts of it. In trying to list everyone to whom I owe thanks, there is inevitably a risk that I will forget someone, but I will try nonetheless: Mohamad Al-Hakim, Nathan Brett, Richard Brunaugh, Enrique Cáceres Nieto, Ian Clarke, Richard Collins, Roger Cotterrell, Maks Del Mar, Ken Ehrenberg, Imer Flores, Juan Vega Gomez, Matthew Grellette, Andrew Halpin, Matthew Kramer, Dimitrio Kyritsis, David Lefkowitz, Max Leonov, Cormac Mac Amleigh, Kent Macaskill, Margaret Martin, George Pavlakos, Dan Priel, Matthew Schaeffer, Stefan Sciaraffa, Sam Steadman, François Tanguay-Renaud, Talene Thomasian, William Twining, Anne van Mulligen, Detlef von Daniels, Neil Walker, Sheldon Wein and Michael Wilkinson. Ken Ehrenberg deserves special thanks for having commented on a full draft of the manuscript in its final stages, saving me from many errors. Three others have been extremely kind and generous with their time, written feedback and encouragement over many years: Leslie Green, Dennis Patterson and Brian Tamanaha. I owe my greatest debts to my teachers, whose patience and attention to my work for well over a decade have served as a true model of inspiration: Keith Culver, Julie Dickson and Wil Waluchow. While I have no doubt still not learned everything they had to teach me, I hope this book is a good start. I also wish to thank my parents for their continued support in all that I do. And finally, for help in choosing a design for the cover, and much, much else besides, I thank Sophia Giudice. This book is dedicated to her.

Most of the chapters in this book draw to some extent on writings previously published or presented for publication. I gratefully acknowledge prior publication of the following articles and book chapters:

(2002) 'Unconstitutionality, Invalidity, and Charter Challenges' 15 *Canadian Journal of Law and Jurisprudence* 69 (Chapter 5).

(2003) 'Existence and Justification Conditions of Law' 16 *Canadian Journal of Law and Jurisprudence* 23 (Chapter 5).

(2005) 'Ways of Understanding Diversity Among Theories of Law' 24 *Law and Philosophy* 509 (Chapters 7 and 9).

(2005) 'Normativity and Norm-Subjects' 30 *Australian Journal of Legal Philosophy* 102 (Chapter 8).

(2008) 'The Regular Practice of Morality in Law' 21 *Ratio Juris* 94 (Chapter 5).

(2009) 'Joseph Raz's Legal Philosophy' in *IVR Encyclopedia of Jurisprudence, Legal Theory, and Philosophy of Law* (online publication: http://ivr-enc.info/index.php?title=Joseph_Raz's_Legal_Philosophy) (Chapter 2).

(2011) 'Analytical Jurisprudence and Contingency' in M. Del Mar (ed.) *New Waves in Philosophy of Law* (Palgrave Macmillan) (Chapters 3, 9, and Conclusion).

(2012) 'Conceptual Analysis and Its Critics' 6 *Problema: Anuario de Filosofía y Teoría del Derecho* 3 (Chapters 1 and 2).

(2014) 'Global Legal Pluralism: What's Law Got to do With It?' 34 *Oxford Journal of Legal Studies* 589 (Chapter 2).

'Imperialism and Importance in Dworkin's Jurisprudence' forthcoming in S. Sciaraffa and W. Waluchow (eds) *The Legacy of Ronald Dworkin* (Oxford University Press) (Chapters 7 and 9).

'Conceptual Analysis, Legal Pluralism, and EU Law' forthcoming in *Transnational Legal Theory* (Chapter 6).

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Introduction

Anyone interested in the question ‘what is the nature of law?’ soon finds a vast array of answers, each embodying a particular set of concerns and methodological commitments, and each proclaiming its own special importance. Among these answers and approaches, analytical legal theory stands out as perhaps the most ambitious, claiming as its objective the identification and explanation of universal, essential truths about the nature of law. As Joseph Raz asserts,

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 universality of the theses of the general theory of law is a result of the fact that they claim to be necessary truths, and there is nothing less that they claim . . . A claim to necessity is in the nature of the enterprise.¹

In this recent encapsulation of his views, Raz sets out in particularly forthright terms a set of goals and commitments long associated with him, since taken up root and branch by other analytical legal theorists.² Julie Dickson, for instance, characterizes the task of analytical jurisprudence in the same way:

. . . analytical jurisprudence is concerned with explaining those features which make law into what it is. A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law . . . If law has a given feature, but this is discovered to be a contingent matter, due, for example, to the social and/or economic conditions which just happen to hold sway in a particular time and place, and hence is not necessary to its existence as law, then the feature in question is not one which is part of law’s essential nature, and cannot assist us in the important task of getting to the heart of this social institution in the sense of understanding that which makes it into what it is.³

¹ J. Raz (2009a) 91–2.

² Most recently, see S. Shapiro (2011). For illuminating criticism of Shapiro’s methodology, see B. Tamanaha (2011).

³ J. Dickson (2001) 17–18. [author’s notes omitted]

The promise of analytical jurisprudence thus expressed is undeniably attractive: by analytical jurisprudence we may gain access to what law really is, through an account of law's necessary and essential features. Raz, Dickson, and many others sharing an interest in finding those necessary features have also appeared to many readers to share a familiar method in analytic philosophy for finding them. The method, most commonly known as 'conceptual analysis', is the exercise of subjecting to rigorous investigation the conceptual commitments which give shape to our shared experiences of typical instances of law. For example, Raz writes:

Legal theory contributes . . . to an improved understanding of society. But it would be wrong to conclude, as D. Lyons has done, that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.⁴

Dickson also explains:

That the concept of law is thus already part of the conceptual currency which we use to understand our social world means that the legal theorist is not in the same position as a criminology theorist seeking to elucidate the concept of ritualism. The legal theorist does not introduce a concept anew in order to further his account of the behaviour of persons not familiar with that concept. Rather s/he seeks to elucidate a concept which people already know about and make use of in characterising the society in which they live, and their own behaviour and attitudes within it.⁵

Conceptual analysis in legal theory is of course most often associated with the work of H.L.A. Hart,⁶ who is often thought to be the first philosopher of law to introduce and use the general methods of ordinary language philosophy and conceptual analysis to understand law. Analytical jurisprudence so conceived in task and method has been hugely influential, with Hart's *The Concept of Law* serving simultaneously as a manifesto and exemplar of the style of analytical jurisprudence in explaining the nature of law. For many inquirers into the nature of law, analytical jurisprudence marks a fundamental step forward in understanding law, at least as it is found in what analytical jurisprudence calls 'modern municipal systems

⁴ J. Raz (1995) 237. [author's notes omitted]

⁵ Dickson (2001) 43.

⁶ H.L.A. Hart (2012).

of law⁷, of the sort most strongly associated with contemporary constitutional democracies, yet also evident in various morally questionable regimes which nonetheless appear to operate legal systems. In its morally neutral, descriptive-explanatory approach to law, analytical jurisprudence has developed a kind of conceptual topography which maps and explains the interactions of law's components, from individual laws to courts and other institutions, and the officials and citizens using those laws.

Yet, despite its attractiveness and explanatory power, analytical jurisprudence has not been immune to probing criticism. Several formidable kinds of challenge have been raised. First, some critics argue that if law has any necessary or essential features at all, these will not be discovered and explained by the morally-neutral method of conceptual analysis. Rather, such features can only be identified using morally and politically evaluative investigation of law's purpose and justification. Ronald Dworkin, for example, argues that law is morally significant by its very nature, to the extent that the creation, application, and enforcement of law affect the interests and well-being of individuals.⁷ On Dworkin's view, to understand law correctly, one must adopt a theoretical approach which best identifies the moral purpose, point or value law is meant to serve. To do otherwise, as analytical jurists engaged in conceptual analysis do, is to generate an account which simply fails to capture and explain the moral significance of law. Second, there are those, such as Brian Tamanaha and William Twining, who also begin with observation of law's role in society, but notice instead that law's manifestations vary so much across time and place as to render pointless the proposed search for necessary or essential features.⁸ On their view, the best theoretical approach to understanding the nature of law is social scientific:⁹ law's existence and character is inescapably shaped by particular historical, sociological, political, psychological and economic factors, such that study of these myriad factors and their interaction is the key to understanding law in all its varieties. Third, there are those, such as Dan Priel and Liam Murphy, who argue that analytical legal theorists engaged in conceptual analysis have typically operated with the unwarranted presumption that there is pre-theoretical

⁷ R. Dworkin (1986).

⁸ See B. Tamanaha (2001); and W. Twining (2009).

⁹ To be more precise, the views of Tamanaha and Twining comprise a legal pluralist strand of social scientific explanation of law. A second, and perhaps more familiar strand is represented by the legal realists, who propose that social scientific investigation be employed to make sense of the decisions of particular legal actors, especially judges. See B. Leiter (2007). Legal pluralist views will be taken up in Chapters 1 and 2, and legal realist views in Chapters 5, 6 and 7.

agreement in the uses of the concept of law and intuitions about what does and does not count as law.¹⁰ They argue that instead of agreement we find disagreement, and such disagreement dooms conceptual analysis, and so analytical legal theory, from the start. Fourth, there are those who argue that analytical legal theory, and again, conceptual analysis of law, have not kept pace with developments in analytic philosophy more generally and epistemology in particular. Brian Leiter, for example, has offered sustained argument that the conceptual arguments of Hart and Raz have failed to learn the lessons we can gather from W.V.O. Quine's criticisms of core ideas in analytic philosophy, especially its reliance on an analytic-synthetic distinction.¹¹ Leiter argues that there can be no reliable *a priori* knowledge about law, and certainly no reliable appeal to shared intuitions about the instances of law. Instead, he argues that the only proper way to judge conceptual claims about law is to see which of these figure in the best social scientific theories of legal phenomena.

The state of contemporary legal theory is thus marked by rejection of a particular conception of analytical legal theory, which arrives in the context of general disagreement over the best method to explain law. A newcomer to scholarly investigation of the nature of law might well be perplexed and not a little troubled by this situation. Must we really abandon the goal of analytical jurisprudence? Might there be some way to achieve something very like that goal by adoption of new methods? This book aims to save the heart of the goal of analytical jurisprudence, and to preserve some of its methods, while reframing the goal and reforming those methods to account for criticisms whose merits cannot be rejected. To do so, I will advance two general theses. First, while analytical legal theory and conceptual analysis of law have often been taken to be the same thing, they are not co-extensive; the association is a false one. Here I shall attempt to show that while conceptual analysis may form an element or perhaps the beginning of the theories of Hart and Raz (as some of their self-characterizations tend to support), conceptual analysis is certainly not the whole nor, by any means, the ultimate end of their theories. Their interests in analytical legal theory – and the viability and value of analytical legal theory itself – reach well beyond conceptual analysis of the kind routinely used to characterize their theories. I shall argue instead that many of their conceptual claims, because of the manner in which they are presented and assessed, are better understood as claims of *a posteriori* necessary truths. In this way I intend to show that the pursuit of necessary

¹⁰ See D. Priel (2007) 175–6; and L. Murphy (2005) 9.

¹¹ Leiter (2007).

features of law can be maintained, albeit by methods not fully articulated or appreciated by Hart, Raz, and others.

However, there is much more to analytical legal theory, and in particular conceptual explanations of law, than identification and explanation of necessary or essential features of law. The second general thesis I will advance is the claim that a staunch commitment to the importance of necessary features of law exacerbates counter-productive divisions between analytical legal theory, moral and political theory, and social scientific investigation of law. The relative isolation of these investigations hampers the ability of legal theory¹² to account for the full richness of life under law. My thesis is that analytical, conceptual explanation of law can and must be understood to make room for the role and significance of contingent features and relations which are critical to a deeper account of the varying experiences of law in diverse communities. Once understood in this way, analytical jurisprudence can aim again at universal truths about the nature of law, composed of a combination of necessary *and* contingent features and relations. Such renewed understanding preserves the historical aim of analytical jurisprudence to provide a universal account of law while recognizing the multi-faceted nature of law (and its conceptual explanation) as a reflection of varied and varying social situations.

One key aspect of my argument deserves an early, preparatory sketch. In contrast to the focus of some analytical legal theorists on necessary conditions of law, I propose to emphasise what I have called contingent features and conditions of law, found in relations between law and other phenomena. It will be helpful to evaluation of my criticism of the necessary features approach (that is, the approach which advocates that legal theorists pursue *only* necessary features in their accounts of law) to have a sense of what I mean by a focus on contingent features and relations as an important part of a conceptual explanation of law which do not so much replace necessary conditions in an analytical picture of law as offer a fuller and more dynamic explanation of the same phenomena. Beginning with terminology, I will follow Dickson and use the terms 'necessary' (and sometimes 'essential') and 'contingent' as types of existence conditions of law. So, for example, X is a necessary or essential feature of Y if X must always be among the existence conditions of Y. Similarly, P is a contingent feature of Q if it is possible for Q to exist in some instance without the presence of P. To distinguish necessary features and relations

¹² A clarification on terminology: by 'legal theory' I mean to include all types of theorizing about law, which includes analytical jurisprudence, morally and politically evaluative theories, as well as social scientific theories.

from contingent features and relations will require argument and analysis about each particular feature or relation under consideration. While there is no general formula to follow, consideration of the following issues, among others, will be relevant in determining whether a particular feature or relation is necessary or contingent: the range of phenomena chosen to be explained (for example, if state law is the only phenomenon chosen to be explained, it might have some necessary features not present in other varieties of law; see Chapter 2), the level of analysis (for example, Hart maintained that coercion was not a necessary element of the existence conditions of *legal obligation*, but he did believe that it was a necessary condition of the existence of a *legal system*; see the concluding chapter), and most importantly, the degree to which a purported necessary feature contributes towards a misleading or distorting picture of social reality (see Chapter 8).

Consider, for example, the relation between law and practical reason. As I will explain in greater depth in Chapter 8, many analytical legal theorists follow Raz in presuming that the relation is necessary: where law exists, it necessarily claims to provide reasons for action for its subjects in the form of directives claiming authority. With this presumption in place, certain explanatory tasks follow. We must, for example, elucidate the precise nature of law's claims on our practical reason (for example, is law trying to offer us a service, or requiring us to surrender judgment over some matter?). However, as I shall attempt to show, it is more likely that the relation between law and practical reason is contingent: it might not always be the case that law operates by making claims of practical reason on subjects. Sometimes, law's creation, existence, and application have consequences for the lives of subjects but not by leaving them with decisions or choices of practical reason; sometimes, that is, law does not treat subjects as reason-responsive agents. Retroactive laws, for example, can create such conditions where law alters the lives of subjects without having given them choices, and so provide a good illustration of the contingency between law and practical reason. The next move in my argument is critical. Once the relation between law and practical reason is found to be contingent, it would be a mistake to suppose that since practical reason does not figure as a necessary feature of law, or does not stand in a necessary relation to law, practical reason ought to be removed from or ignored in our conceptual understanding of law, as Raz and Dickson and others might have it. The contingent relation between law and practical reason, like other contingent features and relations of law, is important and significant to bear in mind in thinking about law wherever and whenever it exists: wherever and whenever law exists, it is important to know that law may not leave its subjects with decisions of practical reason. Observation

of law's contingent relation to practical reason is likely as important as observation of the contingency of law's relation to morality.¹³

I believe it is possible, then, to reject analytical jurisprudence's exclusionary focus on necessary and essential features of law without abandoning altogether the method of morally-neutral conceptual explanation of law. As I shall argue, acknowledgement of contingent features and relations also forms part of the resolution of some methodological disputes which unnecessarily hinder philosophical understanding of law. I argue that on the basis of recognition of the importance of contingent features and relations, such as law's relation to practical reason, new points of meaningful intersection between analytical jurisprudence and moral, political and social scientific theories begin to emerge. More specifically, recognition of contingency demonstrates the underappreciated dependence of analytical theories of law on empirical investigation, and also identifies issues left open for political decision and moral argument. Consider again the relation between law and practical reason. Its contingency is best demonstrated through empirical observation of subjects whose lives have been altered by law without having faced a practical choice. The existence of such subjects also raises political and moral issues having to do with the circumstances under which it might be justifiable (or not) for law to operate by means other than claims on practical reason. These particular insights are obscured or overlooked when only necessary features are pursued; empirical investigation is ignored since what is necessary is not liable to change or variation (so why look?), and moral and political theory is ignored since it does not make sense to talk of what is left open for moral or political

¹³ More specifically, the contingency of the relation between law's existence and content, on the one hand, and its satisfaction or reproduction of moral standards, on the other. Consider Raz's explanation of the importance of the legal positivist separation thesis:

... it is a social fact rather than a moral fact that the law of one country or another is so and so, and no different. This aspect of the law derives from several features fundamental to our understanding of its nature: First, it explains how there can be not only good and bad law, but also law and governments lacking all (moral) legitimacy, as well as those that are (morally) legitimate. Second, it explains why we cannot learn what the law in a certain country, or on a certain matter, is simply by finding out what it ought to be. Third, it explains how two people, one believing the law to be legitimate and the other denying its legitimacy, can nevertheless agree on what it is. What accounts for these and other simple but deep features of the law is that it is a social fact, which means that its existence and content can be established as social facts are established, without reliance on moral arguments.

J. Raz (1998) 169–70. [author's notes omitted]

choice or criticism in an account of the *necessary* features of law (whereas it does make sense to raise moral or political questions regarding features or relations of law which are contingent, and so could be otherwise). If analytical jurisprudence is to combine its insights with those of complementary approaches, the prospect for continuity among approaches through identification and explanation of contingency must be pursued.

The picture of law (or ‘philosophically-constructed concept of law’, as I explain in Chapter 3) which arrives via sensitivity to contingent features and relations of law – which may be indefinite in number and whose identification and exploration depend on inquirer interests and concerns – delivers on the promise of universality, but not through the limiting exercise of hunting for necessary features and relations only, which might be relatively few and in any event encourage a kind of single-mindedness and ignorance of complementary investigations. Instead, a conceptual account of law which identifies contingent features and relations as well is richer; its recognition of the social embeddedness of law gives law’s diverse and variable conditions of existence, as well as its relations with numerous related social phenomena,¹⁴ a role in analytical legal theory which it has not yet enjoyed but must assume for analytical legal theory to make good on its claim to universality.

The chapters are divided as follows. The aim of Chapter 1 is to identify some of the most important and recent challenges to the project of analytical jurisprudence, conceived as an exercise in conceptual analysis. In particular, I will introduce in greater detail three of the objections sketched above: (a) the objection that disputes about the boundaries of the concept of law are simply irresolvable, which in turn shows that conceptual analysis of law ought to be given up; (b) the objection that conceptual analysis employs two problematic epistemological devices – a sharp distinction between analytic and synthetic truths and appeals to intuition; and finally, (c) the objection that the sheer variety of types of law makes pursuit of a single essence or concept of law meaningless. However, since these objections can be seen as criticisms of the method of conceptual analysis more broadly, this chapter begins with an account of the roots of conceptual analysis in ordinary language philosophy and its current status in analytic philosophy. This will be helpful, for subsequent chapters, in explaining precisely the sense in which not all conceptual explanations of law need to be the results of conceptual analyses of law. The category of conceptual theory has more than one possible kind.

¹⁴ For example, from coercion, social rules and morality to practical reason, the state and technology.

In Chapter 2 I assess the net impact of the objections introduced in Chapter 1. Here I argue that while parts of these challenges can be met, more importantly they reveal the need for analytical legal theorists to move beyond *conceptual analysis of law* and towards *constructive conceptual explanation of law*. Conceptual analysis attempts to uncover implicit features of a particular culture's self-understanding of law, and so is inherently conservative, while constructive conceptual explanation seeks to modify or develop new and improved conceptual explanations of law for use in characterizing and understanding the social reality of law. I shall argue that the real value of the three objections set out in the first chapter lies in how they reveal several ways in which the move from analysis to construction can and ought to be made.

Using Hart's conceptual theory of law as an illustration, in Chapter 3 I begin more positive argument. I attempt to show how analytical legal theory has internal resources enabling it to characterize law in terms of contingent features and relations, and not just the necessary features and relations it has historically sought to find and explain. I shall emphasize in particular that Hart's conceptual theory of law is best understood not as a report of some familiar intuitions about law manifested in ordinary language use,¹⁵ but instead as a philosophical construction, comprised of several interconnected theses presented to highlight important features and relations of law wherever and whenever it exists.

While a primary aim of the book is to explain the role of contingent relations and features in analytical legal theory, I still believe there is an important place for necessity claims as well. The notion of necessity involved, however, needs to be carefully explained, so in Chapter 4 I shall introduce the view that many necessary truths about law that, for example, Hart defends, are neither analytic nor *a priori* truths, but are instead best understood as claims of *a posteriori* necessary truth.¹⁶ So while I agree with Leiter that philosophers of law ought to consult the work of epistemologists and analytic philosophers more generally, it need not be the case that Quine's naturalized epistemology delivers the only, or the best, lessons. Saul Kripke's account of the separability of

¹⁵ For explanation about just how little ordinary language philosophy there is in *The Concept of Law*, see L. Green, 'Introduction', in Hart (2012) xlvii.

¹⁶ This is not to say that there is no value in pursuing a project of showing how analytical jurisprudence might seek not just necessary truths, but analytic and *a priori* truths as well. For some excellent resources, see P. Boghossian and C. Peacocke, eds (2000); C. Juhl and E. Loomis (2010); and G. Russell (2008).