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Less Incorrect Ways of Doing Jurisprudence

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Abstract: Theorists interested in the question of how to do jurisprudence often have the aspiration of developing a method that is *the* correct one. The article challenges this aspiration. Focusing on Julie Dickson's claim that Indirectly Evaluative Legal Theory is the correct method, I show that any method claiming to be *the* correct one runs into the problem that law is not the kind of thing that a legal theorist could capture independently of her underlying conception of law, and without potentially influencing what law is through her own theory. However, this does not spell the end of jurisprudential methodology. The article proposes that methodologists should shift their focus away from the pursuit of single correct methods and toward studying and weeding out *incorrect* methods. I outline some of the principles that theorists can use for this purpose and point to promising avenues of research that this shift opens up.

Keywords: Jurisprudential Methodology, Meta-Jurisprudence, Indirectly Evaluative Legal Theory, Incorrect, Methodological Weeding, Pluralism

Introduction

True to the motto "Anything you can do, I can do meta," recent decades have witnessed a surge in investigations into the meta-questions of jurisprudence.[1] Also called the "methodology of jurisprudence,"[2] or the "philosophy of the philosophy of law,"[3] these inquiries are characterized by a shift in attention to a new layer of analysis. Meta-theorists are not primarily interested in questions about

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[1] The terms "jurisprudence," "legal philosophy," and "legal theory"—and the corresponding terms "jurisprude," "legal philosopher," and "legal theorist"—will be used synonymously in this article.

[2] Andrew Halpin, "The Methodology of Jurisprudence: Thirty Years Off the Point." *Canadian Journal of Law & Jurisprudence* 19 (2006): 67–105.

[3] John Gardner, "General Editor's Preface," in *Evaluation and Legal Theory* (Oxford: Hart, 2001), v. On terminology, see also Julie Dickson, "Ours Is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry," *Jurisprudence* 6 (2015): 208.

the law, its rules, and its practices (the first layer), nor in jurisprudential questions about what law is (the second layer). Rather, they are interested in the methods that jurisprudes adopt to go about theorizing law in the first place (the third layer).

To be sure, such third-layer inquiries into the methodology of jurisprudence—which I will call "methodological theories" for simplicity's sake—are not novel. As Julie Dickson, a prominent methodological theorist, has put it, "[a]ll legal theorists take an implicit stance on meta-theoretical or methodological questions."[4] However, before the turn of the millennium, methodological issues were only rarely viewed as a distinctive sub-discipline of legal philosophy.[5] The causes of this relatively recent upsurge of interest in methodological questions are difficult to determine, with some identifying, as probable reasons, a need to move to new questions after the (alleged) closure of the Hart/Dworkin debate,[6] and others pointing to a lack of progress on substantive questions about the nature of law.[7] Especially for methodological theorists of a positivist bent, another reason for pursuing meta-theoretical questions may lie in the apparent value-neutrality of these questions, which would seem suited to lend support to Hart's and other legal positivists' second-layer accounts of law.[8]

Whatever their reasons for pursuing methodological questions, the basic aspiration of most theorists interested in meta-inquiries has remained the same as that of their second-layer colleagues: to develop and defend a theory that is *the (only) correct one*. In many methodological theories, this aspiration is only implicit. Other accounts, however, flaunt it. Dickson's work is an example. Building on Joseph Raz's writings, she has defended what she calls "Indirectly Evaluative Legal Theory" (IELT):[9] a methodological theory according to which theorists can provide successful accounts of law without having to make any moral judgments. As she contends, IELT is "*the* correct methodological approach for a theory of law to adopt."[10]

I argue in this article that arguments according to which there is one and only one correct methodological theory (I call them One Correct Method Arguments, or OCMAs for short) are bound to fail. Whether they take the form

[4] Julie Dickson, *Evaluation and Legal Theory* (London: Bloomsbury Publishing, 2001), 2.

[5] See e.g., John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicolson, 1954); H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), especially Chapter 1; John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), especially Chapter 1; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), especially Chapters 1-2.

[6] See Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), 154.

[7] See Dan Priel, "Description and Evaluation in Jurisprudence," *Law and Philosophy* 29 (2010): 633; Andrei Marmor, *Interpretation and Legal Theory*, 2nd ed. (Oxford: Hart Publishing, 2005), 2.

[8] I am grateful to an anonymous reviewer for this point.

[9] Dickson, *Evaluation and Legal Theory*, 2001, 10; see also Julie Dickson, "Law and Its Theory," in *Reason, Morality, and Law: The Philosophy of John Finnis*, ed. John Keown and Robert P. George (Oxford: Oxford University Press, 2013), 361–78; Dickson, "Ours Is a Broad Church," 4 May 2015; as well as her forthcoming monograph *Elucidating Law*.

[10] Dickson, *Evaluation and Legal Theory*, 2001, 64 (emphasis added).

of Dickson's IELT or other theories about correct methods of conducting second-layer inquiries into law, OCMAs run into the problem that law, as a first-layer object, is not the kind of thing that is susceptible to being understood by means of just one correct method.[11] The reason for this is that law cannot be captured independently of the legal theorist's underlying second-layer conception of law, and does not have a "nature" that is in principle immune from being influenced by second-layer theorists trying to capture it. While this still allows for a method to be *a* correct method for studying one or several of law's "natures"—or structures, as I will call them[12]—it means that determining whether it is correct cannot be settled on the level of the third layer alone. Instead, methodological theorists need to engage in second-layer debates on what the best way of understanding the given structure of law is. As a result, the hopes of those who see in methodological theory a way out of the impasses of second-layer debates seem dashed.

This insight questions the merit of numerous existing methodological theories, including Raz's and Dickson's. However, it does not spell the end for third-layer analysis. The mere fact that methodologists cannot determine the correctness of a particular method without making contentious second-layer assumptions about the structure of law does not mean that there are *no* questions they can answer while remaining on the methodological level. Quite the contrary: once the fruitless pursuit of singular correct methodological theories is abandoned, the door is open to more productive meta-debates. Specifically, I propose that while there is no single correct method of doing jurisprudence, there may still be a number of *incorrect* methods. In other words, not all methods are born equal, and some turn out to be complete dead ends. Identifying which methods are less incorrect than others—a process I refer to as "methodological weeding"—can be carried out (at least to some degree) without making contentious second-layer assumptions, and should therefore become the domain of methodological theorizing.

The article is structured as follows. The next section examines whether there is only one correct method in jurisprudence. It begins by focusing on Dickson's argument that IELT is the correct method and demonstrates that her argument fails because it is based on question-begging second-layer assumptions. This critique then serves as a springboard for an analysis of the general problem with

[11] This view can also be found in the recent eliminativist movement in jurisprudence. The exact meaning of eliminativism differs from account to account. For our methodological purposes, we can define it as the view that nothing is lost if one abandons methodological inquiry in jurisprudence because methodological questions are not distinct from other inquiries in law and can therefore not be settled independently of them. See generally on eliminativism, e.g., Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge: Cambridge University Press, 2014), 88–102; Scott Hershovitz, "The End of Jurisprudence," *Yale Law Journal* 124 (2015): 1160–1205; Lewis A. Kornhauser, "Doing Without the Concept of Law," *NYU School of Law Public Law & Legal Theory Research Paper Series Working Paper 15-33* (2015), 1–31. However, I part with at least some forms of eliminativism by holding that there are still questions methodological theorists can settle: see below, p. 23. See also footnote 96 below.

[12] I will mostly use the term "structure" (or "character") of law to avoid the connotations of singularity that the term "nature" has. See also Brian Z. Tamanaha, *A Realistic Theory of Law* (Cambridge: Cambridge University Press, 2017), 80.

OCMAs. Such arguments, I will argue, are based on the misguided assumption that law has an existence that is *independent* from the theorist, and that it has certain *essential* qualities, in ways that seem to parallel the study of natural objects. As I will show, there may in fact be a plurality of ways law is and a plurality of methods to study it, and popular jurisprudes may influence what law is. The second section argues that this insight opens up new avenues of research in which methodological theorizing has a useful contribution to make in identifying incorrect methods of doing jurisprudence. I will flesh out this claim by discussing different principles that can be used to weed out incorrect methods, and I will defend my theory against two potential objections that could be raised against it. A concluding section summarises the article's main findings.

I. Is There Only One Correct Method?

To understand my call for methodologists to shift their attention to less incorrect ways of doing jurisprudence, it is first necessary to consider why the pursuit of a singular correct method is fruitless. To do this, we need to understand why OCMAs fail. This section will start by presenting one of the most explicit and prominent OCMAs that can be found in methodological scholarship: Dickson's claim that IELT is the correct method for jurisprudence. I will then show, by using Dworkin as a counterexample, that Dickson fails to establish IELT's correctness because her view relies on question-begging second-layer assumptions. Finally, the section will use this critique as a springboard to show why OCMAs in general are problematic.

A. Dickson's "Indirectly Evaluative Legal Theory" Method

What exactly is IELT and why does Dickson argue that it is "*the* correct methodological approach"[13] for jurisprudes to adopt? IELT is Dickson's answer to one of the questions that has attracted considerable attention in methodological debates: do theorists need to make evaluative judgments to develop successful second-layer accounts of law and, if they do, what type of evaluation is required?[14] For some time, a common view was that legal positivists such as John Austin and Hart constructed their accounts by adopting purely descriptive methods. Evaluation was regarded as tantamount to *moral* evaluation, and therefore the preserve of natural law theorists.[15] Outside of natural law, it was Raz who contributed to a more nuanced discussion, arguing that even legal positivists need to resort to "evaluative judgment about the relative importance of various features of social organizations"[16] when trying to provide a second-layer account

[13] Dickson, *Evaluation and Legal Theory*, 64 (emphasis added).
[14] Ibid., 3.
[15] Priel, "Description and Evaluation in Jurisprudence," 634. See e.g., Finnis, *Natural Law and Natural Rights*, 3–19.
[16] Joseph Raz, "The Problem about the Nature of Law," *University of Western Ontario Law Review* 21 (1983): 218.

of the nature of law. Today, most agree that description alone is insufficient for successful inquiry into law.[17] Law, as John Finnis has put it, does not come "neatly demarcated from other features of social life and practice."[18] It is necessary for any second-layer legal theorist to identify the features that make law *law*. This identification, the consensus goes, requires evaluation. Opinions differ, however, on what *sorts* of evaluations are necessary. Some, such as Finnis or Dworkin, believe that moral evaluations are required for developing sound second-layer accounts of law.[19] According to Dworkin, for instance, law must be regarded as having a specific purpose whose interpretation requires moral judgment.[20] Others, like Raz, have argued that while evaluative judgment is necessary, it need "not necessarily [be] moral."[21]

Dickson's theory can best be understood as a detailed apology and development of Raz's arguments, that defends them in particular against opponents like Dworkin.[22] Building on Raz, Dickson introduces methodological distinctions between "meta-theoretical," "indirect," and "direct" evaluation.[23] *Meta-theoretical evaluation*, on her taxonomy, involves mere judgments of "simplicity, clarity, elegance, comprehensiveness [or] coherence."[24] Second-layer theorizing about law, according to her, cannot be value-free in the "banal sense"[25] that no intelligible account of law can do without such meta-theoretical judgments.[26] *Indirect evaluation* goes beyond mere meta-theoretical evaluation in that judgments are made about the importance or significance about a particular feature of law.[27] As Dickson argues, any successful second-layer investigation into law must make evaluative judgments about what is regarded as important by those who are engaged in the first-layer practices of law. This is because such judgments are necessary if a second-layer theory does not simply want to present a meaningless list of facts about law.[28] Finally, there are judgments that involve *direct evaluation*, that is, judgments that involve moral evaluation. Dickson's central argument is that no jurisprude needs direct evaluation in his or her methodological toolkit to be able to present a successful second-layer account of law.[29] Only meta-theoretical and indirectly evaluative judgments are necessary.

[17] See however Stephen R. Perry, "Hart's Methodological Positivism," *Legal Theory* 4 (1998): 427. See also Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," in *Between Authority and Interpretation*, 69, 76.

[18] Finnis, *Natural Law and Natural Rights*, 14–15.

[19] Ibid.

[20] See Dworkin, *Law's Empire*, 96–98.

[21] Raz, "The Problem about the Nature of Law," 218.

[22] See also Priel, "Description and Evaluation in Jurisprudence," 635.

[23] Julie Dickson, *Evaluation and Legal Theory*, 32, 51. See for a critical take on this distinction Priel, "Description and Evaluation in Jurisprudence," 644–650; Matthew H Kramer, "Evaluation and Legal Theory by Julie Dickson," *Cambridge Law Journal* 62 (2003): 211.

[24] Dickson, *Evaluation and Legal Theory*, 32.

[25] Ibid.

[26] See also Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, 168.

[27] Joseph Raz, "Authority, Law, and Morality," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995), 235.

[28] Dickson, *Evaluation and Legal Theory*, 43.

[29] See also Raz, "Authority, Law, and Morality," 236-237.

To be sure, Dickson follows Raz in conceding that, in their search for important features of law, second-layer jurisprudes *may* take into account the moral goodness or badness of features as a potential reason for their importance.[30] However, she contends that there are at least four other ways a second-layer theorist can identify what is significant about law without engaging in direct evaluation.[31] According to her, that some feature X about law is important and significant can also be explained:

(a) "by the fact that X is a feature which law invariably exhibits, and which hence reveals the distinctive mode of law's operation";
(b) "by the prevalence and consequences of certain beliefs on the part of those subject to law concerning X, indicating its centrality to our self-understandings";
(c) "by the fact that the X in question bears upon matters of practical concern to us"; and/or
(d) "by the way in which X is relevant to or has a bearing upon various directly evaluative questions concerning whether it and the social institution which exhibits it are good or bad things."[32]

Because second-layer jurisprudes can use any of these ways to select important features about law without having to make moral judgments, Dickson argues with Raz, correct legal theorizing is possible by resorting to meta-theoretical and indirect evaluation only. She calls this methodological approach Indirectly Evaluative Legal Theory (IELT) and argues that second-layer jurisprudes who follow IELT adopt "the correct methodological approach."[33]

It is worth noting that Dickson realizes that IELT is not the only method in town. For instance, she acknowledges that Dworkin has his own "vision of correct jurisprudential methodology."[34] So how does Dickson defend IELT from a methodological point of view against such other methodological theories? Her response to Dworkin is particularly illuminating, which is why I will focus on it here.

As Dickson notes, Dworkin employs a different methodological standard for what makes a successful second-layer account of law. On his account, the third-layer criteria for successful accounts of law are "essentially moral criteria":[35]

> for Dworkin, the best legal theory is the one which shows the content of law, whether at a greater or lesser level of abstraction, in its morally best light as an example of justified governmental coercion. For Raz, however, the criteria of success of jurisprudential theories lie not with the way in which those theories ascribe moral value to features of the law, or show them in their morally best light, but rather . . . with the institutional mode of law's operation: with the distinctive way in which it does the things it does, and the institutions via which it does them.[36]

[30] Dickson, *Evaluation and Legal Theory*, 58.
[31] Ibid.
[32] Ibid., 64.
[33] Ibid.
[34] Ibid., 103.
[35] Ibid., 125.
[36] Ibid., 126 (emphasis removed). See also 106.

Dickson argues that IELT is preferable to Dworkin's method because the latter "closes down many of the most important questions which can be asked within jurisprudence before they can be properly raised."[37] To understand the point Dickson is making, and its relevance for our discussion below of the general problems with OCMAs, it is helpful to take a closer look at Dworkin's argument about the purpose of law. In *Law's Empire*, Dworkin holds that for legal theorists and lawyers to see their arguments as having a structure, there needs to be agreement about what the point of law is. This agreement, Dworkin argues, constitutes a kind of "plateau" on which legal argument takes place; a plateau that makes it the case that people construct interpretations of the same kind of thing.[38] For the purposes of his argument, Dworkin proposes that "the most abstract and fundamental point of legal practice is to guide and constrain the power of government"[39] by upholding individual rights and responsibilities in compliance with the rule of law. As Dworkin claims, this abstract account of the point of law is "suitably airy" and "sufficiently abstract and uncontroversial to provide, at least provisionally, the structure we seek."[40]

What is airy for some is stuffy for others, however. As Dickson criticizes, Dworkin's fixing of law's purpose in this way forecloses many avenues that a second-layer legal theorist could otherwise have explored. By getting everyone to construct their interpretations in light of law's purpose of constraining governmental power, Dickson argues,

> Dworkin also fixes to a large extent the character of law so far as the abstract questions of legal theory are concerned. Once he has got the genre or function point in place, many of the questions which legal theorists should want to ask, concerning, for example, whether law has an overall point or function at all, and whether that point means that law, properly understood, is a morally meritorious or morally justified phenomenon, have already been answered.[41]

To show that Dworkin's method is far from uncontroversial and that it forecloses too many avenues, Dickson compares it to Raz's. On Raz's method, she argues, the above-mentioned questions remain open for investigation by the second-layer legal theorist. As she emphasizes, Raz does not "hold that law can be characterized in terms of having any one overall function,"[42] so that even that point would be open to second-layer jurisprudential inquiry. Because only IELT keeps these research avenues open, Dickson concludes, it is ultimately better than Dworkin's method (and, she seems to imply, better than all other methods).[43]

B. The Problems with Dickson's IELT

This, in brief outline, is Dickson's argument why IELT is the correct method for second-layer jurisprudes to adopt. As I would now like to demonstrate, this

[37] Ibid., 108.
[38] Dworkin, *Law's Empire*, 92–93.
[39] Ibid., 93.
[40] Ibid.
[41] Dickson, *Evaluation and Legal Theory*, 111.
[42] Ibid., 117.
[43] Ibid., 132.

argument is flawed. I will start by using Dworkin as a counterexample to show that Dickson's argument about the four ways of identifying what is significant about law without direct evaluation is based on question-begging second-layer assumptions. I will then show that Dickson's third-layer defense of IELT against Dworkin is also based on such question-begging assumptions.

1. Question-begging Assumptions Behind Dickson's Four Ways of Identifying Important Features. For Dickson's argument about the correctness of IELT to have some plausibility, she needs to be able to show that there is at least one way for second-layer theorists to identify important legal features without having to resort to the method of direct evaluation. As will be recalled, Dickson offers four such possible ways.

Let us start with her first point (a), namely that a second-layer theorist need not rely on direct evaluation to capture features which law never fails to possess and which account for its distinctive way of operating.[44] To support her point, Dickson invokes, by way of example, Raz's second-layer theory of law, which holds that law claims to have moral authority. This claim to moral authority is an important feature of law, according to Dickson, "simply because it is something which the law invariably does and which is hence characteristic of it."[45]

However, it is unclear how a second-layer legal theorist is supposed to decide which of law's features are distinctive. As Finnis has pointed out, law is made up of a "vast rubbish heap of miscellaneous facts."[46] (Too) many of the facts in the heap may be features which law invariably possesses. That fact alone cannot therefore make them important features. For example, the fact that there may be gavels or men in robes wherever there is law does not yet make gavels or men in robes distinctive features of law.

It could be objected that gavels and men in robes are not features that reveal "the distinctive character of law *as a special method of social organization*,"[47] as Dickson requires. While this is of course true (even providing for the importance of symbolism[48]), it is still far from clear that there is a straightforward way of determining which feature accounts for law's distinctive mode of operation. Dickson illustrates her point with Raz's second-layer theory according to which law's claim to moral authority represents its distinctive mode of functioning.[49] However, she does not explain why, among the vast rubbish heap of legal facts, law's claim to moral authority would appear as the most salient feature of law (or as one of the more salient features). After all, law does not self-evidently present itself as making a claim to *moral* authority. Rather, it could simply be seen as imposing and executing threats. Alternatively, a Dworkinian may want to

[44] Ibid., 58–59.
[45] Ibid., 59.
[46] Finnis, *Natural Law and Natural Rights*, 17.
[47] Dickson, *Evaluation and Legal Theory*, 58 (emphasis added).
[48] See, e.g., Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven: Yale University Press, 2011).
[49] Dickson, *Evaluation and Legal Theory*, 58–59.

point out that it is not law's claim to moral authority that is important but law's actual moral character.

The issue, then, is that the facts about law seem too diverse, too chaotic, for a second-layer legal theorist to be able to pick out a feature as being clearly revelatory of the distinctive character of the way law operates. Rather, as Dickson's example suggests, which feature (or features) second- and third-layer theorists select as being characteristic of law (and therefore the method of capturing it) seems to depend on the second-layer conception of law which they hold in the first place. Those who endorse a second-layer account of law on which law merely *claims* moral authority will not require a directly evaluative method to identify this claiming as a distinctive feature. By contrast, those who adopt second-layer theories according to which law is *actually* morally authoritative because, for example, it justifies governmental coercion as in Dworkin's account,[50] will require direct evaluation to identify the distinctive ways in which law operates. Hence, unless one is already susceptible to a Razian second-layer account of law, it is unclear why law's claim to moral authority should be picked out as an important fact.

Dickson's second point (b) refers to law's character as a hermeneutic concept, which she defines as a concept "which people use to understand themselves."[51] As Dickson argues, second-layer theorists can only understand what is important about law if they take an internal perspective and "ask what is important as regards the way in which we understand ourselves in terms of the law."[52] According to her, a first-layer legal feature can be identified as important if it is based on the beliefs of those who live under the law. To illustrate her argument, Dickson again refers to the theory of law's (alleged) claim to moral authority. At least some people who live under the law, especially the officials, she argues, accept this claim and behave accordingly.[53] On her view, the prevalence of such beliefs shows that this feature of law is taken to be central to the participants' self-understanding, and can therefore be identified as important.

The problem with this point is that it is unclear why a second-layer legal theorist would have to pick out something to the effect of law's claim to moral authority as central to the self-understanding of legal subjects. The theorist might potentially also think that something entirely different is central to people's self-understanding. For example, a Dworkinian is more likely to take people's beliefs to point in the direction of law's purpose as a constraint on governmental power, and thus as a means of securing their fundamental rights and their status as equal citizens.[54] This, as I have mentioned, involves direct evaluation.

According to Dickson's third point (c), the fact that a feature bears upon matters of practical concern shows that it is important. Here, too, she illustrates her

[50] See below, p. 92.

[51] Dickson, *Evaluation and Legal Theory*, 41; Julie Dickson, "Methodology in Jurisprudence: A Critical Survey," *Legal Theory* 10 (2004): 135. See also the discussion below on p. 106–107.

[52] Dickson, *Evaluation and Legal Theory*, 59.

[53] Ibid., 59–60.

[54] See T.R.S. Allan, "Interpretation, Injustice, and Integrity," *Oxford Journal of Legal Studies* 36 (2016): 64–65.

methodological point with the example of Raz's second-layer theory that law claims moral authority. Whether those subject to law believe it or not, she argues, law's claim to moral authority is of practical concern to them because legal officials can, for instance, restrict people's freedoms if they disobey the law.[55]

Dickson may be right to identify law's capacity to limit or remove people's freedoms as important, but it is again not obvious that this fact must lead second-layer jurisprudes to identify law's claim to moral authority as the salient feature that ought to be incorporated into their theories. After all, law might also simply curtail people's freedoms without any claim to moral authority. As indicated above, law's sheer power may be considered sufficient for this purpose. What is more, a second-layer theorist could infer from the way people conduct their lives that they only regard as legal the kinds of decisions that are *actually* (rather than simply claim to be) morally authoritative. This could be gleaned for instance from the fact that some people tend to disobey, in acts of civil disobedience, legal rules which they deem unjust.

It is important to note here that I am not arguing for or against any of these substantive second-layer positions. Rather, I am arguing that what Dickson provides us with is insufficient to establish the correctness of IELT as a method. It may be theoretically possible for Dickson to show—by providing more detailed evidence regarding (a), (b), or (c)—that Raz's second-layer account is actually the one that correctly captures what is important. However, to prove the correctness of IELT, this would require more argument on her part and cannot simply be presupposed. And considering how entrenched and long-standing second-layer debates such as those between Razians and Dworkinians are, delivering such proof is a tall order. Until she manages to show why (a), (b), or (c) necessarily leads us to a Razian second-layer account of law, identifying which features are important will depend on one's second-layer theory of law. Those who think, like Dickson and Raz do, that law's mere claim to authority is of practical concern to people will identify this as an important feature of law, without the methodological need to resort to direct evaluations. By contrast, those, like Dworkin, who take law's actual justification of governmental coercion to be of practical concern to its subjects require direct evaluations. Hence, only if one were to presuppose the correctness of Raz's second-layer account would it make sense to try to capture how law's claim to moral authority has significant effects on practical matters, and to qualify this feature as important. In other words, only if we presuppose the correctness of Raz's second-layer account of law is it correct that direct evaluation is not necessary as a method.[56]

Dickson's final point (d) in support of IELT goes as follows: the importance of legal features can be identified by resorting to the way in which these features are "relevant to whatever direct evaluations we eventually might wish to make

[55] Dickson, *Evaluation and Legal Theory*, 60.

[56] See also generally Gerald J. Postema, "Jurisprudence as Practical Philosophy," *Legal Theory* 4 (1998): 329–57; Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43 (2008): 1–62.

regarding whether those features, and the social institution which exhibits them, are good or bad . . . and hence what we ought to do in light of this."[57] For example, she suggests that law's capacity to limit people's freedoms is relevant for a moral discussion of whether this capacity is morally good or bad.[58] With this argument, Dickson turns the tables on the proponents of direct evaluation by suggesting that, for the most part, it may not be direct evaluation which reveals that a feature is important for indirect evaluation. Instead, it is indirect evaluation that serves as the precursor to direct evaluation in revealing what is important and what could therefore be assessed directly.[59] Only when indirect evaluation is successful at pointing out what is important, she holds, is it "then possible and appropriate to go on and make directly evaluative judgments."[60] Does this argument fare better?

Although appealing at first glance, this point, too, fails to prove that second-layer jurisprudes can do without direct evaluation. Dickson's position suffers from two deficiencies in particular. First, her argument is question-begging in that it assumes that a second-layer theorist *can* lay bare what is important and significant about a first-layer feature of law without engaging in direct evaluation. It is not clear, however, if this is true. On Dworkin's account, for example, law does not have an existence that is independent of its interpretation.[61] Hence, according to him, law's important features cannot be identified before direct evaluation takes place.

Second, it is not necessarily true that direct evaluation can only take place *after* indirect evaluation "has done its job."[62] Description of values and direct evaluation need not necessarily be consecutive. Rather, they could, as Finnis has suggested, be conceived of as a "movement to and fro between, on the one hand, assessments of human good and of its practical requirements, and on the other hand, explanatory descriptions."[63] On this view, there is a "reflective equilibrium"[64] that can be reached (or at least aspired to) by revising one's descriptions of the law in light of moral judgments and by adjusting one's moral judgments with a view to the descriptions of legal facts.[65]

To summarize, Dickson's attempts to establish the correctness of IELT through the four ways of establishing the importance of a legal feature without relying on direct evaluation have not yielded her desired result. IELT may be the correct methodological approach only if we respond to her four points from the

[57] Dickson, *Evaluation and Legal Theory*, 63.
[58] For a similar example see Joseph Raz, "The Morality of Obedience," *Michigan Law Review* 83 (1985): 735; Dickson, *Evaluation and Legal Theory*, 62–63.
[59] Dickson, *Evaluation and Legal Theory*, 63. See also H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 597–598.
[60] Dickson, *Evaluation and Legal Theory*, 63; and see her discussion of "staged inquiry" in Julie Dickson, "Ours Is a Broad Church," 229. See also Andrei Marmor, *Philosophy of Law* (Princeton, NJ: Princeton University Press, 2011), 82.
[61] Only law in a pre-interpretive sense does, see Dworkin, *Law's Empire*, 65–66.
[62] Dickson, *Evaluation and Legal Theory*, 63. See also Leiter, *Naturalizing Jurisprudence*, 169; Jeffrey A Pojanowski, "Reevaluating Legal Theory," *Yale Law Journal* 130 (2021): 1479.
[63] Finnis, *Natural Law and Natural Rights*, 17.
[64] Ibid.
[65] Ibid., 19.

second-layer point of view of a Razian legal theorist. However, as I have argued, once we approach these points from a different second-layer vantage point such as Dworkin's, IELT ceases to be the correct methodological approach because direct evaluation becomes necessary to determine whether a particular feature is important or significant. The problem, in other words, is that at least until Dickson provides definitive proof of the correctness of Raz's second-layer theory of law, her method cannot be shown to be the correct one without adopting question-begging assumptions.[66] As we will see below, this does not mean that Dickson's four features are useless methodological tools.[67] However, her use of them does not suffice to establish the correctness of her preferred method.

2. Question-begging Assumptions Behind Dickson's Rejection of Dworkin's Method. Let us now consider Dickson's third-layer arguments in favor of IELT. Do they succeed in showing that her method is the correct one, or at least preferable to alternative methods such as Dworkin's? As will be recalled, Dickson argues that IELT succeeds, and Dworkin's method fails, because IELT does not foreclose avenues that a second-layer legal theorist would want to explore.

There are several problems with this argument. First, it is questionable whether Dickson's and Raz's method, which concentrates on a small number of necessary features that law is believed to have and relegates everything else to the sociology of law,[68] leaves open more avenues than Dworkin's method does.[69] In fact, as some have argued, Raz's method, too, can be viewed as closing down avenues.[70] For instance, Gerald Postema and Margaret Martin have suggested that Raz struggles to keep open the question as to whether law has a particular function.[71] As a result, they would argue, the opening or closing down of avenues cannot be the key feature that allows us to choose between these methodological theories.[72]

The second problem with Dickson's argument is that even if Dworkin's method closes down more avenues, Dickson is not right in saying that it closes off *all* the questions which she deems relevant. For although Dworkin suggests that the purpose of law is to guide and constrain governmental coercion, he does leave the door open for possible other descriptions of its purpose.[73] In addition,

[66] Jeff Pojanowski has made the interesting argument that a correct method may only be identifiable based on shared assumptions about human nature and the common good: Pojanowski, "Reevaluating Legal Theory," 1458. See also Grégoire Webber, "Asking Why in the Study of Human Affairs," *The American Journal of Jurisprudence* 60 (2015): 51–78.

[67] See also below 111.

[68] See on this also below 102.

[69] See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 104–5.

[70] See, e.g., Margaret Martin, *Judging Positivism* (Oxford: Hart Publishing, 2014), 119.

[71] See Gerald J. Postema, "Law's Autonomy and Public Practical Reason," in *The Autonomy of Law: Essays on Legal Positivism*, ed. Robert P. George (Oxford: Oxford University Press, 1999), 88–104; Martin, *Judging Positivism*, 152–80.

[72] I am grateful to an anonymous reviewer for asking me to clarify this point.

[73] Dworkin, *Law's Empire*, 93.

he allows for the skeptical conclusion that legal practice cannot be understood as having a genuine point or value and therefore lacks legitimacy.[74]

However, suppose for the sake of argument that Dworkin's method forecloses at least some—or enough—of the questions that Raz and Dickson find relevant. The third issue with Dickson's argument is that these are questions which could only be relevant to someone who is not a Dworkinian. To put this thought another way, holding a second-layer theory of law that is not Dworkinian is a necessary condition for being able to consider these questions to form part of the remit of methodological theory in the first place.[75] To argue, as Dickson does, that IELT is a better method than Dworkin's because IELT does not foreclose discussion on these issues thus begs the question: why should one adopt a method that leaves these questions open over another that does not?

Now, one might well think that there are other reasons that militate for methodological theories that license discussion on a larger range of issues. For example, one might think that there are epistemic reasons to prefer asking more questions as this may yield more knowledge.[76] Or there may be aesthetic reasons for preferring a wider set of questions. The more, the merrier. While these views may have some merit, there are also plausible countervailing considerations. Epistemically, parsimony is preferable to plurality. And aesthetically, simplicity can be a virtue. On these alternative principles, one should favor methodological approaches that keep things parsimonious and simple. My intention is not to take sides here. Rather, it is to point out that it is not clear how Dickson or Raz could support the correctness of IELT without relying on assumptions that ultimately beg the question that IELT is supposed to answer.[77]

C. The General Problem with One Correct Method Arguments

The previous section has demonstrated that, as they currently stand, the arguments that Dickson has provided are insufficient to establish that IELT is *the* correct method for second-layer jurisprudes. The reason for this is that Dickson's argument is based on the question-begging assumption that one adopts a second-layer account of law which does not require direct evaluation, thus "proving" IELT by supposition.

In this section, I will build on this finding to spell out the general difficulties that any attempt at providing *the* correct method faces. Joining a growing movement in methodological scholarship, I will critically analyze a misguided

[74] See his discussion of "pragmatism" in *Law's Empire*, 151. Thanks are owed to Trevor Allan for drawing my attention to this.

[75] However, it is not a sufficient condition. There may be non-Dworkinian theorists who, for different reasons, do not find Raz and Dickson's questions interesting, and there are theorists of the eliminativist bent who think that these questions are uninteresting because unanswerable. See on eliminativism footnote 11 above and p. 105 below.

[76] I am grateful to an anonymous reviewer for this point.

[77] It is worth noting that the problem of circularity is a common one in meta-jurisprudential debates and does not only afflict Dickson and Raz's position. For a similarly question-begging account see Leiter, *Naturalizing Jurisprudence*, 168-170. See on this issue also Dan Priel, "Jurisprudence and Necessity," *Canadian Journal of Law & Jurisprudence* 20 (2007): 191; and Priel, "Description and Evaluation in Jurisprudence."

assumption that is still widespread in both the second- and third-layer jurisprudential literature: that law has an existence that is *independent* from the theorist, and that it has certain *essential* qualities, in ways that seem to parallel the study of natural objects. As I will show, there may not only be a plurality of different ways law is as a first-layer phenomenon, but also a plurality of correct third-layer methods to theorize about law, and second-layer theories of popular jurisprudes may lay greater claim to being correct insofar as they can influence the first-layer phenomenon of law.

1. A Misguided Assumption. To understand why exactly OCMAs are problematic, it is instructive to probe an erroneous assumption that lies at the heart of many such arguments: that there is one right method of doing jurisprudence because law's first-layer structure can be correctly captured in only one way. More often than not, the implicit reasoning that drives this position appears to be that law is a phenomenon that the second-layer theorist can get right because it has a certain objective existence and essential quality to it that, at least in principle, could be discovered and accurately explained by him or her. Although it has drawn significant criticism, this assumption is still relatively common in the methodological literature.[78] It is particularly prominent among certain analytic legal philosophers who, as Hillary Nye has noted, are 'especially fond'[79] of claims about law's essence and objective existence:

> Theorists like Joseph Raz, Julie Dickson, and Scott Shapiro make claims about law's nature, or how law necessarily is. The idea that we can know about the very essence or nature of something necessitates positing an external perspective, and arguing that from that perspective we can understand what the thing is essentially like.[80]

To illustrate Nye's point, consider, for example, Dickson's characterization of her analytical approach as being "concerned with explaining the nature of law by attempting to isolate and explain those features which make law into what it is. A successful theory of law of this type . . . consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law."[81]

Her choice of language reveals striking parallels between how many analytic legal philosophers identify the criteria of success of a legal theory—a third-layer exercise—and how natural scientists determine what adequate theorizing about natural objects entails: legal theory, as Dickson and others put it, is a matter of 'isolating and explaining' features about the "nature" of law that are "necessarily true." Elsewhere, she talks about how legal theory has to approach "the data"[82]

[78] See on this Arie Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," *Canadian Journal of Law & Jurisprudence* 31 (2018): 131; Dan Priel, "Is There One Right Answer to the Question of the Nature of Law?," in *Philosophical Foundations of the Nature of Law*, ed. Wil Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2013), 346.

[79] Hillary Nye, "Staying Busy While Doing Nothing: Dworkin's Complicated Relationship with Pragmatism," *Canadian Journal of Law & Jurisprudence* 29 (2016): 75.

[80] Ibid., 75.

[81] Dickson, *Evaluation and Legal Theory*, 17. For a critical presentation of similar accounts see Tamanaha, *A Realistic Theory of Law*, 57.

[82] Dickson, *Evaluation and Legal Theory*, 24.

in the right way. The parallels between this method of conducting second-layer jurisprudence and how natural scientists go about studying natural objects are at least twofold. First, law, as a first-layer phenomenon, is viewed as having a continued existence which, like that of natural phenomena, is in some way *independent* of theorists (I call this the Independence Parallel). As Nye observes, the view of many analytic legal theorists "that there is something that 'properly' or 'really' counts as law, divorced from experience or from normative concerns, assumes the possibility of correctly mirroring an *independent reality*."[83] Second, in a similar way as natural objects necessarily possess certain properties, law, too, is considered to have *essential properties*. They are properties, as Dickson puts it, "which law, at any time, and in any place, must exhibit."[84] I refer to this as the Essentialism Parallel.

There is only one correct method of doing jurisprudence, on this view, because law itself has an essential objective nature that can be discovered and explained by the second-layer jurisprude. As I will argue in the remainder of this section, not only are the Independence and the Essentialism Parallels questionable in themselves, but they also fail to corroborate OCMAs.

2. The Independence Parallel. Let us start by examining the Independence Parallel and by adding some caveats to avoid setting up a strawman. No sane legal theorist denies that law is a different animal from natural objects. Natural objects are natural kinds, which can be defined as "a grouping that reflects the structure of the natural world rather than the interests and actions of human beings."[85] Law, by contrast, is a social kind.[86] In other words, law is entirely a function of human activity. It consists of and is constituted by social practices. As Postema puts it, law

> takes its distinctive shape from very general and abstract views we [agents engaged in legal practices] have about our social interactions governed, guided, and structured by our legal practices and institutions. It is an integral part of a larger network of ideas and beliefs in terms of which we seek to give structure to our lives together and define our most important social arrangements.[87]

This has obvious consequences for the alleged independence of law and its characteristics as compared to those of a natural kind such as, for example, the helium atom.[88] Although there is ongoing debate on how strong the dichotomy between natural and social kinds really is,[89] it is clear that there exist important differences between the two. For example, while the idea of law may persist

[83] Nye, "Staying Busy While Doing Nothing," 90–91 (emphasis added).
[84] Dickson, *Evaluation and Legal Theory*, 18.
[85] Alexander Bird and Emma Tobin, "Natural Kinds," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2018 (Metaphysics Research Lab, Stanford University, 2018), https://plato.stanford.edu/archives/spr2018/entries/natural-kinds/.
[86] See, e.g., Leslie Green, "Introduction," in *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), xvii; Leiter, *Naturalizing Jurisprudence*, 173.
[87] Postema, "Jurisprudence as Practical Philosophy," 357.
[88] For a similar discussion see Tamanaha, *A Realistic Theory of Law*, 58–62.
[89] See, e.g., Muhammad Ali Khalidi, "Interactive Kinds," *The British Journal for the Philosophy of Science* 61 (2010): 335–60.

when humans go extinct—stored in books or saved on hard drives—law itself ceases to exist once its constituting practices disappear. On the other hand, if all human beings disappeared from the planet, no one may be around any longer to conceptualize the helium atom as "helium," but the phenomenon as such would still be here and its nature would remain the same. The fact that it has two electrons, for instance, belongs to its essential and universal properties.

Natural objects, as this thought is sometimes put, are "strongly mind-independent" in that they can generally occur or continue to exist independently of human beings (or other beings with minds) and have a nature that is unaffected by them—including by the scientists who subject these objects to scientific inquiry.[90] Although some have proposed that law's structure is also strongly mind-independent,[91] it is more widely accepted that at least its existence is "*weakly* mind-independent," meaning that law exists independently of *individual* human minds.[92] Put another way, law is a non-individualistic social artifact, that is, a socially created phenomenon based on people's common practices, rather than the practices and views of an individual.[93]

As long as one does not endorse a strong mind-independence view about law, the Independence Parallel does not appear to be particularly controversial. However, I believe that this inference has led some to make the mistake of overlooking the ways in which the existence and character of law can—despite its weak mind-independence—still be impacted by the second-layer legal theorist who studies it. In other words, the fact that law is at least weakly mind-independent does not suffice to show that there is only one way in which law, as a first-layer phenomenon, "is" which the correct second-layer theory could get right.

For even if law is independent in this way, this does not mean that second-layer jurisprudes can simply go out and discover law's objective existence and 'nature' and record it in their theories as natural scientists would natural objects. To assume that second-layer jurisprudes could do so is to neglect the familiar issue which we have encountered above: the social practices that constitute law do not come neatly demarcated from other social practices. Second-layer jurisprudes need to make evaluative judgments to separate the wheat from the chaff, that is, legal from non-legal facts.[94] For example, they need to determine whether or not a claim to morality constitutes an important feature of law or whether it forms

[90] Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007), 5. But see, e.g., for an exception Weizmann Institute of Science, "Quantum Theory Demonstrated: Observation Affects Reality," ScienceDaily, https://www.sciencedaily.com/releases/1998/02/980227055013.htm.

[91] See Kramer, *Objectivity and the Rule of Law*, 7–12.

[92] See, e.g., Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001), 138; Matthew H. Kramer, *H.L.A. Hart: The Nature of Law* (Cambridge: Polity Press, 2018), 123; Brian Leiter, "The Demarcation Problem in Jurisprudence: A New Case for Scepticism," *Oxford Journal of Legal Studies* 31 (2011): 666.

[93] See, e.g., Paula Gaido, "The Purpose of Legal Theory: Some Problems With Joseph Raz's View," *Law and Philosophy* 30 (2011): 687. See generally Luka Burazin, Kenneth Einar Himma, and Corrado Roversi, eds., *Law as an Artifact* (Oxford: Oxford University Press, 2018).

[94] Postema, "Jurisprudence as Practical Philosophy," 334.

part of a separate social category, such as ethics or religion. This takes us back to the methodological conundrum of having to decide whether these evaluations need to be direct, or whether indirect evaluations are sufficient. Things are quite different for the physicist who can, at least theoretically and in most cases,[95] discover the objective existence and nature of her object of study simply by relying on epistemic evaluation. To describe the helium atom, for example, no indirect or direct evaluation of the important features of that atom is necessary (though such evaluations are possible for instrumental purposes). By contrast, evaluations are necessary in jurisprudence not only at the instrumental stage of considering what law can be used for, but even prior to that at the stage of determining which practices should count as legal practices in the first place. It is inevitable that different second-layer jurisprudes will make different evaluative judgments and that they will identify different practices as first-layer legal practices. While some second-layer theories may be more accurate than others, telling which one is correct is more difficult than proponents of OCMAs believe it is.

This has important implications. First, it is possible that there is a *plurality of methods* of doing jurisprudence, and it is reasonable to assume that these methods will generally correspond to the different underlying second-layer conceptions of law.[96] Second, the question as to whether a particular method is correct cannot be determined purely on the level of the third layer. Instead, it has to be determined by answering second-layer questions about law.[97]

Moreover, from law's character as a social kind, constituted by social interaction, it follows not only that second-layer jurisprudes play a role in selecting certain first-layer practices over others and identifying them as the constitutive practices of law. It follows, too, that they can potentially have a causal impact on the practices themselves.[98] As Raz has suggested in an early contribution on meta-jurisprudence,

> since our own concept [of law] is liable to be forever in flux, since legal theory is itself part of the culture to which 'our' concept of law belongs, it is inevitable that legal theory is no mere passive mirror of the concepts of that culture. To the extent that legal theorists acquire influence their views tend to be self-verifying.[99]

[95] See above footnote 90.

[96] See for a similar finding Priel, "Description and Evaluation in Jurisprudence," 650. See also Kornhauser, "Doing Without the Concept of Law." I say "generally" because it may be possible for one method to capture not just one but multiple structures of law. Indeed, as has been suggested to me, someone favorable to an explanatory ecumenism *à la* Jackson and Pettit might even believe that there is a method that can explain *all* social practices, not only those relating to law: see eg Frank Jackson and Philip Pettit, "In Defense of Explanatory Ecumenism," *Economics & Philosophy* 8 (1992): 1–21. However, the necessary detachment of such a method from given structures of law would mean that the kind of understanding of law it would deliver is relevantly different from the one methodological theorists such as Dickson currently aim for.

[97] Cf. Dickson, *Evaluation and Legal Theory*, 12–14. See also Priel, "Description and Evaluation in Jurisprudence," 660–65.

[98] A similar argument is made in Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies* 25 (2005): 500–501.

[99] Joseph Raz, "On the Nature of Law," in *Between Authority and Interpretation*, 98.

In other words, it follows from law's character as a weakly mind-independent social artifact that its structure, and not only its existence, is a function of social practices. A second-layer theorist can, in principle, influence the first-layer practices that make up law with her theory of law. To the degree that her theory is successful in influencing these practices, it becomes "self-verifying." The reason for this is that a second-layer theorist can, if sufficiently successful, come to have a certain sway over the self-understanding of those engaged in the practices that make up law. For instance, influential second-layer theories can come to determine the understanding of law students who then apply that understanding in legal practice. Or influential second-layer theories can be picked up by judges to decide key legal cases that shape the structure of law in their jurisdiction.

To be sure, Raz holds that only "bad theory," that is, second-layer theory which presents wrong conclusions about the phenomenon it purports to explain, can lead to a change in first-layer practices. As he believes, once second-layer legal theorists avow that they aim to change the phenomenon rather than simply to explain it, "they lose the claim they have on our attention, they join reformers in an activity to be judged by different standards altogether."[100] Whether or not we agree with Raz on this point, the fact remains that second-layer jurisprudes can have an impact on law not only in that they pick out the practices which they deem constitutive of law, but also in that they can potentially come to shape these practices. To use a metaphor, theorizing about law is a "two-way street": by trying to study and understand law, the second-layer legal theorist does not simply discover something that is independent of her theory but can possibly also influence the structure of the very thing she studies.[101]

Granted, not all second-layer accounts of law will have the same influence, and (very) many may have none. For example, it is safe to say that my students' attempts at developing their own accounts of law in their supervision essays will not come to shape the first-layer practices of law in our jurisdiction. As Frederick Schauer puts a similar thought, the "urging by a legal philosopher is unlikely to have, at most, any but the smallest real-world effect, and even then only over time and only in implicit coordination or conjunction with the urgings of many others."[102] However, the fact remains that, the more prominent a second-layer theorist's account of law becomes, the more likely it is to influence those engaged in the first-layer practice of law and thereby to change law itself.

With increasing popularity among non-theorists, then, a second-layer theory can shape the practices of law in such a way as to give it greater claim to being the correct theory (or being among the correct theories) in the society that adopts the relevant practices. One topical illustration is the UK Supreme Court's decision in *R. (Miller) v. Secretary of State for Exiting the European Union* (2017), in which the Court referred to Hart's legal theory—and in particular to the

[100] Ibid., 98–99.
[101] See Robert C. Bishop, *The Philosophy of the Social Sciences* (London: Continuum, 2007), 53. See also Tamanaha, *A Realistic Theory of Law*, 1; Rosen, "Law as an Interactive Kind," 146.
[102] Frederick Schauer, "On the Relationship between Law and Legal Reasoning," in *New Essays on the Nature of Legal Reasoning*, ed. Mark McBride and James Penner (Oxford: Hart Publishing, forthcoming), 20, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752911.

concept of the rule of recognition—to identify the sources of UK law.[103] The case shows that Hartian second-layer theorizing about law has become so influential in the UK that the country's highest court has adopted (albeit perhaps without all its implications) Hart's inclusive legal positivist understanding of the legal system as a union of primary and secondary rules, which are determined by the social fact of officials such as the Supreme Court judges themselves adopting the internal point of view toward the secondary rules.[104] Less recent but no less striking examples are the famous decisions by the German Constitutional Court and the German Federal Court in which they applied Gustav Radbruch's natural law theory to decide that moral principles form part of the sources of German law and can invalidate positive laws that are unbearably unjust.[105] Here, too, the second-layer theory of law of an influential jurisprude—Radbruch—appeared to influence the first-layer phenomenon of law itself.

We can therefore say that law's character—despite its weak mind-independence—is not independent from the second-layer theorist, or at least not in the same way that the nature of a helium atom is independent from its theorists. In contrast to natural scientists, second-layer jurisprudes can influence their object of study in the two ways pointed out above (i.e., by selecting certain features over others as the constitutive features and by influencing the practices that give rise to these features if their theories are sufficiently prominent). As a result—and in contrast to what Raz argues in a different and apparently contradictory contribution—second-layer legal theory does not "merely explain[] the concept that exists independently of it."[106]

It could be objected at this stage that my argument is trading on an ambiguity in the notion of an 'object of study'. In the case of the second-layer legal theorist, one might claim, I am using the notion to refer to what a theorist takes himself to be studying (i.e., what he thinks "law" is). In the case of the scientist, on the other hand, I am referring to the objective character of the phenomenon which she is studying. The second-layer legal theorist, according to this objection, can only have an impact on what he himself determines to be law, not on what law objectively is as a first-layer phenomenon.[107]

The issue with this objection is that it presupposes that what law objectively is can be neatly separated from what second-layer jurisprudes take it to be. However, our discussion so far has yielded no support for that presupposition.

[103] *R. (Miller) v. Secretary of State for Exiting the European Union* [2017] U.K.S.C. 5, [2018] A.C. 61 at [224]. See also Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," 500.

[104] Hart, *The Concept of Law*, 79–117.

[105] See, e.g., German Federal Court (BGH), III ZR 168 / 50 (*Erschiessung eines Deserteurs*) [1951] at [34]; German Constitutional Court (BVerfG), BVerfGE 95, 96 (*Mauerschützen*) [1996] at [141]; on Radbruch's theory, see Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)," trans. Bonnie Litschewski Paulson and Stanley L. Paulson, *Oxford Journal of Legal Studies* 26 (2006): 1–11. See also Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," 130–31.

[106] Raz, *Between Authority and Interpretation*, 2009, "Two Views of the Nature of the Theory of Law: A Partial Comparison," 85.

[107] I am grateful to Matt Kramer for raising this objection.

On the contrary, we have identified two issues with that assumption. Starting with the last-discussed issue, we saw that a second-layer theorist can, if their theory becomes sufficiently prominent, influence the first-layer practices that make up law. If this happens, one can no longer claim that law has a separate existence from the second-layer theorist. However, suppose that we are dealing with a run-of-the mill second-layer theorist whose theories are not published, or not widely read, and that therefore do not have any impact on the legal practices in their jurisdiction. Does law have a nature that is unaffected by the theorist in that jurisdiction? No, because, as we saw, second-layer theorists also affect law in a different way: they necessarily have to first identify the first-layer practices that make up law. And, as we saw, this requires evaluative judgment, with different second-layer theorists making different evaluative judgments, and therefore potentially identifying different phenomena as law.

3. The Essentialism Parallel. The second parallel that plays a role in buttressing the view that there can be one correct method of doing jurisprudence is the Essentialism Parallel. According to this Parallel, law as a first-layer phenomenon has a nature consisting of universal essential properties—properties that are necessary for anything anywhere to count as law—similar to natural objects. Raz has put forward an argument along these lines, contending that "the essential properties of the law are universal characteristics of law. They are to be found in law wherever and whenever it exists."[108] According to Raz, law is parochial in the sense of being a Western concept, but it can nevertheless have universal applicability, including to non-Western societies and to Western societies before they developed the concept of law.[109]

The idea that the first-layer phenomenon of law has essential and universal properties has been challenged in the literature. Schauer, for example, has argued that because law is a social and not natural kind, it may not possess any essential properties.[110] Instead, Schauer suggests, legal theorists would do better to understand it in a "cluster-like" fashion, that is, as being defined by partially overlapping similarities rather than necessary and sufficient properties.[111] Whether or not one adopts Schauer's alternative view, the key issue with essentialist second-layer conceptualizations of law is that they risk becoming irrelevant. Suppose a second-layer theorist asserted that law contains certain necessary and sufficient properties—A, B, C, and D—perhaps because these features reflect what law is taken to be in the theorist's culture at time 1 when she developed her theory. What would happen if, at a later point in time 2, property A, B, C, or D was no longer reflected in the practices that are understood as law? After all, practices change as the theorist's society changes. To use Raz's words, they are "forever in

[108] Raz, "Can There Be a Theory of Law," *Between Authority and Interpretation*, 2009, 25.
[109] Ibid., 32.
[110] Frederick Schauer, "On the Nature of the Nature of Law," *Archiv für Rechts- und Sozialphilosophie* 98 (2012): 457–67. See also Murphy, *What Makes Law*, 88–102; Hershovitz, "The End of Jurisprudence"; Kornhauser, "Doing Without the Concept of Law."
[111] Schauer, "On the Nature of the Nature of Law," 458.

flux."[112] As Postema has shown in the context of the common law, for instance, law changes as a result of changes in the self-understanding of agents engaged in the practices of law.[113] In other words, there is no object of study that is stable throughout time that second-layer theorists could capture. For this reason, our theorist's account of how law was at time 1 will lose at least some of its relevance at time 2. The more changes there are, the more her account will become irrelevant because it is "frozen in time" and unable to focus on the "moving target" of law, as Arie Rosen has put it.[114] For this reason, essentialist theories of law are more likely than others to have a short shelf-life.[115]

Interestingly, Raz admits as much when he notes that "[b]ecause legal theory attempts to capture the essential features of law, as encapsulated in the self-understanding of a culture, it has a built-in obsolescence, since the self-understanding of cultures is forever changing."[116] However, he does not seem to regard this as a major problem for the view that law has universal and essential properties. This is puzzling because, as Raz himself argues, second-layer jurisprudence has to attempt to capture the practices that make up law. There thus appears to be an inconsistency in his account as it attempts to capture law's essential, that is, never-changing features while at the same time acknowledging that these features are the product of a society's ever-changing practices. As Brian Tamanaha has put this point, "[t]he main difficulty for claims about necessary features is that law is a social construction that varies and changes over time."[117]

Someone might object to this by arguing that it is not clear why in the above-mentioned society, in which properties A, B, C, or D are no longer reflected in its practices at time 2, this would lead to a change in law's properties. Would we not be more inclined to say in such a case that the society has *abandoned* law (while perhaps still mistakenly referring to its social practices as "law"), than to say that it has *changed* the structure of its law?[118]

This objection fails for two reasons. First, the claim that a society like the above-mentioned one abandons rather than changes the first-layer properties of law is based on the assumption that law possesses essential properties that do not depend on its constitutive social practices. While it is possible in principle to hold such a view, it flies in the face of the widely accepted fact that law, as a first-layer phenomenon, is a non-individualistic social artifact.[119] For once we accept that law is a socially created phenomenon based on people's common

[112] Raz, *Between Authority and Interpretation*, 98.
[113] See, e.g., Gerald J. Postema, "Jurisprudence, the Sociable Science," *Virginia Law Review* 101 (2015): 869–902; Gerald J. Postema, "Time in Law's Domain," *Ratio Juris* 32 (2018): 160–61; Gerald J. Postema, *Bentham and the Common Law Tradition*, 2nd ed. (Oxford: Oxford University Press, 2019).
[114] Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," 135.
[115] For a similar critique see Tamanaha, *A Realistic Theory of Law*, 66; Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," 147. See also Allan C. Hutchinson, "Razzle-Dazzle," *Jurisprudence* 1 (2010): 45–49.
[116] Raz, *Between Authority and Interpretation*, 98.
[117] Tamanaha, *A Realistic Theory of Law*, 58. See also Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," 135.
[118] I am thankful to Timothy Endicott for this objection.
[119] See also Schauer, "On the Relationship between Law and Legal Reasoning," 16–17.

practices, then changes in those practices will necessarily lead to a change in what law is. Refusal to accept this implication leads to problematic entanglements such as those identified above in Raz's work.

Second, as also noted above, exceptionally influential second-layer jurisprudes can have a causal impact on the first-layer practices of law.[120] If such popular second-layer jurisprudes can come to determine the social practices that make up law, they can change its properties. And once one accepts this, then it becomes difficult to maintain that law has properties that are essential and universal.[121]

An important implication of my challenge to the Essentialism Parallel is that there may not only be a plurality of third-layer methods, as pointed out above. In addition, there may also be a plurality of possible second-layer answers to the question "What is law?." Put differently, there may be *numerous correct second-layer accounts*. The reason for this is that if law as a first-order phenomenon lacks an essential nature, then it is possible for law to have different structures in different societies and different contexts. Put differently, there may be different types of law*s* that can in principle be captured correctly by different second-layer accounts.[122] Tamanaha has made this point forcefully, arguing that "the classic question 'What *is* law?' has misled theorists. Thus posed in singular terms, theorists have striven to find a set of elements for a single correct notion of law, their minds closed to the possibility that there might be multiple forms of law."[123]

Suppose for the sake of argument, however, that the arguments I have so far provided against the Essentialism Parallel fail. More specifically, suppose that there is only one structure of law, which has certain essential and universal properties. Would this show that there can only be one correct method of doing jurisprudence? No. The reason why this would not follow is that, as we have seen with the Independence Parallel, the issue of how to identify the relevant properties would remain. Because law consists of and is constituted by sundry social practices, no particular practice or practices will likely stand out and present themselves as the obvious essential features of law.[124] Rather, as we saw, second-layer jurisprudes will need to decide—using evaluation—which of the first-layer practices they consider legal practices, and which of these they consider to form part of law's essence. Law's essence, if it exists, cannot be determined in the same way that physicists can determine that having two electrons is part of the helium atom's essence. Rather, different second-layer theorists may pick out different features as important legal features.

Of course, a methodological theorist like Dickson does not deny this—quite the contrary. As we saw, she emphasizes the key role played by evaluation. But as we also saw, for her, that evaluation need only be indirect. However, that law has essential and universal features would not yet show that IELT is the only correct

[120] See above, p. 99.
[121] Except for the fact itself that law, as a social kind, is susceptible to change due to changing social practices, of course.
[122] See also Tamanaha, *A Realistic Theory of Law*, 48, 56, 58.
[123] Ibid., 76 (emphasis in original).
[124] See also Liam Murphy, "Concepts of Law," *Australian Journal of Legal Philosophy* 30 (2005): 7.

method for identifying these features because there may be other correct methods. Until she adduces more evidence, her claim about the correctness of IELT relies on a contentious assumption about the correctness of a Razian second-layer account of law. And until then, second-layer arguments—the daily bread of most jurisprudes—need to be had to determine which second-layer accounts, and therefore which methods, are better. As with the Independence Parallel, then, we can conclude that it would be equally misguided to infer from the existence of essential and universal properties in law that there could only be one correct method of theorizing about these properties.

II. Less Incorrect Methods

Do we have to conclude from these problems with OCMAs that inquiry into the methodology of jurisprudence as a whole is doomed to failure? It could be tempting to answer this question in the affirmative and join the eliminativist movement that has been picking up steam in recent years.[125] For if methodological theorists cannot find the single correct method, and cannot settle which methods are among the correct ones without engaging in second-layer debates about which is the correct account of law, then would it not be better for them to abandon the methodological project entirely?

As I aim to show in this final section, the answer to these questions is negative. I propose that, rather than leading us to eliminate methodological theory wholesale, the difficulties with identifying correct methods should be regarded as a springboard for a different and more productive understanding of third-layer inquiry. Those who share the eliminativist insight that it is not possible to settle which method is a—let alone *the*—correct one, I argue, can still hold that there is a domain of questions left that third-layer analysis can provide answers to without having to make contentious second-layer assumptions.[126] I propose that this domain lies in exploring and identifying *incorrect* methods of doing jurisprudence. For the fact that it is impossible to develop a universally correct method does not mean that there are no methods that are clearly inferior to others. The proper task of methodological theory, I suggest, should therefore be rethought as the pursuit of less incorrect ways of doing jurisprudence.[127]

Note that, as I define it, avoiding incorrectness is a necessary condition for a correct method, but it is not a sufficient one. Put differently, just because a method is not incorrect does not necessarily mean that it is correct, much like the clearing of weeds does not yet make a flowering garden. To be sure, the difference between weeding out incorrect methods and identifying correct ones may often not be clear-cut, but a matter of degree. However, this does not mean that—to use a different analogy—there cannot be 'easy' cases of clearly incorrect

[125] See footnote 11 above.
[126] On what I take to be an uncontentious assumption, see below, p. 106–107.
[127] "Less incorrect" because there can be no *least incorrect* method for similar reasons why there is no one correct method.

methods that methodological theorists can eliminate without having to engage in contentious debates about the correctness of "hard" cases.

In the remainder of this article, I will try to outline some of the key principles that can guide this pursuit of "methodological weeding," and that future methodological research can explore in more detail. I will start by drawing on a basic principle that inquiry into hermeneutic types like law needs to respect—the principle that methods must suit their objects—and I will put flesh on the bones of this principle by discussing three main elements that factor into the success of a method. I will then consider and refute two objections that could be raised against my theory. Finally, I will sketch some of the new research avenues that this change in focus on less incorrect methods of doing jurisprudence opens up.

A. Methods and Objects

At first glance, the finding that law lacks an essential structure that can be studied independently by second-layer theorists and that there is no single correct method of doing jurisprudence would seem to invite the conclusion that there is no way of criticizing a particular method. However, this conclusion would be premature. As Dickson anticipated, methods can be criticized if they fail to capture the important elements of the first-layer practices of law. Theorists, in order words, do not have *carte blanche*.

To understand why this is so, consider what, drawing on Dan Priel, we can call the Green Jumping Objects Challenge. Priel asked: "what can we say to the 'theorist' who said that law is necessarily connected with green jumping objects?"[128] Responding to this Challenge is a useful heuristic for our purposes because it turns theoretical inquiry into methods on its head: the view that law, as a first-layer phenomenon, is necessarily connected with green jumping objects is patently incorrect. But explaining why this is the case does not require determining what a *correct* method is. The bar is much lower: it only demands the weeding out of methods that are *incorrect.* Crucially, in contrast to identifying correct methods, this can at least to some degree be done without having to debate contentious second-layer questions about law. (I will discuss some of the constraints of my approach in the next subsection).

How, then, can we show that a methodological theory is incorrect which requires us to identify green jumping objects as important or even necessary features of law? The answer to this lies in taking an uncontroversial account of what law is as a baseline and to use that account to identify incorrect methods of doing jurisprudence. I propose that one of the least controversial accounts of law that we can adopt for this purpose is the one we encountered above:[129] that law is not a natural kind but a particular type of social kind,[130] a *hermeneutic* kind. This means that law is best understood as a first-layer phenomenon that is used

[128] Priel, "Jurisprudence and Necessity," 177.
[129] See above, p. 92.
[130] See on this Raz,, "Can There be a Theory of Law?," 31.

by people to give meaning to their actions and practices.[131] For second-layer theorists, this entails that they need to interpret these actions and practices if they want to develop an adequate account of law.[132] As Postema puts it, the hermeneutic approach

> takes for its subject a certain kind of social practice, constituted by the behavior and understandings of its participants; that its task is to explain this practice and its relations to other important social practices; and that it can properly be explained only by taking full account of participant understandings.[133]

Importantly, on my understanding, the term 'hermeneutic kind' extends not only to the position of legal positivists in the Hartian tradition who approach law by focusing on the participants' internal perspectives,[134] but also to interpretivist approaches in the Dworkinian tradition, as well as to other approaches that in one way or another take into account the practices and self-understanding of participants in law.[135]

To address the Green Jumping Objects Challenge, I propose that we can draw on a basic principle in hermeneutics, namely that the method of one's scientific inquiry should suit one's object of study. Let us call this the Method-Object Principle.[136] The insight behind the Method-Object Principle is a simple but compelling one: because law is a first-layer *object* of study that consists of social practices that people use to understand themselves, third-layer *methods* of studying law that fail to accurately portray these practices and the ways people impose meaning on their actions violate this basic principle. As a result, they must be considered incorrect methods of doing jurisprudence. To give an obvious example, microscopes are unsuited for the study of law because law cannot be investigated with this method. Likewise, because green jumping objects do (at least currently) not figure among the things that those involved in legal practices employ to understand their actions, a methodological theory that would lead to singling out green jumping objects as important features of law is incorrect. Importantly, such a third-layer method can be eliminated without having to debate what the features are that a correct second-layer account must explain.

Respect for the Method-Object Principle is indispensable but not sufficient for a successful method. Due to its abstractness, the principle only allows us to eliminate methods of doing jurisprudence that suffer from basic deficiencies. It

[131] See Leiter, *Naturalizing Jurisprudence*, 173; Natalie Stoljar, "What Do We Want Law to Be? Philosophical Analysis and the Concept of Law," in *Philosophical Foundations of the Nature of Law*, ed. Wil Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2013), 239.
[132] Chrysostomos Mantzavinos, 'Hermeneutics', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2020, https://plato.stanford.edu/archives/spr2020/entries/hermeneutics/. See also Pojanowski, "Reevaluating Legal Theory," 1476–78 (who criticizes deep hermeneutics).
[133] Postema, "Jurisprudence as Practical Philosophy," 329.
[134] See Brian Bix, "H.L.A. Hart and the Hermeneutic Turn in Legal Theory," *SMU Law Review* 52 (1999): 167–200.
[135] See, e.g., Postema, "Jurisprudence, the Sociable Science," 900.
[136] Mantzavinos has coined the term "method-object argument" for a different position that (over)emphasizes the divide between inquiries in the social and natural sciences, see Chrysostomos Mantzavinos, *Naturalistic Hermeneutics* (Cambridge: Cambridge University Press, 2005), 12–13.

does not allow the elimination of methods that, while generally suitable for their object of study, fail to give second-layer theorists more determinate tools for capturing the first-layer practices of law. In order to carry out a more fine-grained filtering of incorrect methods, and to give a more specific response to the Green Jumping Objects Challenge, we therefore need to dig deeper. Law's character as a hermeneutic kind again proves instructive here, as more concrete principles are available that have proven useful in hermeneutics, and that can also help shed light on jurisprudential methodology. Specifically, I propose to focus on three such principles that permit a more fine-grained weeding-out of at least some incorrect methods. I will call them the Context Principle, the Explanatory Potency Principle, and the Nexus-of-Meaning Principle.[137]

Let us begin with the *Context Principle*. The Context Principle is a hermeneutic principle according to which the meaning of an action must be understood in its context. In the case of textual interpretation, for example, the Context Principle tells us that what was meant by the use of a word on a particular occasion depends upon the sentence it is in.[138] This principle can also be useful for second-layer studies of law: in order to understand the meaning and importance of certain legal practices, they must be understood in the context in which they take place. A method that pays no regard to context is likely to miss relevant aspects about these practices—such as why exactly they exist and what their legal meaning is—and is therefore more likely to yield incorrect second-layer accounts of law.

The Context Principle is also important from a more general point of view in that it requires second-layer theorists to be attentive to the specific structure(s) of law they are investigating. As mentioned above, law may have no singular structure that any one methodology could explain correctly.[139] Because law can have different structures, second-layer theorists should focus on the context of the structure they are interested in. Tamanaha's account provides a good example of a methodological account that does justice to the Context Principle. As he emphasizes, legal theorists must "center on law within social and historical contexts."[140] What law is and how it should be studied, on Tamanaha's account, cannot be separated from how people in any given place and time conventionally understand law.[141] Different places, on this account, can have different types of law that second-layer theorists must be open to.[142]

Once we understand this point, we can also see that one and the same method may be incorrect in one place but not in another. For example, as Priel suggests, certain second-layer legal theories, such as Hans Kelsen's, might be better suited

[137] This list of principles is neither final nor exhaustive. On other principles, see, e.g., Ralf Poscher, "Hermeneutics and Law," in *The Cambridge Companion to Hermeneutics*, ed. Michael N. Forster and Kristin Gjesdal (Cambridge: Cambridge University Press, 2019), 326–53.
[138] See Mantzavinos, "Hermeneutics."
[139] But see also footnote 96 above.
[140] Tamanaha, *A Realistic Theory of Law*, 1.
[141] See ibid., 73–77. See also Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, 2d ed. (London: LexisNexis, 2003), viii.
[142] Tamanaha, *A Realistic Theory of Law*, 76–77.

for civil law systems than for common law ones such as the United States.[143] Similarly, he points out that Hart's second-layer theory of law fits UK law better than Dworkin's theory, which in turn is more suited for US law.[144] Whether or not we agree with Priel on this, the important point to note is that, much as a second-layer theory of law may be less suitable in one context than another, a particular third-layer method of constructing such a theory may also be less suitable in one context than another.

Second, the *Explanatory Potency Principle*. Considering and explaining legal practices in context is important for successful second-layer legal theorizing. But it is not sufficient. Even theories that take account of the contextual character of law may focus on features that play an insignificant role in these practices. To use an analogy: when interpreting a novel, it is not sufficient to explain the context of the story if one fails to account for the main characters that drive the story. Law may be quite similar in this respect: there are likely to be features of the first-layer phenomenon of law that play a more central role than others. Like a keystone species in the environment, these features may have a disproportionately large influence on other features. Therefore, no method could miss them without becoming (more) incorrect.[145]

When developing and choosing a method, it is thus necessary to take into account what we can call the "explanatory potency" of particular features or practices: the higher that potency, the more aspects about people's self-understanding that feature can explain; the lower the potency, the less reason theorists have to focus on it. Take the above-mentioned example that gavels and men in robes feature in most forms of law. These features have little explanatory potency. As Priel notes,

> The fact that in many legal systems judges wear robes . . . is not an important feature of law, even though it is one that is true of many legal systems, because it is not important for understanding our concept of law: even if this feature were to disappear our understanding of what law is would not change significantly.[146]

Hence, another way of identifying incorrect methods is to look for whether they focus on features such as gavels or robes—or green jumping objects—that have little explanatory potency for what law is and how people use it to make sense of their actions.

Finally, consider the *Nexus-of-Meaning Principle*. According to this Principle, the meaning and importance of practices must be determined by considering these practices against the background of the aims and beliefs that those engaged in them have. As Chrysostomos Mantzavinos has put it in the case of text interpretation, a "nexus of meaning . . . is construed by the author against the background of his goals, beliefs, and other mental states while interacting with his

[143] Priel, "Is There One Right Answer to the Question of the Nature of Law?," 339.
[144] Ibid., 335.
[145] See Robert Hine, "Keystone Species," in *A Dictionary of Biology* (Oxford: Oxford University Press, 2019).
[146] Priel, "Jurisprudence and Necessity," 185. See also Dan Priel, "The Boundaries of Law and the Purpose of Legal Philosophy," *Law and Philosophy* 27 (2008): 684–85, 691.

natural and social environment."[147] In a similar way, legal practices may be said to be constructed by people with certain goals and beliefs in mind. Any method of doing second-layer jurisprudence that wants to avoid being incorrect thus has to be able to capture and give due significance to these goals and beliefs.[148]

In determining this "nexus of meaning" of law, it will likely be important that theorists focus on the role of legal actors who make, enforce, or interpret law. This includes parliaments, courts,[149] and administrative officials. But it can also include other actors that form part of the legal culture, such as the police, attorneys, or legal scholars. Focusing on these actors may be useful because they will generally have a larger impact on influencing the relevant goals and beliefs than other participants. Methods which fail to account for the different actors and factors that determine law's nexus of meaning would miss critical aspects about law's character and therefore be more incorrect than methods that succeed in this.

B. Two Objections

At this stage, it may be useful to consider two objections that could be raised against my proposal to focus on incorrect methods. The first objection challenges my theory on the grounds that it might seem to become a target of my own critique of OCMAs. The second objection holds that my theory is only able to eliminate easy cases and is therefore of little interest.

1. Is the Pursuit of Less Incorrect Methods Question-Begging too? Above, I suggested that identifying incorrect methods is at least to some degree possible without having to debate contentious second-layer questions about law. I can now make good on my promise to explain and defend this point. To do so, it will be helpful to consider the following first objection that could be raised against my theory. My argument in the first section was that OCMAs are bound to fail because they rely on question-begging second-layer assumptions. But my argument for incorrect methods relies itself on a second-layer assumption, namely that law is a hermeneutic kind. Am I therefore not a target of my own critique? In other words, is my theory not just as question-begging as Dickson's?

It is true that my argument in favor of less incorrect methods relies on a second-layer assumption about law, namely that it is a hermeneutic kind.[150] I made that assumption to be able to apply the Method-Object Principle and the more fine-grained Context, Explanatory Potency, and Nexus-of-Meaning Principles.[151] As we saw, these principles are helpful gauges for identifying

[147] See Mantzavinos, "Hermeneutics."
[148] See also Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," 128.
[149] See above, p. 100–101.
[150] I do not exclude the possibility of other such basic assumptions about law. However, as I discuss below, such assumptions would have to be sufficiently broad as to not beg key methodological questions.
[151] For the sake of clarity, it is worth emphasizing that I use Tamanaha as an example to illustrate these principles, but *not* to adopt his sociological theory. I am grateful to an anonymous reviewer for pressing me on this.

incorrect methods. To this extent, my argument does beg certain questions. However, it would be wrong to conclude from this that my second-layer assumption is *just as* question-begging as Dickson's. The simple reason for this is that, in contrast to Dickson's, my second-layer assumption does not beg key questions that are being debated by methodological theorists. Dickson, it will be recalled, assumes that a Razian second-layer account of law is correct and that, as a result, IELT is the correct method for anyone doing jurisprudence. As we saw, the obvious problem with this is that it begs key methodological questions, such as whether direct evaluation is necessary for successful second-layer inquiry into law. In begging that question, Dickson effectively drives out central methodological theories such as Dworkin's and those of other natural law theorists who argue that direct evaluation is indispensable as a method.

By contrast, the assumption that law is a hermeneutic kind is almost universally accepted. While non-hermeneutic ways of understanding law exist (e.g., in the sociology of law),[152] the hermeneutical approach is dominant in jurisprudence, especially among methodological theorists, as it is believed to be central to understanding law's normativity. This holds for both methodological theorists of a legal-positivist and those of a natural-law bent. For instance, as we saw, Dickson herself starts from the assumption that law is a hermeneutic kind.[153] And so do theorists like Dworkin and Finnis.[154] True, as we will see below, not everyone takes law's hermeneutic character to have the same implications.[155] However, as Postema puts it, the general view that "jurisprudence is fundamentally interpretive or 'hermeneutic'" is still "virtually unchallenged."[156] This is true all the more for the broad definition of "hermeneutic kind" that I adopted above,[157] which also accommodates accounts such as Postema's. For these reasons, the second-layer assumption that I require to get my incorrect methods theory off the ground does not beg the key methodological questions that are currently being debated in methodological scholarship. As such, it does not require us to settle contentious second-layer questions about law, in the way that Dickson's position and other OCMAs do.[158] Hence, my assumption can serve as a useful foundation for methodological inquiry into less incorrect approaches to law.

Because Dickson also regards law as a hermeneutic kind, it is thus also not surprising that some of the criteria she discusses for identifying important legal features are reflected in my theory, too. For instance, it will not have escaped the attentive reader that the Nexus-of-Meaning Principle bears resemblance to Dickson's criterion of "the prevalence and consequences of certain beliefs on the

[152] Donald Black, "The Epistemology of Pure Sociology," *Law & Social Inquiry* 20 (1995): 829–70.
[153] Dickson, "Ours Is a Broad Church," 226. But see also Pojanowski, "Reevaluating Legal Theory," 1477–78.
[154] See Postema, "Jurisprudence as Practical Philosophy," 329; Bix, "H.L.A. Hart and the Hermeneutic Turn in Legal Theory," 184–86.
[155] See below, p. 113.
[156] Postema, "Jurisprudence as Practical Philosophy," 329.
[157] See above, p. 106–107.
[158] See however also the harder case discussed below, p. 113.

part of those subject to law."[159] As we saw, Dickson took this criterion to be one of four possible ways of determining the importance of a certain feature of law to people's self-understanding without having to resort to moral evaluation. However, as I argued above, this does not mean that my discussion of the Nexus-of-Meaning Principle (and the Context and Explanatory Potency Principles) is just as vulnerable as Dickson's to my critique of OCMAs. It would only become vulnerable to the critique if methodologists tried to employ these principles to identify a *correct* method. However, as we saw, no contentious second-layer assumptions are necessary for eliminating *incorrect* methods. For example, the fact that gavels or green jumping objects have little explanatory potency and should thus not form the focus of any second-layer legal theory can be determined without having to decide which features are actually important to the self-understanding of those engaged in the first-layer practices of law—and thus which features a correct second-layer theory must explain. Likewise, it is possible to narrow down the nexus-of-meaning of law by ruling out certain beliefs and goals that clearly do not figure among those that the participants hold, as would be the case with the belief that green jumping objects play a key role in law. The same goes for the Context Principle: methods that are ill-suited for a given context, such as methods that focus on the identification of green jumping objects, can be weeded out without having to debate the kinds of second-layer questions about law that would be necessary for identifying whether that method is correct for the context.

Still, the resemblance between my principles and Dickson's four third-layer criteria should not come as a surprise. They have in common that they try to provide the building blocks for what we might call a *meta-theory of importance* in methodology, that is, a third-layer theory that helps guide second-layer theorists in identifying the important or significant aspects about law that their theories cannot fail to capture without becoming incorrect. While there can be some debate about the exact merit of Dickson's specific criteria,[160] on the whole they are still useful elements in such a meta-theory. However, as I argued, we need to lower our expectations as to what precisely such criteria and principles can deliver: they cannot, on their own, tell us which method is correct. They can only help eliminate incorrect ones.

2. Can my Theory Eliminate Anything Other Than Easy Cases? This brings us to the second objection: if my theory is only capable of weeding out easy cases such as methods focusing on green jumping objects, then it would seem to have little payoff as these cases are undisputed.

The first thing to note in response to this objection is that my discussion of the Green Jumping Objects Challenge and of gavels and men in robes intentionally employed (very) easy cases as a heuristic to elucidate my theory. This should not be taken to mean that my theory only applies to such easy cases. We can, for

[159] See above, p. 88.

[160] For instance, they overlap to some extent: if a feature is prevalent based on the beliefs of those subject to law (b), then it is likely also of practical concern to them (c).

instance, imagine a harder case, such as a method ignoring the actions of attorneys in a given jurisdiction. While studies would have to be carried out to yield any definite results on this, employing the Nexus-of-Meaning Principle could show that ignoring the actions of attorneys is problematic as they may have a considerable impact on the self-understanding of those engaged in the first-layer practices of law. Or it might show the opposite. The point is that my methodological approach could be used to weed out such a harder case of a (potentially) incorrect method.

An even harder case are methods, discussed above, that approach the study of law as if it was a natural kind, or possessed features akin to it. For example, third-layer methods which approach law as a phenomenon with an essential 'nature' that is the same everywhere and completely independent of the theorist could be considered problematic because they struggle to account for the ways in which law changes over time due to changes in its underlying practices and participants' self-understanding, which in turn can potentially be influenced by the theorists themselves. While far less incorrect than the green jumping objects method, such methods, too, seem to commit the basic mistake of adopting a third-layer approach that is unsuited for the first-layer object under study. As we saw, such an essentialist method is not uncommon, especially among legal positivists. Does this mean that my theory would require weeding out such methods? According to my critique of OCMAs in the first section, the answer would seem to be yes. But according to my theory of less incorrect methods not necessarily. The reason for this is that the assumption on which the less-incorrect-methods theory is based[161]—ie that law is a hermeneutic kind—needs to be sufficiently broad to encompass most methodological theories so as to not beg any key questions. As I noted above, law's hermeneutic character is widely accepted and is thus in principle suited as such as uncontentious baseline. However, as the last example illustrates, not everyone accepting that assumption draws the same conclusions from it, with some believing it to be compatible with methods that have second-layer theorists look for universal and essential properties of law. In my view, those who draw that conclusion do not fully appreciate the implications of law's hermeneutic character: a view of law based on changing practices and self-understandings sits uneasily with the conviction that such practices and self-understandings have a universal and essential character. This, as we saw above, is what got Raz entangled. However, as this is still a contentious matter in some parts of scholarship, my theory, aiming as it does to avoid begging contentious questions, may not be fully able to weed out such contentious methods—at least until these questions are answered. That is why it is a particularly hard case; one that illustrates that my theory has certain limits.

It is important to note, however, that this is not a problem for my theory. In contrast to many competing methodological theories, my theory does not need its underlying assumption to be so determinate to identify *all* methods that are not *the* correct one. It only needs to be able to weed out (the most) incorrect

[161] Note also that I do not exclude the possibility of different underlying assumptions, as pointed out above in footnote 150.

ones. If my theory were more determinate than just assuming law's hermeneutic character, or more fixated on a particular understanding of it, it could potentially weed out more methods, but it would do so at the cost of begging key questions. That is the very problem that Dickson's IELT and other OCMAs face. For this reason, my theory, which aims to avoid begging such questions, will necessarily be indeterminate to some degree and will be unable to deal with some particularly hard cases. The questions this leaves open will be a matter of contentious second-layer argument and, in my view, can only be resolved on that level.

My theory, to the extent that it acknowledges this limitation, is a deflationary one. However, this is by necessity rather than choice. For once we realize the problem with OCMAs such as Dickson's IELT, it should become obvious that there is no other option for methodological theorists than to settle for less than correct methods. In the absence of conclusive evidence showing that one or another second-layer account of law is correct, more determinate assumptions than the one I am making will likely run into the problem of begging key questions. Such assumptions, as Dickson's case has shown us, only succeed at weeding out more methods by essentially assuming these methods away. And I cannot see how this is preferable to my slimmer theory, which can weed out methods without begging contentious questions or, at the very least, questions that are less contentious than those Dickson's approach begs. Finally, there is still considerable substantive payoff to a theory like mine, as it can draw our attention to more promising methodological avenues. It is to these that I turn now.

C. Fruitful Avenues of Research

The need to move away from the unrewarding pursuit of a single correct method of doing jurisprudence and toward investigations into less incorrect methods should not be regarded as a setback for methodological theorizing. Rather, it opens the door to thus-far neglected inquiries that promise to be more productive. In this subsection, I will focus on two descriptive and one prescriptive research avenues that the pursuit of less incorrect methods opens up.[162]

Let us start with the *descriptive* research directions that a shift to less incorrect methods of doing jurisprudence enables. I will focus on two: a historical avenue and a comparative one. First, once we accept that law can have a plurality of structures and that there is a plurality of plausible methods, the question becomes important how these structures of law and these methods of studying law have developed *historically*. As Tamanaha has pointed out, the key insight behind such historical inquiry is the fact that law "has roots planted in the history of a society, develops in social soil alongside other social and legal growths, tied to and interacting with surrounding conditions."[163] Methodological theorists should be interested in particular in the "social, economic, cultural, political, ecological, and technological circumstances"[164] that have shaped and continue

[162] See also Priel, "Is There One Right Answer to the Question of the Nature of Law?," 344.
[163] Tamanaha, *A Realistic Theory of Law*, 3.
[164] Ibid., 9.

to shape the different structures of law.[165] As Postema notes, "[h]istorical inquiry is indispensable both within the philosophical enterprise itself and as a theoretical partner in the enterprise of general jurisprudence."[166]

To be sure, legal history is already a well-established discipline. However, it is important for legal philosophers to understand that it yields important insights also for them. This is because an understanding of historical factors is critical not only because it allows second-layer theorists to develop accounts of law that are more informed and therefore likely less incorrect. But in addition, it can inform third-layer debates about the inadequacy of the *methods* that are used to construct such accounts of law and how these methods came to be.[167] This is so because, with changes in the social, economic, and other circumstances that influence the first-layer phenomenon of law, the answer to the question as to which methods are less suitable than others also changes. And this promises fruitful investigations into the history of how and why certain methods develop.

Second, abandoning the pursuit of a single correct jurisprudential approach opens up the opportunity for more empirical research into the question how different accounts of law and different methods of doing jurisprudence *compare*. Comparative law has a venerable tradition and it is likely that comparison not only of different laws, but also of different structures of law and different methods of studying law would yield interesting insights. As is the case with traditional comparative law, looking into how other second-layer accounts of law work and how other theorists approach the study of law not only furthers the understanding of these other accounts and methods. It is also a most useful way to deepen the understanding of one's own.

Assume, for instance, that UK law as a first-layer phenomenon has evolved in a way that corresponds more to Hart's second-layer account of law because it incorporates the idea of a rule of recognition as a way of identifying its sources. Studying this fact would allow us to get an improved understanding of the structure of UK law and to make better sense of the Hartian method employed to capture UK law. But we could deepen our understanding of UK law even further if we added a comparative lens and contrasted it with other accounts of law and other methods. For example, if Priel is right that Kelsen's second-layer account is more suitable for civil law systems, then that account and the Kelsenian method could usefully be compared to Hart's in order to shed light on the differences between UK law and civil law, and the accounts and methods employed to make sense of them.

This historical and comparative research can be interesting not only for its own sake, but also because we can derive lessons from it that can help us identify incorrect methods and work toward less incorrect ones. This brings me to my final point about the *prescriptive* research direction that the move to the study of

[165] See also Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law," 147.
[166] Postema, "Jurisprudence, the Sociable Science," 901.
[167] See also Michael Giudice, "Analytical Jurisprudence and Contingency," in *New Waves in Philosophy of Law*, ed. Maksymilian del Mar (Basingstoke: Palgrave Macmillan, 2011), 58–77.

less incorrect methodologies frees up. Once we accept that there is a plurality of structures of law, and a plurality of ways of doing jurisprudence, it becomes possible to ask how particular structures of law *should* be and which methods *should* be adopted to study and perhaps even develop them.

The view that prescriptive considerations should factor into determining what law, as a first-layer phenomenon, is has been defended by authors such as Schauer or Jeremy Waldron in the form of "prescriptive conceptual analysis"[168] and "normative (or ethical) positivism."[169] According to Schauer's prescriptive conceptual analysis, for example, normative considerations regarding what law should be ought to factor into second-layer legal theorists' accounts of law. As he puts it, it is "useful not only to *de*scribe the concept of law, but also to *pre*scribe it, and thus to offer reasons and arguments for why a culture should steer and shape, however slowly and however collectively, its concept of law in this direction rather than that."[170] Natalie Stoljar has defended a similar approach. Drawing on Sally Haslanger's work, she argues that second-layer inquiry into law should be regarded as an "ameliorative project."[171] On this approach, answering the question "What is law?" involves addressing prescriptive questions such as: "What are the legitimate purposes that we want this concept [of law] to serve in our practice? What do we want the concept to do for us? How do we characterise the concept in order to enable it to better serve our purposes?"[172] A similar idea is also at the basis of critical race, feminist, queer theory, and like-minded approaches that have flourished in recent times. Underlying all of these approaches is the normative quest to change oppressive or discriminatory legal structures.

Methodological theorists would be well-suited to assist second-layer jurisprudes in identifying the more and the less useful methods of asking and addressing these prescriptive questions. But in addition, methodological theory can itself become the subject of prescriptive research. If it is possible to ask which structure law should have, then it is also possible to ask what the methods should be like that allow us to study law. Suppose, for instance, that we came to the conclusion that law in the UK should follow a Hartian inclusive legal positivist understanding of the sources of law. If this were the case, we would also want to know which methods would be more (and which less) well-suited to help us develop such a Hartian structure of law.

[168] Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," 499.
[169] Jeremy Waldron, "Normative (or Ethical) Positivism," in *Hart's Postscript: Essays on the Postscript to "The Concept of Law,"* ed. Jules L. Coleman (Oxford: Oxford University Press, 2001), 411–33. See also Frederick Schauer, "Normative Legal Positivism," in *Cambridge Companion to Legal Positivism*, ed. Torben Spaak and Patricia Mindus (Cambridge: Cambridge University Press, 2021), 61–78.
[170] Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," 498 (emphasis in original).
[171] Stoljar, "What Do We Want Law to Be? Philosophical Analysis and the Concept of Law," 233.
[172] Ibid.

Conclusion

This article has challenged the aspiration of methodological theorists in jurisprudence who aim to defend a method that can be considered *the* correct one. I have focused specifically on Dickson's argument that IELT is "the correct methodological approach for a theory of law to adopt."[173] Demonstrating why her argument fails has yielded an instructive lesson for OCMAs more generally: they face the problem that law is not the kind of thing that can be understood by means of just one correct method and that a second-layer theorist can capture independently of her underlying conception of law and without potentially influencing what law is through her own theory. Methodological theory therefore cannot measure up to the expectations of those who believe that it can identify correct methods of doing jurisprudence without having to address contentious second-layer questions.

However, as I have argued, this insight does not spell the end for metajurisprudence. Rather, it forces us to turn to issues on which methodological theory has an independent contribution to make. Specifically, I have proposed that methodological theorists should shift their focus away from the pursuit of single correct methods and toward studying and weeding out *incorrect* ones. The domain of methodological theory, I have thus argued, should be reconceived as the pursuit of less incorrect methods of doing jurisprudence. To unpack this proposal, I have drawn on the widespread assumption that law is a hermeneutic kind and have outlined some important principles that can aid theorists in identifying incorrect methods of doing jurisprudence. Finally, to underscore the usefulness of this shift toward studying less incorrect methods, I have sketched some of the promising descriptive and prescriptive research avenues that this shift helps free up and that invite further examination by methodological theorists.

[173] Dickson, *Evaluation and Legal Theory*, 64.