

# Five challenges for theories of law

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**Abstract:** In this paper, I introduce five intuitive challenges that should be dealt with by theories of law. Then, I argue that the typically positivist idea that the legal ascriptions of a given legal system may be grounded exclusively in descriptive facts seems to conflict with three of these challenges. I conclude that, in spite of the fact that both interpretivism and descriptivism are counterintuitive theories about law, it is the latter that has a greater argumentative burden.

**Keywords:** Grounding, Supervenience, Law as fact.

## I. FIVE INTUITIONS ABOUT LAW

1. Imagine a subject  $s_1$ , in a given legal system  $L$ , evaluating some fact  $f$ . There are several things that  $s_1$  could say about  $f$  except this: “ $f$  is the law, period.” For any legal ascriptions of the type “This is the law,” there must be another such as “This is  $p$ ,” where  $p$  is a non-legal property of  $L$ , and that serves as the determining basis for the first. In other words, (P1) = For any legal system  $L$ , and fact  $f$  in  $L$ : If it is a legal fact of  $L$  that  $f$  is the law in  $L$ , then there is another fact of a non-legal nature in  $L$  that explains the ascription of the property of being the law to  $f$  in  $L$ .

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“(P1)” emphasizes what is called “grounding” and tells us two things: a) that necessarily the legal ascriptions of L are dependent on other facts of L; and b) that the fact of the type “This is p,” which functions as the determining basis for some legal ascription of L, cannot be a legal fact itself.

The fact that serves as the determining basis for a legal fact in L may be unitary or composed of two or more non-legal facts. For example, the legal proposition that “It is the law that the execution of a prison sentence shall commence after the condemnation in the second instance” may be true in the Brazilian legal system, Lbra, because it is a fact of Lbra that the provisional execution of criminal sentences pending extraordinary appeals entails a decrease in the criminal prescription rate, or it may also be based on the fact that in Lbra only 1.5% of the appeals to the higher courts (special appeal and extraordinary appeal) result in some modification of the decision in favor of the condemned. Furthermore, the facts grounding the legal ascriptions of L can be connected by conjunctions or inclusive disjunctions. In the first case, if any of those facts is absent, then the legal fact will not occur. In the second case, the legal ascription would not occur only if all the facts grounding the legal ascription were not facts of L. The only requirement set forth by “(P1)” regarding the nature of the facts grounding the legal ascriptions in L is that they cannot be legal facts themselves.

Legal facts are the legal ascriptions instantiated by L, or, equally, the set of legal propositions of the type “This is the law” that are true about L. The reason why a legal fact cannot itself be based on another legal fact is an imposition of the very nature of the dependency relation presented here. If  $f'$  grounds  $f$ ,  $f'$  is more fundamental than  $f$  and nothing can be more fundamental than itself, and there are no two facts that can be, simultaneously, more fundamental than each other. In other words, the grounding relationship is irreflexive and asymmetric.<sup>2</sup>

“(P1)” states that there is a dependence relationship between the legal fact of L and the non-legal facts that function as its determining basis. The most common sense used to portray this dependence relation is that the occurrence of the basis  $f'$  guarantees the occurrence of the legal ascription: ( $f' \rightarrow f$  is the law)<sup>3</sup>.

2. Imagine a subject  $s_1$  in a given legal system L evaluating two facts (covering facts and acts),  $f_1$  and  $f_2$ , where  $f_1$  and  $f_2$  instantiate the same purely descriptive properties

2 BENNETT (2017: 33): “For all building relations  $B$ , and all  $x$ ,  $\sim Bxx$ , and for all building relations  $B$ , and all  $x$  and  $y$  such that  $x \neq y$ , if  $xBy$ , then  $\sim (yBx)$ .” See also ROSEN (2010: 115-6).

3  $f'$  being the case suffices to explain  $f$  being the law in L. I am intentionally omitting the debate about “necessitarianism,” which roughly saying is the thesis that grounding generates an implication – in the case, between the basis and the legal ascriptions it guarantees – valid in all possible worlds. See TROGDON (2013: 109-112).

in L. There are several things that s1 can say about such facts, except this: “f1 is the law and f2 is not the law.” In other words, (P2) = For any legal system L and any two facts, f1 and f2, of L, if f1 and f2 are descriptively equal, then either both are legal facts of L or none of them is.

“(P2)” tells us that the legal ascriptions within any legal system L supervene (locally) on the distributions of the purely descriptive properties of L.

There is much discussion in legal theory regarding whether legal properties supervene on purely descriptive properties and, if so, what kind of supervenience it is.<sup>4</sup> I believe that at least as formulated in “(P2),” only at the cost of the legal rationality itself, which is strongly based on the requirement of equal legal treatment of similar situations, we could deny the supervenience of the legal properties of a given legal system L on its descriptive properties.

Having said that, let us call the set of all the legal ascriptions of L<sup>5</sup> as “the legal conformation of L” and the set of all the descriptive facts of L as “the descriptive conformation of L.” If in any legal system L, each of the legal ascriptions within L supervenes (locally) on the distributions of the purely descriptive properties of L, or, in other words, on the descriptive conformation of L, then it is not possible to have two legal systems with the same descriptive conformation and different legal conformations. In other words, (P2') = For two legal systems, L1 and L2, a difference in their legal conformations is not possible without a difference in their purely descriptive conformations. “(P2')” would be entailed by “(P2)” and tells us that legal properties supervene (globally) on the purely descriptive properties.

3. Imagine two subjects, s1 and s2, and a fact f1 in a given legal system L, where s1 and s2 agree on the purely descriptive conformation of f1 and L. There are several things s1 and s2 could say about f1, including one of them stating that “f1 is the law” and the other asserting that “f1 is not the law.” In other words, (P3) = For any legal system L and two subjects, s1 and s2, in L it is possible that s1 and s2 agree on the purely descriptive conformation of L and still disagree on its legal conformation.

“(P3)” seems to be a truth easily observed by any legal operator, after all, two courts, or two judges of the same court, often agree on the purely descriptive conformation of a fact submitted to legal evaluation, as well as on the purely descriptive conformation of the legal system in which they live and, nevertheless, disagree on whether that fact is a legal fact of that system.

4 See BROZEK, ROTOLO, and STELMACH (eds.) (2017).

5 These are the set of legal propositions of the type “This is the law” that L instantiates, or, still, that are true in L. In other words, the totality of the legal facts of L.

Two judges of the Brazilian Supreme Federal Court, the highest court in the Brazilian legal system (Lbra), may agree that a) it is written in the Brazilian Constitutional text that “No one shall be considered guilty before the issuing of a final and unappealable penal sentence,” b) it is written in the law of introduction to the norms of the Brazilian legal system that “Res judicata is a case in which there has been a final judgment and is no longer subject to appeal,” c) in Lbra less than 10% of appeals to the higher courts (special appeal and extraordinary appeal) are provided in favor of the convict, d) the beginning of execution of the sentence after conviction in the second instance reduces the rate of prescriptions of criminal prosecutions, and e) it is in the ordinary courts that the possibility of examining facts and evidence is exhausted. However, despite agreeing on all of these, they may yet disagree about whether the execution of the sentence pending extraordinary appeals is a legal fact of Lbra.

4. (P4) = For any legal system L and any fact f of L, necessarily if it is a legal fact of L that f is the law, then f ought to be.

The expression “ought to be” is employed in “(P4)” in a purely normative sense, that is, without telling us something about the merit of any legal fact of L. In other words, “(P4)” only tells us that the legal ascriptions have a normative character by essence, although “(P4)” is inert about the fundamentals of this normativity. In sum, and taking a more direct approach: “(P4)” states that the law prescribes or guides behaviors.

5. (P5) = For any set of non-legal properties p and any pair of legal systems, L1 and L2, it is possible that [(p  $\rightarrow$  f is the law in L1) and (p  $\wedge$  f is not the law in L2)].<sup>6</sup>

I believe that there is no controversy that for any legal system L and any legal ascription of L, it is a posteriori and contingent that f is the law in L. In Brazil it is the law that you should drive on the right, whereas in Australia it is the law that you should drive on the left. This demonstrates that legal ascriptions are contingent. On the other hand, I think that we will not find any law-applying agent claiming to be able to say whether a fact f is the law in a given system L, without first analyzing the concrete conformation of L. This proves that legal ascriptions are a posteriori.

“(P5)” tells us something different and stronger, which is that different legal systems may have different grounds for law. This seems to be the truth. It is entirely possible that the execution of the sentence pending extraordinary appeals is a legal fact in L1

6 It may be the case that “(P5)” would be better stated in (P5') =  $\diamond [p \wedge (f \text{ is not the law})]$ , for any set of non-legal properties p. However, I am not sure about this.

and not in L2 because L1 is based on a model of decrease in impunity, while L2 is based on a model of mitigation of judicial error.<sup>7</sup>

“(P1),” “(P2),” “(P3),” “(P4),” and “(P5)” appear to be intuitive fundamental aspects of legality, being an a priori truth that it is not possible for any legal system to not instantiate them and it is conceptually necessary that (a) the legal properties are dependent on non-legal properties; (b) the legal properties locally supervene in natural properties; (c) legal disagreements may occur in situations of descriptive convergence; (d) if someone has a legal reason to do something, then she ought to do that; and (e) different legal systems may have different grounds for law.

## II. LAW AS FACT [?]

GREENBERG (2004: 157) rightly states that almost no legal theorist denies that legal ascriptions are grounded on natural/descriptive facts. However, the disagreement prevails among scholars when they question whether these ascriptions can be based exclusively on descriptive facts, or, on the contrary, they also depend on moral (value) facts. According to Greenberg, this is an important question in legal theory on which the debate between analytical positivists and interpretivists would be placed.

That being said, let's go back to “(P1),” “(P2),” “(P3),” “(P4),” and “(P5).”

Although “(P1)” requires that the facts grounding the legal ascriptions in L are not legal facts themselves, “(P1)” does not set forth any other requirement on the nature of those facts. Hence, at first, the determining basis of any legal ascription of L may be purely descriptive or moral facts. In other words, “(P1)” is theoretically inert concerning the debate between positivists and non-positivists.

Let us take the discussion about whether the provisional execution of the criminal sentence pending extraordinary appeals is a legal fact of Lbra. All that “(P1)” requires is that the legal ascription to be based on a set of non-legal facts of Lbra. Positivists and interpretivists satisfy this condition; more than that, both positivists and non-positivists argue that there must be a set of purely descriptive facts of Lbra explaining such a legal ascription.

Imagine, for instance, the set T containing the entire descriptive story of Lbra. This set T tells us that in Lbra people, things, and properties are such and such, and they are related to each other in certain ways, that a legal text is interpreted in a certain manner by the courts, that if you whisk together 395g of sweetened condensed milk, 320ml of passion fruit juice concentrate, and 300g of media crema table cream and put it in the refrigerator for 4 hours, then you will have a passion fruit

7 As TAMANAHA (2017: 5) says: “Law is neither mind-independent nor fixed by laws of nature, but rather is socially constructed through the meaningful actions of humans.”

mousse, and so on. In accordance with what I said above, both positivists and non-positivists argue (or might argue) that there must be a subset of T, some partial descriptive story of Lbra, which is relevant to the explanation of the provisional execution of the conviction pending extraordinary appeals as being the law in Lbra, maybe something like  $A = \{\text{the constitutional text in Lbra states that "No one shall be considered guilty before the issuing of a final and unappealable penal sentence" and/or in the Decree-Law 4.657 of September 4, 1942 (Introduction to the Civil Code) it is written that "Res judicata is a case in which there has been a final judgment and is no longer subject to appeal" and/or in Lbra less than 10% of appeals to the higher courts (special appeal and extraordinary appeal) are provided in favor of the convict and/or the beginning of execution of the sentence after conviction in second instance reduces the rate of prescriptions in criminal prosecutions and/or it is in the ordinary courts that the possibility of examining facts and evidence is exhausted etc.}\}$ , and within this partial purely descriptive story of Lbra would be the determinants of the legal fact.

Accordingly, a full comprehension of the provisional execution of criminal sentences pending extraordinary appeals being the law in Lbra has to explain how A is detached from T and, mostly, how A1 or A2 is detached from A. For example, in ascribing the property of being the law to the provisional execution of criminal sentences pending extraordinary appeals in Lbra is it decisive that  $A1 = \{\text{the constitutional text in Lbra states that "No one shall be considered guilty before the issuing of a final and unappealable penal sentence" and/or in the Decree-Law 4.657 of September 4, 1942 (Introduction to the Civil Code) it is written that "Res judicata is a case in which there has been a final judgment and is no longer subject to appeal" and/or it is the case that sometimes the second degree conviction is reversed in favor of the condemned, and so on}\}$  or is it decisive that  $A2 = \{\text{in Lbra less than 10% (ten percent) of appeals to the higher courts (special appeal and extraordinary appeal) are provided in favor of the convict and/or the beginning of execution of the sentence after conviction in the second instance reduces the rate of prescriptions of criminal prosecutions and/or it is in the ordinary courts that the possibility of examining facts and evidence is exhausted, and so on}\}$ ? Obviously, this is an important question, after all, if A1 is the decisive descriptive set, then the provisional execution of criminal sentences pending extraordinary appeals is not the law in Lbra; on the contrary, if A2 is the decisive descriptive set, then the provisional execution of criminal sentences pending extraordinary appeals is the law in Lbra. To summarize: a full comprehension of a legal fact in a given legal system rests not only in some determining basis (in the example above, A1 or A2), on which the legal fact depends

(directly), but also on the parameters that the determining basis must satisfy to take part in the determination of the particular legal conformation of L.<sup>8</sup>

It is here that the disagreement between positivists and interpretivists about “(P1)” emerges. After all, at this point, the core of the divergence between the two theoretical strands is not merely whether moral facts take part in the determining basis of the legal facts of L, but whether such moral facts must take part in the “ultimate determinants of law.”<sup>9</sup> To put it in another way, what really matters here is not knowing whether only descriptive facts are part of A1 or A2, but knowing if moral facts are part of the parameters A1 or A2 must satisfy to be a determining part<sup>10</sup> of the special legal conformation of Lbra.<sup>11</sup>

Now take the following statement “Water is the most abundant substance here.” What do we need to know if that proposition is true or false? At least: what does *water*, *substance*, and *being more abundant than* mean; and what is – in the *relevant* aspects – the context *c* to which the indexical “here” refers to. However, it is the concepts or the meanings of the things in the world that allow us to understand the descriptive story of *c*, separating what is *relevant* from what is not. The same applies to the problem just mentioned about the law: it is the concepts, including the concept of law, that allow us to understand the descriptive story of Lbra extracting A from T; it is the concepts, including the concept of law, that make *irrelevant* to the legal conformation of Lbra that if you whisk together 395g of sweetened condensed milk, 320ml of passion fruit juice concentrate, and 300g of media crema table cream and put it in the refrigerator for 4 hours, then you will have a passion fruit mousse; and it is the concepts that explain the fact that, except here, you do not find culinary recipes in legal books or legal papers. However, a deep schism takes place between positivists and interpretivists at this point. The positivists think that concepts alone are all we need to solve the problem of consolidation of the determining basis of the legal facts

8 Thus, when dealing with the grounds of law, instead of using “f is the law only when f’,” we should use some more complex structure, maybe something like “f is the law only when the f’ that plays the role posed by p,” where f’ is the determining basis on which the legal fact (directly) depends and p is the parameters that f’ have to satisfy to be a determining part of the legal conformation of L and both f’ and p form what is commonly known as the grounds of law.

9 See SHAPIRO (2011: 25ff). See also PLUNKETT (2012: 146).

10 “Being a determining part of the legal conformation of L” = “being the determinant of at least one legal fact of L.”

11 It is not surprising, therefore, that a branch of positivism – the “inclusivists” – may be characterized precisely because they admit the possibility that moral facts take part in the determinants of the legal facts of L provided that in no case they take part in the ultimate determinants of law, i.e., in the parameters those determinants must satisfy to be a determining part of the legal conformation of L. See, for instance, PLUNKETT (2012: 148).

of L as partial determinants of the legal conformation of L, whereas interpretivists think that positivists are putting a very heavy burden on the concept's shoulders, especially regarding the concept of law. After all, while it is difficult to disagree that the concepts play an important role in the consolidation of the building basis of the legal facts in any legal system, it is also difficult to accept that the concepts alone can play a definitive role, especially on the questions regarding, for instance, the extraction of A1 or A2 from A. Why is it difficult to accept? The arguments here are many, and I think they are linked with at least three of our intuitions mentioned above. Let us begin with "(P3)."

As we have seen, in accordance with (P3) For any legal system L and two subjects, s1 and s2, in L it is possible that s1 and s2 agree on the purely descriptive conformation of L and still disagree on its legal conformation.

"(P3)" refers to legal disagreements. There is a legal disagreement between s1 and s2 when at least one fact f is the law for s1 and not the law for s2, or vice versa. For example, take the following proposition (i) "It is the law that headlights must be turned on even during daytime hours if you are driving on the highways." If "(i)" is true for s1 and false for s2, then they are having a legal disagreement or, in other words, they are ascribing different legal conformations to L. Sometimes these legal disagreements occur because s1 and s2 have different factual beliefs about the context L in which they live. For example, "(i)" might be true for s1 and false for s2 because s1 believes that turning on the headlights even during the day decreases the rate of road traffic crashes while s2 thinks otherwise. Obviously, these cases are irrelevant to "(P3)." Sometimes, however, the legal disagreements occur despite the agreement between the subjects about the descriptive conformation of the context in which they live. These cases of legal disagreement, covered by "(P3)," are commonly regarded as a very important subject to the debate between positivists and non-positivists, especially after Ronald Dworkin (1986) launched a famous and controversial attack against the former, which is, the positivist does not have a plausible theory about the "theoretical legal disagreements."

There are many forms by which scholars characterize the theoretical legal disagreements, and each of them can be associated with a specific purpose in combating different manifestations of what Dworkin calls the "plain-fact view"<sup>12</sup> of positivists about the law. One of these characterizations that I would like to mention here is that theoretical disagreements are disagreements over the grounds of law.<sup>13</sup> In my view, such a characterization leads to errors. The expression "the grounds of law" may refer

12 See SHAPIRO (2007: 30) on the subject matter.

13 DWORKIN (1986: 5) himself uses this characterization.

to the determinants by virtue of which some legal ascription takes place in L or to the parameters those determinants have to satisfy in order to consolidate themselves as a determining part of the legal conformation of L. Hence, if theoretical disagreements are disagreements on the grounds of law, does the argument of theoretical disagreements refer to a disagreement on the former, the latter, or both? In addition to being misleading, such a characterization of theoretical disagreements makes Dworkin's argument not work against positivism.

Sometimes this characterization has as its enemy the manifestation of the plain-fact view consisting of a supposed hypothesis that there is an actual consensus between officials about the grounds of law. If the adjudicatory practice demonstrates that officials often disagree on the grounds of law, then positivism is a bad description of legal practice. The argument is weak for several reasons. The positivist's hypothesis taken as a premise in the argument is not a premise, but the conclusion suggested by Dworkin as an explanation of the attitude taken by the positivists when confronted with these types of disagreements. In addition, there is an assumed idea in the second premise, which is, that the adjudicatory practice is demonstrating the occurrences of disagreements over the grounds of law, but this assumed idea would only be justified through a series of prior qualifications. For example, by ensuring that the institutional agents involved in the disagreement are not mistaken and accordingly, by demonstrating the possibility of the persistence of the disagreement even when those agents have all the descriptive information about their legal system and are not applying poor reasoning. So the argument would be acceptable only in the case of persistent legal disagreements between ideal rational agents fully informed about the purely descriptive conformation of the context in which they live.

Another manifestation of the plain-fact view that is often targeted here is the thesis that some criterion allows us to distinguish what is the law from what is not. Since theoretical legal disagreements – as disagreements on the grounds of law – are over the criteria of legal determination, then they would be a kind of knockdown argument against legal positivism. The argument simply does not work. Admit, for example, the following reductionist hypothesis about the law “being the law in L = satisfying  $f'$  that in L plays the role posed by  $p$ ,”  $s_1$  and  $s_2$  could disagree over whether  $f$  is a legal fact of L by disagreeing over the content of  $f'$ . In this case, in a sense, they would be disagreeing over the criteria (i.e., over the grounds of law, in one sense) and, in spite of that, agreeing on what law is.<sup>14</sup>

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14 This kind of counterargument that I am using here is stuck in the distinction between “the role property”, on the one hand, and “the realiser property”, on the other. See JACKSON (2017).

Finally, the characterization of theoretical disagreements as disagreements over the grounds of law sometimes seeks to support the argument about disagreements as evidence that the concept of law is interpretive. As we have already seen, positivists and interpretivists agree that for each legal ascription of the type “*f* is the law in *L*” there must be a descriptive story of *L* on which the legal fact depends. Nonetheless, they differ on whether this purely descriptive story is only part or the whole story to be told about *L* to explain the ascription of the property of being the law to *f* in *L*. Non-positivists think that a moral fact necessarily has to be involved, positivists think the contrary. We have also seen that the point here is not primarily about the facts that directly determine some legal fact of *L*, but rather about the parameters the determining basis have to satisfy<sup>15</sup> in order to consolidate themselves as a determining part of the legal conformation of *L*. Finally, we have seen that the positivists believe that concepts, including the concept of law, would be able to solve the problem whereas non-positivists think differently because the latter argue that a moral fact must be involved in the process. The core idea here is that the concept of law, necessarily involved in legal ascriptions, is an interpretive concept and theoretical disagreements would demonstrate that: a) there is no a priori criteria associated with the concept to be obtained through conceptual analysis, and b) the discussion between officials is about the concept of law that best fits our practices. In both cases, the argument misses the mark. Suppose as certain the hypothesis that a set of purely descriptive properties, (*p*<sub>1</sub>...*p*<sub>n</sub>), have the same ascriptions to the facts as the property of being the law in all epistemically possible legal systems. Hence, for every rationally possible jurisdiction *L*, if some *f* is the law in *L*, then it is (*p*<sub>1</sub>...*p*<sub>n</sub>); and if *f* is (*p*<sub>1</sub>...*p*<sub>n</sub>), then it is the law in *L*. In that case, from the fact that two conceptually competent users disagree over the content of (*p*<sub>1</sub>...*p*<sub>n</sub>) does not necessarily follow the falsity of the hypothesis that, for all we can know a priori, [*f* is the law if and only if *f* is (*p*<sub>1</sub> ... *p*<sub>n</sub>)]. Why? Because the hypothesis being a priori does not mean that it is analytic or, if I understand Jackson (1998), the hypothesis’ truth in all epistemically possible legal systems does not mean that we will not have to work to access it. Therefore, it should not surprise us that we sometimes disagree on this hypothesis, and even debate on what hypothesis best fits our adjudicatory practice, provided that the “best” here is employed not in a moral sense, but in a purely rational one. It is often imagined that the disagreements about what is the best concept of law would imply a substantive moral dispute over the law, thus positivism would be false. This is a mistake. One concept may be better than another, for example, because it is more easily apprehended by its users, or because the first complies with purely rational principles, such as

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15 This is why the parameters also participate in the determination of the legal fact.

non-contradiction, identity, and the principle of least effort, and so on. None of this would imply the substantive moral nature of the discursive venture.

The criticisms made above regarding the characterization of theoretical disagreements as disagreements over the grounds of law bring with them the reasons why I prefer "(P3)." In "(P3)" the enemy is introduced in a straight forward way: its target is the positivists' plain-fact view that there is a purely descriptive story of L apt to fully explain its legal conformation or, as DWORKIN (1986: 7) puts it, the enemy here is the plain-fact view of the positivists that "(...) what the law is in no way depends on what it should be." This is the core of what has been discussed so far with "(P1)," and it is not difficult to understand why "(P3)" is relevant to the discussion: if the positivist's hypothesis about "(P1)" is correct and some purely descriptive conformation of L is sufficient for its legal conformation, then at some point  $s_1$  and  $s_2$ , competent users of the concept of law, will have so much descriptive information about the context in which they live that they can no longer disagree about the legal conformation of that context, unless they are in error or being dishonest. This seems to be in perfect harmony with the Dworkinian perspective about the theoretical disagreements and the positivist's plain-fact view against which the former was placed as the problem. For me, at least in the theoretical disagreements argument, Dworkin seems to be much less aware of the fact that sometimes the agents involved in the adjudicatory practice supposedly disagree on the criteria of legal conformation in a given jurisdiction, than of the subject's attitudes (scholars inclusive) toward such disagreements. What really haunts Dworkin's mind here is the interpretation of those disagreements by some competent users (scholars mostly) in the sense that they are error situations, disobedience situations, or, in Dworkin's words, "illusions." I think "(P3)" deals very well with this Dworkinian approach.

"(P3)" has at least two possible interpretations. "(P3)" could be interpreted as a factual statement concerning the adjudicatory practice in the sense that sometimes competent users disagree over the legal conformation of some legal systems despite agreeing with its purely descriptive conformation. However, "(P3)" could also be interpreted as an epistemic statement in the sense that it is rationally admissible for two competent users to agree on the descriptive conformation of L and disagree over its legal conformation. While in the first interpretation the occurrence of the disagreement is placed in the foreground, in the second one, it is our attitude toward those occurrences that really matter. Furthermore, it must be observed by the reader that if the positivist's solution to the first interpretation seems to be relatively simple, on the second interpretation things are not quite so simple. Is it rationally possible that  $s_1$  and  $s_2$  agree descriptively on L and disagree legally? According to the positivist's hypothesis that there must be a purely descriptive story of L that fully explains (de-

termines) its legal conformation, the answer must be negative. After all, according to this hypothesis, although *s1* and *s2* can disagree, they cannot *continue* to disagree no matter how much descriptive information they have and how much reason they use. Note that the first “can” is much more related to the first interpretation of “(P3)” than with the second one. Why? Because what has just been stated above means that such a disagreement is rationally possible since *s1* and *s2* are committing some error in reason or some error<sup>16</sup> about the purely descriptive conformation of *L*. However, qualified this way, such a “possibility” would hardly be a “rational possibility”; therefore, the positivist has to deny the second interpretation of “(P3).”<sup>17</sup>

It should be noted, however, that this is not a knockdown argument against the positivists’ hypothesis about “(P1).” The reason is simple: the positivist might say “so much the worse for our intuition (P3).”<sup>18</sup> Thus, at least as interpreted here, Dworkin’s theoretical disagreements have a much simpler purpose than providing a definite argument against the positivists’ hypothesis that there must be a purely descriptive story of *L* that fully explains its legal conformation. In the interpretation adopted here, the examples of disagreements put forward by Dworkin do not seek to demonstrate that there isn’t a legal criteria, or a consensus, and so on, but rather that when looking at such disagreements the competent users involved in the adjudicatory practice do not interpret them as error situations, disobedience situations, or dishonesty situations, and so on. On the contrary, generally, they intuitively interpret such situations as occurrences in which things were evaluated differently by different competent users. In this respect, the argument is so successful and powerful that the reader himself, placed by Dworkin as an observer, ends up by experiencing the same intuition of the agents involved in the adjudicatory practice, an intuition very well portrayed by Dworkin’s examples. In other words, what the argument of theoretical disagreements portrayed in “(P3)” does very well is to increase the burden of carrying the positivist’s hypothesis for “(P1).” After all, if there are two possible choices for “(P1)” and our intuitions point to one of them – which is: what the law is depends on what it should be – why should we try to go the other way? Why should we fight against our intuition “(P3)” in the sense that it is rationally possible for two subjects to agree on the des-

16 Where having insufficient descriptive information about *L* is also an error situation.

17 It could be argued, therefore, that “(P3)” would have been better stated in (P3’) For any legal system *L* and two subjects, *s1* and *s2*, in *L* no matter how much descriptive information *s1* and *s2* have about *L*, or how much reason they use, they can agree on the purely descriptive conformation of *L* and still disagree on its legal conformation. I do like “(P3’),” but I also think that “(P3’)” is covered by “(P3)” and “(P3)” is more intuitive than “(P3’).”

18 In LIMA (2018: 247-248) I argue that the intuition “(P3)” is deceptive.

criptive conformation of L and disagree on its legal conformation? This questioning leads us to “(P2).”

According to (P2) For any legal system L and any two facts, f<sub>1</sub> and f<sub>2</sub>, of L, if f<sub>1</sub> and f<sub>2</sub> are descriptively equal, then either both are legal facts of L or none of them is. As I said before, it seems hard to imagine a legal system that could contradict “(P2).” As we have seen, “(P2)” seems to imply (P2’) For two legal systems, L<sub>1</sub> and L<sub>2</sub>, a difference in their legal conformations is not possible without a difference in their purely descriptive conformations. However, if “(P2’)” is true, then necessarily there must be a purely descriptive conformation of L that fully explains its legal conformation, otherwise, a variation in the descriptive conformation of L<sub>1</sub> or L<sub>2</sub> would not be a necessary condition for the variation of its legal conformations. This contradicts the interpretivist hypothesis that moral facts must play a role in determining the legal conformation of L. In other words, “(P1)” plus “(P2’)” would justify the positivist’s hypothesis that there is a purely descriptive story about L that is sufficient to its legal conformation. However, this is not without an increase in the positivist’s counterintuitive charge.

If “(P1)” and “(P2’)” are indeed correct, then “(P1)” would tell us that for each legal conformation of L there must be a purely descriptive conformation of L on which the first one depends; and “(P2’)” would tell us that the purely descriptive conformation of L is sufficient as the determining basis of the legal conformation of L.<sup>19</sup> This seems to imply, for each legal system L, some sort of equivalence between all the legal propositions of the type “This is the law” that are truths of L and the totality of the purely descriptive propositions of the type “This is p” that L instantiates. However, this is quite problematic from the point of view of the positivist tradition itself.

On the one hand, because descriptive propositions and legal propositions seem to provide different kinds of information about L. Moreover, as HART (1994: 84) says in his famous “The concept of law,” these kinds of information seem to be irreducible to each other. On the other hand, if an evaluation of something as being the law in L is to say that L is such and such descriptively, then “(P4)” becomes a huge problem for the positivist. As we have seen, in accordance with (P4) For any legal system L and any fact f of L, necessarily if it is a legal fact of L that f is the law, then f ought to be. “(P4)” has only one goal: to preserve the normative/directive character of the legal phenomenon. It does not take much effort to demonstrate that this has always been an important goal in positivist tradition. Hart, for example, seems to defend “(P4)” by placing his famous *rule of recognition* not only on the sociological fact that it is gene-

19 On how grounding plus supervenience may work as a powerful (though not definitive) argument for reductionism in ethics see JACKSON (2017).

rally followed by officials, but also on the psychological fact that it is generally interpreted by the officials as a standard of conduct. This psychological fact, that Hart calls “the internal point of view,” plays a fundamental role precisely by preserving “(P4),” i.e., preserving the directive character of the law. Kelsen, on the other hand, is not far behind and uses his famous *basic norm* as a protection tool for “(P4).”<sup>20</sup> The fundamental question here is protection against whom? If I am right, then it is against positivism itself. The point here is a tension to be solved between the positivist tradition of preserving “(P4)” at all costs and the commitments – “(P1)” + “(P2)” – positivists have to make (if the path we take in this article is correct) in justifying their “plain-fact view” regarding “(P3),” and their hypothesis that there must be a purely descriptive conformation of L that is able to fully explain its legal conformation. It is gratifying at this point to realize that the tension we have reached here is a traditional problem firmly planted against analytic descriptivism in general. JACKSON (1998: 153-54), for example, in defending conceptual analysis and descriptivism in ethics, clearly knows that he has to face this: “To judge that A is right is, according to cognitivism, to have a belief about how things are, including especially how A is. (...) The hard question we have left to the end is that of explaining how such a belief can have the essentially directed nature distinctive of the judgement that A is right.”

This is not the end of the story. The tension mentioned above is not the only tension weighing on the positivists’ shoulders. We also have (P5) For any set of non-legal properties p and any pair of legal systems, L1 and L2, it is possible that [(p → f is the law in L1) and (p ∧ f is not the law in L2)].

Important legal theorists maintain that a theory of law is composed of propositions about law that are necessarily true (DICKSON, 2001: 18) because only true statements for all existing legal systems that have already existed or may exist are able to explain the nature of the law (RAZ, 2009: 91-92). Therefore, in some sense (conceptual or metaphysical) the role of a theory of law would be to find the essence of the legal phenomenon or the set of necessary and sufficient conditions of legality, that is, a set of conditions C satisfying the following proposition “(ii) Necessarily [x is the law if and only if x is C].” “(ii)” suggests that there are standards of legality that are valid for every possible legal system, and this contradicts “(P5).”

One interpretation of “(P5)” is that law and the concept of law are artifacts, hence, not only the law, but the very idea of law, may be subject to change. As SCHAUER (2018: 30) states: “recognizing that the idea of law itself is an artifact entails the conclusion that what humans have created humans could have created differently, and what humans could have created differently is what humans, subject to all of the

20 RAZ (1974: 94-95), for instance, says the following: “Kelsen postulates the existence of basic norms because he regards them as necessary for the explanation of the unity and normativity of legal systems.”

constraints of path dependence, can still, to some extent, change.” The point here is that the artifactual character of law, and of the concept of law, would be in tension with any pretension of theories of law related with the existence of some conditions of legality that are valid to all possible legal systems.

Probably, there are several ways by which positivists could deal with this alleged tension, but I will not dig into the debate here. I will not dig either into the debate on whether this tension simply does not exist (or cannot exist) because the artifactual character of law is one of the most prominent tenets of the legal positivism against natural law school. All I would like to emphasize here is that the intuition “(P5)” is in a tight relationship with “(P1).” Remembering our example, a full explanation of the provisional execution of the conviction pending extraordinary appeals being the law in Lbra rests not only in some determining basis (A1 or A2), on which the legal fact depends (directly), but also on the parameters that the determining basis must satisfy in order to consolidate itself as a determining part of the legal conformation of Lbra. While interpretivists think that a moral fact has to be part of the process, the positivists argue that the concept of law can handle this task. The point to be observed by the reader is that here we arrive at a new problem to be overcome by the positivists. In addition to requiring parameters by virtue of which A1 or A2 have been consolidated as a determining factor of the legal conformation of Lbra, “(P1)” also requires that such parameters be *independent*. The reason is simple: if the provisional execution of the conviction after condemnation in the second instance is the law (or is not the law) in Lbra in virtue of A1 or A2, then the fact that A1 or A2 is a determining part of the legal conformation of Lbra cannot itself to be based on the legal conformation of Lbra, otherwise the irreflexive and asymmetric character of grounding will be violated. Therefore, if the positivist wants to ascribe exclusively to the concepts, including the concept of law, the consolidation of A1 or A2 as a determining part of the legal conformation of Lbra, then they must begin by demonstrating how the concept of law does not depend on our practice,<sup>21</sup> and this seems to contradict our intuition “(P5).”<sup>22</sup>

### III. CONCLUSION

While interpretivism conflicts (apparently) only with “(P2),” the descriptivism peculiar to the analytical tradition conflicts (apparently) with “(P3),” “(P4),” and “(P5).” Thus, although both theoretical strands are counterintuitive, the obstacles to be overcome by the latter appear to be greater.

21 See (if I understood him correctly) GREENBERG (2004).

22 It may be that a good solution here is to say that “x is the law in L = x satisfies those facts that in L play the role posed by the set of non-juridical and non-evaluative properties that have the same ascriptions to the facts as the law property in all epistemically possible legal systems.” I try this in LIMA (2018).

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