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Is Moralized Jurisprudence Redundant?*

I Introduction

In recent years questions about legal normativity have spilled over into the debate about the methodology of jurisprudence. In fact, it has been thought by some that the resolution of the methodological issue can give us a decisive reason for siding with either positivism or non-positivism. Thus, it has been argued by some anti-positivists that jurisprudence cannot be fully descriptive. Rather, it must necessarily make judgments about which view of law is morally appealing in a suitable sense. The jurist, it is said, is not a detached observer but an engaged participant who takes sides in first-order legal disputes.

This suggestion has been challenged by Julie Dickson, who claims that jurisprudence may still be evaluative without being moralized.¹ All it need do in order to sift through the data of legal practice is make judgments of importance or *indirectly evaluative judgments* in Dickson's terminology. The idea of indirect evaluation is used not only as a shield but also as a sword. If it can help us identify essential truths about law, then the invocation of moral value, far from essential to jurisprudential method, appears to be redundant, a dispensable extra.

This chapter criticizes the use of indirect evaluation in legal theory. It does not go so far as to suggest that such evaluation is unsound. Rather, it aims to cast some doubt on the alleged priority of indirectly evaluative jurisprudence over moralized jurisprudence. In particular, it criticizes the claim that this priority is grounded in the fact that law is crucially shaped by the understandings, attitudes, and beliefs of those who use it. This is one of the

¹ Henceforth, I shall use the terms moralized jurisprudence and anti-positivism more or less interchangeably. However, I shall avoid the term 'normative jurisprudence', which does not readily convey the conviction that jurisprudential method must be morally laden.

features of law that both sides have sought to exploit to tilt the methodological debate in their favor. Non-positivists like to zero in on the normative character of participants' understandings, attitudes, and beliefs, towards law and argue that jurisprudence should be continuous with them, whereas positivists like Dickson insist that, being *about* those understandings, attitudes and beliefs, jurisprudence need not be normatively committed in the same way that they are.

Here I shall put forward a set of arguments for doubting the superiority of the indirectly evaluative methodology in the philosophical study of the concept of law. Their combined thrust is to question the ability of judgments of importance to ground our theoretical choices, as we navigate the complexity of people's understandings of law. Of course, there are other arguments that have as their point of departure the dependence of the concept of law on participants' understandings. Their assessment will have to await another occasion. My suspicion is that, as a general matter, this dependence does not provide a shortcut in the debate between positivism and anti-positivism. Given the limited scope of the present inquiry, however, it will have to remain a suspicion. But at the very least I hope that the arguments I present will encourage participants in the debate to sharpen their use of this dependence so as to effectively engage the opposing view.

The chapter will be structured as follows: I shall first explain what Dickson takes the dialectic between moralized and non-moral jurisprudence to be. I shall show that this decisively frames her own brand of indirectly evaluative jurisprudential method, but that it also risks missing the gist of moralized jurisprudence. I shall then test how well indirectly evaluative jurisprudence can explicate the concept of law in light of the latter's dependence on participants' understandings compared to its moralized opposite number. I shall conclude that, if indirectly evaluative jurisprudence is indeed a sword, it is a rather blunt one.

II Indirect Evaluation and Theories of Law

Legal practice presents us with a vast collection of data. Hardly anyone maintains that jurisprudence must simply report those data; instead, it must ‘systematize, clarify and sieve [them] for importance and relevance’.² How can it evaluate which ones are important and relevant? What criteria should it employ? Anti-positivists maintain that these criteria must include moral considerations: for them, a sound philosophical explication of legal practice is one that is in an appropriate sense morally appealing. Dickson construes the anti-positivist method as follows:

...to evaluate something is to ascribe real value or worth to it, and this univocal meaning is the only one which the term will bear. We just do not count something as being an evaluation, unless it consists of an ascription of such worth or entails such an ascription.³

Dickson argues that this method is underpinned by what she calls the ‘no place to stop’ argument.⁴ She takes John Finnis and other proponents of moralized jurisprudence to claim something like the following: once we have mounted on the evaluative track, there is no stopping short of full-blown moral evaluation. According to the ‘no place to stop’ argument unless jurisprudence is to be reduced to an arid reporting exercise, stripped from any ability to make judgments of relative importance about its database, it cannot but be moralized. The anti-positivist wins by default.

Notice two things about this argument. First, it has a ‘my way or the highway’ air to it. It allows room for only one type of jurisprudential inquiry, one that necessarily involves evaluation. Second, it crucially shapes the dialectical position of methodological positivism. It suggests that all its proponents ought to do is come up with a way of making evaluations that does not involve recourse to moral considerations. This is the ambition of Julie Dickson’s well-known indirectly evaluative legal philosophy (IELP).⁵ IELP resists the starkly binary choice

² J Dickson, *Evaluation and Legal Theory* (Oxford, Hart Publishing, 2001) 43.

³ *ibid* 48.

⁴ *ibid* 43.

⁵ *Ibid*.

between moralized and descriptive jurisprudence. According to it, there is more than one type of evaluation. More specifically, there is evaluation according to moral as well as non-moral standards. It is this kind of evaluation that undergirds methodological positivism. For Dickson it is a mistake to say that positivists aim to describe some phenomena, report regularities of behavior and the prevalence of certain attitudes and beliefs in the community. They aspire to accomplish more than just articulate contingent truths about a certain social institution that may hold in some community but not somewhere else. Rather, they seek to capture necessary truths that help us understand law's distinctive 'mode of operation', its central characteristics that make it the kind of institution it is. This requires discarding what is merely contingent and focusing on what is crucial and fundamental. Though this exercise will inevitably involve evaluation of some sort,⁶ it does not according to Dickson necessitate full-blown moral evaluation. Arguably, indirect evaluation provides the stopping point between mere description typical of sociological inquiries and moral evaluation. Note that Dickson does not deny that there is room for a moralized jurisprudence; legal philosophy, she says, is a broad church.⁷ Still, she insists on the priority of the non-moral inquiry. We must, she writes, 'postpone, and approach cautiously, *morally* evaluating and certainly morally justifying law until we have a non-morally-evaluative -or morally commendatory- account of law's most significant and important properties, and the relevance of those properties to our social, political and moral lives'.⁸

This understanding of the relationship between the study of the nature of law and morality echoes HLA Hart's famous assertion in the Postscript to *The Concept of Law* that the

⁶ There are traces of such a view in later work by Hart as well. See HLA Hart, 'Comment' in R Gavison (ed), *Issues in Contemporary Jurisprudence: Essays in Honor of H L A Hart* (Oxford, Oxford University Press 1986) 39.

⁷ J Dickson, *Ours is a Broad Church: Indirectly Evaluative Philosophy as a Facet of Jurisprudential Inquiry* (2015) 6 *Jurisprudence* 2, 207.

⁸ *ibid* 215.

type of theoretical inquiry he is engaging in is not antagonistic to Dworkin's.⁹ For Hart, whereas the former is in the business of describing the essential features of all legal systems, the latter determines the conditions under which this or that legal system can be morally justified. It is implicit in his argument that the two types of jurisprudence, the descriptive and the normative, operate on parallel levels. There may be important interrelations between moralized and what he calls descriptive accounts of law, but their success is tested independently; they strive, that is, for different kinds of truths.

In this sense, both Dickson and Hart think moralized jurisprudence is redundant. It is redundant not because it is not significant but because it comes to the scene at an analytically second stage, which presupposes and relies on the prior identification of law, the object of its moral assessment. Only after we have determined what is X, are we justified in judging whether that X is also a good or a bad thing.

So, what does indirect evaluation mean more precisely? At times, the distinction between direct and indirect evaluation is presented as a philosophical discovery about methodology in general. To make such a claim convincing, Dickson would have to show that indirect and direct evaluations track different classes of philosophical truths. That there are philosophical truths we arrive at by means of direct evaluation and ones we do by means of indirect evaluation. If she were right about this distinction, she would have indeed come up with a middle ground, a place for jurisprudential theories to stop, without in this way compromising their theoretical aims. But it is not entirely clear which philosophical truths indirect evaluation aims at. Consider the following passages:

- 1) 'An indirectly evaluative proposition of the form 'X is an important feature of the law'' is thus a proposition which attributes some evaluative property to that feature of the

⁹ HLA Hart, *The Concept of Law*, 2nd edition with a new Postscript (Oxford, Oxford University Press, 1994).

law, but which does not entail a directly evaluative proposition to the effect that the feature of the law in question is good or bad'.¹⁰

- 2) 'In the case of a proposition like "X is an important feature", the evaluation concerned does not go to the substance or content of the subject of the proposition in the same way as is the case as regards a directly evaluative proposition'.¹¹
- 3) 'In asserting a proposition like "X is an important feature", we are accounting the existence of some X as significant and hence worthy of explanation, not directly evaluating as good or bad the substance or content of that X'.¹²

Now, it is true by stipulation that indirect evaluation is different from direct evaluation. The former does not employ moral tests while the latter does. It is more difficult to make out by virtue of what Dickson thinks the questions they answer belong to separate philosophical domains. What about the idea that indirect evaluation shies from the 'substance or content of the subject of the proposition'? But what precisely is the substance or content of a proposition to which an indirectly evaluative judgment is juxtaposed? If by 'content' Dickson means its moral merit, then, again, the statement is not particularly informative. So, it must be something else. What about the different idea that indirect evaluation merely asserts the existence of a certain feature? Yet, this idea does not seem to get us much further either. For the idea that, say, a legal norm can *exist* irrespective of its moral merits, is already built into the statement. But that is what is in dispute between positivists and anti-positivists.

Perhaps, we can get guidance from an example Dickson appears to rely on more heavily. Often, we say of an event that it is the most important thing that has happened to someone, without committing ourselves to a particular view about its moral value, about whether it made one's life a good or a bad one. Now, this is undeniable, but we must be careful

¹⁰ Dickson *Evaluation and Legal Theory*, above n 2 at 53.

¹¹ *Ibid.*

¹² *Ibid.*

to determine the precise import of the example. For one thing, something can be important in all sorts of ways, for various reasons. But Dickson is interested in a particular sense of importance. Something is important in this latter sense, if it points to a feature of a social or physical phenomenon that is part of its very nature. If a physical or social phenomenon lacks that feature or ceases to possess it, it is not (or no longer) the same thing. Hence, it may be important that white wine be served chilled, but warm white wine is no less wine, whereas something whose chemical composition is not H₂O is not water, even if it is transparent and we drink it to quench our thirst.¹³ So the claim that some events in our life are important though not morally so does not by itself establish the appropriateness of indirect evaluation as a philosophical -or more narrowly jurisprudential- methodology. It would have to be supplemented by an account whereby the occurrence of such events makes one's life the life that it is, whatever their consequences upon its moral quality.

More fundamentally, as the example of water and wine shows, it is quite true that in many cases the evaluation needed to pin down the essential features of some object or phenomenon, either physical or social, will not require recourse to morality. It would be absurd to suggest that scientists determining the nature of water or wine should go about making moral judgments. By virtue of what would it be absurd? Plausibly, the kind of evaluations needed to determine the concepts we employ to mark objects of our social and physical environment should trace the nature of that object. On this view, there is something in the nature of water and wine that makes moral considerations irrelevant to the determination of their fundamental characteristics.

These thoughts bring Dickson back to square one. There are various things we mean when we make judgments of importance. That is why such judgments normally invite the

¹³ I am assuming here that there is a possible world with H₂O but no creatures with our biological characteristics that need H₂O to quench their thirst and our sensory apparatus to perceive it as transparent. See S Kripke *Naming and Necessity*, Lecture III (Oxford, Blackwell Publishers, 1981) esp. 127-134.

further question: ‘with respect to what?’ Furthermore, things are important in moral or non-moral ways. In this sense the distinction between direct and indirect evaluation is sound. Indeed, it must be rather uncontroversial. But this does not suffice to shield Dickson from the anti-positivist challenge. In addition, she bears the burden of supplying a link between her preferred mode of inquiry and the philosophical study of law. This is a burden that all theory shoulders. Our example was water. We are inclined to say that its chemical composition is important to the concept of water, meaning that nothing without that composition counts as water, even though we obviously do not imply that it is also of moral significance that things be so. A more general way of putting the same point is that the appropriateness of one or the other mode of evaluation is to be judged by appeal to the kind of thing our inquiry is directed to or the kinds of features that belong to its essence.

III A Wrong Turn

Before turning to assess how the finding of the previous section bears on the explanatory potential of indirect evaluation, I want to show how it opens up the possibility of understanding moralized jurisprudence in a different way from Dickson. Recall that she sets herself to refute the ‘no place to stop’ argument, which she takes to be central to the moralized jurisprudence of John Finnis and Ronald Dworkin. According to it there is only one mode of philosophical evaluation, the moral mode; if jurisprudence has to be evaluative, then it must be morally laden. However, this strikes me as too strong a reformulation of Finnis and Dworkin’s position. To my mind, neither author need deny the existence of other non-moral modes of evaluation, nor their appropriateness for certain inquiries.¹⁴ In line with the lesson of the preceding section, we can say instead that they are making the narrower claim that it is something about the nature

¹⁴ For instance, Dworkin acknowledges that non-moral evaluation may be appropriate for examining the ‘sociological concept of law’, which he distinguishes from the doctrinal concept of law, the target concept of legal theory. See R Dworkin, *Justice in Robes* (Harvard, Harvard University Press 2006) ch 8.

of law, and not the nature of philosophical evaluation in general, that makes moral principles pertinent to legal theory.

Take Finnis as an example. For him, the study of law must be morally laden because law is taken by members of the community to provide standards of conduct. He writes: ‘If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation...then such a viewpoint will constitute the central case of the legal viewpoint’.¹⁵ But since nothing can be binding, unless it conforms to right reason, then the primary task of the legal philosopher is to explain how the law is the sort of thing that can impose moral obligations. This exercise will furnish focal instances of law. Of course, actual social orders do not always live up to this aspiration. Despite their moral defects they may still be thought of as law, though only in a peripheral sense. Even then they are law in virtue of their similarity to the focal, morally justifiable instances. Hence, Finnis would insist that moralized jurisprudence is antagonistic with and on the same terrain as descriptive jurisprudence, in the sense that the truth of one entails the falsity of the other. For him we cannot reach conclusions about the nature of law other than by means of moral evaluation of the sort just sketched. Such moral evaluation is not, so to speak, parasitic upon other evaluations that supposedly fully determine the concept of law.

Of course, Finnis may be wrong. But that is beside the point. What is more significant for present purposes is that he has come to propound a version of moralized jurisprudence, because he thinks moral considerations can make best sense of the obligatory nature of law. For all we know, practices that lack this feature might call for a non-moral methodology. Therefore, in order to adjudicate between his position and Dickson’s there is no avoiding looking at legal practice to see which methodology is best suited to explicate it.

¹⁵ See also J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) 14-15.

In fact, elsewhere Dickson herself endorses this line of thought. She claims that ‘if we are to learn something interesting about the role of evaluation in legal theory, then we must seek to understand whether, and in what sense, the particular data with which legal theory deals has a special bearing upon the kinds of evaluative judgments a successful theorist must make.’¹⁶ In the following sections we shall examine some of the reasons she gives for thinking that the exercise described in this passage will pick out indirect evaluation as the one appropriate for legal theory. As announced, these reasons turn on the fact that the concept of law depends on the understandings, beliefs and attitudes of participants. We shall conclude that this fact does not put moralized jurisprudence at a disadvantage from the get-go.

IV Law and Participants’ Self-Understanding

Dickson starts from the observation that those who participate in legal practice employ the concept of law to shape their perception of the social world.¹⁷ Arguably, this means that its analysis must be different from other concepts in the social sciences, which are in a way superimposed on the social world, but do not figure in the thoughts and beliefs of ordinary members of society. An example of the latter type of concept is ‘ideology’, as used for example in Marxist accounts of society. People under the bourgeois ideology will typically be unaware of the fact that their moral claims are ultimately grounded of class interest and struggle. How do we know then that there is such a thing? Simplifying grossly, we can say that sociologists construct concepts like ideology on the basis of stipulations and general assumptions about how society (or a society) functions. They subsequently go out in the world and make empirical observations, which enable them to test whether those concepts can adequately explain various phenomena and patterns of social behavior. It makes sense to speak of ‘ideology’ if this concept

¹⁶ See Dickson *Evaluation and Legal Theory*, above n 2 at 35.

¹⁷ For a similar starting point see J Raz *Two Views of the Nature of the Theory of Law: A Partial Comparison* (1998) 4 *Legal Theory* 249, and M Giudice *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Cheltenham, Edward Elgar Publishing, 2015) ch 8.

improves our understanding of social behavior, even though it is not part of the conceptual scheme of those people whose behavior we seek to understand.

At first sight, the concept 'law' does not work this way at all. One of HLA Hart's key contributions to the theory of law is the idea that law is normative. In *The Concept of Law* Hart distanced himself from Austin who explicates law in terms of habits and sanctions and instead gave prominence to what he called the internal point of view of officials. The internal point of view, he contends, is that of someone who takes law to provide a standard of conduct. Those who adopt it justify their behavior by appeal to that standard and criticize deviations from it in others. An adequate theory of law must account for this internal point of view and the practices of justification and argumentation built around it. From this Hart concluded that jurisprudence ought not to take a purely external perspective, focusing solely on regularities of behavior and the effectiveness of sanctions in securing compliance. Rather, it needs to take the internal point of view at face value. Perhaps Hart was wrong to think that the internal point of view can be accommodated by his theory. But that does not detract from the value of his insight, namely that, unlike concepts like water, law is largely constituted by what people think about it. And this, so the argument goes, has considerable impact on the methodology of jurisprudence.

In fact, this has been taken to be the point of departure for much moralized jurisprudence. Arguably, a value-laden methodology makes better sense of the internal point of legal practitioners and thus vindicates law's normativity, because it helps identify which standards genuinely justify conduct. Thus, it might be said that Ronald Dworkin radicalizes Hart's insight. He suggests that, in order to account for the normative character of law, we ought to accept that the theory of law is not neutral with respect to the competing concrete claims of legal practitioners; it does not strive to describe our attitudes in a detached manner. Rather, it takes sides in ordinary legal discourse. As Dworkin characteristically puts it in a famous passage from *Law's Empire*, 'no firm line divides jurisprudence from adjudication or

any other aspect of legal practice ... Jurisprudence is the general part of adjudication, silent prologue to any decision at law'.¹⁸

There is a prima facie reason why the mere fact that legal practice is normative does not automatically provide an argument in favor of moralized jurisprudence. It does not go without saying – indeed it strikes some jurisprudes as odd- that the philosopher's task should be on the same level as the participant's. The latter takes the practice as reason-giving. But arguably the philosopher merely intends to analyze this feature; to carry out this task she need not be taking part in the practice. According to this view, the claims we make as part of the philosophical analysis of law are neutral with regard to the 'first-order' claims that are put forward in the course of taking part in the practice like the claim that the defendant has a duty in law to pay damages to the claimant. They are neutral in the sense that they do not validate some first-order legal claim -except perhaps strike out the most outlandish ones that defy our conceptual framework such as the claim that the defendant must pay damages because a tree said so. They occupy, so to speak, an Archimedean standpoint. Whether you take one or the other view of what the law requires, your claim still has the same deep structure, and it is that deep structure that legal philosophers seek to elucidate.

In fact, the philosopher need not take the law to be morally justified at all. Perhaps she thinks it is iniquitous and should be modified. Still, on the view under discussion this is a distinct issue, with no bearing on the study of law as it is experienced by those who treat it as reason-giving. Seen from this perspective, moralized jurisprudence appears indeed superfluous. No doubt, legal norms can be morally evaluated, and moralized jurisprudence will be essential to that task. However, when it comes to understanding what makes those norms legal, their moral assessment is an unnecessary –and potentially misleading- extra.

¹⁸ R Dworkin, *Law's Empire* (Oxford, Hart Publishing 1998) 90.

Considerations of moral merit will inevitably filter out some norms that are immoral but are treated by a society as binding. Thus, they will impede our understanding of the concept of law actually used in that society.

If considerations of moral merit are out of the question, which considerations should we rely on instead? This question reintroduces the challenge of sifting through the immense and varied database of legal practice, ‘that Everest of data’,¹⁹ in order to arrive at a unified theory of its essential features. At least, proponents of moralized jurisprudence can use moral considerations to discard some elements from that database and focus on others.²⁰ Dickson, by contrast, anchors judgments about the theoretical importance of some feature of law in ‘the prevalence of certain beliefs on the part of those subject to law concerning X, and the consequences which those beliefs have’.²¹ The first characteristic she often explains as what the law ‘invariably’²² possesses. By ‘consequences’ of some belief she primarily has in mind its effect on our deliberations or its role as a point of focus for our direct evaluations.

Let’s start with the first characteristic. ‘Invariably’ can be taken to mean one of two things: First, it may denote some feature that law possesses in virtue of its very nature. Invariable then would mean necessary. But that would trivialize Dickson’s thesis by making it tautological. What is necessary, part of the very nature of law is supposed to be what a theory of law ends up with. Hence, it cannot figure as a criterion for sorting out through the data on pain of circularity. Or else it might imply an empirical observation: that wherever and whenever there is law, social scientists have discovered that the surface behavior of those

¹⁹ Dworkin, *Justice in Robes*, above n 14 at 166.

²⁰ S Perry, Hart’s Methodological Positivism in J Coleman (ed), *Hart’s Postscript* (Oxford, Oxford University Press, 2001) 311.

²¹ Dickson, *Evaluation in Legal Theory*, above n 2 at 59.

²² *ibid.*

subject to law is the same.²³ For one thing, that would be a tremendously ambitious project, on which no philosopher has ever embarked.²⁴ More to the point, this construal of Dickson's thesis would be saddled with a rather implausible view of error. It would presuppose that people never have mistaken beliefs about the concepts they use. It would also be exposed to the familiar challenge from disagreement. If what makes something important for legal theory is its prevalence, how come people disagree in the way Dworkin thinks they do in pivotal cases? What is it they disagree about? And how can we tell the beliefs of which side we should trust to reveal the important features of law?

To this set of questions legal philosophers have given a wide range of answers. Some say that even when two people disagree about the concept 'law', they still implicitly rely on the conventional meaning of that concept.²⁵ For others, philosophical explanations are extrapolations from paradigmatic applications of the concept and are thus inherently controversial.²⁶ These are both *prima facie* plausible suggestions. However, it is questionable whether they support anything like the indirectly evaluative methodology. The second suggestion is especially hard to square with it. Paradigmatic applications may well serve to signal what practitioners deem important, but they do not by themselves determine how and why they are important, unless they are supplemented by a philosophical account that is built on them. The fact that, though answerable to paradigms, such an account is controversial is strong evidence that indirect evaluation can at best be part of a much bigger methodological story. What about the first suggestion? This one at least gives us comfort that legal theory aims at uncovering the shared understanding of the concept rather than advancing a partisan

²³ This is the approach advocated in W Waluchow, *Inclusive Legal Positivism* (Oxford, Oxford University Press 1994).

²⁴ Dworkin, *Justice in Robes*, above n 14 at 166-7.

²⁵ See for instance J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford, Oxford University Press 2001)

²⁶ T Endicott, 'Herbert Hart and the Semantic Sting' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford, Oxford University Press 2001) 39.

conception with which many practitioners disagree. Still, this metaphysical view requires, at the methodological level, that we cut through the surface disagreements of practitioners. A methodology that insists on a numerical standard of prevalence is of little help in this task.

Some of the criticisms mentioned above also apply to Dickson's second proposal. It is doubtful that we can come up with an unequivocal account of the role legal norms play in our practical lives just by looking at the attitudes of practitioners. For one, Hart acknowledged that some people abide by the law out of fear of sanction. They thus adopt an external perspective toward law, heeding it only when it can hurt them, not because they take themselves to be bound by it. To accommodate this dimension of legal practice, Hart famously maintained that for law to exist it suffices that legal officials adopt the internal point of view, whereas the rest of the population need only by and large conform to legal norms without necessarily taking the law as a normative standard. But this focus on the internal point of view, however reasonable, exposes Hart to a methodological challenge that Dickson also faces. The challenge can be put in the following general form: Which attitudes, beliefs and dispositions should legal theorists focus on? Is it those of the 'bad man' or of the law-abiding citizen? Or is it perhaps those of the official?²⁷ Given that all of these perspectives are rather salient, it is not clear we can answer this question solely by appeal to indirect evaluations.

In making these observations, I do not mean to endorse the view that the concept of law itself is fraught with indeterminacy, and therefore that the task of legal theory is not to reflect how that concept is being used but to produce accounts of that concept that suit our practical, including moral, goals.²⁸ Rather, my aim is the more modest one of pointing out that the existence of disparate perspectives toward the law recommends adopting a methodology that

²⁷ Notably, this point has been pressed by Stephen Perry in Perry, 'Hart's Methodological Positivism' above n 20 at 324ff.

²⁸ L Murphy, Concepts of Law (2005) 30 *Australian Journal of Legal Philosophy* 1; D Priel, Jurisprudence and Necessity (2007) 20 *Canadian Journal of Law and Jurisprudence* 173.

will often have to go beyond the surface behavior of the participants. For Dickson, legal theory may ‘systematize, sieve and clarify’ the self-understandings of the participants in legal practice, but it is not clear whether in her view it can discard any part thereof as simply misguided. And even if she thinks it can, the preceding analysis has demonstrated that ‘the prevalence and consequences’ of certain attitudes cannot yield a determinate philosophical criterion. As a result, what we are probably left with is a range of considerably divergent sets of beliefs, attitudes and dispositions that share too little in terms of a highest common factor for the theorist to construct a ‘modest’ account of law out of them.

V Conclusion

In her critique of Dworkin, Dickson contends: ‘[his] approach results in [him] foreclosing the issue of whether law is an inherently moral phenomenon more or less from the outset of his discussion, thus restricting considerably the remit of legal theoretical inquiry’.²⁹ This point can be generalized to moralized jurisprudence as a whole. But if the foregoing analysis is correct, there is reason to think that this complaint may not be entirely warranted: Dworkin and other proponents of moralized jurisprudence must of course provide their arguments for why we should treat law as an ‘inherently moral phenomenon’. Having done so, they are perfectly justified in foreclosing the methodological issue ‘from the outset’. They may be wrong on substantive grounds but they do not beg the methodological question. In this regard, they are in no better or worse position than their opponents. Any theory of law will have to adopt a methodology that is appropriate for the kind of thing that it takes law to be.

Some may regard this as an alarming proposition. Methodology is there to discipline and guide our search for the nature of law. But then I go on to argue that the methodology is itself sensitive to what we take the nature of law to be, which presumably we should only

²⁹ See Dickson, *Evaluation in Legal Theory*, n 2 at 129

discover at the end of the process. Arguably, we are left with no place to anchor at least some of our beliefs, say about methodology, and to use them as a basis for assessing the truth of our further beliefs, say about the nature of law. Finnis may think that the methodology of jurisprudence must be capable of vindicating the obligatory character of law, but surely Austin would disagree. It is no surprise, then, that they end up with very different respective substantive theories of law. But, surely, we want our methodology to adjudicate between them rather than presuppose them.

While this understanding of methodology as internal to a given legal theory surely poses challenges, I do not think it involves us in a vicious circle. I cannot argue for this bigger claim now. Still, what I have said in this chapter points to a more modest but still interesting thought: We should not expect that methodological considerations by themselves, unhinged from law, will deliver outright victory to either positivism or anti-positivism. Our assessment of Dickson's indirectly evaluative methodology vindicates this thought: Indirect evaluation cannot get off the ground if not supported by arguments to the effect that it has a good fit with the nature or the concept of law. In this chapter I have given some reasons to doubt that. The complex and multi-layered character of legal participants' understandings, attitudes and beliefs seems to defy judgments of importance.

To be sure, I do not preclude that, once the notion of such judgments is further developed, they may be found to be up to the task. Nor do I mean to say that, if Dickson's solution is wanting, this automatically qualifies moral considerations as fit for the job. What I wanted to point out was that successful methodological proposals must take a certain shape and address certain puzzles. Effectively to engage with moralized jurisprudence, positivists have to show what it is about law (or perhaps more generally about philosophical accounts of concepts) that makes it the case that theories of law need not have resort to moral arguments. It is not enough to say that explication of a thing or concept (or, more specifically, law) is one

thing and moral justification is quite another. For the soundness of this distinction is precisely what their opponents are disputing. In this debate there are no defaults.