

## The Limits of Experimental Jurisprudence

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### I “CRITICIZING” EXPERIMENTAL JURISPRUDENCE

Criticisms of experimental jurisprudence might be general or domain specific. General criticisms go beyond law and apply across the board: They refer, for instance, to experimental philosophy in general, or to the use of empirical methods for answering any theoretical question.<sup>1</sup> In this chapter, I will make a domain-specific critique – a critique that is specific to experimental jurisprudence as an approach towards questions about law and legal concepts. Unsurprisingly, many domain-specific critiques can reflect concerns that also apply in other domains. But domain-specific critiques pursue the question about the limits of experimental jurisprudence from the specific perspective of legal theory. While experimental jurisprudence is sometimes described as experimental philosophy addressing legal questions,<sup>2</sup> the distinctive features of law warrant a domain-specific analysis.

The critique I will offer in this chapter is constructive, and builds on some work in experimental jurisprudence. It is not a critique that attempts to undermine the project of experimental jurisprudence, but simply to highlight its limitations. Undoubtedly, experimental jurisprudence can make an important contribution to legal knowledge – particularly in the context of textualism and its emphasis on ordinary meaning.<sup>3</sup> Information about what legal experts and ordinary people think about law and legal concepts, about the effects of legal expertise, and about how legal and ordinary cognition relate to each other is valuable. Experimental jurisprudence

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<sup>1</sup> See, e.g., Antti Kauppinen, *The Rise and Fall of Experimental Philosophy*, 10 *PHILOSOPHICAL EXPLORATIONS* 95–118 (2007).

<sup>2</sup> See, e.g., Karolina Magdalena Prochownik, *The Experimental Philosophy of Law: New Ways, Old Questions, and How Not to Get Lost*, 16 *PHILOSOPHY COMPASS* 1 (2021).

<sup>3</sup> See, e.g., James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 *IND. L.J.* 957–1030 (2019); James A. Macleod, *Finding Original Public Meaning*, 56 *GA. L. REV.* 1 (2021); Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 *BROOK. L. REV.* 461 (2020); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 *HARV. L. REV.* 726 (2020); Kevin Tobia, Brian G. Slocum, & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 *COLUM. L. REV.* 213 (2022).

can make a significant contribution in these domains. But for experimental jurisprudence to make that contribution, its practitioners, and theorists relying on their work, should also be aware of its limitations. Experimental jurisprudence, as I will argue, cannot resolve theoretical debates on its own. We should see experimental jurisprudence as just one limited tool that can make a partial contribution to the collective project of understanding and evaluating law and legal rules, institutions, and practices.

In this chapter, I will flesh out this domain-specific critique of experimental jurisprudence by focusing, first, on *special* experimental jurisprudence – i.e., experimental jurisprudence focused on specific legal concepts operating within legal discourse, such as INTENT, CONSENT, or CAUSATION (II). Second, I turn to *general* experimental jurisprudence, which focuses on general questions about the nature of law and legal reasoning (III). I later offer some remarks about how we should attempt to integrate experimental jurisprudence within a richer, more complex empirical understanding of law, legal institutions, and legal reasoning (IV).

## II SPECIAL EXPERIMENTAL JURISPRUDENCE

### A *The Three Domains of Experimental Jurisprudence*

Experimental philosophy – which uses empirical methods to investigate philosophical intuitions and the factors and mechanisms that underlie them<sup>4</sup> – is concerned with philosophical questions and the relationship between philosophers' theories that answer them and ordinary intuitions.<sup>5</sup> Thus, experimental philosophy typically deals with two spheres of activity: philosophical theorization and ordinary cognition. Experimental jurisprudence, however, deals with three spheres: legal theory, the practice of legal reasoning by participants in it, and ordinary cognition. For instance, experimental philosophy might be concerned with the notion of CAUSATION and how ordinary people conceive of it, and this information might be useful for comparing, assessing, and illuminating philosophical theories. Experimental jurisprudence might similarly concern itself with CAUSATION.<sup>6</sup> But in this latter case there are at least three domains at stake: the domain of legal theory (think, for instance, about Hart and Honoré on causation<sup>7</sup>); the domain of legal reasoning

<sup>4</sup> Stephen Stich & Kevin P. Tobia, *Experimental Philosophy and the Philosophical Tradition*, in *A COMPANION TO EXPERIMENTAL PHILOSOPHY* 3–21, 5 (Justin Sytsma & Wesley Buckwalter eds., 2016). See also Joshua Knobe, *Experimental Philosophy*, 2 *PHILOSOPHY COMPASS* 81–92 (2007).

<sup>5</sup> See Joshua Knobe & Shaun Nichols, *Experimental Philosophy*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Winter 2017), <https://plato.stanford.edu/archives/win2017/entries/experimental-philosophy/> (last visited May 3, 2022).

<sup>6</sup> See, e.g., Joshua Knobe & Scott J. Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 *THE UNIVERSITY OF CHICAGO LAW REVIEW* 165 (2021).

<sup>7</sup> H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2nd ed. 1985).

(i.e., how causation figures in the legal adjudication of tort disputes, for instance); and the domain of ordinary cognition.<sup>8</sup> Or consider the case of CONSENT.<sup>9</sup> There are (i) legal theories about consent; (ii) a doctrinal concept (or multiple doctrinal concepts in different areas of law) of CONSENT adopted by participants in legal discourse; and (iii) ordinary people's conception of CONSENT. Plausibly, as experimental jurisprudence itself has shown, those with legal training might acquire at least partially different concepts from those available to agents without legal training.<sup>10</sup> In the case of CONSENT, then, the legal concept and the ordinary concept might be at odds.<sup>11</sup> And both might be at odds with the best legal theory of CONSENT. Thus, three notions of CONSENT are potentially at play.

We might of course discover that, as an empirical matter, there are no significant differences between these three domains regarding specific concepts or issues. For instance, we might discover that the practice of legal reasoning regarding the concept of FRAUD simply replicates the ordinary concept of FRAUD, and that both coincide with some specific legal theory of FRAUD. Or it could turn out that the internal legal domain simply makes no use or has no need for concepts that we find both in legal theory and ordinary thought. For instance, there might be an ordinary concept of MISOGYNY and a theoretical argument in favor of its adoption in a legal system, but the system might simply not refer to that concept in its operation. Experimental jurisprudence can contribute to elucidate these empirical questions. But, as a general matter, the central point is that the conceptions at stake are not just those of the legal theorist and the ordinary person, but also those of legal experts like judges and lawyers.

### B Operative Legal Facts and the Authority of Legal Experts

More importantly, within legal argument the possible conceptions of particular legal concepts are not on a par. Legal experts can legitimately claim that their reflective participation in legal concept-using practices entitles them to make claims about the meaning of operative legal concepts independently of both theoretical and everyday understandings.<sup>12</sup> This entails that special experimental jurisprudence, if it is going to illuminate the *legal* concept, ought to focus on legal experts.

Let me illustrate why by focusing on the law of contracts. Perhaps there is a fundamental truth about whether a contract is a promise.<sup>13</sup> To use a distinction I have

<sup>8</sup> I say "at least" because arguably we could imagine a fourth domain here – the domain of metaphysical exploration about the nature of causation, which might but need not coincide with the domain of legal theory.

<sup>9</sup> See Roseanna Sommers, *Commonsense Consent*, 129 *YALE L. J.* 2232–2325 (2020).

<sup>10</sup> See Kevin Tobia, *Legal Concepts and Legal Expertise*, 203 *SYNTHESE* 7 (2024).

<sup>11</sup> Sommers, *supra* note 9.

<sup>12</sup> Here, I am echoing (and modifying) a similar argument made by Kauppinen, *supra* note 1 at 98.

<sup>13</sup> This is an endless theoretical debate. For some useful discussions, see generally Michael G. Pratt, *Contract: Not Promise*, 35 *FLA. ST. U. L. REV.* 801 (2008); Seana Shiffrin, *Is a Contract a Promise?*, in *ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* (Andrei Marmor ed., 2012).

offered elsewhere,<sup>14</sup> at a *foundational* level contracts are either promises or they aren't. But at the level of the *operation* of the legal system whether a contract ought to be understood as a promise is an open question that will be settled by the practices of lawyers, judges, and other legal experts. For contemporary American lawyers, it is almost evident that contracts are promises.<sup>15</sup> But that need not be so in the future;<sup>16</sup> it has certainly not been the case in the past;<sup>17</sup> and is not the case everywhere.<sup>18</sup> This does not entail that there is no right answer regarding whether contracts are promises. And perhaps that answer should be responsive to philosophical elucidation and/or to ordinary intuitions. But the operation of contract law will respond, first and foremost, to the specific practices and commitments of the relevant population of legal experts.<sup>19</sup>

Legal facts – such as the fact that the speed limit on California highways is sixty-five miles per hour or the fact that contracts are constituted by an exchange of promises or promises and performances – are not ultimate facts; they only obtain in virtue of some more basic facts.<sup>20</sup> Those more basic facts include the conceptual and inferential practices of human agents,<sup>21</sup> particularly of those in charge of ascertaining legal facts – in our context, legal experts like judges, law professors, and lawyers. The interpretive approaches and the technical distinctions and conceptualizations these experts use to interpret law determine the legal implications of legal texts.<sup>22</sup>

The institutions we theorize in special jurisprudence are, in this way, constituted by expert cognition. Legal experts have a certain authority over their meaning and operation. Theorization of these specific legal institutions is thus constrained by the way in which experts understand the relevant concepts and institutions. One cannot understand institutions like the law of contracts or the law of property without understanding their *internal* conceptual structure.<sup>23</sup> This suggests,

<sup>14</sup> Felipe Jiménez, Private Law Legalism, 74 UNIVERSITY OF TORONTO LAW JOURNAL 41 (2024); Felipe Jiménez, Legal Positivism for Legal Officials, 36 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 359 (2023).

<sup>15</sup> See RESTATEMENT (SECOND) OF CONTRACTS (1981), § 1.

<sup>16</sup> See Crescente Molina, *Contracting without Promising* (unpublished manuscript).

<sup>17</sup> Martin Hogg, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES 109 (2011).

<sup>18</sup> Many civil law jurisdictions conceptualize contracts not as promises but as “juridical acts.” See, e.g., Study Group on a European Civil Code, Principles, Definitions and Model Rules of European Private Law, II, 1:101, 1 (Christian von Bar et al. eds., 2009).

<sup>19</sup> See Brian Bix, *The Promise and Problems of Universal, General Theories of Contract Law*, 30 RATIO JURIS 391–402 (2017); Felipe Jiménez, *Against Parochialism in Contract Theory: A Response to Brian Bix*, 32 RATIO JURIS 233–250 (2019).

<sup>20</sup> Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157–198, 158–159 (2004).

<sup>21</sup> Amie L. Thomasson, *Realism and Human Kinds*, 67 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 580–609, 584–585 (2003).

<sup>22</sup> See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95–118 (2010); Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASHINGTON UNIVERSITY LAW REVIEW 1095–1101 (1995).

<sup>23</sup> As I argue in Felipe Jiménez, *Understanding Private Law*, in *METHODOLOGY IN PRIVATE LAW THEORY* (Thilo Kuntz & Paul Miller eds., 2023). This explains, to my mind, why interpretivism

for instance, that information about the views these experts have about legal propositions, legal doctrine, and legal theories is particularly relevant,<sup>24</sup> not just for merely evidentiary reasons.<sup>25</sup> What legal experts think, say, and do has direct implications for what would count as a correct account of the relevant legal concepts or doctrines. Theories about areas of law and specific legal concepts illuminate the nature and value of objects constituted by the conceptual activities of legal experts.

### C The Authority of Legal Experts

The argument so far has important implications for experimental jurisprudence. Legal participants' role entitles them to make claims about the meaning of those concepts independently of both theoretical and everyday understandings. This is why, as I have argued elsewhere, generally speaking, those in the driver's seat regarding legal concepts are legal officials and participants, not laypeople.<sup>26</sup> This is not a regrettable fact about contingent legal systems but an upshot of both positive and critical morality's indeterminacy and the associated need for legal reasoning to fill gaps in ways that find no pre-established template in moral normative orders.<sup>27</sup>

In this aspect, the debate between scholars engaging in experimental jurisprudence and their critics is different from the debate between experimental philosophers and their critics. In simple terms, the expertise objection has a particular structure and carries a specific weight in the legal domain. Whether philosophers are expert intuiters is a complicated question – and I tend to agree with those who believe they might not be.<sup>28</sup> But whether legal practitioners are expert legal reasoners is not a complicated question.

has been so influential in special jurisprudence. On interpretivism in private law theory, for instance, see Allan Beever & Charles Rickett, *Interpretive Legal Theory and the Academic Lawyer*, 68 *THE MODERN LAW REVIEW* 320–337 (2005); Steve Hedley, *The Shock of the Old: Interpretivism in Obligations*, in *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS* 205–221 (Charles Rickett & Ross Grantham eds., 2008); Stephen Smith, *Taking Law Seriously*, 50 *THE UNIVERSITY OF TORONTO LAW JOURNAL* 241 (2000).

<sup>24</sup> For recent work on this issue (focusing on law professors), see Eric Martínez & Kevin Tobia, *What Do Law Professors Believe about Law and the Legal Academy? An Empirical Inquiry* (2022), <https://papers.ssrn.com/abstract=4182521>.

<sup>25</sup> Against *Id.* at 73.

<sup>26</sup> See Felipe Jiménez, *Some Doubts About Folk Jurisprudence: The Case of Proximate Cause*, *The University of Chicago Law Review Online* (2021), <https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/>. At a more general level, Kauppinen, *supra* note 1 at 103.

<sup>27</sup> As I argue in Jiménez, *supra* note 26.

<sup>28</sup> Jonathan M. Weinberg et al., *Are Philosophers Expert Intuiters?*, 23 *PHILOSOPHICAL PSYCHOLOGY* 331–355 (2010). But see Timothy Williamson, *Philosophical Expertise and the Burden of Proof*, 42 *METAPHILOSOPHY* 215–229 (2011).

Experimental jurisprudence can thus give us relevant information about the content of operative legal concepts when it studies those legal experts.<sup>29</sup> It can also help us determine the content of operative legal concepts when it studies lay agents, but only to the extent that lay and legal concepts coincide – itself a question that experimental jurisprudence can help us determine.<sup>30</sup> Experimental methods can also help us discover the features of ordinary concepts that might (or might not) influence operative legal concepts.<sup>31</sup> But, by themselves, empirical findings about lay cognition do not support direct inferences or conclusions about legal concepts.<sup>32</sup> Moreover, the normative implications of a divergence between the cognition of legal experts and of ordinary people are not obvious.<sup>33</sup> Experimental jurisprudence might tell us, for instance, that concept X is understood as X<sub>1</sub> by population 1, X<sub>2</sub> by population 2, and so on. But it cannot, by itself, settle the question of whether the correct account of the legal concept is X<sub>1</sub> or X<sub>2</sub>.<sup>34</sup> Instead, it necessarily requires the assistance of some type of normative argument that might count in favor of the adoption of X<sub>1</sub>, X<sub>2</sub>, etc.<sup>35</sup> And to be successful *within* the practice of legal reasoning – to be successful as a legal argument – the argument needs to be made by reference to the already established *canon* of acceptable legal arguments.<sup>36</sup> Legal experts are again in the driver's seat.

This is shown by the very practice of experimental jurisprudence. For instance, in their work on causation, Knobe and Shapiro rely on experimental work on that notion to develop a model for understanding its content in American tort law.<sup>37</sup> In order to justify why this model ought to be persuasive, Knobe and Shapiro rely on relatively traditional methods of legal argument, such as reference to case law and to scholarly authorities. In criticizing this work in the past, I made much (perhaps too much) of this point.<sup>38</sup> I do not think this was entirely fair, for in fact Knobe and Shapiro's approach suggests that they are aware of the limitations of experimental jurisprudence and of how it ought to be situated within legal reasoning in order to contribute to discussions about specific legal concepts. Nevertheless, this aware-

<sup>29</sup> See, e.g., Markus Kneer & Sacha Bourgeois-Gironde, *Mens Rea Ascription, Expertise and Outcome Effects: Professional Judges Surveyed*, 169 COGNITION 139–146 (2017).

<sup>30</sup> Kevin Tobia, *Law and the Cognitive Science of Ordinary Concepts*, in LAW AND MIND: A SURVEY OF LAW AND THE COGNITIVE SCIENCES 2 (Bartosz Brozek, Jaap Hage, & Nicole Vincent eds., 2021).

<sup>31</sup> Tobia, *supra* note 10 at 35.

<sup>32</sup> *Id.* at 40.

<sup>33</sup> *Id.* at 5–6.

<sup>34</sup> Roseanna Sommers, *Experimental Jurisprudence*, 373 SCIENCE 394–395, 395 (2021).

<sup>35</sup> Tobia, *supra* note 10.

<sup>36</sup> On the notion of a *canon* of acceptable legal arguments, see Fernando Atria, *On Law and Legal Reasoning* 352 (2002); John Bell, *The Acceptability of Legal Arguments*, in THE LEGAL MIND. ESSAYS FOR TONY HONORÉ 45 (Neil MacCormick & Peter Birks eds., 1986); A. M. Honoré, *Legal Reasoning in Rome and Today*, 4 CAMBRIAN L. REV. 58–67 (1973).

<sup>37</sup> Knobe and Shapiro, *supra* note 6.

<sup>38</sup> Jiménez, *supra* note 26.

ness should also lead practitioners of experimental jurisprudence, like Knobe and Shapiro, to avoid or at least moderate claims about experimental jurisprudence's ability to *resolve* disputes about legal concepts.<sup>39</sup> Experimental jurisprudence can certainly contribute to special jurisprudence, but it cannot resolve disputes about it.

### III GENERAL EXPERIMENTAL JURISPRUDENCE

What about questions in general jurisprudence, such as the question about the concept of law and its connection to morality, or the general issues raised by legal interpretation? While less developed than special experimental jurisprudence, there is also some work that addresses these traditional jurisprudential questions by relying on experimental methods.<sup>40</sup>

Donelson and Hannikainen, for instance, have attempted to evaluate Lon Fuller's procedural conception of the rule of law using experimental evidence.<sup>41</sup> In this work, they try to ascertain to what extent Fuller's conception of the inner morality of law<sup>42</sup> reflects folk understandings of law. As they explain, this project matters whether we interpret Fuller's theory as a form of conceptual analysis about *our* concept of law or as an account of the nature of law. Under either interpretation, wide and reliable experimental data supporting Fuller's conception would bolster his account.<sup>43</sup>

In similar work, Struchiner, Hannikainen, and Almeida assess the Hart–Fuller debate<sup>44</sup> from the perspective of experimental jurisprudence.<sup>45</sup> According to them, Hart and Fuller can be interpreted as making empirical predictions about how agents understand and apply legal rules – in which case, empirical evidence might vindicate one or another view.<sup>46</sup> As they explain, their purpose is to try to determine which philosophical theory could be “vindicated” by experimental evidence about ordinary thought.<sup>47</sup>

<sup>39</sup> Knobe and Shapiro, *supra* note 6 at 171. In making this type of claim, Knobe and Shapiro are not exceptional within the world of experimental jurisprudence. See, e.g., Sommers, *supra* note 34 at 394.

<sup>40</sup> For studies touching upon these issues, see Raff Donelson & Ivar R. Hannikainen, *Fuller and the Folk: The Inner Morality of Law Revisited*, in OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY VOLUME 3 6–28 (Tania Lombrozo, Joshua Knobe, & Shaun Nichols eds., 2020); Brian Flanagan & Ivar R. Hannikainen, *The Folk Concept of Law: Law Is Intrinsically Moral*, AUSTRALASIAN JOURNAL OF PHILOSOPHY 1–15 (2020); Noel Struchiner, Ivar Hannikainen, & Guilherme Almeida, *An Experimental Guide to Vehicles in the Park*, 15 JUDGMENT AND DECISION MAKING (2020).

<sup>41</sup> Donelson and Hannikainen, *supra* note 40 at 7.

<sup>42</sup> Lon Fuller, *The Morality of Law* (1964).

<sup>43</sup> Donelson and Hannikainen, *supra* note 40 at 10–11.

<sup>44</sup> H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593–629 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 630–672 (1958).

<sup>45</sup> Struchiner, Hannikainen, and Almeida, *supra* note 40.

<sup>46</sup> *Id.* at 3. Incidentally, this is – to my mind – a forced reading of the debate between Hart and Fuller in order to make their theories testable through empirical methods.

<sup>47</sup> *Id.* at 14.

### A *The Concept and the Object Law*

Let me start with experimental jurisprudence about the concept LAW. The limitations of experimental jurisprudence here are different from those that apply to special experimental jurisprudence. For, unlike what is the case for legal concepts like CONTRACT or ATTEMPT, legal operators have no particular claim to the concept LAW itself.<sup>48</sup> For starters, it's at least dubious whether lawyers and judges need such a concept. These agents can go about their law-applying and law-interpreting activities without any underlying determinate concept of law.<sup>49</sup> And while what law is in any specific jurisdiction depends on the activities of legal operators – as, for instance, Hart's rule of recognition highlights<sup>50</sup> – the latter don't have any particular expertise regarding the concept LAW. In this aspect, experimental investigation about the concept LAW seems to be closer in structure to experimental philosophy.

Legal philosophers sometimes characterize general jurisprudence as an exploration of the concept – and particularly, the *folk* concept – LAW. Joseph Raz, for instance, argues that the concept of law is a concept used by everyone and “entrenched in our society's self-understanding.”<sup>51</sup> When we study the nature of law, Raz argues, we are trying to study our own self-understanding as ordinary members of society.<sup>52</sup> Legal theorists, from this perspective, select and elaborate the central and significant ideas present in laypeople's concept of law.<sup>53</sup> We want to understand “our ordinary concept of law.”<sup>54</sup>

If we see general jurisprudence in this way, then experimental work focusing on folk cognition about the concept LAW seems particularly relevant. However, as I have argued elsewhere, I don't think that a focus on folk cognition is helpful in debates concerning the nature of law.<sup>55</sup> Law as a complex governance system generates the emergence of a specialized group of experts in charge of the legal system's criteria of validity.<sup>56</sup> The understandings that matter for law's operation in particular instances are, in our context, primarily those of these legal experts, not ordinary individuals.<sup>57</sup> If what general jurisprudence aims at offering is a general theory about a practice that depends to such a large extent on experts' thought and talk, then it should not see itself as explicating the *folk* concept LAW.

<sup>48</sup> Here, I depart from my previous views in Jiménez, *supra* note 26.

<sup>49</sup> LIAM MURPHY, *WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 8 (2014).

<sup>50</sup> H. L. A. HART, *THE CONCEPT OF LAW* (1994).

<sup>51</sup> Joseph Raz, *Can There Be a Theory of Law?*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 324–342, 331 (Martin Golding & William Edmunson eds., 2005).

<sup>52</sup> *Id.* at 331.

<sup>53</sup> Joseph Raz, *Authority, Law and Morality*, 68 *THE MONIST* 295–324, 321–322 (1985).

<sup>54</sup> JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 164 (1999).

<sup>55</sup> Jiménez, *supra* note 26.

<sup>56</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* 36 (1999).

<sup>57</sup> 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* 51–52 (Matthew H. Kramer et al. eds., 2008).

Importantly, neither should general jurisprudence see itself as explicating the *expert* concept LAW.<sup>58</sup> The reason for this is that, in fact, the debate between legal positivists and nonpositivists is not best characterized as a debate about the concept (even the expert concept) LAW. What's at stake in the debate between positivists and nonpositivists is what theory offers a better elucidation of law as a specific type of social practice.<sup>59</sup> The concern is not the concept that designates that practice but rather its nature.<sup>60</sup> For that purpose, given the preeminent role that legal experts play in the actual legal practices we inhabit, taking their conceptual activities and inferential practices seriously, and building upon them, makes sense. Nevertheless, the debate about the nature and the grounds of law is not about the best account of the (expert or folk) concept LAW. Instead, its focus is the general theorization of law as a type of social practice – a task for which legal philosophers, unlike most legal experts, are particularly well suited. General jurisprudence is not concerned with the semantics of our thought and talk about law or with providing an account of the concept LAW, but rather with providing a theory about law itself.<sup>61</sup> As natural lawyers like John Finnis<sup>62</sup> and legal positivists like Julie Dickson<sup>63</sup> argue, the point of general jurisprudence is to articulate and illuminate what is significant about law as a social institution. Seen in this light, jurisprudential debate is not going to be advanced by appeal to and evidence about folk or expert concepts.

Consider, for instance, a recent article by Flanagan and Hannikainen, which aims to determine whether lay people believe that law is intrinsically moral.<sup>64</sup> In this

<sup>58</sup> This is the implication that Kevin Tobia derives from my argument. Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735–802, 769–770 (2022).

<sup>59</sup> To use Donelson's distinction, the project is not conceptual but objectual. Raff Donelson, *Experimental Approaches to General Jurisprudence*, in *ADVANCES IN EXPERIMENTAL PHILOSOPHY OF LAW* 27–43 (Karolina Prochownik & Stefan Magen eds., 2023). In this sense, Hart's characterization of his seminal work as a form of "descriptive sociology" is close to what I have in mind: a social theory about a specific legal institution, rather than (as the title of his book might seem to suggest) an analysis of linguistic or conceptual usage. HART, *supra* note 50. On Hart's methodology, see Alex Langlinais & Brian Leiter, *The Methodology of Legal Philosophy*, in *THE OXFORD HANDBOOK OF PHILOSOPHICAL METHODOLOGY* 670–689 (Herman Cappelen, Tamar Szabo Gendler, & John Hawthorne eds., 2016); Veronica Rodriguez-Blanco, *A Defence of Hart's Semantics as Nonambitious Conceptual Analysis*, 9 *LEGAL THEORY* 99–124 (2003).

<sup>60</sup> For a reconstruction of legal positivism along these lines, see Andrei Marmor, *Farewell to Conceptual Analysis (in Jurisprudence)*, in *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* 209–229 (Wilfrid J. Waluchow & Stefan Sciaraffa eds., 2013).

<sup>61</sup> Making this contrast in the context of theories of rationality, ERROL LORD, *THE IMPORTANCE OF BEING RATIONAL* 6 (2018).

<sup>62</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 1 (1980).

<sup>63</sup> JULIE DICKSON, *EVALUATION AND LEGAL THEORY* (2001). See also Jeff Pojanowski, *Reevaluating Legal Theory*, 130 *YALE L. J.* 1458–1489 (2021).

<sup>64</sup> Brian Flanagan & Ivar R. Hannikainen, *The Folk Concept of Law: Law Is Intrinsically Moral*, 100 *AUSTRALASIAN JOURNAL OF PHILOSOPHY* 165–179 (2022). See also Donelson and Hannikainen, *supra* note 40. Donelson and Hannikainen consider the views of legal experts, which is to my mind better than focusing on lay populations exclusively. But, in my view, they misconstrue Lon Fuller's project in FULLER, *supra* note 42. That project is not a conceptual analysis, but a normative reconstruction of the value of legality.

article, Flanagan and Hannikainen consider a version of the expertise defense, and argue that legal theorists making this objection would still have to overcome something like a presumption in favor of the folk concept LAW.<sup>65</sup> Consistency with folk understandings would count in favor of any theory about the nature of law. Thus, because most of their respondents seemed to reject the claim that law is just a matter of social fact, Flanagan and Hannikainen conclude that “positivist theories appear to be encumbered with supplying an account of the existence of massive folk error about a basic feature of the category [law].”<sup>66</sup> Evidence about folk intuitions would tilt the scales in favor or against specific views about the nature of law.

This approach, while plausible if we see jurisprudence as elucidating the folk concept LAW, is not warranted if we see jurisprudence as concerned with developing a theory that illuminates the significance and role of law as a social institution – as, arguably, H. L. A. Hart did in *The Concept of Law*.<sup>67</sup> For that purpose, the folk concept of law has very little weight. Thus, Raz and other positivists who agree with his characterization of general jurisprudence do seem to face the need to supply an explanation that deflates the challenge generated by Flanagan and Hannikainen’s work. But this is not a burden on legal positivism *as such* – particularly in the case of legal positivists who see their project as one of theory-building rather than conceptual reconstruction.<sup>68</sup>

Again, even if experimental work like Flanagan and Hannikainen’s were redirected towards the obtainment of evidence regarding legal experts’ conception of law, it would still have quite limited implications. True, such redirection would give us a better grasp of the *relevant* conceptual activities and inferences that we might want to use for constructing a theory of law.<sup>69</sup> But, again, legal experts don’t have any expertise regarding the development of general theoretical models about law as a social institution. Even a reorientation of experimental work towards legal experts would fail to make a significant difference to the central jurisprudential debate, correctly understood. Experimental jurisprudence, in this sense, can only give us rudimentary ingredients for developing a theory of law. It cannot, as Flanagan and Hannikainen suggest, tilt the scales in favor of any particular theory – even if it focused on legal experts.

<sup>65</sup> Flanagan and Hannikainen, *supra* note 64 at 167.

<sup>66</sup> *Id.* at 175.

<sup>67</sup> At least when interpreted in its best light. Fully supporting this claim would require an entire paper of its own. It is true that Hart saw the views of an “educated man” as the “starting point” of jurisprudence. HART, *supra* note 50 at 3240. However, he also noted that the fundamental debate about the nature of law was not “one concerning the proprieties of linguistic usage” but rather a theoretical debate that should be adjudicated by, *inter alia*, pragmatic concerns regarding the implications of different theoretical accounts. *Id.* at 209–210.

<sup>68</sup> See, e.g., HANS Kelsen, *PURE THEORY OF LAW* 1 (1967). More recently, Marmor, *supra* note 60.

<sup>69</sup> Hillary Nye, *A Critique of the Concept–Nature Nexus in Joseph Raz’s Methodology*, 37 OXFORD JOURNAL OF LEGAL STUDIES 48–74, 66 (2017).

### B The Nature of Legal Reasoning

The limits of experimental jurisprudence become even clearer when the focus is on other general jurisprudential questions, like the nature of rules, the theory of legal interpretation, and the character of legal reasoning.

Take, for instance, Struchiner, Hannikainen, and Almeida's work on how ordinary agents understand rules and their interpretation – more concretely, on how ordinary people and legal professionals think about rule violations, as evinced by surveys.<sup>70</sup> The underlying intuition seems to be that evidence about how actual individuals engage with rules might contribute to ascertaining which view of legal interpretation is correct.

The problem here is that the interpretation and application of legal rules is not, as these surveys must treat it, an isolated, context-free, single action. One cannot understand a legal rule without understanding the legal system it is a part of, and particularly the principles, beliefs, and practices that underlie them.<sup>71</sup> Legal rules are embedded within more complex social structures and practices,<sup>72</sup> and thus are much more than a canonical set of inscribed words.<sup>73</sup> Instead, they are incorporative cultural forms – parts of a whole that they express and synthesize.<sup>74</sup> This is what explains, for instance, why the textual incorporation of legal rules from one system to another – “legal transplants” – does not simply replicate the same normative consequences produced by the rule in the original system in the receiving system.<sup>75</sup> The textual items that surveys and experiments present to their participants are not genuine legal rules, but merely isolated texts.<sup>76</sup> Surveys, perhaps the central method in experimental jurisprudence, are inadequate to capture the complex character of legal rules and the fact that they are integrated within broader social and institutional practices.<sup>77</sup> Experiments might be less affected by these issues, but they are still premised on the use of isolated, decontextualized legal texts rather than genuine legal norms.

## IV TOWARDS A RICHER EMPIRICISM

This takes me to the last aspect of my critique of experimental jurisprudence. Experimental jurisprudence taken on its own suggests a picture of legal reasoning

<sup>70</sup> Struchiner, Hannikainen, and Almeida, *supra* note 40.

<sup>71</sup> William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats,”* 46 THE AMERICAN JOURNAL OF COMPARATIVE LAW 701, 705 (1998).

<sup>72</sup> William Ewald, *Comparative Jurisprudence (I): What Was It like to Try a Rat?*, 143 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1889–2149, 1896, 1947–1948 (1995).

<sup>73</sup> Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 111–124, 115 (1997).

<sup>74</sup> *Id.* at 116.

<sup>75</sup> A point I make in Jiménez, *supra* note 26.

<sup>76</sup> See generally Erik Encarnacion, *Text Is Not Law*, 107 IOWA LAW REVIEW 207 (2022).

<sup>77</sup> Noting some of these limitations in general, see Kyle Thompson, *Qualitative Methods Show That Surveys Misrepresent “Ought Implies Can” Judgments*, PHILOSOPHICAL PSYCHOLOGY 1–29, 1 (2022).

that is at odds with some central aspects of law, and therefore is not fully able to capture what it means to engage in the practice of legal reasoning. That picture is one that treats the application of legal norms as brute facts, precisely because the empirical methods experimental jurisprudence uses cannot replicate the complex institutional and cultural context of those practices.<sup>78</sup> This, again, does not mean that experimental jurisprudence lacks value. As I have argued, there are multiple questions that experimental jurisprudence can answer – both in general and special jurisprudence. Moreover, the simplified approach that experiments and surveys must adopt might be pragmatically justified even if it doesn't fully capture the complexity of legal reasoning. Still, a full empirical investigation of law and legal concepts requires the use of other methods – methods that are suited to capture precisely what experimental jurisprudence must necessarily ignore, that is, the fact that law is a complex, institutionalized, social, and cultural practice.

There is a long tradition in the philosophy of social science that suggests that human action is not amenable to the methods of the natural sciences.<sup>79</sup> Whether this claim is true in general is something well beyond the scope of this chapter. But it seems to me that law is in fact not amenable to be understood exclusively from the perspective of methods that treat the understanding of legal concepts, the application of a legal rule, and so on, as isolated events that can be captured through survey methods. As practitioners of experimental jurisprudence have noted, expertise in the use of legal concepts emerges over time, as a consequence of acculturation and exposure to legal training and culture.<sup>80</sup>

What this means is that understanding and developing an accurate picture of law, the practice of legal reasoning, and the use of legal concepts, requires other methods beyond those of experimental jurisprudence. The full toolbox must include the contributions of qualitative research, anthropology, and the humanities. These are tools that highlight precisely what experimental jurisprudence's methods, by necessity, cannot fully incorporate: the fact that law is a complex cultural practice that develops over time, and that legal rules, doctrines, and concepts are not isolated texts but norms that synthesize complex patterns of reasoning, habits of thought and talk, and ways of seeing and inhabiting the social world.

## V CONCLUSION

Experimental jurisprudence is a relatively new field. As I have explained, it can make multiple contributions. Moreover, these contributions can be useful ingredients in the construction of legal theories in general and special jurisprudence.

<sup>78</sup> On the contrast between brute and institutional fact, see G. E. M. Anscombe, *On Brute Facts*, 18 *ANALYSIS* 69–72 (1958).

<sup>79</sup> See generally Stephen R. Grimm, *How Understanding People Differs from Understanding the Natural World*, 26 *PHILOSOPHICAL ISSUES* 209–225, 210 (2016).

<sup>80</sup> Tobia, *supra* note 10 at 40.

At the same time, practitioners of experimental jurisprudence should avoid overpromising, by suggesting that it can help us predict legal development;<sup>81</sup> undermine legal concepts because of their inconsistency with ordinary concepts;<sup>82</sup> vindicate philosophical theories;<sup>83</sup> or resolve theoretical disagreements about law and legal concepts.<sup>84</sup>

Experimental jurisprudence offers useful empirical information. When the practitioners of experimental jurisprudence situate that information within larger legal and theoretical debates, without purporting to adjudicate them, this approach can be relevant in the construction of legal theories. Nevertheless, the evaluation, confirmation, and refutation of these theories are still *theoretical* tasks.

<sup>81</sup> See Macleod, *supra* note 3 at 1017–1018.

<sup>82</sup> For the argument against this claim, see Tobia, *supra* note 10.

<sup>83</sup> Struchiner, Hannikainen, and Almeida, *supra* note 40.

<sup>84</sup> See Knobe and Shapiro, *supra* note 6 at 171.