Reconceptualizing the Concept of Law
An Achievement Concept of Law[1]

By
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1. Introduction

The debate over the concept of law has been long, fruitful, and misconceived. I argue that the misconception derives from insufficient attention to the complex nature of governance and institutions. One cannot develop an illuminating concept of law without a deeper understanding of how social systems work. None of the current theories pays adequate attention to governance. They have thus mistaken the nature of the concept of law.

Hart, in his preface, described *The Concept of Law* as a work of descriptive sociology,[3] but the book itself eschews both the development of any social theory and any empirical investigation into the municipal legal systems that are the domain of the concept he seeks to specify. Dworkin was largely dismissive of what he called the sociological concept of law,

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[3]H.L.A. Hart, *The Concept of Law* OUP 1961. Priel, "The Misguided Search for the Nature of Law," SSRN 2015 takes a similar view of Hart's sociology.

describing it as lacking in any philosophical interest.[4]

This essay reconceptualizes the concept of law on the basis of a more elaborate understanding of governance. It is commonplace to consider law a species of governance. Investigations into the concept of law have attempted to characterized the species law without a characterization of the genus governance. This method, on its face, seems misguided both in general and in particular. The species "law" in principle should be distinguished from the other members of the genus "governance." So any analysis of the concept of law must rely on a concept of governance. One may understand law as a species of governance, however, in different ways. Typically, philosophers of law have understood law as a *mode* of governance. By contrast, one might, as I do here, understand law as an *achievement* of governance. This shift in perspective significantly alters one's view of law.

The paper thus introduces a fifth type of concept of law to the taxonomy suggested by Dworkin of doctrinal, sociological, taxonomic and aspirational concepts of law.[5] Achievement concepts are not sociological concepts but functioning governance systems constitute their domain.[6] An achievement concept of law thus naturally combines a sociological component

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[4]Justice in Robes at 1-5. Dworkin would certainly have recoiled at the suggestion here that sociology was a necessary *precursor* to a concept of law. Similarly, most current philosophers of law, even Brian Leiter, who seeks to naturalize the concept, seem to think that any sociological investigation requires first a philosophical specification of the concept of law. This essay argues that these authors are mistaken.

[5]As discussed in section 5.1 below Dworkin's taxonomy ignores the folk concept perhaps because he takes each of the mentioned four to be different elaborations of a folk concept.

[6]These terms are defined below.

with the evaluative one that defines the achievement.

This essay makes both a positive and a negative argument. The idea of governance links the two arguments and play a central role in each. The positive argument introduces the idea of an achievement concept that creates what one might call "evaluative kinds" that identify kinds in terms of the values that they realize or instantiate. Law on the achievement account is the evaluative kind that identifies the (functioning) governance systems that realize the value of legality.

The negative argument contends that the debate over the concept of law has largely presupposed a unitary governance system.[7] With a more elaborate understanding of governance, the negative argument suggests that both sociological and doctrinal concepts of law may be problematic. I suggest that Hart's theory is best understood as a contribution to a theory of governance generally while Fuller's account of law arguably foreshadows an achievement account of law. Dworkin's doctrinal concept itself might be understood not as an achievement concept of law. More strongly, one might eliminate a doctrinal concept of law altogether by attending more carefully to governance.

More specifically the discussion begins with some simple distinctions among various facets of governance. The discussion reveals the complexity of the idea of governance. One might construct from this elaborate structure a plethora of concepts of law. The complexity of

[7]In the terms developed in section 2, a unitary governance system is centralized and undifferentiated. This presupposition lies behind Austin's theory of law as the command of a sovereign; though Hart's introduction of secondary rules offered insight into governance, his focus on the rule of recognition essentially left the unitary system in place.

governance is central to both the positive and negative argument. I begin with the positive argument. Section 3 briefly considers how we evaluate governance systems. The structure of evaluation matches the complexity of the underlying concept of governance. Section 4 integrates the discussion of the prior two sections through a suggestion of an *achievement* concept of law. It first defines achievement concepts and then suggests how one might define achievement concepts of law. Sections 5 and 6 present the negative argument by returning to the contemporary discussion of the concept of law. Section 7 discusses some further implications of an achievement concept. Section 8 concludes.

2. Governance

Philosophers of law consider law a mode of governance[8] but they have not adequately examined the idea of governance itself. This neglect has hindered their efforts to understand legal rules and institutions and "law" itself.[9] This section attempts to elaborate and clarify the

[8]See e.g. Hart, *The Concept of Law* (at least implicitly), Lon Fuller, *The Morality of Law* Yale University Press (revised edition 1969), Waldron, "The Concept and the Rule of Law," 43 Georgia Law Review 1 (2008).

[9]"Governance" is not an ideal term for the phenomenon I seek to theorize because that term, like the term "law," has now accreted a large number of conflicting senses and, in the past 30 years, the usage of the term "governance" has increased dramatically. But the term "governance," unlike the term "law" has no commendatory or honorific connotation.

Literature in law and social science have begun to investigate the idea but no consensus on its structure or even meaning has been reached. See for example Burris, Kempa and Shearing, "Changes in Governance: A Cross-Disciplinary Review of Current Scholarship," 41 Akron L. Review 1 (2008). Burris et al offer a definition of governance that is both narrower and broader than that provided here. They refer to "organized efforts to manage." The "organized" criterion would exclude informal and decentralized systems that I wish to include. "Management" on the other hand seems more inclusive than decision procedures as it seems to include governance means as well. Kjaer, *Governance* Polity Press 2004 also surveys the literature. She defines governance as "the setting, application, and enforcement of the rules of

idea of governance.[10]

All societies have governance systems. A governance system structures social relations within the group. It thus regulates all social life from procreation to resource allocation to day to day behavior. The governance system thus determines collective outcomes and makes collective decisions. Understanding governance thus requires decomposing these systems into the elements that constitute them.

2.1 A preliminary taxonomy

To begin, I discuss four dimensions of governance systems that will bear on the subsequent discussion. First, consider the *realm* of governance. "Realm" refers to the portion of social life to which the governance system applies. This realm may be more or less comprehensive; in some societies, a single governance systems controls all aspects of social life. In complex societies, by contrast, governance is differentiated among a variety of different realms: economic, reproductive, political. Typically, we think of "law" as a type of political governance.

Second, consider the different *aspects* of governance. I distinguish three aspects: the decision protocols that both identify the decision maker and the decision procedure, the

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the game." (At 12). She thus focuses, in the terms of the taxonomy offered below, the functional parts of governance.

Prior studies have not analyzed the concept sufficiently. In particular, they often conflate a distinction central to the argument here: the difference between structures, realizations, and functionings.

[10]This essay thus elaborates and corrects the argument presented in Kornhauser, "Governance Structures and the Concept of Law," 79 Chi-Kent L. Rev 355 (2004)

governance aims or the set of objectives that the governance system hopes to achieve, and the instruments available to accomplish the governance aims. These decision protocols correspond roughly to Hart's secondary rules. Governance aims may vary across realms or even within realms, depending on context. Governance instruments may also vary across realms and contexts. In most contexts, they typically include carrots and sticks as well as what I shall initially call *expressive forms*. These forms may be informative, advisory, persuasive, permissive, requirements or prohibitions. These three aspects are not clearly separable. Presumably, a decision procedure should be specified relative to the aims pursued and the tools available. It is, however, helpful to distinguish these aspects as it is often illuminating to explain and evaluate them separately.[11]

Third, consider the *functional parts* of governance. These include creating or changing the requirements that the members of the group face, monitoring the behavior of group members, adjudicating any claimed deviations, and sanctioning any adjudicated violations. This list can be refined or extended. Consider, for example, the monitoring function. One might decompose this function into three separate activities: identifying the behavior, alleging misbehavior, and condemning the behavior.[12] Similarly, one might decompose adjudication into a fact-finding task and an application task.

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[11]For example, Yahav, "A Theory of Governance Means" (NYU JSD Dissertation 2016) studies governance instruments largely in isolation from the other aspects.

[12]These three (sub)functions correspond to the three titular activities identified in the classic article, Felstiner, Abel and Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming," 15 Law and Society Review 631 (1980). Institutionally, policing amounts to monitoring and blaming while prosecution constitutes claiming.

Finally, consider the points of *instantiation* of governance. We might consider governance *ex ante* when only the governance structure – the allocation of decisions and decision procedures, perhaps relative to the set of available instruments – has been specified.[13]. Or we might consider governance after the roles in the specified governance structure has been populated; call this the *realized* governance system (or, when appropriate, institution). How a governance structure will function depends in part on who populates its roles. An environmental protection agency operated by Franciscan monks will operate differently from an environmental protection agency populated by Harvard MBAs. Recent events vividly illustrate this importance: the governance structure of the United States functions very differently under the Trump Administration than under the Obama administration. Last, a functioning governance institution

[13]I include in the governance structure the protocol for appointment, retention, and dismissal of the agents who populate the relevant institution. On this account, a governance structure can in part constrain the set of realized institutions that can occur.

is a realized institution that is actually operating in actual conditions.[14,15]

Several comments are in order. First, the decision protocols specified in a governance structure are inherently incomplete. No protocol can specify *ex ante* all the questions it will be forced to resolve.[16] In some circumstances, therefore, the decision maker will be forced to elaborate the decision protocol to address the novel situation The process of elaboration may be codified in the decision procedure as a grant of "discretion" to the decision maker or as a

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[14]As noted in Kornhauser (2004), these distinctions parallel the distinctions in game theory among a game form, a game, and a play of a game. Notice that the same game form underlies many different games, each defined by the preferences of the individuals "placed" in the game form. A play of the game is simply that: the decisions, perhaps sequential, of each player (and nature when there are stochastic elements).

Game theory identifies *equilibrium* play of the game. An equilibrium concept is a prediction about the result of a particular play of a game. Typically, the analyst assumes that players make no mistakes during a play of a game. In games with risk and uncertainty, different plays of a game nonetheless may result in different outcomes because of different realizations of the stochastic elements in the game form.

I have identified a functioning governance system with a play of the game rather than an equilibrium. This identification differs from some social scientists and philosophers who identify institutions as equilibria of games. Other philosophic accounts identify institutions with rules of the game; i.e., the game form. That definition coincides more closely with mine. For an account that tries to unify these two approaches see Guala Understanding Institutions (2015).

[15]"Actual Conditions" refer to the technological, social, and natural environment in which the society finds itself. Does it have access only to stone age tools or to all those available in a digital economy? Is it isolated from other groups? Is an island community with the sea level arising and encroaching on its arable land? Is the environment changing slowly or rapidly? Predictably or unpredictably?

[16]This inherent incompleteness parallels that found in contractual instruments and statutes. This parallel should not surprise. After all both contractual instruments and statutes are governance structures for often narrow realms; they allocate decision making authority. In contracts the allocation is typically to one of the parties. In statutes, the allocation is more complex. As in these contexts, the reasons for incompleteness are many: the "drafter" may lack foresight; she may have foresight but the cost of specification may exceed the expected benefit; or there may be benefits to *ex post* specification of the clause.

standard that the decision maker must apply. This incompleteness explains why the realization a governance structure has such significance. When the structure has "gaps," who renders decision in those gaps will matter greatly.

Second, and relatedly, governance systems are dynamic; they change over time. This dynamicism is built into functioning governance systems. After all, they play out in time. Each is simply a sequence of decisions that arise in varying contexts. But governance structures and realized governance institutions are also dynamic. Time and experience may help fill gaps in inherently incomplete governance structures though this process may often be formal rather than informal, and hence the governance structure may revert to prior states.[17] Note also that, over time, governance in many jurisdictions rotates among different individuals. Thus the realized governance institutions will change from time to time.

Third, a governance structure allocates decision-making and specifies a decision making protocol but it does not necessarily specify the decision that the agent must or, more to the point, will make. Consequently, the outcomes of a governance system – the behaviors it induce – thus differ from the decision protocols that structure these outcomes.

Fourth, this characterization of governance, lengthy and complex as it is, leaves many questions open. For example, it does not elaborate on the interrelation among the different elements identified above. Nor does it consider the conditions of instantiation: when motivations do agents have? Under what conditions is a governance system effective?

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[17]This process is evident in common law jurisdictions where precedent may amend decision protocols. In most common law jurisdictions, *stare decisis* is not absolute so that an amendment may erode, disappear or change over time.

Finally, it is important to distinguish governance and governance systems from government. Governance systems should not be confused with *governments*. Governments typically do more than perform the governance tasks set out above. Most importantly, they provide public goods and deliver other goods and services: they deliver the mail; they educate students; they collect garbage; they supply water (and sometimes electricity and gas); they build and maintain roads and bridges, they force savings (in retirement accounts), they insure against unemployment and old age, they coin money and print currency. Presumably, some but not all of this is "governance".

2.2. Classifying Governance and Governance Systems

Hart described *The Concept of Law*[18] as a descriptive sociology but the book largely eschews any empirical investigation or the theorizing that would proceed the empirics. Nevertheless, his introduction of the secondary rules of change, recognition and adjudication foreshadows the idea of a governance structure as secondary rules allocate decision making authority. In addition, they suggest crucial differences among governance systems that help clarify the analysis.

Governance systems differ in both the degree of differentiation and centralization. The prior section identified. Differentiation refers to the extent to which either distinct institutions govern distinct realms or different institutions govern distinct functional parts. Centralization

[18]OUP 1961

refers to the extent to which decisions are centralized rather than dispersed.[19]

Governance systems thus differ in their complexity. Small, closely knit societies have decentralized and undifferentiated systems of governance. More complex societies have more complex governance systems that often are fragmented in complex ways. In large, modern industrial societies, for example, procreation decisions are delegated to individuals and resource allocation is largely left to the market.[20] Other collective decisions, however, are left to a political institutions. In what follows, I shall restrict the term "governance system" to these political institutions.

Societies differ in the extent to which their governance systems are centralized and the extent to which they exhibit functional specialization. Some societies have highly decentralized institutions (or systems) of governance. Norm creation, norm monitoring, norm adjudication and norm enforcement are all decentralized. In a prior era, these governance systems were called "primitive"; they are often described now as "simple" but in fact understanding how these decentralized systems accomplish governance functions requires substantial analysis.[21]

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[19]A third distinction between formal and informal institutions may be confused with the distinction between centralized and dispersed decision making. Formality refers to the explicitness with which the structure is defined. Often a dispersed governance structure is informal but it need not be. Conversely, though centralized structures are typically formal, they need not be. Moreover, as structures are inherently incomplete, no structure is purely formal.

[20]Of course, society as a whole structures both individual and market decisions through a number of mechanisms. Tax and welfare policies, for example, influence the resource allocation.

[21]Note that it is common for anthropologists to describe the norms of these systems as "law" or "legal norms." See for example Malinowski *Crime and Custom in Savage Society* for a classic study. As will become clearer subsequently, the framework suggested in this essay

Other societies have more centralized and more highly differentiated systems of governance.[22] For an example of an almost polar extreme to the decentralized systems mentioned above, consider the United States. Its governance is highly centralized yet nonetheless highly differentiated. It has multiple legislative bodies, multiple systems of courts, a large and diverse set of administrative agencies, a large number of monitoring institutions such as police forces and financial auditors (as the IRS and the SEC), and multiple sanctioning institutions such as prisons and probationary offices. Legislatures, administrative agencies and courts produce statutes, regulations, and opinions that play an important role in the governance of the society. Ordinary usages typically characterizes these texts as "law" or as "legal norms."[23]

Societies with governance systems of intermediate complexity also exist. The institutions of international governance provide an interesting example. Until the twentieth century, international governance was highly decentralized with governing norms typically emerging as custom and with both decentralized adjudication and enforcement. Subsequently, a large number of international courts have emerged; these courts provide somewhat centralized

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agrees that these decentralized systems may, under appropriate conditions, realize the value of legality and hence would have law.

[22]Governance systems should not be confused with *governments*. Governments typically do more than perform the governance tasks set out in the text. Most importantly, they provide public goods and deliver other goods and services: they deliver the mail; they educate students; Ithey collect garbage; they supply water (and sometimes electricity and gas); they build and maintain roads and bridges, they force savings (in retirement accounts), they insure against unemployment and old age, they coin money and print currency. Presumably, some but not all of this is "governance".

[23]The framework outlined here will suggest that these texts should be considered "law" only when the governance system realizes the value of legality.

adjudication but enforcement remains largely decentralized. Whether these institutions produce or constitute law is disputed.[24]

In their analysis of "law," philosophers have largely assumed implicitly an undifferentiated, centralized governance system. This specific type of governance lies behind Austin's theory of law as the command of the sovereign. In this context, one may easily identify the expressions in the governance texts with the law as all governance activity. Centralization of governance means that all functional parts of governance are in the centralized control of a single individual.[25] The absence of differentiation means that each functional part of governance follows the same decision protocol. In this context, all aspects of the governance structure will be uniform and any functioning system will evolve in a straightforward manner. Hence the expressive forms will also be uniform and one might identify law with this expression (or at least expressions that satisfy some additional conditions.

As noted above, however, most governance systems are neither fully centralized nor undifferentiated. Thus the simplicity of expression fails.

3. Evaluating Governance and the Value of Legality

Evaluating governance reflects the complexity of governance itself. After all, an

[24]Within the framework of this paper, the key question would be whether this system of governance realizes the value of legality. An additional question arises about the relation of the value of legality in a governance system of individuals to the value of legality in a governance system of states.

[25]One might think that a group of individuals that constitute a team in the sense of Jacob Marschak and Roy Radner, *Economic Theory of Teams* Yale University Press 1972 would suffice. In a team all group members share a utility function. But they might have different information and hence follow different decision protocols.

evaluation of governance might focus on each of the realms, aspects, functional parts or instantiations identified in the prior section, or, indeed, on any feature of a functioning a governance system. Thus, any evaluation must first identify what I shall the domain of evaluation – what it is that the criterion assesses.[26] Often analysts do not specify the domain of evaluation.

Second, this complexity is further heightened by the different nature of the criteria of evaluation that the assessor may apply. Here I shall distinguish between consequentialist and what I shall call expressivist criteria of evaluation. Consequentialist and expressivist evaluation differ greatly. Consequentialist evaluation assesses its object on the basis of some aspect of its consequences. Governance systems have complex consequences. They influence the behavior of each public and private individual in society. The consequence of a governance system thus includes the pattern of behavior that it induces at each point in history.

Consequentialist evaluation is thus most direct for a functioning governance system. At any given instant, one need only assess the pattern of outcomes that exist at the instant of evaluation (and possibly the preceding instants). This task may be difficult but it seems relatively feasible as it considers actual behavior not possible or hypothetical behavior.[27] If we are

[26]As I discuss below, specification of a concept of law requires the same initial step: what is the domain to which the relevant element of governance belongs. As an example, consider Rawls' theory of justice. He tells us that justice is a virtue of institutions. Does he mean a virtue of the structure of the institution? Or its realization or functioning? He presents his theory as an ideal theory which specifies the realization of the structure; in ideal theory, society is populated by people motivated to act justly. He thus seems to specify the domain as a particular realized institution.

[27]The feasibility will depend of course on how the criterion assesses the consequences. It is easier, for instance, to determine the net economic output of a society than the net welfare of it. And easier to determine aggregate outcomes than how the outcome is distributed across the

evaluating a realized governance system, by contrast, one has to determine what pattern of outcomes would result from each possible realization of the random events that might occur. Evaluation of a governance structure is more complex still as the evaluation must be done for each possible realization of the structure.[28] In each of the latter two instances, the assessment requires a theory that predicts behavior in response to each of the potentially realized governance systems.[29]

Expressive evaluative criteria are, at least superficially, easier to apply. Application requires the observation or measurement of something relatively straightforward. In the context of governance systems, one may need only assess the formal attributes of the aspects of some governance texts or of their promulgation. But, as I shall argue further below, determining what is expressed may be difficult.

Finally, one must identify the evaluative criteria against which one assesses the governance system. One might evaluate a governance system against a large number of criteria. Typically, philosophers of law divide these criteria into three categories: formal, procedural and

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population.

[28]Note that consequentialist evaluation of structures and realization thus requires a criterion for integrating the varied assessments that are involved. One might use the expected outcome or a maximin criterion or some other.

[29]The theory needs to predict not explain what behavior the governance structure or realized governance system induces. More variation in the realization and the circumstances, however, suggests that an explanatory theory may be more important. Most predictive theories work best in environments similar to the ones that produced the predictive theory.

substantive.[30] Legal philosophers, however, usually focus on a subset of these criteria, ones that identify what they call "legality," the "value of legality" or the "rule of law." I shall typically call this value the "value of legality."[31]

Legal philosophers, however, disagree both about the content of the value of legality and its domain. Fuller famously defined the value of legality as purely formal, as criteria for assessing the form of legal norms. He lists eight criteria that focus on the generality and public nature of the norm.[32] Dworkin, by contrast, identified the value of legality as integrity. Integrity is a decision procedure. Still others identify the value of legality as including adherence to various human rights regimes. These are substantive accounts of the value of legality. It is unclear, however, whether these accounts are expressive or consequentialist. A consequentialist evaluation requires determining the extent to which human rights are respected within a functioning governance system. An expressive evaluation requires merely that the respect for human rights be somehow expressed. It may however be difficult to determine what values a functioning governance system expresses. The system produces a large number of texts – constitutions, statutes, administrative regulations, and judicial opinions. These texts are often

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[30]See e.g., Waldron, "The Concept and the Rule of Law," 43 Georgia Law Review 1 (2008)

[31]On the value of legality, see generally, Waldron, The Rule of Law, Stanford Encyclopedia of Philosophy. It might be better termed the value of governance.

[32]The eight criteria are generality, promulgation, non-retroactivity, clarity, synchronic consistency (or non-contradiction), diachronic consistency, possibility (no laws require the impossible), and congruence (of official action with textual requirement). Fuller *The Morality of Law* at 46 - These are not purely formal; congruence is feature of a functioning governance system.

complicated. A statute may or may not have a section articulating the purpose of the statute. It may a text that announces a complex set of operative norms that are likely not co-extensive with the announced purposes of the statute. Regulations may be promulgated under the statute. All of these may be interpreted by a court. Whatever expression that one may extract from this mass of texts may differ from what value one may infer from the behavior of public officials and private individuals.[33]

In this essay, I remain agnostic about which value or values constitute the value of legality. I do so for several reasons. First, it is not clear why one should isolate a particular value as the value of legality. It makes sense to assess a functioning governance system against each of the relevant values. Presumably, when designing a governance structure of amending a functioning governance system, one seeks the structure or amendment that is best all things considered, not simply best along a single dimension. Alternatively, one might identify the functioning governance system that instantiated the most values or some particular set of criteria.

Second, as noted earlier, the content of the value of legality is contested. I shall occasionally refer to the "rule of law" values, amorphous as those are, or to Dworkinian integrity as the value of legality. These references are meant to exemplify the ideas not to argue in favor of a particular account of the value of legality. I note, however, that Dworkin's argument for integrity explains why we should value integrity and understand it as competitive with justice.

I do, however, impose some minimal conditions on the nature of the value of legality. I

[33]For further discussion, see Kornhauser, "No Best Answer?" 146 U. Pa L. Rev 1599 (1998). The sitaution is more complex that the text indicates because there may be multiple rules promulgated by the jurisdiction or by subsidiary jurisdictions.

assume that the value of legality depends on the functioning of the governance system, a constraint that follows from the argument in section 3. Moreover, I assume that the value of legality depends on more than the expression of governance *texts*. This condition may be met either by a value of legality that admits consequential value or by an expressivist account that depends not only on textual expression but also on the behavior of public officials or citizens.

4. Achievement Concepts of Law

We now have all the ingredients necessary to define an achievement concept of law. Achievement concepts take functioning governance systems as their domain. These concepts are evaluative concepts, necessarily consequentialist but possibly incorporating expressivist elements as well. There is an achievement concept for every criterion of evaluation of functioning governance systems (and for every subset of the set of such criteria). Each achievement concept picks out the functioning governance systems that realize or instantiate the relevant value(s). One might thus have an achievement concept of justice that picks out the functioning governance systems that realize justice. As the achievement concept identifies functioning governance systems, the achievement is relative to the realization of the system – i.e., to the people who populate the relevant roles – and to the contingent circumstances that the governance system faced in the particular functioning.

An achievement concept of law thus identifies the functioning governance systems that realize the value of legality. As noted in the prior section, however, the content of the value of legality is contested. Typically, it is seen as a set of related values but the members of this set are contested. One might then construct an achievement concept of law for each of the concepts of

legality. This procedure would allow the analyst to determine which functioning governance systems achieved multiple values of legality under specified conditions. One might view this feature as a benefit of the approach as it allows one to compare different accounts of the value of legality in terms of the instances in which functioning governance system achieve it.

An achievement concept of law poses a large number of empirical questions. One might ask, for instance, whether a specific feature of a governance structure was necessary for a functioning governance system to achieve legality. Or one might ask whether realized institutions populated by agents of some type performed better than realized institutions populated differently. These empirical questions bear on the design of governance systems.

Notice that an achievement concept of law is scaled or graded. A functioning governance system may realize the value of legality to a greater or lesser extent. One might, for instance, conclude that a functioning governance system the texts of which expressed certain formal, procedural, or substantive values and which also realized them consequentially to a given extent succeeded better at achieving the value of legality than a functioning governance system that consequentially realized the value of legality to the same extent but whose governance texts failed to express these values.

Finally, an achievement concept is not a functional concept. There is no claim that the purpose of the functioning governance system or of any aspect of it is to realize or instantiate the value of legality. Nor is any causal relation imputed to the functioning of the part or the whole in achieving the outcome. The success of the functioning governance system does not necessarily feedback to sustain, stabilize, or reproduce the system. The value of legality is simply achieved.

5. Sociological Concepts of Law

This section begins the negative argument. The debate over the concept of law resists easy summary because it implicates both different conceptual methodologies and conflates distinct questions. In this section, I try to disambiguate the debate and then argue in section 5.2 that one of the questions – the sociological concept of law – has failed to understand adequately governance. This lack of understanding has led to confusion over the appropriate domain of the concept. With the distinctions developed in the prior section, this confusion becomes more evident and we can see that the misunderstanding of governance has led to confusing empirical issues with conceptual ones. The discussion of the doctrinal concept makes the same error but, as argued in section 6, when an achievement concept of law is developed, the doctrinal concept disappears.

5.1 Concepts of Law and their analyses

Two related issues muddy the debate over the concept of law. The first concerns ambiguity over the nature of the concept and the appropriate criteria of a successful analysis or exposition of the concept. The second concerns ambiguity of what I called the domain of the concept of law.

Consider first the question of domain. Hart famously puzzled over the question of what constituted the subject of his debate with Dworkin. Hart suggested that they offered answers to different questions and hence did not disagree. Hart claimed that he sought to identify the nature of law and to distinguish it from other social phenomena such as coercion and morality while

Dworkin sought to answer, in Hart's terms, the question of legal validity.[34] Dworkin later acknowledged the distinction between the two questions when he identified four different concepts of law that he termed sociological, taxonomic, doctrinal, and aspirational.[35] He largely dismissed the sociological and the taxonomic concepts as without philosophic interest. Dworkin rather regarded the doctrinal concept of law as philosophically central; he framed the question posed as "what makes a proposition of law true." I discuss the doctrinal concept at greater length in the next section.

Each of the three domains – sociological, doctrinal, and aspirational – have different domains. I.e., the relevant concepts categorize different things in the social or evaluative world. Section 3 discussed the nature of the evaluative concepts. Sections 5.2 and 6 address the sociological and doctrinal concepts respectively. In each case, the ambiguity about what aspects of governance to which the concept applies undermines the analysis. Section 5.2 argues that the current debate has "conceptualized" the sociological concept of law by converting empirical questions into conceptual ones. Section 6 argues more strongly that, when governance is properly understood, we should eliminate the doctrinal concept.

Turn now to the question of the nature of the concept under discussion. Many authors

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[34]See Postscript to the Concept of Law (2d edition).

[35]Dworkin Justice in Robes 1-5. The aspirational concept of law roughly corresponds with what I have called the evaluative concept of law. "Aspirational," however, risks conflating an evaluative concept of law with an aspirational, in the sense of "ideal," concept of governance or justice. Anthropologists sometimes seem to have this latter sense of aspirational in their discussions of law; see Pirie, "Law before Government: Ideology and Aspiration," 30 Oxford Journal of Legal Studies 207- 220 (2010). Pirie's approach offers an alternative or additional sociological concept of law.

state that the inquiry concerns the *folk* concept, what individuals, presumably lay individuals, mean by "law."[36] H.L.A. Hart is sometimes understood this way though he may simply be exploiting distinctions made in ordinary usage to provide insight into the underlying phenomena of interest. An analysis of a folk concept seeks to clarify its content, to eliminate inconsistencies, and, ideally, to reduce it to simpler, more easily understood (folk) concepts.

Folk concepts contrast with what I shall call technical concepts. The category of technical concepts includes a variety of concepts, for example, natural kinds and social kinds. A natural kind is a concept that captures the structure of the natural world rather than one that reflects the interests or actions of individuals. This latter grouping is a social kind. I designate these concepts "technical" because our understanding of the natural and social world is mediated by our best natural and social theories. The kinds they posit thus respond to the criteria for assessing explanatory theories, empirical success, explanatory depth and breadth, consilience and simplicity.

Folk and technical concepts do not obviously exhaust the set of conceptual kinds. Mathematical concepts, normative concepts, including the evaluative concepts discussed above, and modal concepts, for example, superficially seem to be neither folk nor natural (or social) kind concepts. Arguably they are technical concepts as they often fit into complex theories of their

[36]Joseph Raz is perhaps the most prominent adherent of this view. See e.g. Raz, "Can There Be a theory of Law, " in Martin Golding and William Edmundon (eds.) *Blackwell Guide to Philosophy of Law and Legal Theory* Blackwell 2007.

domain.[37]

A third criterion of successful analysis has been invoked in the debate over the concept of law. This criterion directs the analyst to adopt the concept that is politically best.[38] One might understand this criterion as the evaluative analogue to the truth criterion for a technical concept. Phrased differently, each evaluative concept characterizes an evaluative kind: the set of natural and artifactual things that instantiate that value. Understood this way, the concept of law seeks the concept of law that best promotes some political value or values. From this perspective, these views are proto-achievement concepts of law. I suggest later in section 7 that the political understanding of the concept of law is best understood as an achievement concept.

Understanding social phenomena might begin from folk concepts but it would not remain there. As understanding deepened, more technical concepts emerge. A folk concept thus does not seem adequate for a sociological concept of law.[39] A sociological concept of law should thus

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[37]Consider evaluative concepts. For a moral realist they are not obviously folk concepts; the correct concept of "wrong" should correspond not to lay usage but to the real extension of the concept. Perhaps it is then a technical concept in a way similar to natural kinds. For an expressivist the analysis may be more complex. In any case, for purposes of this essay, I require only the lay concept of "evaluative concept".

Notice that the domain of an evaluative concept is the category of objects of evaluation.

[38]Murphy citations, Schauer (?). Priel, "Law as a Social Construction and Conceptual Legal Theory," Law and Philosophy (2019) rejects conceptual analysis and argues for a political understanding of the debates within legal philosophy.

[39]Physical theories grew from experience with the world which was (perhaps is) embedded in our ordinary language. But as physical theories developed, the ordinary concepts provided inadequate. Technical concepts emerged that represented the physical world very differently from ordinary understanding.

Some cognitive scientists argue similarly that folk psychology does not provide an adequate conceptual foundation for psychology. See e.g. Stich, *From Folk Psychology to Cognitive Science* MIT Press 1983.

reflect more sophisticated understandings of social systems.

Nor is it clear that the lay concept of law elucidates a doctrinal concept of law. The truth conditions of propositions of law are arcane, at least in common law jurisdictions. Dworkin's account grounds the concept of legal practice. Moreover, he contends the legal practice includes legal theory. On his account, then, the doctrinal concept would appear to be either a folk concept where the folk are lawyers or a technical concept growing out of legal theory.[40]

5.2 Sociological Concepts of Law[41]

5.21 What is a sociological concept of law? At the outset, I must dispel some terminological confusion. Hart, as noted, described his book as an exercise in "descriptive sociology"; Dworkin distinguished the philosophically interesting (to him) doctrinal concept of law from the philosophically uninteresting (to him) sociological concept of law. On the surface, both authors are discussing the same sociological concept of law that I have in mind. But, as the

[40]Dworkin distinguishes between criterial and interpretive concepts. He treats law as an interpretive concept. See e.g. Dworkin, *Law's Empire* Harvard University Press 1986. An interpretive concept, like an achievement concept, links the evaluative and the institutional; an interpretive concept interprets a social practice in its best light. But, as Dworkin develops his concept of law, he understands the practice very thinly as he seeks only to ground the "norms" embedded in the practice (or what I call the governance texts or an interpretation of them). Moreover, Dworkin largely offers a normative theory of adjudication, of how judges ought to decide cases (or more broadly what rights and duties citizens have). Under an achievement concept, by contrast, the realization of the value depends not (or not only) on how agents *ought* to behave but on their actual behavior. Dworkin's interpretive theory thus integrates not the actual practice but an idealized, perhaps non-existent, version of the practice. In section 6, I suggest that we might better understand Dworkin's interpretive theory as a decision procedure for judges.

[41]I discussed the evaluative concept of law in section 3; I will discuss the doctrinal concept of law in section 5. I will largely ignore the taxonomic concept because taxonomy is usually a prelude to theory.

prior subsection hinted, neither Dworkin nor Hart apparently had in mind a technical concept of law. Their concepts are thus not obviously sociological concepts.

A technical concept is grounded in a theoretical structure. On this account, a sociological concept of law is grounded in a social theory. That theory presumably seeks to explain and understand a variety of social phenomena. The concepts it uses to explain will be those that best serve this explanatory purpose.[42] So a sociological concept of law, if any, must also serve these explanatory ends. From this perspective, it is not clear that social theory requires (or will include) a sociological concept of law. "Law" may not be necessary to explain the social phenomena in which we are interested.[43]

Indeed, the development of the ideas of governance in section 2 might serve as a "law"-less framework for a social theory. After, all the achievement concept of law defined in section 4 is not, without more, a sociological concept; it is an evaluative one.[44] A social theorist might be interested in the achievement concept because, as society prizes the value of legality, she might want to identify when that value is realized or she might want to understand how best to design a

[42]Subject to meeting other criteria such as simplicity and consilience.

[43]Of course, we might be interested in the social phenomena of law in the achievement concept sense. The achievement concept identifies the extent to which a functioning governance system realizes the value of legality. We might want to identify the social processes through which this realization occurs and what governance features, if any, are shared by functioning governance systems that achieve the value of legality (to some given extent). "Law" here is something to be explained.

[44]Note that the evaluative concept picks out functioning governance systems which are objects of sociological study. It is possible, of course, that these functioning governance systems share other features – longer life expectancies, higher literacy rates, greater wealth. One might say that the extent of their legality explains these shared features; or one might think that features of the underlying governance system provide the explanation.

governance system to achieve legality.[45]

Dworkin clearly did not consider technical concepts. He called the sociological concept of law a "criterial concept.[46]" A criterial concept depends on usage. Dworkin does suggest that a sociologist might want to know either what causal effects tokens of this concept have or what social structures produce these tokens.[47] It does not occur to him to think that a mature social theory would not necessarily use the term "law" in a technical way.

Hart similarly did not have any technical concept in mind. His enterprise after all was "descriptive," not explanatory. I suggest below that Hart's distinction between primary and secondary rules advanced social theory. He began to elaborate a concept of governance that requires further development before it provides a mature theory. But his contribution to social theory should be understood as more fundamental than a concept of law.

5.22 Hart and Fuller's concepts as sociological concepts. In this subsection, I shall nevertheless consider Hart's and Fuller's theories of law as sociological concepts that treat law as a mode of governance. Note that the existence of an achievement concept of law does not preclude the existence of a sociological concept of law (just as a sociological or evaluative concept of law does not preclude a doctrinal concept of law). The two types of concepts are not strictly competitive.

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[45]Economists treat Pareto efficiency this way. Pareto efficiency is one, but not the only, virtue that a resource allocation mechanism might have. Economists often seek to identify which resource allocation mechanisms would in fact realize efficiency. On this account, Pareto efficiency is not a concept inherent in economic theory but an evaluative concept.

[46]Justice in Robes at 9-10, 147-155.

[47]These latter questions may be related to achievement concepts.

Nor does the above account require that there be only *one* sociological concept of law. Social theorists might require multiple concepts that reflect different aspects of the folk concept of law. The discussion below thus merely suggests that neither Hart's nor Fuller's concept is likely to be explanatorily fruitful. Obviously, I cannot prove this claim, nor the claim that any concept of law that treats law as a mode of governance is unviable; they can be refuted by any theorist who develops their ideas into a compelling social theory.

I shall suggest that Hart's contribution can be understood not as a contribution to a descriptive sociology but as an important contribution to our understanding of governance. Conversely, Fuller, I suggest, can be understood as a forerunner of an achievement concept.

Hart defines law as the union of primary and secondary rules; the rule of recognition serves as the master rule, the source of validation for the other rules. The rule of recognition itself is grounded in a social practice of certain law-applying officials. On this account, then law is a feature of a functioning governance system.

The requirement of a rule of recognition fails to categorize clearly a number of governance systems that do not fully incorporate the shift to secondary rules. Hart himself notes the difficulties presented by the regime of international governance. But his criterion also does not deal adequately with societies that have partially differentiated their governance institutions such as medieval Iceland.

Hart's theory is nonetheless a major advance on prior accounts as it points to the importance of governance structures as an element of a functioning governance system. As I will argue in section 6, however, Hart's implicit retention, despite his emphasis on secondary rules,

the Austinian assumption of a unitary system which is both centralized and undifferentiated, obscures the fact that differentiation and decentralization dissolve the importance of doctrine.

Fuller's theory of law also focuses on the norms. He identifies law with governance when the prevailing norms meet a set of formal criteria. Two points are worth noting. First, in fact, not all the criteria are formal. The last criterion, congruence, concerns the functioning of the governance system; it requires that the officials and citizens within and subject to governance largely comply with the stated norms. Second, Fuller provides an account of a legal ideal that provides a scale against which to measure the legality of different functioning governance. systems rather than a dichotomous partition of the set of functioning governance systems into two categories: "law" and "not-law."[48] (One might say that the concept of law is a binary relation "more-legal-than" rather than a simple property "legal" that a functioning governance system possesses or does not possess.)

6. The Doctrinal Concept of Law

The doctrinal concept of law, as defined by Dworkin, identifies the grounds of law, the criteria that determine when a proposition of law is true. But what precisely is "law"? What element of a functioning governance system is it?

In Austin's concept of law as the command of the sovereign, the answer to this question is relatively straightforward: the commands of the sovereign comprise the body of law in the jurisdiction. Austin's concept of law implicitly presupposes a centralized and undifferentiated

[48]Simmonds, *Law as a Moral Idea* 2008 similarly sees the concept of law as an ideal more or less fully attained than as a dichotomous concept.

governance system. In this context, all decisions are made by a single individual that conceivably deploys the identical decision protocol for each functional part of governance. There would then be a clear, unitary set of rules guiding the sovereign and to which the sovereign's subjects could look.

This vision of governance, however, strains credulity. Even the unitary sovereign may find herself faced with different types of consideration at different functional stages of governing. She may have reasons not to monitor some conduct according to the stated norm or reasons not to adjudicate a claim correctly or to enforce an adjudicated claim. The sovereign faces a sequential decision problem and it is not clear that adhering to the norm announced at time 0 is in the sovereign's interest when monitoring at time 1, prosecuting at time 2, adjudicating at 3, and sanctioning at time 4. This problem of time-inconsistency may hold even for a sovereign seeking to promote and achieve justice. At each stage, the reasons she has to act change and the appropriate decision may differ from the one dictated by the norm promulgated at time 0. It then becomes Indeed, it becomes less clear that there is some single set of norms exists that agents should follow. Indeed it is unclear that it is politically desirable consistently to follow a single set of norms.

This divergence in the set of reasons applicable to different functions becomes more apparent and more pronounced as the governance system grows more differentiated. Multiple institutions may promulgate norms, monitor compliance, prosecute perceived non-compliance, adjudicate and enforce. A glance at the highly differentiated governance system of the United States reveals a bewildering number of norm-creating institutions – Congress, the legislatures of

50 states, innumerable city, county and school system governing boards and administrative agencies.[49]

Clearly, the dispersed set of public officials must coordinate their actions. Note that modern governance systems produce large numbers of texts. These can serve this coordination function in at least two ways. First, one might, through interpretation, integrate these texts into a set of norms that inform and animate each of the distinct texts. One might call the norms in this integrated text the law. Indeed, it is possible that the decision procedures of each agent in the governance structure directs her to perform this integration before considering whatever other reasons for action the relevant decision procedure specifies. On this account, one can weakly eliminate the doctrinal concept by omitting the interpretive step that integrates the diverse texts into a single one.

More strongly, one might understand the initial observations concerning the effects of differentiation as, in conjunction with the decision procedures specified in the governance structure, rendering a unified legal order not just unnecessary but impossible to generate. Th

Dworkin's theory of law to some extent avoids the extreme differentiation of function that besets more general theories of law because Dworkin places "law" exclusively in the adjudicative branch. His theory of law is thus a theory of adjudication that specifies a clear decision procedure. But his theory conflates the decision procedure with the value of legality which Dworkin identifies as integrity. Judges must pursue integrity. But it is an empirical question

[49]There are over 300 cities in the US with populations over 100,000, over 3000 counties and over 10,000 school districts in the US..

whether a judicial decision procedure to pursue integrity will in fact (best) achieve integrity. Other decision procedures might fare better.[50]

7. Implications of the Achievement View

Thinking of law as an achievement rather than a mode of governance has significant implications for our understanding of law and governance. This section sketches some of these implications.

When law is viewed as a mode of governance, we tend to identify the mode with specific features of the governance structure. As a consequence, we understand law as a categorical concept; a specific society either has law or it does not. By contrast, as a functioning governing system may realize the value of legality to a greater or lesser extent, an achievement concept of law permits societies to be more or less "lawlike." Similarly, an achievement concept represents the dual institutional and normative sides of law in a natural way. Positivism, by contrast, struggles to explain the normativity of law while natural law accounts under emphasize the institutional aspects

Furthermore, as the achievement depends upon the realization of the governance institutions – i.e., who populates them – and on the history of society governed, including random external shocks, the achievement of law is contingent. A specified governance structure may achieve law with one set of governors or a specific history but not with others. Conversely, more than one governance structure, with appropriate personnel and under appropriate circumstances

[50]Of course, the decision procedure that directs judges to pursue integrity might express the value of integrity without achieving it. But it is not obvious that an expressive procedure that fails is superior to an inexpressive one that succeeds.

might, when functioning, achieve law. Both societies with decentralized, undifferentiated governance structures and those with highly centralized and differentiated ones might achieve law. Phrased differently, functioning governance systems that achieve law may not share any particular feature. It is thus an empirical or social theoretical question whether all functioning governance systems that achieve law in some circumstances have common structural features.

The contingency of the achievement of law means that we need to assess and reform our governance systems as personnel and circumstances change. A previously adequate governance system may become inadequate and become "not law" or less legal. This feature of an achievement concept of law offers a different perspective on weight of the political criterion on the debate over the separation of law and morality. Positivists argued that separating law and morality would lead to better governance while non-positivists argued the contrary. On an achievement concept of law highlights the importance of continual assessment of the functioning of the governance system.

An achievement concept also simplifies our understanding of when the obligation to obey the law arises. The question is transformed into a question of when an individual has an obligation to adhere to the direction of the governance system. The extent and nature of the individual to conform her conduct to directives of the governance system on two factors: the nature of the value of legality and extent to which the functioning system achieves this value. The thinner the concept of the value of legality is and the lower degree to which that value is achieved, the weaker the obligation, if any, to obey.

An achievement concept of law also shifts the debate over whether international law is

law. The current debate often focuses on the formality of the institutions governing international relations or the degree of centralization and differentiation of the international governance system.[51] For an achievement concept, however, these questions are irrelevant. Rather one must ask two questions. First, what is the relevant value of legality in a system of international governance. It is not obvious that whatever value of legality we impute to domestic systems should also be imputed to international governance. Second, to what extent does a functioning system of international governance achieve the value of legality? We must shift attention from the features of international governance to its performance.

Of course, much inquiry would continue relatively unchanged. An achievement concept of law simply shifts the inquiry from a conceptual one into law as a mode of governance to practical and empirical one about particular features of specific governance structures. Doctrinal analysis, for example, would continue largely unchanged, a jurisdiction-specific inquiry into the structure of judicial-making. Whether some doctrine or aspect of doctrine is common among many jurisdictions would be an empirical question.[52]

8. Concluding Remarks

Discussion of the concept of law has focused on the doctrinal and sociological concepts of

[51]For example, the absence of centralized enforcement mechanisms is often cited as a reason why international governance is not law.

[52]On this account, the role of imitation and borrowing in comparative law would take on heightened importance and a somewhat different cast. After all, the discussion in section 2 indicates that the performance of rule R (or doctrine D) will depend not only on the content of R or D but also on other features of a functioning governance system. These other elements may explain why a borrowing succeeds in one jurisdiction but fails in another.

law. This essay has argued that this focus should be redirected to concentrate on an achievement concept of law. A sociological concept of law should derive from social theory; though Hart's distinction between primary and secondary rules constituted a significant contribution to social theory, neither he nor subsequent authors developed his insights into a sufficiently rich social theory. Only such a theory can determine whether a sociological concept of law. Moreover, the nature of governance suggests that we can, at a minimum, do without a doctrinal concept of law.

An achievement concept of law, by contrast, derives from an evaluative concept of legality. It identifies the set of functioning governance systems that realize or instantiate the value of legality. This approach offers a simple and direct answer to the question of the normativity of law: the extent of a citizen's obligation to obey the law depends on the nature of the value and the extent to which it is achieved.

Identifying law, on this account, is a joint project of philosophers of law and social scientists. Philosophers must identify the value of legality and why we should want our governance structures to instantiate this value. At least thy must explain how the value of legality is integrated into all-things-considered assessments of governance. Social scientists then need to identify those functioning governance systems that realize the value of legality.