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Methodology in Legal Philosophy

Julie DICKSON
Somerville College, Oxford, and
Faculty of Law, University of Oxford, UK

In their bluntest form, the doubts concern whether there is any more need for a philosophy of law than for a philosophy of bus-driving. Lawyers convey houses, and bus drivers convey people. Both will do so regardless of any philosophical fuss … .

Neil MacCormick[1]

1.1. Introduction: methodology in legal philosophy

It was with a characteristic combination of insight and good humor that Neil MacCormick once raised the doubts mentioned in the quotation above. In a certain – somewhat radical – sense, the doubts are methodological in character: they concern whether there is any point in engaging in legal philosophy at all. Like MacCormick, I believe that these doubts can be disarmed, and, ultimately, put to rest[2]. Moreover, I contend, the path to doing so, although not straightforward, can be both illuminating and enriching. It can be illuminating in the sense that a satisfactory response to the

1 MacCormick, N. (1983). Contemporary legal philosophy: The rediscovery of practical reason. *Journal of Law and Society*, 10, 1–18, p. 1.

2 *Ibid*., 14–15.

Meta-theory of Law,
coordinated by Mathieu CARPENTIER.

"What's the point of legal philosophy?" challenge can shed important explanatory light not just on the issue of why engage in legal philosophy at all but also on how to engage in it, with what aims and aspirations in mind, and subject to which constraints. And this in turn can be enriching in that discussing these issues reveals that the terrain of the proper methodology in legal philosophy is vast, varied and consists of a never-ending well-spring of diverse and developing questions, challenges and areas to explore, all of which fall within the purview of legal philosophical inquiry.

We can start to map some of this terrain by considering exactly what might be meant in discussing "the methodology of legal philosophy". In my view, an expansive approach is the correct course here. By "the methodology of legal philosophy", then, I mean engaging with any of the following questions, and with the further issues which such engagement might open up[3]. What are the aims of legal philosophy? What can it hope to achieve? As per MacCormick's doubts, what is the point of philosophizing about an intensely practical discipline, the practice of which will continue regardless of such philosophizing? How should legal philosophers approach and engage with their subject matter, and what constraints are incumbent on them as they do so? Which questions does and should the philosophy of law seek to address? What are its relations with neighboring disciplines, such as political, moral and social philosophy, and are there important sub-divisions of inquiry *within* the domain of legal philosophy itself? What is the "evidence base" of legal philosophy? In virtue of *what*, if anything, might jurisprudential claims be true or false? What are the criteria of success of legal philosophy, and how do we know if they have been met? To what extent are different jurisprudential explanations of the same phenomena compatible? Can there be progress in legal philosophy? Does the discipline have a finite or a never-ending task?

As this array of questions should make clear, on this expansive understanding of it, the methodology of legal philosophy stretches significantly beyond inquiries concerning *how* or the *way in which* legal philosophy ought to be done. Crucially, it includes and encompasses inquiry into *what legal philosophy is*: its aims, criteria of success, evidence base, constraints and prospects for progress, and indeed how we should determine its domain and subject matter. These are deep-rooted and philosophically rich questions. The present discussion cannot address them all and can explore only certain facets of those issues upon which it does focus. However, as these will emerge from the account of legal philosophy which I develop and

3 The discussion here draws on aspects of Chapter 1 of my forthcoming book: Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford.

defend, this selectivity is an inevitable, but also a valuable, feature of jurisprudential inquiry[4].

In the course of what follows, I examine three main issues with regard to correct jurisprudential methodology: (i) Does it make sense for legal philosophy to search for and attempt to identify and explain the nature of law? (ii) Are the questions of legal philosophy fixed and unchanging or do they develop and alter over time? (and the implications of the answer to this for (i)); (iii) What roles do evaluative judgments play in legal philosophy, and at what junctures should evaluative judgments of various kinds come into play in constructing theories of law?

These issues are examined in sections 1.2–1.4. In conclusion, I hope to have established that one possible and worthwhile task of legal philosophy is to attempt to accurately identify and adequately explain aspects of the nature of law, and that this endeavor involves legal philosophers asking and attempting to answer a never-ending, and constantly evolving, diverse series of questions. Moreover, I hope to have explained and explored my view that the approach to legal philosophy which I have written about in previous work, and which I refer to here as "indirectly evaluative legal philosophy" (IELP), embodies the correct approach with regard to the role, place and type of evaluative judgments necessary for theories of law to be successful.

1.2. The nature of law?

On considering the methodological questions, "What are the aims of legal philosophy?" and "What can it hope to achieve?", a significant number of legal philosophers take the view that one important strand in legal philosophy aims to identify and explain *the nature of law*[5]. Moreover, and interestingly, this methodological aim of seeking law's nature is shared by legal philosophers who end up taking very different views on what that nature is:

4 It should be noted that throughout the discussion I use the terms "legal philosophy", "legal theory", "theories of law", "philosophy of law" and "jurisprudence" interchangeably, and that, as I use these terms here, I do not regard there as being significant differences between these enterprises. For further reflections on this point, see: Dickson, J. (2015). Ours is a broad church: Indirectly evaluative legal philosophy as a facet of jurisprudential inquiry. *Jurisprudence,* 6, 207–230.

5 In this section, I draw upon aspects of Chapters 2 and 3 of my forthcoming book: Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford.

> Familiar legal theories, both those that make reference to moral facts and those that don't, *are* such hypotheses. They aim to provide insight into the nature of law by showing how the factors in terms of which they purport to explain law, *in the particular order that the theory places them*, work to make the law what it is[6].

> Essential or necessary properties of law are those properties without which law would not be law. They must be there, quite apart from space and time, wherever and whenever law exists. Thus, necessary or essential properties are at the same time universal characteristics of law. Legal philosophy *qua* enquiry into the nature of law is, therefore, an enterprise universalistic in nature[7].

> […] I will try to say something about the nature of law, that is I will be advancing views which belong to the general theory of law. […] The general theory of law is universal for it consists of claims about the nature of all law, and of all legal systems […] wherever they may be, and whatever they might be[8].

> [the question "What is law?"] […] reflects a philosophical effort to understand *the nature of law in general* […][9].

> […] as I intend the hypothesis, it purports to identify an essential property of law. It purports not merely to say something true or even necessarily true about law, but to say something about law's nature[10].

There are several important points to note in understanding the character, and the hoped-for explanatory pay-off, of such stances on the aims of legal philosophy.

First of all, as these quotations reveal, an account of the nature of law aims to be general in character, and, if it can be found, will reveal those properties that law possesses wherever, and whenever, it does, and has, existed.

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6 Stavropoulos, N. (2015). The grounds of law: Morality and history. *SSRN* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638033 (emphasis in original).

7 Alexy, R. (2008). On the concept and the nature of law. *Ratio Juris*, 21, 281–299, p. 290.

8 Raz, J. (ed.) (2009). On the nature of law. In *Between Authority and Interpretation*. OUP, Oxford, p. 91.

9 Shapiro, S. (2011). *Legality.* Harvard University Press, Cambridge, MA, p. 7 (emphasis in original).

10 Greenberg, M. (2011). The standard picture and its discontents. In *Oxford Studies in Philosophy of Law*: *Volume I*, Green, L. and Leiter, B. (eds). OUP, Oxford, p. 86.

Second, an account of the nature of law aims to identify and explain those properties law *must* possess in order to be law, that is, those properties that make law into what it is.

Third, certain features of an explanation of the nature of law can light the way to an understanding of what is at stake here, and of what motivates some legal philosophers to adopt this aim. Explaining the nature of law holds special importance in understanding law, because such an explanation, if attainable, would have distinctive and significant explanatory power. It would enable us to understand what is true of law in general, and not merely in the locally and temporally bound form in which we encounter it in our own society. It would enable us to understand which properties are constitutive of law, and which make it into what it is. And it would enable us to separate out what is necessarily the case about law, that is, that which *must* obtain for law to exist, from that which is *sometimes* the case about law, but which is dependent on some prevailing contingencies of the political, economic, cultural and social conditions in which it develops.

Fourth, it is vitally important to note that, in claiming above that explanations of the nature of law – if attainable – would hold a special place in our understanding of law, I am *not* claiming – and neither are many of those seeking such explanations – that other types of inquiry concerning law are less important, less interesting or less worthy of scholarly study than are inquiries into law's nature. In my view, philosophy of law is a "broad church" and we should allow all illuminating approaches to bloom[11]. Theories of the nature of law represent one important kind of jurisprudential inquiry, but it is one of its type among many. For example, there is also much important and insightful work in legal philosophy which examines various important but contingent features of law[12], particular areas of law[13] and jurisdiction-specific features of law[14]. Moreover, some legal philosophers have drawn attention to the possible links between, and mutual complementarities regarding, accounts of certain contingent features of law, and accounts of the nature

11 See: Dickson, J. (2015). Ours is a broad church: Indirectly evaluative legal philosophy as a facet of jurisprudential inquiry. *Jurisprudence,* 6, 207–230.

12 For example, see Williams, P.J. (1991). *The Alchemy of Race and Rights.* Harvard University Press, Cambridge, MA.

13 For example, Gardner, J. (2007). *Offences and Defences*: *Selected Essays in the Philosophy of Criminal Law.* OUP, Oxford; and also Steel, S. (2015). Justifying exceptions to proof of causation in Tort law. *Modern Law Review*, 78, 729.

14 For example, Walker, D.M. (1988–2004). *A Legal History of Scotland* (multiple volumes). W. Green, Edinburgh; and Farmer, L. (1997). *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present.* CUP, Cambridge.

of law[15]. All that is claimed in making the third point above is that an account of the nature of law possesses a distinctive explanatory power, for the reasons which have been noted.

Fifth – as will be explained in section 1.3 – seeking to identify and explain the nature of law does not commit legal philosophers to theorizing at any given time about all those properties which constitute its nature. Rather, legal theorists adopting this methodological approach focus on a subset of those plausibly very numerous properties which make law into what it is, guided by the puzzles and questions which are of interest to them and to their audience.

The points above illuminate further what is, and what is not, involved in seeking to identify and explain law's nature. Of course, it remains the case that it is one thing to have certain methodological aims in legal philosophy, and quite another to make good on those aims, and to succeed in the self-appointed task. The views quoted and aims discussed above may strike some readers as both ontologically and epistemologically extravagant, or even grandiose, and as giving legal philosophy an impossible task: to develop an account of the nature of law, wherever and whenever it is found, when in fact, law, being a human-made social construct, simply has no such nature, and rather exhibits a variety of different features, dependent on the time, place and culture in which it develops. An objector finding such thoughts plausible could seek not so much to explain, but to explain away the apparent commitments in the quotations with which this section opened, perhaps on an "error theory" type basis: these legal philosophers clearly believe that their theories contain propositions that are about the nature of law, that is, about those properties that law must possess in order to be law, and they clearly purport to assert truths about those properties in their theories but, in fact, there are no such properties because the kind of thing that law is renders it incapable of possessing such properties[16].

15 For example, Giudice, M. (2015). *Understanding the Nature of Law*: *A Case for Constructive Conceptual Explanation.* Edward Elgar, Cheltenham.

16 Error theory is most famously associated with the version of moral error theory espoused by Mackie (see: Mackie, J.L. (1977). *Ethics: Inventing Right and Wrong*. Penguin Books, Harmondsworth), but has also been used by philosophers to characterize discourse in a variety of fields, and the literature on it is voluminous. For consideration of various types of moral error theory, and the arguments that can be used to support it, see, for example: Joyce, R. (2001). *The Myth of Morality*. Cambridge University Press, Cambridge, especially Chapters 1 and 2; Joyce, R. (2007, substantively revised 2021). Moral anti-realism. *Stanford Encyclopedia of Philosophy* [Online]. Available at: https://plato.stanford.edu/entries/moral-anti-realism/. For a discussion of error theories in a variety of philosophical fields, see, for example, Daly, C. and Liggins, D. (2010). In defence of error theory. *Philosophical Studies*, 149, 209–230.

Perhaps unsurprisingly, objectors holding views along the lines outlined above are indeed to be found in contemporary legal philosophy. To mention but a few, Brian Tamanaha, Frederick Schauer, Brian Leiter and Kevin Walton have all – at certain points in their work at any rate – expressed doubts with regard to the viability and/or usefulness of legal philosophy seeking to identify and explain the nature of law[17]. Each of these theorists holds subtly different views, and approaches the relevant issues from the direction of their own distinctive interests. There is, however, a common underlying theme that their views highlight: the concern that a human-made, socially constituted and arguably artifactual[18] phenomenon such as law can have a nature, and that there can be a correct account of those properties which such a phenomenon necessarily possesses, and which make it into what it is.

The challenges that such views raise are important, philosophically complex and worthy of extended consideration. The constraints of time and space of the current discussion mean that this cannot fully be attempted here[19]. What I will try to do in the remainder of this section, however, is to indicate what, in my view, needs to be established for inquiries into aspects of law's nature to be possible and viable.

The key here lies in appreciating that what is needed is a context-sensitive and domain-apt understanding of what it would be for law to have a nature. According to my own view of law's character[20], law is indeed a human-made, socially constituted

17 See, e.g. Tamanaha, B. (2011). What is "general" jurisprudence? A critique of universalistic claims by philosophical concepts of law. *Transnational Legal Theory*, 2, 287–308; Schauer, F. (2013). Necessity, importance, and the nature of law. In *Neutrality and Theory of Law*, Ferrer Beltrán, J., Moreso, J.J., Papayannis, D.M. (eds). Springer, Dordrecht; Schauer, F. (2016). A reply to five friends. *Ratio Juris,* 29, 348–363; Leiter, B. (2011). The demarcation problem in jurisprudence: A new case for scepticism. *Oxford Journal of Legal Studies*, 31, 663–677; Walton, K. (2015). Legal philosophy and the social sciences: The potential for complementarity. *Jurisprudence*, 6, 231–251.

18 See, e.g. Leiter, B. (2011). The demarcation problem in jurisprudence: A new case for scepticism. *Oxford Journal of Legal Studies*, 31, 663–677, p. 666; Leiter, B. (2018). Legal positivism about the artifact law: A retrospective assessment. In *Law as Artifact,* Burazin, L., Einar Himma, K, Roversi, C. (eds). Oxford University Press, Oxford.

19 I consider these issues in more depth in my forthcoming book: Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford, Chapters 2, 3, 5, and 6.

20 See, e.g. Dickson, J. (2012). Legal positivism: Contemporary debates. In *The Routledge Companion to Philosophy of Law*, Marmor, A. (ed). Routledge, New York. I offer further arguments in support of this view in Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford, Chapters 5 and 6.

phenomenon, and law comes into being and is modified, revised and applied in virtue of human beings, and the social institutions they create – such as legislatures, courts and legal officials – decreeing, deciding, recognizing, practicing, enforcing or interacting in some way with a given set of norms. Given that law is a phenomenon of this kind, when we come to consider what it would be for it to have a nature, we need an account that is apt for the domain to which law belongs: the domain of human-made socially constituted phenomena which, once constituted, has a social reality. In particular, in my view, we need a domain-apt understanding of what it would be for theories of the nature of law to be about an appropriately understood reality, and a metaphysically modest understanding of what theorists need be committed to in attempting to construct theories about aspects of that reality[21].

The claim that in order for law to have a nature which theories of law are capable of ascertaining those theories must be about an appropriately understood reality, leaves open for discussion the character or, we might say, the ontology, of the reality in question. Clearly, the ontology of that aspect of reality featuring law will be very different from the ontology of that aspect of reality featuring phenomena in the natural world, such as the compositional and orbital properties of the planets of the solar system. We will be talking, in the case of law, about some sort of "social reality": about the processes, practices, institutions, attitudes, intentions, conduct, etc. of human beings that bring legal systems, and the laws comprising them, into existence, and who maintain such systems in existence, and in virtue of which their legal norms are developed, modified and adjudicated upon. The matters to be explored, then, are whether it is plausible that, and what exactly needs to be the case such that, law has a nature in the sense which is relevant to, and apt for, that domain of reality it properly belongs to. To put the matter another way, we should not assume that the standard to be met with regard to whether law has a nature is the same standard as is apt in the case of the reality of entities in the natural world, and we should not assume that because law does not have a nature *in the same sense that*, for example, the planet Jupiter's atmosphere has a nature, law does not have a nature, period, and is not truly part of reality, appropriately understood.

Why should we not make such assumptions? For one thing, it seems odd and inappropriate to assume a "one size fits all" approach to what is required for phenomena to be part of reality when the phenomena in question is as varied as, to pick but a few examples: law, quarks, German shepherd dogs, mobile phones, the University of Oxford, cellular RNA, chess, French new wave cinema, chrysanthemums, solid lipid nanoparticles and helium. Additionally, it would seem

21 In the remainder of this section, I draw upon aspects of Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford, Chapters 2 and 3.

peculiar if not indeed perverse to decide at the outset of our methodological investigation to hold our explanandum – law – to a standard which, given the sort of thing that it is, will be impossible for it, even in principle, to meet. Legal philosophers may indeed have persuasive arguments supporting their challenges to the idea of law having a nature, but the route to establish these surely cannot run via defining at the outset what would have to be the case for law to have nature in terms of criteria, which it is constitutionally incapable of satisfying.

In addition to adopting a domain-apt understanding of law being part of social reality, it is also important that we adopt what can be referred to as a "metaphysically modest" interpretation of the claims about that reality, which theories of the nature of law make. What I mean by this can be illustrated by way of contrasting such a metaphysically modest approach with the way in which those who have doubts regarding legal philosophy about the nature tend to characterize the claims of such theories.

Tamanaha, for example, contends that legal philosophy about the nature of law seeks truths about law which hold good not merely in all human societies, but in "all possible legal systems on all possible worlds, real and imaginary, at all possible times"[22]. Schauer regards many contemporary legal philosophers working on problems about the nature of law as working "within the domain of essentialism and the domain of what is necessarily true of all possible legal systems in all possible worlds" [23]. And Walton criticizes much contemporary legal philosophy about the nature of law for "engaging in an a priori search for law's essence"[24].

These theorists share a tendency to interpret the aims, and claims, of those engaging in legal philosophy about the nature of law in what we might call a "metaphysically heavy-duty" or "metaphysically extravagant" way. Doing so immediately raises, and is intended to raise, intuitive doubts that law, and legal philosophy about the nature of law, can possibly make good on those aims and claims. Accusing legal philosophy about the nature of law as always seeking a priori truths immediately raises the question of whether it makes any sense to think that we can know things about an intensely practical, concrete, social practice such as law without reference to experience of how law actually operates, in society, and upon our practical reasoning. Claiming that legal philosophers interested in the nature of law always seek universal truths of a kind that hold not merely in human contexts,

22 Tamanaha, B. (2011). What is "general" jurisprudence? A critique of universalistic claims by philosophical concepts of law. *Transnational Legal Theory*, 2, 287–308, p. 290.

23 Schauer, F. (2016). A reply to five friends. *Ratio Juris,* 29, 348–363, p. 353.

24 Walton, K. (2015). Legal philosophy and the social sciences: The potential for complementarity. *Jurisprudence*, 6, 231–251, p. 249.

but that are necessarily true in all possible worlds, immediately raises doubts that such philosophers have grasped the sense in which law, as picked out by and understood via our concept of law, is deeply rooted in the aims, needs, functions and limitations of governance practices in human society.

It is a mistake, however, to interpret the aims and claims of legal philosophy about the nature of law in the metaphysically heavy-duty way that Tamanaha, Schauer and Walton do, or to assume that this is the only way to interpret them. On the contrary, we can and should adopt a metaphysically modest interpretation of these matters and, moreover, many legal philosophers interested in aspects of law's nature, already do just that.

Michael Giudice, for example, disputes head on the idea that legal philosophy about the nature of law is in the business of searching for either analytic, or a priori, truths, and devotes a chapter of his recent book to developing and defending the alternative view that:

> […] to the extent that many of the most interesting necessity claims in jurisprudence are defensible, they are best understood and characterized […] as a form of a posteriori necessary truth[25].

Joseph Raz, in responding to criticisms that his view of law having a nature falls foul of a problematic kind of essentialism, which is out of place in the case of a human-made social institution, explains that:

> It seems to me that Bulygin is mistaken in attributing to me a belief in essentialism. There are various things philosophers mean by essentialism. The common one is associated with the thought that some common nouns are rigid designators, that is that the meaning of those common nouns is determined by the way reality is divided […] It has been popular to think that natural kind terms are of this kind […] No one believes that all words are natural kind words, and very few people – perhaps only Michael Moore – believe that 'the law' is a rigid designator. My discussion of the way the concept of law changes shows that I hold beliefs inconsistent with such a view[26].

25 Giudice, M. (2015). *Understanding the Nature of Law*: *A Case for Constructive Conceptual Explanation.* Edward Elgar, Cheltenham, pp. 90–91 (internal reference omitted) and, more generally, see Chapter 4 of that work.

26 Raz, J. (2007). Theories and concepts: Responding to Alexy and Bulygin. [Online]. Available at: http://sites.google.com/site/josephnraz/theory%26concepts, pp. 8–9.

Moreover, Leslie Green, in engaging with Schauer's recent work on methodology, notes that H.L.A. Hart took a distinctively human, and non-metaphysically extravagant approach to the idea of necessity at some points in his work, an approach which Green also welcomes and embraces:

> […] it is Hart who insists that "a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have"
>
> […] in the human sciences, as soon as we start down the dark path of things that hold true in "all possible worlds" we hear a lot of whistling to keep up courage, since we do not have a secure grasp of which worlds are possible. To the extent that Schauer is on Hart's side here, I am on Schauer's. What is "humanly necessary" is as important to jurisprudence as what is "strictly" (conceptually, metaphysically, nomically . . .) necessary[27].

The views quoted above reveal that several legal philosophers interested in identifying and explaining aspects of law's nature espouse a significantly more metaphysically modest understanding of what is involved in doing so than is sometimes attributed to that kind of legal philosophy. Given law's human-made and societally situated and constituted character, such an understanding seems plausible, sensible and well supported.

1.3. Changing questions: diversity and development

As mentioned in section 1.2, in my view, inquiries into the nature of law are one important, and possible, type of jurisprudential inquiry[28]. However, this should *not* lead us to think, as some theorists mistakenly have, that inquiries into law's nature

27 Green, L. (2016). The forces of law: Duty, coercion, and power. *Ratio Juris*, 29(2), 164–181, p. 177. The internal quotation is from Hart, H.L.A. (2012). *The Concept of Law*, 3rd ed. OUP, Clarendon.

28 As was indicated in section 1.2, this is not to denigrate the value of other types of legal philosophy, such as legal philosophy concerning contingent features of law, particular areas of law, or jurisdiction-specific aspects of law. See footnotes 11–15 and accompanying text.

focus on monolithic and unchanging questions and puzzles[29]. On the contrary, in my view it is vital to emphasize the senses in which, and the reasons for which, the questions and puzzles of legal philosophy, including legal philosophy focused on aspects of law's nature; are plural, diverse, arise in and change over time; and are responsive to changing interests and concerns[30]. But does this present us with a puzzle? How can the questions of legal philosophy be plural, diverse, time- and context-dependent, yet the answers to those questions be about the nature of law, about those necessary properties of law that make it into what it is? The remainder of this section aims not so much to solve as to *dissolve* this apparent puzzle, revealing it to be more apparent than real.

The first point to note in this regard is that even brief reflection on law's character indicates that it is a complex and multi-faceted phenomenon. Given, for example, the breadth and complexity of the social functions law performs, the intricate character of relations between its norms, and those norms' manner of attempting to create for us reasons for action, it should strike us as highly plausible that law may possess numerous properties which mark it out as distinctive, and which make it into what it is. Moreover, it is also plausible that each of those properties that make law into what it is can be examined from a variety of different angles, in response to different puzzles and questions which strike us as interesting at a given time. The complex and multi-faceted character of law itself hence makes room for pluralism with regard to jurisprudential accounts of it: different theories of law can and do investigate different sets and subsets of those plausibly numerous properties that comprise law's nature, and do so in multiple ways driven by changes in our sense of puzzlement with respect to them.

In addition, it is important to understand that, to construct successful theories of law, legal philosophers must select the aspect, or aspects, of their subject matter to focus upon, and then, within that selection, further choose which puzzles and questions to address in respect of that aspect, or those aspects, of law. No theory of law can be comprehensive in the sense of focusing on *all* of the properties

29 See, e.g., Krygier, M. (2014). Reply to Patrick Emerton. *Australian Journal of Legal Philosophy*, 39, 176–188, especially p. 186: "Staples of legal philosophy are built around universal answers to single questions: What is law? What is the relationship between law and morality, between law and coercion, law and politics, law and reason? and so on. Typically such questions are posed as though a single universal answer is appropriate to each of them". See also Rundle, K. (2014). Reply to Patrick Emerton. *Australian Journal of Legal Philosophy*, 39, 189–198, especially p. 195.

30 This section is based on the study in: Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford., Chapter 4.

comprising law's nature, and on *all* of the puzzles that those properties might give rise to. Any such attempt would be overwhelmed by the voluminous issues, questions and topics to be addressed, and would run a high risk of failing to offer a focused and cogent account of *any* facet of law, in its attempt to address all of them. In the words of John Finnis, it would be less a theory of law, and more a "vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies"[31].

This being so, legal philosophers seeking to identify and explain the nature of law must select *some* aspects of the nature of law, and *some* puzzles within those aspects of the nature of law upon which to focus. Some examples should help to further illuminate these ideas and begin to indicate the variety of factors that can influence such selection.

With respect to selecting which aspects of law's nature to focus upon, often legal theorists make such choices in a somewhat reactive manner, by choosing to work on features of law that they believe have been neglected, under-explained or poorly explained in accounts of law which came before theirs. Redressing such perceived neglect, correcting errors of either emphasis or substance in other theorists' accounts of law can be a strong driving force in motivating legal philosophers to take up pen and keyboard.

For H.L.A. Hart, it was John Austin's neglect of the role of rules in law and how those rules are used to guide conduct, which provided the impetus for both his criticisms of the command theory approach and the development of his alternative account: the key to understanding legal systems lay in the union of primary and secondary rules, and in the attitudes toward and actions in terms of those rules held and undertaken by those who guide their conduct by them[32]. For Ronald Dworkin, it was H.L.A. Hart's neglect of how legal materials generate and justify propositions of law in the argumentative and contested context of adjudication proceedings which prompted him to develop his own alternative powerful account of these facets of law, from which an entire legal, political and moral theory eventually grew[33].

31 Finnis, J. (1980). *Natural Law and Natural Rights,* 1st ed. OUP, Oxford; Finnis, J. (2011). *Natural Law and Natural Rights,* 2nd ed. OUP, Oxford, p. 17.

32 See e.g. Hart, H.L.A. (2012). *The Concept of Law*. OUP, Clarendon, Chapters 1–4.

33 See e.g. Dworkin, R. (1978). *Taking Rights Seriously.* Harvard University Press, Cambridge, MA; Dworkin, R. (1986). *Law's Empire*. Fontana Press, London; Dworkin, R. (2006). *Justice in Robes.* Harvard University Press, Cambridge, MA; Dworkin, R. (2011). *Justice for Hedgehogs.* Harvard University Press, Cambridge, MA.

Sometimes, however, certain aspects of law's nature come more acutely into focus, and strike us as in need of examination, not in response to the work of other legal philosophers, but because of shifts of focus and interest in neighboring and/or cognate disciplines. For example, a resurgence of interest among philosophers of language and of mind in Wittgenstein's rule-following remarks in the latter decades of the 20th century[34] found its way across to the legal philosophical community in the 1990s. As a result, many legal theorists at that time became interested in and began to address Wittgensteinian questions concerning the possibility of rule-following and the role of interpretation in grasping the meaning of rules, influenced by the movement of this intellectual current from philosophy of language and mind into philosophy of law[35].

The above-mentioned examples indicate some of the reasons why jurisprudential attention shifts from one property or set of properties comprising law's nature to another such property or set of properties. Sometimes, however, change comes in the form of a shift in legal philosophers' sense of puzzlement with regard to one and the same feature of law. For example, we can think of the topic of law's authority. In the early 1970s, the puzzle for Robert Paul Wolff was whether law's possessing legitimate authority could be compatible with our duties of moral autonomy and rationality[36]. Some four decades later, however, the puzzle about authority for Nicole Roughan has shifted to how we should understand the character and

34 The work on this topic at the relevant time is voluminous, but see, e.g., Baker, G.P. and Hacker, P.M.S. (1984). *Scepticism, Rules and Language.* Blackwell, Oxford; Baker, G.P. and Hacker, P.M.S. (1985). *Wittgenstein: Rules, Grammar and Necessity, Vol. 2 of an Analytical Commentary on the Philosophical Investigations*. Blackwell, Oxford; Holtzman, S. and Leich, C. (eds) (1981). *Wittgenstein: To Follow A Rule.* Routledge and Kegan Paul, London; Kripke, S. (1982). *Wittgenstein on Rules and Private Language: An Elementary Exposition.* Blackwell, Oxford; McDowell, J. (1984). Wittgenstein on following a rule. *Synthèse*, 58, 325–363; McDowell, J. (1992). Meaning and intentionality in Wittgenstein's later philosophy. *Midwest Studies in Philosophy*, 17(1), 40–52.

35 See, e.g., Marmor, A. (1992). *Interpretation and Legal Theory*, 1st ed. Oxford University Press, Oxford; Marmor, A. (2005). *Interpretation and Legal Theory*, 2nd revised ed. Hart Publishing, Oxford; Bix, B. (1993). *Law, Language, and Legal Determinacy*. Oxford University Press, Oxford; Patterson, D.M. (ed.) (1992). *Wittgenstein and Legal Theory.* Westview Press, Boulder, CO; Smith, G.A. (1990). Wittgenstein and the sceptical fallacy. *Canadian Journal of Law and Jurisprudence*, 3, 155; Stone, M. (1995). Focusing the law: What legal interpretation is not. In *Law and Interpretation*, Marmor, A. (ed.). Oxford University Press, Oxford.

36 Wolff, R.P. (1970). *In Defense of Anarchism.* Harper & Row, New York. Wolff's conclusion, of course, was that it could not.

legitimation of law's authority in a transnational legal world featuring multiple competing such authorities[37].

This example also indicates that, sometimes, changes in society and in governance arrangements – such as the proliferation of intra-, trans-, supra- and international legal regulation – influence both aspects of law that legal philosophers choose to focus on, and what is perceived to be puzzling about them. Roughan's focus in this regard is on how we should understand legal authorities in the context of such developments. Some of my works arising from and motivated by these same societal changes have instead focused on the concept of a legal system, and whether it is still of use in understanding intra-, trans-, supra- and international legal phenomena[38].

The waxing and waning of jurisprudential interest in the concept of a legal system itself furnishes us with another helpful example illustrating the fact of, and some of the reasons for, changing questions, puzzles and interests within legal philosophy about the nature of law. The late 1960s and early to mid-1970s witnessed a flurry of legal philosophical interest in questions surrounding the identity of legal systems and their continuity through time. For some legal philosophers, this interest was prompted by puzzles generated by the journey to political independence taken by certain former British colonies[39]. Others looked not beyond but within the United Kingdom, keen to explore the sense in which the Scots have their own legal system without their own state, the relations between the Scottish legal system and the

37 Roughan, N. (2013). *Authorities*: *Conflicts, Cooperation, and Transnational Legal Theory.* OUP, Oxford.

38 See, e.g., Dickson, J. (2008). How many legal systems? Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union. *Problema,* 2, 9 [Online]. Available at: https://revistas.juridicas.unam.mx/index.php/filosofia-derecho/article/view/8047/10000; Dickson, J. (2012). The idea of a legal system: Between the real and the ideal. In *MacCormick's Scotland*, Walker, N. (ed.). Edinburgh University Press, Edinburgh; Dickson, J. (2012). Towards a theory of European Union legal systems. In *Philosophical Foundations of European Union Law*, Dickson, J. and Eleftheriadis, P. (eds). Oxford University Press, Oxford.

39 See, e.g., Honoré, A.M. (1967). Reflections on revolutions. *Irish Jurist,* 268; Eekelaar, J.M. (1969). Rhodesia: The abdication of constitutionalism. *MLR*, 32, 19; Eekelaar, J.M. (1973). Principles of revolutionary legality. In *Oxford Essays in Jurisprudence*, 2nd series, Simpson, A.W.B. (ed.). Clarendon Press, Oxford; Harris, J.W. (1971). When and why does the grundnorm change? *Cambridge Law Journal*, 29, 103–133.

18th-century Articles and Acts of Union[40], and the role Scots law plays in expressing and shaping national identity, including national political identity[41].

Once these societal issues and the academic activity they generated ran their course, however, legal philosophers' interest in the theory of legal systems waned dramatically, with little writing explicitly on this topic emerging from the late 1970s onwards. It is only relatively recently that new life has been breathed into this topic by the rapid growth of and increasing interest in intra- trans-, supra- and international governance arrangements. This time round, the focus is not, as it was in the post-colonial era, on how to think about states ceding territories which then go on to become independent states with separate legal systems, but rather on puzzles arising from the legal and other consequences of the coming together of independent polities in larger regional or global units of cooperation, and the relations between those larger units and their constituent parts[42]. In the case of the European Union (EU), the revival of interest in the theory of legal systems plausibly arises in part from the strong claims that this polity, and especially the Court of Justice of the European Union, consistently makes on its own behalf: EU law is much more than a series of intergovernmental agreements between states, and it represents "a new legal order"[43], and has "created its own legal system"[44]. These claims have prompted some legal philosophers to focus on whether and to what extent they are true, what would render them true (or false), and hence whether it is apt and explanatorily helpful to understand supra-national law, and the relations between supra-national law and national law, in terms of the concept of a legal system[45].

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40 The Acts of Union, passed by the English and Scottish Parliaments in 1707 in order to give effect to the Treaty of Union agreed between those two nations the previous year, led to the creation of the United Kingdom of Great Britain on May 1, 1707. See, e.g. https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/act-of-union-1707/.

41 See, e.g. Maher, G. (1977). The identity of the Scottish legal system. *Juridical Review,* 21–37; MacCormick, N. (1978). Does the United Kingdom have a constitution? Reflections on MacCormick v. Lord Advocate. *Northern Ireland Legal Quarterly*, 29, 1–20.

42 See, e.g. Richmond, C. (1997). Preserving the identity crisis: Autonomy, system and sovereignty in European law. *Law and Philosophy*, 16, 377–420; Weyland, I. (2002). The application of Kelsen's theory of the legal system to European community law – The supremacy puzzle resolved. *Law and Philosophy*, 21, 1–37; the essays in Dickson, J. and Eleftheriadis, P. (eds) (2012). *Philosophical Foundations of European Union Law.* OUP, Oxford.

43 Case 26/62 *Van Gend en Loos* [1963] ECR 1, p. 12.

44 Case 6/64 *Costa v ENEL* [1964] ECR 585, p. 593.

45 See, e.g. Dickson, "How many legal systems?" and "Towards a theory of European union legal systems" (see footnote 38); Culver, K. and Giudice, M. (2010). *Legality's Borders*: *An*

All of these examples illustrate change, and some of the factors that drive change in (i) the features of law that legal philosophers choose to focus on and (ii) the particular puzzles about any given feature of law which they choose to tackle. Law's complex character allows for this "question and puzzle pluralism": legal philosophers select sets and subsets of those properties comprising the nature of law to focus on, in response to changing societal and intellectual concerns. Indeed, as some of the examples considered in this section indicate, certain facets of the nature of law, and certain puzzles concerning those facets of the nature of law do not even present themselves as significant, or come into focus for legal philosophers until certain points in time, influenced by, for example, certain political and governmental changes. The methodological lesson to be drawn from all of this is clear: law is a multi-faceted and complex phenomenon, different aspects of which can be illuminated from different theoretical directions, at different times, and for different reasons. Accordingly, the questions of legal philosophy are manifold, various, arise in and change over time, and its quest is never-ending.

1.4. Directly evaluative legal philosophy versus indirectly evaluative legal philosophy

To return to the quotation from Neil MacCormick with which this chapter opens: is there any more need for a philosophy of law than for a philosophy of bus driving? The discussion thus far begins to indicate why we can answer this question in the affirmative. Law is not merely a matter of lawyers conveying houses, and effecting other practical, legal transactions, important though such matters be. Law is a complex, multi-faceted and far-reaching social institution that intervenes in and shapes many matters of significance to individuals and to the societies they live in. It makes sense at least to ask, and to attempt to answer, the question of whether this important phenomenon has a nature, and possesses certain distinctive features that make it into what it is. Moreover, given law's involvement in so many important areas of social and political life, philosophy of law engages with and addresses an ever-developing array of questions and puzzles, responding to changing theoretical interests and societal circumstances.

In addition, law is a social phenomenon that claims comprehensiveness within its self-defined jurisdiction: law may not in fact regulate everything that it might within

Essay in General Jurisprudence. Oxford University Press, New York; Culver, K. and Giudice, M. (2012). Not a system but an order: An inter-institutional view of European Union Law. In *Philosophical Foundations of European Union Law*, Dickson, J. and Eleftheriadis, P. (eds). OUP, Oxford.

that jurisdiction, but in principle it claims that it could[46]. Moreover, law claims that it non-optionally applies to all those who fall within its self-defined jurisdiction, and plausibly operates by pre-empting claims over our actions and allegiances made by other normative phenomena such as morality and religion[47]. That law operates thus, and that it impacts upon many very important areas of our lives – including our personal, professional and business relationships, careers, possessions, duties as citizens, and civil, political and human rights – engenders further thoughts with regard to why we need to theorize about law more than we do about bus driving. Clearly, given its character and its reach, law should concern us more than bus driving should, is capable of having a more profound effect on the lives of individuals and of societies than bus driving does, and stands in need of critical examination in a way that bus driving does not. Is law ever justified in intervening in our lives in the profound way that it does? What, if anything, might justify and/or legitimate it? What critical standards ought law be held to, and what should our response be to it when it fails to meet them? Given the scope and effects of law's operation, it is vital that we undertake theoretical work to answer these questions. Key methodological issues remain, however, regarding exactly how, and when, we should attempt to answer such questions in our jurisprudential theories.

One group of theories takes the view that questions concerning law's moral value and moral obligatoriness ought to take their place front and center from the outset of any theoretical account of law's nature. Such theories – which I herein collectively term "directly evaluative legal philosophy" – insist that we must build our account of what law is from a starting point of ascertaining its moral purpose, and its ability to yield genuinely binding moral obligations to do that which it directs. Such theories involve legal philosophers making what I refer to as "directly evaluative judgments"[48]: judgments concerning aspects of law's full-blooded moral value and moral obligatoriness, from the outset in their theories. Examples of this approach can be found in the work of, for example, John Finnis, Ronald Dworkin and Mark Greenberg.

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46 On law's claim to comprehensiveness, see Raz, J. (2009). *The Authority of Law*, *Essays on Law and Morality*, 2nd ed. Oxford University Press, Oxford, p. 116–119.

47 For discussion of these issues, see, e.g. Raz, J. (ed.) (1994). Authority, law, and morality. In *Ethics in the Public Domain*. Clarendon Press, Oxford; Green, L. (2003). Legal positivism. In *The Stanford Encyclopaedia of Philosophy*, Zalta, E. (ed.) [Online]. Available at: https://plato.stanford.edu/entries/legal-positivism/, section 4; Green, L. (2003). Legal obligation and authority. In *The Stanford Encyclopaedia of Philosophy*, Zalta, E. (ed.) [Online]. Available at: https://plato.stanford.edu/entries/legal-obligation/; see Gur, N. (2018). *Legal Directives and Practical Reasons*. Oxford University Press, Oxford.

48 I discuss this approach at greater length in Dickson, J. (2001). *Evaluation and Legal Theory.* Hart Publishing, Oxford, Chapter 3.

Finnis claims that we must embark upon our theories of law from the starting point of considering what law's moral point or value is, why we have it, and why (morally) we should comply with it, rather than by attempting to describe it without yet considering these matters:

> Suppose we tried to think about law without trying first to describe it or to work out what of the concept of it is. Suppose we asked instead whether, and if so why, and when, *we* – or more precisely each one of us – should favour having, endorsing, maintaining, complying with, and enforcing it[49].

In Finnis' view, if we begin our theories of law, we will come to the conclusion that law is uniquely well-placed to make a positive moral contribution to our lives, and that it is, by its nature, morally valuable[50]. He claims that law's moral point or objective is to reasonably resolve the co-ordination problems of a political community and to provide a set of framework conditions enabling and assisting its members to lead morally valuable lives. Moreover, Finnis also claims that, at the unit level of political society, *only* law can bring this about[51].

For his part, Ronald Dworkin contends that any successful theory of law must "explain how what it takes to be law provides a general justification for the exercise of coercive power by the state"[52]. Dworkin accordingly takes his task in *Law's Empire* to be to constructively interpret our legal practices by putting them in their best light as capable of properly policing and constraining state coercion, and so setting the terms on which law is justified in imposing duties on those individuals related to it[53].

The third theorist mentioned above, Mark Greenberg, contends that:

> According to my view, legal obligations are a subset of moral obligations. Legal institutions – legislatures, courts, administrative

49 Finnis, J. (2003). Law and what I truly should decide. *American Journal of Jurisprudence*, 48, 107–129, p. 107.

50 *Ibid*., 111.

51 See Finnis, J. (1980). *Natural Law and Natural Rights,* 1st ed. OUP, Oxford; Finnis, J. (2011). *Natural Law and Natural Rights,* 2nd ed. OUP, Oxford, *passim*. The first sentence in the book (at p. 3) can serve well as its leitmotif: "There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy".

52 Dworkin, R. (1986). *Law's Empire*. Fontana Press, London, p. 190.

53 *Ibid*., 93, and *passim*.

> agencies – take actions that change our moral obligations. […] I call this view the *Moral Impact Theory* because it holds that the law is the moral impact of the relevant actions of legal institutions[54].

These three theorists are all engaged in what I refer to as directly evaluative legal philosophy, and their albeit distinctive positions nonetheless share some features in terms of the methodological approach they adopt.

First, all three believe that theories of law, in order to be successful, must proceed by making, from the outset, directly evaluative judgments concerning law's full-blooded moral value, point or objective, and the reasons why, morally speaking, it ought to be obeyed. Moreover, they reject the idea that there is any room for, or point in, other methodological approaches to ascertaining law's nature, such as the approach which I term IELP, and which I explain in the following. Legal philosophy, in their eyes, *must* begin by making judgments regarding law's moral point or value, and by explaining how law generates genuinely binding moral reasons for action. This point is perhaps made most explicitly by Finnis, when he claims that:

> In short, a complete and fully realistic theory of law can be and in all essentials has been worked out from the one hundred percent normative question, what should I decide to do […] I can think of no interesting project of inquiry left over for a philosophical theory of law with any different starting point[55].

Second, all three theorists believe that law's inherent moral qualities are positive in character. Finnis states that only law can bring about the conditions of valuable human flourishing in political societies. Dworkin contends that law upholds individual rights and responsibilities and ensures that citizens are only subject to state coercion under conditions where this latter is genuinely justified. Greenberg regards legal obligations as a subset of moral obligations: they tell us what we have genuine moral reason to do.

Third, all three theorists believe that when law fails to live up to its inherent moral value, point or purpose, and/or when its directives fail to generate genuinely binding moral obligations, it makes sense to say that it is not really or fully law, and/or that it is, in the relevant sense, just not law:

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54 Greenberg, M. (2014). The moral impact theory of law. *Yale Law Journal*, 123, 1288–1342, p. 1290 (emphasis in original; internal footnote reference omitted).

55 Finnis, J. (2003). Law and what I truly should decide. *American Journal of Jurisprudence*, 48, 107–129, p. 115.

> Posited (enacted or judicially pronounced) rules of the latter kind [unreasonable laws whose moral claim over us is defeated] are analogous to contracts which have been made in full compliance with every formality and other procedural condition specified by the law of contract but are void for illegality. Or, to take two perhaps closer analogies, they are like medicines which prove futile or lethal and are thus not medicinal at all, or like arguments whose formal elegance only masks their invalidity: no argument. Unjust laws are not laws, though they may still count in reasonable conscientious deliberations, and certainly warrant attention and description[56].

> […] we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, was less than fully law[57].

> Because my theory holds that the law is a certain part of the moral profile, my theory has the consequence that the law can never include truly evil norms Such norms can never be part of the moral profile[58].

Another family of theories, – a family that I count myself as a member of – adopts a different methodological approach. IELP also holds that questions such as which moral and other values law ought to live up to, and whether, when and why law has moral authority over us and creates moral obligations to obey it, are vitally important to address and attempt to answer. But IELP contends that the route to answering them should be more indirect, and theories of law should proceed to understand law's nature in stages.

According to this approach, at the first stage, theories of law should pick out certain properties of law, and certain aspects of those properties of law, which are important and significant to explain. Although this stage requires legal philosophers to make evaluative judgments, these are "indirectly evaluative" in character, and do

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56 Finnis, *ibid*., 114. I discuss aspects of Finnis' views in this regard in Dickson, J. (2009). Is bad law still law? Is bad law really law? In *Law as Institutional Normative Order*, Mar, M.D. and Bankowski, Z. (eds). Routledge, London

57 Dworkin, R. (1986). *Law's Empire*. Fontana Press, London, pp. 103–104.

58 Greenberg, M. (2014). The moral impact theory of law. *Yale Law Journal*, 123, 1288–1342, p. 1337. In my view, Greenberg's stance must deny the status of law to a significantly wider category than just "truly evil norms". I discuss this point in Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford, Chapter 6.

not yet evaluate as good or bad those features that they pick out as important and significant to explain. Only once we have an accurate and explanatorily adequate account of those features of law should we move on to consider whether those features are full-bloodedly/morally good or bad and what contribution they make to rendering law full-bloodedly/morally valuable, and/or worthy of obedience.

IELP acknowledges and indeed embraces the point that one reason why certain aspects of law should be picked out as important and significant to explain is because of the relevance of those features to an eventual consideration of law's full-blooded or moral value. But to pick out certain things as *relevant* to an eventual evaluation of them as good or bad is not yet actually to evaluate them as good or bad. In this manner, IELP facilitates a "staged inquiry" wherein vital questions concerning law's moral value and moral obligatoriness can be answered at an appropriate point in the inquiry, without prejudging the answers to these questions at too early a stage[59].

An analogy is that suppose I want to understand the tutorial teaching system of Oxford University, with a view to eventually deciding whether it is, overall, of genuine educational value such that it is worth Oxford University persisting with, and continuing to fund, this unusual (statistically speaking) style of teaching. In order to eventually be able to address these questions, I will need to know which features of Oxford's tutorial system mark it out as distinctive in ways that are likely to be relevant to its eventual full-blooded evaluation. In order to identify those features, I will need to make what I term indirectly evaluative judgments of importance and significance. For example, I might pick out as important that Oxford University tutorial teaching is extremely small group teaching, with, usually, just two or three students, and one tutor. I would also pick out as important that students usually produce a piece of written work for each weekly tutorial, and that this work forms an important part of what is discussed in the tutorial. I would also pick out the fact that both of the foregoing features render Oxford University tutorial teaching intensive in various ways: it requires considerable work and engagement on a weekly basis by students; it requires tutors to offer individualized feedback and discussion to students; it requires many more person hours of teaching than the more usual teaching model in UK universities wherein students attend one tutorial with around 12 people in it once every 2 weeks.

59 I discuss this approach at greater length in Dickson, J. (2001). *Evaluation and Legal Theory.* Hart Publishing, Oxford, Chapters 2 and 3; Dickson, J. (2015). Ours is a broad church: Indirectly evaluative legal philosophy as a facet of jurisprudential inquiry. *Jurisprudence,* 6, 207–230; and Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford, Chapters 7 and 8.

In picking out these features as important to explain, however, and as plausibly relevant to an eventual evaluation of the tutorial's system's genuine value, I am not yet taking a view on, and indeed may not yet have a view on, whether those features, and the tutorial system to which they contribute, are good or bad. Perhaps these features render Oxford University tutorial teaching an extremely valuable, student-centered and individually tailored learning opportunity of a wonderful kind. Perhaps they render it repetitive, time-consuming expensive, and do so for little educational gain and much overwork for both students and tutors. Perhaps it is a bit of both. The important point is that the kind of methodological approach outlined above allows us to identify important features of some phenomenon, which will be relevant to its eventual full-blooded evaluation, without making assumptions at the outset that the phenomenon is good or bad. This facilitates theorists in undertaking a staged inquiry wherein one can consider the nature of some phenomenon without prematurely accounting it as good or bad in a manner that may problematically color the inquiry.

Such an "indirectly evaluative" methodological approach can be found at certain points in the work of H.L.A. Hart, Joseph Raz, Wil Waluchow and myself:

> [the legal theorist will] be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values[60].

> It [Hartian legal theory] wouldn't be morally evaluative. It's evaluative in a sense, but any theory that tries to define or explain a complex activity would have to select some items out of it as important enough to be focused upon. I mean, if I'm watching a game, if I'm describing the game as a game, I won't pick out in order to describe the game the size of the players, because it doesn't throw light on any major question. Whereas I will pick out that they are not only struggling to get hold of the ball, but if they put it in a certain place then that counts as a point towards winning. So it's evaluative in a sense that you pick out features of the complex activity, not because it justifies it morally, but because these would be relevant to among other questions what moral questions you ask. But it doesn't give the answer[61].

60 Hart, H.L.A. (1987). *Comment.* In *Issues in Contemporary Legal Philosophy*: *The Influence of HLA Hart*, Gavison, R. (ed.). Clarendon Press, Oxford, p. 39.

61 Words of H.L.A. Hart, in Sugarman, D. (2005). Hart interviewed: H.L.A. Hart in conversation with David Sugarman. *Journal of Law and Society*, 32(2), 267–293, p. 288.

> A theory of what the law is strives to identify its central, prominent, important features. What makes a feature prominent or important or central is inescapably and inevitably an evaluative question. It is important if it bears upon what matters. In large measure it is precisely the fact that certain features are relevant to what one ought to do which marks their importance.
>
> It is crucial to remember, however, that we can and often do know that a feature of a scheme or institution is relevant to its evaluation without knowing whether that makes it good or bad[62].

The key question, of course, is which approach should legal philosophers adopt – the indirectly evaluative approach just outlined or the directly evaluative approach championed by theorists such as Finnis, Dworkin, and Greenberg? As I have already made clear, my colors are nailed firmly to the IELP mast. The reasons for this are many and various, and cannot be explored in detail here[63]. However, a few points can be highlighted for present purposes and may provide food for thought for those keen to consider these issues further.

First, in my view, IELP offers us a particularly clear route to avoid the potential methodological pitfall of assuming that law has inherent moral value at too early a point in our inquiries into its character. IELP allows us to begin to identify and try to explain law's distinctive properties while leaving it – for now – an open question what, if any, inherent moral value, and/ or what, if any, inherent moral riskiness, it possesses. The IELP approach leaves considerable room, for example, for the following thoughts, and for investigation into the matters to which they draw attention:

62 Raz, J. (1985). The morality of obedience. *Michigan Law Review,* 83, 732–749, p. 735. See also Raz, J. (ed.) (1994). Authority, law, and morality. In *Ethics in the Public Domain*. Clarendon Press, Oxford; Waluchow, W. (1994). *Inclusive Legal Positivism.* Clarendon Press, Oxford, pp. 19–29; Dickson, J. (2001). *Evaluation and Legal Theory.* Hart Publishing, Oxford, *passim*, but especially Chapters 2, 3 and 7; Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford, Chapters 7 and 8.

63 The need to explore them in more depth is one central motivating factor behind my forthcoming book: Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford.

> […] Dworkin is saying any worthwhile jurisprudence is a blend of description and moral evaluation - it's got to show the law in its best light. Why not show it in the worst light?[64]

> […] *wherever there is law* – new moral risks emerge as a matter of necessity. There are not only more efficient forms of oppression, there are also new vices: the alienation of community and value, the loss of transparency, the rise of a new hierarchy, and the possibility that some who should resist injustice may be bought off by the goods that legal order (in some cases, necessarily) brings[65].

Second, IELP gains further support from the fact that avoiding the methodological pitfall referred to, in the first point, above is particularly at a premium in the case of law. This is because law is a normative phenomenon that approaches its subjects claiming to possess genuine authority over us, and to state what we have genuine reason to do[66]. If we are too quick to assume that it possesses some inherent moral value, then we may also be too quick to jump when it calls, and to do that which it asks of us. This comes with its own set of risks and consequences:

> There are risks, moral and other, in uncritical acceptance of authority. Too often in the past, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude[67].

Third, in my view, IELP helps us to avoid what I regard as the implausible and inapt conclusion provided by Finnis, Dworkin and Greenberg that when law fails to live up to its inherent moral value, point or purpose and/or when its directives fail to

64 Words of H.L.A Hart, in Sugarman, D. (2005). Hart interviewed: HLA Hart in conversation with David Sugarman. *Journal of Law and Society*, 32(2), 267–293, p. 288.

65 Green, L. (2008). Positivism and the inseparability of law and morals. *New York University Law Review*, 83, 1035–1058, p. 1054.

66 For discussion, see, e.g. Raz, J. (ed.) (1994). Authority, law, and morality. In *Ethics in the Public Domain*. Clarendon Press, Oxford; Gardner, J. (ed.) (2012). How law claims, what law claims. In *Law as a Leap of Faith*: *Essays on Law in General*. Oxford University Press, Oxford.

67 Raz, J. (ed.) (1994). The obligation to obey: Revision and tradition. *Ethics in the Public Domain*. Clarendon Press, Oxford, p. 351. See also Hart, H.L.A. *The Concept of Law* (see footnote 27), 207–212; Dickson, J. (2012). Legal positivism: Contemporary debates. In *The Routledge Companion to Philosophy of Law*, Marmor, A. (ed). Routledge, New York, section II C.

generate genuinely binding moral obligations, it is not really or fully law, and/or it is, in the relevant sense, just not law[68]. IELP, at least in my own development of this approach, seeks to do adequate justice to the character of law as an institution and as a social fact[69]. Even if law has a specific moral task to perform, and/or even if law has specific moral standards which it ought to live up to, failing to perform that task or to reach those standards does not have the consequence of rendering it less fully law. IELP, in allowing us the space to identify law and examine aspects of its character prior to and relatively independent of[70] reaching conclusions on the extent to which it possesses moral value, enables the legal philosopher to identify it in terms of, and do sufficient explanatory justice to, the social facts basis that is so important in making human law into what it is.

1.5. Conclusion

This chapter has examined three main issues in the methodology of legal philosophy. I have contended that the project of seeking to identify and explain the nature of law is a possible, important, and valuable jurisprudential enterprise, albeit it is just one such enterprise among many. Provided that we develop and adopt a domain-apt view of what it is for a socially constituted entity such as law to have a nature, legal philosophers can and should continue to search for and explain that nature. Successful such theories have a distinctive and significant explanatory power in our understanding of what makes law into what it is.

I have also sought to establish that, even within the project of attempting to identify and explain aspects of the nature of law, the questions and puzzles of legal philosophy are not unchanging, monolithic givens, but rather arise in and change over time, shaped by a variety of factors. Such development and diversity in the questions and puzzles of legal philosophy is a strength of the discipline. Our subject hence has a rich, pluralistic and never-ending task, as it engages with emerging matters of importance to us and to the societies we live in.

Finally, I have identified and attempted to explain a divide in the methodology of legal philosophy between theories of law adopting a directly evaluative methodological approach, and theories of law engaging in IELP. I have allied myself

68 See footnotes 56–58 and accompanying text.

69 This issue is discussed in more depth in Dickson, J. (Forthcoming). *Elucidating Law*: *The Philosophy of Legal Philosophy*. Oxford University Press, Oxford, Chapters 5 and 6.

70 This point is discussed in Dickson, *ibid*., Chapter 8.

firmly with the latter approach and begun to indicate the reasons why I believe this course to be the correct one.

I hope that the foregoing discussion has shown that, whatever our methodological stance, law is a multi-faceted, complex and powerful social institution with far-reaching effects in our societies and our lives. This makes it worth theorizing about, and both explains and justifies our ongoing, diverse and multiple attempts to do so, as members of a vibrant and worldwide community of legal philosophers.