MICHAEL MOORE'S REALIST APPROACH TO LAW

BRIAN BIX†

> *"When I use a word,"* Humpty Dumpty said in a rather scornful tone, *"it means just what I choose it to mean–neither more nor less."*
>
> *"The question is,"* said Alice, *"whether you can make words mean so many different things."*
>
> *"The question is,"* said Humpty Dumpty, *"which is to be master–that's all."*[1]

INTRODUCTION

Michael Moore has written a number of lengthy articles defending metaphysical realism[2] and urging that legal theory and legal practice be reformed consistent with that philosophical position.[3] He argues against much of what had been considered

---

† Lecturer in Jurisprudence and Legal Reasoning, King's College London. I am indebted to Joseph Raz, Ronald Dworkin, John Bell, and David Helman for their comments on earlier drafts of this Article.

[1] LEWIS CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 269 (Martin Gardner ed., Bramhall House 1960) (1871).

[2] A short note about terminology: Moore claims that it was a "blunder" for the American legal realists to use the term "realism" to describe their ideas. *See* Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 872 n.4 (1989) [hereinafter Moore, *Interpretive Turn*]; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 287 n.18 (1985) [hereinafter Moore, *Theory of Interpretation*]. While it is true that the legal realists used the term quite differently from the way it is used in philosophy (and here, by Moore), I believe their choice was justified. Using "realism" to refer not to the belief in platonic entities, but rather to a more accurate portrayal of experienced reality and to an avoidance of self-delusion is no "blunder;" it is wholly consistent with the most common uses of the term, not only in daily speech, but also in the fields of art, literature, and politics. (Metaphysical realists often seem to conflate the two meanings of "realism" by implying–incorrectly–that metaphysical realism is on the side of common sense. *See* HILARY PUTNAM, *Is There Still Anything to Say About Reality and Truth?*, *in* THE MANY FACES OF REALISM 3, 3-8, 12 (1987)). Moore usually refers to his own position as "realism." To prevent confusing his position with other approaches in both the legal and philosophical literature employing that label, I will speak of Moore's approach as "metaphysical realism."

[3] *See* Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 188 (Robert P. George ed., 1992) [hereinafter Moore, *Law as a Functional Kind*]; Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW 183 (Laurence Goldstein ed., 1987) [hereinafter Moore, *Ethical Generalization*]; Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L.

common sense, obvious, settled, and beyond question, and offers a global challenge to jurisprudence with regard both to thinking about the law and thinking within the law.

Moore's challenge is aimed at legal thinking, but its roots run much deeper and its repercussions are, potentially, much broader. His one-man crusade is premised on the notion that most of us are terribly misguided. In general, we are said to be fundamentally mistaken about the nature of law, the nature of language, the nature of morality, and even the nature of reality. Within law, we are said to be badly misinformed regarding statutory construction, constitutional interpretation, common law precedent, and judicial reasoning.

For those of us who think Moore may be a false prophet, the best strategy to rebut his arguments is to fight them at their source: metaphysical realism. Yet the arguments for and against this position constitute a substantial category in the philosophical literature. It would be far too ambitious to try to refute metaphysical realism in a single book, let alone in a single article. I have set my sights on what I hope to be a more attainable objective.

Moore offers his own (slightly unusual) version of metaphysical realism, and the power of his argument comes from his prima facie showing that approaches to language other than his own cannot adequately deal with certain fundamental matters. If I can show that Moore has underestimated alternative approaches (in particular, approaches based on the later work of Wittgenstein), and if I can show that his approach has problems of its own, then I will have parried the thrust of Moore's challenge. Perhaps then we will not have to rethink everything we thought we knew about law and legal theory.

This Article is primarily concerned with the appropriate theory of language, my main argument being that Moore's approach is not the correct one (or, at the least, that he has not yet proven it superior to other approaches). In the alternative, I argue (briefly) that even if Moore were correct about metaphysical realism it might make no difference in how we think about or do law, and that even

---

if it did make some difference, that difference would be quite small and would usually be swamped by other factors that Moore himself admits judges ought to take into account.

In the course of discussing Moore's work, I will find it helpful to consider some recent work by David Brink, who, like Moore, has tried to apply the "lessons" of metaphysical realism to legal theory.

I. METAPHYSICAL REALISM

Drawing the contrasts between metaphysical realism and its alternatives is of primary importance. The difficulty lies in the different ways of slicing the philosophical pie: the boundaries of "realism," "platonism," and "metaphysical realism" have been drawn very differently by both the supporters and the opponents of the doctrines these labels have been taken to identify. I offer here a small sample of these diverse views to give the reader a sense of where the battle is to be joined.

Lamenting the absence of clear boundaries in the debate about metaphysical realism, Crispin Wright describes realism as no more than "a syndrome, a loose weave of separable presuppositions and attitudes."[4] Wright identifies a series of controversial propositions around which the larger realist/anti-realist dispute may be said to revolve: (1) the objectivity of truth—that a class of statements may be intelligible even though determining their truth-values is beyond our powers of rational appraisal; (2) the objectivity of meaning—that statements have a truth-value independent of our opinion about their truth value, and thus can be "undetectably true"; and (3) the objectivity of judgment—that these statements have a "'genuinely factual' subject matter."[5] He emphasizes that these are "three distinct species of objectivity,"[6] and that a realist stance to one does not entail a realist stance answer to all. The debate over metaphysical realism, Wright maintains, has thus been hampered by the failure to recognize that there is more than one debate going on under that single heading.[7]

---

[4] CRISPIN WRIGHT, REALISM, MEANING AND TRUTH 3-4 (1987). He continued: "What have the mathematical platonist, the moral objectivist, and the scientific realist in common?" *Id.* at 4; *cf.* MICHAEL DUMMETT, TRUTH AND OTHER ENIGMAS at xxxi (1978) ("As is apparent from the use of the term 'realism' in the two quite different pairs realism/nominalism and realism/phenomenalism, it was already obscure whether the term had a unitary meaning . . . .").

[5] WRIGHT, *supra* note 4, at 6. Wright comments that "this is a largely unhelpful characterization, [but] notoriously difficult to improve on." *Id.*

[6] *Id.* at 5-8.

[7] Indeed, beyond questions of objectivity, Wright discusses two other distinct

Simon Blackburn approaches the question of what metaphysical realism means by delineating a set of beliefs that characterize the realist's position in a given area of discourse.[8]   According to Blackburn, metaphysical realism posits that the commitments in an area "are capable of strict and literal truth," and that these commitments "describe the world" and "answer to (independent) facts of a particular kind" which "are discovered, not created, and [which] make ontological and metaphysical *demands*."[9]   He adds that in most, but not all, areas of discourse a metaphysical realist would also believe that the facts that make the commitments true or false are "mind-independent" and that the commitments themselves are irreducible.[10]

For a third perspective on the realist/anti-realist debate, I return to the subject of this Article.   Michael Moore also proceeds by offering a checklist, one that aims at describing what it means to be a metaphysical realist about a given class of entities.[11]   Moore maintains that the "full-blooded" realist (1) believes that the entities in question exist and that this existence is independent of individual minds and community conventions, and embraces (2) a correspondence theory of truth, (3) a classical theory of logic, (4) a truth-conditional theory of the meaning of sentences, and (5) a causal theory of meaning (the Kripke-Putnam theory of reference) for natural kind words.[12]

The above summaries reveal the complications and confusions that accompany most discussion within or about the realism/anti-realism[13] debate.   First, arguments put forward to support a

---

kinds of questions that are regularly involved in disputes over "metaphysical realism": questions of the irreducibility of a class of statements and questions of ontology (e.g., the reality of mathematical objects). *See id.* at 8-9.

[8] Simon Blackburn, Options for the World 4 (1989) (unpublished manuscript, on file with author).

[9] *Id.*

[10] For example, a metaphysical realist about psychological ascriptions would not claim mind-independence for those statements. *See id.*

[11] *See* Moore, *Interpretive Turn*, *supra* note 2, at 878-79.

[12] *See id.*

[13] Another terminological note: "Anti-realism" is used in the literature in two different senses. In the broader sense, it means any position opposed to metaphysical realism. In the narrower sense, it is a particular non-realist position (sometimes associated with the work of Michael Dummett). It is in light of the narrower use of the term that a commentator could suggest that Wittgenstein's work was neither realist nor anti-realist. *See* 3 P.M.S. HACKER, WITTGENSTEIN: MEANING AND MIND 545-46 (1990) (arguing that Wittgenstein's *Tractatus Logico-Philosophicus* was neither realist nor anti-realist); P.M.S. HACKER, INSIGHT AND ILLUSION: THEMES IN THE

particular approach often seem to imply the global claim that that approach is superior to all others for all areas of discourse. Usually, however, the evidence offered can establish no more than the (possible) appropriateness of that approach in a single area of discourse.[14] Second, there is often a deep ambiguity about the focus of a theorist's claims: whether they are claims about language (what certain words mean), psychology (what people mean when they use certain words),[15] or the world (whether certain kind of entities exist or not).[16] Similarly, approaches to law purporting to be metaphysically realistic sometimes seem to be about language (arguing that "malice" means one thing rather than another),[17] sometimes about psychology (asserting that by using a particular term speakers (or legislators) intended to defer to (future) experts' opinions about that entity),[18] and sometimes about the world (insisting that certain "moral kinds" or "natural kinds" exist).[19] Because the many connections between these three categories and claims[20] can lead to ambiguity and confusion, part of my task will

---

PHILOSOPHY OF WITTGENSTEIN 62-65, 322-35 (revised ed. 1986) [hereinafter HACKER, INSIGHT] (same). I will use the term in the first, broader sense.

[14] Areas of discourse that often receive special attention in the philosophical literature because they involve special problems regarding truth, meaning, or ontology include: mathematical propositions, modal terms, generalizations of natural science, statements concerning the past, statements concerning the future, ethical propositions, subjunctive conditionals (counterfactuals), and descriptions of other people's mental states.

[15] Though they may mean different things thereby, many theorists refer to speakers' "intentions." Such intentions seem sometimes to involve individuals' thoughts and at other times to involve (perhaps implicit) understandings or conventions within a group. *Compare* Moore, *Theory of Interpretation, supra* note 2, at 323 ("Most ordinary speakers intend by their use of the word 'death' to name a natural kind of event whose nature it is the business of science to reveal . . . .") *with* HILARY PUTNAM, *Is Water Necessarily H₂O?, in* REALISM WITH A HUMAN FACE 54, 70 (James Conant ed., 1990) [hereinafter REALISM] ("[A] community can *stipulate* that 'water' is to designate whatever has the same chemical structure or whatever has the same chemical behavior as paradigms X, Y, Z . . . ." (emphasis added and omitted)).

[16] Note, for example, that Wright's discussion of metaphysical realism and its alternatives focuses on beliefs about "class[es] of statements," *supra* text accompanying note 5, Blackburn discusses "area[s] of discourse," *supra* text accompanying note 8, and Moore is concerned with beliefs about some "class of entities," *supra* text accompanying note 11.

[17] *See* Moore, *Interpretive Turn, supra* note 2, at 884-85.

[18] *See* Moore, *Theory of Interpretation, supra* note 2, at 323-24, 327, 341.

[19] *See* Moore, *Interpretive Turn, supra* note 2, at 882.

[20] For example, a metaphysical realist's claim that "cruelty" refers to a particular "moral kind" entails the claim that such "moral kinds" exist.

be to clarify the nature of the claims that have been made (and those I make in response).

II. SUMMARY OF MOORE'S POSITION

Moore's claims about language can be summed up in two related assertions: (1) whether we realize it or not (and however much some of us may deny it), we intend our words to be understood in a metaphysically realist way,[21] and (2) the definitions offered in dictionaries, statutes, and elsewhere which purport to be authoritative are merely "conventional glosses on the meaning of words."[22] As for the relationship of language to legal theory, Moore would probably say that the former should not be our focus when thinking about the latter. For Moore, language is only an imperfect tool for describing reality. We therefore should not be concerned with the changing and uncertain usage patterns of the words "virtue," "equality," and "death." Instead, we should devote ourselves to discovering the true nature of the things to which those words direct our attention.

I will focus on one article of Moore's, *A Natural Law Theory of Interpretation*,[23] because in it he comes as close as he has yet done to gathering in one place all the strands of the theory of legal interpretation and judicial reasoning he has been developing over the years. In this article Moore is primarily concerned with establishing two propositions: first, that "there is a right answer to moral questions, a moral reality if you like,"[24] and, second, that judges should therefore "seek answers that are really correct" in deciding cases; they should interpret and apply the law in accordance with the moral reality they discern.[25] He also argues that a metaphysically realist theory of meaning can be extended to evaluative terms (for example, "responsible" and "justice") and natural kind words (for example, "bird" and "death"), and that a metaphysically realist analysis should be used even for terms that are specifically defined within a statute.[26]

---

[21] *See* Moore, *Theory of Interpretation, supra* note 2, at 300.

[22] *Id.* at 331.

[23] Moore, *Theory of Interpretation, supra* note 2.

[24] *Id.* at 286.

[25] *Id.* at 287.

[26] *See id.* at 300-01. In this article, Moore took no position on whether a metaphysically realist theory of meaning should be extended to *all* words. *See id.*

My focus in this Article will be on metaphysical realism about meaning (in particular, regarding the meaning of simple descriptive terms) and Wittgenstein's critique of that position. Metaphysical realism regarding other areas of discourse—e.g., science, mathematics, modal terms, and morality—involves other issues and its consideration is outside the scope of this Article (although my discussion may touch upon those issues, and, of course, arguments about metaphysical realism regarding one area of discourse, even though not conclusive, have some relevance to the arguments about metaphysical realism in other areas of discourse[27]).

Moore's metaphysically realist theory of meaning is based on the idea that a word "refers to a natural kind of [thing] that occurs in the world and that it is not arbitrary that we possess some symbol to name this thing."[28] Under this approach, our use of a word and the definition we offer for it will not necessarily be static, but will change as our understanding of the object, event, or idea to which the term refers changes.[29] Moore offers "conventionalism" as the (disfavored) alternative to a metaphysically realist theory of meaning:[30] in contrast to metaphysical realism, "[a] conventionalist theory . . . regards the relationships between symbols and things to be essentially arbitrary."[31]

It would seem that one instance in which recourse to any theory of meaning need not take place is when a judge must explicate a term the legislature has explicitly defined within a statute. Even here, however, Moore gives metaphysical realism a prominent role. He gives an example of how a close (in fact, somewhat myopic) reading of a hypothetical statute's definitional clauses could allow a judge to conclude that a horse with a downy pillow on its back should be considered a bird for purposes of the statute.[32] The

---

[27] *See* SIMON BLACKBURN, SPREADING THE WORD 145-47 (1984).

[28] Moore, *Theory of Interpretation, supra* note 2, at 294.

[29] *See id.*

[30] Moore's bifurcation of theoretical space into metaphysical realism and conventionalism is contentious and strictly speaking, untenable. Wittgenstein rejected the notion that a choice between realism and conventionalism was unavoidable. *See* 2 DAVID PEARS, THE FALSE PRISON 488-89 (1988) (discussing Wittgenstein's rejection of both realism and conventionalism); *cf.* Blackburn, *supra* note 8, at 1-16 (sketching a taxonomy, consisting of four separate approaches, by which philosophical discourse can be undertaken). To be fair, Moore is on the horns of a dilemma: to have an alternative to metaphysical realism specific enough to be summarized and evaluated, he has no choice but to present an approach with which not all opponents of metaphysical realism would agree.

[31] Moore, *Theory of Interpretation, supra* note 2, at 291-92.

[32] *See id.* at 329-32 (paraphrasing H. Pomerantz & S. Breslin, Comment, *Judicial*

statute defined a "bird" as an animal, with two legs, covered with feathers; the horse was an animal, it was covered with feathers, and it had (at least) two legs.[33] Moore's point was that we are vulnerable both to absurd results and to mistaking the legislature's intention if we examine only the statute's stipulative definition. Instead, we must understand that the ordinary meaning and usage of a term and our beliefs about the world provide a background, a context within which we interpret statutory definitions. For Moore, legislative definitions, like conventional definitions, are merely "conventional glosses on the [real or realist] meaning of words;" it may thus be necessary for judges sometimes "to ignore the [legislative] definition when it runs counter to the true nature of the thing the definition was attempting to pick out."[34]

III. THE PROBLEM ABOUT "DEATH"

According to Moore, one major advantage of metaphysical realism over "conventionalism" in the legal context is the latter's relative inflexibility and immobility. He argues that as our understanding of objects and processes in the world changes and improves, "conventionalism" offers neither a process nor a justification for modifying our definitions of words to keep pace. "[M]eaning will 'run out' in our attempt to describe the world."[35] Under "conventionalism," he states, any attempt to apply an old term to new circumstances must be characterized as a change of that term's meaning.[36] His favorite example to explain and justify this realist theory of meaning is that of "death."[37] People once equated death with the cessation of heart and lung function. Such definitions were occasionally incorporated into statutes (for example, determining when a person's organs could be removed for use in transplant surgery).[38] More recently, doctors have gained the ability to revive some persons whose heart and lungs had stopped functioning for a short period of time. Moore points out that doctors and legislators now tend to equate death with the cessation of brain function or with non-revivability. He argues,

---

Humour–Construction of a Statute, 8 CRIM. L.Q. 137 (1965)).

  [33] *See id.* at 329.
  [34] *Id.* at 331.
  [35] *Id.* at 293.
  [36] *See id.*
  [37] *See id.* at 293-94, 297-300, 308-09, 322-28, 382.
  [38] *See id.* at 293, 322-28.

however, that contrary to what he claims a "conventionalist" must believe, the (real) meaning of "death" has not changed. "Whether a person is really dead or not will be ascertained by applying the best scientific theory we have about what death really is. . . . A realist . . . believes that there is more to what death is (and thus what 'death' means) than is captured by our current conventions."[39]

Within this area, Moore's argument for his theory of statutory interpretation has some initial plausibility. If the statute authorizing transplants explicitly used the old definition of "death" we would think it ghastly for a judge to rely on that definition to allow the removal of an organ from a person who could still be revived.[40] For Moore, statutory definitions in such cases are not stipulations so much as initial estimations subject to change. The legislature "should be held to have the same linguistic intentions as other language users, namely, [metaphysically] realist ones."[41]

For my part, I do not think that the word—and the concept of— "death" is as helpful to Moore's metaphysically realist theory of meaning as he implies. His analysis is vulnerable to two kinds of objections: first, that "death" may not be a single "kind" or a sufficiently unitary "kind" to fit into his analysis; and, second, that contrary to Moore's analysis, a "conventionalist" about "death" would *not* be troubled by the increased ability to resuscitate people who once upon a time would have been thought of as "dead." I will discuss these two challenges in turn.

The advances in medical knowledge in the past generation have not created a consensual change in the way we think about death. On the contrary, the advances have only led to unending debate and controversy in many realms: politics, medical ethics, theology, and law. Although more and more persons may now equate death with the complete cessation of brain function (or "higher brain function"), there are still sensible, intelligent observers who insist that those whose brain has ceased to function but who retain heart, lung, and metabolic function (perhaps with the help of "life-support" systems) are still alive. The consensus Moore assumes and implies does not exist.[42] Medical advances have also left us with a series

---

[39] *Id.* at 294.

[40] *See id.* at 322-25.

[41] *Id.* at 323.

[42] I do not mean to claim that consensus is important to Moore. As a metaphysical realist he would not rely on consensus in determining meaning or ontology. In

of intermediate cases: patients in permanent comas, patients in permanent vegetative states, and patients whose brains retain some minimal functioning and who may or may not be able to feel pain or pleasure (doctors cannot tell in many cases). The very active debate in the courts, the legislature, and the academic journals as to when medical treatment for such patients can (should) be discontinued and who should make such decisions indicates that scientific advances have muddled rather than clarified the issue of what death—and life—mean.[43]

One could argue that the ways we have reacted to these medical advances support not a metaphysically realist interpretation of "death," but one based on a criteriological-conventionalist theory of meaning. That is, meaning derives from the list of criteria we associate with a term; when a new situation arises to which some of those criteria apply but others do not, there will then be a break-down in consensus as to whether the term should apply to that situation.[44] One listing of criteria for life might be: systemic function, lower brain function, higher brain function ("conscious-ness"), and ability to feel pain and pleasure. In earlier times, these criteria were always present ("life") or absent ("death") together. Advances in medical science have led to there being patients who exemplify almost every conceivable permutation of these criteria making the absolute terms "life" and "death" less helpful, and there is no consensus regarding what alternative characterizations might be appropriate.[45]

---

this particular discussion, however, he implies that there exists a popular consensus about "death" that reflects the current scientific "best theory" about it. The absence of a consensus on this matter does not by itself disprove metaphysical realism about "death": it may only mean that our perception of a unified category is partial or flawed; but it *may* mean that there is no unified category to perceive. The absence of consensus is not inconsistent with metaphysical realism, but it is *more* consistent with alternative approaches, and it is part of an argument that an approach other than metaphysical realism would be more appropriate.

[43] For an overview of some of the issues in the "right to die" area, see Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); NORMAN L. CANTOR, LEGAL FRONTIERS OF DEATH AND DYING (1987); Brian Bix, *Legal Frontiers of Death and Dying*, 18 SETON HALL L. REV. 523 (1988) (book review); Ronald Dworkin, *The Right to Death*, N.Y. REV. BOOKS, Jan. 31, 1991, at 14.

[44] *See* Moore, *Theory of Interpretation*, *supra* note 2, at 296; *see also* H.L.A. HART, THE CONCEPT OF LAW 123-124 (1961) (offering a criteriological approach to meaning).

[45] *Cf. In re* L.H.R., 321 S.E.2d 716, 722 (Ga. 1984) (stating that in a case in which a terminally ill infant was in a chronic vegetative state "the life support system was prolonging her death rather than her life"); Severns v. Wilmington Medical Ctr., Inc., 421 A.2d 1334, 1344 (Del. 1980) (characterizing the zone in which these permutations

Future scientific advances—ones that are foreseeable, though still far away—will probably further decrease our ability to think (in the way Moore would like) about life and death as simple and separate. The possibility of transplanting one person's brain (and thus that person's consciousness as well?) into another person's body or of cloning persons undermines our traditional ideas about (continuous and unique) personal identity and about death (*qua* the cessation of one person's identity).[46] As our confidence diminishes that "life" and "death" represent two unitary areas that are clearly demarcated, Moore's argument that we are (and should be) metaphysical realists about the term "death" becomes less persuasive.[47]

Moore might argue that in the disagreement between the person who believes that life ends when higher brain functions cease and the person who believes that life ends only when all brain functions cease, there is (must be) an underlying agreement: that there is a fact of the matter regarding when death (the event) occurs; the only disagreement could be about discovering this fact, this truth. The metaphysical realist's response to disagreement is to point out that it is disagreement *about some object or entity*. That is why metaphysical realism is as compatible with substantial disagreement as it is with consensus, and that is why it can explain conceptual change.

An alternative characterization of the dispute is possible, however. When the argument in newspaper editorials and at the meetings of hospital ethics committees is framed in terms of the question, "Is this patient really still alive?" the various terms used

---

occur as "the penumbra where death begins but life, in some form, continues").

[46] *See* DEREK PARFIT, REASONS AND PERSONS 199-320 (1986).

[47] Moore claimed not to be troubled by "more radical . . . thought experiments," since these would only serve to refute "deep conventionalism" while supporting metaphysical realism. Moore, *Theory of Interpretation*, *supra* note 2, at 299. In this regard, he raises the possibility that science will one day discover that although our bodies die our minds continue to live on, and asks: "Would we say that no one dies, that there is no such event as death? Or would we say that death has a very different nature than we had thought?" *Id.* at 299-300.

Moore obviously intends for us to choose the latter alternative. But I for one do not find that my reactions suddenly become metaphysically realist in the face of his thought experiment. I would have concluded from the hypothetical's facts: (1) that the term "death" was becoming increasingly inadequate (over-burdened and over-stretched); (2) that at the least it had come to describe a family-resemblance group of phenomena rather than a unitary "natural kind of event;" and (3) that it would be entirely appropriate to make the "conventionalist" observation that language had run out here and that arbitrary language-choices were thus required to decide whether we should call the newly discovered phenomenon "death" or not. These are hardly metaphysically realist responses (though I cannot be sure how widely shared such responses would be).

("alive," "really alive," "delayed death," "limbo between life and death," etc.) are often only place-markers for positions on difficult ethical questions—for example, "Should this patient continue to receive certain forms of treatment?" The discussion is in terms of "life" and "death" not because of any underlying metaphysical or ontological agreement, but because these are the only terms now available and generally understood in public discourse. The use of these terms in unconventional ways in the dispute indicates a dissatisfaction with, not an acceptance of, the usual semantics and metaphysics.

This analysis need not be confined to Moore's example of "death." It may often be helpful to consider whether labels are being used (in part or in whole) as markers for legal or moral conclusions. For example, disputes regarding whether a particular agreement constitutes a "contract" could be seen as arguments about whether agreements of this kind should be validated and enforced by the legal system.[48] (Wittgenstein often warned against "one of the great sources of philosophical bewilderment: a substantive makes us look for a thing that corresponds to it."[49]). The agreement underlying substantive disagreement need not be a thing to be described; it can be a question of how people should act or of what should be done.

Regarding my second set of responses to Moore, his criticism of a conventionalist approach to "death" depends on whether the greater ability to revive patients in certain circumstances has changed the meaning of the term "death." Moore the metaphysical realist does not think so, but I do not see why someone who was not a metaphysical realist would think so either. The disagreement between the legislators of 100 years ago and the legislators of today is not regarding what death is, but when (by what criteria) one can be certain that life has ended.

Moore complicates matters by focusing not on death, *qua* property of an entity that once was alive but now is not, but rather on death as an event, as the moment of transition between an entity's living and non-living state.[50] This focus leaves Moore with

---

[48] This type of analysis is close to that offered by H.L.A. Hart in his Inaugural Lecture, DEFINITION AND THEORY IN JURISPRUDENCE (1953). In this connection, I note only that such an analysis need not go so far as to posit, as some have read Hart's lecture as having done, that legal terms are *merely* performative utterances. There is conceptual room here for the possibility that such terms are also (at least in part) descriptions (or interpretations) of past legal actions.

[49] LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 1 (1969).

[50] *See, e.g.,* Moore, *Theory of Interpretation, supra* note 2, at 294 ("'death' refers to

the problem of how to describe a person whose heart has stopped and who could still be revived, but who, if resuscitation techniques are not applied quickly, will become unable-to-be-revived. Is that person alive during this "transition period," even though none of the normal signs of life (for example, breathing and pulse) are present? Moore might say that the person is still alive (or, at least, "not dead") because resuscitation is still possible; death, the event, occurs at the point when resuscitation is *no longer possible*. If this is our final conclusion, however, there is no reason to think that "conventionalists" past or present would ever have disagreed, nor that they would believe, merely because the dividing line has changed with medical progress, that the meaning (or even the definition) of "death" has changed.

The discovery that some cessations of breathing are only short-term or are reversible is nothing more or less than that. There is a flexibility to language and to meaning that allows it to adapt to minor changes in circumstances without forcing us to come up with wholly new concepts (or to become metaphysical realists). We are allowed to judge whether a slight increase in revivability changes the concept of "death" (either as event or as state of being).[51] We have not yet concluded that the concept has changed (or needs to be changed), but we might well judge differently in the future if we discover, for example, that people could be revived after having been frozen for 100 years or that bodily functions could be maintained indefinitely after all brain functioning had ceased permanently.

IV. CHANGING BELIEFS AND CHANGED CONCEPTS

Moore insists that "conventionalism" cannot justify such flexibility in the use of language; under approaches other than metaphysical realism any modification in criteria must constitute a change in concept. Though there may be theorists who believe that the only alternative to platonism about meanings is to equate a term rigidly with certain sufficient and necessary conditions, this is certainly not true for most theorists in the literature, and specifically not true of the later Wittgenstein.[52]

---

a natural kind of *event* that occurs in the world" (emphasis added)).

[51] At the least, we seem to have added the concept "clinically dead" for those whose breathing stops but who are later revived.

[52] *See, e.g.,* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 65-88 (G.E.M. Anscombe trans., 3d ed. 1968) (noting that the mere fact that a word has a

In his discussions of family resemblance, ostensive definitions, and rule-following, Wittgenstein emphasized that how we apply terms depends as much on judgments—common, shared judgments that can be traced to a common "form of life"—as it does on reference to set criteria or paradigms.[53] Even though scientific beliefs about these concepts have changed in the last 100 years, a Wittgensteinian need not say that "momentum" or "simultaneity" either refers to something different or has a different meaning now than it did before Einstein's work caused us to rethink these notions. In Hilary Putnam's words, it is a matter of recognizing that a word can have a new sense (and new applications) without having a new meaning, and it all depends on people (whether scientists or laymen) "knowing how to go on."[54] Whether a particular novel set of circumstances is sufficiently similar to other events we have called "death" to also carry that label is like the decision whether a particular activity is sufficiently similar to other activities we know as "games" to be called a game.[55]   As I have discussed elsewhere,[56] these decisions cannot be ascribed to platonic entities or described as arbitrary choices. They come from people reacting in a certain way, "doing what comes naturally."

The starting point for analysis is that in the contexts of changing beliefs over time and disagreement in beliefs between persons at a particular time, we often assume/believe/act as if the subject of the changing beliefs or the disagreement in beliefs is constant. Moore argues that this attitude entails metaphysical realism, that "constant subject" must mean platonic entity. I do not agree. There is no sharp divide between a change of beliefs about a concept and a change of concepts. The idea of "same concept" is not itself

---

"family" of (different but related) usages does not deprive it of meaning); *see also* G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: UNDERSTANDING AND MEANING 315-450 (1980) (discussing how Wittgenstein offers a theory of meaning that makes room for vague concepts).

[53] *See* WITTGENSTEIN, *supra* note 52, §§ 65-74, 208-09, 212-17, 224-27; G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY 165-81 (1985); BAKER & HACKER, *supra* note 52, at 178-84, 320-43.

[54] *See* Hilary Putnam, Mathematical Necessity Reconsidered 19 (1990) (unpublished manuscript, on file with author). Although Putnam's discussion refers to Cavell's analysis, *see* STANLEY CAVELL, THE CLAIM OF REASON 120-22 (1979), Putnam notes that the phrase in quotes, used by Cavell, is borrowed from Wittgenstein.

[55] *See* WITTGENSTEIN, *supra* note 52, §§ 65-77 (discussing "game" as a family-resemblance concept).

[56] *See* Brian Bix, *The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory*, 3 CANADIAN J.L. & JUR. 107, 108-13 (1990); *see also infra* notes 58-66 and accompanying text.

transparent and self-evident.[57] These points may be clearer in the (slightly) less emotionally charged discussions about "justice," "democracy," "equality," or "the Christian way of life," than it is in Moore's hypothetical situations involving "death." In political and moral discourse, it is equally hard to show that the disputants are definitely talking about the same thing or that they are definitely *not* talking about the same thing when they disagree (e.g., about "justice" or "democracy"). In any attempt to analyze disagreement in these areas or to discuss scientific progress over time, change in beliefs and change in concepts merge.

As the line between change in beliefs and change in concepts in many areas blurs upon close inspection, one can be skeptical about the ability to use substantive disagreement as a base for proving (or disproving) metaphysical realism.

V. WITTGENSTEIN'S CRITIQUE OF PLATONISM

In earlier Parts, I have argued that Moore has overstated the difficulties of approaches to language and meaning other than metaphysical realism. In this Part, I will suggest that he has also overstated the strengths of metaphysical realism.[58] The argument will proceed by summarizing and adapting Ludwig Wittgenstein's criticism of platonist approaches to meaning.[59] The platonist

---

[57] In much the same way that Wittgenstein argued that the idea of "the same" could not be analyzed separately from the idea of a "rule," *see* WITTGENSTEIN, *supra* note 52, §§ 208, 224-25, one could argue that the idea of "same concept" cannot be analyzed separately from the way concepts are actually used. We are often willing to describe slightly different objects or slightly different situations as "the same." How much leeway there is in this expression (that is, how different objects have to be before we feel compelled to describe them as "different") is itself responsive to, and reflective of, our usages and practices.

[58] There are a number of places where Moore seems to underestimate the philosophical difficulties of a metaphysically realist approach. For example, within a handful of pages in one article, Moore both supports a causal theory of reference/ meaning and asserts that causation is itself a natural kind. *See* Moore, *Interpretive Turn, supra* note 2, at 876, 882. As Putnam noted, if meaning and reference are explained by a particular relationship between ourselves or our language and the world (here, causation), there is a problem with describing or understanding that relationship. The relationship must be somehow primitive or a priori and cannot itself be subject to further explanation by the same relationship without descending into an infinite regress. *See* HILARY PUTNAM, *Is the Causal Structure of the Physical Itself Something Physical?, in* REALISM, *supra* note 15, at 80, 83-90.

[59] My discussion of Wittgenstein's critique follows that of David Pears. *See* 2 PEARS, *supra* note 30, at 423-534; David Pears, *Rule-Following in* Philosophical Investigations, *in* WITTGENSTEIN IN FOCUS 249, 249-61 (Brian McGuinness & Rudolf Haller eds., 1989).

claims that the meaning of a term somehow exists out in the world and that our minds are in some way able to grasp that meaning. Understanding a term's meaning is thus equivalent to grasping the platonic entity, which in turn somehow guides our application of the term in a potentially infinite number of circumstances.

The platonist is looking for something *in the world* that determines what the meaning of particular terms is and how those terms should be applied. Placing meanings in the world seems to solve many problems: meaning is now constant even in the face of scientific progress or lack of consensus, and evaluations of correctness of meaning and correctness in application seem to be independent of people's beliefs about the object.

Wittgenstein offered the following image for the idea that the rule for applying a term already exists in the world: "[W]e might imagine rails instead of a rule. And infinitely long rails correspond to the unlimited application of a rule. . . . I no longer have any choice. The rule, once stamped with a particular meaning, traces the lines along which it is to be followed through the whole of space."[60] Wittgenstein then added: "But if something of this sort really were the case, how would it help?"[61]

Having meanings "in the world" would only help us if there were some way for us to have cognition of, to grasp somehow, those meanings. "Rails laid out to infinity would be useless unless the traveller were locked on to them, and, similarly, complete guidance by rules already laid down in reality would be useless unless there were something in the rule-follower's mind that latched him on to them infallibly."[62]

Even if our minds did internalize some magic image or formula that was said to contain all the applications of a term, it would not be enough. For that image or formula would still need to be interpreted.[63] Images (and the related ostensive definitions), like

---

"Platonism" refers to certain kinds of metaphysical realism, usually theories whose ontology and epistemology resemble the positions advocated in Plato's dialogues. Sometimes the term is used even more broadly to refer to all forms of metaphysical realism. I am using it in the narrower sense, as Wittgenstein's arguments seemed directed against a particular kind of metaphysical realism. As I will argue, however, attempts to move to a "more defensible" form of metaphysical realism will not necessarily allow the theorist to escape the force of Wittgenstein's critique.

[60] WITTGENSTEIN, *supra* note 52, §§ 218-19.

[61] *Id.* § 219.

[62] 2 PEARS, *supra* note 30, at 466.

[63] *See* WITTGENSTEIN, *supra* note 52, §§ 139-41; 2 PEARS, *supra* note 30, at 469-73.

rule formulations, are not self-interpreting. Their connections to objects, to actual applications, are explained by the way people act and react. The process of natural reaction is illustrated in the following passage from Wittgenstein's lectures:

> For instance: you say to someone "This is red" (pointing); then you tell him "Fetch me a red book"—and he will behave in a particular way. This is an immensely important fact about us human beings. . . .
>
> Another such fact is that pointing is used and understood in a particular way—that people react to it in a particular way.
>
> If you have learned a technique of language, and I point to this coat and say to you, "The tailors now call this colour 'Boo'" then you will buy me a coat of this colour. . . . The point is that one only has to point to something and say, "This is so-and-so", and everyone who has been through a certain preliminary training will react in the same way.[64]

Metaphysical realism of this full-blooded platonist type (with meanings equated with platonic entities) is thus shown not to help— indeed, not to affect—the language user. Even if we posit the existence of these strange platonic entities, meaning and usage still come down to human judgments and human reactions, not to abstract entities. Moore may appear to avoid the force of Wittgenstein's criticisms by joining his metaphysical realist ontology with a coherence epistemology,[65] but he can do so only at the cost of undermining the significance of his approach. Once one rejects the claim that we have some direct cognition of the "real," the advantage of metaphysical realism—in explaining how we actually behave or in prescribing how we should approach problems of meaning—seems to disappear. If what we are to seek are beliefs that fit in well with our other beliefs and observations, and our sole criterion for accepting a belief is its fit with our other beliefs and observations, then the platonist notions about truth and meaning are empty concepts that serve no purpose. If a theorist writes about

---

[64] LUDWIG WITTGENSTEIN, WITTGENSTEIN'S LECTURES ON THE FOUNDATIONS OF MATHEMATICS 182 (Cora Diamond ed., 1976).

[65] *See* Moore, *Theory of Interpretation, supra* note 2, at 312. Moore is describing a "coherence epistemology" when he asserts that "[j]ustification of any belief about anything is a matter of cohering that belief with everything else that we believe." Moore, *Ethical Generalization, supra* note 3, at 198. This is contrasted with a "foundationalist epistemology," according to which beliefs and justifications of knowledge-claims are based on indubitable sensory experiences, first principles, or analytical truths. *See id.* at 197-98.

judges searching for "the best scientific theory of what death *really* is like" or "what vehicles *really* are," the implicit invocation of "reality" and "[metaphysical] realism" does not affect what the judge should do or think. The term "real" here is a disconnected wheel in the machinery: it spins but it does no work.[66]

VI. MOORE'S PROJECT: A SECOND LOOK

Perhaps Moore's metaphysical realism is not supposed to help us. It is not always clear from Moore's articles how he views his project, whether as reform or as revisionist description. On the one hand, he is emphatic that beliefs regarding metaphysical realism make a difference, in the sense that whatever position one takes on metaphysical questions will have an effect on practical matters: "I aim . . . to rescue the debate itself from the criticisms of those who proclaim it either meaningless or irrelevant to any practical concern. . . . The metaphysical debate over realism is both meaningful and relevant to practical concerns, in law as elsewhere."[67] More specifically, he argues that metaphysically realist views will "lead [their holders] to practice law in quite a distinctive way,"[68] yielding approaches to the construction of statutes, the application of precedent, the interpretation of the United States Constitution, and even the conduct of legal theory that stand in vivid contrast to those that follow from "conventionalist" views.[69]

Regarding my chosen focus, metaphysical realism about meanings,[70] Moore is clear that here, too, adherence will entail a change of practice and lead to changes in the outcome of cases:

Judges should guide their judgments about the ordinary meanings of words by the real nature of the things to which the words refer

---

[66] *See* Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1782-85 (1987) (discussing the drawbacks of Moore's realist approach to judicial decisionmaking); Dennis M. Patterson, *What Was Realism?: A Reply to David Brink*, 2 CANADIAN J.L. & JUR. 193, 194-95 (1989) (pointing out that Brink uses the term "real" in two different senses, neither of which indicates how to choose among competing interpretations of legal materials).

[67] Moore, *Interpretive Turn*, *supra* note 2, at 873.

[68] *Id.* at 883.

[69] *See id.* at 882-88.

[70] As in other discussions in this Article, I am bypassing questions involving the realism/anti-realism debate as regards other areas of discourse. Moore had a great deal to say, for example, about a metaphysically realist approach to morality and moral terms, and how that approach might (or might not) require a change in how judges decide cases. *See* Moore, *Theory of Interpretation*, *supra* note 2, at 388-96. Such questions are beyond the scope of my project, however.

and not by the conventions governing the ordinary usage of those words . . . .[71]

[J]udges should use the realist theory of meaning [rather than a "conventionalist" theory] whenever the ordinary meaning of a legal text is relevant.[72]

[T]he realist theory of meaning . . . seems likely to produce better results in the long run [than would a "conventionalist" a- pproach].[73]

The message in all of this is that we ought to change our beliefs— "mend your ways," Moore seems to say, "seek truth, not error"—and thereby change (that is, improve) our practices.

But against this theme there sounds at times a quite different one: no change in our practices is required after all for whether we know it or not we are already metaphysical realists. It is only the description of what we do that requires revision. Not unlike Monsieur Jourdain, we "conventionalists" thus discover to our surprise that we "have been speaking [metaphysically realist] prose [all along]."[74]

The respective legislatures using the word "death" in the above statutes should be held to have the same linguistic intentions as other language users, namely, realist ones.[75]

[Most people] fairly expect their courts to give "death" the meaning they themselves would give it: as the name of a natural kind of event about which we can learn all sorts of surprising facts without changing the meaning of the word at all.[76]

[O]ur interpretive practices reveal us to be . . . metaphysical realists . . . . [T]he way we use language in both ordinary speech and in statutes presupposes a realist metaphysics about the hidden nature of natural kinds.[77]

Finally, there is a third theme: that while reforming one's actions and thoughts to Moore's requirements would get one to the

---

[71] *Id.* at 287.
[72] *Id.* at 301.
[73] *Id.* at 325.
[74] *See* JEAN BAPTISTE MOLIERE, LE BOURGEOIS GENTILHOMME act 2, sc. 4 (1670), *in* 5 THE DRAMATIC WORKS OF MOLIERE 221 (Henri Van Laun trans., 1875).
[75] Moore, *Theory of Interpretation, supra* note 2, at 323.
[76] *Id.* at 324.
[77] *Id.* at 397.

right answer, it may be that one would be as likely, or even more likely, to get there by a different path, perhaps even by intuition.[78] Moore writes that his thesis aims "at telling us what is the correct interpretation of a legal text, not what psychological steps judges should go through to reach it."[79]

This is all rather confusing, and probably not entirely consistent. There is indeed something strange, something paradoxical, about the whole project. Moore purports to tell us how to understand language. The usual stuff of law review articles concerned with such matters consists of arguments insisting that there are special methods for understanding and interpreting legal texts—e.g., viewing enactments in light of the problems to which they were responding, treating judgments as if they were portions of chain novels, or remembering that it is a constitution we are expounding. Moore's prescription is not (primarily) of that form; he often emphasizes that the interpretation of legal texts ought *not* differ from that of ordinary texts.[80] But surely we understand normal words and sentences (in our own language) well enough, and if we were to need assistance it would likely be from a dictionary rather than a philosophical treatise.

I would venture that Moore took this possible response into account, implicitly if not explicitly. It is what accounts for the theme of nonreform, of "mere" revisionary description in his articles. What remains to be explained then are the prescriptive elements. One possible reason for them is the view, which sometimes surfaces in the articles, that judges, though metaphysical realists in "real life" like the rest of us, are as a group under the delusion that they should follow awkward conventionalist theories when they interpret statutes.[81] I offer another possible explanation: Moore's arguments have a prescriptive force on the occasions when we (as interpreters and appliers of norms) must choose between speakers' meaning and words' meaning, and when we have to decide how to treat each after the passage of time. As to the latter, the question is how we should treat a rulemaker's comments about entities if popular or expert opinion about those entities has

---

[78] *See id.* at 396 n.218.

[79] *Id.*

[80] *See, e.g., id.* at 323 ("[L]egislatures . . . should be held to have the same linguistic intentions as other language users.").

[81] This is suggested, among other places, in Moore, *Theory of Interpretation, supra* note 2, at 326 n.86, 333-36, 353-58.

changed. While these are difficult questions of policy, the notion that a philosophical theory about meaning could settle the matter does not seem tenable.

Moore tries to transform difficult questions of authority and interpretation into the more direct question of semantic content, removing the whole question of speaker's intent by reducing it to a simple function of semantic content. He seeks to prevent the chasm between speakers' meaning and words' meaning from coming about by talking about speakers' "linguistic intentions" as to how their words should be understood, and then positing that everyone's "linguistic intentions" are (a priori?) the same.[82] All of this analysis is, however, powerless to make the chasm disappear. When, for example, due to my ignorance of botany, I say "lady slipper" when I wish to refer to tulips, I still want to be understood as referring to tulips, even though the reference of the term "lady slipper" itself is not what I take it to be. Our "linguistic intentions" are often to be understood according to what we meant, even when this seems to disagree with what we said. With authority subsumed by semantic content in Moore's analysis, it is possible to claim that a rulemaker's term should always be interpreted in keeping with our best current theory about the entity named. The independent claim of authority in law, and the problems it poses for judicial interpretation, cannot be so easily overcome.

Perhaps the reason it is so unclear whether Moore's metaphysical realist positions are supposed to make a difference is that the whole theoretical machinery works largely as a diversion or a disguise. The theory is there as an excuse to focus on semantic content and to discount or ignore authoritative intentions.

VII. Two Additional Criticisms

Before moving to other topics, I want to mention briefly two more criticisms of Moore's work. First, Frederick Schauer has recently argued that Moore's writings should be understood not so much as discussions of meaning or metaphysics as of rule application. In applying a nineteenth-century statute that contains the words "death" or "vehicle," Schauer argues, the decision to interpret those words in terms of our current understanding of them rather than the drafters' understanding is simply a choice to interpret the rule according to its purpose rather than according to the meaning

---

[82] *See id.* at 323-24.

of a rule-formulation.[83]   Throughout his book, Schauer refers to this as particularistic decisionmaking, as contrasted with rule-based decisionmaking. The rule-based approach, accepting the drafters' notions about what the words mean, may lead to some absurd or suboptimal results, as is the case with all rule-based decisionmaking (consider the usual hypothetical examples, the statues, emergency vehicles, and cleaning vehicles that seem to be within the scope of the rule "no vehicles in the park"[84]). Here, as elsewhere, however, all the benefits of staying with rule-based decisionmaking may be found: predictability, stability, separation of powers, and so on. The "metaphysically realist" approach thus may be better as a matter of policy, but should not be seen as required as a matter of the nature of language or the nature of rules.[85]

Whatever the merits of Schauer's argument as a reading of Moore, it hints at a basic problem with many recent articles on law and interpretation (and law and rhetoric, law and hermeneutics, and law and Wittgenstein). The question of how judges should decide cases cannot be conclusively resolved—it probably cannot be more than slightly furthered—by a (new and better) theory about meaning or understanding. All the important questions can be answered—and *should* be answered—by a political theory about the appropriate

---

[83] *See* FREDERICK SCHAUER, PLAYING BY THE RULES 215-18 (1991).

[84] *Id.* at 74-75.

[85] *See id.* At one point, Moore briefly considers but then brushes aside an argument similar to Schauer's. He imagines a situation in which a judge must decide whether or not to permit the removal of organs from a patient who, though "dead" by the criteria of an old authorizing statute, was nonetheless revivable by present-day means. Moore notes that a "conventionalist" judge could justify refusal to permit the organs to be removed by observing that "all judges check ordinary meaning against the *purpose* of a rule." Moore, *Theory of Interpretation, supra* note 2, at 328. The judge would, however, be "us[ing] a realist notion of death in formulating the purpose behind the rule." *Id.* At best, this takes the argument too quickly.

A judge in the above hypothetical situation could argue as follows: at the time the statute was enacted the rulemakers thought that "death" (the event) was a simple boundary between life and death (the state of being). Now we know that some patients go through not one, but two "events" before they are dead: first, a point at which most bodily functions cease, but the patient could still (in principle) be revived; and second, the point at which the patient can no longer be revived. Whether we call the first event "death" (as in the original statute) or "clinical death" or something else, it would clearly be contrary to the purpose of the original enactment to allow organ removals before the second event (nonrevivability) is reached. Contrary to Moore, this account does not require a metaphysically realist view of "death" (the event), and as there has been no change in beliefs about "death" (the state of being) the question of metaphysical realism about that term does not arise.

relationships among rulemakers, rule-interpreters, and the general public.

This conclusion is supported by the fact that the same judicial action can be characterized in so many different ways. For example, the judge's refusal to permit the removal of organs from a revivable patient on the strength of an outdated statute could be seen as: giving effect to the (metaphysically) real meaning of "death" rather than a legislative definition thereof; overriding the plain meaning of a statute to avoid an unjust or absurd result; interpreting the language of a rule in accordance with its purpose; applying a statute in a way that reflects what the rulemakers would have provided had they considered the situation at hand; or any number of similar things. One's political theory might place above all else either making a rule's interpretation accord with the general public's understanding of the rule or following the rulemaker's wishes. In either case it would be appropriate to follow the general public/rulemaker's understanding of what a particular term in the rule-formulation meant, even if that understanding was wrong or misguided according to one's philosophical (and scientific) theories regarding what the term "actually" means[86]

The second criticism is that Moore's arguments sometimes seem to confuse causes with effects, or at least labels with explanations. In one place, Moore writes that the legal term "malice" is a "functional kind" whose nature is "whatever makes one properly liable for the punishment fixed for murder,"[87] where murder is defined as "a killing . . . performed with malice."[88] In discussing the idea of right answers to legal problems, he writes that for a metaphysical realist, "an answer is right when it corresponds to a complex moral fact (which in law includes the institutional facts that further moral facts make important)."[89] This seems to translate to nothing more than saying the "right answer" is what a judge gets after properly applying the appropriate standards and balancing

---

[86] I do not claim that the authors discussed in this Article would necessarily disagree with my position. On the contrary, I think their articles tend to support me in this respect. For example, Brink explicitly states that a proper semantic theory is only one part of a theory of legal interpretation and that the "semantic content" of a statute might be bypassed if it is clear that the rulemakers meant something else by those words. *See* David O. Brink, *Semantics and Legal Interpretation (Further Thoughts)*, 2 CANADIAN J.L. & JUR. 181, 186-88 (1989).

[87] Moore, *Interpretive Turn*, *supra* note 2, at 886.

[88] *Id.* at 884.

[89] Moore, *Epistemology*, *supra* note 3, at 480.

techniques. As with the "functional kind" "malice," the metaphysical entity posited ("a complex moral fact") does not guide the reasoning process, it merely decorates it.[90]

VIII. SUMMARY OF BRINK'S POSITION

> If, say, a chicken began to lay perfectly ordinary walnuts which
> were planted and grew into walnut trees, I would not wish to refer
> to this result as the production of a grove of chickens.[91]

There are many parallels between the writings of Michael Moore and those of David Brink, though it is hard to find reference to either in the other's work. Moore has written extensively in law journals, his primary theme often being the defense and application of metaphysical realism. Brink has published primarily in philosophy journals, where he has defended his own version of metaphysical realism;[92] he has, however, also written a handful of articles about legal theory and law, which, though they have not directly promoted metaphysical realism, have centered on an approach to reference and meaning that is often associated with it.[93] In addition, Brink has criticized legal positivism on the grounds that it is based on "empiricist" semantics,[94] a criticism analogous to Moore's argument against legal positivism as having been based on "conventionalism."

Brink argues that all legal theories rely on some semantic theory and that the theory upon which most forms of legal positivism have been grounded is wrong.[95] He characterizes legal positivism as basing the argument for judicial discretion[96] on the open texture

---

[90] Ronald Dworkin's discussions of "right answers" may be subject to a similar criticism, but Dworkin was less insistent that his ideas about "right answers," by themselves, were either guiding judges in their actions or explaining those actions after the fact. *See generally* RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985) (explaining and arguing for his "right answer thesis").

[91] John Dupre, *Natural Kinds and Biological Taxa*, 90 PHIL. REV. 66, 88 (1981).

[92] He has recently published a book on the subject. *See* DAVID BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989).

[93] *See* Brink, *supra* note 86, at 181-85. His most comprehensive work in this vein is David Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988) [hereinafter Brink, *Legal Theory*].

[94] *See* Brink, *Legal Theory*, *supra* note 93, at 111-21.

[95] *See id.* at 111-16.

[96] Brink states that "[a] judge has discretion [insofar as] her decision is not controlled by standards set by [some outside] authority." *Id.* at 112; *see also id.* at 106 (asserting that discretion exists where questions "are genuinely legally indeterminate" and that the exercise of such discretion entails "exercising at least a limited legislative capacity"). Other theorists use the term in a similar way, *see, e.g.,* RONALD DWORKIN,

of general terms, an argument based on a semantic theory that ties a term's meaning and reference to the properties speakers associate with the term.[97] On this view, if people with legal training disagree about the application of a term to a particular case, then the term's meaning and reference is uncertain in that area and a judge must use discretion in deciding whether and how the term should apply.[98]

Brink points out two related problems with the semantic theory allegedly implicit in legal positivism. First, it has trouble explaining disagreement: if two people have different ideas about "mass" or "due process," the theory would be forced to conclude that these people were talking about different things.[99] Second, the theory cannot distinguish changes in belief from changes in subject matter: it cannot accommodate the fact that someone's (or some community's) beliefs about "gold" or about "cruelty" can change without the object of those beliefs having become different.[100]

As an alternative, Brink proffers a semantics predicated on the notion that "the way the world is," rather than our beliefs about it, determines the reference[101] of our words.[102] He argues that a correct semantic theory will show that meaning—or at least reference—does not depend on users' beliefs about a term, but only on the properties of the object or class of objects to which the term corresponds. The beliefs of authorities and experts will be "our best evidence about . . . the nature of" a term's referent,[103] though Brink acknowledges that the experts will sometimes

---

TAKING RIGHTS SERIOUSLY 32-33 (1978), and it is in this sense that it is employed in the analysis that follows.

[97] *See* Brink, *Legal Theory, supra* note 93, at 112-13.

[98] *See id.* at 112.

[99] *See id.* at 114-16.

[100] *See id.* at 115-16.

[101] For those, like Brink and Putnam, who want to maintain "the traditional semantic theory's claim that meaning determines reference," "the way the world is" would also constitute a large part of a term's meaning. *Id.* at 118.

Some Wittgensteinians would resist a strong connection between meaning and reference, both in the "traditional" version of that connection and in the Brink/Putnam version, where meaning could be said to include knowledge about the referent, even if most speakers do not have that knowledge. *See* G.P. BAKER & P.M.S. HACKER, LANGUAGE, SENSE & NONSENSE 221 n.19 (1984); HACKER, INSIGHT, *supra* note 13, at 247-48. Brink is willing to allow for other conceptions of meaning so long as they do not provide that meaning determines reference. *See* Brink, *Legal Theory, supra* note 93, at 118.

[102] Brink, *Legal Theory, supra* note 93, at 117.

[103] *Id.*

disagree, and that even when they are all in accord their beliefs about particular objects may yet prove erroneous. This, however, means only that there is a risk that judges will occasionally get matters wrong; it does not mean that they are free to disregard the available evidence in interpreting a term, still less that any choice they make in doing so will be per se acceptable.

A semantic theory of this kind has no difficulty dealing with disagreements about the meaning of words or with the evolution of a term's meaning over time.[104] Our disagreement with our colleagues (and our forebears) about what constitutes "due process" or "cruel and unusual punishment" does not come about because we are talking about different things, but because we disagree about the real nature of the matter in question, about which at least one of us is wrong.[105] Moreover, since on this view mere disagreement about a term does not justify judicial discretion in applying it, the amount of legal indeterminacy we will be forced to endure will be much smaller than if we were to embrace a legal philosophy grounded in a mistaken semantic theory.[106]

IX. CRITICISM OF BRINK

The major problem with Brink's argument is that it attacks a non-existent adversary. No legal theorist I know has advocated either the view of semantics or the view of judicial discretion Brink describes. The theorist he uses as an example, H.L.A. Hart,[107] had a very different view, as I have discussed in detail

---

[104] *See id.* at 116-19.

[105] *Cf.* RONALD DWORKIN, LAW'S EMPIRE 11-44 (1986) (discussing the nature of disagreements in law). Brink does allow for one type of situation where judicial discretion would be required: where there is agreement about what criteria should be used to determine whether a term applies, but there is disagreement in the application of the criteria to a particular case. *See* Brink, *supra* note 86, at 189. He gives the example of whether an extremely dark charcoal shade should be considered gray or black. He called such cases "borderline" or "fuzzy" cases, *see id.*, though they are far closer to Dworkin's idea of a "weak sense of discretion" than they are to Hart's ideas about discretion in borderline cases. *Compare* DWORKIN, *supra* note 96, at 31-32 (distinguishing a weak sense of discretion, where standards cannot be applied mechanically, from a strong sense of discretion, where given standards are not binding) *with* HART, *supra* note 44, at 123-26 (arguing that judges have to make "a choice between open alternatives" when deciding borderline cases).

[106] *See* Brink, *Legal Theory, supra* note 93, at 119-21.

[107] Brink describes his argument as contrary to the view presented in Hart's *The Concept of Law. See* Brink, *Legal Theory, supra* note 93, at 106-07, 114. At times, however, he appears less than certain that his characterization of Hart's presentation is accurate. *See* Brink, *supra* note 86, at 189 n.8.

elsewhere.[108] Briefly, Hart argued that judges have discretion in part because rules embody choices made relative to particular situations and circumstances; when the rule must be applied to other situations and circumstances a fresh choice must be made. This model has its own difficulties, but they are not those described by Brink.

Brink's approach does not help us if we believe that judicial interpretation is largely a matter of implementing (or being "guided by") the choices made by people in authority. That we now use certain words differently than did the makers of a rule may be interesting, but it is hardly relevant to the task of implementing that earlier (authoritative) choice.[109] Brink might respond that the rulemakers wanted above all to refer to a type or group, and thus if we now know more about the boundaries and the nature of that type or group, we should, if we truly wish to implement their choices, take that additional knowledge into consideration.[110] He does not deny, however, that a rulemaker's "specific intent" may diverge over time from the "semantic content" of a rule, or that the former should at times override the latter in implementing a rule.[111] It thus appears that Brink has added little—apart from a rebuttal of a position no one holds. Indeed, at the end of his primary discussion of interpretation, he casually admits that "meaning and purpose can conflict, and this gives rise to certain interpretive difficulties."[112] We have not travelled very far at all from Hart's picture of rule-application and judicial discretion in *The Concept of Law*.

A similar point can be made about Moore's work. Even if one agreed that judicial practices should be reformed in keeping with Moore's suggestions, and even if one allowed that metaphysical realism requires us to change radically our ideas about meaning in some cases, it might still be the case that adopting the metaphysical realist program would not substantially change the results courts reach. Moore prescribes a four-step interpretative scheme for judges to follow: (1) determine the ordinary meaning of the text; (2) determine "what interpretation is suggested" by precedent; (3)

---

[108] *See* Brian Bix, *H.L.A. Hart and the "Open Texture" of Language*, 10 LAW & PHIL. 51, 65-71 (1991).

[109] *See* Larry Alexander, *Of Two Minds About Law and Minds*, 88 MICH. L. REV. 2444, 2446-47 (1990).

[110] *See* Brink, *Legal Theory*, *supra* note 93, at 122-23.

[111] *See id.* at 124-25; Brink, *supra* note 86, at 186-88.

[112] Brink, *Legal Theory*, *supra* note 93, at 128-29.

check the ordinary meaning and interpretation suggested by precedent against "what the judge takes to be the purpose of the provision"; and (4) "check[] ordinary meaning, precedent, and purpose against an 'all things considered' value judgment about the best result in this case."[113]

Moore considers but then rejects the idea that his approach to meaning and morality would entail giving precedent no weight. "Even a [metaphysical] realist, who thinks that all interpretation should aim at describing the nature of the moral or natural quality named by legal texts, can and should admit that the rule of law virtues are real values too and that, accordingly, how prior courts have decided like cases has some moral force behind it."[114] According to Moore, the moral force a precedent has varies because the predictability and reliance interests fostered by respect for precedent are more important in some areas of law (for example, criminal law) than in others.[115]

Thus, for a Moorean judge, in common law cases as well as in those involving statutory interpretation, the lessons of metaphysical realism must often yield to, or at least be modified by, the value of adherence to past decisions. Moore recognizes that within any legal system the value of getting the meaning of the words right is often offset by considerations of consistency, public expectations, and justice. The fact that a judge with proper metaphysically realist credentials would interpret a sentence one way under normal circumstances does not mean that this judge should interpret that

---

[113] Moore, *Theory of Interpretation, supra* note 2, at 376.

[114] *Id.* at 372.

[115] *See id.* at 363. The match here with Ronald Dworkin's conclusions about precedent is almost exact. *See, e.g.,* DWORKIN, *supra* note 105, at 367 ("Law as integrity is sensitive to the different marginal value of certainty and predictability in different circumstances.").

There are a number of other parallels with Dworkin's work. Like Dworkin, Moore rejects, on grounds both of plausibility and value, an "intentionalist" approach to interpretation. *See id.* at 313-37; Moore, *Theory of Interpretation, supra* note 2, at 338-58. In addition, Moore's worry that deferring to the ordinary meaning of a statute could lead to absurd or unjust consequences leads him to assert that a judge should "construct[] the morally best purpose for a statute, and constru[e] it by reference to that purpose," *id.* at 354, a position that obviously resonates with Dworkin's work. The resonance may be even stronger in Moore, *Ethical Generalization, supra* note 3, at 210 (arguing that the judge should approach questions of precedent with a view to "constructing the most morally coherent account of all common law decisions"). These surface similarities in aspects of Dworkin's and Moore's theories, however, should not distract us from the basic differences in approach and methodology. For a slightly partial overview of the differences, see Moore, *Epistemology, supra* note 3; Moore, *Interpretive Turn, supra* note 2, at 942-57.

sentence the same way when it is part of a legal rule that the judge is to apply.   Within Moore's own suggestions about judicial reasoning, metaphysical realism about meanings is only one factor among many in determining how *this* statute should be applied to *this particular* fact situation.

X. THE KRIPKE-PUTNAM THEORY OF REFERENCE

[A] passage [in Borges] quotes a "certain Chinese encyclopaedia" in which it is written that "animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies.[116]

In the remainder of this Article, I will consider the Kripke/ Putnam approach to semantics and reference more closely. I want to examine whether that approach entails metaphysical realism, as Moore believes it does,[117] or whether it is compatible with other views, in particular those of Wittgensteinian theorists. My conclusion is that the necessary connection Moore asserts does not exist; thus he does not benefit from aligning himself with Kripke/Putnam.

Putnam argues that meanings are not in the mind.[118]   What a person means by a word is not merely a summation of that person's beliefs about it, nor is it given by some consensus within a community about the term.   Instead, the use of a term acts primarily as a pointing, an act of ostension.   What I mean by "water" is the group/category/kind of thing of which that (the liquid to which I am pointing) is a member.[119] It may then be left

---

[116] MICHEL FOUCAULT, THE ORDER OF THINGS at xv (1970).

[117] *See* Moore, *Theory of Interpretation, supra* note 2, at 292 n.25 (asserting that "if one subscribes to the [Kripke/Putnam] theory of meaning . . . one is necessarily a metaphysical realist," though acknowledging that a metaphysical realist need not accept "Kripke/Putnam essentialism"); *see also* Moore, *Interpretive Turn, supra* note 2, at 876 (including Kripke/Putnam's "causal theory of reference" as an integral part of "a complete metaphysics").   As noted earlier, Brink does not claim there is a necessary (logical) connection between a Kripke/Putnam approach and metaphysical realism.

[118] *See* HILARY PUTNAM, *The Meaning of "Meaning," in* MIND, LANGUAGE AND REALITY 215, 226 (1975) [hereinafter MIND].

[119] *See* Philip Pettit & John McDowell, *Introduction* to SUBJECT, THOUGHT AND CONTEXT 1, 2 (Philip Pettit & John McDowell eds., 1986). Ostension, the connection of this term with that natural kind, is accomplished by the community. Any particular individual within the community could of course be mistaken regarding the liquid to

to others in the community to discover (and then report) the nature of that kind. We associate a word with an object, and by that word we mean to refer to that object and all other objects of the same nature.[120] To say that objects are of the same nature is to say that they "have the same composition, or obey the same laws—indeed, what makes composition important, when it is, is its connection with laws of behavior."[121]

Putnam's purpose was to attack a theory of meaning according to which (1) knowing the meaning of a term consists of having a particular psychological state, and (2) meaning, in the sense of intention, determines a term's extension.[122] In particular, he wanted to emphasize the contribution of society and the contribution of the real world to both the intention and the extension of a term, the former deriving from the linguistic division of labor, the latter from the idea of natural kinds.[123]

The notion of the linguistic division of labor is one that Brink borrowed from Putnam and made central to his own semantic theory.[124] The general idea is that we defer to other persons, as part of our competence in a language, in our understanding of particular terms. For example, part of the nature of gold is to be found in its chemical composition and the way it reacts with other chemicals. Most speakers of the language, however, though acknowledged as competent language-users who know the meaning of the word "gold," are not aware of these chemical facts. Here, according to Putnam, the linguistic division of labor comes into play: it is of no moment "that confirmation procedures for *being gold*, or *being aluminum*, or *being an elm tree*, or *being David* are not

---

which "water" refers.

[120] *See* HILARY PUTNAM, *Reference and Truth, in* REALISM AND REASON 69, 71 (1983) ("The extension of 'multiple sclerosis' includes whatever illnesses turn out to be *of the same nature* as the majority of the 'paradigm' cases of multiple sclerosis; we do not suppose that what that nature is . . . is completely known to us in advance.").

[121] *Id.* at 74.

[122] *See* PUTNAM, *supra* note 118, at 219. Putnam defined "intention" as "the 'concept' associated with [a] term" and "extension" as "the set of things [a] term is true of." *Id.* at 216-17.

[123] *See id.* at 223-47. In discussing the idea of "natural kind terms" in an earlier article, Putnam argued that a thing which is a member of a natural kind "is likely to have certain characteristics," which, if present, are "likely to be accounted for by some 'essential nature' which the thing shares with other members of the natural kind." HILARY PUTNAM, *Is Semantics Possible?, in* MIND, *supra* note 118, at 140. "What the essential nature is," he continued, "is not a matter of language analysis but of scientific theory construction . . . ." *Id.* at 140-41.

[124] *See* Brink, *Legal Theory, supra* note 93, at 117-18 & nn.17-18.

the property of every speaker—the speakers defer to experts for the fixing of reference in a huge number of cases."[125]   The linguistic division of labor permits a move away from the semantic theory according to which convention or community consensus determines meaning to theories according to which convention only determines usage by singling out the authority to which (and the circumstances in which) we should defer.[126]

In considering the linguistic division of labor, one sees how Putnam's view is consistent with a Wittgensteinian (or other non-metaphysically realist) approach to language: the latter need not reject Putnam's theories, so long as it can allow that in some cases understanding what a term means involves knowing that one must defer to the opinions of others (experts). That it is a scientist in our society who makes the final judgment regarding which one-celled organisms are "plants" and which are "animals" or that it is an elder of a certain community who makes the final judgment regarding whether a particular form of discipline is "cruel" and therefore prohibited does not entail that "animal" and "cruel" refer to platonic entities. This deference within language is, of course, consistent with platonism, but it is also consistent with a wide range of non-platonist metaphysical theories. Putnam's approach can thus be seen as a matter of language use and not (at least not necessarily or primarily) a matter of (metaphysically realist) ontology.

One might object that in effecting a reconciliation between natural kinds analysis and Wittgensteinian theories of language the central point of the former is lost: that part (at least) of what a word means is determined by "the contribution of the world." But this objection has force only if one presumes the correctness of metaphysical realism. In the hands of a committed metaphysical realist like Moore, natural kinds analysis does seem to involve some sort of direct communication between "the world" and us, mediated through those (our "experts") whose function it is to discern and communicate the world's real nature.

But as soon as one rejects metaphysical realism as a *premise* of the natural kinds analysis, one finds that it does not at all necessarily follow as a *conclusion* therefrom. It is at least as plausible to

---

[125] HILARY PUTNAM, MEANING AND THE MORAL SCIENCES 114 (1978).

[126] *See* BLACKBURN, *supra* note 27, at 130-31 ("As a group we defer to medical authority in defining what does and does not count as arthritis, and I will be held to have said whatever it tells me I said [(when using the term arthritis)]. . . . [T]his is so regardless of my own understanding of what I was doing.").

suppose that the world does not "speak to us" in the straightforward manner Moore envisions. From this perspective, we find that in day to day life "the contribution of the world" is merely descriptive of our practice of deferring to what experts (often scientists) tell us about things. Such experts do not—because they cannot—tell us what the "real nature" of an object is. All they can tell us is that *relative* to our current conceptual categories and our current (scientific) procedures and practices, this object seems to be a member of this unitary group that appears to have this nature.[127] Again, deference to experts is not inconsistent with the belief that unitary kinds with "real natures" exist independent of us (that is, independent of human attitudes, observations, and needs); but it is equally consistent with a variety of non-metaphysically realist approaches.

XI. NATURAL KINDS ANALYSIS

The idea of natural kinds has played an important role in the writings of Moore and Brink. It is used both as an argument against "conventionalist" or "empiricist" approaches to language and as a bridge between the semantic and ontological claims of metaphysical realism. The idea is also central to their arguments for why judges should not automatically defer to the specific intent of a rulemaker or to the terms of a statutory definition.[128] In this Part, I offer a brief critical review of their use of "natural kinds" analysis.

---

[127] *See* HILARY PUTNAM, *Realism with a Human Face, in* REALISM, *supra* note 15, at 3, 3-29 (criticizing the notion that we can discover the way things really are). In the above article and elsewhere, Putnam has come to reject metaphysical realism even as he has continued to defend his natural kinds analysis. *See* HILARY PUTNAM, *A Defense of Internal Realism, in* REALISM, *supra* note 15, at 30, 40-42 (describing an alternative to metaphysical realism); PUTNAM, *supra* note 15, at 68-70 (discussing his current position on natural kinds); *see also* HILARY PUTNAM, REASON, TRUTH AND HISTORY 22-48 (1981) (offering a discussion of reference as part of an argument against metaphysical realism). It remains open to other theorists not only to agree with both natural kinds analysis and metaphysical realism, but also to claim that the former entails the latter. Still, the fact that the person who did the most to develop natural kinds analysis now thinks otherwise counsels caution before we accept such a claim, especially when it is asserted by a legal theorist who has not made a specialty of the philosophy of language and who is interested in that subject primarily insofar as it relates to his views on law and legal philosophy.

[128] *See, e.g.*, Brink, *Legal Theory, supra* note 93, at 120-29 (arguing that judges should focus on the abstract rather than the specific intentions of legislators); Moore, *Theory of Interpretation, supra* note 2, at 322-58 (arguing that a theory of interpretation that incorporates natural kinds analysis is not "glued to the past," unlike theories that rely on specific legislative intent).

A natural kind term is one whose extension is answerable to the outside world; put differently, it is a term that refers to a class of objects, where the boundaries of the class are defined by facts which are independent of us. Objects that are members of a particular natural kind are such because they share a single essence or nature.

This idea—that a term's extension is the group of objects that has a common essence, an essence based on "objective laws" "fixed by the world"[129]—seems most compelling with respect to chemical elements or chemical compounds.[130]   For terms referring to plants and animals, the notion of natural kinds has somewhat less force, for it is actually quite rare for common language to correspond to a non-arbitrary grouping in scientific taxonomy.[131] As for human artifacts, it is not at all obvious that a natural kinds analysis could be extended to meet the needs of the case, nor that the attempt would even be warranted. What reason is there to believe that human creations break down into clear categories in the way that the objects of chemistry and biology might seem to do? Tables, televisions, and tone poems seem likely, in a way that chemicals or even animals do not, to exemplify the notion that intention determines extension, that the criteria thought necessary and sufficient for a term's application are so by virtue of that very fact.

Despite the apparent difficulties, in an early article Putnam applied natural kinds analysis to pencils.[132] The effort did not succeed. To begin, let us say that "pencil" is "a thin, cylindrical object, which contains graphite to allow it to make marks on paper or similar substances." Putnam would have us consider the following question: What would happen if we discovered that all the objects we thought of as pencils turned out to be living objects?[133] The discovery would, I admit, affect our beliefs about pencils. But I do not see how that could be seen to change the

---

[129] Brink, *Legal Theory, supra* note 93, at 117.

[130] Our experience in science and our knowledge of the history of science lead us to believe that the business of dividing up the chemical world is not terribly vulnerable to ideologies and "subjective" interests. Different chemists working at different times under different circumstances are very likely to reach similar conclusions—that is, the relevant data seem truly to be "objective." This contrasts not only with topics of study whose status as "sciences" is a matter of dispute, like sociology and psychology, but even with some of the "harder" sciences, like biology.

[131] *See* Dupre, *supra* note 91, at 73-83.

[132] *See* PUTNAM, *supra* note 118, at 242-44.

[133] *See id.* at 242.

"meaning"—either the intention or the extension—of the term "pencil."

That aside, the basic problem with Putnam's approach is obscured if we consider only the situation in which all pencils turn out to be alive. Instead, let us suppose that only one or a few pencils are living. This makes serious problems for a natural kinds analysis because the "group" purportedly described as "pencils" no longer shares an essence, and the description of that group as "a single kind," a category defined independent of human observation and human needs, becomes untenable.

In the end, the natural kinds theorist must rest his claims on the idea that there is an "essence" or "nature" that the different members of a group share. It is thus of no small importance that such a theorist be able to state what this shared essence or nature is in particular cases. Putnam emphasized composition—chemical composition for chemical objects, and underlying genetic code for living organisms. There are difficulties with the analysis even in these cases,[134] but the problems are far greater when no obvious basis can be identified on which to assign objects to various categories. Someone might, of course, simply assert that these categories are perceptible to us and are in fact independent of linguistic conventions, even though what constitutes the group members' shared essence cannot (yet) be articulated. But this assertion proves nothing. Moreover, as an explanation of our experience of the world, it has nothing to recommend it in favor of the obvious alternative provided by Wittgenstein's discussion of family-resemblance concepts.[135] On the Wittgensteinian view, category borders that seem to be independent of us may turn out to be merely a matter of our "form of life," our common human nature or training: that we delimit categories the way we do is merely a reflection of the way *we* react, the way we "go on," in the face of our experience; this is just the way the objects seem *to us* to sort out.

Even if one grants that meaning something primarily involves "pointing" to some group or category, still, in addition to nature, the linguistic community plays some part in determining the groups

---

[134] Dupre has pointed out that, for living organisms, the genetic variability within a species is sometimes greater than that between two related species. *See* Dupre, *supra* note 91, at 84-85.

[135] *See* WITTGENSTEIN, *supra* note 52, §§ 65-77; BAKER & HACKER, *supra* note 52, at 320-43.

into which "reality" is divided.[136] For example, the fact that the term "arthritis" includes only rheumatoid complaints that affect the joints rather than all rheumatoid complaints is contingent—it could have been otherwise.[137] How our concepts divide up reality is arbitrary, in the sense that one cannot speak about it as "true" or "justified" (or as "more true" or "more justified" than some alternative division).[138]

XII. ALTERNATIVES TO NATURAL KINDS ANALYSIS

The point, then, is that it is simply implausible to maintain that "reality" and nothing else determines the meaning of all the terms we use to divide up the world, including those that are commonly important in legal matters. Various attempts have been made to get around this limitation of traditional natural kinds analysis. Brink, for example, simply broadens the notion of what ought to qualify as a "natural kind." He would include within the concept any "property or universal that figures in laws and explanatory general-izations."[139] Thus "institutions, practices, and relations"[140] can be seen as natural kinds, just like birds or gold. Still, the central idea in this modified analysis is that there is a difference between the "real nature" of some object and the "descriptions conventional-ly associated" with it.[141] In the end, it seems the lesson Brink learned from Kripke and Putnam that he wanted to pass on to judges and legal theorists is that our theory of meaning must be such that we can say that individuals and communities can be wrong

---

[136] *See* Pettit & McDowell, *supra* note 119, at 6-10. For the importance of social interests and arbitrary community choices even in biological classifications, see Dupre, *supra* note 91, at 73-83.

[137] *See* Pettit & McDowell, *supra* note 119, at 7-8.

[138] This is Wittgenstein's idea of "the autonomy of grammar." There is, however, a sense in which grammar is not arbitrary. Hacker explains:

> The claim that [grammar] is arbitrary does not mean that it is capricious, unimportant, or a matter of individual whim. Nor does it mean that we cannot ever give *reasons* why such-and-such grammatical rules are useful, or that there cannot be reasons why, for rather specialized purposes, we choose to adopt new grammatical structures.

HACKER, INSIGHT, *supra* note 13, at 193; *see also* LUDWIG WITTGENSTEIN, ZETTEL § 358 (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe trans., 1967) (suggesting that there is at once something arbitrary and something non-arbitrary about our system of language).

[139] Brink, *supra* note 86, at 185.

[140] *Id.*

[141] *Id.*

in their beliefs about *anything* (in contrast to forms of analysis in which whatever everyone believes about some matter is, by definition, "correct"). The fundamental problem remains, however: if we cannot point to a chemical composition or a genetic code or some other basis for believing that an object's "nature" or "essence" exists independent of human interests and human choices, then why should we accept this teaching? What is the point of a natural kinds analysis here?

Moore's approach to this problem is both sophisticated and challenging.[142] To begin, he admits that there are certain things that are merely "nominal kinds," items grouped together in a (linguistic) category that share no common nature and are connected only by a common label, which is wholly a matter of convention.[143] These items he distinguishes not only from the familiar sort of thing that is a "natural kind,"[144] but also from what he terms "functional kinds." Items within the same "functional kind" share the same nature, but the nature they share "is a function and not a structure."[145]

In making the case for functional kinds analysis, Moore cites with approval a decision in which the Seventh Circuit was called upon to construe the meaning of the word "mower."[146] At issue was whether a debtor in a Chapter 7 proceeding could retain his haybine (an implement that mows and conditions hay) under an old state statute granting a personal exemption for one "mower." The court permitted the exemption, construing "mower" as covering the entire class of things that do what a mower does[147]—the court treated "mower" as a functional kind.[148] This is all very nice, but

---

[142] *See* Moore, *Law as a Functional Kind, supra* note 3.

[143] *See id.* at 206.

[144] *See id.* ("A natural kind is a thing that exists in nature as a kind without human contrivance.").

[145] *Id.* at 208. Moore, as will be seen shortly, cites the example of "mowers" in explicating this notion: "It is not very plausible to think that mowers have some essential structural features, features without which they would not be mowers. . . . Anything that mows hay is a mower, whatever its structural features turn out to be." *Id.* at 207-08; *see also* Moore, *Interpretive Turn, supra* note 2, at 885 (listing "lawyer," "knife," "vehicle," and "paperweight" as examples of functional kinds).

[146] *See In re* Erickson, 815 F.2d 1090 (7th Cir. 1987), *cited in* Moore, *Law as a Functional Kind, supra* note 3, at 207.

[147] *See Erickson*, 815 F.2d at 1092 ("A statutory word of description does not designate a particular item . . . but a class of things that share some important feature. Which feature is important depends on the function of the designation and how it will be interpreted by the audience to whom the word is addressed.").

[148] Or so Moore implies. *See* Moore, *Law as a Functional Kind, supra* note 3, at

the fact that some terms are (or can be) defined by objects' functions is as consistent with "conventionalism" as it is with metaphysical realism. Moreover, we do not need a radical change in our theories either of language or of judicial reasoning to justify judges sometimes interpreting statutory terms in that way.

Ultimately, the point of talking about "functional kinds" is that it justifies study of the object in question—for law, we are told, is a functional kind. "If law were [only] a nominal kind . . . then there would be no unified nature to seek in descriptive general jurisprudence."[149] Calling something a functional kind responds to an academic worry, but it does not seem to have any metaphysical or ontological implications.

If I do not give Moore's analysis of "functional kinds" more attention here, it is not because I think it either uninteresting or obviously wrong. I shrug off his position because I do not believe that he has claimed (let alone proven) anything with which critics of metaphysical realism need disagree. Unlike other aspects of Moore's metaphysical realist approach to law, the discussion of "functional kinds" seems to make no ontological or epistemological claims (or to require any special ontological or epistemological assumptions). The closest Moore comes to making such a claim is his suggestion that, "[u]nlike nominal kinds, items making up a functional kind have a nature that they share that is richer than the 'nature' of merely sharing a common name in some language."[150] Unless and until a much stronger claim is made about the ontological and epistemological consequences lurking within the vague reference to "shared nature," I do not believe that Moore's discussion of functional kinds presents a case with which critics of metaphysical realism have reason to concern themselves.

CONCLUSION

The greatest benefit of theories like those of Michael Moore and David Brink is that they remind us of the extent to which thinking about the law and thinking within the law are dependent on unstated beliefs about metaphysics, semantics, and morality. Not

---

207. The actual opinion reads somewhat differently. It does not (only) use a functional kinds analysis, but also discusses legislative purpose, historical context, choice among criteria, and even cost-benefit analysis in the process of interpreting the statutory term. *See Erickson,* 815 F.2d at 1092-94.

[149] Moore, *Law as a Functional Kind, supra* note 3, at 206.

[150] *Id.* at 208.

only are these foundational assumptions usually unstated, they are also usually unquestioned.   Any theorist who can uncover and challenge these assumptions deserves our serious consideration.

Moore shows us how much may be at stake if we are persuaded to think differently about philosophical issues—these are not mere parlor games for legal theorists. Our day to day practices as lawyers and law teachers might be radically changed if we were to accept Moore's approach to interpretation, precedent, and legal reasoning.

I do not think, however, that Moore has yet met his burden of proof in attempting to show that the way most of us currently think about language or the way most of us currently do (and teach) law is incorrect. In particular, I do not think that he has shown that approaches to language other than metaphysical realism are, as he claims, inadequate for scientific, moral, and legal discourse. These are debates that will no doubt continue to receive close attention, and it is heartening to know that Professor Moore will continue in his attempts to convert us to his way of thinking.

Metaphysical realism is a response to an insecurity that arises from pondering the foundations of thought and action. A series of anxious questions can come to mind: If language is not directly connected with some set of stable objects independent of us (and our interests), what grounds its day to day operation? How can we know whether a term applies or not in a novel situation? How can we understand current disagreements—or the changes of meanings of terms over time—as anything other than people talking about different things and only deluding themselves into thinking that they are discussing a common matter? Metaphysical realists doubt alternatively the ability to ground language simply in human practices and tendencies, and the legitimacy of doing so even if it were possible. They seek solace in a complicated ontology and epistemology, which they hope will both justify and make sense of the way we actually speak.

The problems and insecurities to which metaphysical realism seems to respond become even greater when it is brought into the context of legal thought.   Here we are also worried about the divergence between what rulemakers intended and what the words in their enactment (seem to) mean and the problem of applying texts written long ago to current situations. Metaphysical realists hint that they might be able to give us simple solutions even to these problems, by making the answer to *all* interpretive questions depend on current expert opinion.   Difficulties of institutional competence, institutional legitimacy, and political theory seem to

dissolve in the mixture of ontological and epistemological claims in the underlying theory. Like most panaceas, I suspect that metaphysically realist approaches to law are more fraud than cure.

What Wittgenstein in his later writings and other sophisticated critics of metaphysical realism have been trying to persuade us of is that the way we actually use language is grounded in our practices and inclinations and *is* adequate to our needs. No further buttressing is necessary, or even possible. In the context of law, one need add only that we cannot escape difficult moral and political questions by seeking ever more sophisticated theories of meaning and metaphysics. Wittgenstein's work offers no miraculous solutions: it leaves us where we began, though less anxious about language in general, and, one hopes, also less likely to try to use theories of language to solve questions of an entirely different realm.