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Joseph D'Agostino

Against Imperialism in Legal Concepts

17 U.N.H. L. REV. 67 (2018)

ABSTRACT. The authority of government—and that of its politicians, judges, regulators, and other specific authorities—continues to grow more imperialistic. This is partly due to the imperialism of legal concepts as facilitated by Wittgenstein's famously non-essentialist treatment of concepts through family resemblance theory. Although non-essentialism or anti-essentialism can be highly valuable in forming religious and literary concepts, and in describing the sometimes incoherent everyday usage of concepts and terms, all legal concepts should be scientific-style essentialist concepts. Such essentialism combats the broad discretion granted and obscured by non-essentialist approaches that allow concepts to absorb contradictory elements and harmfully hold them together, thus allowing legal authorities to choose from among only those elements that suit their purposes in any given case. Instead of arguing for the total exclusion of family resemblance and similar theories from use in legal concepts, I argue for translating non-essentialist concepts into essentialist ones while still using the former's theory forms. Precise essentialist concepts, with core and non-contradictory properties clearly delineated, are necessary for maximizing the rational and moral legitimacy of law, which coercively regulates the behavior of ordinary citizens at the command of political and legal authorities. Legal rules and commands must be as clear and consistent as reasonably possible not only for optimal rationality and morality, but also for legitimacy in the eyes of those subject to law. This is especially important in an increasingly diverse society of incompatible perspectives and decreasing conscious and unconscious adherence to the Anglo-American legal tradition.

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INTRODUCTION

Given an imperial presidency, an imperial judiciary, and an imperial administrative state controlled by increasingly unconstrained authorities, legal theory should consider one small but significant enabler of this imperialism: the baleful influence of Ludwig Wittgenstein's non-essentialism. The use of his work has contributed to the ongoing disintegration of coherence in legal concepts, and redirecting law's tendencies away from his non-essentialist concept forms and toward dedication to essentialist ones is a crucial part of any restoration of the rule of law. Non-essentialist conceptual theories such as family resemblances, cluster concepts, prototypes, and generics allow legal concepts to assimilate self-

contradictory elements in ways appropriate to religious and literary concepts.¹ Political and legal authorities then use these imperialist legal concepts to coercively regulate the behavior of citizens in ways those citizens cannot predict, for the concepts give those authorities too much discretion while disguising that discretion and its boundaries.

Other forms of authority, such as religious, non-legal social, artistic, and scientific authority, need not be coercive and can leave believers and citizens to reach their own conclusions concerning how to behave. Legal authority necessarily requires the conformity of citizens who are subject to that authority, i.e., it demands certain actions of human legal subjects who cannot legitimately decide for themselves what they should or should not do in response to the law in the way they can in response to religion, moral exhortation, literature, science, and the like. Truly legal concepts are never purely theoretical, but always have implications for practical decision-making, and always carry with them the potential for coercion. Therefore, they always touch upon potentially non-voluntary action.

The decline in legal coherence has no doubt contributed to the decline of political life as well as respect for political and legal authority. Even setting aside the antics of politicians, we live in an era in which a pivotally important judge and legal scholar is comfortable repeating, to the general public, what he and many other legal scholars have been saying in their writings for years: that law is irrelevant to most judicial decisions at the appellate level. Thus, perhaps, everyday citizens are justified in holding their rulers in low esteem.² To combat these trends, only precise, essentialist, scientific-style legal concepts should be used to understand and explain law and to derive legal rules. With the use of essentialism, various legal authorities and legal practitioners are more likely to share the same understandings of legal concepts across the legal system. Ordinary legal subjects then can best

¹ On prototype theories, see ELEANOR ROSCH, *Principles of Categorization*, in COGNITION AND CATEGORIZATION 27–48 (Eleanor Rosch & Barbara B. Lloyds eds., 1978); on cluster concepts, see JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (photo. reprint 1970) (1969); for family resemblance theory, see LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1967); and on generics, see Mark Johnston & Sarah-Jane Leslie, *Concepts, Analysis, Generics and the Canberra Plan*, 26 PHIL. PERSP. 113, 113–71 (2012).

² Cf. Adam Liptak, *An Exit Interview With Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html> [<https://perma.cc/FG8R-55LB>] (Judge Posner stating “I pay very little attention to legal rules, statutes, constitutional provisions”). For more on Richard Posner’s statements, including his descriptions of most U.S. Supreme Court interpretations of the Constitution as “lawless,” and a pro-essentialism, pro-rule of law reaction, see Joseph D’Agostino, *Posner’s Folly: The End of Legal Pragmatism and Coercion’s Clarity*, 7(2) BR. J. AM. LEG. STUDIES (2018).

determine what the law requires of them and predict what penalties will apply for legal violations, and thus we can go some way toward the rehabilitation of the rule of law.

This is especially important in an increasingly diverse nation in which formerly shared cultural features, ideological beliefs, and attitudes left over from Anglo-America and the Anglo-American legal tradition give way to dissent from and, sometimes, incomprehension of that tradition. Those shared assumptions and values have consciously and unconsciously promoted consistency in the application of vague and ambiguous laws while nurturing greater trust in traditional legal methods, even when they sometimes produce bad results in the eyes of many. Yet, such shared perspectives are going with the wind, thus necessitating much greater clarity in legal definitions and a much more conscious effort to promote consistency and predictability in legal rulings.

To these ends, instead of eliminating anti-essentialist or non-essentialist concept forms, I propose an *essentialist understanding of traditionally non-essentialist concept forms*. Purely theoretical concepts can be healthily non-essentialist, as perhaps can concepts meant for practical reasoning about what actions to take when used by individuals acting voluntarily—at least before such reasoning is translated into specific decision-making. So can concepts meant to describe the crude and contradictory ways ordinary people, and sometimes specialists who should know better, use or misuse concepts. But legal concepts, as part of *social practical reasoning*, cannot be healthily non-essentialist. They must be precise enough to be used consistently by a multiplicity of increasingly diverse legal authorities and yield rules that a variety of increasingly diverse members of society can understand and obey in the same way for all practical purposes, i.e., legal concepts must be socially objective rather than purely individual mental kinds.

Anything else impairs law as a rational and moral way of facilitating the coercive regulation of the actions of some (legal subjects, who are usually ordinary citizens) by others (lawmakers, judges, and other legal authorities). Although law can use non-essentialist concepts, such as religious and moral ones, as sources for itself, it should refine those concepts into essentialist regulatory legal concepts when making law. By “concept,” I mean an abstract idea that can be used in rational thought. Concepts are often understood and communicated with the assistance of semantic definitions using terms, and usually with much imperfection.

Anything less than an unvarying commitment to essentialism allows judges and other legal authorities to employ the intellectually high-sounding excuse of non-essentialism to avoid the candor and hard work that constructing proper legal concepts requires. When legal concepts are non-essentialist and contain contradictory elements, they allow judges and others to select from them those

elements that they wish to use in a given case. Other or even the same judges and legal authorities can then select different elements to apply to a future case that should, on the basis of its facts, be treated in the same way as the first case. Sometimes this selection process is conscious, sometimes unconscious, but lawmakers, judges, and regulators are not renowned for the precise use of concepts—legal authorities rarely have a clear idea of how they are using concepts and what influence non-essentialism, common in legal theory and elsewhere,³ has had on them.⁴ This incoherence and instability in law can be combatted, to an extent, by a conscious and rigorous use of conceptual essentialism for all legal concepts so that they have clearly defined, non-contradictory essential elements. Scientific-style essentialist concepts can reduce legal authorities' unwarranted discretion while also more clearly delineating what discretion the law properly grants them—judges and others sometimes need considerable discretion in making their decisions, and I do not argue otherwise.

Conceptual essentialism will not drive vagueness and ambiguity entirely from law, nor reveal clearly correct answers to all difficult cases. Far from it. It is merely a necessary step in the direction of realistically optimal legal clarity, stability, consistency, moral and social legitimacy, and indeed, rationality.

After I have outlined an approach to transforming non-essentialist concepts into essentialist ones for the purpose of social practical reasoning such as law, I will make a brief argument for understanding physically-coercive intent on the part of a lawmaker against her legal subjects as one of the essential elements of any maximally coherent and reality-conforming concept of law. Almost all legal philosophers today reject coercion in any form as a necessary feature of law, and I aim to revive the Jeremy Bentham-John Austin command theory of law in a refined guise while also retaining social legitimacy and other elements as essential to the concept of law. I have made an extended argument in favor of this understanding

³ See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 49–50 (1988); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 29 (2004); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 763–64 (1984); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 880–81 (2009); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069 (2014); Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087 (2002); Torben Spaak, *Schauer's Anti-Essentialism*, 29 *RATIO JURIS* 182–214 (2016).

⁴ See Simon Evans, *The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches*, 29 UNSW L.J. 207, 207–08 (2006) (“[Judges] often employ definitions that do not consist of ‘essential features.’”).

elsewhere and will not repeat it here.⁵

Part I explains that natural-kind concepts should serve as models for our social-kind concepts. Part II denatures family resemblance imperialism and shows how family resemblances need not be non-essentialist, and then Part III examines abstract and material referents and their roles in distinguishing concepts. Part IV sketches illustrations of my approach, first as applied to the natural-kind concept of snow, and then to coercive intent in the social-kind concept of law.

I. NATURAL KINDS: MODEL FOR SOCIAL KINDS

A. *Analogy to Objective Natural Realities*

I follow a broadly Aristotelian, naturalistic epistemology that models understanding of social-kind concepts, such as those of political positive law and many of the concepts it uses, upon our understanding of physical natural-kind concepts such as those of rock, gold, and dog.⁶ Only philosophical realism, broadly understood as deriving objective—or at least socially-objective—mental understandings partially but necessarily from the effects of worldly phenomena upon our minds,⁷ supports rational thinking in practical matters, and I do not know what epistemology that strict nominalists, who cannot coherently use abstract terms such as “law” that refer to universals, or strict idealists, who cannot form a firm connection between interior mind and outside reality, might offer that could satisfy legal theory.⁸ Of course, the human mind must have a pre-existing capacity

⁵ See generally Joseph D’Agostino, *Law’s Necessary Violence*, 22 TEX. REV. L. & POL. 121 (2017).

⁶ “From a philosophical standpoint, what bears special notice is that the epistemic norms of common sense and the epistemic norms of science are simply on a continuum. As Quine remarks, ‘The scientist is indistinguishable from the common man in his sense of evidence, except that the scientist is more careful.’” BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 51 (2007).

⁷ Cohen’s epistemology may be “expressed in the sentence, ‘A thing is what it does.’” Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 826 (1935).

⁸ See LEITER, *supra* note 6, at 48. Leiter states:

The pragmatic view of theory-construction is essentially the view expressed most famously by Marx in the “Theses on Feuerbach”: “Man must prove the truth, that is, the reality and power, the this-sidedness of his thinking in practice. The dispute over the reality or non-reality of thinking which is isolated from practice is a purely *scholastic* question.”

Id. (citations omitted). Although I do not believe so, some believe that the exclusive value of pragmatic naturalism may be restricted to practical fields such as legal philosophy, which by definition concerns political positive law first and foremost, and political positive law is a practical thing. *Cf. id.* Leiter continues:

Theorizing, in other words, should make a difference to practice (or experience). Notice that this is

to interpret and classify its experience of matter into conceptual mental forms or else it would merely record sensory experience, as does a motion picture camera. I believe that anti-realist “interpretivists,” who reject for social science the scientific approaches of natural science, cannot construct universally-intelligible understandings without realist interpretations of their claims.⁹

It is certainly beyond the scope of this Article to demonstrate the superiority of realism, and I take it as a starting point and productive methodology. I will sketch my approach to it by drawing analogies between our formation and understanding of natural-kind concepts and our formation and understanding of social-kind concepts.¹⁰ I will certainly not attempt to resolve the foundationalist versus anti-foundationalist controversy, although I am in the former camp. A social-kind concept’s beginning, though not its entirety, should be derived naturalistically from the effects of the concept’s referents (the real-world phenomena that the concept describes and classifies) upon the typical conscious human mind.¹¹ I argue that natural-kind and social-kind concepts are similar enough in salient aspects to be essentialist for the same reasons.¹²

centrally a *normative* maxim, concerning what sort of theorizing is *worth doing*. It is not a substantive metaphysical or semantic doctrine to the effect that, e.g., theoretical claims that make no difference to practice or experience are meaningless and without cognitive content.

Id.

⁹ Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 874 (1989) [hereinafter Moore, *The Interpretive Turn*]. Professor Moore explains:

No version of interpretivism, I conclude, can make good its claim to have escaped from metaphysics. The interpretive turn has only obscured the metaphysical presuppositions of our thought, in law as elsewhere. The result is not a successful escape from doing metaphysics, as interpretivists believe; it is rather only metaphysics done unself-consciously and badly.

Id.; see also Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 188–244 (Robert P. George ed., 1994).

¹⁰ I believe this view is in line with what Dan Priel describes as a potentially “more fruitful approach.” Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 WASH. U. JURIS. REV. 269, 322 (2012). Jurisprudence should “adopt aims similar to those of political philosophy by focusing on questions of normativity and legitimacy . . . but it would be much more cognizant of scientific work, especially in the domain of cognitive psychology, and its potential significance to answering these questions.” *Id.*

¹¹ This is not to assert that every belief must be traceable to specific sense experiences. “[F]or once we accept a framework of epistemic norms, then the criteria for belief acceptance need *not* be pragmatic, except to the extent that the epistemic norms we accept—on *pragmatic* grounds—themselves embody pragmatic criteria.” LEITER, *supra* note 6, at 52.

¹² Leiter seems to agree and observes:

I find a certain type of pragmatism attractive (indeed, unavoidable), but it is both more modest and more radical than the apology for fuzziness that masquerades as pragmatism in the law journals. . . . The

B. Objectivity as the Socially Sharable

Social kinds such as law and legal concepts are not individual mental kinds, but rather are communal, and therefore must have objectively-discoverable meanings precise enough to be socially useful in the same way that our concepts of natural phenomena must if we are to use them to communicate and cooperate.¹³ If the law uses the terms “negligence” or “judgment” but subjects have no way to tell, with reasonable assurance, what the law means all the way down to how these concepts are used in applying coercion to them such as by facing them with the possibility of paying a monetary “judgment” when found “negligent,” law is impaired in the same way that discussions concerning the natural world are impaired without the widespread, reasonably-thought-not-necessarily-entirely-consistent, socially-understood meanings of concepts describing natural kinds such as “gold” and “dog.”¹⁴ Taken far enough, conceptual or semantic vagueness renders law and social

radicalism of this pragmatism resides in its recognition that the only possible criteria for the acceptance of *epistemic norms*—norms about what to believe—are pragmatic: we must simply accept the epistemic norms that work for us (that help us predict sensory experience, that allow us to manipulate and control the environment successfully, that enable us to “cope”).

Id. at 50.

¹³ For an argument that may contradict this idea, see Cohen, *supra* note 7, arguing that “we are to redefine the concepts of abstract thought as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we do actually see or do. All concepts that cannot be defined in terms of the elements of actual experience are meaningless”. I think this misleading; rather, I would say that all concepts insofar as they can be *legal* ones must be *relevant* to practical reasoning about action in the actual world. To take an extreme example, a social taboo based upon the mythological actions of non-existent demigods and used to justify legal decisions may not be entirely definable “in terms of the elements of actual experience,” but its effects on thinking and behavior can be felt and observed, and these are “elements of actual experience”—and these observable effects cannot be fully understood without understanding the non-reality-based aspects of the taboo that affect practical reasoning, which means those aspects are not meaningless from a legal perspective. A judge, seeking to appease a non-existent evil demigod, and who orders punishment of subjects on that basis, has made his notions of appeasement meaningful and relevant to the subjects, who must understand the judge’s fantastical thinking in order to explain the judge’s behavior and best predict how to avoid the judge’s punishments in the future. Anyone who refused to employ the judge’s concept of the evil demigod because the concept referred to something without real existence, would hamper his understanding of the world, including the legal world, rather than enhance it *precisely because the concept of the evil demigod does affect the actual experience of those subject to the judge’s authority.*

¹⁴ Law journals have been publishing articles drawing creative connections among ancient ways of thinking, modern cognitive science, and legal concepts for some time now. “Recent work in cognitive theory suggests” that Midrash, a form of ancient Jewish biblical commentary, can be helpful in understanding “[t]he central role of embodiment [that] is evident in even the most abstract processes of reason, suggesting how inappropriate are the mind/body and subject/object

knowledge of science impossible, for no one could know what another meant by a legal or scientific concept or term. Although social kinds depend upon human volition, as natural kinds do not, *the need for objectivity is the same whether that objectivity rests upon an unalterable metaphysical foundation or upon social convention.*¹⁵

When legal concepts have no reasonably ascertainable objective and essential social meaning, then law is hindered as an exercise in the rational regulation of citizens' behavior. If non-essentialism were taken far enough, *there could be no law at all*, no recognizable society-wide set of consistent rules as each subject or legal authority decided for herself the content of legal concepts—non-essentialist concepts by design can contain conflicting elements, from which the users of the concepts can then choose, in conflict with other users, when making a practical decision that requires specific action.¹⁶ I consider inaction to be a species of action in this context. Non-essentialist concepts render easier, and sometimes render necessary, the legerdemain that allows different interpreters to plausibly derive conflicting legal requirements from the same legal sources. Well-formulated essentialist concepts do not solve this problem but reduce its incidence by having coherent and rationally-indisputable *cores*, even if those cores are sometimes fixed by social convention rather than absolute realities.¹⁷ Still, essentialist concepts can

dualisms that have dominated the philosophic tradition.” Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1117 (1989).

¹⁵ Cf. Michael S. Moore, *The Plain Truth About Legal Truth*, 26 HARV. J.L. PUB. POL'Y 23, 28 (2003) (stating that “[f]ew things are more satisfying in intellectual life than rising above the debates of others and showing that the proper ‘resolution’ of such debates is not to engage in them”). The need-for-a-metaphysical-foundation debate is worth engaging, but this is not necessary for my argument here.

¹⁶ A source of confusion can be the failure to distinguish between extensional and intentional thinking. “The extension of a concept is the class of things in the world to which it refers. The extension of ‘bird’ is thus the set of all birds.” James A. Hampton, *Thinking Intuitively: The Rich (and at Times Illogical) World of Concepts*, 21 CURRENT DIRECTIONS PSYCHOL. SCI. 398, 398 (2012). A greater source of conceptual creativity is the other form of thought. As Hampton explains:

The intension of a concept is the set of properties we associate with it. For example, the intension of the concept “bird” is the list of things that we consider to be generally true of birds, and that are relevant to their bird-ness—having two legs, hatching from eggs, and so forth.

Id. Most often, “[i]ntuitive reasoning is reasoning based on beliefs about the characteristic properties of things. . . . Intensions take us from the real world into the world of possibilities.” *Id.* at 399–400. Aspects of this “world of possibilities” can then become ascribed to the real world by the incautious.

¹⁷ Cf. David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 10 (1992). Millon says:

Conventionalist legal theory accepts the antifoundationalist epistemology that has influenced CLS [critical legal studies]. It responds to the skeptical challenge by emphasizing the importance of the legal profession’s shared understandings of the law’s meaning and appropriate interpretive method and by

leave much room for dispute, particularly over *marginal* cases that may or may not fall within any given essentialist concept. But even well-formulated non-essentialist concepts add to that problem another: ambiguity over which of the contradictory or at least unrequired potential core elements of the concept will be used to resolve any particular practical dispute, thus reducing the socially-sharable understanding, stability, and predictability of law.

The use of a truly non-essentialist concept is like using “dog or cat” when using either “dog” or “cat” would better inform, and is like using, in measuring negligence, “either the reasonable person standard or the utmost care standard” when what subjects truly need to know is which standard applies. I elaborate on this argument in a later section.

C. Objectivity of Natural Kinds

Natural kinds have objective realities independent of our subjective thoughts and thus well-formulated concepts of those kinds can have rationally indisputable cores naturally. We can infer these cores through natural kinds’ effects upon our conscious minds through our senses, effects that are consistent regardless of our expectations and desires.¹⁸ For example, physical gold possesses a unique set of properties that allows us to identify it as gold. Only gold possesses a certain clearly distinguishable mix of qualities that registers upon our senses, even if only

arguing that these attributes of legal practice are sufficiently rich and definite to limit the law’s otherwise unlimited interpretive potential.

Id. Constraints on legal interpretation can be achieved because “the profession functions as an interpretive community, an idea derived indirectly from Ludwig Wittgenstein’s reflections on linguistic communication and, more directly, from Stanley Fish’s analysis of literary criticism and normative understanding.” *Id.* Millon rejects Wittgenstein’s view and says, “[i]n contrast to the formalist models . . . , which locate constraint in the implications of essential meaning or shared understandings that one can derive by formal analysis, this Article conceptualizes constraint as arising within the minds of individual lawyers interpreting the law.” *Id.* at 24. For me, the approach of conceptual essentialism can facilitate the ends of law even if its only effect is a psychological one, constraining lawmakers and jurists to be clearer and more precise even if, sadly, they do not go all the way to adopting essentialism rigorously.

¹⁸ This includes the effects on us of observations of the effects on others. Wittgenstein begins what is perhaps his best-known work with a quote from St. Augustine’s *Confessions* concerning how children learn language:

When they (my elders) named some object, and accordingly moved towards something, I saw this[,] and I grasped that the thing was called by the sound they uttered when they meant to point it out. Their intention was shewn by their bodily movements, as it were the natural language of all peoples: the expression of the face, the play of the eyes, the movement of other parts of the body, and the tone of voice which expresses our state of mind in seeking, having, rejecting, or avoiding something.

WITTGENSTEIN, *supra* note 1, at 2.

indirectly as by a scientific instrument indicating to us the presence of gold, that our minds can interpret as signifying gold.¹⁹ It has a color not shared by most other substances, a weight per volume usually not shared by other substances, certain distinctive chemical reactions to other substances, and thanks to modern science, a discovered atomic number that enables us to distinguish it from other substances without fail.²⁰ Because of the universal, intuitive, and objective nature of the process of conceptualizing natural kinds on the basis of their sensory effects, we also should use effects first in forming our concepts of social kinds. Our minds are naturally conditioned by experience of the physical world to work in this way.

D. Views of Relation of Concept to Referent

1. The Common-Sense View

Theorists offer several views of how people do, and how people should, relate the mental concepts they have of things to the things themselves. I believe that what seems to me the common-sense way in which the typical person uses concepts is also the best way to understand the use of legal concepts.²¹

The word “gold,” when used ordinarily, typically first and most fundamentally refers to our concept of gold *insofar as it is based accurately* upon our sensory experiences as caused by interactions either with gold directly or with other things causally affected by gold.²² We rely on the latter form of causality, the indirect sort,

¹⁹ “Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.” 5 CHARLES SANDERS PEIRCE, *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, PRAGMATISM & PRAGMATICISM* 258 (Charles Hartshorne & Paul Weiss eds., 1934). I would add that inferences drawn from the conceptions of the effects can add to the whole conception of the object, especially when combined with analogies to the conceptions of other phenomena.

²⁰ *Gold (Au)*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/science/gold-chemical-element> [<https://perma.cc/GM84-S2BX>] (last updated Oct. 4, 2018) (“atomic number 79”).

²¹ I incline to the causal theory of reference, although I think that other theories fit with my argument here. Cf., e.g., SAUL A. KRIPKE, *NAMING AND NECESSITY* (11th prtg. 1999).

²² The consistency of a substance’s effects—its properties—on our senses is our method for identifying multiple individual instances of it as the same thing in different circumstances:

[T]he property of being *F* is identical with the property of being *G* if and only if *F* and *G* make the same contribution to the causal powers of physical objects possessing them. Then, given that the causal powers of objects are determined by the natural laws governing the properties (universals) which those objects possess, the foregoing criterion seems to reduce to this: the property of being *F* is identical with the property of being *G* if and only if *F* and *G* enter into the same laws in the same ways.

E. JONATHAN LOWE, *Kinds, Essence, and Natural Necessity*, in 4 *INDIVIDUALS, ESSENCE AND IDENTITY: THEMES OF ANALYTIC METAPHYSICS* 189, 198 (Andrea Bottani et al. eds., 2002).

both in ordinary contexts—if items are missing from a cabinet, we may conclude that a person took them—as well as in more rarified ones, such as when astronomers infer the existence of unseen celestial objects from gravitational effects upon seen objects.²³ Causality upon the conscious mind, or effect upon the conscious mind, is a necessary element of rationally knowing anything.²⁴ This is not to say that only sensory perceptions can be known—writing this article would be a waste of time if so—but only that our reliable abstractions come at least in part from sense data, with the possible exception of some ideas perceived by exclusively spiritual means—and these latter, marvelous as they are, make a poor basis for political positive law.²⁵

This is a version of Aristotle’s approach of deducing essences from accidents, the best that we can do since we have no direct access to essences any more than we have direct access to the concepts in others’ heads—we must infer them from external indications.²⁶ We perceive gold, a rock, or Pluto not through any direct mental perception, but by an intellectual act that infers from sensory impressions and discovers or imposes intelligible structure in or upon those impressions.²⁷ The intellectual abstraction from that data is a concept, as when employed in inferring the existence of a bar of gold from the shape, color, weight, and so on of an object

²³ Neptune’s existence was inferred this way, although more direct sensory perception may be necessary to meet both common-sense and scientific standards of *proof* of existence beyond a reasonable doubt. “In 1846, the planet Neptune was discovered after its existence was predicted because of discrepancies between calculations and data for the planet Uranus.” Eric G. Blackman, GRAVITATIONAL PERTURBATIONS AND THE PREDICTION OF NEW PLANETS, <http://www.pas.rochester.edu/~blackman/ast104/perturbations.html> [<https://perma.cc/BB28-6RRV>] (last visited Oct. 22, 2018). Pluto’s seemingly similar discovery is now considered an accident. *See id.*

²⁴ “[A] ‘scientific epistemology’ which says—in part, and quite roughly—that: (a) only that which makes a causal difference to experience can be known; and (b) only that which makes a causal difference to experience is real.” LEITER, *supra* note 6, at 236. I believe that the former is true so long as indirect effects and inferences therefrom are included, whereas the latter is not subject to demonstration, but can be “proven” only through conceptual fiat.

²⁵ Unless, somehow, they become part of socially-shared experience.

²⁶ Although it has been said that entities with no effects do not exist, I do not see how that conclusion is justified. Rather, the existence or non-existence of entities with no effects whatsoever, however indirect, on our minds never can be determined. The same is true of any quality an entity might possess. “[I]t may be pointed out that we can only *detect* the properties of physical objects by interacting with them or with other objects affected by their activities.” LOWE, *supra* note 22, at 198.

²⁷ Aristotle may have cataloged five, but there are at least several more senses. Carl Pfaffmann, *Human Sensory Reception*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/human-sensory-reception> [<https://perma.cc/5F8A-2ZZS>] (last visited Oct. 22, 2018).

before us.²⁸

Further, the recognition of the broad use of functionalism at high levels of abstraction, well beyond the inference of physical kinds, is no new thing.²⁹ Such high-level abstract concepts can change as their underlying realities change in ways that the realities of physical kinds do not. Within the legal sphere, legal doctrines are—or should be—formulated to be as consistent as reasonably possible over time, with new situations then recognized as falling within or without those doctrines, just as we use our concepts of natural kinds to categorize new experiences such as by recognizing a new phenomenon as a previously unknown individual dog.

But just as we do with our concepts of natural kinds, we must adjust our understandings of legal concepts as we acquire new information and then communicate that new understanding to others as intelligibly as possible. An Australian High Court justice wrote (note that “connotation” refers to the features of things, such as being gray, and “denotation” refers to things themselves, such as a cloud or the color gray):

The essential meaning of the *Constitution* must remain the same, although with the passage of time its words must be applied to situations which were not envisaged at federation. Expressed in the technical language of the logician, the words have a fixed connotation[,] but their denotation may differ from time to time. That is to say, the attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them.³⁰

The term “cloud” can refer to collections of water vapor floating well aboveground that appear white or gray—those are its connotations—and then we denote specific phenomena that we see when we look into the sky as “clouds.” We do the same with legal concepts, such as conceptualizing negligence and then deciding which acts are negligent and which not.

Yet, *contra* the good justice, the essential meanings of legal concepts do not

²⁸ Concepts are not mental representations, strictly speaking, such as a mental picture of a bar of gold, but are more abstract, coming into play in our thinking when conditions trigger them. “[O]n what we have been calling the substantial theory, concepts are abstracta that encode conditions of application; they are not mental processes or mental representations.” Johnston & Leslie, *supra* note 1, at 117.

²⁹ Cohen, *supra* note 7, at 830 (“Finally, it must be remarked that the functional method is not a recent invention. Plato’s attempt to define ‘justice’ by assessing the activities of a just state, and Aristotle’s conception of the soul as the way a living body behaves are illustrious examples of functional analysis.”).

³⁰ *Street v. Queensland Bar Ass’n* (1989) 168 CLR 461, 537 (Austl.) (Dawson, J., concurring) (emphasis added).

always need to remain the same. Just as more experience can teach us that some clouds are black or other colors, or that we may need better criteria to distinguish clouds from fog and mist, judges and others do the same with legal concepts, including those contained in constitutions, when new information comes to light such as scholarship about the original intent behind legal provisions or a new fact pattern that reveals the pragmatic inadequacy of existing legal concepts.³¹ Thus, my argument for essentialism is not an argument for conceptual ossification—legal conceptual essences should remain stable as much as *reasonably* possible, and we should revise even our concepts of natural kinds when new discoveries warrant.

2. Implicitly Reformable Concepts

Philosophers have disputed for some time over what natural-kind terms and concepts such as “gold” refer or should refer to.³² And, of course, the word “gold” or the concept of it can include non-physical notions such as gold’s role in monetary value or decoration, or in statements such as “he has a heart of gold”—these are just other meanings of the same word.

Yet “gold” most fundamentally is taken to mean the physical substance of which we have formed a concept, and I believe that when ordinarily used, it refers to our concept of gold with the implicit caveat that *the inaccurate parts of that concept do not belong in it*. The referent of a term determines the term’s meaning, rather than the term determining the referent.³³ If a woman is mistaken about a quality of gold—its electrical conductivity perhaps—and is corrected, she is unlikely to say, “That was not part of my idea of gold, so what you say is irrelevant,” or “Everyone thought the same as I about gold, so what you say is mistaken, for it is to our concept I refer when I say ‘gold.’” Instead, she is likely to accept that “gold” is meant to refer to the real physical substance with its real qualities, however imperfectly understood, with pedants such as myself pointing out that a concept must intervene because physical substances, by themselves, generate collections of sensory impressions only and not

³¹ Non-essentialism should play no part in the solution. See, e.g., Evans, *supra* note 4, at 218 (indicating a difficulty in using prototype theory for legal concepts, stating “[f]irst, and most conspicuously, the prototype model (by design) does not define sharp category boundaries. That may reflect how cognitive processes actually operate on concepts, but it may be a weakness if the model is to be transplanted to the legal domain”).

³² Luca Gasparri & Diego Marconi, *Word Meaning*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/archives/spr2016/entries/word-meaning/> [<https://perma.cc/6zMR-RFLG>] (last visited Oct. 22, 2018).

³³ Cf. LEITER, *supra* note 6, at 267 (stating that “if on the old view the ‘meaning’ of an expression (the descriptions speakers associated with it) fixed the reference of the expression, on the new theory, the referent fixes the meaning”).

ideas about what those sensory impressions might indicate. She will revise her concept of gold to fit reality.

We implicitly mean to refer to the real thing of gold when we speak of it and so our concept of it, if we are rational, implicitly carries with it the feature that the concept may be mistaken in some aspects.³⁴ If we mistakenly think that gold has an atomic number of 47, we typically still intend to refer to real gold with its real atomic number³⁵ when we speak of gold—and we revise our concept of gold when we learn more, whether from direct experience or from other persons or sources we trust, rather than seek to change real gold to fit our concept of it.³⁶ *This process of revision shows that the typical person seeks to use terms and concepts to refer to natural realities as they actually are rather than as they are thought to be.*

So it is with law, or at least so it should be. When we refer to the law or to a legal concept, we typically intend to discuss the real social phenomenon as it is used in the legal system rather than our own private and possible faulty understanding of it, even though our private concept is all we have to employ at the moment of speaking. We also typically do not intend to refer to laymen's possibly common but incorrect understanding of a legal concept—we do not consider that to be the real concept. Again, the test is that we are happy to revise our understanding of a legal concept to fit reality when presented with evidence that the legal concept is used in the legal system differently from how we or others understand it. Of course, there are exceptions to this procedure, as when lawmakers such as legislators, or judges acting as de facto legislators, seek to alter the law and legal concepts, which they—unlike most of us—may have the authority and power to do, or when legal advocates attempt to persuade such authorities to change the law explicitly or implicitly.

The more consistently any concept is used *for practical purposes rather than purely theoretically* across the legal system, the better able we are to share an understanding

³⁴ See, e.g., Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. PA. L. REV. 1293, 1322 (1992) (“The general idea is that we defer to other persons, as part of our competence in a language, in our understanding of particular terms. . . . Most speakers of the language, however, though acknowledged as competent language-users who know the meaning of the word ‘gold,’ are not aware of these chemical facts [about gold].”).

³⁵ *Gold (Au)*, *supra* note 20.

³⁶ We need the conditions that provide for:

[C]oncept publicity; that is, the possibility of two speakers with very different beliefs about a subject matter sharing the same concept of that subject matter. Someone who knows that arthritis is a disease of the joints can genuinely disagree with someone who believes it can spread to the bones. The second is in error . . . [and] can be meaningfully corrected by the experts. . . .

Johnston & Leslie, *supra* note 1, at 114–15. This is the only way it can be that “they are not changing the subject on him when they tell him that one cannot have arthritis in the thigh.” *Id.* at 115.

of that concept and communicate effectively with it when considering the legal concept's implications for decision-making regarding action.

3. The Theory of Reference for Legal Terms and Concepts

The common-sense approach to concepts is the most useful and most reflective of both ordinary life and of life in legal practice. Therefore, I use terms such as “gold” and “law” to refer to the real things as far as possible, which generally means that they refer to the parts of our concepts of those things that are based accurately, or at least are striven to be based accurately, upon our accurate perceptions of their effects and what we rationally infer from those effects. Even if any inaccuracies are unknown, rationality requires that we recognize that inaccuracies in our concepts may exist, that we could be wrong about all but a few things, and that we be prepared to change our minds in the light of new evidence. Applied to semantics, what I describe is more or less the Kripke-Putnam theory of reference.³⁷

This treats legal authorities' intents like natural objects, with essences to be fixed by their observed effects, and those essences then used to understand their intents and to predict future intents.³⁸ Sometimes the construction of this intent is exceptionally artificial such as with legislative intent, but political positive law cannot make sense without the concept of instructions, which depends on the concept of intent on the part of legal authorities to have certain instructions followed. Indeed, the discernment of intention is needed for something as simple as distinguishing a draft of a statute from a statute, or a book falsely claiming to contain law from a book that actually contains law—we look to see if the legislature or some other authority has indicated socially-recognizable intent to promulgate the legalese as actual law.³⁹ Marks on a page or sound waves traveling through air can communicate nothing intelligent without ascribing intent to their source to mean something by them, and this includes all circumstances such a judge reading a statute or a judge informing a litigant of his ruling.⁴⁰ Something as simple as

³⁷ See, e.g., Hilary Putnam, *The Meaning of 'Meaning,'* in 2 MIND, LANGUAGE AND REALITY 215 (1975).

³⁸ *Contra* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 292 n.25 (1985); see Bix, *supra* note 34, at 1321 (“I want to examine whether that [Kripke-Putnam] approach entails metaphysical realism, as Moore believes it does, or whether it is compatible with other views, in particular those of Wittgensteinian theorists. My conclusion is that the necessary connection Moore asserts does not exist. . .”).

³⁹ See D'Agostino, *supra* note 5, at 150–54 (discussing legislative intent).

⁴⁰ See Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1456 (1990) (“Language is only construable within the assumption of some or other human purpose. No act of reading can stop at the plain meaning of a document, because that meaning itself will

“Speed Limit 55 mph” must be understood to come from a socially-recognized legal authority, who must be understood to intend to have subjects obey it, before it can be seen as law rather than as friendly advice, a purely moral exhortation, or something else.

This is the most reliable way for subjects to know the law and obey it, even though they know that unlike the essences of gold and other natural kinds, legal essences can change when legal authorities’ minds change—and thus subjects must watch for the external manifestations of such changes just as, when they confront an unexpected effect of a natural phenomenon, they must revise their concept of that phenomenon.⁴¹ *This is part of the scientific method as applied to legal concepts.*

4. Effects as the Fount of Legal Concepts

And so, with legal concepts as with everything else, we should first look at their effects upon minds: What does “law” or “negligence” make people think of, how does it affect legal authorities’ attempts to regulate the actions of legal subjects, and how are legal subjects’ decision-making processes affected?⁴² Since law is first and foremost meant to affect the actions of legal subjects by affecting those decision-making processes—by telling them, for example, to pay a certain amount in taxes or face incarceration—the effect of legal concepts upon the decision-making processes of legal subjects, including the decision-making of government officials when commanded by laws detailing their duties, is the first step in classifying and understanding them.⁴³ For example, to distinguish the concept of political positive law from exhortation, guideline, advice, propaganda, theory, and the like—including from exhortation and propaganda emanating from legal authorities—we should seek to identify law’s unique characteristic effect or unique set of characteristic effects upon those subject to it. The abstraction from those effects is the essential foundation for the concept of law, just as the essential foundation for the concept of physical gold is drawn from gold’s effects on the senses.

As I will discuss further below, such characteristic effects of law include a

have emerged in the light of some stipulation of intentional circumstances, of purposes held by agents situated in real world situations.”).

⁴¹ Cf. Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2083 (1995) (“At its very core, classical positivism rejected the idea that legal concepts have an *a priori* existence: Austin and Bentham found Blackstone incredible precisely because classical common law theory ignored the contingent and mutable sources of law.”).

⁴² Thereby, we give legal concepts some realist content of their own. Cf. Moore, *The Interpretive Turn*, *supra* note 9, at 884 (“The realist discovers here that the legal system may generate its own concepts and terms, which do not appear to refer to any natural or moral kinds.”).

⁴³ See Cohen, *supra* note 7, at 843 (“A judicial decision is a social event.”).

socially-perceivable intent to use the legal system to physically coerce—a coercive intent missing from mere exhortation, guideline, advice, and the like even when legal authorities are the ones merely exhorting or advising. Thus, in categorizing phenomena, there is an inferential move from examining effects to then classifying by causes—just as the Philosopher said⁴⁴—and within law, the causes inferred include a legal authority or collection of legal authorities intending to exercise their specifically legal authority.

5. Social Kinds as Conceptually Irreducible to Natural Kinds

Social-kind concepts cannot be resolved into natural-kind concepts. Although we detect social kinds through our senses, usually by listening to or seeing the communicated information of others, *knowledge of the content of human intentionality* is required.⁴⁵ We need know nothing of human intentions in order to detect and know about gold as a physical substance, nor to see if an object is multi-colored. Yet to know if a group of men are competitively playing a game of baseball requires more than sense data and abstractions made directly from that data, but knowledge of the social meaning of the physical movements in which they engage and perhaps more, e.g., a group of actors could simulate the playing of baseball. Thus, not only must we have a man-made concept of baseball before we can identify the sense data of the movements as indicating baseball—a man-made concept that depends upon an idea of what the men intend to do and not just their physical movements—we cannot always reliably infer their intent from their physical movements even if we already possess the concept of baseball. The physical movements may be a pretense. We receive information about human mental intentionality through our senses—such as someone saying to us, “These actors are pretending to play baseball, and their every move is carefully choreographed”—but the information itself is not about the natural physical world.⁴⁶ The same is true of a trial, regulatory hearing, and every other process of a legal system.

The social-kind concept of baseball is still measured by the effects upon

⁴⁴ Cf. ARISTOTLE, PHYSICS II.3, 194b18-20 (Terrence Irwin & Gail Fine trans., Hackett Publishing Co., Inc. 1995) (c. 384 B.C.E.) (“For our inquiry aims at knowledge; and we think we know something only when we find the reason why it is so, i.e., when we find its primary cause.”).

⁴⁵ Cf. JOHN R. SEARLE, INTENTIONALITY, AN ESSAY IN THE PHILOSOPHY OF MIND viii (1983) (arguing that “the forms of Intentionality underlying language are social forms”).

⁴⁶ I follow Searle in using the baseball analogy. See, e.g., John R. Searle, *Social Ontology: Some Basic Principles*, 6(1) ANTHROPOLOGICAL THEORY 12, 16 (2006) (“I am pitching the ball as part of our playing a baseball game. Collective intentionality is the intentionality that is shared by different people, and just as there can be shared intentions to do things, so there can be shared beliefs and shared desires.”).

observers, but includes the effect of information about the intentions of others—information not needed in determining natural kinds. The subjective intent of those whose behavior or speech is being observed or discussed is not the standard, but what is *objectively concluded by rational observers, including what is concluded about the intent of others*. A man playing baseball who thought he was playing basketball would, of course, be playing baseball, for it is the social phenomenon of which we speak and think. A lawmaker who promulgates, “The fine for speeding is \$1,000,” when she meant to promulgate, “The fine for speeding is \$100,” has promulgated the former as law—unless, somehow, her true intention can and should be inferred from other objectively-communicated information such as legislative history. Her purely private intentions are socially inaccessible.⁴⁷

The social effects of natural kinds work similarly. A man giving a woman a gold ring has a meaning that depends upon intentionality. Metaphorical uses, such as “he has a heart of gold,” have meanings and concepts separate from the definitions of the physical natural kinds. These issues are not of only theoretical interest but have practical implications.⁴⁸

II. DENATURING FAMILY RESEMBLANCE IMPERIALISM

A. *Equivocation and Contradiction*

Any non-essentialist family resemblance or similar concept can be shown to be equivocal, reality non-conforming, a disguised essentialist concept, or a collection of subjugated essentialist concepts whenever practical reasoning about the real world is involved. I will show how family resemblance theory can still be useful for understanding essentialist legal concepts, but those who consider non-essentialism

⁴⁷ If interpreters can with reasonable certainty discern what the lawmaker meant rather than what she said, there is logic in applying the intended meaning instead of the surface meaning—but lawmakers, for the sake of consistency and stability in law among other reasons, might prefer that their surface meanings always be followed. Thus, the ultimate intent of a lawmaker might be better followed by never trying to determine if she misspoke. Cf. Bix, *supra* note 34, at 1313 (“When . . . I say ‘lady slipper’ when I wish to refer to tulips, I still want to be understood as referring to tulips Our ‘linguistic intentions’ are often to be understood according to what we meant, even when this seems to disagree with what we said.”).

⁴⁸ See, e.g., Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20 (1913). As Hohfeld explains:

If, therefore, the title of this article suggests a merely philosophical inquiry . . . the writer may be pardoned for repudiating such a connotation [T]he main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, everyday problems of the law.

Id.

to be essential to family resemblance and related theories can treat my argument as one in favor of excluding those methods from legal concept formation altogether.

At times, a family resemblance concept clearly does not fit the phenomena it purports to describe. Some may mistake a word used to refer to two or more independent referents as a “cluster concept” when, in fact, the word simply has multiple meanings, each describing a different concept—or, perhaps, is not truly one word at all and should be considered a collection of homonyms (understood here to mean different words pronounced and spelled the same way but having different meanings).⁴⁹ An example is the word “club,” which, among other things, can refer to a physical object meant for hitting other objects or persons, an organization dedicated to a specific purpose or purposes, or a playing card of a certain suit.⁵⁰ Although imagination and perhaps etymology can discover links among these meanings, the reality remains that as they are employed in American English today, they are separate and independent even if occasionally speakers jumble the concepts together in their heads or their speech.⁵¹ Thus the word by itself is equivocal, and no Wittgenstein-style family resemblance can make its different meanings into one concept except by non-rational fiat. In fact, the various meanings of “club” can be thought of as being referenced by separate words that coincidentally appear the same.

The failure to create sufficient categories can generate an apparent need for non-essentialism, but the true solution is to create more essentialist categories. For example, if a company is negligent in its representations to others who then enter into a contract as a result, but no legal category of negligent misrepresentation exists in the relevant jurisdiction, judges and jurors may struggle to fit the company’s behavior into the existing categories of innocent misrepresentation or fraudulent misrepresentation. This may produce a desire to surreptitiously turn one of those categories into a de facto non-essentialist one that can cover both its original criteria and those specific to negligent misrepresentation, with the future

⁴⁹ For an extended application of this approach to some of the different legal meanings of business “reorganization,” see Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577, 648–58 (2001).

⁵⁰ “Because competent speakers share ‘shallow meanings,’ there is no disagreement about examples of discrete (non-overlapping) homonymy (e.g., bank in the case of ‘river bank’ and ‘savings bank;’ or crane (a bird or a machine).” *Id.* at 637.

⁵¹ Cf. Robert S. Summers, *The New Analytical Jurists*, 41 N.Y.U. L. REV. 861, 868 (1966) (“After assembling representative examples of uses of ‘just’ and ‘justice,’ an analytical jurist might try to establish that there is only one basic concept embedded in this usage. . . . Then, too, he might decide that no single principle ties them together, and that usage reflects . . . several distinct, though cognate, concepts.”).

usage by the legal system of this new non-essentialist concept hard to predict. In subsequent cases with materially identical facts, judges and jurors may or may not employ the likely ill-defined new concept in the same way, or even at all. Thus, instead, a more precise third category of negligent misrepresentation should be openly adopted.⁵²

Equivocations can contradict directly even when only considerably abstract ideas are involved. For example, “sanction” as a verb can mean either “approve” or “penalize,” two nearly opposite meanings.⁵³ In the typical user’s mind and in the meaning communicated to others, “sanction” can refer to one of two different concepts depending on its usage and context, not to any family resemblance covering both. Although it could be said that the idea of judgment runs through both meanings, thus creating a connection that would justify considering the two meanings to be one family resemblance concept, such highly abstract ideas as “judgment” can be used to connect any set of meanings. If such thinking were accepted, a family resemblance could be derived from all sets of random terms whatever—thus destroying any useful ability that family resemblance theory may have to classify or draw lines among concepts, certainly an ability necessary for practical reasoning. One example would be shoe, door, air conditioner, and rabbit: They are all physical things that can assist human survival and comfort. These genuine similarities among the concepts are not enough to make them into one concept in any useful sense, and here specifically, *usefulness for practical reasoning involving law is the proper standard for judging concepts and conceptual approaches*.⁵⁴

⁵² Sometimes, even natural phenomena are forced into pre-existing categories that do not fit them, which then seems to create a need for non-essentialism. Again, instead we should create new categories to accommodate them. For example:

[Researchers] showed people a picture of men of different heights and asked them to judge whether statements about the men were true or false. Remarkably, the results completely defied logic. For example, 45% of participants agreed that Suspect 2 was both tall and not tall, and 54% agreed that he was neither tall nor not tall.

Hampton, *supra* note 16, at 401. The difficulty here seems to be not that subjects failed to adhere to the law of the excluded middle, as Hampton thinks, but that instead of trying to fit the men into just one of two categories, the subjects were thinking of a third perfectly common and comprehensible category, that of “medium height” or “not particularly tall or short,” and trying to express that idea with the inadequate two categories given them by the researchers. The subjects may have been meant to follow an artificial logical process of choosing only one of two categories, but instead they tried to follow the more descriptive common-sense categories with which they were familiar—and there is nothing self-contradictory about using those latter categories.

⁵³ *Sanction*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sanction> [<https://perma.cc/T4SY-672Z>] (last visited Oct. 22, 2018).

⁵⁴ Non-essentialism is subject to Wittgenstein’s own criticism of the psychoanalytic

Maureen B. Cavanaugh notes that Aristotle recognized that a “better definition’ (a complete definition, not simply a signification) necessarily includes the essence of that being defined” but also “that not all ‘definitions’ state essences.”⁵⁵ For more rigorous thinking, we cannot be content with using signifiers passively,⁵⁶ but should ensure that, when needed, we delineate the boundaries of our terms and their associated concepts as clearly as possible, particularly so that others applying these concepts later have the best chance of properly including new phenomena and situations in—or excluding new phenomena and situations from—the coverage of those concepts.⁵⁷ The more overlapping, rather than clearly discrete as with “club,” the meanings of homonyms such as “healthy,’ ‘good,’ and ‘justice’” are, “the more investigation and analysis is required.”⁵⁸ A healthy man has a body in good order, but a healthy attitude toward disappointment may have little to do with anything physical, yet both uses of “healthy” get at something important that is shared. We must carefully identify the shared and unshared properties of the terms and concepts and clarify which term and concept we are using, and if necessary, how we are using them, and “[s]uch investigation will be rewarded because we will avoid error in these more philosophically interesting cases. Recognizing these as homonyms will prevent a mistaken assumption that we are dealing with a univocal account.”⁵⁹

We can identify what we might call family resemblances running through all the homonyms, or we could treat the homonyms as one word and identify the family resemblances running through the different meanings of that word. Yet either way, we must identify the meanings, the concepts, their cores and their fringes, and use them precisely rather than allowing uncertain equivocation and blurring to obscure

interpretation of dreams. Wittgenstein states:

Freud remarks on how, after the analysis of it, the dream appears so very logical. And of course it does. You could start with any of the objects on this table—which certainly are not put there through your dream activity—and you could find that they all could be connected in a pattern like that; and the pattern would be logical in the same way.

WITTGENSTEIN, LECTURES & CONVERSATIONS ON AESTHETICS, PSYCHOLOGY AND RELIGIOUS BELIEF 51 (Cyril Barrett ed., 1967).

⁵⁵ Cavanaugh, *supra* note 49, at 635.

⁵⁶ We cannot be content with using signifiers passively in part because “[f]act is richer than diction.” J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC’Y 1, 21 (1956).

⁵⁷ The word “define” may not be strong enough to describe the process required in difficult cases. See Cavanaugh, *supra* note 49, at 650 (pointing out that “Aristotle cautions us that even the word ‘definition’ is homonymous”).

⁵⁸ *Id.* at 637.

⁵⁹ *Id.*

our communications—unless obscurity is desired and justified. Importantly, the use of the same word or different identical-appearing words to refer to different concepts does not make those concepts into one overarching, imperial, non-essentialist concept in any rational scheme of classification.⁶⁰

Sometimes, the equivocation is as simple as confusing the concept of a physical object or collection of objects with a corresponding legal one:

The word “property” furnishes a striking example. Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a “blended” sense as to convey no definite meaning whatever.⁶¹

Shifts and blends among legal concepts alone are even easier to engage in, consciously or unconsciously, and even harder to detect and disentangle than those between legal concepts and concepts based more directly upon physical realities.

B. *Abstract Referent versus Material Referent*

Confusion often results when the distinction between abstract and material referents is not honored. A concept can have an *abstract referent* that remains constant while the *material referents* change. For example, “multi-colored” can describe an object that is red, green, and yellow and also one that is blue, orange, and violet. The shared characteristic that defines the essence of the meaning of the term is not any specific color or colors themselves, but the abstract notion that there is more than one color present.⁶² Sense data are generally necessary, but never sufficient, for concept-formation because abstraction is always involved, i.e., the simple idea of “multi-colored” does not reside in sense data any more than the idea

⁶⁰ Words can have various levels of relation. “By examining the relationship of associated homonyms, Aristotle demonstrates that this association is meaningful because the associated homonyms are related around a ‘core.’” *Id.* at 638.

⁶¹ Hohfeld, *supra* note 48, at 21–22.

⁶² Cf. Kit Fine, *The Question of Realism*, in *INDIVIDUALS, ESSENCE AND IDENTITY: THEMES OF ANALYTIC METAPHYSICS* 3, 16–17 (Andrea Bottani et al. eds., 2002). Fine argues:

[W]e might believe that there really are complex attributes in the world and that their attribution cannot, for this reason, be reduced to the attribution of the simpler attributes of which they are composed. Thus even though we may explain their identity in term of the simpler attributes, we do not reductively account for their attribution in those terms.

Id.

of a dog or of negligence does.⁶³ The material referents—the specific physically-perceivable colors—may change but the abstract referent does not, and thus there is no equivocation in meaning any more than when “dog” is applied to different individual canines.

For any given concept, the material referents are those which are *indivisible for that concept* and thus are not necessarily sense perceptions or physical objects. Although direct and individual sense perceptions are the most obvious material referents, such referents can be very abstract instead. Thus, a material referent can be abstract without becoming an abstract referent. For the concept of a pack of wolves, the concept of an individual wolf is a material referent—anything less than a wolf *per se*, such as the perception of wolf fur or the concept of mammal, cannot be a constituent part of a pack of wolves unless it is already a constituent part of an individual wolf. Yet the concept of an individual wolf, viewed by itself, has in turn an abstract referent based upon material referents such as the perception of wolf fur and the concept of mammal—and they in their turn have their own abstract referents with their own material referents. This distinction between the two types of referents, which is reflective of the Aristotelian distinction between form and matter, will become central to my argument later.⁶⁴

C. *Obscured Contradiction*

Sometimes theorists attempt to reconcile the irreconcilable instead of recognizing that a concept is fundamentally self-contradictory and therefore in need of reformation.⁶⁵ In legal argument, each side often does not realize that the

⁶³ Abstractions of abstractions also are often irreducible. The concept of an average, for instance, includes something significant in meaning that goes beyond its mathematical definition. “To take a paradigm example, the sentence ‘The average American is 5 feet tall’ will reduce to ‘The sum of the heights of all Americans divided by the number of Americans is 5 feet,’ since the latter brings us closer to the logical form of the proposition that is expressed.” *Id.* at 14. Yet typically when we think of an average real-world something or an average of real-world somethings, we do not think merely of the result of acts of addition and division, but of an exemplar.

⁶⁴ The more abstract the referent, the more the concept can seem non-essentialist. “Superordinate semantic categories are of particular interest because they are sufficiently abstract that they have few, if any, attributes common to all members.” Eleanor Rosch & Carolyn B. Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 J. COGNITIVE PSYCHOL. 573, 576 (1975). Superordinate categories include “furniture” and “vehicle,” while “chair” and “car” are basic. *Id.* “Law,” as a generality, should be considered a superordinate category.

⁶⁵ Cf. Emmanuel Q. Fernando, *The Relevance of Philosophy to Law*, 73 PHIL. L.J. 1, 31 (1998). Fernando insists:

other is using different standards to measure the scope of a legal doctrine or rule, impairing debate or rendering it fruitless altogether.⁶⁶ This differs from equivocation in which the same term is used differently in different circumstances, often with reasonable clarity in non-discretionary contexts.

For example, one could conceive of God as immaterial spirit while also thinking of Him as an old man in the sky. Although this may be acceptable for everyday thinking and not contradictory if understood metaphorically, the two cannot be reconciled when precision is needed. Rather than finding family resemblances between the two or otherwise seeking to square a circle—such as by noting that “old” reflects the notion of God as existing before time, “man” implies He has intellect and will, and “in the sky” suggests His presence everywhere, thus rendering “old man in the sky” compatible with “immaterial spirit” even though that is not what those, when asked to speak precisely, who say “old man in the sky” truly mean—we do better to find the resemblances, identify the contradictions, and then purify the concept and its associated term by jettisoning the less useful contradictory elements. We might refine “old” into “eternal,” “man” into “personal,” and “in the sky” into “omnipresent.” This is part of the duty of philosophy.⁶⁷

Another possible example, famously treated by Wittgenstein, is “rope.”⁶⁸ Under

[A] philosopher does not end his inquiry with the lexical definition, for ordinary usage may be vague, ambiguous, inconsistent, or even misleading . . . [T]here exists a common or shared meaning actually communicated by that term, which is free from logical impurities . . . Or such a common or shared meaning may not actually exist, but remains to be constructed.

Id.

⁶⁶ Cf. RONALD DWORKIN, *LAW’S EMPIRE* 43–44 (1986) (discussing such a debate in reference to the case *Riggs v. Palmer*, 115 N.Y. 506 (1889)). Dworkin says:

If two lawyers are actually following *different* rules in using the word “law,” using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is. Earl and Gray must mean different things when they claim or deny that the law permits murderers to inherit: Earl means that his grounds for law are or are not satisfied, and Gray has in mind his own grounds, not Earl’s. So the two judges are not really disagreeing about anything when one denies and the other asserts this proposition. . . . Their arguments are pointless in the most trivial and irritating way, like an argument about banks when one person has in mind savings banks and the other riverbanks.

Id.

⁶⁷ Cf. Austin, *supra* note 56, at 8 (describing the impact the use of words has on our perceptions). Austin explains:

When we examine what we should say when, what words we should use in what situations, we are looking again not *merely* at words (or “meanings”, whatever they may be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena.

Id.

⁶⁸ “Rope” makes a good example since family resemblances are often compared to ropes. *See*,

one definition, the essence of rope is “a row or string consisting of things united by or as if by braiding, twining, or threading”; thus this term has one definition that has a moderately abstract referent or meaning form as does “multi-colored.” Yet it also has other more specific definitions that refer to less abstract, though still somewhat abstract, and more tangible qualities without an “as if” exception, such as “a large stout cord of strands of fibers or wire twisted or braided together.”⁶⁹

Some unique essential meaning must be identified in order to identify a unique concept, and similarities among things do not mean they are the same—dog, cat, and sheep all have unique concepts associated with them even though they share in the concepts “animal” and “mammal” and perhaps many more such as “domesticated” and “highly useful to man.” Claiming to merge separate concepts or terms together by family resemblance because of some shared features merely creates confusion.

D. Non-Conceptual Resemblances Are Not Family Resemblances

Some may point to linguistic or historical connections to construct non-essentialist family resemblances, but these resemblances are not necessarily conceptual and hide more than they reveal when they are, in fact, not conceptual. The concept associated with the word “opera” from Latin meaning “work, pains” is not the same concept as “opera” as typically used in English today, even though the word is the same and not by coincidence: The English word is derived from the Latin one.⁷⁰ The historical etymological connection, even in combination with the weak conceptual connection (English “opera” is a kind of musical work), cannot justify identifying the two conceptually in one imperial, non-essentialist concept. “Opera” has evolved enough that it has a different meaning today, one that no speaker of classical Latin could guess intelligently even though a linguist might be able to draw an unbroken line through the change in the word’s meaning over time. An ancient Roman, upon observing a modern opera and having its nature explained to him, could not thereby deduce that the name of the phenomenon that he had experienced was “opera,” nor could he identify the concept of what he had seen with the concept associated with Latin “opera.” Wittgenstein’s strands cannot unify what are truly

e.g., FREDERICK SCHAUER, THE FORCE OF LAW 38 (2015) (“Rather, the things we call games, and even the multiple things that are central or paradigmatic cases of games, relate to one another as a family resemblance, like the strands of a rope rather than the links in a chain.”).

⁶⁹ *Rope*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rope> [https://perma.cc/598W-MFZ4] (last visited Oct. 22, 2018).

⁷⁰ *Opera*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/opera> [https://perma.cc/DLB9-GJE6] (last visited Oct. 22, 2018).

separate words, separate concepts, and their separate associated real-world referents.

We know that Latin “opera” and English “opera” refer to two different concepts despite the historical, etymological, and usage continuities between the two just as we know that, say, the word “courtesy” can refer to the same essential concept over time even if its associated word changes completely, its practices change radically, and the purpose behind it shifts from showing respect for social superiors to preventing hurt feelings on the part of anyone.⁷¹ Any plausible dissent from this rests on semantic disagreement alone, on disputes over what words refer to which concepts and when, not truly on conceptual disagreements.⁷²

Wittgenstein’s strands, which are properties that do not run through all of the core instances of a family resemblance concept but which still somehow are supposed to hold the concept together, cannot do the work that they are meant to do. We know when Wittgenstein’s strands do and do not bind because *we have a separate standard for determining the relationships of words and concepts, one based on essential meanings*. Put another way: what determines whether Wittgenstein’s strands have enough continuity to form one concept? Not history, not superficial features such as similar or identical sound combinations, nothing but qualitative judgment based on essential conceptual similarity or dissimilarity.⁷³ Incoherent usage, usually by ordinary people or poorly-thinking specialists, of the concept or its term to cover too much should not be good enough for philosophy or for law. When we say, for another example, that the concept associated with the modern word “virtue” is somewhat similar to, but has substantial differences from, that associated with Roman “virtus,” with its emphasis on manliness absent from today’s sex-neutral concept, we consider—or should consider—solely the conceptual similarities and dissimilarities *based upon the conformity of the concepts to experienced phenomena*. All the historical and other similarities between the Latin “opera” and

⁷¹ Cf. DWORKIN, *supra* note 66, at 47 (discussing the history of the word “courtesy”).

⁷² Yet it can be important for lawmakers to be clear about the rationales and other conceptions underlying the law. For example, judges could view the First Amendment’s free speech clause as about recognizing or granting an autonomy-related human right, or instead an instrumental right with, say, the purpose of facilitating public discussion of important issues, and such differing conceptions can lead to different legal decisions. See Frederick Schauer, *Hohfeld’s First Amendment*, 76 GEO. WASH. L. REV. 914, 921–32 (2008) (discussing the issue of free speech in this context).

⁷³ See, e.g., FRANK JACKSON, *FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS* (photo. reprint 2008) (1998) (defending traditional understandings of concepts); COLIN MCGINN, *TRUTH BY ANALYSIS: GAMES, NAMES, AND PHILOSOPHY* (2012) (defending the idea that philosophy consists of broadly construed conceptual analysis).

the English “opera” cannot make them mean the same thing in any plausible sense of “mean”—or if non-essentialist theory indeed can merge them conceptually or semantically, the theory profoundly misleads. Viewing them as two separate concepts facilitates understanding and communication better than does viewing them as one family resemblance concept.

III. THE ESSENTIALIST NATURE OF ABSTRACT REFERENTS AND DISTINGUISHING CONCEPTS

A. *Truly Essential Elements versus Inessential Elements Treated as Essential*

1. Abstract Referents as Essences

Wittgenstein used the concept of a game to illustrate his contention that some concepts do not have properties shared even by all of their core or central instances.⁷⁴ I believe that game or any other concept *consistently* useful in social practical reasoning must share properties across all of its core instances. At minimum, all of the central cases of each such concept should share at least one property in at least this way: a defined set of qualities from which a certain number must be present in a certain degree even though no one particular quality is required, and this is *an essentialist idea based upon requiring a certain combination of properties drawn from a limited set of properties*. That required combination is itself an abstract property, an abstract referent to which a social-kind concept can refer just as a natural-kind concept, such as multi-colored or dog must refer to an abstract referent rather than to sensory perceptions alone.⁷⁵

A legal instance could be certification of a subject’s identity. The state may require that any three forms of identification from a list of ten be presented to certify identity, perhaps in order to receive benefits. No particular form is ever required, but an easily comprehensible essence, an abstract referent, remains in “any three drawn from the following list of ten valid forms of identification in order to legally certify identity in order to obtain these benefits.” These are the essential properties needed to understand this part of this certification process—of course,

⁷⁴ WITTGENSTEIN, *supra* note 1, at 32.

⁷⁵ See, e.g., MAX BLACK, PROBLEMS OF ANALYSIS: PHILOSOPHICAL ESSAYS 28 n.4 (1954) (“It may be that *some* complex truth function of the desired characters will prove roughly adequate. But such a combination of characters will hardly answer to the demands of the traditional classificatory definition, nor will it include any indication of the relative ‘weight’ of the factors.”). I believe that though it may not be traditional, the approach that I outline here is essentialist, and that the weights of factors can be specified as precisely as essential characteristics are in many other approaches.

the nature of each form of identification and so on is also needed to understand the entire process. The material referents of this concept of certification include “a valid form of identification.”⁷⁶

Any coherent family resemblance-style practical social concept depends upon an essential abstract referent in the same way that the concept of multi-colored does. Both the limited universe of qualities and the minimal number or combination that must be present demark the necessary conditions for such a concept, including any complicated set of conditions such as: if this quality is absent, then at least one of three other qualities at a certain degree must be present, but if this other quality is present, then one and only one of two entirely different qualities must be present, and so on.

Notice that this understanding is different from the examples of self-contradiction above. Instead of God as “in the sky” and also “omnipresent,” and rope allowing for “as if” exceptions and also not allowing for “as if” exceptions, which contradict when taken in their common senses, conditional essences avoid self-contradiction by objectively resolving or excluding contradictory elements in a concept *at the moment the concept is applied*. They specify exactly when certain properties should be used and when others should be and thus, for all *practical* purposes, there is never a contradiction or ambiguity in the applicable circumstance, nor are contradictions and ambiguities resolved by discretionary reference to criteria external to the concept. I explain further below why my approach does not swallow the difference between essentialist and non-essentialist concepts.

The above explanation fits nicely with the simple concept of multi-colored. No particular color is required or even implicated, just the abstract idea of more than one color. In other words, there is a limited set of qualities—the various colors distinguishable by the human eye—of which at least two must be present, and this is the most basic version of the common-sense concept of “multi-colored.” One can and sometimes should argue over a more precise delineation: Is the presence of different shades of red enough to make an object multi-colored? Is two truly enough for “multi” or must there be at least three? But beyond a certain point, greater

⁷⁶ Cf. SCHAUER, *supra* note 68, at 38–39 (discussing generics, concepts, and the concept of law). Schauer states:

The philosophers Max Black and John Searle discussed “cluster concepts”—concepts defined by a weighted set of criteria, with no single criterion being either necessary or sufficient for proper application of the concept, and no one of which is either necessary or part of a set of jointly sufficient criteria for proper application of even the central cases of the concept.

Id. I find this capable of an essentialist interpretation just as surely as natural-kind concepts. See generally BLACK, *supra* note 75; SEARLE, *supra* note 1.

precision may become arbitrary. There is no doubt that an object that is entirely of one shade of one color is not multi-colored and that an object that is clearly one-third navy blue, one-third canary yellow, and one-third crimson is. Generally understanding “multi-colored” in a way that would make this false would be irrational—although it may not be when referring to a separate and specialized meaning of the term, and, in fact, some legal terms of art usefully create additional meanings separate from common-sense ones. The common-sense concept of “multi-colored” has an essential, rationally-indisputable core of certain minimal properties even if its fringes are debatable and *even if rational debate is possible over what additional properties should be included in the core*, thereby necessitating its core be at least partially fixed by social convention.

2. Separate Specialized Concepts

The law could define that a product in a certain industry meets the legal definition of “multi-colored” only if it has five or more colors. This would simply be the law inventing a new concept and adding another meaning onto “multi-colored.” The legal term should have no effect on the simple common-sense meaning of “multi-colored” any more than a car without airbags should, as a matter of common sense, cease to be a car even if the law decreed that only automobiles with airbags could be properly termed “cars.” The law may declare that exceeding a certain speed is negligent as a matter of law even if driving somewhat faster than that speed is no less safe, statistically speaking. Thus, even though as a matter of common sense as well as science, such speedy driving cannot be rationally considered negligent, it remains legally negligent. Unqualified negligence is one imperial and non-essentialist concept that embraces much, but then there are separate concepts refining it in different spheres.

3. Metaphysical Status as Irrelevant

The separate metaphysical or ontological status of multi-colored and other abstractions is irrelevant. The same is true of any legal concept or legal thing such as a contract. When a theorist says, of a dispute over whether a certain agreement is a contract, that the disputed “agreement underlying substantive disagreement need not be a thing to be described; it can be a question of how people should act or of what should be done,” he misses the point.⁷⁷ The thing to be described, if it is an agreement concerning behavior at all, is the shared understanding relevant to how people should act. This shared understanding may exist only in the minds of the two parties, especially if the alleged contract is an oral one, but it must be a

⁷⁷ Bix, *supra* note 34, at 1304.

describable, even if a non-physical, “thing” sufficient to support conclusions about what should be done—and that relevance to practical reasoning is necessary to making it into a legal thing in the first place. If there is nothing to describe—here, no agreement to examine—then there is nothing from which inferences can be drawn regarding how people should act.

4. Distinction Between Essentialism and Non-Essentialism

A critic may object that my understanding of abstract referents as essences eliminates the distinction between essentialist and non-essentialist concepts. In fact, my critic might say that if the set of criteria of the presence or absence of various properties is itself a property, then we can construct one “essentialist” concept to embrace all of existence. The criteria for “club” could include, “If a playing card with a black symbol resembling a cloverleaf is present, then it is a club, but if no playing card is present, then an oblong object used to hit people or things must be present,” etc., and then “club” becomes one imperialist family resemblance-style concept after all. Taken to an extreme, the criteria could be extended indefinitely such as by including, “If none of the foregoing are present, then a small furry mammal with. . .,” until all phenomena are embraced by the empire of one enormous concept.

One concept, or perhaps several similar but still genuinely-distinguishable concepts, already does this—it is called “all of existence” or “all phenomena” or “the universe” or “everything” or “all of experience.” How should concepts not meant to be all-embracing be limited under my approach?

Usefulness is the guide to limiting and dividing concepts. Usefulness is measured by the ends and means in question; thus, when ends and means differ, the optimal constitution of concepts can differ as well. The *end* of political positive law is the ordering of human behavior in a temporal society by *means* of authoritative coercive rules and commands promulgated or enforced by legal authorities.⁷⁸ In law, it is best to view truly non-essentialist concepts as mingling multiple essences that should be independent. Instead, the concepts should classify experienced phenomena in order to best conform to the realities thus experienced *as those realities should be understood for the intended goals*. This process applies to separating the various essences within a non-essentialist concept into multiple, essentialist concepts in the same way that it applies to drawing the correct lines among essentialist concepts.

And so when should we decide that internal conceptual tensions are enough to consider a concept confusing and thus in need of purification, or division into two

⁷⁸ See generally D’Agostino, *supra* note 5, at 139–50.

or more concepts? When the collection of the effects upon which the concept is based are dissimilar enough to render division *more useful* to our understanding, and to our communication, than continued unification. As part of this, any concept not maximally reality-conforming *for its particular purpose* presents a certain avoidable risk of confusion in describing and communicating about the world—a risk that dividing or purifying the concept can eliminate. Often, a more capacious concept remains useful while narrower ones are also needed to maximize usefulness, e.g., “mammal” can be divided into “dog,” “cat,” and other such animals while retaining usefulness for some purposes itself. This process can go in reverse as well—inferring “mammal” from various species is valuable for some purposes.

The real world must provide the raw material for our conceptual understandings, including our experiences of law, the legal system, and legal authorities. At times, the decisions whether and how to purify or divide are easy and obvious, and at other times they involve rationally discretionary line-drawing problems. As another analogy to everyday natural science, dogs and cats are easily and uncontroversially sorted into two separate species while different dog breeds are easily and uncontroversially considered of the same species, but some organisms’ species classifications are hotly disputed.⁷⁹

Yet could my critic correctly assert that the essentialist use of abstract criteria such as, “If this property is present, then this, but if not, then that” leads to the inclusion of things in one concept that do not share any actual properties, or potentially includes far too many properties across all core instances, just as non-essentialism does? No, for the conceptualization of a “property” depends upon usefulness—every property used in a concept is a kind of concept itself. The inclusion of “three forms of identification out of ten possible” as a property in the certification process maximizes usefulness even though, by themselves, those three forms of identification do not necessarily have anything about them that indicates any kind of legal certification any more than any colors, by themselves, necessarily have anything about them that indicates the concept of multi-colored. This remains true even if multiple colors are present—the concept of multi-colored is not present

⁷⁹ See Jen-Pan Huang & L. Lacey Knowles, *The Species versus Subspecies Conundrum: Quantitative Delimitation from Integrating Multiple Data Types within a Single Bayesian Approach in Hercules Beetles*, 65(4) SYST. BIOL. 685, 685 (2016). The authors explain:

[S]pecies delimitation is itself a challenging endeavor. The actual biological properties used in identifying species have evolved with shifts in the availability of different data types and with recognition of the limitations of different species concepts. . . . [M]ultiple species might be recognized based on the monophyly of mitochondrial gene trees, whereas only one species may be delimited based on morphological differences.

Id.

unless and until our minds conceive of it, which they should do when it is useful to do so. The concept of multi-colored helps us to understand and communicate about the world, and this rootedness in reality forms the basis of the essentialist approach. Fundamentally changing the properties of the concepts or adding more properties to them, even by using “if . . . then” thinking to avoid contradiction in any given circumstance, would impair the usefulness of the concepts unless reality warrants it. Integrating the concept of “dog” into that of “multi-colored” would not be useful, nor would integrating the concept of “beauty”—how could always considering non-beautiful things to never be multi-colored be anything but confusing?

The shared properties, “usable to certify identity” in one instance and “one of multiple colors” in the other, are not initially parts of the concepts of the forms of identity or of the individual colors, but are mentally ascribed to them once we have a purpose for doing so—we should add that layer of abstraction if and only if we must for some purpose. In other words, we conceptually perceive or invent, and then use, properties when we have need of them, and do not when more properties would only complicate or confuse. Similarly, we should not subtract properties when that would only over-simplify, complicate, or confuse. We should look at the forms of identity anew when we consider their role in the certification process for the legal benefits, as we look at the colors anew when we consider their role in making an object multi-colored.

Thus, with this approach, the experience of reality and the use we wish to make of it determine the content of concepts, which are then labeled with terms. The non-essentialist approach, in contrast, seeks the things to which a term is used to refer and then determines the concept based upon them. It also, perhaps, takes a concept as commonly used and treats it as proper no matter its relation to experienced reality—as if human minds always and inevitably use concepts in ways best suited to scientific, philosophical, or legal discourse. The non-essentialist approach can be proper if only meant to describe usage, but not if meant to validate usage in areas that require essentialism for optimal understanding and communication. Further, the essentialist approach adds a reality-referring caveat to every concept, one that says the concept is subject to future revision based upon new knowledge about the world, new understandings of current knowledge, or new intents and purposes.

Thus, the essentialist approach uses the objective standard of ends-based understanding of our experience of reality in order to define and shape required properties of concepts, whereas the non-essentialist approach allows for experience- or reality-non-conforming and even incoherent concepts by uncritically accepting often poorly-drawn terms and concepts. The former approach seeks to make the mind conform to reality, whereas the latter approach attempts to impose a deceptive Gnostic empire of the mind upon reality. Gold’s

nature is as it is regardless of what human minds think it is, and legal negligence is as it is used in the legal system regardless of what the vast majority of human minds believe it to be.

And so my approach does not eliminate the distinction between essentialist and non-essentialist concepts. Latin “opera” and English “opera” cannot be part of the same concept in my essentialist view—the relevant properties as conceptualized based upon the real-world effects of the phenomena are too dissimilar to avoid rendering a grouping together less useful than separation—but could be in a non-essentialist view based upon the *real-world usages* of a term or concept, or that produces a concept that less usefully divides up reality.

For legal concepts, the experience of social realities is part of the raw *real-world matter* from which we should form concepts. Whether or not “negligence” or “fault” have any kind of metaphysical existence, they exist socially and within the legal system in ways that affect thought and action. Our concepts of these things should therefore be based upon how they are understood and used, and we do this by observing what legal authorities and legal subjects say and do.

5. Distinctions and Distinguishing, Not Absolutes

Conceptual classifications do not necessarily have to achieve any kind of absolute status, but rather need only be relative, that is, be able to distinguish various experienced phenomena from one another and then, subordinately, to understand those phenomena better by making further distinctions not strictly needed for the first act of distinguishing. We need know only enough about “dog” in order to determine with confidence what is and what is not a dog, and secondarily need to know more in order to understand canine nature as much as possible. For example, we might need to know the general shape of dogs in order to recognize them, but not need to know that they are mammals, as the concept of mammal distinguishes some animals from others, such as reptiles, but is not needed for the everyday recognition of dogs or even for the proper care of and relationship to dogs. Thus, the property of “mammal” is not *useful* enough to be essential to the common-sense concept of dog, however useful and essential it may be to the biological concept. Again, optimal concepts vary with the purposes of those who use them. The essence of a concept is what is needed to distinguish it from other concepts to maximize understanding of and communication about *not our experience of concepts*, but rather the real-world phenomena to which the concepts refer. Only after such distinguishing has been done might we arrive at any absolute understandings of things, assuming such understandings are possible as I believe they sometimes are.

In law, we typically need to know enough about “negligence” or “property

crime” to know when legal authorities will find us or others liable for them—to recognize their legal existence—and secondarily how they will be used in generating real-world consequences.

6. Systematizing Intuitions and Essences

At times, to optimize usefulness, jurists and theorists must draw lines in essentialist ways even though equally persuasive arguments can be made for drawing the lines in different places. Effects remain the raw material, but usefulness presents more than one option for what seems to be the best way of understanding that material. When this occurs, typically there are properties that clearly *should* be part of the essential core of the concept in question and others that *could* be, and adding some of the latter to the core could make the concept more useful for practical reasoning. Thus, reality-conforming concepts have an essential core that, because of their roots in experience, cannot be fundamentally altered without making them into different concepts. Furthermore, additional inessential elements *must often be treated as essential* so that we can understand and communicate even more effectively than we could with the truly essential core alone.

Thus, there are two levels of usefulness: first, what is always most useful for any given purpose when included in the core of a concept, i.e., the truly essential; and second, what is useful when included although something else—or nothing else—could have been just as useful had it been chosen instead, but the intrinsically arbitrary choice increases usefulness, i.e., the inessential-treated-as-essential, or the contingently essential.

After all, prototypes and other such non-essentialist theories only describe what we already intuit, perhaps based upon at times incoherent common usage, as a category and its members.⁸⁰ The primary value of formulating clearer essentialist distinctions for our concepts, such as by using rationally-delineated weighted criteria, is the accompanying examination of our intuitions in the light of our goals and experience, and the ability to include or exclude marginal cases on a more consistent basis even if those criteria sometimes are chosen arbitrarily. These more consistent classification schemes are typically a great boon to those subjects attempting to follow the law and, indeed, to anyone hoping that legal

⁸⁰ “[T]he weighted averages required to identify the prototype and, hence, to determine whether something is a member of the category depend on already knowing the members of the category.” Evans, *supra* note 4, at 219. Yet the averages, once formulated on the basis of core cases, can then tell us whether marginal cases should be included—we do not necessarily know *all* of the members of the category in advance, but may have doubts about some that we can resolve either through closer inspection or by choosing criteria that resolves them.

interpretations performed by various different persons will be consistent with one another.

The failure to recognize the distinction between truly essential elements, necessary to facilitate comprehension and communication at a universally fundamental level in a given scheme of practical reason, and inessential elements *treated as essential* although helpful only contingently, creates false doubts concerning essentialism in the minds of many. When an inessential element treated as essential is shown to be inessential, some conclude that nothing is essential. For example, we can decide that two distinctly different shades of the same color always qualify as different colors for the purposes of calling an object “multi-colored” and treat this as essential to the concept simply so that we can more often agree on exactly what we mean when we say “multi-colored.” Yet we could easily decide the opposite without destroying or even impairing the usefulness of the concept in the everyday classification of worldly phenomena. However, to maximize usefulness particularly when philosophical or legal precision is needed, and especially as opposed to the sort of ambiguity that may be most useful in religious, literary, or other contexts, we should decide on one or the other. What we rationally cannot decide, when classifying the appearance of the world, is that the concept of multi-colored includes monochrome or does not include the one-third blue, one-third yellow, and one-third crimson example, at least not without doing such violence to the concept that we would need a new concept, with a new name, to correspond to what multi-colored does now—or, more likely, we would need a new name for the old but still-existent concept of multi-colored as its label came to be applied to a new concept.

The essential versus inessential-treated-as-essential distinction helps to explain the existence of “essentially-contested concepts”—concepts that no amount of rational argumentation can convince all reasonable disputants to understand in the same way—although it remains that the sorites (explained below) and other problems also contribute to these irresolvable arguments.⁸¹ Thus, if they are to be used socially, the contests over them must be resolved by other means such as social convention.

In law, so dependent on mercurial human wills and evolving social conditions,

⁸¹ W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y 167, 169 (1956). According to Gallie:

[T]here are disputes . . . which, although not resolvable by argument of any kind, are nevertheless sustained by perfectly respectable arguments and evidence. This is what I mean by saying that there are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.

Id.

contingently essential elements are ruled into and out of concepts frequently, sometimes on an arbitrary basis, so that we may have shared conceptual and semantic vocabularies with which we can engage in legal thinking and discourse. Negligence did not and does not have to be based on the reasonable man or reasonable person standard, but it certainly does have to include lack of due care as an essential element in some way to remain what it is, by which I mean distinguishable from strict liability and other standards. For example, due care could be based upon what the exceptionally conscientious man would do rather than upon what the reasonable man of ordinary prudence would do, as occasionally it has been in the context of common carriers.⁸² The legal concept of a maximum speed limit must include the notion that exceeding a certain speed is illegal, but does not require a precise numerical boundary: “dangerously excessive speed is forbidden” is a kind of speed limit. But whatever the law or anything else says, something that does not include a cap on speed in some form cannot possibly be a maximum speed limit or else “speed limit” would be redefined to refer to a different concept—nor would it make sense to say that the concept of speed limit had become a family resemblance that included both the current notion and whatever the new one was. Concepts would not change in the minds of the clear-headed, only what terms referred to them.

7. Synthetic Nature of Both Natural- and Social-Kind Concepts

Beyond this, the *concepts of all physical objects depend upon abstract referents*, and thus we should not find it strange that “game” and legal concepts do as well. After all, we synthesize together many bits of sensory data to infer the existence of a cup, a gold ring, or a dog, and no one particular perception is required to reasonably infer the presence of any of those phenomena. Thus, Wittgenstein is wrong when he asserts that all speakers are “playing with words” who say of a thread that “[s]omething runs through the whole thread—namely the continuous overlapping

⁸² A range of different standards for negligence under different circumstances has long existed. See, e.g., Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1133 (1990) (explaining that “[Lord] Holt noted that the degree of care that the common law imposed varied from slight care to extraordinary care. . .”). In particular, common carriers were often held to the highest negligence standard. Kaczorowski, describing the 1797 King’s Bench case of *Aston v. Heaven*, noted:

The court explained that an injured passenger’s cause of action was “founded entirely in negligence” and “stands on the ground of negligence alone.” However, it added that the carrier “is answerable for the smallest negligence.” The common-law obligation of passenger carriers was to safely convey passengers “as far as human care and foresight could go.”

Id. at 1158–59 (citations omitted).

of those fibres” when no one fiber runs through its entire length.⁸³ It is no more abstract and artificial to identify and define a thread by a continuous overlapping of fibers than to define “gold” by a continuous combination of sensory perceptions that we consider “gold” to be when synthesized. No one individual sensory perception, such as seeing the right shade of yellow, ever can be enough to identify “gold” when perceiving it directly. Nor is sight even required in all circumstances, e.g., a blind woman could use a chemical reaction that makes a certain sound in order to identify gold. In addition, synthesized sensory perceptions continue across whatever piece of gold we examine even though, in fact, it is made up of many individual atoms just as the thread is made up of many individual fibers that we cannot necessarily see.⁸⁴ Typically, we perceive the fibers as fibers because we interpret particular arrangements of sensory perceptions as fibers of a thread or rope, thus applying a prior concept of fibers to a new circumstance.

We could see them as, say, only wool with no meaning in their configuration as we might a random tuft of wool, but typically we do not any more than we typically see a ring of gold as the same as a lump of gold because its shape as well as its color, weight, and so on communicate information about the object—intended for wearing, for example. Further, we synthesize serially-perceived sensory information such as when examining a building too large to see all at once—we piece together different glances into the concept of one physical structure. Similarly, to infer the existence of a cup, at minimum we need to detect a shape that we could interpret as being able to hold objects or liquids, at least if the shaped object were solid enough. Both a blind woman and a deaf woman can determine if an entity before them is a cat, as can one who is both blind and deaf if she can touch it. Always, it is an abstract set of criteria that we use to determine the concepts of everything from gold to cup to cat to dog; to courtesy to coercion to negligence; to law itself.

The things themselves have essential qualities, or we could not know to what we referred when we spoke of them, e.g., pure gold is yellow in sunlight to typical human eyesight, a cup has a shape that could hold something, a dog has its overlapping everyday and scientific understandings, and so on. How can we identify what is spoken of when the term “game” is used without an idea of what,

⁸³ WITTGENSTEIN, *supra* note 1, at 32.

⁸⁴ Those atoms are made up of smaller particles, some of which have been shown to be made up of smaller particles still, and so on—or perhaps there is a stopping point. “Quarks are as small as or smaller than physicists can measure. In experiments at very high energies . . . quarks appear to behave as points in space, with no measurable size . . .” Christine Sutton, *Subatomic Particle*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/subatomic-particle> [https://perma.cc/23PK-WGAC] (last visited Oct. 22, 2018).

minimally, it includes? How can we distinguish a “game” from a “club” from a “bird” from an “idea,” or even the different definitions of “game” from each other? How could we even distinguish central cases from marginal cases without a prior idea of what is central?⁸⁵

To a biologist, a dog’s mammalian classification may be essential to his understanding and study of dogs; to a boy, total ignorance of the concept of mammal may not hinder in the least his relevant understanding of and relationship with his animal companion—relevant for his purpose of having a pet, protector, or hunting assistant, that is. Again, for concepts, the raw material of reality is *objective*, including the raw material of social realities, but what is chosen from that raw material to be included in any given concept is *subjective* in that it depends upon the ends or purposes of the thinking subject. For a social kind to be truly social and thus shared by many, the subjective concepts formed by the various society members must be similar enough that they can fairly be said to refer to a *socially-objective concept* even if that concept is not metaphysically objective.

The more precisely we specify our concepts in communicated language, the greater our chances of talking about the same things. Some do not start with what “a reasonable man of ordinary prudence in the same circumstances” would do as the ground of due care, but from some other starting point such as the common-carrier “utmost care” standard or a “custom equals reasonableness” standard. They may find a great deal of discussion time wasted when they discover that they were using one standard to judge negligence in a particular fact situation as others were using a different standard while neither side knew of the difference.⁸⁶ Thus, they were not debating, or at least not debating only, what the reasonable man would have done—they might have agreed at the start if they had been—but ignorantly and incoherently also debating substantially different concepts of negligence or, as some prefer to say in certain circumstances, different conceptions of the concept of

⁸⁵ Cf. SEARLE, *supra* note 1, at 8. Searle states:

We could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with. It is as much a test of a man’s mastery of the concept *green* that he has doubts about applying it to a glass of Chartreuse, as that he has no doubt at all about applying it to a healthy lawn or withholding it from fresh snow.

Id.

⁸⁶ This can create particular problems as beliefs and concepts change over time. Cf. Bix, *supra* note 34, at 1306–07. Bix explains:

There is no sharp divide between a change of beliefs about a concept and a change of concepts. . . . In political and moral discourse, it is equally hard to show that the disputants are definitely talking about the same thing or that they are definitely *not* talking about the same thing when they disagree (e.g., about “justice” or “democracy”).

Id.

negligence.⁸⁷ Clearly delineating all the essential elements, including the contingently essential ones, of the relevant version of a concept avoids this problem at the start.

8. Mutability of Essences Distinguish Natural and Social Kinds

With the possible exception of the involvement of mental perceptions based upon pure and isolated sensory perceptions such as seeing the color yellow, natural and social kinds are equally essentialist. For us to be speaking of the same thing, whether a natural kind or a social kind, we must *refer to enough of the same criteria to distinguish that thing sufficiently from other things*.⁸⁸ That set of criteria is the essence of the concept, and that essence cannot be fundamentally altered without fundamentally altering the concept into a different one.

Those Americans who think that football in England is the same sport as American football, and then learn that it is soccer instead, abandon their old concept of English football and adopt a new one. The term labelling the concept, “English football,” and some aspects of the concept, such as a sport popular in England, remain the same, but the concept fundamentally becomes something else—unless, somehow, English football and American football should be considered essentially

⁸⁷ For example, in the case of value-laden concepts, particularly highly abstract ones such as “justice” or “morality,” on whose essential meanings reasonable people can always disagree. Michael Stokes argues:

Essentially contested concepts are used to evaluate rather than to refer to objects or phenomena. . . . An essentially contested concept is one which admits of different competing conceptions and the debate which focuses on the concept is part of an ongoing attempt to determine which of these conceptions is preferable or correct.

Michael Stokes, *Contested Concepts, General Terms and Constitutional Evolution*, 29 SYDNEY L. REV. 683, 689 (2007). The concept of essentially-contested concepts may be superfluous or needlessly confusing. “A basic objection to the notion of essentially contested concepts is that it may be impossible to distinguish a situation in which there are competing conceptions of the same concept from the situation in which there are different but related concepts to which the one term refers.” *Id.* at 690. For the classic treatment of essentially-contested concepts, see Gallie, *supra* note 81, at 167–98.

⁸⁸ Whether this is due to unchangeable realities or to convention does not matter. *Cf.* Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381, 420 (2005) (stating that “[t]he shift from thing-by-nature to thing-by-design reflects evolution from the Kantian and Aristotelian traditions . . . and toward later philosophers, including and especially Hegel, on the other”). If a legal concept is a thing-by-design, it must be one clearly communicable to those who did not participate in the designing. “Adjudication, legislation, and scholarship should make the bases of thingness more transparent, so that the sources and weight of authority can be better evaluated, and so that the tools thus discovered can be put to more effective use.” *Id.* at 478.

the same sport. Of course, this depends upon our purpose being to distinguish among all sports, or something along that line. If our purpose is, say, to divide sports into team sports and non-team sports, we can correctly reconcile both English and American football in the same category whether we believe they are essentially the same or different sports—our concepts of them for this purpose need not have essences specific enough to classify beyond “team sport” or “non-team sport.”⁸⁹

B. Distinguishing the Essence

1. Multiple Meanings and Multiple Materials

Confusion often sets in when a term possesses multiple meanings, each referring to a different concept, and in addition at least some of those concepts lack consistent material referents. Referents of “game” include: (1) a rules-based athletic contest played for amusement or exercise; (2) such a contest played for money by professionals; (3) a rules-based contest of ability or luck or both with no athletic component; (4) a playful activity that involves goals but no contests; (5) such an activity that could appear playful but is done seriously and possibly as a contest; (6) a deadly serious attempt by one or some to chase down another or others who attempt to hide (“a cat-and-mouse game”); (7) psychological manipulation (“stop playing games with my heart”); and (8) animals taken in hunting or trapping.

Only a minimal abstract referent runs through all eight above definitions of “game”: a notion of the involvement of a test of ability or luck or some combination of the two that conventionally could be thought to produce amusement on the part of at least one party.⁹⁰ That is the essence of “game” across these meanings. My critic will object that this is a very thin definition that, were it used to describe “game” to a listener unfamiliar with the concept, would woefully under-communicate and leave him insufficiently enlightened about the nature of the concept and the usage of the term.⁹¹ I agree, yet that is often the nature of language and concepts—and unlike some proposed family resemblances, this thread of test of ability or luck and so on is still sufficiently thick to be significantly useful in distinguishing “game” from other phenomena.

Therefore, it is not useless or misleading, at least not for certain purposes,

⁸⁹ A marginal case could be doubles tennis.

⁹⁰ I add “conventionally” because it is possible to take amusement in anything or to think such amusement possible.

⁹¹ “[I]t may well be a definition offered at such a high level of abstraction as to be essentially uninformative.” SCHAUER, *supra* note 68.

although I believe that typically, “game” should be more narrowly understood and thus some of these definitions separated from the rest, e.g., a deadly serious cat-and-mouse game should be understood to be a game only metaphorically. We would deceive the unfamiliar listener if we did not explain the vagueness inherent in the term and general concept, and we would also deceive if we did not flesh it out with specific examples. The abstract referent stated above is the family resemblance running through those meanings, assuming there is one. It, or some similar formulation, is the only possible conceptual commonality among these usages of the term “game.”

An analogy can be drawn to birds. According to the scientific definition, which does specify some essential characteristics such as the possession of feathers,⁹² flight is not an essential characteristic of birds, yet we would deceive if we did not mention flight when describing birdness to the uninitiated.⁹³ Similarly, the thinness of the essential part of the definition of “game,” leaving out so many aspects that tend to come to mind when we hear the word, no more transforms it into a non-essentialist concept than the thinness of the scientific definition of “bird,” with its lack of inclusion of flight, so transforms it.⁹⁴ Just as we can point to birds that cannot fly, we can point to games that lack some very important, near-universal attributes of games.

2. Distinguishing Core from Marginal Cases

My critic might argue that my broad abstract referent of “game” is not useful and that I instead should break “game” into entirely separate concepts as I did with “club.” Such arguments are often plausible concerning many terms, and theorists and lawyers often separate a commonly-used term into multiple terms labeling different concepts in order to achieve greater clarity.

Many cases will fall clearly on one side or other of the line, but marginal cases can be impossible to resolve rationally any more than it is always possible to tell when enough blue has been added to red in order to make purple—yet although

⁹² “Bird, (class Aves), any of the more than 10,400 living species unique in having feathers, the major characteristic that distinguishes them from all other animals.” Robert W. Storer, Frank Gill & Austin L. Rand, *Bird*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/animal/bird-animal> [https://perma.cc/49VS-7WQH] (last updated Oct. 12, 2018).

⁹³ “[I]f we ask someone to think of a bird, rarely will that person choose a penguin, an ostrich, or an eagle with a broken wing.” SCHAUER, *supra* note 68, at 37.

⁹⁴ See Joseph Raz, *Can There Be a Theory of Law?*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 324–42 (Martin P. Golding & William A. Edmundson eds., 2005) (“[F]or only necessary truths about the law reveal the nature of the law.”). Although I agree with Raz on law possessing an essential nature, I disagree that only the essential aspects reveal law’s nature.

some things may be classified plausibly as either red or purple, others are clearly red and not purple, or purple and not red. When to identify a conceptual family resemblance across uses of a term and when to classify uses as separate often involves the ancient sorites paradox even when the purpose of conceptualization does not vary.⁹⁵ How many grains does it take to make a heap? Any specific number seems arbitrary, yet, heaps of grain exist and are often clearly distinguishable from non-heaps despite the inability to define—in a way that must be accepted by all reasonable observers—the number and configuration of grains that are required to constitute a heap.⁹⁶ It could be obvious that driving at 20 mph is a reasonably safe speed on a certain road under good conditions and that 90 mph is obviously unsafe, while the precise line at which speed crosses from safe to unsafe is not.

There may be no way to draw a rationally-defensible line at any particular point, yet that does not change the fact that there are reasonably safe speeds and unsafe ones, at least if we agree that there are such things as reasonable and unreasonable behaviors in driving. Similarly, what criteria, exactly, renders weather “hot”? The examples are endless and do not destroy the distinction between family resemblance and separate meanings any more than they destroy the distinctions among heaps and other collections of grains, among colors, among weather conditions, and between safe and unsafe speeds. The lines exist but are fuzzy—thinking otherwise would destroy the needed ability to classify much of the world and would certainly destroy the ability to “do law” in an effective way.⁹⁷

C. *Non-Rational Connections*

It sometimes seems that speakers use the same word to cover different concepts due to strong commonalities among the concepts that are non-rational or even irrational. I might form such an association between my friend named Jones

⁹⁵ Dominic Hyde, *Sorites Paradox*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2014), <http://plato.stanford.edu/archives/win2014/entries/sorites-paradox/> [<https://perma.cc/48EF-8Q3S>].

⁹⁶ *Id.*

⁹⁷ Contrary to Dworkin’s position, legal philosophy is not just a matter of the interpretation of legal systems from the inside, but situating legal systems in the web of the whole of human experience, just as a legal speed limit must be evaluated in the light of the physics of safety. Unlike those within a legal system, legal philosophers do not begin with a constitution or any other text to interpret when beginning their inquiry. “Jurisprudence, by contrast, is not interpretive because there is no point making the practices of judges authoritative for legal theorists . . . [W]hy should I as a legal theorist feel bound to respect any text as I seek to construct my own theory of the best way to practice law?” Moore, *The Interpretive Turn*, *supra* note 9, at 948. We are bound only by all of discernible existence instead.

and Jones County, Georgia, based on nothing more than the sharing of the same very common name, and this may persist even after I learn that his family has never had a connection to Jones County. Similarly, I might develop a too-strong unconscious connection between “contest” and “game” because so many games are contests, causing me to tend to think of games that are not contests as contests. Such unconscious connections may become widespread, but until they cause speakers either to use terms differently or to understand them differently at a rational level, they cannot be said to form a part of a family resemblance—or similar grouping—of the socially-understood general concept. An image of my friend might flash into my mind every time I hear “Jones County” uttered, but that does not affect the meaning of “Jones County” socially or even necessarily for myself.

Still, at the twilight edges of concepts and terms reside powerful unconscious associations and effects. “Certain words and phrases are useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions and attitudes in a political or a judicial audience,” wrote Felix Cohen, famously.⁹⁸ And because “law is not a science but a practical activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold,”⁹⁹ any good rhetorician will take account of these effects in persuading others, which certainly includes judges, jurors, legislators, and regulators. In this lies one of the inevitable non-rational aspects of law’s operation.¹⁰⁰

All that I argue is that law and its authors should seek to shine a rational light on concepts and their uses, pulling the unconscious into the conscious when they can and specifying clearly as much about the law as reasonably possible—nothing human could be called a rational exercise if perfect rationality were required. Our duty here is to try for perfection, which in any case will move us much closer to it than failing to attempt it, just as we credit a man as good who tries to do good but sometimes fails, but do not so credit a man who does not try.

Wittgenstein’s Catholic upbringing may have influenced his approach to non-

⁹⁸ Cohen, *supra* note 7, at 812.

⁹⁹ *Id.*

¹⁰⁰ Here is where the following from Cohen becomes partially true: “*Legal concepts* (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith.” *Id.* Since these concepts affect the ways in which legal authorities regulate subjects’ behavior, they have a highly relevant and verifiable existence in that sense, even if they have no independent ontological existence. Insofar as they are consciously or unconsciously treated as ontologically real rather than conventionally defined, and even given a kind of exalted quasi-sacerdotal status, they can have metaphorically supernatural effects—which, again, can manifest as quite real in how the law is applied to subjects.

essentialist concepts more than secular interpretations of his work may indicate.¹⁰¹ Non-rational need not be irrational, and as I have said, the non-essentialist approach is beneficial in some contexts but not for strictly legal concepts. Wittgenstein did not emphasize legal concepts in the posthumously-published *Philosophical Investigations*, some of which is framed in conversation with St. Augustine.¹⁰² When translating valuable non-essentialist, non-legal concepts into legal ones, such as the broad and deep religious and moral idea of “fault” into a legally-cognizable concept or collection of concepts, lawmakers and others should make them into essentialist ones with their implications for subjects’ decision-making as easily ascertainable as reasonably possible. The immensely rich, diverse, and conflicted conceptual empire of religion and morality should be refined into a drier, more homogenous, and consistent conceptual nation of law.

D. Restoring Trust in Law

Because law has so many elements, because value judgments underlie so much of it, because so many words shift in meaning on a regular basis, because its thinking is so often far removed from the natural realities that more tightly constrain scientific and some other forms of thinking, because it relies upon so many realities and terms external to itself, and because so many lawmakers and interpreters with differing perspectives are involved in its evolution, law deals with a universe of concepts subject to a continual indeterminacy that can contribute gravely to injustice and to a lack of confidence among subjects.

The candid movement of inessential features in and out of the core of what is treated as essential can rescue abstract concepts from both excessive fluidity and excessive rigidity. The *explicit and clear use* of this procedure allows for reformation of concepts when circumstances warrant while signaling to legal practitioners and subjects exactly what is taking place. Further, because many legal concepts can lose their usefulness when their truly essential cores no longer describe doctrines or social realities in optimal ways, judges and other legal authorities should explain openly when they are abandoning them instead of pretending to merely “reform” them disingenuously or pretending to still use them while actually using different concepts and rules. Essentialist concepts need not be prisons when circumstances or values change, and formalism should yield to the accurate description and intended regulation of the real social world.¹⁰³

¹⁰¹ Wittgenstein said, “I am not a religious man but I cannot help seeing every problem from a religious point of view.” RUSH RHEES, DISCUSSIONS OF WITTGENSTEIN 94 (1970).

¹⁰² WITTGENSTEIN, *supra* note 1, at 2ff.

¹⁰³ This responds to one of the criticisms leveled at some types of conceptualization. An example

The discipline required here can induce those disaffected by the miasmic nature of law and legal discourse to reinvest trust in them. If legal discourse in many areas has reached a point where opposing camps no longer see value in discussion, a refocus on precise essentialist thinking might break down such attitudes and lead to productive ways forward.¹⁰⁴ If compromises among conflicting values must be made—and in law they must—perhaps those compromises struck with clarity from the beginning are more socially desirable than those struck vaguely at their start, with their consequences dribbled out over years or decades in a series of “clarifying” decisions that dissenters inevitably see as dishonest.¹⁰⁵ *Dred Scott* and its use of the concept of substantive due process,¹⁰⁶

of such criticism comes from Professor DiMatteo, who states:

The problem with abstract conceptualism was not so much in its abstractness but its formalism. . . . The problem with abstract conceptualism was its static nature. The abstract concepts may have justified themselves from a “rule fit” measurement at the time of their creation but their formalistic application over time increasingly divorced them from social reality.

Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 452–53 (2004).

¹⁰⁴ Stanley Fish describes the languishing of such discussion, and says: “[w]ithout good manners—a weak phrase for the willingness to refrain from bashing one’s opponent’s head in—civilization itself would fail, not because, as some have been telling us recently and others had been telling us even before Juvenal’s third satire, we have lost hold of first principles and basic truths,” but rather because such principles are unavailable to us. Fish, *supra* note 40, at 1453. Thus, he warns, “given the unavailability of such principles and truths to limited mortals . . . we would fall instantly to fratricide (and to matricide, patricide, genocide, and every other cide) did we not invest our energies in procedures and habits designed . . . to keep the conversation going.” *Id.* I believe first principles are indeed available, but that the approach Fish describes may be socially workable as well.

¹⁰⁵ Cf. LEARNED HAND, *A Personal Confession*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 307 (3d ed. 1960) (“Values are incommensurable. You can get a solution only by a compromise, or *call it what you will*. It must be one that people won’t complain of too much; but you cannot expect any more objective measure.”). Perhaps people sometimes complain less of compromises whose implications they can truly understand, as the fear of the unknown is so powerful.

¹⁰⁶ *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857). The majority states:

And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

Id. Some attribute the genesis of the substantive due process doctrine to *Dred Scott* while others argue it used an already-established concept. For example, Timothy Sandefur asserts:

I should address this recurring myth: that substantive due process originated in *Dred Scott*. As near as I can tell, this idea originated in John Hart Ely’s *Democracy and Distrust*, and was taken up by Robert Bork in *The Tempting of America*. . . . [T]he claim, while not entirely false, contains only enough truth to be

Griswold and the concept of privacy,¹⁰⁷ and *Citizens United* and the expansive concept of corporate rights¹⁰⁸ make for good American examples.

Why, for example, does the supposed constitutional right to privacy include a right to contraception but not to potentially useful drugs not approved by the FDA? Why to abortion but not to protection against the burgeoning surveillance state? Why do equal protection and due process guarantee a right to same-sex marriage but not to polygamy? More mundanely, why are judges and regulators, without prior warning, allowed to use different versions of negligence—ordinary prudence or utmost care—and related legal concepts in cases whose facts seem to justify no such differential treatment? Including contradictory elements in legal concepts is like using “dog or cat” to tell someone what animal to expect, and then choosing one or the other when it is too late for anyone else to do anything about it; using “dog” or “cat” is usually desired, especially by those who may suffer legal penalties depending on which it is.

To those who disagree with such a ruling, the choice generally seems arbitrary. All this becomes more important every passing day as society and the points of view within it become more diverse and more prone to sharing little ground—and less mutual trust.

IV. ILLUSTRATIONS

A. A Natural-Kind Illustration

The term and concept of snow can assist in illustrating the above arguments further. I chose snow because of the difficulties and ambiguities inherent in it despite its simplicity and familiarity; I believe it is an easily-understood case, but not an easy one.

“Snow” is typically used to refer to water that has frozen into crystalline flakes and fallen from the sky, but one could make the concept vaguer and call “snow” artificially-produced crystalline flakes of water (“artificial snow”) or even crystalline flakes of other substances. Yet in typical circumstances, if a woman came indoors

misleading.

Timothy Sandefur, *Dred Scott and Other Fallacies of Substantive Due Process*, CATO UNBOUND (Feb. 21, 2012), <https://www.cato-unbound.org/2012/02/21/timothy-sandefur/dred-scott-other-fallacies-substantive-due-process> [https://perma.cc/UE45-ZES6].

¹⁰⁷ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussing the concept of ‘privacy’ in American constitutional law).

¹⁰⁸ See generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (discussing the concept of rights of corporations).

and told others that “there is snow on the ground outside,” her audience would rightly feel ill-informed if they later learned that this “snow” was not made of water. Under its everyday concept, snow is made of water, and crystalline flakes of other substances are typically called “snow” only by analogy. This, of course, is an empirical question about ordinary usage of the term and concept, and my argument would work just as well with a few adjustments if it turned out that the ordinary usage was somewhat different.

It is coherent, reflective of reality, and easily comprehensible to define “snow” as crystalline flakes of any substance, or perhaps as white flakes of any kind, or just flakes of any kind, but each step removed from the commonly-understood usage in this case impairs our understanding of our experience of natural phenomena and our ability to communicate efficiently. In other words, it is not *optimally* reflective of reality for *everyday purposes*. Keeping “snow” and all of its implications as they currently are makes the most sense given the common natural manifestation of snow in our environment and the importance of knowing whether something is made of water or of another substance. Requiring indications that the “snow” spoken of deviates from the usual qualities, such as the addendum “of *something*” to speak of crystalline flakes not of water, optimizes understanding and communication better than requiring speakers to say “snow of water”—not to mention even more qualifications such as “frozen crystalline flakes of water”—in order to make their meaning clear.¹⁰⁹ Broadening the concept and meaning of its associated term would, overall, tend to detract from our abilities to understand and communicate as would broadening the concept of gold so that speakers have to replace “gold” with “precious metal of yellow color.” The multiplicity of words and concepts that require mental processing and synthesis would be counterproductive, as would be losing the wonderful connotations that accompany the current words “snow” and “gold.” “Snow” is associated with a certain aesthetic, certain sports, certain dangers, and Christmas because it typically refers to the matter that falls from the sky—“crystalline flakes of water that fell from the sky” is unlikely to have the same rich associations, at least not unless synthesized mentally into one seamless concept, in which case using one word is more efficient as well as more poetic.

Conversely, although less importantly for my argument, narrowing—rather

¹⁰⁹ Here I can agree with prototype theory, which:

[H]olds that our concepts are structured on the basis of their similarity to some central prototype representation. The theory accounts for a whole range of “prototype effects.” Items close to the prototype (typical items) are processed more rapidly, learned more quickly, remembered better, and so forth, than are atypical items.

James A. Hampton, *Typicality, Graded Membership, and Vagueness*, 31 *COGNITIVE SCI.* 355, 356 (2007).

than broadening—the concept and meaning of “snow” also would tend to decrease understanding. Having one concept for snow that, for example, is relatively wet versus another for that which is more thoroughly frozen, or for that made of large loose flakes versus that made of smaller and more tightly-packed ones, and so on would needlessly complicate understanding and communication. Or, possibly, having such separate words would not be disadvantageous, and could even enhance understanding and communication especially for those who need such distinctions, but then a new word and concept would need to be invented to take the current place of “snow.” We would still benefit from an overarching concept to cover the various forms of what is now called “snow” so that we easily could think of, and communicate about, that phenomenon. Likewise, the concept and term of “precipitation” assist by providing a convenient way of speaking of water falling from the sky in any form whether rain, snow, sleet, and so on, though the term “precipitation” is typically less needed than “snow,” for it is highly useful to know whether snow, rain, hail, or sleet is falling from the sky. But narrower is not always better, and more specific separate terms for “snow” are unneeded since it is, relatively, rarely important to know whether the falling snow is fluffy or compact—and saying “fluffy snow” or “compact snow” suffices.

Again, our experience must serve as our subject matter, and our ends or goals must be the paramount determinant of our analysis of that subject matter—empirics as experienced should determine conceptual essences in light of needs and desires. Here, I am presuming that our concerns with snow, sleet, rain, and related phenomena are their differing effects, first and foremost, on travel; second, on outdoor activities; third, on clothing choices; fourth, on aesthetics; and, fifth, on the survival and flourishing of plant and animal life. If all that we ever wanted or needed to know was the molecular composition of the substance falling from the sky, i.e., that it was water or something else, then the concepts of the forms that the substance can take—rain, sleet, snow, hail—would be superfluous and possibly confusing additional concepts with which we could usefully dispense. They would only get in the way of understanding and communication. “Precipitation” or “water precipitation” would be all we would need.

Those other concepts would merely distract us, or be used by some to distract us, from what we wanted or needed to know, just as some defense attorneys may use irrelevant concepts to cast doubt on the claims against their clients—they can muddy the conceptual waters by colonizing the relevant legal concepts with irrelevant ones. Plaintiff’s attorneys are far from immune—one tactic could be to insinuate that a jury should find a wealthy defendant liable at least partially because he is wealthy, even when the law insists that wealth is irrelevant to the liability determination. Such attorneys implicitly, and occasionally explicitly, can attempt

to invade the *legal* concept of liability in jurors' minds with a *moral* or *practical* concept along the line of "the wealthy should be more susceptible to paying plaintiffs."

Therefore, just as having separate terms and concepts for the substance of "gold" depending upon whether it was in a ring, a lump, or an electric wire would obscure more than enlighten, so would having separate terms and concepts for the various forms of snow. (Whether Eskimos,¹¹⁰ who could be among those who would benefit most from finer distinctions here, have a great many words for snow may be a matter of opinion.¹¹¹)

Fluffy snow is snow, but calling hail "snow" cannot be correct except in some metaphorical sense, although anything can be called anything else in a metaphorical sense—Pluto can be called a dog in a metaphorical sense. In fact, we can separate metaphorical from literal senses only because essences are identifiable and understood. Otherwise, we could not tell which was literal and which metaphorical. Thus, something very similar to snow, e.g., hail that is frozen water falling from the sky, is clearly not snow.

Still, it is plausible to argue over where exactly to draw the lines. Our current terms in this area seem to strike the right balance, no doubt because our ancestors, who were affected by the weather more directly than we typically are, struck it that way.

Even if some of the above is disputable, even if some of the lines should be drawn differently, the concept of snow and other such concepts must have some kind of natural essences that we do best to recognize or, if they do not, we must give

¹¹⁰ Contrary to politically correct fashions, "Eskimo" is the right word, and the alternative promoted to replace it is wrong. "Most Alaskans continue to accept the name 'Eskimo,' particularly because 'Inuit' refers only to the Inupiat of northern Alaska, the Inuit of Canada, and the Kalaallit of Greenland, and it is not a word in the Yupik languages of Alaska and Siberia." Lawrence Kaplan, *Inuit or Eskimo: Which Name to Use?*, ALA. NATIVE LANGUAGE CTR. AT THE U. OF ALA. FAIRBANKS (July 1, 2011), <https://www.uaf.edu/anlc/resources/inuit-eskimo> [https://perma.cc/N8SP-9RQC].

¹¹¹ See, e.g., Larry Kaplan, *Inuit Snow Terms: How Many and What Does It Mean?*, ALA. NATIVE LANGUAGE CTR. AT THE U. OF ALA. FAIRBANKS (June 1, 2003), <http://www.uaf.edu/anlc/snow/> [https://perma.cc/XL83-8N7J]. Describing the research of Dr. Laura Martin, Emerita Professor at Cleveland State University, Kaplan explains:

She further stresses that the polysynthetic morphology of Eskimo languages renders a discussion of "words" as such almost pointless, since the number of words in these languages is practically infinite due to highly productive patterns of suffixation. . . . [W]hat is phonologically a single word is most often not a lexicalization but a longer combination of elements generated as part of the speech process and not found anywhere in the mental lexicon, much like sentences in more analytic languages like English.

Id.

them essences so that we may think and speak about them consistently, particularly in contexts requiring precision such as science and law.

B. An Application to the Concept of Law

1. Socially-Perceivable Coercive Intent as an Essential Element

Following the way of thinking above: every political positive law must have socially-perceivable coercive intent on the part of legal authorities behind it in order to be a law properly so called, and those who believe that some laws are not coercive are mistaken.¹¹² Even laws that seem devoid of coercion, such as laws defining terms or establishing personnel structures, must relate in some way to coercive regulation by the legal system in order to be law at all. My claim is based on inferences drawn from experience,¹¹³ my own and that of others communicated to me in writing and speech, about the phenomena of the human condition, including when subject to legal systems.¹¹⁴

¹¹² Recall that although Hart denies that all laws are necessarily coercive, he accepts that some municipal positive law must be coercive due to a sort of natural law:

[W]e do need to distinguish the place that sanctions must have within a municipal system, if it is to serve the minimum purposes of beings constituted as men are. We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity*. . . .

H.L.A. HART, *THE CONCEPT OF LAW* 199 (3d ed. 2012). His highly inadequate identification of the survival of its members as the one indisputable aim of human society illustrates the need for a much better-developed theory of ultimate ends. As Russel Hittinger argues:

Even those who take a strictly this-worldly view of human goods are not apt to say that self-preservation is a greater good than self-development, even if it be a persistently necessary condition of self-development. . . . Necessary conditions do not produce a sufficient condition, and until we find a good or goods that are likely candidates for the latter, I fail to see how we can generate action-guiding norms for the former. To say that one or another good is necessary does not tell us how, and under what conditions, to choose it.

Russell Hittinger, *The Hart-Devlin Debate Revisited*, 35 AM. J. JURIS. 47, 49–50 (1990).

¹¹³ “A scientific epistemology must, of course, encompass more than a commitment to inference to the best explanation. We need . . . certain epistemic norms which satisfy neither the empiricist [sic] nor the abductive criteria. These epistemic norms admit of only a *pragmatic* defense” LEITER, *supra* note 6, at 236 n.30.

¹¹⁴ As Leiter states:

[J]ust as philosophical pragmatists hold that it is a criterion of acceptability for particular epistemic norms that they work for us humans—e.g. by helping us predict sensory experience—so too it is a criterion of acceptability for a theory of adjudication for the Realists that it *work for lawyers*. Work for lawyers, for the Realists, means that it enables them to predict what courts will do.

Id. at 52. Although I agree with Leiter here, I believe that the experience of the ordinary legal subject is a more fundamental ground than the experience of lawyers.

I cannot imagine any realistic human society that could be a state—able to sustain and order itself with political positive law—and exist without systematic coercion employed by its rulers. Nor can I imagine a human world in which maintaining the distinction between law and other phenomena such as exhortation, guideline, and moral suasion would not be useful for both understanding and practice unless I imagine that the world unrealistically became something very different from what it is now. Coercive intent on the part of lawmakers is one, although not the only, essential element needed to distinguish a law, such as from legally-formal pronouncements that are exhortations, rhetoric, propaganda, and the like, though legal authorities often use all of these in their attempts to regulate society. For example, a congressional “statute” calling on Americans to give more to charity or commanding employers to pay a living wage, but providing for no penalties or rewards based on compliance or the lack thereof, is not a true law.

2. The Bad Practitioner and the Puzzled Practitioner

To test this, consider: In response to the above “law,” the competent legal practitioner would not tell his clients that they were required to give more to charity or to pay their employees a living wage. Indeed, he would explain that legal provisions that may seem coercive, but which are never used to coerce—either negatively (threatening to impose a penalty) or positively (offering a benefit, but only if certain conditions are met, and penalizing those who take the benefit without meeting the conditions)—such as a statutory provision ignored or distorted by judges or regulators, did not apply to his clients. At the same time, he would advise his clients to follow coercive rules used by the legal system even if their legal formalities were clearly defective. Such a rule might be an improperly-promulgated regulation still enforced by regulators, where a court challenge to the regulations was deemed too expensive to pursue or which had been tried but had failed—even though, based upon formal law, it should have succeeded.¹¹⁵ The competent practitioner concerns himself with the possible coercive effects of the

¹¹⁵ This presence or absence of coercion employed by the legal system is how the typical legal practitioner and the typical legal subject identify law. This does not mean that goodness, justice, and rationality are irrelevant to law or even to its power, but that goodness, justice, and rationality without coercion cannot constitute political positive law. Cohen, *supra* note 7, at 837 (“Law commands obedience not because of its goodness, or its justice, or its rationality, but because of the power behind it.”) Cohen also states, “[w]hile this power does rest to a real extent upon popular beliefs about the value of certain legal ideals, it remains true today, as Hobbes says in his *Dialogue on the Common Law*, ‘In matter of government, when nothing else is turned up, clubs are trump.’” *Id.*

legal system on his clients, not on *sometimes misleading legal formalities or non-coercive urgings of legal authorities* except as they affect coercion.

Whether a Holmesian “bad” practitioner¹¹⁶ who cared only about serving his clients’ interests or a Hartian “puzzled” practitioner¹¹⁷ who cared about what is legal for its own sake, any competent practitioner would advise his clients in the same way. I argue there is no distinction between the bad man and the puzzled man in how they identify law. A truly bad practitioner, or truly bad lawyer, does not use coercion as an essential yardstick for measuring law, and the good practitioner, or good lawyer pure and simple, does. What the law “should be,” or what law books, or even the Constitution, say that it is are not the ultimate guides. Instead, it is the consequences that subjects experience at the hands of the legal system, or rather what legal authorities intend for subjects to experience, i.e., those authorities’ socially-discernible *coercive intent*, that tells us what the law is. While we can objectively discern legal authorities’ coercive intent socially by external signs such as what they say and how they act, their completely private, subjective intentions cannot be part of law. Moreover, subjects occasionally flout the law and its consequences, rendering legal authorities’ intent to cause consequences a better guide to law rather than the actual consequences. If the authorities tolerate illegal behavior long enough, including circumstances in which higher legal authorities tolerate the illegal behavior of lower authorities, it can be reasonable to conclude that the authorities’ coercive intent—and thus the law—has changed even if the law has not been formally altered, as the doctrine of desuetude recognizes.¹¹⁸

¹¹⁶ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹¹⁷ “The puzzled man is disposed to comply with the law *just because it is the law*, and an account of law that fails to take account of the puzzled man simply does not, Hart said, ‘fit the facts.’” SCHAUER, *supra* note 68, at 42.

¹¹⁸ “Desuetude, the obscure doctrine by which a legislative enactment is judicially abrogated following a long period of nonenforcement, currently enjoys recognition in the courts of West Virginia and nowhere else.” Notes, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006). This is debatable, for American courts outside West Virginia have applied the doctrine in all but name. Cass Sunstein discusses “the (largely implicit but still vibrant) doctrine of desuetude, banning enforcement of anachronistic law.” Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 8 (1996). Desuetude was probably well-known to the jurists among the Founding Fathers. As Darrell Miller explains, “James Pfander and Daniel Birk have cited the influence of Scottish jurists, lawyers, and philosophers on the Framers of the Constitution. Although desuetude was not widely recognized in England, it appears to have been a fixture of Scottish law during the Founding generation.” Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J. L. PUB. POL’Y 223, 230 (2016). The doctrine has an ancient lineage:

The legal foundation of desuetude begins with the Roman jurist Julian, who wrote that “statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.” From

3. Ends, Means, and Coercion

Coercive intent is not the only essential element of political positive law. Social legitimacy, authority, normative qualities—these too are necessary to identify law and distinguish it from, say, rules laid down by an organized crime syndicate or from other phenomena.¹¹⁹ This coercion may be indirect, such as when a testator draws up a will—the coercion of the state is directed according to the testator’s wishes to ensure that none other than his beneficiaries receive his property. Any entirely non-coercive “law” from a legal authority is simply an exhortation or guideline with a deceptive name.

Many things achieve the *end* of ordering temporal society, e.g., social norms, religious laws promulgated by religious authorities, moral beliefs and urgings, experts’ advice, propaganda, and non-legally-enforceable statements from political and legal authorities. Without the exercise of the distinctive ordering or regulatory *means* of political positive law, i.e., the coercive power of the state backed by a monopoly on the licensing of physical violence and channeled through the legal system, *distinctively legal* authority is not exercised. Socially-perceivable, legal-system-enforceable coercive intent is the most reliable signal from legal authorities to legal subjects that legal authority is, in fact, exercised, that a legal obligation is created, and that their obedience is legally required. Thus, there are rational and moral imperatives for legal authorities to clearly employ this signal whenever they claim to make law.¹²⁰

Their coercive intent must, ultimately, have physical force or at least the threat of it as its backing, for financial and other penalties cannot be *enforced* otherwise. Notices to pay fines or judgments that can escalate only into further notices, public or private, are mere exhortations whose effects depend upon the voluntary reactions of society’s members rather than anything specified by the legal system. An in-no-way-physically-enforceable “legal” order to shun an offender has more in common with a religious excommunication than with anything politically legal, as it depends entirely upon moral force and general social attitudes for its effects.

The tendency today is to apply mechanistic thinking to everything rather than discover states of mind such as intent. Legal interpreters sometimes tend to view law as a discovered phenomenon that contains no intention in itself, but must be

these Roman-law roots, desuetude found its way into several legal traditions. Of particular interest is the argument of the German Historical School (chiefly Savigny) recognizing the legitimacy of desuetude.

Notes, *supra* at 2211.

¹¹⁹ Cf. Cohen, *supra* note 7, at 838 (“The definition of a general term like ‘law’ is significant only because it affects all our definitions of specific legal concepts.”).

¹²⁰ See generally D’Agostino, *supra* note 5, at 171–83.

given one by the discoverer. Political positive law, by definition, cannot be such. It is a matter of choosing social ends and formulating means to achieve them.¹²¹ A legal interpreter who gives his own regulatory intent to the law, *rather than discovers the intent of its lawmakers*, thereby becomes the lawmaker—he himself creates the rules or commands that are meant to guide practical reasoning. For law to be able to regulate socially, and therefore for it to exist at all, each society member—or even each legal authority—cannot possibly be a lawmaker unto himself but must conform to society-wide law with considerable consistency.

4. Beneficial Vagueness

Not only are essential elements such as coercive intent needed to consistently recognize laws and legal obligations relevant to subjects' decision-making, it is irrational and immoral to use non-essentialist concepts in the coercion of citizens. Some vagueness in legal concepts is unavoidable, and sometimes the evils of the vagueness are outweighed by the benefits of allowing discretionary judgment. But legal vagueness and ambiguity always have the potential for harm and much, if not most, of the injustice intrinsic to any legal system *per se* is caused by unnecessarily vague, ambiguous, or contradictory law that can leave subjects in the dark as to what they should do to avoid legal penalties.

Even when lawmakers choose to leave beneficial vagueness in the law, they should use essentialist concepts to do so rather than rely upon the incoherence and discretionary obscurity of non-essentialist thinking—the cores and fringes of essentialist concepts leave more than enough room to contour such vagueness and *can render clearer what, exactly, is being left vague*. And in fact, in every sphere of life, essentialist concepts are often too vague than not vague enough. Lawmakers shirk their duty at times and prefer to leave harmful vagueness in the law, even sometimes leaving vague what it is that they are leaving vague. Tracing the path of coercion, as actually employed in the real world, from legal system to legal subject can help in finding the true law as opposed to the illusions created by rhetoric.

5. Deceptive Thought Experiments

Felix Cohen, referring to Rudolf von Ihering, put it well in describing the fantastical misdirections of much legal philosophy:

Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face to face, the many concepts of jurisprudence in their absolute

¹²¹ Cf. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 167 (1990) (“Aristotle’s physics treats objects in nature much as if they were animate beings, with goals; today we are more likely to treat animate beings on the model of objects.”).

purity, freed from all entangling alliances with human life. . . . Here one found a dialectichydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts. The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs.¹²²

James Madison posited, “If men were angels, no government would be necessary.”¹²³ Whether this is true does not matter for our purposes, for men are not angels and never will be, and terrestrial human affairs are the actual concern of political law and the actual raw material for legal concepts to classify mentally. Certainly our concepts could become essentially different if the realities upon which they were based became essentially different, but this will not happen simply because we can imagine it. In any case, those who theorize about worlds populated with angelic men governed by thoroughly coercion-free “law” are theorizing about worlds without law at all.¹²⁴ In human experience, order can be maintained consistently—murder controlled, taxes collected—only with the assistance of coercion, and thus coercion is essential to any real-world concept of a political legal system. Fantasy concepts that reflect fantasy worlds do not matter. An occupational hazard for philosophers is the indulgence of these thought experiments that lead them far from Earth.¹²⁵ Speculations along the lines of “if men were angels”—common among legal theorists—or “if all men agreed to a social contract” are only useful when shedding light upon the real world.¹²⁶ The positing

¹²² Cohen, *supra* note 7, at 809.

¹²³ THE FEDERALIST NO. 51 (James Madison).

¹²⁴ This does not necessarily mean that they would not have other kinds of social rules.

¹²⁵ See, e.g., Kenneth Einar Himma, *The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law*, 1 (Sept. 14, 2015), <http://ssrn.com/abstract=2660468> [<https://perma.cc/97LM-YN2L>]. Himma argues:

Despite the universality of coercive enforcement mechanisms in every known existing legal system, many legal philosophers specializing in conceptual jurisprudence believe that the authorization of coercive enforcement mechanisms is not a conceptually necessary feature of law. What seems *prima facie* obvious from our experience is rejected on the strength of examples of systems of norms governing beings profoundly different from us, such as a “society of angels.”

Id.

¹²⁶ Even some of the arguments from some of our best-known contemporary legal philosophers fail for this simple reason. In reference to Scott Shapiro’s book *LEGALITY* (2011), Schauer explains, “[a]ll too often Shapiro’s book is trapped within a jurisprudential milieu which slights the pervasiveness of coercion and exaggerates the significance of the decidedly counterfactual possibility of sanction-free law.” Frederick Schauer, *The Best Laid Plans*, 120 *YALE L.J.* 586, 621

of a world in which men in a political state always do the right thing without need of coercion, and therefore of a world in which force is not needed, is irrelevant except as it might help to explain real human societies with all of their characteristics intact.¹²⁷ It may be that coercion is not needed in Heaven, but we do not live there.¹²⁸

And so some philosophers create their own essentialist definitions of law, or deny the possibility of any essentialist definition, by postulating what law must be across “all possible worlds.”¹²⁹ By inventing a world in which men always follow the law or always behave rationally, they eliminate the need for coercion in law.¹³⁰ This is akin to the invention of a world in which men do not need to consume protein in

(2010).

¹²⁷ Schauer puts it this way, restricting his critique to the empirically universal without jumping to the conceptually necessary:

Yet it is surely not irrelevant that Shapiro’s community of cooks is a make-believe story. While the make-believe serves valuable heuristic purposes, we know that all real legal systems employ sanctions. Communities of trusting angels are conceptually possible, but the fact that no such communities exist within the realm of governmental legal systems is more than just an interesting but ancillary fact about the legal world. It is evidence, albeit not conclusive, of the nature of the communities that are governed by the law of political states and their subdivisions. And in the world of law as it exists and as it is experienced, coercion is rampant and sanctions are omnipresent.

Id. at 605.

¹²⁸ Perhaps a few do, spiritually: “Quod si spiritu ducimini non estis sub lege.” *Galatians* 5:18 (Latin Vulgate), THE ARTEL PROJECT, <http://artflsrv02.uchicago.edu/cgi-bin/philologic/getobject.pl?c.47:1:4.NEWvulgate> [<https://perma.cc/CT33-WUTA>] (last visited Oct. 22, 2018). “But if you are led by the spirit, you are not under the law.” *Galatians* 5:18 (Revised Standard Version Catholic Edition), BIBLEGATEWAY.COM, <https://www.biblegateway.com/versions/Revised-Standard-Version-Catholic-Edition-RSVCE-Bible/> [<https://perma.cc/G927-F25A>] (last visited Oct. 22, 2018).

¹²⁹ *Contra* Hans Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71, 73–74 (1976) (explaining that “[his] central thesis is that neither sanctions, coercion, nor coercive sanctions are necessary features of legal systems. In particular, the existence, identity, structure, and point of law and legal systems do not turn on their presence or absence. This is not to deny, though it does not imply, Hart’s contention that coercion is a ‘natural necessity’ of legal systems under human conditions. Even if Hart is correct, however, this only tells us something about human [sic] and the human predicament; it tells us nothing about the concept of law.”). This separation of the human from the concept of human law is what I find so destructive.

¹³⁰ *Cf.* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 232 (2d ed. 2011). Finnis asserts:

There are, in the final analysis, only two ways of making a choice between alternative ways of coordinating action to the common purpose or common good of any group. There must be either unanimity, or authority. There are no other possibilities. Exchange of promises is not a third way; rather, it is a modality of the first way, unanimity.

Id.

order to be healthy and then concluding that protein is not essential to a healthy diet, or the invention of a world in which lions were sparrows and then concluding that a lion seen on the savanna or in a zoo could potentially fly under its own power. After all, it involves no necessary logical self-contradiction to imagine men with no need of protein or lions with wings, just non-conformity to empirical reality. Thus, including these possibilities in our concept of a healthy diet or of lions would impair rather than enhance thought and communication whenever practical reasoning is involved—whenever we ponder our diet, we should consider the amount of protein that we need, and whenever we encounter a lion, we should not ponder whether it will fly. In both cases, our lives could depend upon accurate, essentialist thinking.

I argue that coercion's inclusion in the concept of law is even stronger, for a man who eats no protein would still be distinctly recognizable to common sense as a man and perhaps a lion with wings would still be distinctly recognizable as a lion. Non-coercive "law" cannot be distinguished from other things—typically exhortation, rhetoric, theory, guideline, or advice—even if it emanated from a legal authority with all legal formalities. The effect upon a reasonable subject—while the subject remained reasonable and law-abiding—would be, or could be, identical to that of a solemn non-legally-formal exhortation from the same authority.

Even the rule-like nature of law, often thought to be part of its essence by theorists who accept essentialist thinking, could be discarded using thought experiments across "all possible worlds."¹³¹ It is said that angels need law to coordinate their activities, but angels being perfectly rational and good means this law never needs be coercive.¹³² But perhaps angels—or men just like angels—need no law at all, for perhaps they make infallibly correct decisions moment-by-moment

¹³¹ *Contra* SCHAUER, *supra* note 68, at 93–94. Schauer argues:

In a community of angels . . . law would be necessary to manage coordination and cooperation. . . . The very fact that the community of angels, hypothetical but conceivable, would not need coercion would cause coercion to lose its place in an account of law's conceptually necessary properties.

Id.

¹³² *See* Himma, *supra* note 125, at 7 ("As the matter is sometimes put, law without sanctions is *logically*—but not *humanly*—possible, human nature being what it is."). Himma continues:

An institutional system of norms with a social rule of recognition and primary norms governing a society of angels antecedently motivated always to obey the law counts, on this oddly influential line of argument, as a system of law, despite lacking coercive enforcement mechanisms. But why think that the appropriate concept of interest is one that reaches so far beyond what we can expect in the very world in which beings like us create the practices that construct *our* concept of law? As Raz correctly observes, it is the core features of *our* legal practices that construct the content *our* legal concepts [sic]. But Raz consistently overlooks that the practices constructing our concept of law are concerned with what *beings like us do in circumstances of material scarcity that create our need for the social institution of law*.

Id. Yet Himma does not endorse coercion as essential to the concept of law itself.

and thereby always act in ideal harmony with one another. Perhaps they do not need social rules of any kind for their behavior just as men who always spontaneously agree on what collective action to take do not need preexisting rules to tell them what action to take, or even to designate who decides what action to take. We could call their regularities of behavior or thought “laws.” Those who imagine away coercion but still maintain that social rules are necessary for law to exist—therefore concluding that a rule-like nature, but not coercion, is essential to the concept of law—must explain why we cannot imagine away the need for social rules as well.¹³³

CONCLUSION

The employment of a non-essentialist approach and the abandonment of the necessity of coercion for law’s existence allows legal theorists to expand the concept of law to conquer any number of non-legal phenomena such as moral exhortations from politicians and other legal authorities, non-coercive guidelines, plans, “expressive value,” religious concepts, and social norms. This is conceptual legal imperialism, and this Gnosticism renders easier the colonization of subordinate legal concepts by one another and of areas of life best left untouched, or less touched, by law. Essentialism and coercion shrink and shape the concept of law into its proper place as measured by the best method of classifying legal subjects’ experience. Imperial presidents, imperial judges, imperial regulators, and imperial legal others are thereby constrained more than they otherwise would be.

This is not to condemn good empires and good imperialism in concepts or anywhere else. Just as non-essentialism is valuable and even optimal elsewhere, so may be imperialism and empire.

Essentialism is valuable because there is a *limited range of possibilities in the real world as we experience or realistically could experience it*, and thus it can be possible to draw rational boundaries. If we jettison the raw material of the real world and are bound only by the principle of non-contradiction, almost anything could be alchemically reclassified as anything else as we create new raw material with which to work, in an almost infinite variety of logically-possible configurations.¹³⁴ Gold does not have to be yellow in order to be gold, some might say. But whether there is

¹³³ See generally D’Agostino, *supra* note 5 (arguing in favor of coercive intent as essential to the concept of law itself).

¹³⁴ See, e.g., Kenneth Himma, *Coercion and the Conceptual Force of Law*, JOTWELL, 3 (Feb. 16, 2016), <http://juris.jotwell.com/coercion-and-the-conceptual-force-of-law/> [<https://perma.cc/N49M-GP3L>] (“It is not clear, however, why anyone should think that a system of norms governing a society of angels should be thought of as being a system of law.”).

a God-given absolute metaphysical requirement that gold be yellow is not the question, but rather how we view and must view our experience; and in our experience, anything that does not appear yellow in sunlight cannot be pure gold.

Theory wholly unconnected to the practical is merely fantasy.¹³⁵ Legal theory cannot be purely theoretical but must be connected to the practical—and therefore must conform itself accordingly. If the laws of physics or of human souls fundamentally change, or if our understandings of those laws as they operate in the real world fundamentally change, we then can reconsider what should be fundamental to our concepts.

The use of a naturalistic approach applied to the phenomena of the real world supports an essentialist view of both natural-kind and social-kind concepts relevant for social practical reasoning, for they do not differ in ways that could support essentialism for the former and non-essentialist family resemblance or related theories for the latter. Instead, the synthetic, abstract referents that we use to identify physical kinds as simple as gold and dog also enable us to identify social kinds such as positive law and its essential elements.

All pragmatically-useful family resemblances and other such forms should be recognized as the essentialist ideas that they truly are or could ideally be, and legal theories resting on this foundation can clarify definitions, concepts, and issues in law as well as the nature of law itself in order to optimize our understanding and communication. In fact, essentialism is maximally beneficial to any thinking and speech that can produce useful results in any field of social practical reasoning. Non-essentialism can be useful in religion, literature, other forms of art, and in modeling the sometimes incoherent usage of terms and concepts by ordinary people and, perhaps, badly-reasoning experts. Legal authorities should not use the excuse or disguise of non-essentialism to avoid the duty of rigorous thinking or to obscure the grant of broad discretion to themselves, particularly not in a diversifying society with ever-fewer shared assumptions.

Without an essentialist understanding of them, family resemblance-style theories cannot be employed to comprehend the nation of legal concepts and still maintain the salutary rational and moral legitimacy of law in its necessary task of the coercion of subjects. A more carefully delimited approach to legal concept formation and alteration—one more conducive to the restraint of law's imperialist tendencies—can promote respect for and trust in law across diverse subjective perspectives as well as increase its stability and effectiveness. Rather than being excluded altogether, family resemblance and related theories should be used within

¹³⁵ Cf. LEITER, *supra* note 6, at 275 (“[C]ausal power is all we have to go on in ontology.”) (emphasis omitted).

the legal sphere in productive ways that recognize law's imperative and ideally non-imperialistic essentialism.