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# THE YALE LAW JOURNAL

JEFF POJANOWSKI

## Reevaluating Legal Theory

### *Evaluation and Legal Theory*

BY JULIE DICKSON

HART PUBLISHING, 2001

**ABSTRACT.** Must a good general theory of law incorporate what is good for persons in general? This question has been at the center of methodological debates in general jurisprudence for decades. Answering “no,” Julie Dickson’s book *Evaluation and Legal Theory* offered both a clear and concise conspectus of positivist methodology as well as a response to the long-standing objection that such an approach has to evaluate the data it studies rather than simply describe facts about legal systems. She agreed that legal positivism must evaluate. At the same time, she argued, it is possible to offer an evaluative theory of the nature of law that identifies law’s essential features, takes the views of its participants seriously, and prescind from moral judgment. Twenty years on, the debate on this question persists and, despite increasing insight and sophistication, some wonder whether we have reached a dead end.

To understand this dispute, and general jurisprudence’s methodological cul-de-sac, we need to broaden the range of questions and tools we bring to those arguments. To this end, this Review offers a mixture of the old and the new—demonstrating the usefulness of its approach by exploring the promise and limits of Dickson’s work. In terms of the old, it argues that moralized approaches to general jurisprudence, especially the classical natural-law tradition of legal theorizing, can better deliver on positivism’s promise to offer theories of law that are both general *and* take seriously the point of view of participants. In terms of the new, it seeks to ground this approach in a broader philosophy of social science that avoids both reductive naturalism and relativistic particularity in its explanations. Law is intertwined with morality, but it is also a social fact: a practice and institution. Any general theory of jurisprudence, like any general theory of human practices and institutions, must reckon with the relationship between law’s moral life *and* its factual existence. This Review begins the work of developing and rendering explicit such a social theory for a jurisprudence that takes both dimensions seriously.

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## INTRODUCTION

Must a successful theory about what law “is” also make value judgments about what it “ought” to be? This question about the relationship between value judgments and the nature of law has long been a central point of contention in legal philosophy. In Anglo-American jurisprudence, Thomas Hobbes<sup>1</sup> and David Hume<sup>2</sup> planted the seeds for the contemporary debate, which began to flower in earnest with Jeremy Bentham’s rejection of the classical natural-law tradition. Bentham distinguished between “expositorial jurisprudence,” which explains what a legal system is, and “censorial jurisprudence,” which seeks to reform any particular system the theorist has identified.<sup>3</sup> His intellectual disciple John Austin pithily summarized this position when he intoned that the “existence of law is one thing; its merit or demerit is another.”<sup>4</sup>

From the mid-twentieth century onward, a coterie of Oxford scholars took up the torch. H.L.A. Hart, while departing from Austin in crucial ways, also insisted that the key to understanding a legal system—the so-called “rule of recognition”—can be identified without undertaking any kind of moral assessment.<sup>5</sup> Hart’s students would carry on this debate as they became his colleagues at Oxford. Joseph Raz, in developing his theory of legal positivism, contended that the governing set of legal norms is “fully determined by social sources,” not by their moral content.<sup>6</sup> If identifying a legal system and its norms is a matter of finding social facts about the world and excludes appeals

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1. Thomas Hobbes argued that it “is not Wisdom, but Authority that makes a Law,” and for that reason, law consists of the sovereign’s commands and prohibitions, not reason. THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 55 (Joseph Cropsey ed., 1971) (1681); *id.* at 69 (identifying law with commands and prohibitions).
  2. David Hume famously distinguished between “is” and “ought” and argued that one cannot derive the latter from the former. *See* 1 DAVID HUME, A TREATISE OF HUMAN NATURE bk. 3, at 302 (David Fate Norton & Mary J. Norton eds., 2007) (1740).
  3. On Jeremy Bentham’s distinction, *see* JULIE DICKSON, EVALUATION AND LEGAL THEORY 4-5 (2001).
  4. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble ed., 1995) (1832).
  5. H.L.A. HART, THE CONCEPT OF LAW 107 (3d ed. 2012); *see id.* at 107-10.
  6. JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37, 46 (1979).

to moral worth or purposes, the line between describing and evaluating law appears sharp indeed.<sup>7</sup>

Oxonian critics of positivism challenged this theoretical separation. John Finnis, another former student of Hart, dedicated the first chapter of his seminal book on natural law to challenging his mentor's methodological neutrality.<sup>8</sup> A theorist, according to Finnis, must have some "principle of selection" to make sense of the welter of phenomena out in the world that go by the appellation "law."<sup>9</sup> For theorizing about purposive human institutions like law, the principle must focus on how a practically reasonable person understands law's point.<sup>10</sup> And because identifying that person's point of view is a task of moral and political philosophy, the line between jurisprudence and more general normative inquiry cannot run all the way up the theoretical ladder. Ronald Dworkin, one of Finnis's colleagues at Oxford, also contended that legal positivism was wrong to draw a sharp line between description and evaluation in legal theory. Such a move fails, he argued, because legal actors have deep disagreements about what counts as the "grounds of law" in legal disputes—disputes we cannot resolve just by pointing at brute facts about practice.<sup>11</sup> Identifying "the law," in Dworkin's view, requires an interpretive argument that reads the preexisting legal materials in their best moral light.<sup>12</sup>

This was roughly the state of play when Julie Dickson's book *Evaluation and Legal Theory* came on the scene in 2001.<sup>13</sup> Dickson, herself a former student of Raz, sought to defend legal positivism's separation of law and morality against Finnis's slings and Dworkin's arrows. In objecting to purportedly morally neutral descriptions of legal systems, scholars like Finnis contended that "jurisprudence, like other social sciences, aspires to be more than a conjunction of lexicography with local history, or even . . . a juxtaposition of all lexicographies conjoined with all local histories."<sup>14</sup> Moral evaluation of the purpose was there-

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7. In this respect, Joseph Raz draws a sharper conceptual distinction between law and morality than H.L.A. Hart. See HART, *supra* note 5, at 250 (noting that the rule of recognition "may incorporate as criteria of validity conformity with moral principles").

8. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3 (2d ed. 2011) ("[N]o theorist can give a theoretical description and analysis of social facts without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.").

9. *Id.* at 4.

10. *Id.* at 15.

11. RONALD DWORKIN, *LAW'S EMPIRE* 3-6 (1986).

12. See *id.* at 52-53.

13. See Dickson, *supra* note 3.

14. FINNIS, *supra* note 8, at 4.

fore necessary to transcend descriptive reportage. To avoid the implication that positivism is vulnerable to that objection, Dickson sought to offer an account that incorporates evaluations about significance and importance without placing moral judgment at the cornerstone of the edifice.

Like a good positivist, she rejected *directly* evaluative legal theories, namely approaches that (i) include moral evaluations of legal institutions and norms; (ii) view law as a morally justified enterprise; or (iii) consider the moral consequences of any given legal theory.<sup>15</sup> Developing hints of argument in Hart's and Raz's work, however, Dickson introduced an alternative framework she labels "indirectly evaluative legal theory."<sup>16</sup> Under this approach, a theorist identifies what is "significant" and "important" *to the participants* in the legal system. Doing so requires evaluation—sorting out the trivial and the marginal from the participants' point of view—but not moral assessment. What is important and significant about law could in principle be morally bad and still be constitutive of our concept of law, and we can identify such importance and significance before attaching such a label. Or so Dickson argued.

By elaborating her theory of indirect evaluation, she sought to redraw the dividing line between positivism and its critics: it was not the difference between description and evaluation, but rather *what kind of evaluation* is proper to legal theory. Such arguments about theory construction, moreover, emphasized the connections between jurisprudence and more general social philosophy. With Hart describing *The Concept of Law* as an "essay in descriptive sociology"<sup>17</sup> and critics of the Oxford positivist consensus drawing on the likes of Eric Voegelin, Max Weber, and Peter Winch<sup>18</sup> in reply, the need for legal philosophers to delve deeper into general social theory became clear.<sup>19</sup> Dickson's book, and her elaboration of indirectly evaluative legal theory in subsequent work, sought to offer a more sophisticated defense of the kind of morally neutral social explanation that her school of legal positivism requires.<sup>20</sup>

15. DICKSON, *supra* note 3, at 9–10.

16. *Id.* at 10.

17. HART, *supra* note 5, at vi.

18. FINNIS, *supra* note 8, at 19 (citing Weber and Voegelin); H. Hamner Hill, *H.L.A. Hart's Hermeneutic Positivism: On Some Methodological Difficulties in The Concept of Law*, 3 CAN. J.L. & JURIS. 113, 114 (1990) (invoking Winch).

19. Cf. Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 199 (1999) ("Legal theorists would do well to pay attention to what is going on elsewhere in social theorists—and other social theorists, likewise, would do well to see what is being proposed and debated in the jurisprudence literature.").

20. Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 LEGAL THEORY 117, 125–29 (2004) [hereinafter Dickson, *Methodology in Jurisprudence*]; Julie Dickson, *Ours Is a Broad*

*Evaluation and Legal Theory* attracted significant critical notice at its publication.<sup>21</sup> Further, jurisprudents interested in the philosophy of social science have joined the debate, though often to criticize positions like Dickson's and Hart's.<sup>22</sup> Dickson's work is a worthy starting point because she has articulated and defended the methodological premises of regnant legal positivism with great clarity, energy, and insight. This Review takes stock of the current state of argument and hopes to enrich it by bringing in new perspectives in social theory.

Jurisprudence students and scholars may wonder why it matters where we draw the line between legal philosophy, on the one hand, and moral and political philosophy on the other. At first glance, it seems a trivial labeling dispute: legal positivists like Dickson plainly care about the moral and political dimensions of human affairs and their relationship to law. Why care whether those normative considerations are *included* in our theorization about the nature of law?<sup>23</sup> One might wonder if this is at all an interesting endeavor.<sup>24</sup> Little sur-

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*Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry*, 6 JURIS. 207, 220-30 (2015) [hereinafter Dickson, *Ours Is a Broad Church*]. Dickson will further elaborate on her theory in a forthcoming monograph, tentatively entitled *Elucidating Law*, which she hopes to release in 2021. See Julie Dickson: Professor of Legal Philosophy, U. OXFORD FAC. L., <https://www.law.ox.ac.uk/people/julie-dickson> [<https://perma.cc/98UA-G4BX>].

21. See, e.g., Brian H. Bix, Book Review, 28 AUSTL. J. LEGAL PHIL. 231, 231 (2003); Matthew H. Kramer, Book Review, 62 CAMBRIDGE L.J. 210, 210 (2003); Mark McBride, Book Review, 66 MOD. L. REV. 661, 661 (2003); Dan Priel, *Description and Evaluation in Jurisprudence*, 29 LAW & PHIL. 633, 635-36 (2010); Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493, 493 (2005).
22. See, e.g., Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 40-43 (2003) (arguing that Dickson's indirectly evaluative theory is not evaluative at all, but rather reflects more descriptive epistemic values); Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 311, 312-13 (Jules Coleman ed., 2001) (arguing that conceptual analysis, which is distinct from science, is inconsistent with methodological positivism). For an excellent exploration of the relationship between jurisprudence and the sciences, see Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 WASH. U. JURIS. REV. 269 *passim* (2012).
23. For present purposes, this Review does not draw a sharp terminological distinction between a theory of the "nature of law" and a "concept of law." Joseph Raz, by contrast, distinguishes between our concepts about something and that thing's nature. See JOSEPH RAZ, *Can There Be a Theory of Law?*, in BETWEEN AUTHORITY AND INTERPRETATION 17, 19 (2009) ("Concepts are how we conceive aspects of the world, and lie between words and their meanings . . . on the one side, and the nature of the things to which they apply, on the other."). I am using "concept" in the broader sense as referring to our understanding of the thing's nature.
24. See David Enoch, *Is General Jurisprudence Interesting?*, in DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 65, 65 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019) ("[W]hen it comes to general jurisprudence—questions about the nature of law, the necessary and sufficient conditions of legal validity in general . . . obviously the

prise, then, that some argue we are not even asking the right questions in general jurisprudence, and that legal systems and norms are, in fact, not interestingly distinctive from other normative systems that have moral and prudential “upshots.”<sup>25</sup> This Review’s conclusion will suggest that many philosophers still care—and get so heated about these questions—because those competing views of the dividing line between jurisprudence and normative philosophy intertwine with competing visions of what is good for persons, which themselves intertwine with competing ways of thinking about society. The lines we draw here suggest a broader picture of our moral and even metaphysical commitments.

To understand this dispute, and the methodological cul-de-sac we have spent the past few decades circling around, we need to broaden the range of questions and tools we bring to those arguments. To this end, this Review offers a mixture of the old and the new—demonstrating the usefulness of its approach by exploring the promise and limits of Dickson’s work. In terms of the old, it argues that moralized approaches to general jurisprudence, especially the classical natural-law tradition of legal theorizing, can better deliver on positivism’s promise to offer theories of law that are both general *and* take seriously the point of view of participants. In terms of the new, it seeks to ground this approach in a broader philosophy of social science that avoids both reductive naturalism and relativistic particularity in its explanations. Law is intertwined with morality, but it is also a social fact: a practice and institution. Any general theory of jurisprudence, like any general theory of human practices and institutions, must reckon with the relationship between law’s moral life *and* its factual existence. This Review begins the work of developing and rendering explicit such a social theory for a jurisprudence that takes both dimensions seriously.

Part I of this Review describes Dickson’s indirectly evaluative legal theory and her argument about what general jurisprudential method should look like. Part II criticizes this framework. It amplifies the work of other jurisprudence scholars and draws on more general philosophy of social science to argue that a legal theory about the nature of law cannot at the same time (a) pick out essential features, (b) based on the understanding of the participants, (c) while remaining morally neutral about the practice. Approaches like Dickson’s seek to

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wars over legal positivism, and so on—I always get the feeling that if there is a point, I’m missing it.”).

25. See, e.g., Scott Herskovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1173 (2015) (“There is a way out of the debate, and indeed, the way out is as simple as the way in: to escape the debate, we could simply abandon the thought that starts it up. That is, we could abandon the thought that, in addition to their moral and prudential upshots, legal practices have distinctively legal upshots.”).



do all three, combining interpretive and naturalistic understandings of social theory that do not cohere.

Part III argues for a teleological approach to general jurisprudence that picks out essential features, draws on the understandings of the participants, but eschews moral neutrality. Such theories are old hat, of course, but this Review seeks to place a few new feathers in the band. It seeks to ground this approach by looking to social-science theories that reject both reductive forms of naturalism and particularistic and relativistic forms of hermeneutical explanation. Theories like Dickson's wisely seek to avoid both vices, but this Review argues that reckoning plainly with the evaluation inherent in jurisprudential method offers the most promising way to escape those twin snares.

## 1. EVALUATION AND METHOD IN GENERAL JURISPRUDENCE

Dickson's book and her subsequent work elaborating upon its arguments focus on what she calls "the philosophy of legal philosophy."<sup>26</sup> These questions concern not only the right way to do legal philosophy (often labeled arguments about "methodology"<sup>27</sup>), but what the discipline is: "its aims, criteria of success, evidence base, constraints and prospects for progress, and indeed how we should determine and understand its very domain and subject matter."<sup>28</sup> We can add to that questions about legal philosophy's relationship to, and place among, cognate fields like moral and political philosophy, the social sciences, and good old-fashioned doctrinal analysis.<sup>29</sup> Dickson perceived, correctly, that if you scratch the surface of an argument about the "right way" to do legal philosophy, you will very quickly find yourself mining these more foundational questions. Dickson made her stance on jurisprudence's character and domain clear and, in doing so, offered a crystalline explication of the approach that has been predominant in Anglo-American legal philosophy.<sup>30</sup> This Part will sketch Dickson's argument, which draws deeply on the thought of jurisprudential doyens H.L.A. Hart and Joseph Raz.

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26. Dickson, *Ours Is a Broad Church*, *supra* note 20, at 208.

27. See, e.g., Dickson, *Methodology in Jurisprudence*, *supra* note 20, at 117–18 (surveying the debates).

28. Dickson, *Ours Is a Broad Church*, *supra* note 20, at 208.

29. See *id.*

30. Like Dickson, I will use the terms "jurisprudence" and "legal philosophy" interchangeably. See Dickson, *Ours Is a Broad Church*, *supra* note 20, at 210 ("I am not using 'legal philosophy' in contradistinction to 'legal theory,' or to 'jurisprudence.'").

In *Evaluation and Legal Theory*, Dickson contended that general jurisprudence's task is to "explain[] the nature of law by attempting to isolate and explain those features which make law into what it is."<sup>31</sup> To do so, a good theory must (1) identify propositions that "are necessarily true" and (2) "adequately explain the nature of law."<sup>32</sup> In short, the theorist must identify law's "essential properties."<sup>33</sup> Nor should the theorist be content with identifying the essential properties of a particular legal system. She must find the properties "which law, at any time, and in any place, must exhibit."<sup>34</sup> Or, as her methodological ally Scott Shapiro put it, just as discovering that H<sub>2</sub>O is what "makes water *water*," the legal theorist should seek to discover "what makes all and only instances of law instances of *law* and not something else."<sup>35</sup>

To illustrate this approach, consider Joseph Raz's argument about the nature of law. To oversimplify, Raz famously contended that law's distinguishing feature is its claim of authority over its subjects.<sup>36</sup> Authority, in this sense, preempts or overrides the practical reasoning of people subject to its jurisdiction on the matter in question.<sup>37</sup> To do so, "the existence and content of every law [must be] fully determined by social sources" as opposed to, say, open-ended moral principles.<sup>38</sup> We might have our own opinions about when we should keep promises, what is a reasonable risk, or whether a particular killing is justified. However, when we deliberate about how to act on those matters, law insists that it can override our reasons and tell us what to do, even if we think law is dead wrong. And to do its job, law cannot invoke its authority just to point to abstract moral principles, but rather it must issue an instruction crystallized in an identifiable, posited social source. This theory, Raz contends, picks out (at least some subset of) the "features which all legal systems necessarily possess."<sup>39</sup>

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31. DICKSON, *supra* note 3, at 17.

32. *Id.*

33. *Id.*

34. *Id.* at 18. Dickson does not assume that law necessarily has such essential properties, but rather that a successful theory of law would focus on them *if* they in fact exist. *Id.* Nor does she claim that the legal systems a successful concept would theorize are necessary components of every society. *Id.* at 19.

35. SCOTT J. SHAPIRO, *LEGALITY* 9 (2011).

36. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 55-56 (1986).

37. See *id.* at 57-59.

38. RAZ, *supra* note 6, at 46.

39. JOSEPH RAZ, *The Institutional Nature of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, *supra* note 6, at 104-05. For approaches to conceptualization that also focus on necessary and timeless features, see, for example, JOHN GARDNER, *Law in General*, in *LAW AS*

Through what kind of lens should a theorist search for those essential, fundamental properties? Following Hart and Raz, Dickson argued that any successful theory must flow from the self-understandings of the persons participating in the practice. It is not enough to observe the behavior of people in a society to understand their (the?) concept of law. Legal theory must “advance our understanding of society by helping us to understand how people understand themselves.”<sup>40</sup> Thus, a sound theory must “account accurately for and explain adequately beliefs about and attitudes towards the law on the part of those who are subject to it, and who understand their social world partly in terms of it.”<sup>41</sup> So, for example, while Raz distinguishes legal philosophy from sociological reportage,<sup>42</sup> his theorization builds from, and seeks to clarify or illuminate, the concepts immanent in people’s beliefs about law.<sup>43</sup> Similarly, Hart’s concept of law focuses on the internal point of view of participants in social practice, not merely external actions or a priori theorizing.<sup>44</sup>

Although this approach takes account of people’s beliefs about law, such theorizing, Dickson insisted, should not take a moral stance on those beliefs. Law, adequately conceptualized, *could* be a morally valuable social practice, but we need not make moral worth a criterion for theoretical success.<sup>45</sup> Indeed, she dedicated the bulk of her book to critiquing such “directly evaluative” approaches.<sup>46</sup> In this respect, legal theorists are like sociologists or anthropologists who study a group’s practices from its point of view while withholding

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A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 270, 296-97, 296 n.75 (2012); ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 27 (2d ed. 2005); SHAPIRO, *supra* note 35, at 13-22; and Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164, 175-79 (2006). Raz has, in later work, retreated from insisting that a theory of law identifies a single set of features. Brian H. Bix, *Joseph Raz and Conceptual Analysis*, *APA NEWSL. ON PHIL. & L.*, Spring 2007, at 3 (“While much of Raz’s recent work could be seen as assuming our society has a single concept of law, in recent comments Raz has denied making that assumption or conclusion.”).

40. DICKSON, *supra* note 3, at 40 (quoting JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 237 (1994)).

41. *Id.* at 41.

42. JOSEPH RAZ, *The Institutional Nature of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, *supra* note 6, at 103-05.

43. See JOSEPH RAZ, *The Inner Logic of the Law*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS*, *supra* note 40, at 236-37.

44. See HART, *supra* note 5, at 88-91.

45. See DICKSON, *supra* note 3, at 21.

46. See *id.* at 51-82 (challenging John Finnis’s natural-law theorizing); *id.* at 84-93 (challenging Frederick Schauer’s consequentialist positivism); *id.* at 103-32 (challenging Ronald Dworkin’s interpretive argument for law as integrity).

moral judgment about what they find. Dickson agreed that moral evaluation is worthwhile. Still, we must first identify what law *is* before we decide whether it is a good thing. After that important work, “it is then possible and appropriate to go on” to evaluate law as a matter of moral or political theory.<sup>47</sup>

To illustrate this approach, consider again Raz’s contention that law, as a matter of conceptual necessity, *claims* authority to override our relevant reasons. That, per Raz, is part of what law is and what it does. He does not further claim that it follows that law is, as an abstract matter, a morally good thing. In fact, Raz provides a detailed argument about *when* it is morally justified to submit to authority, and he rejects a general presumption that one ought to obey legal authority.<sup>48</sup> Similarly, for Hart, the internal point of view toward law is not moralized: one can have an attitude of legal obligation for nonmoral reasons.<sup>49</sup> Putting moral obligation at the center of law, in Hart’s view, is an “unbalanced perspective” no more plausible than Marxist theories of legality based on class conflict.<sup>50</sup>

Dickson emphasized—and this is the major contribution of the book—that such approaches to jurisprudence are not and should not be merely “descriptive.” After all, a theory of a complex social practice like law cannot simply restate the jumble of facts it seeks to conceptualize. Rather, it must abstract from the data, filter out irrelevant features, and highlight others. Critics of the positivist tradition in which Dickson works have long argued that such necessary selection makes morally neutral legal theorizing a nonstarter.<sup>51</sup> Dickson agrees that all theorizing must be evaluative; she just contends that not all evaluation is *moral*. Proper theorizing about the nature of law eschews moral judgment about the practice while relying on what she calls *indirectly evaluative* judgments.

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47. *Id.* at 63–64; *see also id.* at 137 (arguing that nonmoral theorizing helps us “identify and analyse those features of the law which are relevant to its eventual direct evaluation, or to subjecting the law to moral scrutiny”).

48. RAZ, *supra* note 36, at 142–59 (providing the moral criteria for justified authority); *id.* at 112–14 (denying a “*prima facie* [moral] obligation to obey” the law).

49. HART, *supra* note 5, at 203 (“[A]llegiance to the [legal] system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.”).

50. H.L.A. HART, *Introduction*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 12, 12 (1983).

51. *See, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3–4 (2d ed. 2011) (denying that a “value-free description” of law is possible); *see also* Grégoire Webber, *Asking Why in the Study of Human Affairs*, 60 *AM. J. JURIS.* 51, 54 (2015) (“The study of . . . human conduct . . . is the study of the action’s point, purpose, goal, value, objective, rationale, reason for acting, as conceived and understood by the person whose action it is.”).

To show how theorizing about law can be more than descriptive, but still less than moral, Dickson pointed to two kinds of conceptual criteria for constructing theories. First, there are “banal,” “purely meta-theoretical values” like “simplicity, clarity, elegance, comprehensiveness, and coherence.”<sup>52</sup> Any theories, including those in the natural sciences, aspire to those values. More interesting are those evaluations which are thicker than these banal criteria, but thinner than judgments of moral and political theory. These are judgments about which features, in the view of the participants in the practice, are “important,” “significant,” or “illuminating” about it.<sup>53</sup> Dickson analogized to an agnostic who wants to understand the Catholic mass.<sup>54</sup> The observing theorist will make judgments about which features the practitioners find important or significant (say, kneeling gestures and the Eucharist) compared to the irrelevant (say, the inevitable shuffling of feet or squirming of children, or people responding “God bless you” to sneezes). To explain what is central to a mass, or what makes a mass excellent in the eyes of the practitioners, one does not have to be Catholic; increased familiarity can even breed contempt.

By the same token, for the indirectly evaluative theorist, it may be important and significant that law claims authority to override our moral judgments, that there are officials who resolve disputes about law’s content, or that departure from legal norms requires an explanation. By contrast, the particular order of Titles in the United States Code is trivial<sup>55</sup> and the fact that we even codify law in text is contingent.<sup>56</sup> In articulating and defending indirectly evaluative theorizing, Dickson sought to rebut the accusation that analytical-positivist theorizing is too thin to be useful or coherent. At the same time, she sought to maintain the position that moral theorizing about law is a distinct area of inquiry that, while important, must wait until we settle on more neutral grounds what law exactly is.

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52. DICKSON, *supra* note 3, at 32.

53. Dickson, *Ours Is a Broad Church*, *supra* note 20, at 221; *see also* DICKSON, *supra* note 3, at 52.

54. DICKSON, *supra* note 3, at 68–69.

55. Cf. Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 284 (2007) (“The Code is made by taking the session laws, hacking them to pieces, rearranging them, and stitching them back together in a way that gives them false life.”).

56. Cf. Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017) (“A society can be recognizably originalist without having a written constitution, written law, or any writing at all.”).

## II. GENERAL JURISPRUDENCE AND SOCIAL THEORY

Dickson, in line with many other legal positivists, argued that identifying what counts as law or legal is a prolegomenon to, or a separate question from, evaluating law in general or specific provisions of law. This contention is as familiar as it is controversial. Leading foils in Dickson's book such as natural lawyers like John Finnis<sup>57</sup> and interpretivists like Ronald Dworkin (in his later work)<sup>58</sup> argue that law and moral/political philosophy fuse at the horizon, such that one cannot understand as a general matter what law *is* without understanding what it is good *for* and how it can realize those good(s) in practice. Whatever the differences between the classical natural-law tradition and Dworkin's particular theory—and they are important—both understand legal philosophy as a subset of practical reasoning or moral and political theory, not as an autonomous practice that harvests and processes social facts for normative philosophers to test down the line.

To get a better view on this longstanding debate, it is worth widening the lens to view broader arguments about how to form theories about social practices and institutions. In important respects, general jurisprudence resembles anthropology, political science, and sociology in that its practitioners seek to theorize and understand how we order important parts of our lives. Accordingly, Hart said his *Concept of Law* was “an essay in descriptive sociology,” Finnis's natural-law critique of Hart's concept of law draws on Max Weber's arguments about the necessity of theorists making evaluative judgments; Dworkinian Stephen Perry criticizes Hartian methodology via hermeneutical social theory; and Brian Leiter seeks to theorize general jurisprudence in terms of social scientific naturalism.<sup>59</sup>

Although Dickson did not lay her cards on the table about the nature of social scientific explanation, we can understand her argument as at least ground-

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57. See, e.g., John Finnis, *Law and What I Truly Should Decide*, 48 AM. J. JURIS. 107, 108 (2003) (arguing that jurisprudential inquiry is “about whether and if so why I, the reflecting person doing the inquiring, should want there to be [law], and be willing to do what I can and should to support and comply with it (if I should)”).

58. See, e.g., RONALD DWORIN, JUSTICE IN ROBES 34-35 (2006) (“We might do better with a different intellectual topography: we might treat law not as separate from but as a department of morality. . . . We might treat legal theory as a special part of political morality distinguished by a further refinement of institutional structures.”).

59. FINNIS, *supra* note 8, at 9; HART, *supra* note 5, at vi; see Brian Leiter, *Postscript to Part II: Science and Methodology in Legal Theory*, in NATURALIZING JURISPRUDENCE 183, 183 (2007); Perry, *supra* note 22, at 312-13 (arguing that conceptual analysis, which is distinct from science, is inconsistent with methodological positivism). For an excellent extended exploration on the relationship between jurisprudence and the sciences, see Priel, *supra* note 22.

ing her theory in a model of social theorizing. She, like Hart and Raz, is interested in understanding, illuminating, and clarifying a living social practice based on the understanding of its participants. Dickson may not have recognized herself as undertaking such work. She endorsed Raz's statement that

it would be wrong to conclude . . . that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that unlike concepts like "mass" or "electron," "the law" is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.<sup>60</sup>

But, as Leiter observes, this does not take projects like Dickson's out of the domain of social scientific theorizing; it simply draws a plausible line between theorizing about natural entities and social practices, with the latter focusing at least in part on "how humans make themselves and their practices intelligible to themselves."<sup>61</sup> As Priel puts it, Hart did not *abandon* his professed aims of "descriptive sociology" by focusing his analysis on a selected point of view of law's participants. His approach, which Raz and later Dickson would build off of, simply constituted what Hart thought *good* sociology looks like—a method, that we shall see, has affinities with established approaches to theorizing about social phenomena.<sup>62</sup>

To summarize Dickson's argument, she contended that a concept of law should seek features of law that are (a) necessary or essential to all legal systems, based on (b) what those subject to the legal system find important and significant about law (c) without imposing a morally evaluative filter on those important and significant theoretical necessities. Is there a tenable framework for theorizing about the social sciences that can accommodate these features? Perry and Priel have argued, persuasively, that frameworks like Dickson's offer an untenable hodgepodge that combines features of theorizing about the natural sciences with more humanistic approaches to interpreting social practices.<sup>63</sup> This Part builds off, and modifies, this line of argument to emphasize how different features of theories like Dickson's draw on competing understandings of theorizing about the human sciences.

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60. DICKSON, *supra* note 3, at 40 (quoting JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS*, *supra* note 40, at 221).

61. Leiter, *supra* note 22, at 40.

62. See Priel, *supra* note 22, at 304.

63. See Perry, *supra* note 22, at 313-14; Priel, *supra* note 22, at 271-72.

### A. Jurisprudence Modeled on the Natural Sciences

Concepts of law like Dickson's identify features of that practice that are necessary or essential without undertaking moral evaluation. What kind of theorizing about human practices could produce such features? There are models of social science in which concepts pick out essential, universal features of human practices like law without undertaking moral evaluation. Building on the work of sociologist Auguste Comte, some positivist, empirical models of social science (which unfortunately for clarity purposes is *not* the same thing as "legal positivism"<sup>64</sup>) theorize human affairs in terms of the natural sciences.<sup>65</sup>

Here, social scientists pursue what is known as the "covering-law model" approach associated with philosopher Carl Hempel.<sup>66</sup> To explain something is to "show[] that the outcome was 'to be expected under the circumstances,' by subsuming it beneath one or several laws."<sup>67</sup> If you know the scientific law, and you know the facts at play, you will be able to predict and explain the result because of the general law. Although the covering-law model has a natural home in the hard sciences, "Hempel suggests that good explanations in the social and historical sciences always refer to general laws, at least tacitly."<sup>68</sup>

Drawing on Hempel, behavioralist political scientists in the middle of the twentieth century hoped their theorizing "would yield predictive laws" to make sense of the welter of data their studies generated.<sup>69</sup> As Priel has argued, some early legal positivists also sought to understand legal systems in this fashion. Hobbes understood his concept of law as the will of the sovereign based on the human "*need for law*," given stable features of human psychology and biology – not a priori reasoning or a desire to understand the point of view of the participants.<sup>70</sup> In this respect, a scientific-positivist approach to law resembles behav-

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64. See Priel, *supra* note 22, at 276 ("[B]oth [scientific] 'positivism' and 'legal positivism' have meant different things to different people at different times.").

65. See TED BENTON & IAN CRAIB, *THE PHILOSOPHY OF SOCIAL SCIENCE: THE PHILOSOPHICAL FOUNDATIONS OF SOCIAL THOUGHT* 22-23 (2d ed. 2011).

66. Philip S. Gorski, *The Poverty of Deductivism: A Constructive Realist Model of Sociological Explanation*, 34 *SOC. METHODOLOGY* 1, 2 (2004); *id.* at 5 (citing CARL G. HEMPEL, *ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE* (1965)).

67. *Id.* at 5.

68. *Id.* at 6.

69. JASON BLAKELY, ALASDAIR MACINTYRE, CHARLES TAYLOR, AND THE DEMISE OF NATURALISM: REUNIFYING POLITICAL THEORY AND SOCIAL SCIENCE 17 (2016).

70. Priel, *supra* note 22, at 288; see also *id.* at 289-94 (describing Bentham's jurisprudence, which had materialist premises, as based on the scientific method, and eschewing attempts to understand law from within in favor of external observation).



iorism or rational-choice theory, which presume “a natural-science, cause-effect model” of social science.<sup>71</sup>

Such a covering-law approach can identify concepts of law with necessary features and without moral evaluation: humans being what they are—based on external observation—will with lawlike regularity satisfy needs they have in complex societies by generating this practice called “law,” in which a person with power to rule has his commands habitually obeyed because of threat of sanctions.<sup>72</sup> One problem with this approach, however, is that such behaviorist approaches are “rarely espoused nowadays,” even by scientific naturalists.<sup>73</sup>

That said, there are approaches to social scientific concept formation that follow the covering-law approach *and*, like Dickson, consider how human actions are meaningful “for those who perform them.”<sup>74</sup> Mark Bevir and Asaf Kedar’s exploration of concept formation in political science is illuminating. They distinguish between what they call “naturalist” and “anti-naturalist” approaches to concept formation. Both methods consider participants’ beliefs, but only the former seeks to explain social phenomena in terms of general laws.<sup>75</sup>

These theorists, Bevir and Kedar contend, adopt an essentialism that forms concepts “in ways that ignore the historical specificity of the various objects to which they refer” and “neglect[] historical contingency in order to postulate cross-temporal and cross-cultural regularities.”<sup>76</sup> In its strong form, this essentialism seeks “core attributes” that “characterize all cases to which we might apply [the] concept,” a quest for commonality in which concepts are “defined by a set of fixed attributes to be found in all relevant cases.”<sup>77</sup> Identifying essential features out of the welter of facts is “a precondition of the validity of social sci-

71. BENTON & CRAIB, *supra* note 65, at 87.

72. Cf. Priel, *supra* note 22, at 293 (identifying how Austin’s sovereign/sanction concept of law was “an account of law grounded in observable fact”).

73. Mark Bevir & Asaf Kedar, *Concept Formation in Political Science: An Anti-Naturalist Critique of Qualitative Methodology*, 6 PERSP. ON POL. 503, 505 (2008); cf. Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD J. LEGAL STUD. 663, 672 n.46 (2011) (rejecting Quine’s version of naturalism due to its “unprincipled commitment to psychological behaviourism”).

74. Bevir & Kedar, *supra* note 73, at 505.

75. *Id.* at 504-07. This naturalist approach to concept formation in the social sciences suggests that Perry’s sharp dichotomy between theorizing in terms of natural science on the one hand, and conceptual analysis in a hermeneutical fashion on the other, is overdrawn. Perry, *supra* note 22, at 312-13. There are nonhermeneutic approaches to concept formation.

76. Bevir & Kedar, *supra* note 73, at 507.

77. *Id.* at 508.

ence concepts.”<sup>78</sup> Thus, for example, a political scientist defines a concept of political power (“*X* has power over *Y* with regard to *Z* only if there is a relation of causality between *X* and *Y* with regard to *Z*”) that seeks the highest level possible on the ladder of abstraction.<sup>79</sup>

There is a strong resemblance here to essentialist general jurisprudence that builds on participants’ views but seeks general features of the concept, or nature, of law across time and geography.<sup>80</sup> (“*X* is law if it claims moral authority to override *Y*’s judgment and is identifiable in social sources” or “*X* is law if it is a union of primary and secondary rules toward which legal officials *Y* have an internal attitude of obligation and if there is a general level of compliance among non-officials *Z*<sub>1</sub> to *Z*<sub>*n*</sub>.”)

So far, so good, but problems remain. First, such an approach to social sciences is controversial even among naturalists who would make inquiry into human practices continuous in method with those of the natural sciences. Leiter, for example, has argued that, unlike natural kinds, human artifacts like law lack essential features. Law, unlike water or gold, is not a natural kind, but a product of human choice and action and therefore “hostage to changing human ends and purposes.”<sup>81</sup> Theorizing about social practices, the argument goes, cannot lead to the kind of concepts Dickson, Hart, Raz, Shapiro, and others seek.

Nor is it at all clear that this is the kind of game Dickson and others are trying to play. Consider other features of naturalist concept formation that Bevir and Kedar identify and criticize. Such approaches, they argue, “reify[y]” concepts, defining them “either in ways that neglect relevant meanings entirely or

78. *Id.*

79. *Id.* at 510 (quoting Jan-Erik Lane & Hans Stenlund, *Power*, in *SOCIAL SCIENCE CONCEPTS: A SYSTEMATIC ANALYSIS* 315, 327 (Giovanni Sartori ed., 1984), and noting how, under an essentialist approach to concept formation such as this one, “the greater the number of attributes that comprise a concept’s intension, the smaller the number of empirical cases that comprise its extension, and vice versa”).

80. See JOSEPH RAZ, *Can There Be a Theory of Law?*, in *BETWEEN AUTHORITY AND INTERPRETATION* (2009) 17, 25 (“Naturally, the essential properties of the law are universal characteristics of law. They are to be found in law wherever and whenever it exists.”). Raz, to be sure, also recognizes “in legal theory there is a tension between the parochial and the universal.” *Id.* at 38. He explains that legal theory “aims to explain an institution designated by a concept that is a local concept, a product of Western civilization. On the other hand it is universal theory for it applies to law whenever and wherever it can conceivably be.” *Id.*

81. Leiter, *supra* note 73, at 666; accord FREDERICK SCHAUER, *THE FORCE OF LAW* 35-41 (2015) (challenging “essentialism” such as Dickson’s); see also Bevir & Kedar, *supra* note 73, at 506 (noting the prominent view “that the human sciences deploy languages that presuppose ideas of choice and contingency that are quite at odds with the forms of explanation found in the natural sciences”).

in ways that neglect the holistic character of meanings,” treating a concept as a thing free floating above intentional actors.<sup>82</sup> Thus, such social scientists conceptualize, for example, “social class” in terms of objective criteria independent of the subjects understanding of class.<sup>83</sup> Although such social scientists will form concepts that take account of human meanings, they will treat them as “epiphenomena” or “independent variables” in mechanical causal explanations.<sup>84</sup>

Furthermore, this “naturalist” approach to concept formation understands the social scientist as separate from the human objects of study. The social scientist wields “sterilized linguistic instruments that are shielded from their own ordinary language” and views the “social world as a neutral object on which the concept is set to work as an instrument of discovery, description, classification, and explanation, without recognizing that the actors within this world form concepts with which to understand it and to act within it.”<sup>85</sup>

These other features in addition to essentialism are harder to square with Dickson’s project. Like Hart, Dickson does not treat concepts as variables to predict lawlike patterns of activity. And, while the concept of law the theorist will identify will be a refinement or elucidation of a group’s concept, it will very much still be rooted to *their* understanding of what the concept is.<sup>86</sup> Unlike such naturalist concept formation, indirectly evaluative legal theory does not identify meanings with the hope that they will ultimately “drop out” of more lawlike explanations.<sup>87</sup> It does not seek to predict human behavior under covering laws and it views the perspective of the participants as central to identifying what counts as significant or important about the practice.<sup>88</sup> In short, while a

82. Bevir & Kedar, *supra* note 73, at 507.

83. *Id.*

84. *Id.*

85. *Id.* at 508.

86. That said, there remains some ambiguity about the extent to which Dickson views the theorist as inside or outside the group she is studying. Consider her discussion of essential properties. She says an essential feature “X” is one “law invariably exhibits and that hence reveals the distinctive mode of law’s operation; by the prevalence and consequences of certain beliefs on the part of those subject to law concerning that X, indicating its centrality to our self-understandings.” Dickson, *Methodology in Jurisprudence*, *supra* note 20, at 126. Studying the beliefs of “those subject to law” could suggest the kind of outsider approach Bevir and Kedar identify, while the claim that such inquiry enriches “our self-understanding” suggests otherwise.

87. Bevir & Kedar, *supra* note 73, at 505.

88. Dickson, *Ours Is a Broad Church*, *supra* note 20, at 226 (stating her approach “seek[s] to elucidate law in a way which does adequate justice to how it is already understood, and is understood to feature in, the lives of those who create, administer, and are subject to it”).

naturalistic approach to concept formation *might* be able to offer a concept of law that is essentialist and value-neutral, it is not the kind of concept that theorists like Dickson have in mind when they seek to understand law from the perspective of the participants.<sup>89</sup>

### *B. Hermeneutical Jurisprudence*

Nor should this tension be surprising. For Hart, in whose tradition Dickson works, “the methodology of the empirical sciences is useless,” for jurisprudence demands a “‘hermeneutic’ method which involves portraying rule-governed behaviour as it appears to its participants.”<sup>90</sup> As Perry notes, Hart goes far enough to invoke Peter Winch, whose hermeneutical philosophy of social science rejects the naturalist approach discussed above.<sup>91</sup> The next question is whether hermeneutical approaches to social science—exemplified by theorists like Winch, Max Weber, and Clifford Geertz—can provide Dickson with the kind of concept of law she sought.

The difference between such interpretive and naturalist social theorizing is the importance the former gives “to meanings in the explanation of actions and so in the explanation of practices and institutions arising out of actions.”<sup>92</sup> Thus, there is an obvious fit in the way such humanistic, non-naturalist approaches to social science center social theories on the meanings and understandings of participants in the practice.<sup>93</sup> For Winch, a good social theorist has “learned all that the ideal native informant could tell him; sociological

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89. See Priel, *supra* note 22, at 304 (describing how Hart thought good sociology “did not attempt to emulate the methods of the natural sciences (external investigation), their language (explanation by means of general laws that govern human behavior), or their goals (making testable predictions)”).

90. H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13 (1983).

91. See H.L.A. HART, *THE CONCEPT OF LAW* 289 (2d. ed. 1994) (citing PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* (Routledge Classics 2008) (1958) as presenting a “similar view” to his on the “internal aspect of rules”). Hart, of course, “does not want to go as far as those hermeneuts who, like Peter Winch, think that the theorist has no choice but to ‘join the practice’ and theorize about it from the participants’ point of view.” Perry, *supra* note 22, at 326. As Perry notes, this “hybrid methodology,” *id.*, creates a serious tension in Hart’s work, *id.* at 312–13.

92. Bevir & Kedar, *supra* note 73, at 505.

93. See BENTON & CRAIB, *supra* note 65, at 96 (stating that, under hermeneutic approaches, “the task of the social sciences is to understand the meanings that people give to their social world”); Bevir & Kedar, *supra* note 73, at 505 (noting that hermeneutical approaches understand that “constitutive features of human life set it apart from the rest of nature to such an extent that the social or human sciences cannot take the natural sciences as a model”).

knowledge is the kind of knowledge possessed in implicit and partial form by the members of a society rendered explicit and complete.”<sup>94</sup>

Whether this school of social philosophy can be nonevaluative or essentialist is more doubtful. First, take the question of whether hermeneutic social theorizing can be normatively neutral. This ground is well-covered, but worth noting.<sup>95</sup> Theorists like Hart and Dickson do not think general legal theory should be directly evaluative, so they resist the idea that “the theorist has no choice but to ‘join the practice’ and theorize about it from the participants’ point of view.”<sup>96</sup> Scholars like H. Hamner Hill and Stephen Perry, however, have argued that the interpretive turn in jurisprudential method *requires* evaluative engagement, either by endorsing the practice one theorizes or by choosing among alternative viewpoints to make sense of the practice.<sup>97</sup>

A glance at Winch’s *Idea of a Social Science and its Relation to Philosophy* suggests why. He contends that the “concepts we have settle for us the form of the experience we have of the world.”<sup>98</sup> Put another way, in Winch’s view each culture constitutes its own reality, a language game with its own rules that are not readily translatable to other cultures.<sup>99</sup> Motives, reasons, and decisions—and thereafter *actions*—by groups and individuals are “intelligible by reference to the rules governing the form of social life in which the agent participates”<sup>100</sup> and, while those immersed in the practice can understand “the social rules that are implicit in meaningful behavior,”<sup>101</sup> they can do so only as insiders within that social practice. To do anything less than enter this lifeworld is to introduce a distorting redescription of the culture’s views in light of one’s own, and thereby fall short of full understanding. Thus, the argument goes, it is inconsistent with a hermeneutic approach to be morally agnostic about a group’s

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94. ALASDAIR MACINTYRE, *The Idea of Social Science*, in *AGAINST THE SELF-IMAGES OF THE AGE: ESSAYS ON IDEOLOGY AND PHILOSOPHY* 211, 212 (1971) (characterizing Winch’s project).

95. For an excellent overview this debate, see Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 *SMU L. REV.* 167 (1999).

96. Perry, *supra* note 22, at 326.

97. See Hill, *supra* note 18, at 114 (contending that Hart’s theory requires the adoption of “a strong version of [Winch’s] *verstehen* thesis—one in which understanding a legal system requires endorsing or accepting it”); Perry, *supra* note 22, at 348–49 (arguing that internalist theories of law inexorably lead to Dworkinian interpretive evaluation).

98. WINCH, *supra* note 91, at 14.

99. See BENTON & CRAIB, *supra* note 65, at 95–98.

100. MACINTYRE, *supra* note 94, at 214.

101. BENTON & CRAIB, *supra* note 65, at 97.

concept of law—to introduce the moral distance of detachment is to introduce distortion by separating oneself from the lifeworld of its practitioners.<sup>102</sup>

Another, less appreciated, way in which hermeneutic social science is inconsistent with Dickson's approach to legal theory concerns essential, trans-historic features. Hermeneutic theorists argue the contingency of human affairs precludes the patterns we find in studying natural phenomena.<sup>103</sup> Winch, after all, understood his approach to social science as a rebuttal to John Stuart Mill's belief that human affairs could be analyzed in terms of scientific regularities.<sup>104</sup> If Winch is right, it is hard to say that certain stable, enduring features are essential to law in the way "H<sub>2</sub>" and "O" are necessary features of water. This is a problem for Dickson, who contrasted her approach with those that investigate "contingent" features of law, which "vary between times and places, without such variations determining whether or not something is law."<sup>105</sup> Here we have theorists using a method that emphasizes contingency to identify essential or necessary features of the phenomenon.

As Perry notes, approaches like Dickson's adopt the hermeneutic stance while still seeking to maintain a critical distance short of moral evaluation or endorsement.<sup>106</sup> At the same time, such methods seek general, necessary features akin to the natural sciences while embracing humanistic methods that emphasize contingency. It is far from clear that this "hybrid"<sup>107</sup> of naturalism and anti-naturalist interpretivism offers two great tastes that taste great together.

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102. See Hill, *supra* note 18, at 117 ("The very real difficulty that Winch's hypothesis poses for the social scientist is that before the social scientist can give an explanation of behavior in terms accessible to the person whose behavior is being explained, the social scientist must be able to see the world *as does the person whose behavior is the explanandum*.").

103. Bevir & Kedar, *supra* note 73, at 505 (citing Max Weber's *verstehen* theory as an example of this tendency); see also *id.* at 506 (explaining that hermeneutic anti-naturalists reject explanations "in terms of trans-historical generalities because they conceive of human action as being inherently contingent and particular").

104. See MACINTYRE, *supra* note 94, at 213 (stating that Winch was responding to Mill's belief that we could "formulate empirical generalizations about regularities in human behavior, generalizations which are causal and explanatory in precisely the same sense that generalizations in the natural sciences are").

105. Dickson, *Ours Is a Broad Church*, *supra* note 20, at 221 (emphasis omitted).

106. Perry, *supra* note 22, at 326 ("But Hart does not want to go as far as those hermeneuts who, like Peter Winch, think the theorist has no choice but to 'join the practice.'").

107. *Id.* ("This can, perhaps, be viewed as a hybrid methodology.").

### III. EVALUATIVE JURISPRUDENCE REVISITED

This Part draws on the philosophy of social science to sketch a vision of jurisprudential methodology that takes the views of participants seriously, identifies necessary features in a concept of law, and situates it in a broader framework for theorizing about human practices. It embraces what seems true and valuable about Dickson's resistance to both the naturalist's externalist approach to law and the hermeneut's radical particularity. To maintain these salutary features, however, one will have to jettison the notion that normative evaluation of law is something we must postpone until we neutrally identify the social phenomenon.

#### A. *The Trouble with Deep Hermeneutics*

As noted above, a full-bore embrace of an interpretive—or hermeneutic—approach to theorizing about human practices risks radical particularity and a kind of debilitating relativism. Take for example Winch's strong form of *verstehen* theory, to which Hill insists scholars like Hart (and, by extension, Dickson) commit themselves when they theorize about law from the internal point of view of the practitioners.<sup>108</sup>

First, a strongly hermeneutic concept of law may have very little explanatory power beyond a group of people it studies. It certainly cannot be “the” concept of law, and even if it is “our” concept of law, it is unclear how far the “we” beneath “our” extends. A careful anthropologist would not conflate the life-worlds of cultures that originated in the same tradition but diverged one or two hundred years prior. By the same token, one would not assume that the legal consciousness of an Indiana Hoosier is the same as a London barrister. There will be similarities and connections, of course, but it would be surprising to find the webs of meaning mirroring each other.<sup>109</sup> For example, constitutional law without an entrenched constitution would baffle an American, at least at first glance, just as the more general American jurisprudential fixation on the judicial process struck Hart after greater reflection.<sup>110</sup>

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108. See Hill, *supra* note 18, at 123–25.

109. Hart himself was struck by the differences in the legal cultures when he visited the United States. See, e.g., H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

110. See *id.* at 970 (explaining that the U.S. focus on the judicial process “is one salient feature of American jurisprudence contrasting strongly with our own”). For an illuminating contrast between the American and English orientation on public- and private-law theory, see Chaim Saiman, *The Law Wants to Be Formal*, 96 NOTRE DAME L. REV. 1067 (2021).

This epistemology permits only a narrow gauge of generalization across the map. Moreover, it does not guarantee stability over time. Winch insists that “[w]here someone is following a rule, we cannot predict how he will interpret what is involved in following that rule in radically new circumstances.”<sup>111</sup> A careful interpretivist might be able to communicate the concept of law of a group at time X, but that monument of scholarship would start to erode at time Y. Perhaps a legal philosopher should be resigned to clarifying concepts with a limited shelf life, but Anglo-American jurisprudence appears to be seeking more enduring discoveries.<sup>112</sup>

Furthermore, strong interpretivism can lead to an uncomfortably radical relativism when applied to the study of law and legal cultures. Winch famously argued that it is not sensible to say whether belief in tribal witch doctors is more or less rational than Western medical science because “concepts of rationality and truth . . . were themselves completely relative to particular cultures.”<sup>113</sup> Critics have long linked legal positivism with moral relativism,<sup>114</sup> but this is a charge positivists like Dickson reject even as they insist moral evaluation is improper for giving a theory about what law is.<sup>115</sup>

It is possible that a positivist will bite that bullet and concede that different, radically incommensurable concepts of law exist and that there is nothing more to say about them *as law*. Positivists like Dickson, however, seek to transcend both the immersive particularity and the moral skepticism of deep hermeneutics.

Consider the first worry about internal particularity. In responding to the argument that Hartian jurisprudence simply records the practices of the group under study, Dickson emphasizes how indirectly evaluative legal theory does more. It elucidates, organizes, and clarifies that data in light of what participants in the practice view to be important.<sup>116</sup> Of course, one could respond that

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111. MACINTYRE, *supra* note 94, at 214.

112. Cf. Leiter, *supra* note 22, at 46 (“Glorified lexicography is important . . . but its results are strictly ethnographical and local: one thing such a method can not deliver are timeless or necessary truths about how things are. But this is exactly what legal philosophers [like Raz and Dickson] appear to be after . . .”).

113. BLAKELY, *supra* note 69, at 89 (discussing Peter Winch, *Understanding a Primitive Society*, 1 AM. PHIL. Q. 307, 308-12 (1964)).

114. E.g., LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 5 (Beacon Press 1966) (1940) (“Generally—though not invariably—the positivistic attitude is associated with a degree of ethical skepticism.”).

115. Dickson, *Ours Is a Broad Church*, *supra* note 20, at 220 & n.36 (identifying other works of methodological positivists that take questions of moral and political philosophy seriously).

116. Dickson, *Methodology in Jurisprudence*, *supra* note 20, at 132.



such a theorist is simply recording what the participants identify as important—and that to understand the texture of importance and resolve conflicts about competing important ends one must internalize the value scale of the participants. But Dickson went beyond immersive meta-reportage about what people think to be important:

Some self-understandings of the participants will be confused, insufficiently focused, or vague. Moreover, some self-understandings will be more important and significant than others in explaining the concept of law. It seems likely, for example, that understandings of features of law that are relevant to ultimately answering questions about law's moral value and ability to create moral obligations to obey will be among the most important self-understandings of participants.<sup>117</sup>

Confused, unfocused, or vague according to whom? Perhaps we are seeking to find (or become) the ideally clear conceptualist in the community operating pursuant to its distinctive form of rationality, ineffable to those not playing the language game. Her argument, however, seems to appeal to more general standards of rationality. This appeal better fits the scope of her inquiry, which seeks to understand a concept of law that transcends the views of a klatch of philosophers in an Oxford common room.

Second, indirectly evaluative legal philosophy presumes a more enduring concept of law than deep hermeneutics' moving cultural target, which can change over time due to the vagaries of human choice and cultural changes. Although she agrees that the *focus* of legal philosophy changes over time based on the questions that capture theorists' passions, that does not "undermine the view that legal philosophy seeks to identify and explain truths about aspects of the *nature* of law."<sup>118</sup> The nature of law being, for her, that which "law invariably exhibits and that hence reveals the distinctive mode of law's operation."<sup>119</sup>

Third, there is Winch's deep relativism. Positivists like Dickson appear to reject such a presumption. This is evident in her later surmise that questions surrounding law's "moral value" will "be among the most important" features in the eyes of the participants.<sup>120</sup> She could be using "moral" as a term of art for "morality, relative within the system," but this does not seem so. To think it is likely that questions about law's normativity will tend to be important assumes cross-cultural regularities in societies' thinking about law's nature, pur-

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117. *Id.* at 138-39.

118. Dickson, *Ours Is a Broad Church*, *supra* note 20, at 225.

119. Dickson, *Methodology in Jurisprudence*, *supra* note 20, at 126.

120. *Id.* at 138-39.

poses, and relationship with morality. At a deeper level, it assumes a more general pattern across cultures in which law and morality are meaningfully separate concepts—that the notion of separating the two at the level of theory is one that is cogent everywhere with a proper legal system. But if, in a Winchian framework, “different cultures *are* different realities,” such regularity in the normative landscape seems highly unlikely.<sup>121</sup> What universal, non-normative framework allows Dickson to transcend this particularity is a question unasked and therefore unanswered in the work.

More broadly, Dickson’s embrace of a staged inquiry for moral evaluation of law precludes such deep relativism. Although Dickson insists that moral evaluation is separable from theorizing about law, she agrees it is important and valuable to undertake moral assessment of law once we identify it through more neutral means.<sup>122</sup> In fact, she argues, it is morally valuable to strive for a nonmoral account of law as a social practice lest we veer into unwitting veneration of law.<sup>123</sup> Her elaboration of the “Benthamite insight”—that it is morally valuable to first undertake a “cool-headed and un-romanticised” account of law before morally assessing it—is hardly the project of a relativist.<sup>124</sup> If Winch were right that different cultural practices comprise separate, incommensurable moral universes, and that the “concepts we have settle for us the form of the experience we have of the world,”<sup>125</sup> the moral stage of Dickson’s evaluation would require a view from nowhere that could not exist.

If theorists like Dickson are unsatisfied with the implications of a full-bore interpretive approach, as they are and should be, the question remains how they can center their legal theory on participants’ point of view while escaping a vicious hermeneutic circle. Nonrelativist approaches to social theory that build upon, but also transcend, the meanings participants ascribe to practices could show a way forward.

### *B. Transcending the Hermeneutic Circle*

We can approach this alternative indirectly by first examining philosopher Alasdair MacIntyre’s critique of Winch. MacIntyre first challenges Winch’s argument that a person’s internal sense of rule-following is the only way to understand reasons as causes of human behavior. MacIntyre charges that we

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<sup>121.</sup> BENTON & CRAIB, *supra* note 65, at 95.

<sup>122.</sup> Dickson, *Ours Is a Broad Church*, *supra* note 20, at 215, 227–30.

<sup>123.</sup> *Id.* at 227–28.

<sup>124.</sup> *Id.* at 227.

<sup>125.</sup> WINCH, *supra* note 91, at 14.

sometimes act in ways irreducible to reasons, for reasons we cannot explain, or in ways that are simply not rule-governed.<sup>126</sup> Anthropologists like Bronislaw Malinowski were therefore correct, MacIntyre argues, to insist that people's bare understanding of their own activity will be insufficient and that the observer's more complete "account of institutions" will be "a *construction* not available to the untutored awareness of the native informant."<sup>127</sup>

The social theorist could take this insight in a number of directions. One could simply treat the practitioners' beliefs as psychological data for a reductive naturalist explanation of behavior, even without taking those beliefs at face value. In fact, Malinowski's "distinction between the rules acknowledged in a given society and the actual behavior of individuals in that society," and his argument that relying on the native informant gives the theorist a "lifeless body of laws, regulations, morals and conventionalities" recalls the American Legal Realists' distinction between the real rules judges actually apply on the ground and the "paper rules" in the hornbook.<sup>128</sup> It makes sense, therefore, that Brian Leiter claims the scientific branch of legal realism in his work to naturalize jurisprudence.<sup>129</sup> In a similar vein, Leiter seeks to rescue Hart from deep hermeneutics by understanding the internal point of view in such naturalized terms.<sup>130</sup>

This is not the direction MacIntyre goes, however. He contends that, while Winch is right to start with the meanings and self-understanding of the participants, Winch is wrong to stop there. Rejecting Winch's relativism and vision of social theory as "little more than a construction of lists" of different features, MacIntyre argues that "typologies and classificatory schemes become[] empty and purposeless unless we have a theory which gives point and criteria to our classificatory activities."<sup>131</sup> MacIntyre agrees it is impossible to offer lawlike generalizations about human practices in the manner of the natural sciences, but concludes "not that we ought not to generalize, but that such generalization must move at another level."<sup>132</sup> Even if the participants' self-understandings are not always a sure guide for social explanation, inquiring

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126. MACINTYRE, *supra* note 94, at 221.

127. *Id.* at 212 (emphasis added).

128. KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 22-25 (1962).

129. See Leiter, *supra* note 59, at 286-302.

130. Leiter, *supra* note 73, at 672.

131. MACINTYRE, *supra* note 94, at 229.

132. *Id.*

what “needs and purposes” a social institution serves can illuminate those practices.<sup>133</sup>

This argument follows from the insight that human actions sometimes, but not always, are mirrored by their reasons. If I say I drove my car to the store to get milk, you will likely credit my explanation if I, in fact, go to the grocery store. If I pull up to an automotive store and pour motor oil in my Cheerios, you might seek a different explanation for my action. To explain human behavior, then, the observer has to make threshold judgments about what is in fact rational.<sup>134</sup> Even Winch, for all his apparent relativism, makes such judgments: by insisting that human actions are not reducible to causal laws, Winch has to think historical materialists like the Bolsheviks are at some level “deluded,” even as he tries to describe their beliefs.<sup>135</sup>

Charles Taylor’s argument about “value-slope” in explanations of social behavior is also illuminating here.<sup>136</sup> A conceptual framework to explain human practices builds in an understanding of human nature and purposes and therefore what needs to be explained and how. For example, orthodox Marxists could not explain McCarthyism “in terms of early upbringing and the resultant personality structure,” because doing so ignores broader forces they understand to structure the world.<sup>137</sup> He argues that any framework of explanation “secretes a notion of good” because “in the light of the framework certain goods can be accepted as such without further argument, whereas other rival ones cannot be adopted without adducing overriding considerations.”<sup>138</sup>

Although such a demonstration requires a separate work, one might glimpse a similar phenomenon at play in general jurisprudence. For example, Raz’s exclusive positivism—which insists, as a conceptual matter, that law is identified only in social sources—chimes with his normative claim elsewhere that authority is justified (only) when it helps individuals make better deci-

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133. *Id.*

134. See BLAKELY, *supra* note 69, at 88 (“[I]n cases of rational beliefs, the self-understandings of the subject of study should be charitably reconstructed in order to form explanations, while in cases of irrational beliefs the language of self-understanding needed to be challenged and perhaps even supplanted.”).

135. *Id.* at 91; see also *id.* at 90 (“Winch’s own conceptual language (that of the reconstruction of beliefs held by agents) is fundamentally at odds with some of the conceptual languages that guide people in the world.”).

136. 2 CHARLES TAYLOR, *Neutrality in Political Science*, in PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 58, 73 (1985).

137. *Id.* at 63.

138. *Id.* at 90.

sions than they would on their own.<sup>139</sup> If, like inclusive positivists, we held that a system could incorporate moral principles as legal norms,<sup>140</sup> law would fail to do its job, given the exclusive positivist's understanding of human nature and needs. After all, what's the benefit of law telling us to "do the right thing" when we do not know what that is? If one takes it as a factual given that autonomous individuals sometimes need authoritative guidance to achieve their chosen moral ends, any concept of law that does not provide that kind of guidance is defective, or at least in need of an overriding explanation justifying an exception within the terms of the framework.

The upshot, from this perspective, is that social practices are only comprehensible in light of an overarching framework of rationality and human needs, one that the observers "impose" or, less skeptically, cannot help but presume to share with the participants whose actions they seek to understand. Social practices are constituted by the meanings and beliefs of their practitioners. While such contingent practices can evince some general regularity, we can pick out those patterns only in the context of a narrative structure whose coherence flows from an overarching judgment about the point of the practice.<sup>141</sup> Rather than a naturalist reduction of human behavior, the social theorist should look higher and broader, drawing on philosophically contested—but richer—understandings of human nature and purposes.

Readers familiar with the jurisprudential literature will see a resemblance between this teleological approach to social theorizing and the "central case" method in general jurisprudence popularized in recent years by John Finnis and embraced by Dworkinians like Stephen Perry.<sup>142</sup> To make sense of the welter of human practices that march under the banner of law, the framework holds, one has to identify how human law should truly serve the common good—and therefore the underlying human goods that provide the basis for any sound conception of the common good. Whether the ideal be solving coordination problems, justifying the use of force, ensuring equal concern and

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139. See RAZ, *supra* note 6, at 53.

140. See W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994).

141. See ALASDAIR MACINTYRE, *Is a Science of Comparative Politics Possible?*, in *AGAINST THE SELF-IMAGES OF THE AGE* 260, 273 (1971) ("[T]he patterns which we discern in comparative history will always be *de facto* guides yielding Machiavellian maxims, rather than Hobbesian laws."); see also BLAKELY, *supra* note 69, at 65 (interpreting MacIntyre to hold that "humans are best understood as creatures that orient their actions through narrative sequences" and that "human actions were only ultimately intelligible when placed in the context of an agent's further goals and aims (in other words, teleological forms)").

142. See FINNIS, *supra* note 8, at 9-18; Perry, *supra* note 22, at 313 n.5 (acknowledging his debt to Finnis's method); cf. Leiter, *supra* note 22, at 51 (recognizing Finnis's teleological approach as the remaining rival to legal naturalism).

respect, or some combination thereof, the ideal(s) against which various instantiations of law are judged to be successful or defective in varying degrees explain the human practice we call law. And because this approach presumes rationality and human agency shared by the observer and the observed, central-case theorists do not understand themselves to be imposing an alien conceptual grid on the lives and practices of others any more than a person evaluating my misguided use of motor oil on Cheerios.<sup>143</sup> Rather, they are seeking to understand and orient a social practice that promotes the common good by addressing the practical reasoning of its participants.

Dickson's failure to reckon with this teleological approach helps explain why her criticisms of normative theorists such as Finnis miss the mark. Dickson charged that evaluative approaches like Finnis's lead to a presumption of moral obligation that unhealthily valorizes law and might leave unjust systems in place. But, as Matthew Kramer argues in his review of Dickson, this criticism trades on an equivocation between "law" as a general measuring ideal and "the law" of a particular jurisdiction.<sup>144</sup> Directly evaluative concepts of law do not bless and pledge allegiance to any old institution bearing that label, but rather seek to "discern the goods that are realised by law even in its less worthy instantiations."<sup>145</sup> Furthermore, as Dan Priel argues in his review of Dickson's work, there will be disagreements among those in the practice about what features of law are important or significant, such that the indirectly evaluative legal theorist may be at a loss to neutrally elucidate the concept of law.<sup>146</sup> To the central-case theorist, this will come as no surprise, since there may be reasonable moral argument about law's point, which goes directly toward arguing about what features are *important* about the practice.<sup>147</sup>

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143. Indeed, as Grégoire Webber has argued, it is difficult to read Hart's discussion of the defects of systems of law containing only primary rules as anything but *his* and *his readers'* views, insofar as he offers reasons for agreeing that any reasonable person would see the defect and assent to the remedies of secondary rules of recognition, change, and adjudication. See Grégoire Webber, *Asking Why in the Study of Human Affairs*, 60 AM. J. JURIS. 51, 68-69 (2015).

144. Matthew H. Kramer, Book Review, 62 CAMBRIDGE L.J. 210, 211 (2003).

145. *Id.* at 212.

146. Dan Priel, *supra* note 21, at 653-56; cf. Margaret Martin, *Postema on Hart: The Illusion of Value-Neutrality*, in PHILOSOPHY OF LAW AS AN INTEGRAL PART OF PHILOSOPHY: ESSAYS ON THE JURISPRUDENCE OF GERALD J POSTEMA 193, 199 (Thomas Bustamante & Thiago Lopes Decat eds., 2020) ("Insofar as [Hart] is committed to observer theory, he must decide whether to defer to participants and their judgments of importance, or, alternatively, whether he should make an independent judgment.").

147. Cf. BLAKELY, *supra* note 69, at 92 ("This self-reflective dimension of human agency means that the adoption of a particular theory is never fully separable from moral and political questions about what counts or does not count as a defensible form of human agency.");

## CONCLUSION

Dickson and many of her fellow analytical positivists seek to frame a concept of law that (a) captures law's essential nature, (b) is based on participants' beliefs and self-understandings about what is important about the practice, and (c) avoids direct moral or political evaluation of the concept's content. This Review argues that you cannot have all three at the same time. The essentialism is inconsistent with the humanistic, hermeneutic understanding of human practices, for it is rooted in a model of social science that seeks to mirror the natural sciences (and might be bad naturalism to boot). The resistance to moral evaluation leads to a particularism that belies any claim to *general* jurisprudence and, by presuming its own overarching understanding of rationality, is incoherent on its own terms.

A directly normative methodology, however, can offer a concept of law that identifies essential features of the central case of law *and* takes the point of view of participants seriously—theoretical desiderata that Dickson's conceptual analysis struggled to simultaneously achieve. If the concept of law is an enduring moral ideal that judges and makes sense of varying, contingent social practices, such a concept picks out and highlights essential properties amid the flux of human affairs. By starting its theorizing with the beliefs and meanings of participants in the practice—with whom the theorists share a moral and social universe—this concept of law also avoids the pure externalism that treats mental states about practices as epiphenomenal or mere data. Its critical rationality, however, transcends the immersive relativism of Winch or the reportage of the opinion pollster.

This latter vision, of course, is grounded in a broader vision of moral philosophy and social science that is controversial. One would have to make the case for a fixed, enduring understanding of human nature and flourishing. This requires at the same time a metaphysics and ontology that is richer than reductive naturalism and more realistic and hardheaded than the subjectivity of social constructionism. Along those lines, one such framework on offer in the philosophy of social sciences is known as critical realism, a method which theorists have deployed in fields as diverse as sociology, political science, history, and even theology.<sup>148</sup> Evaluative legal theorists seeking to shore up their meth-

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Priel, *supra* note 21, at 656–57 (arguing that disagreements over importance likely turn on “disagreement on what counts as a good explanation of human behavior. And views about this tend to be . . . correlated with moral and political views”).

148. See, e.g., CHRISTIAN SMITH, *TO FLOURISH OR DESTROY: A PERSONALIST THEORY OF HUMAN GOODS, MOTIVATIONS, FAILURE, AND EVIL* 9 (2015) (proposing his theory of “critical realist personalism” in sociology); see also CRITICAL REALISM, HISTORY, AND PHILOSOPHY IN THE

odological arguments in broader theory should consider exploring such avenues.<sup>149</sup>

A teleological understanding of human nature, goods, and practices will have a “value slope,” so to speak, at the methodological level. Such a theorist will recognize it is possible, and sometimes useful, to distinguish between the organizing, normative concept of *law* and the factual, historical *laws* that humans posit.<sup>150</sup> But to always stop there would be incomplete or, more accurately, inconsistent with the broader understanding of thinking about human goods and practices. By contrast, in later works developing her theory, Dickson invokes the very different Benthamite tradition of *suspicion of tradition* as a reason to separate moral evaluation from general theories of law—going so far as to cite Bentham as the Martin Luther of legal theory who stripped the “cloak of moral veneration” from the jurisprudential altars.<sup>151</sup> Her argument that such a “cool headed and un-romanticised” vision of law is necessary for “moral and social progress” echoes Hart, who argued that positivism promotes moral clarity in criticizing unjust regimes.<sup>152</sup>

This differing value slope may shed light on why it matters where we draw the line between legal philosophy, on the one hand, and moral and political philosophy on the other. At first glance, it seems a trivial labeling dispute: legal positivists like Dickson plainly care about the normative dimensions of human affairs and their relationship to law. Why care whether those moral considerations be *included* in the concept of law? Perhaps philosophers care—and get so

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SOCIAL SCIENCES (Timothy Rutzou & George Steinmetz eds., 2018) (history); N.T. WRIGHT, *THE NEW TESTAMENT AND THE PEOPLE OF GOD* (1992) (theology); Michiel van Ingen, *Conflict Studies and Causality: Critical Realism and the Nomothetic/Idiographic Divide in the Study of Civil War*, 18 *CIVIL WARS* 387 (2017) (political science). For an accessible introduction to this methodological approach, see Philip S. Gorski, *What Is Critical Realism? And Why Should You Care?*, 42 *CONTEMP. SOC.* 658 (2013).

149. I have begun to take a rough stab at a more systematic application of the theory in jurisprudence. See Jeffrey A. Pojanowski, *Critical Realism and Methodology in Jurisprudence* (July 30, 2015) (unpublished manuscript) (on file with author). Finnis, who invoked Weber’s argument that social theorizing is necessarily evaluative, found it insufficient on its own due to its generality. See Finnis, *supra* note 57, at 117 n.21.
150. See 4 JOHN FINNIS, *Adjudication and Legal Change*, in *PHILOSOPHY OF LAW: COLLECTED ESSAYS* 397, 397 (2011) (describing law’s “double life” as norm and fact).
151. See Dickson, *Ours Is a Broad Church*, *supra* note 20, at 227.
152. *Id.* at 227; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 620–21 (1958) (“If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. . . . [W]hen we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable [natural law] philosophy.”).



heated about these questions—because those competing ways of viewing the dividing line between general jurisprudence and normative philosophy intertwine with competing visions of human goods, which intertwine with competing ways of theorizing about society. For a Benthamite utilitarian confronting a benighted, superstitious order, or a moral noncognitivist like Hart confronting a legal regime that reifies moralized terms, the notion of building objective teleological truths about human flourishing into the nature of law is not particularly palatable.<sup>153</sup> The lines we draw suggest a broader picture of our moral and even metaphysical commitments.

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153. Again, a value slope goes toward tendencies, not logical entailment. Cf. TAYLOR, *supra* note 136, at 90 (“[A] given explanatory framework secretes a notion of good, and a set of valuations, which cannot be done away with—though they can be overridden—unless we do away with the framework. . . . The framework can be said to distribute the onus of argument in a certain way. It is thus not neutral.”).