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Experimental Legal Philosophy: General Jurisprudence

Abstract: This chapter offers an overview of experimental legal philosophy with a special focus on questions in general jurisprudence, that part of legal philosophy that asks about the concept and nature of law. Much of the experimental general jurisprudence work has tended to follow the questions that have interested general jurisprudence scholars for decades, that is, questions about the relation between legal norms and moral norms. Wholesale criticism of experimental general jurisprudence is scant, but, given existing debates about experimental philosophy generally, one can anticipate where disagreement is likely to occur. Outside of experimental general jurisprudence, there is plenty of vibrant discussion about how experimental results can enrich our understanding of various concepts that figure in everyday legal thought such as causation, intention, consent, or meaning. In the future, experimental legal philosophers should continue to consider the degree to which their project is purely descriptive or whether it is revisionary or pragmatic in its ambitions. Also, future work might consider whether to focus more attention on legal experts.

Keywords: Causation; Consent; Empirical Legal Studies; Experimental Jurisprudence; Experimental Philosophy; Expertise Defense; General Jurisprudence; Legal Positivism; Natural Law Theory; Pragmatist Jurisprudence

1 Introduction

Legal philosophy has a long and storied history. At least as far back as Plato, one finds Western philosophers wondering whether we have a general obligation to follow the law (Plato, *Crito*) and making claims about which kinds of activities require legal regulation (Plato, *Republic* IV, 425b–d). Experimentalists today are adding a new chapter to that story. In just the past few years, experimental legal philosophy has flourished, and this new work has mainly taken the form of using the tools of cognitive psychology to explore "how core legal concepts are understood by laypeople who know little about the law" (Sommers 2021, p. 394).[1] At first blush, it would seem that such investigation, however interesting, is irrelevant to legal philosophy. This chapter aims to assuage this

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1 To be sure, some work examines experts, rather than laypeople, see, e. g., Donelson and Hannikainen (2020).

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worry or, at the least, aims to explain why a number of well-trained philosophers think their work is continuous with the traditional concerns of legal philosophy.

Like other subfields in philosophy, legal philosophy does not have a singular focus. Some of the work is normative or normative-adjacent. For instance, some thinkers explore our supposed obligation to follow the law (Raz 2009b, Mackie 1981); some focus on whether certain acts should be criminalized (Nussbaum 1998, Husak 2002); some think about free will and responsibility as they relate to the law (Levy 2019, Caruso 2021). Another stream of work is more analytical; thinkers working in this stream are concerned to offer the correct analysis of *law*, *legal system*, or any of the varied legal concepts that surface in everyday legal thought such as *intention*, *cause*, *consent*, and so on. Most of the recent work in experimental legal philosophy, usually styled *experimental jurisprudence* (or "ex-jur" or "XJur"), concerns these analytical projects. This chapter, which seeks to capture a part of the field as it presently stands, similarly focuses on experimental jurisprudence in the analytical vein.

Though this chapter focuses narrowly on experimental work that seeks to advance conversations in legal *philosophy*, and specifically *analytical* projects within legal philosophy, there is plenty of experimental work about other legal matters. Some of this research adopts the "ex-jur" label; some of it embraces the broader *empirical legal studies* banner. There are thousands of articles that fit this description such that any overview will be woefully inadequate. Nevertheless, exemplary works include Kassin and Norwick (2004), which explains why people waive their right against self-incrimination, Wilkinson-Ryan (2015), which explains why people breach contracts (and why they don't, even when it would be efficient), as well as Kugler and Strahilevitz (2017), which shows that people's expectations of privacy from government intrusion are not much affected by court decisions about privacy rights.[2]

2 Experimental General Jurisprudence

Even within analytical projects in experimental jurisprudence, there is great diversity. One can distinguish between two streams of research. First is research that focuses on understanding the nature or concept of law. A second strand is research that focuses on

2 For someone looking for this sort of work, instead of experimental legal philosophy, there are many, many potential sources. The *Journal of Empirical Legal Studies* has perhaps broadest appeal, while plenty of other journals have particular disciplinary concentrations. For instance, *Law and Human Behavior* is a periodical which highlights psychology, the *Journal of Experimental Criminology* centers on crime, and the *American Law and Economics Review* focuses on economics (and not all of it is empirical, let alone experimental). Also, one sometimes finds experimental work in generalist outlets like the *Journal of Legal Studies* and many student-edited American law reviews such as the *Harvard Law Review* or the *Northwestern University Law Review,* the latter of which currently has an annual empirical issue. For some writing on the rise of empirical legal studies in American law reviews, see Diamond and Mueller (2010).

what one might call *everyday legal concepts*, concepts that regularly figure in legal reasoning, especially in legal doctrines. Everyday legal concepts include concepts such as *legal cause*, *intention*, *punishment*, and the like. The former project is what many call *general jurisprudence* because it treats law at its most general. This chapter concentrates on experimental approaches to general jurisprudence, while briefly mentioning some of the experimental work about everyday legal concepts.

To get a handle on how experimentalists add to the discussion, it is important to first understand the main conversations in general jurisprudence, much of which proceeds in a non-empirical, or armchair, fashion. Perhaps the most famous cluster of debates within general jurisprudence is the controversy over whether there are moral criteria that something must satisfy in order to be a (full) legal norm. Some thinkers – sometimes called *natural law theorists*, sometimes called *legal non-positivists* – claim that membership among the class of legal norms requires that the norm comport with some standard, usually a moral standard. Examples of this view include Finnis (1980). On the simplest version of the thesis, a norm is not a legal norm if it requires behavior that is morally impermissible. For instance, then, the American Fugitive Slave Act of 1850, which required people to assist in the return of runaway slaves, is a paradigmatically unjust law that required morally impermissible behavior. Natural law theorists typically claim that legislation like that is not genuine law. Opponents of this kind of view – often called *legal positivists* – contend that a norm can be a legal norm, even it requires morally impermissible behavior. Examples of this view include Kelsen (1967), Hart (2009), and Shapiro (2011).

It is fitting to call this a *cluster* of debates because natural law theorists and legal positivists each have their own intramural debates.

Natural law theorists divide over two main questions. The first is whether failure to comport with the strictures of morality fully disqualify a norm from membership in the class of legal norms or whether the immorality just means the norm fails to be a legal norm in *the fullest sense.* This debate is sometimes called the debate between strong and weak versions of natural law theory. The classical view, espoused by folks like Martin Luther King Jr. (1986) and Thomas Aquinas (1994) is a strong version of natural law theory, and its adherents contend that an immoral law is no law at all. Meanwhile, contemporary natural law theorists like M. Murphy (2011) tend to embrace the weak version, which claims that immoral laws fail to be laws in the full sense.

A second controversy within the natural law theory camp concerns the debate between substantive natural law theory and procedural natural law theory. Substantive natural law theory holds that a norm is not a (full) legal norm if that norm requires any morally impermissible behavior. By contrast, procedural natural law theory, championed by Fuller (1969), holds that some legal norms may require immoral conduct, so long as the norms adhere to certain morally desirable procedural standards. For instance, for Fuller, legal norms must be prospective, rather than retrospective, in order to give legal subjects fair notice because providing fair notice is morally desirable. If a set of norms failed to give this fair notice, it would fail to be a legal system or fail to be a legal system in the fullest sense.

These two debates within natural law theory have no overlap. It is, therefore, possible to occupy one of four different positions: (1) strong, substantive natural law theory, (2) a weak, substantive natural law theory, (3) strong, procedural natural law theory, or (4) weak, procedural natural law theory.

Legal positivists have their own internecine squabbles. While all legal positivists contend that, in general, some norm can be a legal norm even if it is morally iniquitous, inclusive legal positivists contend that some legal systems include or incorporate moral norms (see, e.g., Hart 2009). For instance, the Eighth Amendment to the American Constitution purports to outlaw cruel punishments. If "cruel" is a thick ethical term, encoding both normative and descriptive elements, this suggests that this particular law incorporates a moral stricture, a prohibition on what is in fact cruel. This, at least, is the official story of the inclusive legal positivist. By contrast, exclusive legal positivists deny that legal systems actually incorporate moral norms; instead, they incorporate what the legal officials *think* morality requires (see, e.g., Raz 2009b).

This summary of important debates within general jurisprudence has necessarily been quick, and discussion of many valuable contributions has been omitted. The point, however, was not to offer a comprehensive overview of the field. Instead, the point is to offer sufficient summary to set up a new question, *the question of relevance.*

2.1 The Question of Relevance

The most pressing question for experimental philosophy is the question of relevance. In essence, the question demands that experimentalists explain why results from cognitive psychology, the paradigmatic kind of evidence garnered by x-phi researchers, have any bearing on philosophical questions. Since philosophers typically care about how the world is, and not how people believe the world to be, psychological data seems irrelevant. Before any review of experiments in general jurisprudence, it is important to consider head-on this most important challenge to the experimentalist turn.

For some experimental work, the argument for relevance is relatively straightforward and well-known. For instance, some experimentalist work, to borrow from Nadelhoffer and Nahmias (2007), is of the *Restrictionist* variety. Restrictionists often deploy a kind of master argument. First, they claim that philosophical work that traffics in thought experiments requires uniform, well-reasoned responses to the hypothetical cases described. Next, Restrictionists present evidence that the folk (or experts) differ in their responses to philosophical thought experiments or that the folk (or experts) seem to be affected by irrelevant factors in their responses to those thought experiments. Finally, Restrictionists conclude that all philosophical projects that rely on intuitive responses to hypothetical cases are suspect. Because general jurisprudence abounds in such intuition-pumping projects, Restrictionist experimental work is clearly relevant to general jurisprudents. Of course, the Restrictionist reproach is not peculiar to general jurisprudence. For this reason, jurisprudence scholars feel no particular compunction to address such work.

The tricky case for establishing the relevance of experimental results concerns, not the blunt negative program of the Restrictionist, but rather the positive program that Nadelhoffer and Nahmias (2007) call *Experimental Analysis.* The Analysts offer experimental results with the aim of defending (or rebutting) particular claims about the proper analysis of some object of philosophical concern, and that analysandum might be *knowledge*, *causation*, *the self*, or indeed *law.* In short, the Experimental Analyst who works in general jurisprudence claims that she can tell us specifically about the nature or concept of law using experiments, and the question is how. Some recent papers provide answers.

Donelson and Hannikainen (2020) offer one answer to the question of relevance. This paper begins with the suggestion that general jurisprudential claims may be interpreted in at least two ways, as quasi-empirical claims about our shared concept[3] or as metaphysical claims about the referent of our law-talk. If general jurisprudence is rightly understood in the first sense, the entire enterprise is about how people understand the world, and cognitive psychology is of immediate relevance. Many legal philosophers reject this psychologistic reading of general jurisprudence, however. If general jurisprudence is rightly understood in the second sense, as a metaphysical enterprise, probing folk intuitions is still indirectly relevant. According to Donelson and Hannikainen, in proposing a theory about something as ubiquitous as law, theorists labor under a presumption against error theories. This presumption provides that a theory which most would reject as false must, as an epistemic matter – not just as a practical matter – adduce more evidence than theories that are widely believed to be true. If this presumption is sound, "determining what people believe is essential to determining whether the presumption against error theories weighs for or against" a particular theory of law (Donelson and Hannikainen 2020, p. 11).

In addition to this claim about the presumption against error theories, Donelson and Hannikainen also briefly suggest that widespread and reliable support for a theory may bolster it. The widespreadness condition should be both easy to understand and easy to motivate. Reliability is another story. For Donelson and Hannikainen, an intuition is reliable insofar as it will be elicited consistently by the same, or substantially the same, stimuli, and if the response pattern is not much affected by irrelevant factors. To illustrate reliability and explain how its absence means that widespread support for a theory is epistemically valueless, consider an example. Suppose that an overwhelming majority of the folk were inclined to support, say, legal positivism when an experiment is run on a Monday, but when the study is re-run on Tuesday, an equally large majority is inclined not to support legal positivism. This response pattern is inconsistent and seemingly affected by an irrelevant factor, namely the day of the

3 This appears to be the view of Raz (2009a). To be clear, Raz does think that investigating our shared concept will tell us some about the referent of that concept. For worries about whether that project can be pulled off, see Nye (2017).

week in which the study is conducted. Thus, widespread support for a theory bolsters it only when that support is also reliable.

Flanagan and Hannikainen (2022) indicate a related basis for the relevance of experimental analysis of law. They point out that many legal philosophers themselves take the intuitiveness of a view as some evidence in the view's favor: "A brief review of prominent positivist and natural law contributions establishes the folk concept's role as a ground on which to defend a theory of [...] legality" (Flanagan and Hannikainen 2022, p. 166). No doubt, one need not to accept that the folk intuition is direct evidence to make a limited case for the relevance of x-phi. Insofar as some jurisprudents accord folk intuitions epistemic weight, it is important to know what those folk intuitions are so that legal philosophers can judge their arguments by the standards they accept as normative.

Donelson (forthcoming) supplies yet another answer to the question of relevance. In this paper, Donelson begins by noting that philosophical conversation relies on unproven premises. Even if foundationalism about knowledge and justification turns out to be true, as a practical matter, philosophical discussion must proceed with unproven premises. If philosophical practice is to continue, philosophers must adhere to the following epistemic principle: In making arguments, one should only rely on those premises that can be expected to be generally acceptable to interlocutors. Donelson does allow for a weaker version of this principle according to which we have more reason to accept arguments with generally acceptable premises than premises without generally acceptable premises. Those acceptable premises are what Donelson calls "common ground propositions". As Donelson sees it, results from cognitive psychology can help establish what is, or is not, common ground in legal philosophy.

Taken together, these answers proclaim that what others think has epistemic value. If everyone disagrees with one's theory, this is some reason to doubt that theory. If everyone supports one's theory, this is some extra reason to have confidence in that theory. If philosophical practice is to continue producing knowledge, or approximations thereof, which is epistemically valuable, we need to meet interlocutors on common ground, which is determined by what others think. If what others think has epistemic value for conversations in legal philosophy, discovering others' thoughts – the work of ex-jur – is philosophically relevant. This collection of arguments, which are independent but mutually supportive, vindicates experimental analysis of law. Having concluded the case for relevance, we can turn to the experiments themselves.

2.2 Summarizing the Recent Work

One of the earliest examples of experimental analysis of law is found in Donelson and Hannikainen (2020). This paper evaluates Lon Fuller's version of procedural natural law theory. According to Fuller (1969), a set of norms fails to be a legal system if those norms do not adhere to eight procedural principles which together ensure that the law treats legal subjects with a minimal level of respect. For Fuller, laws

must be consistent, general, intelligible, possible to comply with, prospective, public, stable, and enforced in a manner consistent with the official, public version. Donelson and Hannikainen perform a set of surveys to determine whether ordinary folk and legal experts agree that legal systems must observe these Fullerian principles.

The results of these studies show that, although a few Fullerian principles garner broad support, many of these principles do not, and, averaging across the set of principles, they jointly do not have widespread support from either the folk or experts. This suggests that Fullerian principles are not common ground. If Fullerian principles are best understood as premises in support of procedural natural law theory more generally, these results cast doubt on Fuller's argument for procedural natural law theory. However, because the principles do enjoy modest support, the presumption against error theories does not imperil Fuller's conclusions.

The study by Donelson and Hannikainen also reveals that support for Fullerian principles is unreliable. "Participants were much more likely to endorse Fuller principles in the abstract" (Donelson and Hannikainen 2020, p. 21). That is, when asked if a hypothetical legal system must observe Fullerian principles, survey respondents were likely to agree. On the other hand, when asked about actual legal systems or asked to think about *both* hypothetical and actual legal systems, respondents were far less likely to affirm Fullerian principles. Donelson and Hannikainen (2020, p. 24) claim that the abstract construal is the less epistemically ideal setting because "our intuitions are sharpest when considering more everyday things". Even if this were not so, the fact that there is a construal effect at all presents a problem that advocates for Fuller's view should address. If Fuller's view aims to represent our shared understanding of law, these conflicting reports lend some credence to the worry that we have no shared conception of law in the first place, or a very limited shared conception, a worry voiced by L. Murphy (2005) and Priel (2011). If Fuller's theory aims to describe law itself, these construal effects – the fact that the folk agree with the theory when construed one way and disagree with it when construed another way – may not *undercut* his theory, but they offer no support for it either.

Published as a follow-up to Donelson and Hannikainen (2020), Hannikainen et al. (2021) is a cross-cultural, cross-linguistic analysis. This study focused on an odd finding in the original study: Survey respondents, as a whole,[4] both said that laws must obey Fuller's criteria and that actual laws do not obey Fuller's criteria. This is curious because "must", understood as a modal term rather than a deontic term, designates what is necessarily the case, and if laws necessarily obey Fullerian criteria, then it cannot also be that there are laws in the actual world that fail to obey the criteria. In short,

4 When one set of subjects was only asked the more abstract question, about whether a hypothetical legal system must obey the Fullerian principles, they agreed, and when another set of subjects was only asked the concrete question, about whether actual legal systems do obey Fullerian principles, they disagreed. However, when yet another set of subjects was asked both about hypothetical and actual legal systems, they tended to disagree with Fuller. Thus, the group as a whole had the seemingly conflicting intuitions, but individual subjects did not exhibit this conflict.

the folk seems to be in contradiction with itself. The 2021 study sought to discover whether this response pattern would hold for a more diverse set of respondents. Whereas Donelson and Hannikainen (2020) relied on Anglophone respondents from the United States, Hannikainen et al. (2021) selected speakers from the United States, the United Kingdom, and nine non-Anglophone countries. In those non-Anglophone countries, experiments were conducted in a non-English language commonly spoke in the relevant country. For instance, Portuguese was the experimental language in Brazil, Khmer was the experimental language in Cambodia, and Dutch was the experimental language in the Netherlands. Remarkably, Hannikainen and his co-authors found that the response pattern held in all 11 nations: Respondents said that no law could flout the Fullerian principles and that actual laws do flout those same principles.

While the 2021 study offers "limited insight into the psychological processes that engender conflicting beliefs about actual versus possible laws" (Hannikainen et al. 2021, p. 10), Hannikainen and his co-authors note that several interpretations are consistent with these findings. Among them is the thought that law is a dual-character concept (Hannikainen et al. 2021, p. 11). To better understand dual-character concepts, consider a concept like *philosopher*. In one sense of the word, *philosopher* covers anyone employed by a philosophy department to teach philosophy classes. There is, however, another sense of the word, such that one can ask of any particular philosophy teacher whether they are a *true* or *real* philosopher. The true philosopher exhibits intellectual curiosity, argues in good faith about philosophical questions, and holds genuine convictions about certain philosophical claims. But many a person employed to teach philosophy is an uncurious charlatan. *Law* might be the kind of concept that also has two senses. Perhaps *law* in the more pedestrian sense is any norm recognized as law by the procedures specified in a constitution that a majority of officials accept, but a *true* law must be part of a set of norms that jointly obey Fullerian principles.[5]

Even though Hannikainen and his co-authors decline to draw the link, their study may lend some modest support for weak natural law theory. If the shared conception of law is as a dual-character concept, this understanding of law would fit easily with the weak natural law theorist's contention. Recall that weak natural law theory provides that laws failing to meet certain moral criteria fail to be law in the full sense. Weak natural law theory is a theory of what law itself is, and law-as-dual-character-concept is a theory of how we conceive law, but the latter can offer some support for the former in part because of the presumption against error theories. If further investigation does vindicate the conjecture from Hannikainen and his co-authors that law is usually conceived as dual-character, someone attacking weak natural law theory has a bit of an uphill battle. That theorist would need to explain why everyone else is wrong and why the theorist is in such a better epistemic position to see what everyone

5 For a more thoroughgoing explication of dual-character concepts, see Knobe and colleagues (2013) as well as Leslie (2015).

else has missed. Of course, this is getting ahead of ourselves. The evidence from Hannikainen and his co-authors merely suggests that this a possibility.

Another recent paper worth noting is Flanagan and Hannikainen (2022). This piece is unique in that the authors seek to determine the nature of law via experiments testing folk intuitions about grammaticality, which is a proxy for the folk's conceptual frameworks. They tested five main hypotheses. Following their nomenclature, the five hypotheses are as follows.

(1) Strong classical natural law: an unjust rule is not a law in any sense,
(2) Weak classical natural law: a grossly unjust rule is not a law in any sense,
(3) Strong neo-classical natural law: an unjust rule is not a law in the true sense,
(4) Weak neo-classical natural law: a grossly unjust rule is not a law in the true sense,
(5) Positivism: a grossly unjust rule is no less a law than is a just one.

Important for the authors is the widespread assumption that the positivist has commonsense on her side. They claim their study shows just the opposite: "A large majority (64.4 %) rejected the view that, ultimately, law is just a matter of concrete social facts" (Flanagan and Hannikainen 2022, p. 175). Ultimately, the authors conclude that the folk concept of law is intrinsically moral and that the folk concept is a hybrid between strong and weak natural law theses, in the traditional senses of those terms, or, in their nomenclature, a hybrid between classical and neo-classical nature law theory.

As mentioned above, Flanagan and Hannikainen hold that results such as theirs are valuable because they can tell us who has commonsense on their side. Positivism may still be true, but if these results are to be trusted, the positivist has an uphill battle, or at least more of an uphill battle than one might have thought.

While Flanagan and Hannikainen suggest that their results are a resounding victory for natural lawyers, there is another interpretation of their data worth nothing. In looking over their results, one finds that roughly a third of respondents offer answers suggesting weak natural law theory, another third affirms strong natural law theory, and the last third affirms positivism. Perhaps, this is no victory for anyone.

2.3 Criticisms

Since its inception, experimental philosophy has been subject to many sorts of criticism. Philosophers have tried to deflect Restrictionist arguments and deny Restrictionist conclusions in various ways, by claiming that philosophers do not rely on intuitions in the first place (for an overview of such work, see Nado 2016), by arguing that use of intuition is indispensable (see, e. g., Nagel 2012), and even by suggesting that a master argument against any use of intuitions in philosophy is unscientific (Tobia 2015). Less

critical attention has been paid to the Analytic project,[6] and even less attention has been focused specifically on experimental analysis of law.

Jimenez (2021) offers an interesting version of an expertise defense that specifically targets experimental general jurisprudence. Before looking more specifically at Jimenez's version of it, it is worth saying something general about the "expertise defense" (also see Chapter 3 of this book). At its most general, an expertise defense is a criticism of experimental work which seeks to ascertain folk attitudes; the proponent of an expertise defense holds that the folk attitudes are irrelevant, for what really matters are the attitudes of experts of the relevant kind. The expertise defense often arises in response to Restrictionist work because those experimentalists are keen to show that folk responses to philosophers' thought experiments diverge from the expected intuitive response either as a general matter or because folk intuitions on the question are unreliable. Those offering up the expertise defense tell Restrictionists to ignore those folk attitudes, whatever they are. Of course, one could raise the expertise defense with respect to analytical work, and this is precisely what Jimenez does.

For Jimenez, law is the kind of concept, and accordingly the kind of thing, that is shaped by certain kinds of legal experts, particularly those who apply the law. As such, we best learn about the law, not by asking the person on the street, but by asking one of these legal officials. As he puts it, "questions about the concept of law [...] might be illuminated by armchair speculation about certain agents' intuitions or by empirical evidence about their actual views – but only to the extent those agents are involved in the interpretation and application of legal concepts and, more broadly, in the operation of the legal system" (Jimenez 2021, p. 8).

The trouble with this iteration of the expertise defense is that it depends on seeing law as a rarefied concept, when it arguably is not. For certain rarefied concepts, it seems odd to seek out folk opinions. If one wants to learn about neutron stars, post-structuralism, or stereotype threat, seeking out the folk intuitions, if there are any, seems unlikely to yield anything of theoretical value. When an astronomer's conception of a neutron star differs from that of the folk, this does nothing to diminish the astronomer's justification in holding that conception because we have no reason to believe the folk were in a good position to know the truth. Or, another way of putting it, explaining why the folk would misunderstand the nature of a neutron star is a simple task. The same goes with philosophers' conceptions of post-structuralism or psychologists' conceptions of stereotype threat. For these and other rarefied concepts, most people are unfamiliar with the concepts and the referents. Law is not like that. Nearly every adult on earth has knowingly lived under a legal system for decades and has used and applied the concept of law on a regular basis throughout their lives. In democratic systems, adults are regularly called upon to select the people that create laws in their society, and they are asked to evaluate the laws created by those people. Some democratic systems even permit the populace to make laws directly. There are also

6 But see Kauppinen (2007, 2014) for such critiques. Also see Donelson (forthcoming) for a reply.

myriad detailed depictions of legal systems in popular media, from courtroom dramas or to works focusing on the day-to-day struggles of elected officials and law enforcement. For better or worse, there are no movies about neutron stars or post-structuralism.

In rejecting the expertise defense offered by Jimenez (2021), one must be careful not to overstate the disagreement. Law is an arena where expert intuitions are important too. This is a topic for further discussion in Section 12.4.1, below.

3 Further Topics

While this chapter focuses on experimental general jurisprudence, there is also new work which employs experimental techniques to analyze everyday legal topics, such as consent and causation. Reviewing some of this interesting work is valuable because it is some of the most visible scholarship under the experimental jurisprudence heading. Also, this works reveals the wide variety of purposes to which experimental results can be put.

3.1 Consent

Sommers (2020) is a groundbreaking study on the folk conception of consent. The paper focuses on a puzzle in American law. On most scholarly accounts of the concept of consent, deception vitiates consent. However, there are cases where judges, from time to time, find consent where there was deception. According to Sommers, this is not puzzling when one recognizes that there is a reliable understanding of consent that is compatible with the possibility of deception: the folk conception of consent.

In a series of experiments, Sommers shows a few things about the folk conception of consent. The major conclusion, of course, is that the folk think that a deceived person still consents. For instance, if A deceives B with respect to A's HIV status in order to have B agree to sex, the folk think that B still consented. This is surprising, and for some, disturbing. Sommers also shows that this view of consent is a reliable intuition that crops up not just when the folk consider consent to sexual activity; the view is reliably elicited in cases about consent to medical treatment and consenting to a search by law enforcement. Next, Sommers amply shows that the best explanation of the folk response pattern is a genuine folk belief that deception does not undermine consent. The pattern is not best explained by the folk finding the offeree unsympathetic, by the mere fact that "consenter" said yes, et cetera. Finally, Sommers shows that on those occasions in which the folk was inclined to find consent incompatible with deception this owes to a distinction they implicitly draw between being deceived about what is happening (fraud in factum) and being deceived about the balance of reasons for engaging in the deed (fraud in inducement). Only the former sort of deception is thought, by the folk, to vitiate consent.

What is most interesting about this work is Sommers's explanation of its relevance for the law of consent. For Sommers (2020, p. 2301), it is not the case that legal systems should mirror the folk conception of consent simply because the folk hold that view. Instead, the primary value of such work, for Sommers, may well be explanatory. Having uncovered this understanding of consent, one can employ it to better understand the American judges who claim to find consent where there was deception. Perhaps these judges are influenced by the folk conception of consent (Sommers 2020, p. 2297). Knowing that this explains judicial conduct, as opposed to something else, is of great practical value.

In addition to explaining judicial behavior, these findings have upshots for ordinary people too. Knowing how ordinary people think about consent will be useful information when thinking about how to help people in their interactions with the law as jurors and as private citizens.

3.2 Causation

As a preliminary remark, it is important to note that there are two major causal notions under American law, actual causation and proximate causation. Roughly, actual causation asks a descriptive question about whether *x* causes *y*; whereas, proximate causation asks whether the causal relation is sufficient to conclude that A is responsible for *y* given that A did *x* which causes *y* in the actual causation sense. This distinction is important to bear in mind, for the two studies discussed below attempt to reveal the folk notion of legal cause, but one study examined actual causation while the other study examined proximate causation (also see Chapter 9 of this book for experimental work on causation in non-legal contexts).

Macleod (2019) is one of the earlier experimental papers to explore legal causation in any sense,[7] and it focuses on actual causation. The starting point of the paper is the fact that American judges often, though not invariably, claim to rely on the ordinary meaning of causal phrases like "because of" or "results from" when interpreting statutes containing such language. To recover the ordinary meaning of these phrases, judges rely on their own understandings or use dictionaries, but Macleod suggests that one might instead rely on survey data to determine ordinary meaning. Accordingly, Macleod employs this technique to determine the conception of causation held by most Americans.

The most significant finding of Macleod (2019) is that the folk strongly disagree with the courts about what "cause" means. American courts often suggest that a legal cause is, per definition, a necessary condition for an event's occurrence, or to put it in the courts' terms, a legal cause is a *but-for cause.* To be clear, but-for causation

7 However, see Kominsky and colleagues (2015). This paper is not specifically about legal cause, but the motivating example is a legal case about causation.

does not look for *logically* necessary conditions for the event. In asking "but for *x*, would *y* have happened?" one is looking for conditions that are physically necessary for the event, given that certain other antecedents to the event remain fixed. With that said, Macleod's (2019, pp. 999 f.) survey results amply show that "the but-for test appears to be overly restrictive: most people confidently allege that *y* 'resulted from' *x*, and that *y* occurred 'because of' *x*, while simultaneously and confidently alleging that *x* was not a but-for cause of *y*". If there are reasons to follow the folk understanding, whether from one's general approach to adjudication or from specificities about particular legal doctrines, these results present a major problem to judges who apply a different understanding of legal cause.

Knobe and Shapiro (2021) is another work about causation, this time about proximate causation. The starting point for this paper is an age-old debate about proximate causation.[8] For Knobe and Shapiro, legal formalists claimed that judges employed the term *proximate cause* as just the ordinary, descriptive notion of cause; whereas, legal realists claimed that, for judges, proximate cause is not so much a doctrine to be used in reasoning as a legal conclusion. For the realist, a judge first reaches the moral judgment that someone is morally responsible for, and thus liable for, a harm, and then the judge employs the "doctrine" of proximate cause to justify the legal outcome, post-hoc. Knobe and Shapiro argue that there is a middle path between these views, and that view is the folk conception of cause. This folk conception has two major benefits: it not only avoids certain theoretical pitfalls, but it also best explains a spate of judicial decisions which employ the concept of proximate cause.

For Knobe and Shapiro, the folk conception of causation works in the following way. The folk have a normative understanding of cause which they in turn apply to reach a normative conclusion about whether someone is liable. To be more perspicacious, the authors argue that the folk begin with normative judgments, specifically judgments about what is normal versus abnormal conduct. Abnormal conduct might be statistically abnormal, or it might violate some deontic standard. Armed with this peculiar kind of normative judgment, the folk make determinations of causation. A faculty member causes a receptionist to miss taking down an important message if the faculty member and someone else took the last two pens, but only the faculty member was forbidden by rule from taking the receptionist's pens. After making this causal judgment, the folk make the ultimate, normative judgment of who is liable for the problem. Knobe and Shapiro draw attention to the fact that the folk are making two distinct normative judgments, one about normality and the other about ultimate liability. These both go into reasoning about proximate causation.

What is most interesting about this study, beyond the experimental results themselves, is the use to which these results are put. Knobe and Shapiro, like Sommers (2020), use their work to give cover to judges. It is hard to understand and justify some bit of judicial conduct. The formalist understanding of the conduct makes judges

8 This chapter does not endorse this framing of that age-old debate.

good rule-followers, but the formalist implausibly claims that no moral judgment is involved in reaching the causal judgment. The realist understanding of the conduct allows that judges use moral judgment, but then the judges seem to be completely unrestrained, which has some major democratic difficulties. The Knobe-Shapiro account explains how judges can be rule-followers and use moral judgment. Of course, if this is the biggest upshot of the paper, it is unclear why it matters that the best explanation happens to comport with the folk conception of causation.[9]

4 Prospective Outlook

In considering the future of experimental jurisprudence, particularly work in the analytical vein, there are two main issues that advocates might consider, whether the work is general jurisprudence or the analysis of everyday legal concepts. First, experimentalists should consider whether to consider the intuitions of legal experts, rather than – and sometimes in addition to – the folk. Second, the experimentalists should think more broadly about how their work can enrich legal philosophy and legal practice.

4.1 Probing the Experts

Above, a version of the expertise defense from Jimenez (2021) was considered and rejected. Recall that Jimenez suggested that law is a rarefied concept such that the folk is unlikely to know much about it. In addition to arguing that this is likely mistaken, there are two other points to make.

First, instead of insisting that folk and expert intuitions about the nature of law diverge or converge, it would be better to gather and inspect empirical data. In other words, the best defense against the expertise defense may well be an experimental one. There is some work that seeks out expert intuitions (see, e.g., Donelson and Hannikainen 2020), but there should be more of this work.

Second, the Jimenez suggestion about rarefied concepts is much more plausible when one thinks, not of the concept of law, but of certain everyday legal concepts that are anything but "everyday" for most people. Jimenez actually makes this point too. The law abounds in concepts that are unfamiliar such as "due process of law" and "the rule against perpetuities". Even terms that are familiar might be given a different legal meaning, terms like *hearsay*, *search*, and even *consent.* How should experimentalists react to this version of an expertise defense? Examining a recent paper may point the way.

9 This point is made more eloquently by Jimenez (2021).

Klapper (2021) offers a range of arguments against using surveys to find the correct analysis of everyday legal concepts. Some of these worries are more technical ones about whether surveys can be designed to do what experimentalists want. For instance, Klapper wonders if surveys can uncover reliable response patterns, if enough context can be given to respondents, and if respondents know whether they are being asked descriptive versus normative questions. While these difficulties are genuine, they likely can be surmounted by technically trained experimentalists. Klapper also raises harder questions about when asking contemporary ordinary folks seems inappropriate. If the term under investigation is not ordinary but is instead a term of art,[10] or if the term's meaning has considerably changed from the time of enactment, surveys of the folk have limited applicability. The deeper worries are perhaps best seen as a version of the expertise defense. Legal experts are well-suited to understand legal terms of art and to understand which legal terms have drifted over time.

If Klapper (2021) is understood to raise a version of the expertise defense, an obvious answer is in the offing. While Klapper takes his expertise worries to fell the entire survey approach, these worries might be appropriately read more narrowly. There are times when it would be more appropriate to survey experts instead of the folk. Borrowing from Macleod (2019), one can develop an argument on why expert surveys may be helpful. Sometimes the courts are looking to ordinary, plain meaning as a first pass. If there is an unambiguous plain meaning, it must control, but if there is not, there are other consequences. Consider the rule of lenity, a principle for adjudicating criminal matters. According to the rule of lenity, if it is unclear that some behavior is contemplated for criminalization by the criminal statute, the criminal defendant found to have engaged in the behavior cannot be convicted under the relevant criminal statute. Applying the rule of lenity, then, requires understanding the ordinary meaning of criminal statutes. However, as Klapper points out, "ordinary meaning" perhaps does not refer to what the person on the street thinks, but what the ordinary person *with legal training* thinks. If that were so, surveying legal experts could uncover just how clear or unclear a given criminal statute is. If a sufficient number of legal experts were divided, one might conclude, as a matter of law, that the rule of lenity requires acquittal.

As this example from Macleod (2019) makes clear, surveying experts may hold considerable value for applying legal doctrine in particular cases. If, as a doctrinal matter, one must know whether experts disagree about the meaning of a legal text, discovering whether experts agree or disagree is important. There might, however, be different ways that expert (or, for that matter, folk) intuitions are legally or philosophically significant.

10 What Klapper (2021) calls the Drax problem is really just another version of the worry that the term is a term of art.

4.2 A Broader Vision

For both experimental work seeking to further conversations in general jurisprudence and work seeking to uncover the meaning of everyday legal concepts, richer conversations might be had about the conclusions one can draw from this work.

For experimental general jurisprudence, much of the research has only argued *in passing* that the results would enrich debates in general jurisprudence. A more sustained conversation would be good to see. In addition to more theoretical conversation, it would be great to have more experiments on the familiar topics in general jurisprudence. There has been no work on different versions of legal positivism, for instance. Also, it would be nice to see analytical work with a wider focus. Most of the experimental work narrowly centers on vindicating or vanquishing particular claims about the relation between legal norms and moral norms. This is the heart of general jurisprudence, as presently understood, so this exclusive focus is forgivable, but there are other conversations to which experimentalists might turn. There are, for example, other conversations about the necessary conditions of a legal systems, such as conversations on whether legal systems require coercion, conversations on whether law is a system of rules or imperatives, and conversations on the difference between legal officials and mafiosos.

Beyond considering new studies on the necessary conditions for legal systems, there are meta-debates to which experimentalists can contribute. As one example, some legal philosophers contend that we lack a shared concept of law which could be the focus of philosophical discussion (see, e.g., L. Murphy 2005, Priel 2011). While one can interpret some experimental findings in ways that support that view (Flanagan and Hannikainen 2020), no work yet has made that issue its primary focus. This would be of interest. Also, some legal philosophers contend that the point of general jurisprudence should not be to discover the nature of law, but instead to settle on, or *engineer*, a conception of law to satisfy certain practical aims (for an overview, see Donelson 2021). Experiments may be helpful in carrying out that engineering work.

Moving from experimental general jurisprudence to experimental takes on divining everyday legal concepts, there is much more work those experimentalists can do too. In its most modest incarnation, experimental work on everyday legal concepts seeks to discover information that legal doctrine already requires lawyers and judges to have. Sometimes legal doctrine explicitly demands the ordinary folk or expert view on something, and experimentalists are just doctrine's handmaidens. In more ambitious forms, experimentalists may insist on totally *a priori* grounds that most or all everyday legal concepts ought to cohere with ordinary understandings. If such normative arguments can be sustained, this would certainly broaden the range of everyday legal concepts that experimentalist should study. However, there is an underexplored middle path between waiting to see if legal doctrine already calls for experimental interven-

tions and having a more "activist" stance.[11] For instance, maybe research will reveal that conceptions of certain everyday legal concepts are sticky or relatively impervious to correction. If so, and if these are concepts that laypeople have to employ, either as a juror or as a private citizen conducting their affairs, maybe these legal concepts ought to cohere with folk understandings. In this example, experimental results themselves supply part of the explanation for when folk understandings ought to receive reliance.

In closing, then, I implore experimentalists both to continue performing studies and to search out new ways to ply their trade. There are cogent arguments about why such research would advance jurisprudence. It remains for researchers (and their funders) to produce the work.

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11 A thought akin to this is developed by Sommers (2020, pp. 2302 – 2306).

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