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Legal Interpretation, Conceptual Ethics, and Alternative Legal Concepts

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Abstract. When legal theorists ask questions about legal interpretation—such as what it fundamentally is, what it aims at, or how it should work—they often do so in ways closely tethered to existing legal practice. For example: they try to understand how an activity legal actors (purportedly) already engage in should be done better, such as how judges can better learn about the content of the law. In this paper, I discuss a certain kind of "conceptual ethics" approach to thinking about legal interpretation, which is less tethered to existing legal practice (or the existing meaning of core pieces of legal terminology). The approach I explore asks questions about legal interpretation in a way that is tethered to what legal (or "legal-ish") concepts people should deploy, as part of arguments on behalf of engaging in legal (or "legal-ish") practices different from our current ones. In exploring this approach, I aim to help us better understand the landscape of philosophical issues about legal interpretation, including parts of it that I think have been underexplored.

1. Introduction

A common claim about legal practice—endorsed by legal practitioners and theorists alike—is that "legal interpretation" is an important activity that judges and other legal actors engage in. There is a range of different questions that philosophers ask about what legal interpretation is, or about what it should be. One important question is what the success-conditions of legal interpretation *as such* are; or, put another way, what the constitutive aim of legal interpretation is. Another question is how judges (or other legal actors) *should* engage in legal interpretation: for example, whether they should use a "textualist" interpretative method, which (put roughly) hews closely to the "original" meaning of legal texts, or a "purposivist" one, which (put roughly) looks to uncover the "purpose" behind legislation. These two questions are tied closely together. For if the constitutive aim of legal interpretation is to X, this provides a standard with which to evaluate proposals for how judges (or other legal actors) should engage in legal interpretation: namely, we can ask how well those proposals would allow them to X.

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When legal philosophers ask these (and other related) questions about legal interpretation, they often do so in a way that is closely tethered to actual legal practice. In short, they standardly want to better understand an activity (one aptly discussed as "legal interpretation") that legal actors already *actually* engage in, and how they should do *that* activity, in order to do it better. In this paper, I want to put on the table another set of questions about "legal interpretation" that are asked in a way that is less tethered to actual legal practice. The questions are tied to a certain kind of "conceptual ethics" approach to thinking about both "legal interpretation" and "law". In broad terms, the approach I explore asks questions about what legal (or "legal-ish") concepts people should deploy, as part of arguments on behalf of engaging in legal (or "legal-ish") practices different from our current ones. Somewhat more specifically, I focus on arguments that involve advocating for a change in what activity should count as "legal interpretation" (at least in certain contexts), via making an argument for shifting which concept the term 'law' (as used in stating a theory of legal interpretation) is used to express.[1] The idea of such an argument, in the versions of it that I am interested in, is (roughly) to argue that certain people (e.g., certain judges or legal theorists) should engage in this new activity (at least in certain contexts), rather than the activity we currently discuss as "legal interpretation".

My aims in this paper with respect to this kind of approach to "legal interpretation" are relatively philosophically modest. I aim to get this sort of "conceptual ethics" approach to issues about "legal interpretation" more clearly in view, and explore how the issues it raises are distinct from other, related ones that have received more sustained and more explicit critical attention. In discussing this approach, I aim to help us better understand the landscape of philosophical issues about legal interpretation, including parts of it that I think have been underexplored. Toward the end of the paper, I also briefly discuss how issues raised by this approach might help us see a certain kind of ideological role that statements about legal interpretation might play, which we should be attentive to.

2. What Legal Interpretation Is

In order to situate the particular kind of conceptual ethics approach to "legal interpretation" and "law" that I want to focus on in this paper—and the kinds of distinctive issues it brings up—it will be helpful to say a bit more about the initial two questions about legal interpretation that I introduced in the first paragraph of the introduction. I will start by discussing them as asked in relatively standard ways, which don't have the same ties to the kinds of "reforming" or "revolutionary" views in conceptual ethics about 'law' that I eventually focus on. This will help provide a useful contrast for better understanding the alternative kind of approach I want to focus on.

Let's start with the question about what the constitutive aim of legal interpretation is.

[1] In this paper, I use single quotation marks (e.g., 'shoe') to mention linguistic items (as well as to nest quotation marks within pairs of enclosing double quotation marks). I use double quotation marks (e.g., "shoe") for a variety of tasks including quoting others' words, scare quotes, and mixes of use and mention. I use small caps (e.g., SHOE) to pick out concepts.

Mark Greenberg (2020, 125) puts this issue in terms of what "legal interpretation, by its nature, seeks." To get a sense of the issue here, consider that, as Greenberg emphasizes, we can think of many views about legal interpretation in terms of a method they propose by which to reach an output (an interpretation) from a given input (ibid., 124). For example, put roughly, a common "textualist" idea is that the right way to interpret the law is in accordance with the original meaning of certain legal texts, and not give much (if any) independent weight to facts about legislative history or the "purpose" behind acts of legislation.[2] That's giving you a method to go from an input (certain legal texts, certain legal practices, etc.) to an output (the interpretation). That interpretation is a judgment about *something*. What's that *something*? Greenberg glosses three salient alternatives here, based on existing discussions about "legal interpretation": "(1) the linguistic meaning of the text of the relevant provision, (2) the provision's contribution to the content of the law, and (3) the best resolution of disputes" (ibid., 125–6).

Greenberg endorses option (2). That is, he defends the view that the constitutive aim of legal interpretation of a given provision is to discover its contribution to the content of the law.[3] This means that, for Greenberg, legal interpretation is an enterprise with fundamentally *epistemic* success-conditions. Borrowing from Scott Shapiro, we might describe this activity—an activity that involves trying to learn about the content of the law (in a given jurisdiction, at a given time)—as an example of "legal reasoning", narrowly construed (Shapiro 2011, 248). This kind of activity is distinct from other activities legal actors (e.g., judges) engage in that don't have solely epistemic success-conditions, but also broader moral or practical ones. For example, consider here what Shapiro calls the activity of "judicial decision-making" (ibid.). That activity, which is closely tied to Greenberg's option (3) above, is the activity of judges making decisions about legal cases. One might think that the decision a judge should make in a given case (and perhaps most or all cases) should be determined largely by what the relevant law is. Yet, even if so, it might well be something that one thinks should be informed by other considerations too, such as considerations about what public policies should be adopted, or about what decisions might best help promote moral progress. Even if you think that judges should in general just "apply the law" when making legal decisions, you can see how the questions at the heart of "legal reasoning" and "judicial decision-making" are conceptually distinct by reflecting on the following kind of scenarios (which a wide range of theories of law hold to be possible): ones where a judge is legally obligated to make a decision about a case, but where we stipulate that the existing law "runs out" and doesn't fully determine the legal status of the case at hand. In such a scenario, a judge would be unable to issue a verdict by solely "applying" existing law.

[2] I here follow Greenberg's basic gloss of "textualism" in Greenberg 2020. Note that, as Greenberg emphasizes and discusses further in that paper, there are obviously important issues here about what this broad idea amounts to. For example, we can ask what role (if any) different facts play in determining the "original meaning" of the relevant legal texts (e.g., what role(s), if any, facts about conversational context(s) play), as well as what the relevant notion of "meaning" is (e.g., a certain kind of understanding of semantic content or something that incorporates certain pragmatic elements). These are important questions, but they are not my focus in this paper.

[3] Greenberg 2020, 127, and 2021. For similar views about the constitutive aim of legal interpretation, see Berman 2018 and Berman and Toh 2013.

Suppose we stick with Greenberg in thinking that legal interpretation, by its very nature, is something with epistemic success-conditions tied to the content of the law. The epistemic success-condition that Greenberg focuses on is "accuracy" in beliefs about the content of the law—where that involves, put roughly, correctly representing what the content of the law is (Greenberg 2020, 137). We could also imagine other closely related activities that incorporate other broadly "epistemic" success-conditions, such as the achievement of understanding or knowledge. We could also imagine shifting from learning about the "content of the law" to other things about legal reality. Some of these things might be closely related to what Greenberg calls "legal content", or even just more precise ways of stating Greenberg's basic idea of what legal content is. Other ones might be closely related, but also importantly distinct. To illustrate, suppose we are ultimately interested in how a provision impacts the content of the law. And suppose we understand the "content of the law" in the way that Greenberg suggests: namely, as the total set of general legal obligations, rights, powers, privileges, and so on that obtain in a given jurisdiction (at a given time).[4] To do this, we might well need to understand what that provision consists in.[5] As Greenberg emphasizes in much of his work, it is a contested matter how a given provision (e.g., a given statute or law) is related to legal texts, legal activities, etc.[6] And that should be no surprise: after all, a law is a kind of norm or standard, which is not the same thing as a text. So the question of how to learn about what a given legal standard consists in can itself be quite a substantive issue as well, leading to its own epistemic project.[7]

Now consider the following question: when Greenberg is giving his account of the constitutive aim of the activity of legal interpretation, *which* activity is he giving an account of? As I read him, Greenberg is trying to make sense of an aspect of our actual legal practices. In particular, as I read him, he is trying to zoom in on an important kind of activity that is a central part of those practices, and which (at least important parts of) existing discussion about "legal interpretation" either refers to, or which can help orient us to.[8] By proceeding in this way, Greenberg is in line with others, including Mitchell Berman and Kevin Toh, who have also offered important related arguments on behalf of the idea that legal interpretation is an activity with epistemic success-conditions closely tied to those Greenberg identifies.[9]

[4] See Greenberg 2006 and 2014.
[5] As Greenberg himself notes in Greenberg 2020, 126 n. 61, based on feedback from Mitch Berman.
[6] See, e.g., Greenberg 2006; 2011; and 2014.
[7] It should be noted that different accounts of legal content differ on what explanatory roles they hold individual "laws" have in explaining legal content in Greenberg's sense of "legal content". (Compare, for example, the kind of view Greenberg advocates for in Greenberg 2014 with the view that he labels "the standard picture" in Greenberg 2011.) Different accounts of the nature and grounds of legal content might thus support different ideas about how important it will be to learn about individual laws in order to make progress on learning about legal content overall.
[8] To see that this is roughly the way that Greenberg aims to identify the relevant activity, see the kinds of arguments he gives in Greenberg 2011 and 2014 to support his views. For another example, consider the main argument he gives in Greenberg 2020 for why he thinks the constitutive aim of legal interpretation is what it is. See Greenberg 2020, 127.
[9] See Berman 2018 and Berman and Toh 2013.

Once one has identified a set of constitutive success-conditions for an activity, one might then think that the relevant activity, as currently done, could be done better by the lights of the standards supplied by those success-conditions. Consider the following. As Greenberg argues, if legal interpretation, by its very nature, seeks to uncover what impact a provision has on the content of the law, we can ask how well existing attempts at legal interpretation actually do at accomplishing that end. We can also ask how well existing methods that are endorsed by legal practitioners or theorists—e.g., a given form of textualism, along the lines I glossed above—would actually do at accomplishing that end, if correctly followed. Tied to that kind of evaluative reflection, we can then ask what methods of legal interpretation we should actually use to better accomplish the aim of legal interpretation as such. Greenberg, Berman, and Toh all ask versions of these questions.

They also all suggest a version of the following thought, which is also a central theme of Shapiro's *Legality* (Shapiro 2011). The thought is this: our best overall general jurisprudential theories of what legal thought and talk involves, and what it is about, should hang together with our best account of legal interpretation. They draw on this idea to suggest that our best overall general jurisprudential theories might help us critically evaluate theories of legal interpretation.[10] To illustrate one way this might go, consider the kinds of theories of law that both Greenberg and Berman understand as "constitutive" accounts of the law, which they both offer as part of their own overall accounts in general jurisprudence (Berman 2018; 2019; Greenberg 2006; 2014). These "constitutive" accounts are ones that explain *in virtue of what* the law is one way or another in a given jurisdiction (at a given time), where the "in virtue of" relation here is a kind of metaphysical asymmetric dependence relation (arguably well understood as "grounding"), rather than a causal one.[11] Suppose one was convinced of such a view (whether as part of one's "general jurisprudential" views or otherwise).[12] One could then use that as part of the standard against which to judge different theories of legal interpretation. In short, one could see whether the theory of legal interpretation suggests an interpretative method that (if followed) would help people (whether in general, or certain people, such as judges, in certain contexts) learn about the law in a given jurisdiction (at a given time) *given* that particular view of what facts make the law what it is, and how they do so. An important question here will be how well following this method would do in this regard *compared to* following

[10] There is a range of recent views about what exactly the connections here are, and why. For some of the different recent views here, see Berman 2018; Greenberg 2014; Plunkett and Shapiro 2017; Shapiro 2011; and Toh 2013.

[11] For connected discussion, see Chilovi and Pavlakos 2019 and Plunkett 2012.

[12] I add in the qualifier "whether as part of one's 'general jurisprudential' views or otherwise" as a nod to the fact that it is possible that such an account might not be defended as part of the best overall view in general jurisprudence, but on other grounds—e.g., as a certain kind of "substantive" first-order view. This possibility is particularly important given the possibility of expressivist accounts of legal thought and talk, such as those advanced by Etchemendy 2016 and Toh 2011. See Plunkett and Shapiro 2017 and Toh 2013 for discussion.

other relevant methods, endorsed by proponents of other, rival theories of legal interpretation.[13]

There are a variety of constitutive accounts of law on offer—including ones that differ in important ways from each other, both in explanatory and extensional terms. For example, consider the kind of theory that Greenberg offers, in contrast to H. L. A. Hart's.

According to Greenberg's "Moral Impact Theory", the content of the law is (put roughly) identical to a subset of the general moral obligations, rights, permissions, and powers that obtain in a given context: namely, those that were brought about by the activity of the relevant legal institutions (in the relevant ways).[14] On this view, the grounds of legal content are whatever the grounds are of these moral obligations, rights, permissions, and powers. On Greenberg's view, these "moral" obligations (and rights, privileges, and powers) should be understood as "genuine" ones, where I take this to mean that they are directly about what we "really and truly" should do.[15] In other words, I take Greenberg to here be talking about what, in other work, drawing on Tristram McPherson, I have called "authoritatively" normative facts: put roughly, facts about what we "really and truly" should do, think, or feel. As I understand it, "authoritative" (or "robust") normativity contrasts with the thin kind of "merely formal" (or "generic") normativity that (put roughly) comes with just having standards of any kind (such as the rules of board games, or the norms of a corrupt social organization).[16] Greenberg's view is an antipositivist one, on which it lies in the nature of law that, necessarily, both social facts and authoritatively normative facts (or other normative facts that bear a close connection to such facts) are part of the ultimate grounds of legal content.[17]

In contrast to Greenberg's antipositivist theory, Hart defends a positivist theory, on which it lies in the nature of law that, necessarily, only social facts (and not authoritatively normative ones, or other normative facts that bear a close

[13] Note that one might also ask similar questions by relying not on an overall account of what determines the law as such, but a more local one, such as one about what determines the law *around here* (in this jurisdiction) or one about what determines this *kind* of law (e.g., constitutional law, either in general, or in a particular jurisdiction). For connected discussion on providing a "constitutive" account of the grounds of constitutional law, see Rosati 2019.

[14] See Greenberg 2014 and 2020.

[15] As Greenberg (2020, 134) puts it: "When I say 'genuine' obligations, I am talking about whatever we are really required to do."

[16] I discuss this contrast between "merely formal" (or "generic") normativity and "authoritative" (or "robust") normativity further in McPherson and Plunkett 2017; McPherson and Plunkett forthcoming (drawing on McPherson 2011 and 2018); Plunkett 2019; and Plunkett and Shapiro 2017.

[17] My formulations of legal positivism and antipositivism in terms of rival theses about the "ultimate" grounds of legal facts draw from the basic characterizations given in Greenberg 2006; Plunkett 2012; and Shapiro 2011. I put my formulations in terms of "authoritatively normative facts", rather than "moral facts", for the reasons given in Plunkett 2019. In that work, I also discuss further complexities of defining "positivism" and "antipositivism" that I am skating over here. I include the starting phrase "it lies in the nature of law" for the reasons given in (Plunkett and Wodak 2022b). Other legal philosophers prefer to define positivism and antipositivism in other ways. However, my main arguments in this paper don't depend on defending these particular formulations. They would equally go through if, for example, one preferred the formulations offered in Gardner 2001 or Green and Adams 2019.

connection to such facts) are the ultimate grounds of legal content.[18] Hart argues in *The Concept of Law* that the law is a combination of primary rules and secondary rules (i.e., rules about rules). Among the secondary rules of a legal system is a "rule of recognition", which specifies the conditions for a rule being part of that legal system.[19] Both the existence and content of the rule of recognition are determined by social facts alone: put roughly, facts about the convergent behavior of relevant legal officials. On Hart's form of "inclusive" legal positivism, a rule of recognition, if it has certain content, can make it the case that moral facts are relevant to determining the law, in that jurisdiction. In such a case, moral facts (or other normative facts that bear some kind of important connection to "authoritative normativity") then owe their relevance to determining the law to the obtaining of the relevant contingent social facts, and thus aren't part of the "ultimate" grounds of legal facts (in the relevant sense of "ultimate").[20] Inclusive legal positivists thus grant moral facts (or other normative facts that bear some kind of important connection to "authoritative normativity") a role in explaining the content of the law, but deny they play the sort of "ultimate" explanatory role that antipositivists claim that they do.

The fact that there are a variety of different constitutive accounts of law on offer is something that matters in a number of different ways for theories of legal interpretation. For example, return to the idea that "constitutive" accounts of what explains legal content might help guide us in evaluating approaches to legal interpretation. If one thinks that a number of different constitutive theories of law have something going for them, and is unsure which is correct, there is going to be a limit to how much direct guidance these kinds of theories can provide. This will especially be so if one is more uncertain about which of these theories is correct than about the overall merits of a certain approach to legal interpretation, either in general or relative to a salient cluster of cases that one is looking for guidance on.

[18] I take this reconstruction of Hart that I offer here to be a viable one, which captures the core of his views in Hart 2012. However, it should be underscored that there are rival views about how to best read Hart which would reject this reconstruction, such as Toh's (2005) reading of Hart. My aim in this paper isn't to advance my particular views about how to best interpret or develop Hartian views. (For some of my discussion on this front, see Finlay and Plunkett 2018.) Rather, I aim to use Hart's view for purposes of illustration. Thus, for the purposes of this paper, if you don't like my reading of Hart, then I invite you to swap in another positivist view that involves many of the core features that I attribute to Hart, and run my arguments focused on that view instead. For example, I think my core points could be made focusing on the views put forward by either Berman 2018 or Shapiro 2011.

[19] Some philosophers read Hart as holding that there is only one rule of recognition per legal system, while others think that this need not be so. For an example of the first kind of reading, see Marmor 2011. For an example of the second kind of reading, see Gardner 2012. For ease of exposition, I stick with the first kind of reading, but this should not be read as my taking a firm commitment on this interpretative issue.

[20] It should be underscored that the use of "ultimate" here, in "ultimate grounds", is meant as a sort of placeholder notion to mark out the idea that positivism can either take an "inclusive" form (where, put roughly, authoritatively normative facts can be part of the grounds of law *if* certain contingent social facts obtain) or an "exclusive" form (which denies that authoritatively normative facts can ever be amongst the grounds of law). It shouldn't therefore be read as indicating that the social facts themselves have no further grounds (e.g., in the physical facts). For further discussion, see Greenberg 2006; Plunkett 2019; and Shapiro 2011.

Another thought one might have about these rival constitutive theories is the following. Suppose that one theory (such as Hart's) describes one possible object for legal (or at least "legal-ish") thought and talk to be about. (I use the phrase 'legal-ish thought and talk' to mean, roughly, thought and talk that has many of the core features of our current "legal" thought and talk, including such things as its important inferential, communicative, and referential roles.) And suppose that another theory (such as Greenberg's) describes another possible object for legal (or "legal-ish") thought and talk to be about. We can ask the descriptive question of whether one of them gets it right about what our actual legal thought and talk is *in fact* about. We can ask this kind of descriptive question at different levels of generality. For example, we can ask whether one of them gets it right about *all* of legal thought and talk refers to. Or we may ask it about whether one of them gets it right about the reality that is referred to by certain *relevant* parts of legal thought and talk (e.g., the legal thought and talk that judges and lawyers use in making legal arguments in courtrooms), or perhaps just a subset of such "relevant" parts of *it as used by certain people, in certain contexts* (e.g., the legal thought and talk that certain judges and lawyers, in certain jurisdictions in the contemporary USA, use in making legal arguments in courtrooms). These questions can be seen as core ones in what Shapiro and I describe as "metalegal inquiry". On our view, metalegal inquiry aims to explain how actual legal thought and talk—and what (if anything) that thought and talk is distinctively about—fits into reality overall.[21] If we take "legal reality" to be the part of reality that actual legal thought and talk is distinctively about, we can gloss this (slightly misleadingly) as the project of explaining how legal thought, talk, and reality fit into reality overall.[22] On our view, general jurisprudence is the subset of metalegal inquiry that concerns "universal" legal thought, talk, and reality, by which we mean the parts of legal thought, talk, and reality that show up across all legal systems (Plunkett and Shapiro 2017). In contrast to descriptive questions about how legal thought and talk in fact works, and what parts of reality that thought and talk in fact refers to, we can instead ask normative questions about which parts of reality certain people (e.g., legal theorists or legal officials) *should* be referring to (in certain salient clusters of contexts) using legal (or "legal-ish") thought and talk. In particular, as I will now discuss, one normative question of this sort that we can ask concerns the term 'law', which, in turn, can have implications for the term 'legal interpretation'.

3. Conceptual Ethics, Conceptual Engineering, and Alternative Concepts of "Law"

Consider the normative question that I just put on the table: namely, the question of how a certain group of people (e.g., legal theorists, or legal officials) should use the term 'law' (in certain salient clusters of contexts). Alexis Burgess and I call this

[21] Plunkett and Shapiro 2017. For connected discussion, see McPherson and Plunkett 2017, focusing on metaethics, and McPherson and Plunkett 2021a, focusing on metaepistemology.

[22] I say "slightly misleadingly" because it might turn out that on some metalegal theories there is no "legal reality" as such. For further discussion of this point, see McPherson and Plunkett 2017 and Plunkett and Shapiro 2017.

a question in "conceptual ethics".[23] We take "conceptual ethics" to be a branch of normative and evaluative inquiry. Put roughly, on our view, conceptual ethics deals with certain kinds of questions about thought and talk, such as which concepts we should use, and why, or what it would be good for certain words to mean, and why. We introduced the term 'conceptual ethics' as a label to refer to this relevant branch of normative and evaluative inquiry, dealing with this relevant group of questions about thought and talk. We argued that it was the best available label to use for our purposes. But it is not without drawbacks. The label, as we acknowledged when introducing it, is potentially misleading, in at least two respects. First, as the above description of "conceptual ethics" suggests, we use term 'ethics' in 'conceptual ethics' in a *very* broad way. We use it to mean, roughly, "normative and evaluative inquiry". Thus, our calling it 'conceptual ethics' isn't meant to signal that the most important norms here are broadly moral and political ones. Second, our use of 'conceptual' in the label is not meant to signal that the most important items for "conceptual ethics" are concepts, strictly speaking. As the rough gloss above suggests, issues about words might be just as important (or more so), as might issues about other kinds of items (whatever they are) that are part of one's best theories about thought and talk, such as, perhaps, "conceptions".

Consider some of the different answers one might give to questions in conceptual ethics about the term 'law'. Here is one kind of answer: people should use 'law' in a way that is consistent with what the term currently means, as used by ordinary people. That view in conceptual ethics might well be right (at least when the relevant conceptual ethics issues concern certain people, in certain contexts). But it's not the kind of view I want to explore in this paper. Another answer is that people should use the term 'law' in a way that illuminates actual legal practices, such as referring to something explanatorily important within legal reality that helps us better understand those practices, and which is in the rough vicinity of what many people (whether ordinary people, legal theorists, or legal actors) currently describe as 'law'. That answer might involve reforming the meaning of 'law' in certain ways (or perhaps replacing it with a new one). It would do so for the purpose of helping us better describe our actual legal practices, and better understanding legal reality. That kind of answer might make a lot of sense if one was engaged in doing legal sociology, legal history, or legal anthropology. It would also make sense if one was engaged in the explanatory project that Shapiro and I discuss as "metalegal inquiry", which, recall, we take "general jurisprudence" to be a subset of.

But the project that one might be interested in when thinking about how certain people should use the term 'law' need not be one that aims to correctly describe actual legal reality.[24] Suppose one thinks that using one "legal-ish" concept rather than another—and expressing it by the term 'law'—will help us create better social and political practices, at least if it is used in certain contexts, at certain times (e.g., when

[23] My characterization of conceptual ethics below draws from Burgess and Plunkett 2013a; 2013b; 2020; and Cappelen and Plunkett 2020.

[24] Following Shapiro's and my understanding of "legal reality" that I introduced earlier, I here take "legal reality" to be the part of reality (if any) that actual legal thought and talk is distinctively about. This use of 'legal reality' draws from Plunkett and Shapiro 2017.

a Supreme Court justice in the contemporary United States writes a judicial opinion, or when she gives speeches about how to interpret the US Constitution). If so, this might be the basis for a conceptual ethics argument for using that concept, in those contexts.[25] If someone favors using concept A (which, say, picks out something correctly described by Greenberg's Moral Impact Theory) and another favors using concept B (which, say, picks out something correctly described by Hart's positivist theory) in that same context, then we have a conflict. The conflict is not one about how to correctly describe existing legal reality, but rather about the normative issue of which concept we should use, which is tied to different proposed ways of organizing social/political practices.

In some cases, it might be that the concept one person favors in that kind of conflict has an empty reference. For example, there might be nothing in our world that corresponds to what Greenberg's theory describes. That would be the case, for example, if nihilism about authoritative normativity was correct, as some metaethical error theorists contend.[26] Or perhaps there is nothing in the world that corresponds to what Hart's theory describes. This would be the case, for example, if judges lacked the kind of convergence that Hart thinks is necessary to have a "rule of recognition" in a given context, which is necessary for the existence of a legal system, according to Hart's theory.[27] But in other cases, a range of rival concepts might all refer to actual things. For example, two different proposed ways of using the term 'law'—each associated with a different concept—might both refer to some actual parts of reality, even though only one of those concepts is the one we currently express by the term 'law', and which composes the meaning of that term. It also might be that certain people already use 'law' in ways that align with one's conceptual ethics proposal, even though not everyone does. Consider here a view on which different legal actors (or, relatedly, different legal theorists) use core parts of legal terminology (e.g., 'law' or 'legal interpretation') in importantly different ways, perhaps including meaning different things by those terms. Because of this, it might well be that an antipositivist theory (such as Greenberg's) captures certain parts of legal thought, talk, and reality, whereas another theory (such as Hart's) captures other parts of legal thought, talk, and reality.[28] If so, in making a conceptual ethics argument on behalf of meaning one thing by 'law', one might, in effect, be arguing on behalf of prioritizing one existing part of legal practice over another.

Furthermore, suppose that the concept one person favors doesn't currently refer to anything in reality. It might well be that we could change our practices to make it refer to something. For example, we could organize our social lives along the lines that Hart's theory describes, including with legal officials converging on certain interpretative methods for making legal judgments to give rise to a rule of

[25] I discuss conceptual ethics arguments of this sort for certain uses of 'law' in Plunkett 2016b.

[26] For defenses of this kind of metaethical "error theory", see Mackie 1977; Olson 2014; and Streumer 2017.

[27] In such a case, then, the relevant people would, strictly speaking, arguably not be "judges" at all, given that their being "judges" implies their playing an official role within a legal system. If no such legal system exists, then there would be no institutional role of "judges".

[28] For further discussion of (different versions of) this kind of option, see Plunkett 2016b; Plunkett and Sundell 2013b; and Plunkett and Wodak 2022a.

recognition, etc. In such a case, one might argue that certain people using that concept—say, certain officials, in certain contexts—might help bring about those social practices.[29]

I've been focusing on arguments in conceptual ethics that involve words we already use (e.g., 'law') and also appeal to concepts that we already use (or at least have in our conceptual repertoire). For example, this is so of the concepts we have from grasping Greenberg's theory of law, or from grasping Hart's. Even if those concepts fail to accurately describe the parts of reality they purport to (e.g., by only capturing a small slice of existing legal reality, or by not capturing any slice of it at all), we can still use those concepts, and at least still have them in our conceptual repertoire. But we can also imagine efforts to reform the legal concepts we have, or to forge new legal (or at least "legal-ish") ones, and the same with words.[30] This brings out a more general point: there is a range of options here in what Burgess and I call "conceptual innovation". Put roughly, we take "conceptual innovation" to cover the activity of attempting to reform an existing concept (or word, etc.), create a new concept (or word, etc.), or create new concept-word pairings (e.g., using an existing term to express a different concept than it currently does).[31] Alongside conceptual innovation, another activity some might be interested in is what Burgess and I call "conceptual implementation". This involves trying to get other people (perhaps a small group, or perhaps a quite large one) to adopt the conceptual innovations one proposes, informed by one's views in conceptual ethics. We take "conceptual engineering" to be work tied to these three activities (with paradigm cases of "conceptual engineering" involving all three).[32]

With all of this in mind, I now want to return to the issue of what "legal interpretation" is, with an eye towards some salient arguments one might make in conceptual ethics tied to "legal interpretation". Some of these arguments might naturally be coupled with the other two elements of conceptual engineering projects that I just canvassed, and thus come to resemble paradigm examples of conceptual engineering projects.

In thinking about how conceptual ethics arguments about "legal interpretation" might go, it is important to emphasize that there is a wide range of moving parts tied to the theory of "legal interpretation" that one might target in making an argument in conceptual ethics. To appreciate just how wide that range is, consider again how Shapiro and I understand metalegal inquiry. On our view, metalegal inquiry aims to explain how legal thought, talk, and reality fit into reality overall. Since the project consists in "fitting in" legal thought, talk, and reality into reality *overall* (or, put another way, reality *in its entirety*), this means there are many

[29] In floating the idea that this might sometimes happen, I am not here claiming that this strategy of using such a concept will always work for bringing about the desired results. Indeed, it might not, for any number of reasons. For example, it might be that if certain legal actors (in certain contexts) use the relevant concept, then this would cause some people to act in ways that bring about markedly different social practices than the ones the legal actors aim to establish.

[30] Where the line is between reforming a concept and creating a new one is a complicated issue, which interacts with issues about the nature of concepts in general. For the purposes of this paper, I don't need to take a stand on this issue.

[31] See Burgess and Plunkett 2020.

[32] See Burgess and Plunkett 2020 for more details of our account. For closely connected discussion, see Cappelen and Plunkett 2020.

different things at issue here: for example, how legal thought, talk, and reality relate to morality, linguistic meaning, power, literary interpretation, human communication, and board games, as well as thought and talk about them. If one advocates for a conceptual ethics argument about our thought and talk about any of those things, it might well impact one's views about what "legal interpretation" amounts to, or, relatedly, about what "law" is. How big the impact will be will, of course, depend on which views are being advocated. Whether a particular view in question about one of these topics counts as advocating for a shift in which concept is expressed by 'legal interpretation' (or 'law'), or which of a range of "legal interpretation"-ish or "law"-ish concepts one is advocating for, depends on the details of the view being put forward. It also depends on how we should think about other, more general issues in the philosophy of mind and language (e.g., the nature of concepts, and how we should individuate them).[33]

I think it is well worth exploring a range of conceptual ethics arguments, about a range of different topics tied to "legal interpretation" and "law". However, in what follows, I want to consider a specific kind of conceptual ethics argument in this area that one might make that I think is philosophically instructive.

To see what I have in mind, first consider the following salient (and straightforward) move in conceptual ethics about 'legal interpretation' that one might make: propose a new (or reformed) meaning for the term 'legal interpretation'. Depending on what that meaning is, one might then insist that Greenberg has the right theory of the aims of the activity picked out by the term 'legal interpretation', with its current meaning, but not of the aims of the activity picked out by the term with the relevant new (or reformed) meaning. Or, in a related but different vein, one might insist that Greenberg correctly describes the aims of a relevant activity within our existing legal practices that can be illuminated by using the term 'legal interpretation', with its current meaning, but not the aims of the kind of activity picked out by the term with its new (or reformed) meaning.

This kind of move might be more or less philosophically interesting, relative to the general kinds of concerns that animate contemporary debates about legal interpretation. For example, suppose one claims that by 'legal interpretation' we should mean the activity of judges issuing rulings or decisions in cases, all-things-considered. This is the activity, recall, that Shapiro calls "judicial decision-making". Everyone agrees that judicial decision-making so understood is part of legal practice. And plenty of legal theorists and legal practitioners (e.g., judges) already have theories of precisely that thing. So it's not as if this argument is really about illuminating or uncovering some new terrain to theorize about. Instead, the move is just about shifting the label we use for the relevant part of legal activity.[34] Given that many people (including both legal theorists and practitioners alike) already sometimes use the label 'legal interpretation' to refer to what I am here calling "judicial decision-making", the argument is one on behalf of using one of the already circulating usages of the term 'legal interpretation'.

[33] For emphasis on this point, see Plunkett 2015 and Plunkett and Sundell 2013a.

[34] Note that a similar line of thought to what I have said here might also apply to questions about which parts of the legal activity of judges (or others) should be described using the label of 'construction' as opposed to the label of 'interpretation'.

The issue of how people should use this label among an existing (or possible) range of options can be a substantive one, tied to all sorts of further issues about how we organize and understand our lives. This is for the sorts of general reasons I have discussed at length elsewhere.[35] For example, insofar as the term 'legal interpretation' is tied to certain default inferential patterns in our thought and talk (e.g., what that label applies to is something that, by default, has a certain pride of place in our thinking about how judges should behave) a lot can hang on how we choose to use that term. Thus, the question of which of a range of existing concepts that term should express can be a substantive issue in conceptual ethics well worth arguing about in certain contexts. But, at the same time, it's not clear how much is gained in our thinking about "legal interpretation" by just advocating for using it to refer to something else many already think is an important part of legal practice, such as what I am here calling "judicial decision-making".

The argument in conceptual ethics that I want to reflect on here is tied into these issues about what might hang on the use of the term 'legal interpretation'. However, it's not one about using the term 'legal interpretation' to refer to what I am here calling "judicial decision-making", or to something else closely akin to that. Rather, the argument I want to focus on concerns what *object* legal interpretation concerns, while holding fixed the idea that legal interpretation has fundamentally epistemic aims. Depending on how that argument gets developed, it might direct us to an object that might well be something that many don't think currently plays a central role in existing legal practice, or at least not the kind of role the proponent of the argument thinks it should play (e.g., in guiding judges in their deliberations, or in shaping our thinking about the kind of governments we should have).

Here is the kind of thing I have in mind. Suppose one grants that the constitutive aim of "legal interpretation" is to figure out what impact provisions have on legal content. However, one then insists that by 'law' we should mean something *different* than what people currently mean by 'law', or at least different than what some contextually salient group of them means by 'law' (e.g., different from what some ordinary people mean by 'law', or from what some relevant theorists or judges mean by it). Rather than using the relevant current meaning (whatever that is) of 'law', one proposes a different concept—to be expressed by the very same term 'law'—which differs in both intension and extension from the relevant concepts one is drawing attention to. Insofar as this concept would play similar interferential roles in our thought as the concept LAW, would refer to something with similar features to law, and would support similar communicative patterns to those we currently have when using the term 'law', then we might think of this as at least a "legal-ish" concept, if not in fact an alternative "legal" concept. This concept might well refer to something which is perhaps no longer law, strictly speaking, but something closely related to it. If we tie the activity of "legal

[35] I discuss this idea, among other places, in Plunkett 2015 and Plunkett and Sundell 2013a; 2013b; and 2021a.

interpretation" to discovering the content of this different thing, then we have a different aim for "legal interpretation".[36]

To illustrate, consider again the different "constitutive" accounts offered by Greenberg and Hart that I glossed earlier. Suppose, for the sake of argument, that Greenberg's account is correct about what law in general is, and what explains its content in a given jurisdiction (at a given time). If that is true, then legal interpretation, as it currently stands, is thus about law as theorized by Greenberg. But suppose one thought that it would be better to organize our social lives around a "legal-ish" system that operates as Hart describes, rather than the one we currently have. One might then argue that we should start engaging in an activity much like "legal interpretation", but with the constitutive aim of uncovering the kind of "legal content" (or at least a kind of "legal-ish content") that is part of the thing that Hart offers us a theory of. Based on this argument, one might advocate for at least certain people (e.g., certain judges, or legal theorists) using the term 'legal interpretation' to pick out this different activity.

To recall an earlier point in my discussion: depending on whether one thinks that the thing Hart gives us a theory of already exists, and what roles (if any) one thinks it plays in legal practice, this kind of advocacy could be seen in different ways. If the thing Hart talks about already exists, it could be seen as a move advocating to switch our terminology to reference one thing that already exists as opposed to something else that also exists. Then there is the issue of how much of a role in existing legal practice this thing already plays, if it exists. For example, if thought and talk about this part of legal reality plays *some* role in legal practice (but not a dominant one), the move could be seen as advocating for referring to one part of legal reality, as opposed to another, with perhaps the idea of trying to make it more important within legal practice. Or, to turn to another option, if the thing Hart's theory describes doesn't already exist, this move could be seen as advocating using terminology in such a way that might help bring that thing into existence. There is an important question about how (if at all) the use of the relevant terminology in relevant ways might work to bring that thing into existence. One thought here might be this: perhaps the iterated use of the relevant terminology in this way (by relevant people, in relevant contexts) might help bring about

[36] Whether what I am calling a "new thing" still counts as "law" or not (and thus also how much of a "new thing" it really is) depends on further philosophical issues, including ones in conceptual engineering, that are beyond the scope of this paper. To illustrate, one such issue concerns "topic continuity". Put roughly, according to some views on what "topics" are (e.g., the topic of *law* or the topic of *legal interpretation*), topics might persist even with significant conceptual shifts. Or at least they might be "continuous" in relevant ways that would block charges of "changing the subject" when there is a shift from one topic to another. (For discussion, see Cappelen 2018; Kocurek 2022; McPherson and Plunkett 2021c; and Thomasson 2020.) If that is right, then we might shift from one "legal-ish" concept to another and still count as talking about the same topic of *law* or *legal interpretation*, at least when the question of "topic continuity" is evaluated in certain contexts, given certain concerns. These discussions about "topic continuity" matter for how to (more precisely) formulate some of the core ideas I am considering in this paper. However, given the focus of the paper, I leave these issues to the side. Note also that the more one takes "preserving topic" to be an important desideratum for conceptual ethics proposals (such as those about the term 'law' still being ones about the topic *law*), then the more these issues about topic continuity will matter for assessing the conceptual ethics proposals I discuss here, and not only for how to best formulate my core claims about them.

the relevant kinds of convergence in attitudes among legal officials necessary to have "law" in the Hartian sense.[37]

4. Reflections

I have just been considering a certain kind of argument about "legal interpretation". Put roughly, the argument takes this basic form. First, propose that some group of people (e.g., legal theorists or judges) should mean something different by the term 'law' than they currently do, such that they use that term to express a different concept than they currently do. (The idea is that this concept would share many crucial features with the relevant concept it is replacing or modifying, such that it is either alternative kind of "legal" concept, or at least an alternative kind of "legal-ish" one). Second, plug that new understanding of "law" into an existing view about the constitutive success-conditions of the activity of "legal interpretation" (e.g., Greenberg's view of it, as involving certain epistemic success-conditions). This yields an activity which is much like the activity we currently discuss as "legal interpretation", but which is distinct from it in a crucial respect (e.g., it aims to uncover one kind of "content", but not "legal content" as Greenberg understands it). Finally, argue that certain people (at least in certain contexts) should use the term 'legal interpretation' to refer to this new activity. I now want to make a series of observations about this kind of conceptual ethics argument about shifting the meaning of 'law', and, with it, the meaning of 'legal interpretation'.

First, this kind of argument is importantly different than an argument that claims that Greenberg has the right account of actual legal thought, talk, and reality, whether all of it, or just some part of it. Such an argument is tied to the project of metalegal inquiry, and perhaps to general jurisprudence, as Shapiro and I understand these things. Recall that, on our view, general jurisprudence is a subset of metalegal inquiry. On our view, metalegal inquiry aims to explain how actual legal thought, talk, and reality fit into reality overall, and general jurisprudence concerns the part of that inquiry about "universal" legal thought, talk, and reality. As we understand it, metalegal inquiry is a fundamentally descriptive, rather than normative, enterprise: it aims to explain how things actually are. In contrast, the argument in conceptual ethics about 'law' that I've been discussing is a normative argument. In particular, it's a normative argument in conceptual ethics, about which concepts people should use, and what they should mean by their words. Following one standard pattern of arguments in conceptual ethics, this kind of argument will most plausibly be developed as one focused on particular people, in particular contexts.[38] For example, it might be developed as one about which concepts judges should use in making judicial decisions. To defend this kind of normative claim, one needs a different kind of argument, supported by different

[37] It is worth emphasizing here again, as I noted in footnote 29, that this kind of approach might fail, for any number of reasons. For example, it might be that the use of the relevant parts of legal terminology (by the relevant people) might lead to markedly different social practices than the ones the legal actors aimed to establish.

[38] For further discussion of how arguments in conceptual ethics often have this kind of focus, see Burgess and Plunkett 2013a; 2013b; and Cappelen and Plunkett 2020.

evidence, than one would need to defend a descriptive claim about actual legal thought and talk.

Second, despite the fact that this kind of argument in conceptual ethics is not one primarily aimed at helping with the explanatory task of general jurisprudence (as Shapiro and I understand it), it might well still benefit from engagement with general jurisprudence, or metalegal inquiry more broadly. To see some of why, consider that to support an argument that we should change X to Y, one will generally need some sufficient understanding of what both X and Y are. Without such understanding, it's hard to see why one would be warranted in thinking that we should change X to Y. In cases where the relevant existing practices are sufficiently complicated, and where one is exploring changes that interact with those practices in important (and perhaps unforeseen) ways, the bar for what is "sufficient" understanding might be relatively high. A conceptual ethics proposal to change (perhaps radically) what (at least certain) judges or legal theorists mean by the term 'law' is arguably that kind of proposal. Because of this, it might be that many who make conceptual ethics arguments about 'law' would often do well to engage in thinking about general jurisprudence, and metalegal inquiry more broadly.[39] So too might they do well to think about other, related descriptive issues, such as ones about the history of our use of the relevant legal concepts and words, and what roles they have played in our lives.[40] Put more carefully, the idea is that they might do well to engage with metalegal theory and these other forms of descriptive inquiry *to a certain extent*. The degree to which engagement in these descriptive inquiries will matter to a given conceptual ethics proposal is a complicated issue. It will depend, among other things, on what the relevant conceptual ethics proposal is, as well as on a range of more general issues, including ones about how to assess conceptual ethics proposals in general, as well as ones about the relation between normative and descriptive inquiry. It will also depend on what other sorts of inquiry might be even be more beneficial to engage in, and how much time the relevant inquirers have.

Third, the kind of normative argument involving conceptual ethics about 'law' that I have been considering isn't one that is standardly made explicitly in these terms. Putting it in these terms signals how it connects to a growing literature on conceptual ethics and conceptual engineering that cuts across multiple subfields of philosophy.[41] This way of formulating the argument is thus ripe for further exploring, both for those interested in foundational issues about law and legal interpretation, and for those interested in case studies in conceptual ethics and conceptual engineering.

Fourth, even if the argument is relatively novel as one *put* in terms of "conceptual ethics" and "conceptual engineering", it might well help illuminate certain existing

[39] My points here parallel points McPherson and I make in McPherson and Plunkett 2021a and 2021b about the relationship of conceptual ethics projects about ethical or epistemological concepts (or words, etc.) to other projects in ethical theory and epistemology, such as metaethics and metaepistemology.

[40] See Plunkett 2016a for further discussion about the connections between work on conceptual ethics and work on the history or "genealogy" of concepts.

[41] For example, see the essays collected in Burgess, Cappelen, and Plunkett 2020.

arguments (or at least components of them) in the philosophy of law. Here are three examples.

To start with, consider the case of "prescriptive" legal positivism.[42] Put roughly, that position is sometimes glossed as the idea that we should make our legal system one where positivism is true. That idea can seem somewhat confusing given standard glosses of the debate over positivism and antipositivism, according to which both views are about the "nature of law". If they are about the nature of law, it is hard to see how we could *make* law "positivist" or not: either law is that way or it isn't. The conceptual ethics approach I have been discussing in this paper offers one way of developing this idea on which it makes sense. The strategy, in short, is that we should organize our social lives around a "legal-ish" practice that involves something of which positivism is true, and which we can then pick out using the term 'law'.[43] As I have been discussing, one could also make the parallel kind of conceptual ethics argument inspired by the idea of legal antipositivism instead. That is, one could argue that we should organize our social lives around a "legal-ish" practice that involves something of which *anti*positivism is true, and which we can then pick out using the term 'law'.

This last point ties into a second example: the case of Scott Hershovitz's arguments in "The End of Jurisprudence" (Hershovitz 2015). As I read him, Hershovitz there puts forward some views about how actual legal thought and talk in fact work, and thus can be seen as making a contribution to "metalegal inquiry", as Shapiro and I understand it. He also, though, engages in what I take to be a distinct kind of conceptual ethics argument, which isn't aimed at contributing to metalegal inquiry. Roughly, at least on one way of reading him, the main conceptual ethics view he argues for is this: we (or at least many legal philosophers, and legal officials) should eliminate our thought and talk about "legal content" (given false presuppositions Hershovitz thinks are built into it) and instead engage in a form of "legal-ish" thought and talk that operates in a way similar to how Greenberg's antipositivist Moral Impact Theory describes our actual legal thought and talk as operating.

A third example is Natalie Stoljar's work that advocates an "ameliorative" approach to theorizing about our concept LAW, and to general jurisprudence more broadly (Stoljar 2013). Put roughly, on Stoljar's approach, the key question is what we want the concept LAW to do for us, and how we might reform it going forward based on our answer.[44] Stoljar models her approach on Sally Haslanger's "ameliorative" approach to gender and race, which is taken by many (including myself) to involve important elements of conceptual ethics and conceptual engineering.[45] Indeed, Haslanger's work is often taken by many (again, including myself) who work on

[42] For some of the relevant discussion here, see Campbell 2004 and Waldron 2001.
[43] I discuss this basic idea at a bit more length in Plunkett 2016b.
[44] For another approach that resonates with Stoljar's in important ways, see Murphy 2008.
[45] See Haslanger 2000. For some of Haslanger's recent reflections on philosophical methodology, in connection to debates about conceptual ethics and conceptual engineering, see Haslanger 2020.

conceptual ethics and conceptual engineering to be a paradigm example of work in this area.[46]

There are further (at least potential) examples to discuss here. These include important parts of canonical work in the history of legal philosophy, ranging from Jeremy Bentham's proposed "reforming" definitions of "law" to parts of Hart's methodological reflections in chapter 9 of *The Concept of Law*.[47] In general, the question of how much work that is standardly characterized as work in "general jurisprudence" centrally involves arguments in conceptual ethics is, I think, relatively underexplored, and well worth exploring further.[48] Doing so might help us better understand the work itself, whether done by central historical figures in the field (such as Hart, Ronald Dworkin, or Hans Kelsen), or by others whose work has received comparatively less attention. Moreover, it might also inform our self-understanding of what legal philosophy involves, or at least could involve in the future.

Fifth, if certain approaches in philosophy of language are correct, then philosophers of law or legal actors (e.g., judges) might well be *implicitly* putting forward views in conceptual ethics about 'law' (or closely related terminology) more than many legal theorists commonly assume, including in cases where it might be hard to tell that this is going on. For example, if the phenomenon that Tim Sundell and I call "metalinguistic negotiation" is widespread in legal philosophy or legal practice, this would be so.[49] Put roughly, in a metalinguistic negotiation (or, equivalently, a "normative metalinguistic dispute"), speakers appear to use (rather than mention) a term to put forward a normative view in conceptual ethics about how that very term should be used. Sundell and I have explored the idea that this might happen in some cases where judges or theorists argue about what "the law is".[50] If metalinguistic negotiation about what counts as "law" is widespread, then this might mean that, in some cases, legal actors or theorists engage in metalinguistic negotiation to put forward not just a view about what the law around here should be (in a given jurisdiction, at a given time), but also a view in favor of a rival legal (or at least "legal-ish") concept we should express with the term 'law', or (relatedly, or perhaps equivalently) what we should mean by the term 'law'.

Sixth, consider a way in which this kind of conceptual ethics proposal offers a distinct kind of way of arguing for a given method of legal interpretation. Take the case of "textualism" as an example. For our purposes here we can stick with the basic gloss of "textualism" I introduced earlier, according to which textualism is the view that (put roughly) the right way to interpret the law is in accordance with the original meaning of certain legal texts, without giving much (if any) independent weight to facts about legislative history or the "purpose" behind acts of legislation. Now contrast two different ways in which one might want to put forward normative arguments for textualism,

[46] For some of the recent discussion, see Burgess and Plunkett 2013a; Cappelen 2018; Cappelen and Plunkett 2020; and Pinder 2021.
[47] See Bentham 1970 and Hart 2012, chap. 9. For further discussion, see Plunkett 2016b.
[48] For connected discussion about other areas of philosophical inquiry (focused on epistemology and ethics, respectively), see McPherson and Plunkett 2021a and 2021b.
[49] For an overview of how we understand "metalinguistic negotiation", including our take on some of the different varieties of it, see Plunkett and Sundell 2023, in which we expand on and clarify the basic views about "metalinguistic negotiation" that we first put forward in Plunkett and Sundell 2013a.
[50] See Plunkett and Sundell 2013b and 2014. See also Plunkett 2016b.

which are different from claiming it is the correct method for interpreting the law (in a given jurisdiction, at a given time) as that law currently stands.

The first way is as follows. Suppose that textualism is false as a theory of the right interpretative method in a given legal system. One reason that might be so is because of contingent social practices in that legal system. Those practices might be changed in certain ways that would then make textualism true. To illustrate, consider Hart's theory again. Recall that, on Hart's theory, the content of the rule of recognition is determined by the convergent behavior of judges. If enough judges converge in adopting textualist methods, this could make it such that the rule of recognition in that legal system is one that (unsurprisingly) could then mesh well with judges (or others) adopting textualist methods to engage in legal reasoning.[51] A textualist might well want to advocate for making such changes if she thinks there are normative reasons to want judges to employ a textualist method, such as that it (purportedly) has broader social/political benefits. For example, a textualist might think it places the right kinds of constraints on judges in a democracy, given how we should want democracies to work. Notice that the way of arguing for textualism that I'm considering here aims to establish it as the (or at least *a*) correct method of legal interpretation in the relevant jurisdiction.[52] But it doesn't involve trying to change what law *as such* is. As I just illustrated using Hart's theory, the textualist of the sort I am imagining here is just be trying to change the relevant social practices in such a way that, *given* what law as such is, the content of the law in the relevant jurisdiction (even if not in others) becomes something that we correctly learn about using textualist methods.

In contrast to this kind of situation, now consider the following. Another way to argue for textualism as a normative view about something we should bring about is to argue that we should change the basic kind of "legal" (or at least "legal-ish") system people have in a given context. More specifically, the argument I am thinking about is one according to which people should have a system where (at least in the relevant given jurisdiction) textualism would be the (or, again, at least *a*) correct interpretative method for learning about "the law". That need not involve advocating for a "legal" (or at least "legal-ish") system that, by its very nature, guarantees this result about textualism. Instead, it could involve advocating for a general kind of "legal" (or at least "legal-ish") system that, contingently, yields this result in this context. For example, it could involve advocating for a Hartian kind of system where it is then made the case (through the establishment of the relevant social practices) that this system involves a kind of rule of recognition

[51] It should be noted that the existence of such a rule of recognition isn't a guarantee of that method always being the correct one to use, even in that jurisdiction. After all, it might be that certain other heuristics are better ones to use instead—where, put roughly, the relevant epistemology need not mirror the underlying metaphysics. (For connected discussion, see Greenberg 2020, 136–7.) The point here is just that such a shift in the rule of recognition—a shift on which the criteria for legality become closely tied to the things textualists urge us to focus on—could make textualism a better method to use than it would be with another rule of recognition.

[52] I include the parenthetical "(at least *a*)" in light of the following possibility: there might be multiple good ways of learning about the content of the law (in a given jurisdiction, at a given time), some of which are perhaps better to use in certain circumstances than others. This point ties into the point about heuristics in the previous footnote.

that makes textualism an apt interpretative method to use for learning about legal content in that jurisdiction. This kind of argument for the establishment of textualism as the correct interpretative method is closely related to the one I just glossed above. But it is importantly different in how it draws on a different kind of move, tied to advocating for a different kind of "legal-ish" system in general, and not just for changing practices within the kind of "legal-ish" system we have now. This kind of argument might be made in part by arguing for a view in conceptual ethics about which of a range of "legal-ish" concepts we should employ by the term 'law', and, in connection, by 'legal interpretation'.

Suppose that this latter argument in favor of a different kind of "legal-ish" system is tied to a conceptual ethics argument in this way. If so, it won't be enough to rebut it by saying something such as "but that wouldn't be about the content of the law, given what law as such is." Why not? One reason it might not be, which isn't my main focus here, is that this utterance might in fact be false as uttered in many contexts. This is because how we should best interpret what it would take for something to count as "law" might be something that allows for significant conceptual change—including shifting from one legal (or at least "legal-ish") concept to another, perhaps due to conceptual engineering.[53] But putting aside that point—which takes us further afield into other parts of the literature on conceptual engineering that I don't have room to explore here—there is a more basic point about why that kind of rejoinder wouldn't be enough by itself. Suppose we grant that it lies in the nature of law that only Greenberg-style systems for organizing social/political life count as "law", and Hartian-style systems do not. One could still argue that the Hartian-style "legal-ish" system is a better way for the relevant group of people (in the relevant context) to organize their social/political lives, whether or not it is "law", strictly speaking. And one could then argue that it would still be useful to use our existing term 'law' to pick out this new "legal-ish" system, and to describe the relevant norms, content, etc., that are part of it. After all, the whole point of this kind of argument, as imagined, is to make a case for a different way of organizing social life, a way tied to the use of one legal (or at least "legal-ish") concept as opposed to another such concept. The fact that the thing picked out by that new concept might not (strictly speaking) count as "law" is a descriptive fact about what that concept refers to. However, it doesn't show that the normative argument in favor of using that concept is wrong. Indeed, a proponent of this argument might say, "sure, it's not strictly speaking about the *law* anymore, but it's about the kind of law-like thing we *should* have." Of course, some might well object that changing from organizing our life around "law" to something "law-like" is an objectionable change, given the virtues of law as such. That might well be so. So too might it be objectionable for any number of reasons (e.g., reasons having to do with preservation of smooth communication) to change our thought and talk in such a way that we use the term 'law' to refer to something law-like, rather than to law. My point here is just that these are normative claims,

[53] This point ties into the point about "topic continuity" that I briefly made earlier (in footnote 36), namely, that on some approaches to what "topics" are (e.g., the topic of *law* or *legal interpretation*, or the topics of *what law is* or *what legal interpretation is*), topics might persist (or least be "continuous" in relevant ways to avoid relevant charges of "changing the subject") even with significant conceptual shifts.

and thus need to be settled by normative argument, rather than solely descriptive argument.

Seventh, consider how facts about the prevalence of conceptual ethics arguments about "legal interpretation" of the kind I have been discussing might interact with questions about the existence of law. The basic point I want to make here is this: different theories of law involve different theses about how many arguments of this sort (and in what contexts, by which people) can happen and still have *law*, strictly speaking, especially if those arguments impact the relevant behaviors of certain people (e.g., judges) in the right way. For example, consider again Hart's theory of law. His theory holds that the existence and content of the rule of recognition requires a certain kind of convergence among certain legal officials in their practices. If certain judges within the same legal system advocate (either explicitly or implicitly) for different legal (or at least "legal-ish") concepts we should express by 'legal interpretation'—and this advocacy impacts how they actually behave in their judicial practices in the right way—then this might undermine the sort of convergence needed for there to be a rule of recognition, and thus undermine the existence of law in that context.[54] In contrast, Greenberg's Moral Impact Theory doesn't require the same level of convergence among judges or other legal officials. Thus, if his theory of law is right, then it might well be that legal systems can tolerate relatively higher levels of judges arguing for rival views about which "law-like" objects the activity of "legal interpretation" should be tied to, whether via making arguments in conceptual ethics or some other way.[55]

In closing this section, I want to briefly flag one final idea about the kind of conceptual ethics proposal about "legal interpretation" I have been discussing, a proposal tied to advocating for an alternative legal (or at least "legal-ish") concept to

[54] The point I have just made is one about how judges regularly making certain kinds of conceptual ethics arguments about what people should mean by the term 'law' could pose a problem for the maintenance of a legal system, understood along Hartian lines. From a different angle, however, it should also be noted that appeal to the presence of arguments in conceptual ethics within legal practice (including perhaps especially those that happen implicitly, via such mechanisms as metalinguistic negotiation) might help Hartians (and other positivists) in various ways in defending their views. It might, for example, help such legal philosophers explain how and why legal actors appeal to various normative considerations in legal argument in a positivist-friendly way. This is because they could offer such an explanation that doesn't posit that these normative considerations are aimed at tracking the normative facts that an antipositivist theory might hold are amongst the grounds of law. Instead, these normative considerations might best be understood as supporting (perhaps implicit) arguments in conceptual ethics that legal actors are making. The presence of conceptual ethics arguments in legal practice (especially those that happen via metalinguistic negotiation) might also help Hartians (and other positivists) respond to Dworkin's influential disagreement-based argument against positivism. For further discussion of these issues, see Plunkett 2016b and Plunkett and Sundell 2013b and 2014.

[55] I should flag that there might well be other reasons why Greenberg might not want to posit the widespread presence of certain kinds of extensive arguments in conceptual ethics about 'law', either explicit ones or implicit ones that happen via such mechanisms as metalinguistic negotiation. For example, this could be due to reasons stemming from his more general views in the philosophy of mind and philosophy of language. My point here, however, is just about what is compatible with the core claims of the Moral Impact Theory of law (with regard to the nature and grounds of legal content), rather than with Greenberg's overall philosophical views.

express with the term 'law'. This point concerns how this kind of proposal potentially ties into certain kinds of issues about ideology surrounding "legal interpretation".

To illustrate, return again to the case of textualism that I discussed above. Suppose that textualism is *not* the right method for discovering legal content as the law currently is (in a given jurisdiction, at a given time), but that it could be for discovering the content of some other "law-like" thing, tied to an alternative set of social/political arrangements that one favors bringing about. Suppose that someone advocates for textualism as an "interpretive method" as part of an attempt to foster those alternative social/political arrangements. Now suppose that we mistake this kind of textualist view for one that's really about how we should uncover the actual law (in a given jurisdiction, at a given time).[56] If we make this kind of mistake, then we will fail to see just what the proposed change might really involve. Of course, the fact that a change is called for doesn't mean that the change would be wrong. But to properly evaluate the view, we need to understand it for what it is: namely, not just a normative view about what we should do in order to better do the thing we (or at least certain legal theorists or practitioners) currently call "legal interpretation", but rather a normative view in favor of engaging in a related, but different, activity tied to a different social/political reality one wants to bring about. Furthermore, not understanding it as this kind of normative proposal might not only prevent us from properly wrestling with it as a normative view, but might also hinder our ability to understand the descriptive issue of what our current social/political reality actually is. This is for the following basic reason: when we don't appreciate the gap between the way social reality is and the way it should be (or should be *according to* a given theory that we take seriously), we can then end up with a worse grasp on what social reality is really like, in addition to what it would take to really make it better.

How much of an ideological danger is this in actual contemporary societies? I'm not sure. A lot obviously depends on the details of the general mechanisms of the kind of ideological distortion I've sketched above, which are beyond the scope of this paper to discuss at length. Moreover, a lot also hangs on how many arguments for theories of "legal interpretation" (e.g., for a form of textualism) really are best read as the particular kind of conceptual ethics arguments I have sketched in this paper, but not always recognized as such. That's obviously a further question that goes well beyond anything I have said in this paper. I am certainly *not* committed to thinking that the particular kind of "conceptual ethics" argument I've sketched about "legal interpretation" is a good model for what is going on in most existing discussion about "legal interpretation", whether by legal theorists or legal practitioners. Indeed, I suspect it is not, and that it instead only illuminates some relatively small portion of that existing discussion. That being said, the potential ideological role of confusing this kind of "conceptual ethics" way of arguing for a view about legal interpretation (e.g., textualism) with other arguments might still be socially important (at least to some degree) if certain arguments (made by certain people, such as influential judges or legal theorists) have (at least key elements of)

[56] There might be any number of reasons why it might not be obvious which kind of view it is. It could be, for example, that the people who have the view aren't clear themselves. Or it could be, for example, that the linguistic mechanisms they use to express their views make it hard to tell apart the various different readings. In other work, I argue that this can often be so in cases of what Sundell and I have dubbed cases of "metalinguistic negotiation". See Plunkett 2015; Plunkett and Sundell 2013a and 2021b.

the particular kind of "conceptual ethics" argument I've been focusing on. Here, I think it is likely that this is the case, at least if the general model of metalinguistic negotiation that Sundell and I have explored elsewhere illuminates key parts of those discussions. Furthermore, at the end of the day, even if the particular form of "conceptual ethics" arguments about "legal interpretation" isn't that socially influential, these arguments are still, I think, philosophically interesting and instructive to think through. For the purposes of philosophy of law, that's enough.

5. Conclusion

In this paper, I've reflected on a certain kind of "conceptual ethics" approach to thinking about "legal interpretation". The approach I have explored asks questions about "legal interpretation" in a way that is tethered to meanings for 'legal interpretation' and 'law' that people (purportedly) *should* adopt. More specifically, I've focused on the following kind of view: one which proposes (1) that some group of people (e.g., legal theorists or judges) should mean something different by the term 'law' than they currently do, such that they use that term to express a different (legal, or at least "legal-ish") concept than they currently do and (2) that they should use the term 'legal interpretation' in much the same way certain people currently do (e.g., in line with Greenberg's theory of the constitutive aims of legal interpretation), except with this new proposed meaning of 'law' plugged into it. The result is that they use 'legal interpretation' to refer to an activity much like the activity certain people currently discuss as "legal interpretation" (at least as understood on a certain theory, such as Greenberg's), but which is distinct from it in a key way (e.g., it aims to uncover one kind of "content", but not "legal content" as Greenberg understands it).

As I have discussed, this broad kind of argument might involve a range of different views about how the key conceptual ethics proposals about 'law' and 'legal interpretation' relate to how people use the relevant legal terms, and what those terms mean. For example, as I have discussed, such an approach might argue on behalf of an existing pattern of use of 'law' and 'legal interpretation' that plays *some* role in legal practice, but not a dominant one. For example, perhaps it involves arguing on behalf of using a meaning of 'law' inspired by Hart that corresponds to how some judges, but not others, think and talk about "law". In turn, if one has certain views of "meaning" (or at least certain views of one good notion of "meaning"), we might take these patterns of use to be tied to what we hold that certain people, in certain contexts, mean by the relevant parts of legal terminology, even if others mean different things by them. So it might be that this kind of "conceptual ethics" approach to "legal interpretation" involves arguing on behalf of one thing certain people (in certain contexts) mean by the relevant terminology, at least on one relevant notion of "meaning". On the other hand, such a "conceptual ethics" approach to "legal interpretation" might involve advocating for new patterns of use (or perhaps new meanings) for the relevant parts of legal terminology. Some such arguments might involve arguments on behalf of reforming the existing meaning of the relevant legal terminology, and others might involve the replacement of those meanings with new ones.[57]

[57] Which ones are which will, of course, depend on which changes in legal terminology are being advocated for. It will also depend on which theory of word meaning is correct about the relevant notion of "meaning" at issue here (whatever that is).

If one is interested in this "conceptual ethics" approach to thinking about "legal interpretation", it is important to note that it need not replace approaches where one is investigating something fundamentally tied to our actual legal practices, or to the actual meaning of relevant legal terminology (e.g., the terms 'legal interpretation' and 'law'). This point follows from a more general idea: projects in conceptual ethics need not be competitors to other philosophical projects, such as those that aim to correctly describe our existing thought, talk, or practices, or those that aim to identify substantive truths about topics defined in terms that hew closely to existing thought, talk, or practices. Instead, many of these projects can be complementary, and help inform each other in interesting and fruitful ways.[58] With that background idea in mind, my goal in putting forward this "conceptual ethics" approach has *not* been to advocate for using it instead of other existing approaches to "legal interpretation", a number of which I take to be tied to worthwhile philosophical projects well worth engaging in. My aim, rather, has been to put the idea of one such conceptual ethics project about "legal interpretation" on the table: namely, one that advocates for certain people (e.g., certain legal theorists or judges) having a view of "legal interpretation" tied to a concept of "law" (or at least a "legal-ish" concept) that is different from the one they currently employ. In so doing, I hope to have shown some of how thinking about this project might help us better understand the philosophical landscape in debates about "legal interpretation", including parts of it that I think merit further, more sustained exploration.

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[58] For connected discussion, see McPherson and Plunkett 2021a and 2021b.

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