SOME DOUBTS ABOUT FOLK JURISPRUDENCE: THE CASE OF PROXIMATE CAUSE

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This Essay offers a critique of "folk jurisprudence," the focus on folk understandings as a means to determine the content of the concept of law and of legal concepts. Folk jurisprudence is characteristic of some (though not all) forms of both armchair analytic philosophy and experimental jurisprudence. Folk jurisprudence gets many things right. For instance, it captures the fact that law and legal concepts are social kinds that are sensitive to the ways in which agents conceptualize them. However, folk jurisprudence gets one big thing wrong: the understandings that matter are not those of the population at large. The legal system is a governance structure characterized by an artificial, highly technical, and relatively arcane form of practical reasoning. Law is not a practice of the folk; it is a practice of an elite of experts in law—legal officials. The concept of law is not the people's concept of law. It is the concept of law of the legal officials who populate the governance structure we call "law" and make that governance structure an institutional reality. The same is true for legal concepts. Their meaning depends on their use by law's personnel. This explains why legal institutions are exposed to the risk of legal alienation. It also explains why folk concepts are not determinative of the concept of law or legal concepts and why attempts to determine the content of legal concepts by appealing to folk understandings—like Professors Joshua Knobe and Scott Shapiro's—are misguided and inevitably collapse into traditional forms of legal argument. We might want law to be responsive to citizens' views. We might also want to reduce legal alienation. Still, we should not confuse what we would want to be the case with what is in fact the case.

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Introduction

According to a relatively common view, general jurisprudence is an exercise aimed at understanding "our ordinary concept of law."[1] Despite their differences, both positivist and anti-positivist views about the nature of law commonly appeal to folk intuitions about the nature of law in order to bolster their arguments. In the case of positivism, H.L.A. Hart—perhaps the most influential legal philosopher of the twentieth

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[1] JOSEPH RAZ, PRACTICAL REASON AND NORMS 164 (2d ed. 1999).

century—argued that the main building blocks for any theory of law ought to be the intuitions of "any educated man"[2] and that the task of the legal theorist is thus to elucidate the folk concept of law. In similar terms, Joseph Raz has argued that a study of the nature of law is a study of our own self-understanding.

The focus on folk concepts and citizens' understandings is not limited to armchair reflection by legal positivists. Recent work in experimental jurisprudence has followed a similar approach and has focused on generating and collecting empirical evidence regarding ordinary individuals' conceptions about the nature of law.[3] Not just the concept of law, but concepts relevant within law, like *consent*, *causation*, and *reasonableness*—what I will call *legal concepts*—have been the subject of similar empirical studies centered on ordinary individuals' understandings. Significantly, not all projects in experimental jurisprudence regarding legal concepts have the same aims. Some of these projects are particularly attuned to, and interested in highlighting, the contrasts between legal and folk concepts. This Essay focuses particularly on the experimental jurisprudence projects that—like Professors Joshua Knobe and Scott Shapiro's work on causation, which I discuss in more detail in Part VI—attempt to understand or illuminate the meaning of legal concepts by appealing to empirical evidence about folk understandings.

One type of worry about the focus on folk concepts is that laypeople might be mistaken. According to this concern, just as we rely on the best available scientific theories and explanations in other spheres of human understanding, if we truly want to comprehend the nature of law, we ought to focus on an epistemically robust understanding of law provided by social science or some other discipline. Perhaps something similar could be said about the focus on folk legal concepts such as *consent*, *causation*, and *reasonableness*. According to this worry, using what certain (actually existing or idealized) individuals or social groups think about the nature of law or legal concepts as a marker of—or starting point for elucidating—the truth about the nature of law or legal concepts is a misguided project. Just like in other spheres of human knowledge, we should rely on our best available methodology. Whether what that method tells us is consistent or not with presumed or empirically verified lay understandings is beside the point.

While this concern is plausible, in this Essay, I pursue a somewhat different route—in fact, a route that is in important ways at odds with

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[2] H.L.A. HART, THE CONCEPT OF LAW 240 (3d ed. 2012).

[3] Raff Donelson and Ivar R. Hannikainen do not limit their analysis to ordinary people. Their study also includes experts, anticipating a potential objection similar in spirit to the argument made here.

the social scientific naturalism from which some versions of this concern start.[4] I will not question that collective understandings and shared views about law and legal concepts can be key to understanding their nature. Law and legal concepts are, after all, social kinds that are sensitive to the ways in which agents conceptualize them (Part I). Instead, I will argue that, although the nature of law and legal concepts depends on social understandings, the understandings that matter for this purpose are not those of the population at large. In this aspect, my argument is an argument against what I will call the strong version of the "folk law thesis" (Part II). The legal system is a governance structure characterized by an artificial, highly technical, and relatively arcane form of practical reasoning (Part III). That is why being a lawyer requires years of legal education, citizens consult lawyers to arrange their legal affairs, and media outlets hire legal experts and commentators to analyze legal news.

Law is not a practice of the folk. It is a practice of an elite of experts in law—legal officials, i.e., the agents who collectively contribute to the construction and determination of legal content in any given jurisdictions, including judges, members of the legal profession, and even legal scholars.[5] The concept of law is not the people's concept of law. It is legal officials' concept of law because legal officials, the personnel that inhabit the governance structure "law," make that governance structure a realized, practical institutional reality. The same is true for legal concepts. Their meaning depends on their use by law's personnel (Part IV). This explains why legal alienation is an endemic risk to legal institutions (Part V).

In order to give a more concrete grounding for my argument, in Part VI, I take Knobe and Shapiro's recent work on proximate causation as a useful testing ground for the ideas developed in Parts I through V. As I will argue, while Knobe and Shapiro's project of preserving a distinct role for proximate cause in tort doctrine is valuable, their work shows some of the shortcomings of folk jurisprudence. In particular, their argument promises an empirically grounded method for resolving

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[4] As it will become clear, unlike the social scientific naturalism of the previous objection, my argument is more interested in what Sally Haslanger calls *manifest concepts* (the concepts that play a role in law's discursive practice and in its propositional content) than in what she calls *operative concepts* (the concepts that are, actually—and sometimes deceivingly—in the driving seat of our social practices). Importantly, whether the manifest and operative concepts in legal practice diverge is an open question—one that has been the focus of traditional disputes between the varieties of legal realism and its opponents.

[5] *See* MATHIEU DEFLEM, SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION 181 (2008).

disputes about legal concepts like proximate cause by resorting to folk judgments but ends up relying on some of the most traditional and old-fashioned methods of legal reasoning: fit, taxonomy, and epistemic authority. This raises the question: What, if anything, can folk understandings contribute to ascertaining the content of legal concepts?

Finally, a clarification: my general argument addresses the focus on folk understandings of both *law* and *legal concepts*. While the concerns raised by these two different projects are not exactly the same, throughout my argument I address concerns raised by both types of projects indistinctly—but try to explicitly note whenever a difference between them might be relevant. More importantly, as my focus on Knobe and Shapiro's work suggests, I am particularly concerned with folk jurisprudence as applied to legal concepts—and most of all with folk jurisprudence as a means to unpack the meaning of those concepts.[6]

I. Law and Legal Concepts as Social Kinds

Law is a social kind. A kind is social, as opposed to natural, when the conditions for kind membership—in this case, the conditions for some social practice to count as *law*—include social properties, relations, and facts. Precisely, whether a legal system exists, whether under that system an individual owns something, what legal ownership allows that individual to do, and whether that individual can transfer their property, for example, are all questions of social—as opposed to brute—fact. Both the concept of law and the legal concepts used by lawyers exist, if they do, because of the occurrence of certain social facts. Without groups of people doing certain things and interpreting and labeling those things in certain ways, legal facts simply cannot obtain. Law is a social practice partly shaped, as such, by what those who participate in the practice understand it to be. Our conceptual schemes and images about law affect our legal practices, how we identify the law and ascertain its content, and how we apply legal rules and doctrines. All of this affects the nature of law and of legal concepts.

Another way of putting this idea is that legal practices, like social practices in general, do not exist independently of the way we think and talk about them. What law is depends, to a large extent, on what certain agents think. The same is true about legal concepts. When law regulates behavior, it imposes new status on the behavior it regulates. Legal concepts such as *property*, *crime*, and *contract* are the upshot of human beings' conceptual activities within law. This means that understanding legal concepts requires understanding how they are used by actual

[6] Again, some forms of folk jurisprudence—such as those aimed at determining ordinary meaning and the divergences between legal and ordinary concepts—are unproblematic on my account.

agents. Both the concept of law and legal concepts are thus not just a description of independently existing social practices. They also contribute, through their use and adoption by individual agents, to constitute and structure those practices.

Now of course individual agents can be mistaken about the concept of law or about legal concepts. We might be collectively self-deluded about these concepts and their operation. Our cognitive abilities are fallible. We might also be confused, have a partial understanding of legal practices, or lack specific knowledge relevant to specific questions about law and legal concepts. But, even in these cases, the mistakes of the relevant agents will have an impact on law and legal concepts.

Consider the notion of a *legal fact*. A legal fact is a fact about the existence of a legal system or its content. As Scott Shapiro—whom I closely follow here—explains, "[i]t is a legal fact . . . that Bulgaria has a legal system . . . [and] that the law in California prohibits driving in excess of 65 miles per hour."[7] These legal facts are not ultimate facts; they only obtain in virtue of some other facts. In both examples—*Bulgaria has a legal system*, and *the California speed limit is 65 miles per hour*—the explanation as to why those facts obtain would have to refer to other more basic facts, and those facts would include the conceptual and inferential practices of individuals. While positivists and non-positivists disagree about whether moral facts are part of the basic facts that ground legal facts, they agree that social facts, including facts about the conceptual and inferential practices and activities of certain agents, contribute to ground legal facts. Legal facts are thus institutional facts as opposed to brute facts—they depend on human representations and conceptual practices. This is true about facts embedded in social practices in general: their meaning can only be made explicit by looking at human activity.

All of this becomes particularly evident when we consider law as an actually existing governance regime or an actually operating social practice in a specific jurisdiction. How law operates in practice, in any given society, depends on the human representations and conceptual activities of those involved in the practice. Understanding American law as an existing practice with effects on social life, thus, requires turning our attention towards the people whose activities and patterns of reasoning make American law an operative governance regime. This is, I believe, a plausible interpretation of the familiar idea of *law in action*.[8] But even *law in the books* depends on legal reasoners' activities and

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[7] SCOTT SHAPIRO, LEGALITY 25 (2011).

[8] *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

forms of reasoning.

All of this offers a partial vindication of folk jurisprudence. It shows that the experimental jurisprudence project is correct in focusing on the views of individuals as a means to understand legal concepts and the concept of law itself. If we want to understand legal concepts and the concept of law, and particularly if we want to figure out how law and legal concepts operate as a matter of social fact, it is sensible to try to ascertain what the actual representational and conceptual practices of certain agents are. The focus on folk concepts, thus, might seem to be vindicated. However, this is only a partial vindication. The claim that the concept of law and legal concepts are dependent on the actual mental representations, understandings, and activities of certain agents is entirely correct. At the same time, that claim is entirely neutral as to the identity of those agents. Thus, while the practitioners of experimental jurisprudence might be right about trying to look at and figure out the conceptual practices of *a* population, they could be wrong about the specific populations on which they have focused. In other words, they could be wrong about focusing on *folk* understandings and concepts.

II. The Folk Law Thesis

It is worth distinguishing between two assumptions that seem to underlie the focus on folk understandings of law and legal concepts. One assumption is that the nature of law and legal concepts depends—whether entirely or partially—on individuals' representations. This first assumption, as I have argued, is basically correct. The other assumption is that the concept of law and legal concepts depend—whether entirely or partially—on potentially *all* individuals' representations in any jurisdiction, without any distinction. The second assumption is connected to the folk law thesis.

According to the folk law thesis, laypeople's ordinary concepts are at the root of many important legal concepts such as *intent*, *knowledge*, *consent*, *reasonableness*, and *causation*. Under this thesis, for instance, the legal concept of *proximate cause* is best understood as an application of the ordinary, folk concept of causation.[9] Legal cognition, under this view, is closely associated with, and based upon, ordinary cognition. Thus, if we want to know how legal reasoning and legal concepts work, we should study whatever empirical evidence we can gather about the ways ordinary people think about the cognate ordinary concepts.

The folk law thesis is open to two interpretations. In its weak version, the folk law thesis says that many or perhaps even most legal concepts are not *entirely* distinctive, that they draw in some way on, or

[9] *See infra* Part VI.

are somehow related to, ordinary concepts. In its strong version, the folk law thesis states that legal concepts are, at the most basic level, just expansions or determinations of ordinary concepts.

The strong version of the thesis is implausible. We know that there are important incongruities between ordinary and legal understandings of concepts that play a relevant role in legal practices.[10] Moreover, very early on, analytical positivists were aware of the possibility of legal officials and the population at large having divergent attitudes towards law and legal rules.[11] And much work in experimental jurisprudence stresses the relevant differences between legal and ordinary usages of notions like *intentionality* and *consent*.

Thus, I will ignore the strong version of the thesis, which is mostly a strawman and would be rejected by practitioners of analytic and experimental jurisprudence, and instead focus on the weak version. The weak version, unlike the strong version, is highly plausible and in fact—I would venture—true. But it is trivially true. While there might be a certain connection between ordinary concepts and their legal cognates, it is the legal concepts and not their ordinary versions that are employed within legal practice. In fact, it could very well be the case that ordinary views are in many cases aligned with legal reasoning. But, as Anthony Sebok argues, alignment is not enough. There are questions that ordinary reasoning, even if aligned with legal reasoning at a broad level, cannot resolve by itself. To answer those questions, specific legal forms of reasoning are required. Ordinary reasoning, in simple terms, underdetermines the detailed questions with which legal institutions must deal. As I will argue in Part VI, Knobe and Shapiro's argument regarding proximate causation shows exactly this.

The relative indeterminacy of ordinary thought and the resulting need for further legal determination is a relatively uncontroversial observation. Classical natural law theorists were keen to highlight the need for specifically legal determination of questions that were left open by moral reasoning.[12] Kantian legal theorists are also familiar with the idea that some normative demands can only be fully articulated in specifically legal institutions and forms. Finally, Hartian positivism's notion of a rule of recognition (a rule about rules, which allows us to figure out which primary rules of behavior are valid rules of any legal

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[10] Regarding intentionality, *see* Markus Kneer & Sacha Bourgeois-Gironde, *Mens Rea Ascription, Expertise and Outcome Effects: Professional Judges Surveyed*, 169 COGNITION 139–46 (2017).

[11] *See* HART, *supra* note 2, at 117.

[12] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284–89 (2d ed. 2011); Tony Honoré, *The Dependence of Morality on Law*, 13 OXFORD J. LEGAL STUD. 1, 2–4 (1993).

system)[13] is a reminder of the fact that law as a complex governance system generates the emergence of a specialized group of experts,[14] whose technical and specialized judgments might diverge from those of the population at large.[15] Given this relative indeterminacy of ordinary thought, there is only so much that empirical evidence about ordinary reasoning can tell us about distinctively legal reasoning and the concept of law.

Of course, sometimes what is legally correct turns on questions of ordinary, public, or plain meaning. In those cases, the question is correctly posed as one about what ordinary individuals understand the meaning of the relevant terms to be.[16] And some legal concepts—such as *reasonableness*—invite or require the use of lay understandings to determine at least part of their extension.[17]

There is also a lot we can learn from the divergences between legal and ordinary understandings of legal concepts. In general jurisprudence, similarly, there is value in knowing lay understandings and images of law and legal institutions and how they compare to those of lawyers and judges. But in cases of divergence, we should not be deceived: the understandings that matter for law's operation, those that make law the actual social institution that it is, are those of legal officials, not those of ordinary individuals.[18] I turn to this point in the

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[13] *See* HART, *supra* note 2, at 100–10.

[14] *See* JEREMY WALDRON, LAW AND DISAGREEMENT 36 (1999).

[15] *See* John Gardner, *Law in General*, *in* LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 270, 284 (2012).

[16] This type of question also lends itself to corpus linguistics analysis. On this method and its theoretical and practical limitations, *see generally* Anya Bernstein, *Legal Corpus Linguistics and the Half Empirical Attitude*, 106 CORNELL L. REV. (forthcoming 2021); Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, Note, 2010 BYU L. REV. 1915 (2010); Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311 (2017); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020); Kevin Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE (Mar. 5, 2021).

[17] I say "at least part" because reasonableness, for instance, arguably contains a prescriptive element the determination of which ought to be sensitive to normative, rather than factual, considerations about what counts as reasonable. To the extent that reasonableness contains—as Tobia suggests—a prescriptive element, how ordinary people, jurors, or actually existing judges would determine whether someone has acted reasonably is not evidently or non-problematically determinative of what ought to be considered reasonable.

[18] *See* Gerald J. Postema, *Conformity, Custom, and Congruence: Rethinking the Efficacy of Law*, *in* THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 45, 51–52 (Matthew H. Kramer et al. eds., 2008).

next two parts.

III. Law as a Governance Structure

The previous paragraph might seem to suggest an elitist view about law and legal concepts. Later on, I will explain why my view is not based on a normative judgment about this feature of legal institutions. Before, however, I want to explain why the view is to some extent inevitable once we consider the structure and operation of contemporary legal institutions. The view, as I will try to show, follows from relatively uncontroversial observations about contemporary legal systems.

The legal system is a governance structure. It is an institutional apparatus specifying procedures and norms for coordinated behavior. Given the complexity of contemporary societies, the institutional apparatus is not just a set of primary norms of conduct.[19] It crucially includes procedures and norms that allow societies to adapt their rules, detect compliance with them, apply them to specific cases, and enforce them in cases of violation. The rules that we see in constitutions, statutes, codes, and published decisions are not, however, an actually operating legal system.

An operating legal system is the institutional structure, inhabited by particular individuals—in the United States, for instance, federal and state judges, legal bureaucrats in administrative agencies, the professional bar, etc.—in charge of interpreting, applying, and enforcing legal norms, operating against a specific social and physical background. The American legal system is not just the body of American legal rules, doctrines, and precedents. It also includes a social apparatus in charge of legislation, regulation, adjudication, and enforcement. The social apparatus is populated by public officials, judges and lawyers and is applied within a circumscribed social and physical space.

In other words, law's operation involves a specialized body of personnel in charge of identifying, applying, and enforcing the law.[20] Given this fact, how any legal system operates depends in part on who populates it and fills out specific institutional positions within it. As Lewis Kornhauser writes:

> How a governance structure will function depends in part on who populates its roles. An environmental protection agency operated by Franciscan monks will operate differently from an environmental protection agency populated by Harvard MBAs. Recent events vividly illustrate

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[19] *See* HART, *supra* note 2, at 91–99.

[20] *See* WALDRON, *supra* note 14, at 36.

> this importance: the governance structure of the United States functions very differently under the Trump [a]dministration than under the Obama administration.

The past few years in American political and legal institutions, as Kornhauser suggests, offer a glimpse of this phenomenon. But the phenomenon is not new. For instance, it is almost a commonplace thought in contemporary comparative law that the same rules can operate differently when situated in different legal systems.[21] Part of the explanation is that those applying the rules in different legal systems differ from each other in important ways. Law is as much an input to legal decision-making as the output generated by the activities of legal interpreters.[22]

This has an important implication. Consider the fact that institutions affect the way we see the world. Law, in particular, can change the normative status of behavior and individuals' expectations about it. As Francesco Guala explains, for instance, given that the British rules of traffic prescribe driving on the left, people there expect drivers to keep left; given that we have a system of private property, we do not expect our neighbors to freely use our backyard for their own parties; etc.[23] By regulating behavior, law generates new meanings, statuses, and labels for that behavior. But legal rules are not self-applying.[24] While legal rules are the creatures of legal institutions,[25] legal rules are only applied through the mediation of the individuals who populate and have decision-making power within legal institutions. Existing and effective legal institutions depend on the activities of their personnel. The law, as John Gardner writes, "exists only when there are law-applying officials with the authority to rule on particular matters in purported application of the legal rules."[26] So, when legal institutions change the way we see the world, they do so through the mediation of its personnel. Whether an agreement counts as an enforceable contract,

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[21] For a philosophical perspective, *see* Fernando Atria, *The Powers of Application*, 15 RATIO JURIS 347, 351 (2002).

[22] *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 818–19 (1987).

[23] *See* FRANCESCO GUALA, UNDERSTANDING INSTITUTIONS: THE SCIENCE AND PHILOSOPHY OF LIVING TOGETHER 119 (2016).

[24] *See* Atria, *supra* note 21, at 352; *see also* Bernstein, *supra* note 16, at 45. *See generally* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

[25] *See* Matthew Noah Smith, *Officials and Subjects in Gardner's* Law as a Leap of Faith, 33 L. & PHIL. 795, 796 (2014).

[26] John Gardner, *The Supposed Formality of the Rule of Law*, *in* LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 195, 209 (2012).

whether a certain asset can be owned, and whether an enrichment is unjust and leads to restitution, for example, are all institutional facts the existence of which depends not just on bare institutional norms and texts but also on the discursive and interpretive activities of law's personnel around those norms and texts. The interpretive approaches and the technical distinctions and conceptualizations lawyers use to interpret the law change the legal implications of legal texts.[27] The implication is that how law treats any given activity depends on the frameworks, perspectives, and ideas of the law-applying officials.

All of this might seem relatively evident, but it raises the question of what—if anything—folk understandings of law and legal concepts are supposed to teach us about law and legal concepts. If the realization or actual operation of legal texts and norms requires implementation by a certain group of individuals, and the identity, attitudes, and habits of that group determine the exact contours of that operation, then that group of individuals is the subset of the population at which we should be looking. Questions about the concept of law and legal concepts might be illuminated by armchair speculation about certain agents' intuitions or by empirical evidence about their actual views—but only to the extent those agents are involved in the interpretation and application of legal concepts and, more broadly, in the operation of the legal system.

There are three potential objections to this argument. The first objection is straightforward: there must be some congruence between lay and official understandings or else the legal system will lack sociological legitimacy and, potentially, efficacy. The law must play a role in citizens' actual deliberations, and citizens' views must find some way to affect law. Otherwise, it will be perceived as illegitimate and might ultimately end up being unable to control and orient behavior.[28] This is all true, and it would be implausible to argue that a legal system could be efficacious or legitimate in the long-term with widespread divergences between citizens' and legal officials' views. But note that this argument relies on the previous observation—that what law and legal rules look like in their actual operation depends on the activities, attitudes, and practices of legal officials. The argument is that there must be an alignment between legal officials and the citizenry at large because we acknowledge that legal officials are in the driving seat. If lay

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[27] While the interpretation-construction distinction is not the topic of this Essay, I believe the distinction is compatible with the argument I am making here. On that distinction, *see generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L. REV. 1095 (1995).

[28] *See* Smith, *supra* note 25, at 806.

understandings were driving the application and ultimate meaning of legal rules, the demand that the views of legal officials ought to align with those of ordinary citizens would be meaningless. The objection, then, rests on an acknowledgment that legal officials' understandings are what ultimately counts, descriptively.

This, admittedly, is a response to the sociological legitimacy concern but leaves concerns about efficacy relatively untouched. According to the latter concerns, too radical divergences between lay and official understandings might entail the inefficacy of legal governance. If the citizenry at large ignores legal officials' activities and the legal system's norms, the legal system might simply cease to be effective. Legal positivists have been keen to stress that a legal system must be effective across the general population to count as genuinely legal. Yet the general population can perfectly follow the law's mandates as a standard of behavior even though it does not have a deep understanding or commitment to its rules. A general habit of obedience and even an internal point of view towards law are compatible with fear, blind acquiescence, conservatism, or ideological pretense being the underlying cause for these attitudes.[29]

Even without habits of obedience and an internal point of view—even, that is, when the population at large breaks the law routinely or ignores the law in their practical deliberations—the legal system might still exist as a powerful and efficacious tool of domination and control.[30] In more normal times, the efficacy of the legal regime is probably explained by a combination of both virtuous and disturbing mechanisms with the latter including domination, fear, and blind acceptance. The explanation for a relative ignorance of legal meanings and concepts need not be, however, sinister. It can also be part of what Peter Birks called a "democratic bargain:" as citizens, we let a class of legal experts interpret the law based on an understanding that we can always claim control through democratic law-making. This allows for an efficient division of labor that lets us devote our time and energy to more

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[29] *See* HART, *supra* note 2, at 61.

[30] As Adams writes when he criticizes Hart's account of legal efficacy:

> [A] legal order does not cease to be effective just because large numbers end up behind bars or subject to other kinds of penalties. If it did, the United States of America, a country whose per capita prison population remains the highest in the world, would be, to the extent that it engages in the practice of incarceration, inefficacious. No one, however, doubts the effectiveness of that legal regime and a large part of the reason for this has to do with its capacity for enforcement.

personally valuable pursuits than learning the law.[31] This might sound anti-democratic for those who see popular sovereignty as the constitutive basis of law. But, as I will argue below in Part V, it only takes a quick a look at our actually existing legal regimes to note that this official-centric conception of law captures something true about contemporary legal systems.

According to a second objection, law does not govern behavior exclusively through the mediation of legal experts and legal officials. Law is also a matter of self-application by citizens and firms, without legal mediation. In fact, in many cases this self-application is all that effective legal governance requires and can achieve in practice. While this observation is true, it is relevant to understand that cases of self-application—e.g., driving under the legal speed limit, filing your income tax declarations by the legal deadline—only exist against a backdrop of a complex set of institutional facts. We know what the speed limit is and when to file our taxes because there are certain conventions, validly enacted statutes, regulations, and techniques—both discursive and physical—applied by legal officials that convey institutional facts about maximum speed limits and tax filing deadlines. There are also informal social practices that communicate these facts. Without the complex set of institutional and official arrangements, a sign with the terms "60 MPH" by the side of a road, for instance, would tell us very little. Official application—and complex patterns of official application—is therefore the prelude to self-application.

The third objection argues that, while legal officials might be in the driving seat for determining the meaning of legal concepts and the actual structure of law as a realized regime, they are human beings, just like everyone else. This claim, in its stronger form, denies that there is anything distinctive about legal reasoning. Legal reasoning is just reasoning *simpliciter* by agents acting within legal institutions. I do not think this claim is true, but even assuming it is and that there is no distinctive set of techniques and conceptual practices associated with legal reasoning, legal officials are not a random sample of the general population. They are a very specific subset of the population, selected under fairly regulated procedures, for jobs not everyone is interested in performing. Once selected, legal officials inhabit social, cultural, and physical spaces they share with other legal officials: bar associations, law schools, agencies, courts, judicial associations, law institutes, etc. It would be surprising if these officials did not have certain habits of thought and talk that diverged from the population at large. No

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[31] For more on this in the criminal law context, *see* John Rappaport, *Some Doubts about "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 751–54 (2020).

assumption of a specifically legal form of reasoning is required to see this.

In the end, of course, whether there is a divergence between lay and legal understandings in any given society is an empirical question. Experimental jurisprudence can shed light on this issue—but this project is a comparison between legal concepts and ordinary concepts, not an *a priori* assumption that they must coincide or that ordinary concepts hold the key to understanding legal concepts. In fact, given how contemporary legal systems are structured and how they operate, it would be surprising if there were identity between ordinary concepts and their legal cognates.

This response, however, assumes there is in fact nothing distinctive about legal concepts and legal language. That is not an assumption we should make, as I argue in the following section. The concepts and language of legal officials are, in fact, distinctive.

IV. Legal Thought and Talk

Legal language is replete with technical terms. As Frederick Schauer explains, some terms are technical because they do not even exist in the domestic language: *quantum meruit*, *laesio enormis*, *assumpsit*, *habeas corpus*, etc. Other terms are technical because, although they might exist in something that looks like the domestic language, they have no ordinary meaning: *interpleader*, *letter rogatory*, *desuetude*, etc. Finally, some terms resemble ordinary words, but have divergent, specialized meanings: *contract* is perhaps the clearest example.

Given that both internal legal concepts and law as a whole are institutional facts that depend on agents' conceptualizations of them, we should look at the experts in the technical terms and in law as a whole and consult their views to understand the relevant concepts. If the relevant project is one of figuring out human understandings to determine the nature of the concepts, some people's understandings are more relevant than others': the relevant data to consider are the views of judges and other legal officials who can make authoritative legal determinations.

To avoid any misunderstandings, this claim is not a version of the expertise objection to some projects in experimental philosophy. According to the expertise objection, philosophers are experts on philosophical issues and their ability for intuition-based analysis might be considerably higher than the general population's. Therefore, experimental evidence about ordinary individuals' biased or otherwise mistaken intuitions or reactions to hypothetical cases is insufficient to undermine philosophers' reliance on their own intuitions regarding

hypothetical cases. The argument I am making, instead, is that law and legal concepts are not identical to their ordinary language equivalents, and that therefore experimental evidence about ordinary individuals' use of legal concepts is basically irrelevant to understand those legal concepts—even if lay individuals might be experts about the cognate ordinary concepts. Legal discourse can only be fully understood by those with specialized training, a training that does not just encompass technical terms and locutions but habits, expectations, cultures, and values.

There is, of course, a long tradition of criticisms against this professional elitism—a tradition that includes Locke, Bentham, and Kant. But professional elitism is a persistent trait of the social division between lay people and legal professionals which is characteristic of modern Western law, whether we like it or not. For modern Western legal systems, at least, law is a traditional language with its own peculiarities that are not fully grasped by the layperson.

Now, of course, in many instances legal rules ask us to consider ordinary usages, meanings, and concepts. And there might be reasons for judges to be attentive to ordinary meaning even beyond the instances in which legal materials ask them to do so. To this extent, the use of empirical methods to verify ordinary meanings in the pertinent contexts is entirely justified. But we should not confuse this relatively limited corner of the law with its entirety. While some aspects of law might rest on ordinary meaning, while some adjudicative decisions ought to be sensitive to ordinary meaning, etc., we need to bear in mind that meaning depends on usage, and usage is always circumscribed within a specific set of social institutions and interactions. The distinctiveness of legal meaning is a specific consequence of the general distinctiveness of law as a governance structure.

Kevin Tobia has offered a response to a claim that, though different and limited to experimental jurisprudence, is closely related to the concern I have expressed. According to Tobia, this "common myth" about experimental jurisprudence is the view that experimental jurisprudence should be studying legal experts, not laypeople. According to this myth, Tobia explains, experimental jurisprudence is misguided in its choice of population because jurisprudence is a field for legal experts with legal knowledge, and therefore reliance on lay population is just a low-cost alternative to access to experts. As Tobia correctly notes, this potential objection rests on a misunderstanding because experimental jurisprudence has not "settled" for laypeople as its subjects. It has deliberately decided to study laypeople. For experimental jurisprudence, laypeople are actually more important than experts. Tobia mentions a series of potential motivations for this focus: ordinary people engage

(and perhaps should engage) with the law; under the idea of the rule of law, the law ought to be publicly available and provide fair notice to laypeople; finally, democratic considerations seem to suggest that the law ought to reflect ordinary judgments and concepts.

It is true that ordinary people engage with the law. This is particularly true about juries, but juries are, at least generally, understood as fact-finders. Understanding lay cognition about matters of fact can, of course, illuminate the activities of juries, but juries' purely factual assessments depend on—and are cabined by—legal concepts that are handed over by legal officials through jury instructions,[32] and take place within a heavily legalized structure that itself depends on the conceptual activities of legal officials. This is precisely what happens in the context of proximate cause doctrine—the jury applies a legal concept that is predetermined by the judge's and the legal culture's articulation of legal doctrine.[33] It is also true that lay people engage with the law when they self-apply it, but, again, this is only possible against the backdrop of a relatively complex and sophisticated structure populated by legal officials.

Note, too, that the two other reasons provided by Tobia are aspirational: the law *should* be publicly available and provide fair notice, and it *ought to* reflect ordinary judgments. Of course, the rule of law and democracy are central political values in contemporary societies. Yet there are two reasons to doubt this should lead to the folk focus of experimental jurisprudence. First, the fact that it would be good if something were true does not make it true. Perhaps it would be good from a democratic or rule-of-law perspective if the law were transparent, publicly available, and responsive to ordinary individuals' substantive views. This does not mean that it is. Second, and more fundamentally, whether the values of the rule of law and democracy are best served in a regime under which lay conceptions are perfectly reflected in law, and legal concepts just reflect ordinary concepts, is an open question. The answer depends on the specific conception(s) of the rule of law and democracy, empirical facts, and complex questions of institutional design. The rule of law and democracy as abstract ideals do not demand

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[32] Notably, there is a long-standing concern about the difficulties and potentials for miscommunication in jury instructions, and particularly in their (in)ability to translate legal into ordinary concepts.

[33] In fact, this is an understatement. Given that the "duty" element in tort—a legal question fully determined by the judge—requires asking questions about reasonable foreseeability, questions about proximate causation answered by juries are, in a sense, a second consideration of issues that have already been addressed by the judge.

any specific institutional arrangement.[34] Of course, they might discard certain arrangements, but one cannot simply assume that any specific arrangement (and particularly arrangements that seem so prevalent in jurisdictions we might otherwise label as democratic and in compliance with the rule of law) is in fact discarded by these values just because it fails to directly implement them.

Still, the concern that there is something potentially troubling about a regime where legal officials' concepts and understandings diverge from those of lay individuals is not misplaced. I turn to this issue in the following section.

V. Legal Alienation

By now, you might be feeling a deep sense of unease. If legal meaning can always diverge from ordinary meaning, if what the law is ultimately turns on the conceptions of the legal officials, and if both legal concepts and the concept of law itself derive from the activities and usages of that population, then it might seem law is a problematically elitist institution.

We might not be pleased with this conclusion. But at least an attenuated version of that conclusion seems to be true. The law is in fact, as Leslie Green writes, "endemically liable to become alienated from its subjects," because the constitution of a distinct body of positive law with its own separate social, institutional, and linguistic forms marks a separation between legal officials and laypeople. We see this in the very way legal education is structured and in the way in which law professors teach students the potential divergences between everyday thinking and legal reasoning. Given the separation between legal and ordinary meanings, it is unsurprising that there is a long history of folklore about the absurdity and mechanical distinctions of law. The more detailed and sophisticated legal materials and distinctions become, the more ordinary people will find it hard to know and identify with the law.

This is a process of legal alienation. And of course significant degrees of legal alienation will undermine the sociological legitimacy of the legal system. Law generates all sorts of good things, but law's efficacy comes at the expense of significant moral risks. These risks include the possibility of citizens acquiescing to legal rules in a sheeplike manner and the appropriation by legal officials of the institutional apparatus for their own benefit. Those who are in charge of recognizing, interpreting, and applying the law may use this distinct position for their own benefit and to the detriment of everyone else. Legality is both

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[34] For instance, whether ordinary meaning-based textualism is the best approach to achieve fair notice is an open question. *See* Shlomo Klapper, Soren Schmidt & Tor Tarantola, *Ordinary Meaning from Ordinary People* (2020).

an achievement and a risk. It is particularly risky for democratic governance.

The claim is not just about law's legitimacy as perceived by citizens, the typical focus of social scientists who ask questions about legal alienation. Even when it is perceived as just, legitimate, and so on, law is always subject to appear with a certain arcane, complicated, and overly technical character. As Jeremy Waldron writes while discussing the transition from a primitive order of primary rules to a modern legal system with primary and secondary rules:

> As secondary practices of deliberation, interpretation and rule-change become established in the community, both those practices and the primary rules they validate may begin to seem increasingly distant from ordinary people's ways of life. Previously, primary rules changed through the slow modification of existing practice; now, the rules may change through deliberate discussion and decision, and it will be for the first time an open question whether ground-level practice is able to keep up with this change.[35]

Because of this, in the relatively complex legal systems of contemporary societies, access to law, knowledge of legal facts, and so on, are mediated by legal professionals. All of this generates concerns about law's technicality and its obscurity for the general public, many of which were highlighted by Bentham's critique of the common law and, earlier, by Hobbes's attack on the idea of law's artificial reason. Some of these concerns might lead us to, in Savigny's vein, wish and strive towards a connection between legal technique and the concerns of the *Volk*.

From this perspective, knowledge about the disparities between folk conceptions and legal conceptions is valuable. The divergence, however, is not determinative of what we ought to do in response to it: folk concepts can be tribal, cruel, and biased. The fact that, in these circumstances, legal cognition is not simply reflective of ordinary cognition offers, perhaps, a less disheartening aspect of legal alienation.

Be that as it may, the very concept of legal alienation is based on the acknowledgment that legal meanings can diverge from ordinary meanings. And the broader recognition that law as an institutional structure might be put to uses that are antithetical to the preferences and judgments of the citizenry at large rests, as well, on the acknowledgment that what law looks like and what it is depend, crucially, on its personnel's conceptions and images. The attempt to

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[35] Jeremy Waldron, *All We Like Sheep*, 12 CAN. J.L. & JURIS. 169, 178–79 (1999).

democratize law or to bring it closer to ordinary judgments might sometimes be justified—but it is an attempt that is premised on the fact that an elite's understandings determine the meaning of both law and legal concepts. Because of this, lay understandings are neither indicative nor determinative of the concept of law or of legal concepts. In the next Part, I use the concept of proximate cause as an example.

VI. The Case of Proximate Cause

Under the doctrine of proximate cause, tort law typically insists on a certain connection between the defendant's faulty behavior and the plaintiff's harm—a connection that goes beyond but-for causation. It is not enough for the harm suffered by the victim to be the effect of the defendant's behavior. It must also be the type of harm that the defendant had a duty not to cause. In practice, this means that the causation inquiry is not limited to purely factual questions but also includes normative considerations, such as "whether the causal relationship was sufficiently close or predictable to justify liability."

Criticism of the doctrine of proximate cause is, as Jessie Allen puts it, "nearly as old as the doctrine." And many commentators seem to agree with Leon Green's claim that the doctrine of proximate cause was just judicial jargon covering up policy judgments. Given these and other concerns about the adequacy of proximate cause as a category, the American Law Institute's Third Restatement generally avoids the language of proximate causation, using instead the term "scope of liability."[36]

This is the context in which Knobe and Shapiro intervene with *Proximate Cause Explained: An Essay in Experimental Jurisprudence*. As they explain, the doctrine of proximate cause seems to be caught between two inadequate extremes: formalism and realism. The formalist view, according to Knobe and Shapiro, takes the language of proximate cause too seriously, treating it as just another type of factual inquiry. The formalist view leads to an obfuscated analysis, potentially inconsistent outcomes, and, if applied consistently, a tension with intuitive notions of justice. Yet the realist alternative also seems implausible: for the realist, proximate cause is just a smokescreen for moral judgments.

Knobe and Shapiro want to offer a third alternative, one that arises out of a more discerning account of moral judgments and their relationship to judgments about causation and which is based on the way in which ordinary judgments about causation work. According to this alternative, the endpoint of the causation inquiry is a judgment as

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[36] AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM 6 Spec. Note, §29 (2010).

to whether the defendant should be held liable. One step along the path to get at this judgment is a judgment about whether the defendant's behavior was the proximate cause of the plaintiff's injury. But this judgment is, in turn, influenced by a previous moral judgment about the moral status of the defendant's behavior. Thus, moral judgments about the defendant's behavior lead to judgments about proximate causation, which then lead to a conclusion regarding liability.

The starting point for Knobe and Shapiro's argument is thus a systematic set of empirical evidence about ordinary individuals' judgments about causation and morality. According to that evidence and to the model that they build on the basis of it, while in ordinary reasoning moral considerations—such as considerations regarding the (ab)normality of the agent's behavior—play a role in explaining judgments about causation, judgements about causation also have an impact on moral judgments about whether the agent should be held liable.

If successful, this type of approach would chart a middle course between realism and formalism about proximate cause. The argument for the approach could follow several strategies: one could argue that this approach is optimal from a social welfare perspective; one could argue that it is the correct approach given the demands of interpersonal morality, justice, or some other dimension of fairness broadly understood; or one could, in the vein of traditional doctrinal analysis, argue that it offers an accurate reconstruction of the law. Knobe and Shapiro's argument follows, broadly, the last approach. They argue that "the only way to know whether this new model is correct is to look at actual legal decisions and legal doctrines." The upshot of this analysis, according to Knobe and Shapiro, is that "[l]egal judgments of proximate cause . . . actually are best understood as application of the very same criteria one finds in the ordinary folk concept."

There is a lot that could be said about Knobe and Shapiro's suggestive argument. As they maintain, it does seem that both realism and formalism have a hard time accommodating certain cases and judicial decisions regarding proximate cause. Whether realism and formalism are the only games in town or the most compelling alternative views about proximate causation, however, is a question that Knobe and Shapiro leave unanswered. It is also, coincidentally, a question that plausibly could be answered by doctrinal experts, such as those in charge of the Third Restatement.

Let's ignore this issue for now. Knobe and Shapiro's "sandwich" model of proximate causation strikes me as quite plausible. Yet whether I or any other individual legal scholar find the test plausible is relatively irrelevant. What matters is how we should decide that this is the correct

way to think about proximate cause in tort doctrine. Significantly, Knobe and Shapiro argue that the "key test" to evaluate the correctness of their proposal is whether it fits existing doctrine. Knobe and Shapiro assert that a systematic analysis of the entirety of the relevant case law would be beyond the scope of their argument, and therefore restrict their analysis in several ways. They (i) focus on proximate cause in the tort of negligence; (ii) explore the cases contained in *Prosser and Keaton on the Law of Torts*; and (iii) limit their argument to the doctrines of intervening causation and concurrent causation.

Here lies the crucial point. While the starting point of Knobe and Shapiro's model is, in their words, a "new approach to resolving jurisprudential controversies," at the end of the day the methods they employ to evaluate the success of their model are fairly old-fashioned: the evaluation of theories by asking questions about fit with extant doctrine, the use of taxonomical distinctions found in traditional legal doctrine, and reliance on doctrinal authority. Thus, it seems that, contrary to Knobe and Shapiro's original promise, folk jurisprudence does not offer a new approach to *resolve* legal controversies. While folk jurisprudence is the starting point for their model, Knobe and Shapiro end up acknowledging that the ultimate test for their model as an account of the legal concept of proximate cause is a fairly traditional one—one that, crucially, admits that ultimately the best theory about the content of legal concepts depends on the understandings of legal officials and experts.

A different way of stating this point is that the success of Knobe and Shapiro's theory is independent from its basis on folk understandings. Let's assume the "sandwich" model is already reflected in the case law (as identified by Knobe and Shapiro). If that is the case, what does evidence about ordinary individuals' cognition contribute to the doctrinal project of producing an adequate theory of proximate cause? One answer is that provided by Knobe and Shapiro: the model fits the case law. But then it's hard to see what role empirical evidence about folk views of causation is playing in the argument. Conversely, if someone claimed that the model does not fit the doctrine or that it does not offer an adequate reconstruction of it, the fact that it reflects ordinary judgments would be an immaterial answer to that critique. Folk judgments are neither here nor there when the project is understanding legal concepts.

One potential response Knobe and Shapiro might offer is the following. They might argue that what a theory about proximate causation needs to fit is not the legal concepts and categories around proxime causation, but rather the outcomes of particular cases. From this perspective, their theory is successful as an account of case

outcomes, which can be explained by reference to lay intuitions without the mediation of technical legal concepts.

While this response is plausible, it rests on the assumption that judges use the law's categories and concepts as *post hoc* justifications for decisions that are entirely driven by lay cognition. Judges, under this view, would use legal concepts and categories but end up in the place that folk concepts lead to because, in the end, they are *just* using folk concepts. This means that an analysis like Knobe and Shapiro's can only succeed if one starts from a skeptical premise: the premise that legal concepts like "proximate cause" are empty vessels. If that is the case, then Knobe and Shapiro are far from offering a middle path between formalism and realism. Instead, they would end up offering a classical realist argument that explains case outcomes by reference to judges' ordinary moral judgments.

Note, moreover, that Knobe and Shapiro's response cannot be that the existing doctrine was too indeterminate and that the empirical evidence about ordinary individuals' reasoning contributes to give a more determinative decision procedure in tort cases. In fact, the opposite seems to be true: ordinary judgments underdetermine many cases that are part of the central concerns of tort law. And this makes sense. Many of the questions law has to answer, as I argued above, lack an answer in ordinary reasoning.

The upshot of all of this is that Knobe and Shapiro's "sandwich" model could very well be the best way to understand proximate cause even if it didn't reflect lay intuitions. Equally, the fact that the model captures lay intuitions is toothless as a consideration in favor or against its adequacy as a theory of the doctrine of proximate cause. Whether the law ought to track ordinary judgments is an open normative question that, presumably, depends on the specific areas of law we are dealing with and the specific judgments at stake. My own view is that there is no *a priori* reason for believing that legal concepts ought to mirror ordinary cognition. One of the great contributions of law to social life is that it can provide an artificial, determinate normative order that transcends ordinary judgments and settles many of the questions unaided reflection leaves open. Still, at least descriptively, it seems relatively clear that ordinary intuitions and judgments do not determine the meaning or content of the concept of law and legal concepts. Knobe and Shapiro's contribution—which starts with empirical evidence about ordinary judgments but ends in a doctrinal argument about fit, taxonomy, and authority—is the best example of this.

Conclusion

Jurisprudence is sometimes pictured as a process of collecting and

explaining truisms about law. If this is what it requires, then we have to identify the truisms that those who have a good understanding of legal institutions take as such. The same is true for legal concepts. Perhaps, the concepts are connected to ordinary cognate concepts. Perhaps, in certain cases, judges might have to consult ordinary concepts and meanings because legal rules direct them to do so or because this is required by the correct theory of interpretation or adjudication. There is value in asking questions about folk cognition. There is value in the project of comparing folk concepts to legal concepts. Experimental jurisprudence is a promising project in this regard.

Yet we should not confuse these valuable questions with the project of discovering, ascertaining, or arguing for the content of the law or of legal concepts. In the particular case of experimental work around lay judgment and cognition, such work can in many instances be valuable—but not always, and particularly not as a means to understand the content of legal concepts. We should cherish the developments in experimental jurisprudence and use them for multiple legitimate goals. But, as Knobe and Shapiro's argument ends up showing, determining the meaning of legal concepts is not one of those goals.

Both legal philosophy and legal reasoning require a measure of interpretive insight about the meaning of law and legal concepts. Empirical data about lay concepts and intuitions and armchair intuitionism about what ordinary people think are unable to replace the insight of those involved in the practice of law. This might be a sobering idea from the perspective of many of our values, such as the rule of law and democracy. As I have suggested, it does not need to be. There might be value—both social and intellectual—in law's artificial reason, its technicalities, concepts, and taxonomies. Still, even those who believe that law's artificial reason is problematic should try to avoid confusing what they would want to be the case with what actually is the case.

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