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The burning armchair: can jurisprudence be advanced by experiment?

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ABSTRACT

Is the field of general jurisprudence catching up – or is it simply getting distracted? Whereas legal philosophy has always featured claims about the content of the folk concept of law, it is only in the last few years that it has begun to self-consciously test those claims. Kenneth Himma's recent review of this effort in Jurisprudence is a milestone: it reveals X-Jur as having progressed to the point of attracting broader philosophical attention, and it challenges X-Jur's practitioners to persuade those not already convinced of the potential of alternatives to the analytic method. I take Himma's critique as an opportunity to sketch some preliminaries for a theory of experimental jurisprudence, considering, in turn, the nature of jurisprudential truth, the role of expertise, and how empirical data might best be interpreted to help adjudicate claims about the content of the folk concept. I conclude with a brief discussion of the field's future.

KEYWORDS

Experimental jurisprudence; analytic legal philosophy; intuitions; folk concept of law

Is the field of general jurisprudence catching up – or is it simply getting distracted? Systematic empirical scrutiny of the adjudicative activities of the judiciary has been underway for over seventy years.[1] Equally, there is nothing new anymore about the empirical investigation of philosophers' appeals to intuitions about the nature of knowledge, semantic reference, agency and many other basic categories.[2] But whereas legal philosophy has always featured claims about the content of the folk concept of law, that is, about what is 'natural to say',[3] it is only in the last few years that it has begun to self-consciously test those claims.[4] Kenneth Himma's recent review of this effort in these pages is a milestone.[5]

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[1]Howard Gillman, 'What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making' (2001) 26(2) Law & Social Inquiry 465, 470.

[2]Joshua Knobe and Shaun Nichols, 'Experimental Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University 2017) <https://plato.stanford.edu/archives/win2017/entries/experimental-philosophy/>. Pockets of resistance remain; a paper recently submitted to a prominent law journal prompted a referee to remark that experimental philosophy is 'not really in philosophy'.

[3]Andrei Marmor, 'Exclusive Legal Positivism' in Jules Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002) 119.

[4]Kevin Tobia, 'Experimental Jurisprudence' (2022) 89(3) University of Chicago Law Review 735; Roseanna Sommers, 'Experimental Jurisprudence' (2021) 373(6553) Science 394.

[5]Kenneth Himma, 'Replacement Naturalism and the Limits of Experimental Jurisprudence' (2023) 14(3) Jurisprudence 348. Himma has since published an addendum: 'Replacement Naturalism and the Limits of Experimental Jurisprudence' (2023) Jurisprudence, Latest Articles DOI: 10.1080/20403313.2023.2281929. Himma uses his addendum to qualify his

Researchers have already begun to chart the use of empirical methods to uncover intuitions about the nature of law and legal meaning.[6] Often such projects involve surveys by which individuals participate in vignette-based experiments that try to establish whether some feature influences responses in the way that claims about the intuitiveness of some theory of law might be thought to predict. Although this work is situated within the broader experimental turn in legal theory,[7] we will henceforth use the term 'experimental jurisprudence' or 'X-Jur' to refer solely to these narrower questions of general legal philosophy. What is different about Himma's paper is that it is the first full-length review of the (generalist) X-Jur programme by a scholar who is not themselves involved in producing X-Jur.[8] This is significant for two reasons. First, the development reveals X-Jur as having progressed to the point of attracting broader philosophical attention; second, it poses the challenge to X-Jur's practitioners of persuading those not already convinced of the potential of alternatives to the analytic method:

> Communities of legal scholars differ in how much they accept the notion that empirical work can inform discussion in their subfields. By my estimation, general jurisprudence scholars are among the most hostile.[9]

We will take Himma's critique as an opportunity to sketch some preliminaries for a theory of experimental jurisprudence, considering, in turn, the nature of jurisprudential truth, the role of jurisprudential expertise, and how empirical data might best help adjudicate claims about the content of the folk concept. We will conclude with a brief discussion of the field's future. In this effort, we will take Himma's recent contribution as a foil for thinking about how jurisprudence might harness the potential of experiment.

1. Truth in jurisprudence

As elsewhere in philosophy, jurisprudence features disagreement over questions of methodology. In this section, I will argue that, at its present stage of development, X-Jur offers existing approaches an ecumenical resource.

When HLA Hart described the purpose of his book *The Concept of Law* as that of 'providing an improved analysis of the distinctive structure' of the relevant phenomenon,[10] he might have been describing analytic philosophy in general as it has sought to shed light 'from the armchair' on the nature of reality. One way to defend such a project of

critique somewhat, but his basic conclusion remains no less robust: 'It is a bad idea to jump into the deep end of a swimming pool if one does not know how to swim; and it seems to me that those who deploy experimental methods to answer conceptual questions have done exactly that.' (p 4).

[6]See Karolina Prochownik, 'The Experimental Philosophy of Law: New Ways, Old Questions, and how not to get Lost' (2021) 16(12) Philosophy Compass e12791; and Ivar Hannikainen et al, 'The Natural Law Thesis Under Empirical Scrutiny' in Hugo Viciana, Antonio Gaitán and Fernando (eds), *Issues in Experimental Moral Philosophy* (Routledge 2023).

[7]See Kevin Tobia, 'Experimental Jurisprudence' (2022) 89(3) University of Chicago Law Review 735 (notably, the experimental turn encompasses research into specific legal concepts).

[8]See also Emad H Atiq, 'Disagreement about Law and Morality: Empirical Results and the Meta-Problem of Jurisprudence' (2022) Jotwell <https://juris.jotwell.com/disagreement-about-law-and-morality-empirical-results-and-the-meta-problem-of-jurisprudence/>; Felipe Jiménez, 'Some Doubts About Folk Jurisprudence: The Case of Proximate Cause' (2021) The University of Chicago Law Review Online <https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/> (focusing on 'folk jurisprudence as applied to [specific] legal concepts'); Felipe Jiménez, 'The Limits of Experimental Jurisprudence' in K Tobia (ed), *Cambridge Handbook of Experimental Jurisprudence* (Cambridge University Press) Forthcoming, preprint: <http://dx.doi.org/10.2139/ssrn.4148963>.

[9]Raff Donelson, 'Experimental Approaches to General Jurisprudence' in Karolina Prochownik and Stefan Magen (eds), *Advances in Experimental Philosophy of Law* (Bloomsbury 2023) 27.

[10]HLA Hart, *The Concept of Law* (Oxford University Press 1961) 17.

conceptual analysis is to locate a domain of inquiry whose conclusions are true in virtue of their meaning alone. In his famous critique of the distinction that this defence draws between claims that are analytic and those that are answerable to experience, WVO Quine challenged philosophers to generate theories that aspire to a broader explanatory power.[11] In the philosophy of law, Quine's challenge has been said to call for an abandonment of armchair-based philosophy, and the commencement of what Brian Leiter has described as a 'naturalized' jurisprudence, in which 'conceptual analysis of the concept of law should be replaced by reliance on the best social scientific explanations of legal phenomena'.[12] At first glance, experimental jurisprudence might be thought to represent an answer to this call.[13]

Undoubtedly, X-Jur makes use of an empirical methodology that is designed to uncover an aspect of the natural world, namely, the content of people's intuitions. Presumably, it is this discontinuity with armchair-based personal reflection that prompts Himma to describe X-Jur as 'replacement naturalism'.[14] Conversely, an alternative interpretation is suggested by how X-Jur studies have so far been framed by their authors, for whom such work 'fills a gap' in existing jurisprudential research,[15] 'sheds light' on an existing controversy,[16] or presents research from which current debate 'would benefit'.[17] As conceived by many of its practitioners, X-Jur seeks to advance the elucidation of legal concepts by adjudicating conflicting claims by Hart, Fuller, Dworkin and others about the meanings attributed to law by laypeople. So understood, X-Jur exhibits some important continuity with traditional analytic jurisprudence. Indeed, the practical challenge of developing empirical hypotheses about a folk concept may require a degree of precision about the implications of competing theories of the subject that the existing taxonomy might not explicitly provide. Thus, even if data is never actually collected, by incorporating theory-types empirically tested in other domains, such hypothesis development can help resolve vagueness in a theory's existing formulation.[18] In this respect, the discipline of X-Jur appears suited to help advance an analytic agenda directly.

In a way, the proper characterisation of X-Jur depends on its results. Since the beginning of experimental philosophy, two basic programmes have been identified: a positive programme that seeks to 'aid[] in the traditional philosophical project of conceptual analysis' and a negative programme which 'argue[s] that empirical research into the nature and sources of our intuitions reveals that they are ill suited to serve as the

[11]Willard V O Quine, 'Two dogmas of empiricism' (1951) 60(1) Philosophical Review 20.
[12]Brian Leiter and Matthew X Etchemendy, 'Naturalism in Legal Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University 2021) <https://plato.stanford.edu/entries/lawphil-naturalism/>.
[13]Though such a conclusion could not licence an appeal to authority: 'While unclear how Leiter would respond to these surveys, it is not absurd to predict he would reject them for the same reasons he rejects the views themselves – namely that the philosophical arguments conclusively refute the views tested in those surveys; after all, it seems unlikely, given the force of his remarks, that he would change his views about those arguments because a majority of ordinary speakers believe otherwise.' Himma (n 5) 370.
[14]ibid 349.
[15]Brian Flanagan and Ivar Hannikainen, 'The Folk Concept of Law: Law Is Intrinsically Moral' (2022) 100(1) Australasian Journal of Philosophy 165.
[16]Lucas Miotto, Guilherme Almeida and Noel Struchiner, 'Law, Coercion, and Folk Intuitions' (2023) 43(1) Oxford Journal of Legal Studies 100.
[17]Raff Donelson and Ivar Hannikainen, 'Fuller and the Folk: The Inner Morality of Law Revisited' in Tania Lombrozo, Joshua Knobe and Shaun Nichols (eds), *Oxford Studies in Experimental Philosophy* (Oxford University Press 2020) 6.
[18]For instance, by treating a recent strand of natural law theory as characterizing law as having a dual character structure such as that exhibited by the concepts of friend or scientist (Flanagan and Hannikainen (n 15) 168).

foundation for philosophical theorizing.'[19] In jurisprudence, an increasingly prominent strand of thought holds that, instead of a singular folk concept of law, there are a plurality of disparate folk concepts, such that, 'where a dispute about the content of the law in force turns on the relationship between law and morality … partisans of different accounts … simply talk past each other'.[20] This view appears to prefigure a negative programme, in which X-Jur offers a basis for a departure from the traditional project of analytic elucidation towards social scientific approaches and normative jurisprudence. Insofar as this work might generate evidence tending to reveal a univocal folk concept, by contrast, it would take on the appearance of a positive programme, in which experiment serves to identify whether intuitions are in fact elucidated by one theory or another. At this point in its evolution, however, it is perhaps premature to judge X-Jur's relative continuity with analytic jurisprudence and its naturalised (or normative) alternatives.

Supposing that X-Jur takes shape in part as a positive programme, one question is whether it ought either to supplement or to displace armchair-based reflection. On one reading, Quine's basic lesson was simply that, just as in the case of an empirical theory, one should look to a philosophical account's overall merits.[21] This view does not recognise a binary by which the theorist is required to uncover '"law as it is," not "law as it is perceived by laypeople"'.[22] It does not presume from the outset that '[c]ompetence in a language does not buy one insight'[23] into the nature of a basic category. Rather, it invites the theorist to weigh evidence that the folk possess a particular concept of law against any explanatory virtues associated with alternative theories of law's nature: 'Our conventions for using a term should be conceived … as subject to revision when they have problematic implications.'[24] In fact, X-Jur is often framed explicitly in this supplementary capacity: 'Naturally, the theorist is free to argue that some or all aspects of the folk concept of law are incorrect.'[25] So far, so good.

But how important, exactly, would the existence of a particular folk concept be? The advantage of a theory of the nature of law that coheres with lay intuition is that it avoids the burden of explaining why the folk have gone systematically wrong on the matter.[26] Of a decision to retain a counter-intuitive theory by assuming such a burden, one might caution that 'the price is perhaps not prohibitive, but the returns had better be

[19]Alexandra Plakias, 'Experimental Philosophy' in *The Oxford Handbook of Topics in Philosophy* (Online) (Oxford University Press 2015) <https://doi.org/10.1093/oxfordhb/9780199935314.013.17>

[20]Liam Murphy, 'Better to See Law This Way' (2008) 83(4) New York University Law Review 1094. Similarly, Brian Tamanaha, 'Socio-Legal Positivism and a General Jurisprudence' (2001) 21(1) Oxford Journal of Legal Studies 1; Dan Priel, 'The Scientific Model of Jurisprudence' in Jordi Ferrer Beltrán, José Juan Moreso and Diego M Papayannis (eds), *Neutrality and Theory of Law* (Springer 2013); Hillary Nye, 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology' (2017) 37(1) Oxford Journal of Legal Studies 48; Arie Rosen, 'Law as an Interactive Kind: On the Concept and the Nature of Law' (2018) 31(1) Canadian Journal of Law and Jurisprudence 125.

[21]Brian Flanagan, 'Analyticity and the Deviant Logician: Williamson's Argument from Disagreement' (2013) 28 Acta Analytica 345.

[22]Leonard Hoeft, 'A Case for Behavioural Studies in Experimental Jurisprudence' in Karolina Prochownik and Stefan Magen (eds), *Advances in Experimental Philosophy of Law* (Bloomsbury 2023) 215, 226.

[23]Max Deutsch, 'Experimental Philosophy and the Theory of Reference' (2009) 24 Mind and Language 445, 459.

[24]Himma (n 5) 366.

[25]Flanagan and Hannikainen (n 15) 167; similarly, Miotto et al (n 16) 102–03.

[26]'[T]he kinds of intuition relied on by conceptual analysis – rational intuition and shared intuitions conditioned by and expressing shared linguistic practices – are far more reliable than other kinds and are certainly not systematically unreliable.' Kenneth Himma, 'Reconsidering a Dogma: Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy' in Michael D A Freeman & Ross Harrison (eds), *Law and Philosophy* (Oxford University Press 2007) 22.

good.'[27] Accordingly, in adopting a particular theory, it would be important to know whether it calls for such a 'drastic' decision,[28] knowledge that experimental jurisprudence is best placed to supply. Of course, the importance of such knowledge will depend on whether the burden of explaining why the folk go wrong is an onerous one. This is not guaranteed; laypeople may simply lack the relevant expertise.

2. Expertise in jurisprudence

The question of the nature of law certainly seems like a specialist subject – academic philosophers, lexicographers and legal practitioners might all appear to have a superior claim to answer it than the folk. None of these professionals offers a sound substitute for lay intuition, however. We consider them in turn.

The academic philosopher might seem to have every advantage. The question of the nature of law forms the basis of PhD programmes, endowed chairs, annual academic conferences, and dedicated scholarly journals and monograph series published by major university presses. Reflection on this accumulation of professional jurisprudential expertise could well prompt reservations about listening to mere laypeople:

> [T]he project of experimental jurisprudence needs considerably more theoretical study and justification than it has gotten up to now … if one takes the position that poll results should sometimes trump the uncontentious conceptual claims of legal theorists in cases where they conflict, then one must provide a plausible defense of that claim. And none has been given up to now.[29]

It might well be thought that, with the availability of a cohort of professional philosophers with tailored training on such matters, 'it is not clear why the views of merely competent speakers should ever be treated as relevant in explicating a concept.'[30] Rather, insofar as legal concepts are 'settled by the classificatory machinery of human thought', one might think that they are 'amenable only to philosophical … reflection'.[31]

In general, certainly, there is little problem explaining why the views of many academics as to the evidence for particular theories of this and that are to be preferred to those of the folk: their insights will contribute, directly or indirectly, to more accurate predictions of how things will be. In contrast to other sorts of expertise, however, the views of professional philosophers as to the evidence for claims about the constituents of basic categories, such as knowledge and law, do not always offer an obvious predictive advantage. As a result, crediting the philosophy professoriate's tendency to prize particular views as to the evidence for a theory might seem to involve a leap of faith that is not required when recognising the rights of geography academics to 'deny [a climate change denier] a platform or a job' in virtue of their expertise in 'discriminat[ing] between good and bad ideas … sound and hare-brained methods'.[32] How can we tell whether such a

[27] Willard V O Quine, *Philosophy of logic* (Harvard University Press 1970) 86.
[28] 'Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system' Willard V O Quine, 'Two Dogmas of Empiricism' (1951) 60 Phil Rev 41 (quoted by Himma (n 5) 366).
[29] Himma (n 5) 373.
[30] ibid.
[31] John Gardner, 'Book Review: Nicola Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream' (2005) 121 Law Quarterly Rev 329, 331.
[32] Amia Srinivasan, 'Cancelled' (2023) 45(13) London Review of Books <https://www.lrb.co.uk/the-paper/v45/n13/amia-srinivasan/cancelled>.

tendency duly reflects the epistemic superiority of those views or simply the fact that the existing professoriate happened to come to share them? Consider the alternative: that philosophers are 'teaching neophyte philosophers to have intuitions that are in line with those of more senior members of the profession.'[33]

It might be the case, no doubt, that legal philosophers agree on a particular intuition about the nature of law, in virtue of which: 'students are universally taught to ascertain whether a norm counts as law simply by considering whether it has a source in an appropriate legislative, judicial, or executive act.'[34] Furthermore, such agreement might be associated with philosophical training: 'it is not just happenstance that people who publish in legal theory have graduate degrees in law or philosophy.'[35] It does not necessarily follow, however, that the intuition in question is more likely to be accurate. For that conclusion, we need a story about how becoming a legal philosopher is not simply a function of having the relevant intuition. It is not entirely clear what that story might be.[36]

Accordingly, it may be tempting to look instead to an empirical arena where there is consensus, namely, lexicography. Dictionary makers are experts, who, in most cases, exhibit little or no disagreement on what words mean: '[Modest conceptual analysis] … must … rely on scientifically rigorous studies of word usage by lexicographers to ascertain the content of our conventions, the results of which are reported in dictionary definitions.'[37] Although, without any organising theory or any capacity to generate predictions, lexicography might seem less a science than a particular sort of cultural practice,[38] we often do treat dictionary entries as an authoritative source of information. Indeed, they can sometimes be cited in legal judgments as a decisive consideration. It might therefore be thought that, in combination, analytic philosophy and lexicography render X-Jur redundant,[39] that a theorist might simply look up 'a representative lexical definition of the concept-term "law"' and thereby conclude that lay intuition eschews the notion that 'unjust laws are impossible'.[40] In truth, however, lexicography is no alternative to X-Jur.

[33]Jonathan M Weinberg, Shaun Nichols and Stephen P Stich, 'Normativity and Epistemic Intuitions' (2001) 29(1–2) Philosophical Topics 429, 438. See further, Edouard Machery, 'Expertise and Intuitions About Reference' (2012) 27(1) Theoria: Revista de Teoría, Historia y Fundamentos de la Ciencia 37; Christina Starmans and Ori Friedman, 'Expert or Esoteric? Philosophers Attribute Knowledge Differently Than All Other Academics' (2020) 44(7) Cognitive Science e12850; Dan Priel, 'Evidence-Based Jurisprudence: An Essay for Oxford' (2020) 19(2) Analisi e Dirrito 87.

[34]Himma n (5) 362.

[35]ibid 367.

[36]Himma speculates that the ability to entertain counterfactuals might itself require philosophical training: 'If … people need some training in counterfactual reasoning to do it competently, then the fact that academic lawyers and analytic philosophers get such training would seem to afford them a clear advantage in addressing conceptual issues' (ibid 372). But psychological research suggests, to the contrary, that counterfactual reasoning is a basic part of human cognition that develops in childhood, see Ruth Byrne, 'Counterfactual Thought' (2016) 67(1) Annual Review of Psychology 135–57.

[37]Himma (n 5) 351. As glossed by Himma, the goal of 'modest' conceptual analysis is 'to learn something about the world as our words structure or construct it' as opposed to seeking to learn about the world 'as it really is, presumably from some sort of objective, or God's-eye, perspective' (350–51).

[38]See Arleta Adamska-Sałaciak, 'Lexicography and Theory: Clearing the Ground' (2019) 32(1) *International Journal of Lexicography* 1, 12–13.

[39]'[O]ur conceptual practices … are jointly determined by our semantic conventions for using the relevant terms and the shared metaphysical views about the nature of the corresponding kind that can be extracted from empirical patterns of word usage. Ascertaining the former is the province of lexicographers, while ascertaining the latter is the province of legal theorists; lexicographers are trained to do tasks legal theorists are not trained to do, and legal theorists are trained to do tasks lexicographers are not trained to do.' Himma (n 6) 372.

[40]Kenneth Himma, *Morality and the Nature of Law* (Oxford University Press 2019) 44.

What we treat as authoritative when we defer to a dictionary definition is not a definition of a concept in the scientific or philosophical sense: '[T]he entire defining tradition developed by logicians and philosophers lies outside that of dictionaries.'[41] Rather, what we learn from a dictionary are the things most likely to help us identify the category's various manifestations:

> [W]hereas the logical definition must unequivocally identify the defined object (the definiendum) in such a way that it is both put in a definite contrast against everything else that is definable and positively and unequivocally characterized as a member of the closest class, the lexicographic definition enumerates only the most important semantic features of the defined lexical unit which suffice to differentiate it from other units.[42]

A particular property might be omitted from a dictionary definition not because it is agreed not be intrinsic to the definiendum but rather because it is only rarely the difference in whether the definiendum is instantiated, or, alternatively, because its absence does not preclude a plain, but nevertheless shallow sense, in which it is instantiated.[43] (The contrary assumption is a version of the 'Nonappearance Fallacy' in legal corpus linguistics, in which the absence from a particular corpora of any use of 'vehicle' in describing an airplane is falsely taken to imply that an airplane is not a vehicle.[44]) It is for this reason that philosophical debate about familiar concepts is never settled by dictionary definitions, and that it seems inapt to pursue a philosophical investigation in the guise of a lexicographer: '[D]o not lexicographers attend to what the users of the language mean by the words they employ and then write up the results? Is philosophy, on this account, just glorified lexicography?'[45]

The promise of experimentation – whether analytic or empirical – is that it can elicit the connection between the relevant concept and the feature of interest by holding everything else constant – including those features with which the concept's application might vary most frequently in practice. On the question of the folk concept of law, the empirical experiments have so far comprised contrastive survey vignettes, a method often deployed in psychological research to help isolate the factors that influence our judgments.[46] In

[41] Alain Rey, 'Defining definition' in Juan C Sager (ed), *Essays on definition (Terminology and Lexicography Research and Practice 4)* (John Benjamins Publishing Company 2000) 7.

[42] Ladislav Zgusta, *Manual of lexicography* (De Gruyter Mouton 1971) 252.

[43] Compare, for instance, the simplicity of the dictionary definition of scientist, e.g., 'A scientist is someone who has studied science and whose job is to teach or do research in science' <https://www.collinsdictionary.com/dictionary/english/scientist> with a sketch of the corresponding folk concept, e.g., Joshua Knobe, Sandeep Prasada and George E Newman, 'Dual Character Concepts and the Normative Dimension of Conceptual Representation' (2013) 127(2) Cognition 242, 242:

> Imagine a physics professor who spends her days writing out equations but who clings dogmatically to a certain theoretical perspective against all empirical evidence. Does this person genuinely count as a scientist? In a case like this, one might feel that both answers are in some sense correct. It might therefore seem right to say:
>
> (1) There is a sense in which she is clearly a scientist, but ultimately, if you think about what it really means to be a scientist, you would have to say that she is not a scientist at all.
>
> Now suppose we come upon a person who has never been trained in formal experimental methods but who approaches everything in life by systematically revising her beliefs in light of empirical evidence. In a case of this latter type, it might seem appropriate to make the converse sort of statement:
>
> (2) There is a sense in which she is clearly not a scientist, but ultimately, if you think about what it really means to be a scientist, you would have to say that she truly is a scientist.

[44] See Kevin Tobia, 'Testing Ordinary Meaning' (2020) 134 Harvard Law Review 726, 735.

[45] Brian Leiter, 'Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence' (2003) 48(1) The American Journal of Jurisprudence 17, 46.

[46] See e.g., Fiery Cushman and Joshua D Greene, (2012) 'Finding faults: How moral dilemmas illuminate cognitive structure' (2012) 7(3) Social Neuroscience 269.

contrast, lexicographers do not run experiments: they do not seek to systematically theorise a concept's internal structure or its intuitive connections with other concepts. It follows that it is philosophically immaterial that 'none of the dictionaries' that one 'look[s] at define [*sic*] an evaluative usage [of 'law']'.[47]

Lexicography is not the only empirical expertise that has falsely been thought to promise special jurisprudential insight. The question of the nature of law supplies the implicit starting point for the daily activities of an immense, venerable services industry. Moreover, unlike both philosophers and lexicographers, lawyers can claim to be in the business of prediction. Laypeople, not to mention corporations and governments, are more than willing to defer to lawyers on the content of the law – they pay for the privilege. It seems, at first glance, that lawyers have just the sort of expertise required. Thus, the very lack of training that makes ordinary folk less equipped to anticipate court decisions might be thought to naturally lead them astray when it comes to the nature of law in general:

> The doctrinal concept [What makes a proposition of law true?] is a *technical* concept not a folk concept because the truth conditions are determined by the professional practice of judges and lawyers not the ordinary usage of citizens. It remains a technical concept even though we cannot articulate clearly the rules of inference that the technical concept deploys.[48]

On reflection, however, a risk of circularity emerges.

Whereas both lawyers and biologists have superior predictive abilities in a particular domain (law and nature, respectively), one's status as a biologist is governed by this predictive ability in a way that one's status as a lawyer is not. Whether one is a lawyer or not is a legal fact. Any ascription of such status must rest ultimately on an assumption as to what would create such a fact, the grounds for which, ought, presumably, be grounds for a theory of the nature of law.

The challenge in prioritising professional legal expertise on the matter of the essence of law is to explain how we might identify professional lawyers – including judges or other officials – without a concept of what law is. Whether someone's biography marks them as a lawyer rather than, say, a priest (or a fantasist), is ultimately a legal matter, for which we need to be able to say what counts as the law establishing professional legal qualifications. For this, we need to be able to say what counts as a relevant source of law, which, in the end, will mean knowing how to distinguish an actual constitution from a merely purported one. The identity of any legal experts will duly depend on how such questions are answered; accordingly, we cannot rely solely on legal expertise in answering them. We might rely on the folk concept, of course. Indeed, we might trust

[47] Himma (n 5) 360.

[48] Lewis L Kornhauser, 'Doing Without the Concept of Law' (2015) NYU School of Law, Public Research Paper No. 15–33, 6 <http://dx.doi.org/10.2139/ssrn.2640605> (original emphasis). See also, Himma (n 6) 371, suggesting that legal practitioners who adopted a natural law approach 'would rightly be disbarred by the governing bar association for failing to meet minimum standards of character and competence'; and Felipe Jiménez, 'Some Doubts About Folk Jurisprudence: The Case of Proximate Cause' (2021) The University of Chicago Law Review Online <https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/>, 'The concept of law is not the people's concept of law. It is legal officials' concept of law because legal officials, the personnel that inhabit the governance structure 'law,' make that governance structure a realized, practical institutional reality'. (Professor Jiménez moderates this claim in forthcoming work: 'The Limits of Experimental Jurisprudence' in Kevin Tobia (ed), Cambridge Handbook of Experimental Jurisprudence (CUP forthcoming) SSRN preprint available at <http://dx.doi.org/10.2139/ssrn.4148963> 11–12.)

someone claiming to possess the legally required qualification to have themselves applied the folk concept in establishing their status. But, if folk intuition is to be taken to be ultimately determinative of who counts as a legal professional, it follows that the accuracy of professional intuition cannot straightforwardly be taken to exceed that of the folk.

It seems then, that, when it comes to issues of what fundamentally constitutes a law or legal system, lawyers are not necessarily better equipped, in virtue of their biography, than the folk.[49] Consequently, it would not appear open to a theorist simply to point to a lack of professional legal training to explain why the folk are systematically mistaken about the nature of law itself.[50] Admittedly, it is natural to look to explain lawyers' advantage in predicting courts' application of the law in terms of their superior legal knowledge. Perhaps there is a characterisation of lawyers' knowledge that is sufficiently narrow to preserve some role for the folk concept of law that might avoid the circularity described above. We will touch on this question later when reviewing X-Jur's future directions. For now, the worry is just that there will be little illumination in an answer to the question of what law consists in that we owe to any cohort whose identification presupposes an answer to that very question.

The limitations of these three different possible sources of expertise seem to confirm the advantage of a theory of the nature of law that coheres with lay intuition, an advantage that Himma himself appears to endorse:

> Competence with a term requires no more than just being able to correctly apply it in those cases to which it obviously applies and cases to which it obviously does not apply because only those cases fall clearly within the conventions for using the term and therefore count as easy; cases in which it is not obvious whether a term applies are hard cases that can be solved, when there is a determinable answer, only by identifying the shared philosophical views about the nature of a kind that condition its use in hard cases.[51]

What Himma overlooks is that it follows directly from assigning philosophical value to knowledge of the lay concept that systematic efforts to uncover the latter's content are philosophically justified. Recognition of the advantage of a theory that makes sense of linguistically easy cases is all the motivation that X-Jur needs. Just to recognise such an advantage is, in fact, to imagine that empirical findings might potentially 'trump the uncontentious conceptual claims of legal theorists in cases where they conflict', such that the demand for 'a plausible defense of that claim' is already met.[52]

It is worth emphasising that we are long past the point at which our jurisprudential traditions assumed an implicit commitment to X-Jur. In principle, a legal philosopher might consider empirical evidence of the content of our folk concept as 'at best be a

[49]On questions of the nature of legal meaning/interpretation, X-jur has already included samples of professional lawyers, e.g., Ivar Hannikainen et al, 'Coordination and Expertise Foster Legal Textualism' (2022) 119 (44) Proceedings of the National Academy of Sciences e2206531119 <https://doi.org/10.1073/pnas.2206531119>.

[50]Indeed, it is not unusual for analytic legal philosophers to defend a theory by reference to assumptions about the relative culpability that the folk will respectively ascribe to lawyers and legislators: '[Exclusive legal positivism] captures and systematizes distinctions we regularly make … We assign blame and responsibility differently when we think that a bad decision was mandated by the sources than we do when we think that it flowed from a judge's exercise of moral or political judgement … These are deeply entrenched distinctions, and there is no reason to abandon them' Leslie Green, 'Legal Positivism' in *The Stanford Encyclopedia of Philosophy* (Stanford University 2018) <https://plato.stanford.edu/archives/spr2018/entries/legal-positivism/>.

[51]Himma (n 5) 367. As Scott Shapiro puts the point: '[t]he fact that an account [of the nature of law] does not square with some of our intuitions … may count against [it]'. Scott J Shapiro, *Legality* (Harvard University Press 2011) 17.

[52]ibid 26.

starting point, and something for the legal philosopher to work with, interpret, and extrapolate from.'[53] But such legal philosophers are a rare breed. From the outset, both positivist and anti-positivist theorists have consistently invoked as a decisive argument for their respective position, its supposed convergence with the folk concept.[54] As such, theorists have *already* extrapolated from lay intuition – or at least from what they assume it to be.[55] For jurisprudence to make progress, those extrapolations are claims with which it must reckon: either by adjudicating them on their own empirical terms or by reconsidering their value in elucidating the nature of law (ideally not in the face of recalcitrant data). Indeed, in circumstances where theorists continue to appeal to conflicting assumptions as to what folk agree on,[56] the project of actually testing such assumptions seems important for advancing the dialectic of jurisprudential debate and avoiding the sort of stalemate well described by Lon Fuller:

> When we ask what purpose these definitions serve, we receive the answer, 'Why, no purpose, except to describe accurately the social reality that corresponds to the word 'law.' 'When we reply, 'But it doesn't look like that to me,' the answer comes back, 'Well, it does to me.' There the matter has to rest … .'[57]

In the next section, we will consider how X-Jur's potential contribution to legal philosophy might best be integrated.

3. Interpreting X-Jur

The principle of charity applies equally to the interpretation of texts and of science. Empirical data invites a holistic construal: social scientific evidence can accumulate incrementally; confidence in a hypothesis can advance (and retreat) in baby steps. For this reason, a study's design may depend on a 'pre-test', a paper's publication may depend on the coherence of the studies it reports, and a field's direction will, in turn, depend on the extent to which studies replicate in subsequent papers. The lesson for understanding individual X-Jur results is that their context is critical. We will take Himma's critique of the three empirical papers that he treats as representative of X-Jur as a starting point for reflection on this point.

When considering a social scientific contribution, it is helpful to review all the studies a paper reports; later ones might confirm an earlier one or rule out alternative interpretations of the data, thereby refining the paper's overarching conclusion. This is true, for instance, of Himma's critique of two of his target X-Jur papers, in which he mentions

[53] Julie Dickson, *Elucidating Law* (Oxford University Press 2022) 114.

[54] See Brian Flanagan and Guilherme Almeida, 'Lawful, but not Really: The Dual Character of the Concept of Law' <https://www.researchgate.net/publication/370252253_Lawful_but_not_Really_The_Dual_Character_of_the_Concept_of_Law> (listing a broad array of theorists of all schools and periods who make explicit or implicit appeals to the folk concept of law) 3–7.

[55] Felipe Jiménez, 'The Limits of Experimental Jurisprudence' in Kevin Tobia (ed), Cambridge Handbook of Experimental Jurisprudence (CUP forthcoming); preprint available at <http://dx.doi.org/10.2139/ssrn.4148963> p 15, 'Raz and other positivists who agree with his characterization of general jurisprudence do seem to face the need to supply an explanation that deflates the challenge generated by Flanagan and Hannikainen's work.'

[56] Consider two recent examples: Kenneth Himma's claim that '[A] conceptual analysis of law should cohere with the nearly universal intuition that Nazi Germany had a system of law despite the unconscionable quality of the content of its laws,' Himma (n 5) 20; and Joshua Jowitt's comparison of a wicked statute's failure to count as a law to a counterfeit bill's failure to the satisfy the definition of money: Joshua Jowitt, *Agency, Morality and Law* (Bloomsbury 2023), 83–84.

[57] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) Harvard Law Review 631.

only the first study of the suite of studies that they each report. In one case, this results in a worry that a paper's conclusion is jeopardised by 'the abstract character' of an initial study,[58] the results of which are consistent with a series of further experiments that elicit practical applications of the relevant concept. In another case, it results in a concern that a paper's conclusion is undermined by the non-realism of an initial study,[59] the results of which are confirmed by a subsequent experiment that replaces the original focus on angelic beings with a focus on ordinary humans.[60]

A related worry concerns the possibility that a particular study might collect data from participants who happen to mostly comprise outliers among the broader population on the particular question.[61] This is a greater risk with the convenience samples in which X-Jur studies have so far consisted than in the nationally representative samples that have been used in cognate domains,[62] and it will vary with the size of the sample in question. Even a cross-cultural study that relies on convenience sampling will not yield more than initial evidence for a particular hypothesis. Accordingly, a key question is whether different studies are showing roughly the same thing, in which case, the prospect of them reporting the views of outliers begins to recede.

Thus, the risk of outlier participants should prompt us not to ignore X-Jur but rather to survey fully what is already reported. We find, for instance, that the finding of an ostensible disparity in folk judgments between what is procedurally necessary and actual[63] is confirmed in a subsequent cross-cultural study that data collected from a diverse set of 11 societies.[64] Similarly, the finding that the folk concept of law is not descriptive is consistent with subsequent research suggesting that morality is a fundamental aspect of the proper application of rules.[65] We see then how later work begins to assuage the fear that these papers might merely document 'stray intuitions of subjects' that are 'just not sufficiently stable to accurately express their considered views.'[66] Looking forward, the risk of outliers is a reason to help to produce and to fund X-Jur's further development.

[58]Himma (n 5) 359 (reviewing Flanagan and Hannikainen).
[59]ibid 354–55 (reviewing Miotto et al 2022).
[60]Conversely, there is also a risk that data reported by one study might be *conflated* with that reported by a subsequent study: '[T]he numbers do not justify the conclusion [Flanagan and Hannikainen] reach: … only 38% of subjects expressed an antipositivist view; but … a much greater degree of convergence on a hypothetical case than 38% is needed to validly deduce any conclusions' (Himma (n 5) 361). In fact, Flanagan and Hannikainen's conclusion that the folk concept of law is not descriptive is based on a subsequent set of studies in which, '[a] large majority (64.4%) rejected the view that, ultimately, law is just a matter of concrete social facts' (n 16 175).
[61]'[W]e need not claim that the subjects of the poll are not competent with the term to justify concluding their convergent beliefs about norm-less legal systems are false and that they do not tell us anything about our conceptual practices pertaining to law. Competence with a term, as I have explicated it, requires only the ability to apply it correctly in the vast majority of easy cases; it does not – and could not – require infallibility with respect to those cases.' Himma (n 6) 369.
[62]See, e.g., James Macleod, 'Finding Original Public Meaning' (2021) 56(1) Georgia Law Review.
[63]Donelson and Hannikainen (n 17).
[64]Ivar Hannikainen et al, 'Are There Cross-Cultural Legal Principles? Modal Reasoning Uncovers Procedural Constraints on Law' (2021) 45 Cognitive Science e13024.
[65]Brian Flanagan et al, 'Moral Appraisals Guide Intuitive Legal Determinations' (2023) 47(2) Law and Human Behavior 367. Likewise, a ResearchGate preprint reports one study that conceptually replicates Flanagan and Hannikainen's finding that the folk concept of law is not descriptive and another that presents evidence for an explanation of the ostensible disparity in folk judgments between what is procedurally necessary and actual, namely, that the concept of law possesses a dual character: Brian Flanagan and Guilherme Almeida (n 54).
[66]Himma (n 5) 368.

Equally, an experiment in which groups of actual people have participated has a claim to produce evidence to which armchair speculation cannot aspire: '[T]he question whether … [people have a coherent and determinate set of intuitions about law] is an empirical one, and none of the participants in the debate have undertaken any proper empirical research to establish their views'.[67] Whatever the general shortcomings of convenience samples, it is experimental results that put armchair expectation to the test, not vice versa. We should therefore be cautious about dismissing such results based on prior expectations.[68] Care is also required in how we factor prior expectations into an experiment's design.

We have seen the motivation for experimental research into the content of lay legal intuition. In constructing an experiment directed at uncovering such intuition, one might in principle include references to the perceived popularity of particular answers among purported experts:

> A poll is not equipped to tell us much about even what subjects *believe* about the law unless the questions expose all of the implications of an answer that might affect how they respond, which requires they understand, at the very least, all potentially relevant *uncontentious* conceptual and logical considerations.[69]

It is not clear how this methodological requirement might relate to studies asking questions about law's relation to morality, on which, there is, in fact, no agreed theory to expound. Yet suppose that there were an agreed theory and consider how stringent the described requirement would be. Generalised to other categories of thought, it would exclude a broad swath of experimental psychology, much of which also employs simple, non-theoretically laden vignettes. Indeed, psychologists *favour* the omission of theoretical information from experimental stimuli. One of the benefits attributed to vignette-based experiment is precisely that it facilitates the exclusion of such content: 'A useful property in this context is that researchers can sidestep the requirement to define crucial terms (e.g., bullying or discrimination) by embedding specific behaviours within the vignettes.'[70]

A survey instrument initiates a conversation between researcher and participant.[71] By including a theoretical primer, we would implicitly convey to participants that they would be wrong to select the answers noted to be contrary to theorists' assumptions and would thereby prompt them to answer differently. But this would be self-defeating. Articulating a theory in an experiment's stimuli would undermine its purpose, namely, to determine how the *folk* respond, not how individuals who have had training – in this case, training provided by the experiment itself – would respond.[72]

[67] Grant Lamond, 'Methodology' in John Tasioulas (ed), *The Cambridge Companion to Philosophy of Law* (Cambridge University Press 2020) 35.

[68] 'The claim that unjust norms do not count as law, on the descriptive usage, cannot be reconciled with the obvious and awful fact that most, if not all, legal systems in our world have adopted and enforced unjust norms that … ordinary speakers describe as legal norms' Himma (5) 371.

[69] Himma (n 5) 355 (original emphasis).

[70] Thom Baguley, Grace Dunham and Oonagh Steer, 'Statistical modelling of vignette data in psychology' (2022) 113(4) British Journal of Psychology 1143, 1145.

[71] Simon Cullen, 'Survey-Driven Romanticism' (2010) 1(2) Review of Philosophy and Psychology 275.

[72] On the question of training, Himma cautions that, 'It is a bad idea to jump into the deep end of a swimming pool if one does not know how to swim; … if one wants to do experimental jurisprudence *on any issue*, one needs training in social-scientific methods that students in law and philosophy simply do not get as a matter of course' (original emphasis) (n 4, 4–5). In fact, general X-Jur is now regularly published in peer-reviewed social science outlets, such as, e.g.,

4. Future directions

In discussing approaches to the interpretation of experimental data, the preceding section offered something of a stock take of existing X-Jur.[73] Clearly, there is much to be both confirmed and explored. This is not the place for a systematic review of the possibilities,[74] but we might, for instance, be curious as to how folk intuitions about international law measure up. Is international law as paradigmatic an example of law as its municipal counterpart given differences in political organization?[75] Does morality play an equivalent role in intuitions about both its validity and proper interpretation?[76] Equally, we might wonder whether the weight assigned by individuals to different determinants of legal meaning – a rule's letter and spirit – is something that tracks differences in individuals' core dispositions. In addition to expanding X-Jur's thematic scope, methodological diversification must be on the agenda. For one thing, diversification would supply techniques by which to directly test the legal pluralist hypothesis that there is no univocal folk concept of law but rather multiple disparate concepts. Developmental, longitudinal, and nationally representative study designs would offer possible ways of meeting this challenge. In the remainder of this section, however, I want to return to the question of whether some people's jurisprudential intuitions should be recognised as expert. Consider an intriguing line of results about rule application that indicates that lawyers tend to hew closer than laypeople to a rule's letter.

Let us speak of, 'legal meaning', as a provision's proper application when all relevant things, including the provision's pertinent semantic meaning (technical or otherwise), are considered. Across different jurisdictions, there is evidence that, in ascribing legal meaning, both ordinary folk and lawyers weigh not just a rule's letter but also its spirit.[77] However, it seems that lawyers give significantly more weight than laypeople to a rule's text.[78] One reading of this result that is lawyers' heightened emphasis on text is an aspect of lawyers' 'relatively fine-grained' understanding of what law consists in,[79] based on which, they are trusted to advise clients and predict court interpretations. On this view, lawyers' expertise consists in part in a superior understanding of the nature of legal meaning itself. But recall our earlier discussion of intuitions about the nature of legal validity, in which we noticed the circularity inherent in using legal expertise to identify legal experts.

Proceedings of the National Academy of Sciences (PNAS), Journal of Experimental Child Psychology, Law and Human Behavior, Cognition, Judgment and Decision Making, and Cognitive Science.

[73]Note that have not reviewed the many recent experimental papers that deal with topics in special rather than general jurisprudence; see Tobia and Sommers (n 4) for references.

[74]For which, see, e.g., Karolina Prochownik, 'The Past and Future of the Experimental Philosophy' in Karolina Prochownik and Stefan Magen (eds), *Advances in Experimental Philosophy of Law* (Bloomsbury 2023) 7–16.

[75]Hart (n 10) 3–4.

[76]Recent research suggests that it might: Benedikt Pirker and Izabela Skoczeń, 'Inside the treaty interpreter's mind: An experimental linguistic approach to international law' (2023) 36(3) Leiden Journal of International Law 519 <https://doi.org/10.1017/S0922156523000134>.

[77]Ivar Hannikainen et al, 'Coordination and expertise foster legal textualism' (2022) 119(44) Proceeding of the National Academy of Sciences 4 <https://doi.org/10.1073/pnas.2206531119>.

[78]ibid. In contrast, there is some initial evidence that, in the application of precedents, the presence of a sympathetic litigant may affect professional judges more strongly than law students: Holgar Spamann and Lars Klöhn, 'Can Law Students Replace Judges in Experiments of Judicial Decision-Making?' (2023) Harvard Public Law Working Paper No. 1093, Available at SSRN: <https://ssrn.com/abstract=4362199>.

[79]Julie Dickson, *Elucidating Law* (Oxford University Press 2022) 113.

To say that someone is a lawyer, some legal provision must be interpreted. The accuracy of any professional understanding of the nature of legal meaning is then a function of the accuracy of the non-professional understanding by which the professional comes to be identified. To attribute lawyers' textualism to a greater insight into nature of law, we must overlook how any such professional tendency is only as correct as the non-lawyerly perception on which the professional status depends. This puzzle about the scope of legal expertise invites an empirical question: do lawyers *think* themselves to be expert in legal meaning per se or are they open to deferring to a broader conception?

Certainly, professional legal knowledge ranges over broader terrain than the nature of legal interpretation. Even on a question of our statutory or constitutional obligations, we might have many reasons for paying for legal advice. Then, in terms of legal understanding itself, it could be that what a client is missing is mostly just a knowledge of what texts – enactments and other instruments – the system's authorities have posited on the relevant topic, and the time to carefully read and synthesise them all. Much of the value of their lawyer's advice might consist in the promise that it is the product of someone diligently doing the pertinent reading on the layperson's behalf, that is, on the behalf of someone 'leading [a] busy li[fe] infused with their own interests, commitments, and specialisms.'[80] If so, we might then account for the mutual expectations underpinning the exchange of professional legal advice without supposing that, insofar as the legal application of each individual clause goes, lawyers necessarily have any broad authority over the 'any educated man' to whom HLA Hart attributed knowledge of the contents of a generic legal system.[81] Indeed, folk perceptions of a provision's application might, if only implicitly, be sometimes considered determinative.

A narrow characterisation of lawyerly interpretive expertise is consistent with evidence of folk deference towards lawyers as to the appropriate literal meaning to assign to a legal provision when considering its ultimate application.[82] Moreover, it is consistent with a decisive role for a lawyerly analysis in the application of provisions featuring specialised legal concepts, such as tortious causation or mens rea. Accordingly, a notion of legal expertise that falls short of characterising law as merely 'the internal dialogue of a professional culture'[83] would still seem to comfortably accommodate the reality that 'being a lawyer requires years of legal education, citizens consult lawyers to arrange their legal affairs, and media outlets hire legal experts and commentators to analyse legal news.'[84] Moreover, a modest model of legal expertise appears to dovetail with an argumentative strategy prominent in both judicial and scholarly writing.

Judicial opinions often justify a legal interpretation by reference to epithets such as 'ordinary' or 'plain' meaning,[85] or, conversely, disavow alternative applications of the

[80]Dickson, ibid. In this vein, we might say that lawyers' key advantage is a superior library of legal *information*, rather than superior legal knowledge per se.
[81]Hart (n 10) 3.
[82]See Kevin Tobia et al, 'Ordinary Meaning and Ordinary People' (2023) 171(2) University of Pennsylvania 365.
[83]Frederick Schauer, 'Is Law a Technical Language' (2015) 52 San Diego Law Review 501, 513.
[84]Felipe Jiménez, 'Some Doubts About Folk Jurisprudence: The Case of Proximate Cause' (2021) The University of Chicago Law Review Online <https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/>.
[85]Kevin Tobia, 'Testing Ordinary Meaning' (2020) 134 Harvard Law Review 726, 728, '[W]ithin legal interpretation, among the most pervasive inquiries is the search for ordinary meaning … [L]egal theorists and practitioners regularly evaluate the text's ordinary meaning.'

relevant provision as 'absurd' or 'overly literal'.[86] Such moves invoke a public responsiveness that seems incongruent with an 'acknowledge[ment] that legal officials are in the driving seat'[87] regarding the provision's application. Rather, such references can fairly be read as appealing to a folk understanding of the text's legal meaning. Similarly, scholarly analyses of particular theories of the nature of legal meaning frequently develop counterarguments that invoke historical or hypothetical legal questions whose answers are taken to be obvious. This has been true of criticism of purposivist,[88] literalist,[89] and moralistic[90] theories alike. In such scholarship, the difficulty with the target theory's implied legal answer to the question is often characterised in terms that evoke a general reaction, e.g., a 'laugh test',[91] rather than one confined to any particular subgroup of speakers. So construed, such argument is not simply seeking to call attention to an answer that lawyers would give, but to one which lawyers would be wrong *not* to give. In light of this role for the folk concept in a prominent strand of judicial and philosophical debate, the existence of a general systematic difference between lay and lawyerly understandings of rules might seem puzzling.

Equally, the possibility that lawyers' heightened disposition towards textualism may be driven by a professional focus on rules as means of coordination points to a paradox.[92] Whereas, in principle, convergence on a provision's literal meaning might seem best placed to promote coordination, if lawyers truly seek to maximise predictability and consistency in legal interpretation, they might need to join the folk in assigning less weight to it. Imagining how lawyers might be faced with such a predicament suggests, in turn, a possible solution to these conflicts.

One way to reconcile the prominence afforded to the folk concept of law in scholarly and judicial argumentation with the divergence between folk and professional legal interpretation is to suppose that, rather than being the subject of a linguistic division of labour in which the folk defer to experts, a provision's legal meaning is often a question on which lawyers are prepared to defer to the folk. Absent recognition by laypeople of lawyers' inherent superiority in discerning legal meaning, lawyers, just like any other subgroup, would presumably lean towards any application of a given provision on which they suppose the folk would generally insist. On this view, the folk possess a residual or default authority on legal meaning that, in virtue of their 'relations of cooperation'[93] with lawyers, is supplanted by specialist legal terminology and concepts on a case-by-case basis. The evidence of *general* divergence between layperson and lawyer might then be a story of how the legal profession selects certain

[86]D. Neil MacCormick and Robert S Summers, *Interpreting Statutes: A Comparative Study* (Dartmouth Applied Legal Philosophy Series 1991) 461, 485 (observing that all nine legal systems in the study recognized an absurdity doctrine).
[87]Felipe Jiménez, 'Some Doubts About Folk Jurisprudence: The Case of Proximate Cause' (2021) The University of Chicago Law Review Online <https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/>.
[88]E.g., Max Radin, 'Statutory Interpretation' (1930) 43(6) Harvard Law Review 863, 879.
[89]E.g., Larry Alexander, 'In Defense of the Standard Picture: The Basic Challenge' (2021) 34(3) 187, 194–95.
[90]E.g., Hasan Dindjer, 'The New Legal Anti-Positivism' (2020) 26(3) Legal Theory 181, 188–89.
[91]Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997) 132.
[92]Hannikainen et al (n 78) 6, '[T]he rule of law and the legitimacy of judicial decisions hinge on legal systems' expression of stability and predictability in judicial outcomes. Our studies suggested that this circumstance can be fruitfully modeled as a mixed-motive game in which legal officials – despite their heterogeneous moral preferences – can reach an equilibrium if they are rewarded for their coordination.'
[93]Hilary Putnam, *Volume 2: Mind, Language and Reality: Philosophical Papers* (Cambridge University Press 1975) 274.

sorts of personalities rather than how it imbues an expert understanding of legal meaning per se, whereby:

> A difference between ordinary and expert judgments … is explained by factors about the kinds of people who enter the legal profession (e.g., the kinds of people who attend law school and become lawyers or judges).[94]

Testing such a solution by examining whether lawyers' interest in coordination might lead them to suppress their preference for a rule's letter when apprised of laypeople's general preference for its spirit would be an interesting further step.

5. Conclusion

In 2015, David Enoch, Oxford University's new Professor of the Philosophy of Law, famously described general analytic jurisprudence as 'not interesting'.[95] Enoch urged a recalibration of legal philosophy towards inquiry into 'understanding the normative constraints and considerations applying to *the* law'.[96] X-Jur offers a possible synthesis. The project of investigating whether people identify law as having a moral kernel, of how they relate such a kernel to politics, and of how it contributes to the application of legal rules promises both to advance debate about law simpliciter and to help elucidate moral questions relevant to *the* law of a particular domain or jurisdiction. The future of jurisprudence is experimental.

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[94]Kevin Tobia 'Legal Concepts and Legal Expertise' (2023) *Synthese* (forthcoming) available at SSRN: <https://ssrn.com/abstract=3536564> 9. By means of the ellipses, I have generalized Tobia's original formulation of the selection hypothesis, which refers to judgments 'corresponding to the same term'. (In that paper, Tobia reports evidence against this hypothesis in relation to judgments of intentionality.)

[95]David Enoch, 'Is General Jurisprudence Interesting?' (2015) SSRN <https://ssrn.com/abstract=2601537> 30 (emphasis added); published as: 'Is General Jurisprudence Interesting?' in David Plunkett, Scott J. Shapiro, and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019) 65–86.

[96]ibid 31.