

## *Methodology in Legal Theory: Finnis and His Critics*

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*In Natural Law and Natural Rights, John Finnis argues that to understand law, the theorist must attend to the good reasons that humans have for adopting and maintaining a legal system. This is because Finnis believes that the human actions and decisions that constitute law can only be understood adequately with reference to their purpose. Finnis argues that the “central case method” is the correct way to develop a general theory of law. He posits that there is a central case of law — a good, stable form of social ordering — with reference to which all other cases (including the deviant or corrupt) ought to be understood. Finnis’s methodology has been criticised by those who believe jurisprudence can and should be undertaken without regard to morality. They argue that there is no legitimate role for practical reason in the methodology of jurisprudence and that the central case method is the incorrect way to proceed. This article will set out Finnis’s method and discuss the merits of arguments that have been levelled against it by several critics who have engaged directly with his methodology. Discussion of the critics will act as a framework within which to explore sound method in jurisprudence. This article will conclude that the critics’ arguments are unsatisfactory and that Finnis’s methodology is the correct one in legal theory.*

### I INTRODUCTION

John Finnis revived the classical natural law tradition with the publication of *Natural Law and Natural Rights*.<sup>1</sup> Natural law attempts to identify both the basic human goods and the principles of reason that enable individuals and communities to seek and attain those goods. In Chapter 1, following this tradition, Finnis outlines the appropriate methodology to adopt when examining and developing a theory of a social phenomenon such as law. He argues that no general theory is possible without the theorist taking a substantive position on what are truly good reasons for action and what is truly conducive to the flourishing of human persons. This article is concerned with Finnis’s methodological thesis in jurisprudence. It has been criticised

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<sup>1</sup> John Finnis *Natural Law and Natural Rights* (2nd ed, Oxford University Press, New York, 2011).

by theorists who, for different reasons, believe that jurisprudence ought to be carried out without any appeal to morality. They contend that law can be described and explained adequately without the theorist evaluating the reasons for having law or taking a stance on what is truly good for human persons. This article will defend Finnis's methodology and consider the arguments of several major critics that have engaged directly with Finnis's work. Other legal theorists will be discussed where their arguments are relevant to those of the main critics. Discussion of these criticisms provides a framework within which to explain sound method in jurisprudence.

Section II begins by setting out Finnis's method in legal theory. Section III will discuss Julie Dickson's critique of this method. Dickson's approach to jurisprudence follows and defends Joseph Raz's methodology. She considers the fundamental issue to be the role of moral evaluation in jurisprudence: whether the theorist needs to evaluate the law morally or to consider the law morally justified in order to understand it. This article will show why Dickson's position does not call into question the soundness of Finnis's method and why her defence of an alternative methodology is not compelling.

Section IV will consider arguments made by two theorists who are more sympathetic to Finnis: Scott Shapiro and Nick Barber. Shapiro takes issue with Finnis's use of the central case method. Barber, conversely, accepts the need to articulate a central case and recognises the need for moral evaluation to enable general conclusions to be reached. However, he believes Finnis mistakenly focuses on idealised versions of practices when using the central case method. This article will show why the concerns of both Shapiro and Barber are unwarranted.

The final theorist discussed is Brian Leiter. Leiter believes that the methods of science should inform philosophy. Like Dickson, his position is that moral evaluation is unnecessary for a descriptive theory of law. In Leiter's view, Finnis's approach to jurisprudence makes the mistake of relying on a theorist's understanding of human goods, when value-free description is possible using the scientific method. The article concludes that Leiter's criticisms of Finnis are unsound.

## II FINNIS'S METHODOLOGY IN JURISPRUDENCE

To understand Finnis's methodology clearly, it is necessary to begin with his account of human persons. Finnis identifies both the human capacity for free choice and the recognition of reasons for action as of crucial importance to social theory.<sup>2</sup> He argues that it is self-evident to anyone with the capacity to reason that one can consciously choose between courses of action and that there are some good reasons for choosing one course over another. As an example, Finnis describes a playground incident where a child is first

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2 John Finnis *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, Oxford, 1998) at 22.

confronted with an awareness of the ability to pursue a course of action: to join the bully or to help the victim.<sup>3</sup> He argues that in such childhood situations “one enters ... the ethical domain or domain of morality” from which one never leaves “save through unconsciousness or supervening incapacity to understand options as instances of intelligible benefits realizable in indefinitely many situations”.<sup>4</sup> To understand humans it is necessary to understand their individual and collective actions, and their decisions. To understand these actions and decisions we need to understand this capacity to identify and deliberate about reasons for action.

Following this understanding of the nature of human persons, Finnis adopts Aquinas’s vision of the irreducibility of the sciences. The basic proposition is that, in relation to human reason, there are four orders of reality, none of which is completely reducible to any other.<sup>5</sup> Finnis puts it this way:<sup>6</sup>

[The] sciences {scientiae} are of four irreducibly distinct {diversae} kinds: (1) sciences of matters and relationships {ordo} unaffected by our thinking ... (2) the sciences of the order we can bring into our own thinking, i.e. logic in its widest sense; (3) the sciences of the order we can bring into our deliberating, choosing and voluntary actions ... (4) the sciences of the multitude of practical arts[.]

The conclusion from this irreducibility is that:<sup>7</sup>

... human actions, and the societies constituted by human action, cannot be adequately understood as if they were merely (1) natural occurrences, (2) contents of thought, or (4) products of techniques of mastering natural materials[.]

This is because they are the result of (more or less) reasonable choices. Aquinas’s position is that those choices cannot be understood adequately without the theorist engaging directly with the question of their reasonableness.

A theorist of a social practice aims to describe and explain his or her subject matter. The actions and dispositions that the subject matter consists of “can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance”.<sup>8</sup> This flows from the fact that these actions are the responses of some persons to reasons that seemed to them to warrant action. A theorist would fail to understand the practice properly — and the central reality of human action — if he or she ignored the reasons for which humans act. This theorist would fail to enter into Aquinas’s third order of reality at all. Finnis points out that there is a problem of generality in explaining the social practice: the actions, practices

3 John Finnis “Law and What I Truly Should Decide” (2003) 48 Am J Juris 107 at 109.

4 At 109.

5 John Finnis *Reason in Action Collected Essays: Volume 1* (Oxford University Press, Oxford, 2011) at 217.

6 Finnis, above n 2, at 21.

7 At 22.

8 Finnis, above n 1, at 3.

and self-understandings of the participants “vary greatly from person to person, from one society to another, from one time and place to other times and places”<sup>9</sup> The concern relates to how there can “be a general descriptive theory of these varying particulars”<sup>10</sup> The theory will not be general if the theorist simply records and reports back on the inconsistent actions and understandings of participants. Finnis recognises that this type of reporting is possible: it is what “biographers, military historians, and others do all the time”<sup>11</sup> However, the resulting work will not be a general theory. As Finnis notes, the social institution of law is an example:<sup>12</sup>

But the conceptions of law ... which people have entertained, and have used to shape their own conduct, are quite varied. The subject-matter of the theorist’s description does not come neatly demarcated from other features of social life and practice.

In other words, it is difficult to imagine how the theorist could make the necessary decisions about what to include in the theory. Finnis states that the theorist must do more than simply list the differing conceptions of the practice to develop a theory. He or she needs to make judgements of importance and significance to render intelligible the mass of particulars.

As Finnis puts it, “jurisprudence, like other social sciences, aspires to be more than a conjunction of lexicography with local history”<sup>13</sup> It aims to provide a general theory of law. Some rationale is required to decide what to include in the theory and the theorist needs a way to understand and develop the information that he or she begins with — the “awareness, linguistic, experiential, and by report, of *the* law of our own time and town or country”<sup>14</sup>

In seeking such a rationale, Finnis recognises that what is powerful in HLA Hart’s (and later Raz’s) theory of law is the attention to the point or purpose of law. This was a vast methodological improvement over earlier legal theorists such as Jeremy Bentham and John Austin, who had ignored the reasons for law’s existence.<sup>15</sup> Hart and Raz’s differing descriptions of law arose due to differing opinions about “what is *important* and *significant* in the field of data and experience with which they are all equally and thoroughly familiar”<sup>16</sup> On the basis of such differing descriptions, Finnis suggests that the obvious next question is “[f]rom what viewpoint, and relative to what concerns, are *importance* and *significance* to be assessed” if the theory is to be general?<sup>17</sup>

Finnis suggests that the “philosophical device” that enables the theorist to exercise his judgement and develop a general theory of law is the

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9 At 4. See also Finnis, above n 2, at 39.

10 Finnis, above n 1, at 4 (emphasis in original).

11 Finnis, above n 3, at 118.

12 Finnis, above n 1, at 4.

13 At 4.

14 Finnis, above n 3, at 107 (emphasis in original).

15 Finnis, above n 1, at 6–9.

16 At 9 (emphasis in original).

17 At 9 (emphasis in original).

“central case” method.<sup>18</sup> Finnis’s approach is that the problem of generality can only be resolved adequately by reference to a single central case of the phenomenon. Finnis argues that this method marks a “conscious departure” from the belief that explanatory and descriptive terms (such as “law”) used by the theorist must be used.<sup>19</sup>

... in such a way that they extend, straightforwardly and in the same sense, to *all* states of affairs which could reasonably, in non-theoretical discourse, be “called ‘law’”[.]

There is no need to look for the lowest common denominator or give special attention to the popular conception of the phenomenon. The theorist identifies the reasonable or well-formed case of the phenomenon and sees variations of it as deviations from that central case.

The central case method provides a solution to the problem of what to include in the theory and resolves the issue of how to make judgements of importance and significance. It allows the theorist to relate all aspects of the phenomenon to a central case without him or her having to incorporate into the theory all possible manifestations of the phenomenon. The field of inquiry “includes everything which is relevantly *related* to one *central* type”, including defects or corruptions of the central type.<sup>20</sup> From this, the theorist can differentiate the mature from the undeveloped, the flourishing from the corrupt and the central case from peripheral cases.<sup>21</sup> Law has existed in many different (and possibly inconsistent) forms throughout history and participants have held, and continue to hold, different conceptions of it. But these brute facts are irrelevant. The theorist must formulate a central case by reference to which all forms (the well-developed and the corrupt or deviant) can be understood. By way of analogy, the theorist can see that not everything that has been called medicine in history is curative, but that medicine in its central case is something curative. The theorist understands the concept of medicine by identifying its central case and then seeing variations as corrupt or deviant instances of this central case.

Thus far in his argument, Finnis has explained that for social theory to be general and adequate, the theorist needs to make (the correct) judgements of importance and significance. He has also explained that the central case method enables the theorist to relate different forms of the phenomenon under consideration to each other to determine what is important or significant.

The next question is, therefore: upon what basis is the legal theorist to determine the central case of law? Law is a social practice — it is made up of human actions and deliberations about what ought to be done, and it is understood by understanding its purpose. To determine the central case of

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18 Finnis, above n 1, at 9–11.

19 At 9–10 (emphasis in original).

20 Finnis, above n 2, at 43 (emphasis in original).

21 Finnis, above n 1, at 10–11.

law, the theorist must engage critically with the question of what ought to be done.<sup>22</sup> This will, in turn, require the theorist to engage with the question of why law would be a good thing to have. Such engagement lets the theorist see the good reasons for people to make the choices that constitute the practice, as well as discover the unsound reasons that create defective or distorted instances of the practice.

Another way of reaching this conclusion is made clear in Finnis's response to Hart's idea of the internal point of view: the theorist can consider the various conceptions and viewpoints that exist, or could exist, in relation to law. Some of these viewpoints will be the result of practical reasoning about how humans should live and about law's practical value. Furthermore, some of these viewpoints will be "more reasonable than others".<sup>23</sup> The theorist should identify the reasonable viewpoint or conception of law, which will inevitably require the theorist to engage directly in practical (moral) reasoning. Through this, the central case enables the theorist to understand those good reasons that mark law out as worth having over time. Thus the practically reasonable viewpoint provides a stable way to see the phenomenon.

But how does one engage in practical reasoning? Finnis states that "[a] sound theory of natural law ... undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable".<sup>24</sup> Such a theory claims to be able to identify what is truly good for human persons, and what conditions and principles are conducive to their flourishing as individuals and groups. Natural law theory is the culmination of practical reasoning that picks out principles that should guide our action, which in turn allows judgements of importance and significance to be made. Finnis is thus able to offer an explanation of the nature of law, and a description of what law is and the differing forms it takes. For Finnis, the boundaries of legal theory are defined through practical reason. So the legal theorist can begin the inquiry from a completely normative standpoint, by asking: what should I do?

### III DICKSON: ALTERNATIVES TO MORAL EVALUATION IN JURISPRUDENCE

Julie Dickson is a defender of Raz's approach to legal philosophy. Raz's jurisprudential theory develops from reasoning about the authority of law. He aims to explain the nature of law and not just particular legal systems. He shares this aim with Finnis. Dickson outlines what she and Raz take the purpose of jurisprudence to be:<sup>25</sup>

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22 At 16.

23 At 15.

24 At 18.

25 Julie Dickson *Evaluation and Legal Theory* (Hart Publishing, Oxford, 2001) at 17. See generally Joseph Raz "Can There Be a Theory of Law?" in Martin Golding and William Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2004) Blackwell Reference Online <[www.blackwellreference.com](http://www.blackwellreference.com)>.

[A]nalytical jurisprudence is 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 ... consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law.

Dickson clarifies that “the nature of law” is the set of essential properties that “a given set of phenomena must exhibit in order to be law”.<sup>26</sup> This is a departure from Finnis’s understanding of jurisprudence. Regarding the role of morality in jurisprudence, Raz and Dickson are willing to admit that law may have a moral task to fulfil, but maintain that law is not something that is by nature a morally valuable institution. Raz’s methodological thesis stands with other legal positivist accounts in holding that “it *is* possible to have an adequate account of law, ‘as it is’ which is distinct from an account of how it ought to be” and that the former does not require the latter.<sup>27</sup> This stands in contrast to Finnis’s position.<sup>28</sup> Finnis holds the view that in order to know what law is, one must analyse what law ought to be. Finnis says that the theorist cannot provide an adequate descriptive account of law without understanding what good law would be.

In response to Finnis, Dickson seeks to defend Raz from those who think that moral evaluation is a requirement of successful legal philosophy by focusing on the role of moral evaluation in jurisprudence. Of interest to this article are Dickson’s arguments against what she understands Finnis’s methodology to be. The conclusion of this analysis will be that Dickson’s arguments do not form a successful attack on Finnis’s method. In summary, Dickson’s arguments concern: (1) whether it is necessary to evaluate the law morally to understand it adequately; and (2) whether it is “necessary to hold the law to be a morally justified phenomenon”.<sup>29</sup>

### Indirect Evaluation in Legal Theory

First, Dickson makes the point that confusion is possible with regard to what kind of evaluation takes place in theorising in general. When constructing a theory, the theorist must inevitably undertake a form of evaluation of raw data in order to determine the importance of certain facts and decide what to include in the theory.<sup>30</sup> Dickson notes:<sup>31</sup>

[Theorists] must necessarily be in the business of making evaluative judgements in the course of constructing their theories so as to ensure that they exhibit these virtues [of simplicity, comprehensiveness,

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26 Dickson, above n 25, at 17.

27 At 8 (emphasis in original).

28 Joseph Raz “About Morality and the Nature of Law” (2003) 48 Am J Juris 1 at 12. Contrast Finnis, above n 3, at 111.

29 Dickson, above n 25, at 29.

30 At 33.

31 At 33.

coherence, etc] to the highest possible degree.

This is a relatively uncontroversial but important point to note about the role of evaluation in legal theory. Finnis, of course, does not dispute the requirement that the theorist engage in this minor form of non-moral evaluation.<sup>32</sup> His thesis is that these principles or virtues are simply not sufficient. That is the real dispute.

Briefly setting out Dickson's understanding of Finnis's methodology exposes the points of contention and how they can be resolved. Dickson believes Finnis responds to issues (1) and (2) in the affirmative. That is, that the theorist must: (1) morally evaluate the law; and (2) hold the law to be a morally justified phenomenon (whether or not that second point necessarily follows from the first).<sup>33</sup> Part of the weakness of Dickson's critique can be attributed to her misunderstanding of Finnis's position.

Dickson argues for a methodology in jurisprudence that does not rely on the theorist's moral evaluations of law, as Finnis's theory requires. She believes that an indirectly evaluative methodology is the correct one.<sup>34</sup> As above, she does not dispute that some kind of evaluation is necessary. Her aim is to separate direct (that is, moral) evaluation from indirect evaluation of law and show that direct moral evaluations are unnecessary in legal philosophy. In her view, such an indirectly evaluative theory, if viable, parries Finnis's argument that moral evaluations are required in jurisprudence, thereby vindicating Raz's methodology.<sup>35</sup>

To succeed, Dickson must illuminate the difference between moral and non-moral (direct and indirect) evaluation. All types of evaluation are made with reference to some basis or criteria. Dickson must elucidate this basis. The first of several problems with Dickson's argument is her understanding of direct moral evaluation compared to indirect evaluation. She defines direct moral evaluation as ascribing some kind of moral worth to something: for example, by saying "X is good (or bad)".<sup>36</sup> Indirect evaluation, according to Dickson, takes the form of "X is important".<sup>37</sup> The problem with this approach is that the two types of phrases are not evaluative in the same manner. By saying something is "good", one applies moral criteria and judges that, based on those criteria, the thing in question is good. On the other hand, saying something is "important" does not in itself explain why (or based on which criteria) the thing is important. That we need some basis upon which to judge things as important is shown by Dickson's choice of analogy:<sup>38</sup>

[I]f I claim that leaving his native land was the most important thing

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32 Finnis, above n 1, at 3.

33 Dickson, above n 25, at 9.

34 At 10.

35 At 51.

36 At 52.

37 At 53.

38 At 53.

that happened to John in his life and is hence important to explain in understanding his life, my claim does not entail that the event in question was a good or bad, wonderful or terrible thing.

Upon what criteria are we to decide why it was important that John left his native land? And how can the theorist know it was important without knowing why? Finnis can deal with such an example by attending to the purpose of the action and looking to the principles of practical reasonableness, and the basic goods to which they respond, to determine why it was important. Dickson has no explanation. She seems to evade questions about why certain data is important. Finnis's position is that a general theory needs to attend to the reasons why certain facts are important (not just point out that they are important). In fact, Finnis argues further that the theorist cannot know what is important without knowing why.

Dickson argues that “[a] judgement that it is important for a legal theory to explain the law’s claim to possess legitimate moral authority ... would also fall into the indirectly evaluative category.”<sup>39</sup> She bases this statement on the fact that law “invariably claims moral authority” and, because it is something that “law always does”, it is an important feature to explain.<sup>40</sup> These phrases indicate two important things. First, as mentioned above, Dickson apparently already has a definition of law: the boundaries of the subject matter appear to be well-defined. This is an issue because legal theorists (including Finnis) disagree on how the subject matter of jurisprudence should be determined — making it part of the substantive debate over methodology.<sup>41</sup>

Secondly, the criterion upon which she is basing importance appears to be the fact that, in the legal systems with which we are acquainted, people in positions of authority always claim legitimate authority. The problem with judging importance based on statistical frequency is that it is possible for certain features to be extremely prevalent in a legal system, but also irrelevant to an adequate theory of law. Similarly, uncommon features may be important. For example, it is very common for lawyers to wear black, but this is irrelevant to an understanding of law. Furthermore, judges may or may not always apply the law fairly, but the fact that they should is fundamental to an understanding of law. Commonality may be irrelevant and a theory based on it may obfuscate much that is crucial to understanding the intelligibility of the practice: what it is that unifies various particulars into one type. Finnis's methodology is able to identify important aspects of the phenomenon and engage with why they are important. In fact, as discussed in relation to Dickson's example of John's life, we would think it odd if she were able to pick something out as important while leaving inadequately answered the question of why. In this respect, Dickson's argument is unsound and offers no viable alternative to Finnis's methodology.

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39 At 54.

40 At 54.

41 See Danny Priel “Evaluating Descriptive Jurisprudence” (2007) 52 Am J Juris 139.

Dickson suggests that Finnis could support his argument that there is only one type of legitimate evaluation in legal theory by arguing that indirect evaluative propositions can only be supported by appealing to morality. An example of such an indirect evaluative proposition is that the law's claim to moral legitimacy is important. Dickson states that Finnis might argue that the law's claim to moral legitimacy is an important feature of law because "law is a morally justified phenomenon which lives up to the claims of moral legitimacy".<sup>42</sup> It is a misunderstanding of Finnis if Dickson believes him to have argued that law is always a morally justified institution. Dickson states that although these moral judgements about law would support a conclusion that a particular feature is important, they are not the only way that that conclusion can be reached. Following Raz, she offers the fact that law (in "our" legal systems) invariably does claim moral authority as a reason for its importance.<sup>43</sup> But Finnis need not point to law *actually* being morally justified as the sole reason that the law's claim to moral justification is important — he need only explain how practical reasonableness means that human law *can and should* be a morally justified institution. The theorist's focus is on the relationship between law's central case and other potentially defective cases where the law's moral legitimacy is tenuous or non-existent. Finnis could therefore say: the fact that officials in most present legal systems claim morally legitimate authority is important because law is something that could have (and would have, in its central case) moral legitimacy.

Finally, Dickson attempts to find alternative support for indirect evaluation by suggesting that some features of law are important "because they bear upon matters which are of practical concern to us in conducting our lives".<sup>44</sup> Nick Barber has provided a neat criticism of this argument:<sup>45</sup>

[Dickson's] assertion of importance [based on a feature bearing upon matters of practical concern] is, then, a statement about the actual or potential impact of a given phenomenon on people's lives. We are compelled to assess what is potentially valuable — or potentially harmful — about a social phenomenon.

He argues that Dickson seeks to assess neutrally the bearing of certain features on matters of practical concern, but this is impossible without some understanding of practical concern: "[w]ithout being committed to a prior ethical framework, we have no reason to suppose that the feature is of importance."<sup>46</sup> Barber is correct. It is incoherent to suggest that the theorist could identify in advance all the features of a practice that actually or potentially bear upon matters of practical concern without taking a view on what type of things really matter to people.

42 Dickson, above n 25, at 58 (emphasis in original).

43 At 59.

44 At 60.

45 NW Barber *The Constitutional State* (Oxford University Press, Oxford, 2010) at 10.

46 At 10.

Brian Leiter identifies a further inconsistency in Dickson's approach, thereby showing part of her argument to be unsustainable. Leiter asks why values like simplicity, evidentiary adequacy and consilience are not enough to explain a phenomenon that partially consists of participants' self-understandings. Leiter uses Dickson's own analogy to make his point: the agnostic observer trying to understand a Roman Catholic Mass.<sup>47</sup> Dickson used this analogy to show that her methodology does not require the observer to make directly evaluative (moral) judgements about the Mass. However, part of the relevant data for the theorist must be made up of the Mass participants' self-understandings and their own moral and other beliefs. So the theorist will be carrying out what Dickson terms "indirect evaluation" of the data. However, as Leiter points out, this is not a position intermediate between pure description and moral evaluation, as Dickson wants it to be.<sup>48</sup> It is pure description: "[d]escription may still be description, even when what is described is an evaluation."<sup>49</sup> Leiter is correct in showing that Dickson's position does not have any conceptual ground to occupy. Her position collapses either into Leiter's version of pure description or relies on Finnis's normative judgements.

### Whether the Theorist Must Consider Law to Be Morally Justified

Recall that Dickson set out two issues that concern evaluation in legal theory. The second is "whether a legal theory needs to hold law to be morally justified" so that theorists can adequately understand it.<sup>50</sup> Dickson misreads Finnis in claiming that his position is that moral evaluation of "the law ... will lead to the conclusion that the law is a morally justified phenomenon which lives up to its claims that it is morally authoritative and ought to be obeyed".<sup>51</sup>

There are two problems with this reading. First, Finnis at no point makes the broad statement that all or most instances of "law" — as referred to by persons — have been morally justified. Finnis emphasises that it is not part of natural law legal theory to think that law has been morally justified throughout history, a point apparently understood by Raz.<sup>52</sup> Further, Dickson reluctantly concedes that Finnis "does not wish to exclude morally defective examples ... from the ambit of law".<sup>53</sup> she understands that Finnis is not solely interested in understanding good law.

Secondly, and crucially, Dickson fails to pay adequate attention to Finnis's own methodology. Contrary to Dickson's claims, Finnis's position

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47 See Dickson, above n 26, at 68.

48 Brian Leiter *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, Oxford, 2007) at 175.

49 HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994) at 244.

50 Dickson, above n 26, at 71.

51 At 71.

52 Finnis, above n 3, at 111.

53 Dickson, above n 26, at 74.

is not that the theorist must assume or stipulate that there is a central case of law that is morally justified.<sup>54</sup> Finnis's argument, which is based on the requirements of practical reasonableness, explains why there is a central case of law. When one adopts the viewpoint of the practically reasonable person, one sees that there are human goods that only law can enable us to secure. However, Finnis's methodology does not presuppose this conclusion, for it is possible to use Finnis's method and not conclude that law is justified.

Dickson then addresses Finnis's claim that his theory is "compatible with some of the tenets of legal positivism" (for example, that what counts as law in a particular community is what is enacted according to the rules of that community).<sup>55</sup> She argues that Finnis can only claim to maintain compatibility with legal positivism because of the "constantly shifting way in which he uses the term law", and his use of the term in "two different senses".<sup>56</sup> She claims that Finnis argues "law" is morally justified, while also saying that "law" is not always morally justified. Dickson considers Finnis's approach problematic for two reasons. The first is that it apparently cannot answer definitively the question of whether rules enacted according to the Rule of Recognition are laws. Secondly, she considers that "it does not seem to take seriously the enterprise of identifying what law's essential properties are".<sup>57</sup>

The first response to these arguments is that it is not incoherent to speak of law in different senses. For instance, we can still call the practices of the witch doctor "medicine", but in a peripheral sense of the word. Similarly, it is not incorrect to refer to an invalid argument as an argument. So, in one sense, rules enacted under the Rule of Recognition are laws — they are laws recognised as made by persons with authority to make them. In another sense, they might not be laws because they (might) lack something fundamental to the nature of law (that it be moral).

The second response is that Finnis does have an answer to whether any particular law is a valid law. It is inherent in the central case method that comparisons between different possible usages of the term in question will arise. This makes the method powerful. Dickson admits that the purpose of general jurisprudence is not to describe and explain certain legal systems or adjudicate on correct word usage, but to explain "the nature of law in the abstract".<sup>58</sup> She maintains, nevertheless, that "[s]urely the answer matters" to the question whether a particular legal system counts as law.<sup>59</sup> However, when using the central case method, it is a non-issue whether any particular legal system counts because something can be law in one sense and not in another (and both at the same time). What matters is the relationship between the legal system and the central case of law. Dickson surely agrees with Finnis

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54 At 74.

55 At 75.

56 At 75–76.

57 At 77.

58 At 18.

59 At 76.

that the role of legal theorists is not to banish to another discipline borderline or diluted instances of law, but to take them into account in a full and general theory.

#### IV SHAPIRO, BARBER AND THE CENTRAL CASE

Scott Shapiro and Nick Barber both offer relatively sympathetic critiques of Finnis's methodology. I will consider Shapiro's critique first. He begins by drawing attention to what he considers to be the natural conclusion of applying the central case method — that unjust regimes can still be "central". He states:<sup>60</sup>

[A] regime is not peripheral, watered down, or borderline merely because it is unjust. An unjust regime that satisfies the identity conditions of legality ... is a genuine legal system that simply does not do what it is supposed to do.

Finnis would not completely disagree with the second part of this statement. He recognises that there can be unjust legal systems. It is because they are legal systems (in a diluted or peripheral sense) that it matters that they are unjust. For instance, they are still legal systems in that they probably still coerce people with force as if they had legitimate authority. Finnis does not want to banish human law to another discipline, even if it is unjust. But the central case method is designed to promote clear thinking about law — it places certain forms of the phenomenon on the periphery in the process of abstraction that the method entails. Some (or possibly most) legal systems will not live up to the standard of the central case. This does not mean we should stop calling them legal systems or that they are of no interest to legal philosophers. The point is that these regimes still fall to be understood by legal theory and the central case method provides the best way to understand them: as distorted or ill-formed instances of the central case. When we think about the concept of law we should keep in mind that unjust regimes lack something fundamental to the nature of law (that it be a resolver of moral problems and a creator of reasons for action) and so they are not central cases of law, despite sharing a number of characteristics with them.

The next argument that Shapiro uses against Finnis's conclusion that unjust regimes are not central cases of law is one based on logic: "a defective instance of a kind [for example, law] is not ipso facto an attenuated version of its kind".<sup>61</sup> Shapiro states that Finnis is confused by the two different senses of the terms "ideal" and "central".<sup>62</sup> In one sense, a just legal system meets all the requirements to be considered law and in another sense, it is an ideal

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60 Scott Shapiro *Legality* (Harvard University Press, Cambridge (MA), 2011) at 391.

61 At 392.

62 At 391.

or exemplary instance of law (because it is just). Shapiro accuses Finnis of illegitimately sliding from law's failure in the second sense to a failure in the first sense.<sup>63</sup> Shapiro is effectively claiming that because there can be unjust instances of law it is not part of the essence of law to be just. The response to this argument is that it misidentifies the nature of law.

Martin Jay Stone soundly criticises this reasoning. He argues that while it is superficially attractive, it focuses on the lowest common denominator consistent with all variations of the phenomenon and thus "fails to capture the logic of understanding of any domain of objects that is structured teleologically".<sup>64</sup> That is, things have some fundamental purpose or aim. To ignore such aims in this discussion would be like arguing that there can be invalid arguments so validity is not essential to understanding arguments, or that there can be medicine that fails to cure so being curative is not part of the nature of medicine. Such arguments are intuitively unsound: "from the fact that you can construct an object without an *x*, it does not follow that *x* is not essential to its form".<sup>65</sup> The purpose of an argument is to connect true premises to a true conclusion and thus be valid, and the purpose of medicine is to cure. Failure to attend to those purposes leads to inadequate understanding. The theorist needs to be sensitive to what kind his or her subject matter belongs to. It is incorrect to assume or conclude that law is of a kind that is not structured teleologically, or that law's purpose is secondary or irrelevant to its nature. The nature of human action, the problem of generality and the general priority of the well-developed over the corrupt make law a thing to be understood by reference to its point and the reasonable choices that constitute it. When Finnis uses the central case method, he is not illegitimately sliding from one form of failure to another. He is recognising that failure to be just is a crucial failure on the part of law (going to its nature) so unjust laws can be legitimately considered peripheral. By thinking unjust law is a central case, Shapiro has misidentified the nature of law and misunderstood the central case method.

Shapiro attempts to illustrate his point more clearly by using an analogy with clocks. He argues that a broken clock is no less of a clock than a working clock: it is as much a central case of "clockhood" as a perfectly functioning clock. An uncontroversial response to this argument is that it is part of the nature of clocks that they correctly show the time. Clocks that fail to do so fail in a way that is fundamental to being a clock, in a way similar to invalid arguments or non-curative medicine. Therefore, in an important sense, a broken clock is not a clock. Clearly, if the object has other features we normally associate with clocks, such as numbers, hands and a mechanism, it would not be incorrect to call the object a clock. But this response is not interested in correct usage of vocabulary. One would understand the broken clock to be a form of clock by reference to what it should be and fails to be (a

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63 At 392.

64 Martin Jay Stone "Planning Positivism and Planning Natural Law" (2012) 25 CJLJ 219 at 229.

65 At 229.

device that tells the time). Furthermore, it does not make sense to talk about broken clocks unless we already know what a clock is. We cannot understand a defective instance of a kind if we have no idea what that kind is in its normal or central instance.

Jules Coleman raises a similar argument against Finnis that relates to the capacity of law to have a moral aim. He argues that law “is just the kind of thing that can realize some attractive ideals”.<sup>66</sup> But the statement that “a thing, by its nature, has certain capacities or can be used for various ends ... does not entail that all or any of those capacities ... are a part of our concept of that thing”.<sup>67</sup> Coleman’s point is that just because a thing has a certain capacity, that capacity is not necessarily fundamental to understanding that thing. Coleman’s example is that a hammer could be used as a paperweight but that does not mean that that capacity is fundamental to our concept of hammers.<sup>68</sup> Similarly, the capacity of law to realise moral ends is not fundamental to the concept of law. Finnis’s response is that “[o]ne can reasonably spend a lifetime of using hammers without ever noticing that they would be good as paperweights”.<sup>69</sup> In contrast, we cannot begin to understand law without noticing that it “shares much of the same action-guiding vocabulary as morality” and that it “purports to occupy *the same place in the world* as morality”.<sup>70</sup> Finnis is making reference to the crucial fact that law is to be understood with reference to its end. Coleman’s analogy between hammers and laws is mistaken because it takes all possible capacities as equally important. A hammer’s capacity to act as a paperweight is mere coincidence, whereas law’s capacity to realise moral ideals is not.

In a book about the constitutional state, Nick Barber sets out his views on proper methodology in social sciences.<sup>71</sup> He is sympathetic to Finnis’s methodology and agrees that the theorist’s direct moral evaluations are indispensable in developing a social theory.<sup>72</sup> However, regarding the central case method, he believes Finnis focuses on idealised versions of practices and that this is a mistake: “[a]lthough ethical evaluation is needed ... this need not cause us to provide an idealized interpretation [of the practice]”.<sup>73</sup> In addition, Barber thinks a flaw is the method’s apparent inability to explain bad practices adequately, such as torture or slavery.<sup>74</sup> He also believes that the resulting theory should not stray too far from the popular understanding of the practice.<sup>75</sup> These two methodological issues divide Finnis and Barber’s

66 Jules Coleman *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, Oxford, 2001) at 194.

67 At 194. Note Coleman’s wording: “our concept of that thing”. Finnis, however, makes the point that we are interested in law, not our concept of law: Finnis, above n 3, at 125.

68 Coleman, above n 69, at 194.

69 Finnis, above n 3, at 126.

70 At 126 (emphasis in original).

71 Barber, above n 45.

72 At 5.

73 At 12.

74 At 13–14.

75 At 7.

accounts of the central case method.

Barber notes that the central case method functions well when dealing with a valuable practice, but struggles when applied to a harmful practice. The issue is that the theorist attempts to understand the bad practice as a deviant or corrupt form of a good practice and this is “an intuitively odd way of proceeding”.<sup>76</sup> For example, Barber thinks that in an account of slavery, it would try the patience of one’s reader to begin with an account of penal servitude and inheritance.<sup>77</sup> However, Finnis’s argument is that without understanding the good reasons humans have for acting (creating and maintaining a social phenomenon), we cannot properly understand the bad or less than reasonable forms of action. It is moral evaluation that lets the theorist develop a central case through which he or she can view deviant cases. Finnis argues that bad practices should be understood as corrupt forms of good practices. Social phenomena are to be understood by looking to their point or purpose and to the good reasons there are for creating and maintaining them. The problem with Barber’s understanding is that he would have the theorist attempt to evaluate a bad practice without any foundation (a central case) through which to understand why the practice is bad. Plain ethical evaluation of bad practices is possible, but will not result in a general social theory.

Both Shapiro and Barber make similar points about the theory conforming in some way to a popular conception of the phenomenon. Shapiro implicitly notes that the United States legal system must be a central case, but that the Afghan government is probably a borderline instance of a legal system.<sup>78</sup> However, if what the theorist is doing is attempting to understand a social phenomenon, it seems there is little reason to avoid straying too far from the popular conception, which could be very far from the truth. Legal theorists are seeking the truth about law, not what people happen to think of law. Shapiro’s version of the argument, therefore, cannot succeed. However, Barber is correct to note that the popular understanding provides the starting point for theorising. The theorist needs a “collection of phenomena to analyse”.<sup>79</sup> Finnis recognises that the theorist cannot avoid starting the project with some awareness of the subject matter.<sup>80</sup> It does not follow, however, that the theorist’s conclusions ought to conform to these popular conceptions. In fact, part of the whole purpose of social theory is to make a phenomenon intelligible and illuminate its interesting aspects. Otherwise, the theorist will be limited by popular understandings or classifications. Barber himself recognises this when defending the need for ethical evaluation: “[t]here is a difference between an account of the popular conception of the state and an account of the state.”<sup>81</sup> Hypothetically, the theorist should be able to conclude

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76 At 13.

77 At 13.

78 Shapiro, above n 60, at 391.

79 Barber, above n 45, at 6.

80 Finnis, above n 3, at 107.

81 Barber, above n 45, at 9.

that France, popularly classified as a state, is not a central case.

## V LEITER AND JURISPRUDENTIAL METHODOLOGY

Brian Leiter challenges Finnis's method from a different direction. He defends naturalism in philosophy. Although a difficult term to define, naturalism in this context refers to a broad set of positions related to the idea that philosophy and science are basically engaged in the same endeavour and should use the same methods.<sup>82</sup> Leiter in particular considers naturalism to be an approach that sees philosophy as the "abstract, reflective, and synthetic branch of empirical science".<sup>83</sup> Leiter has developed an approach to jurisprudence "with the aim of understanding where we can locate law and morality within a naturalistic picture of the world".<sup>84</sup> He questions both traditional legal positivist accounts and natural law accounts of law. This section will discuss Leiter's general methodological thesis in jurisprudence and his disagreements with Finnis. Leiter's position is that jurisprudence is (or should be) about describing law: he is a descriptivist. According to him, philosophers should turn to the scientific method to make progress in legal philosophy. Leiter thinks that Finnis is wrong to believe that the theorist is required to evaluate law morally in order to describe it adequately. He is of the view that we can describe law without moral evaluations.<sup>85</sup> This article will endeavour to show that Leiter's arguments against Finnis's position are weak and his methodology mistaken.

### Leiter on the Redundancy of Moral Evaluation

A convenient starting point is Leiter's 2003 article in the *American Journal of Jurisprudence*, in which he criticises Finnis's methodology.<sup>86</sup> He uses a dialogue about cities (as an analogy to the nature of law) to argue that evaluation of the requirements of practical reasonableness is redundant in descriptive legal philosophy.<sup>87</sup> The dialogue is between a "Descriptivist", representing Leiter's point of view, and a "Natural City Theorist" (NCT), representing what Leiter considers to be the natural law point of view.<sup>88</sup>

Leiter's overall thesis is that moral evaluation is unnecessary to provide a satisfactory descriptive account of law. Recall that a significant part of Finnis's methodological thesis is that in order to demarcate the boundaries

82 David Papineau "Naturalism" (2009) *The Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu>>.

83 Leiter, above n 48, at 3.

84 At 3.

85 At 6.

86 Brian Leiter "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence" (2003) 48 *Am J Juris* 17.

87 At 35.

88 Because Leiter is using the concept of "city" as an analogy with law, he terms the equivalent of the natural law position a Natural City Theorist. In reality, it should be "Natural Law City Theorist", or something similar that recognises the theorist as a natural lawyer developing a theory of cities.

of the subject matter we need moral evaluation. This is because law is a social phenomenon made up of innumerable and possibly contradictory decisions, actions and beliefs. The concept of law is not easily severable from the rest of social existence. We need some way of knowing what to include and what to exclude in our theory. The central case method is Finnis's solution.

However, Leiter completely ignores this issue and from the outset places the focus on specific instances of things referred to, and popularly understood, as cities: London, Paris, New York.<sup>89</sup> The problem with this approach is that it means that the subject matter, which Leiter later intends to describe without moral evaluation, is not a concept but a set of objects. Any resulting theory will, at best, describe some of the shared characteristics of those places. No true conclusions about the concept of a city will be reached because the concept is not the subject matter here. As above, our focus should be on the concept, not word usage. There is no reason to think popular understandings deserve a defining role in the theory. Part of the point of developing a theory of the phenomenon is the possibility of reaching general conclusions that transcend popular understandings. Once the Descriptivist has abandoned the project of providing a general theory, he or she must be content with attempting to provide a "satisfactory descriptive account of what we find" and "understanding what we call 'cities' are actually like".<sup>90</sup> Leiter gives up on providing a descriptive account of the concept of "law". The subject matter becomes what people refer to when they use the word law or the set of electrical impulses in participants' brains. The real question is, despite Leiter's abandonment of a general descriptive theory, whether a descriptive theory of law is even possible without the work of moral evaluation.

### Whether Description Is Possible without Evaluation

Both John Gardner and Leiter argue that the sort of evaluation a natural lawyer wishes to carry out requires non-evaluative description first.<sup>91</sup> The general argument is that any form of evaluation is logically impossible prior to description and that evaluation is "parasitic on a demarcation [of the subject matter] made based on purely *epistemic* [scientific] criteria".<sup>92</sup> These arguments specifically deny Finnis's claim that moral evaluation is required for an adequate description of a social phenomenon such as law.

It is convenient to begin with Gardner's version of the argument.<sup>93</sup> First, he discusses the idea that there are different forms of legality. "Legality" can refer to the intra-systemic validity of laws and also to moral legitimacy.<sup>94</sup> He then says that the existence of these two types of legality does not undermine

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89 Leiter, above n 50, at 168.

90 At 168 and 170.

91 John Gardner "Legal Positivism: 5½ Myths" (2001) 46 *Am J Juris* 199 at 226; and Leiter, above n 50, at 169–170.

92 Leiter, above n 48, at 169 (emphasis in original).

93 Gardner, above n 91, at 199.

94 At 226.

the truth of intra-systemic validity. The idea of intra-systemic validity “tries to answer a logically prior question. What is this field of human endeavor, to which the natural lawyer’s proposed criteria of success and failure apply?”<sup>95</sup> That is, the natural lawyer will need to know to what *thing* to apply his moral evaluation. Finnis, like all natural lawyers, recognises the concept of intra-systemic validity and comfortably admits that we need some way of identifying intra-systemically valid laws prior to morally evaluating them.<sup>96</sup> This in no way undermines his more fundamental position that we cannot describe the concept of law without morally evaluating it. If, however, Gardner believes that, in understanding law’s whole nature, the best place to begin is with the question of intra-systemic validity, he must be mistaken. As Finnis notes:<sup>97</sup>

[Gardner’s belief is based on the] assumption that in relation to human things constituted by human choices, like law, you can answer the question [“]What is it?[]”] before you tackle the question [“]Why choose to have it, create it, maintain it, and comply with it?[]”]

It is of no use to Gardner to argue that his descriptive question is logically prior, because that simply assumes that that question can be adequately answered. That assumption is a thesis that Finnis opposes. One must have regard to the good reasons there are to have law in order to describe it adequately. It would be wrong for the theorist to assume that law has no moral objective or that we can describe law without reference to its objective. If law has a moral purpose, then we need to understand that purpose before we can describe non-central cases.

Leiter’s formulation of the point appears more troublesome for Finnis. He states that practical questions, including those a natural lawyer would ask, are “parasitic on a demarcation made based on purely *epistemic* criteria”.<sup>98</sup> He also states that “a conceptual demarcation of law from other forms of normative control” is required to even be able to ask practical questions.<sup>99</sup> Leiter makes the more direct point that to be able to answer practical questions about the concept of law we need first to distinguish and describe the concept (without moral evaluation). Leiter argues that to answer the question Finnis poses for himself — why would it be good to have law? — we need to have some kind of description of law. It seems sensible to think that in order to decide whether we ought to adopt and maintain something, we need to know what that something is. But the correct response to this challenge is the same as the response to Gardner’s argument: to think that it is possible to describe law adequately prior to evaluation is erroneous.

Furthermore, we can know and understand the good reasons for having

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95 At 226.

96 Finnis, above n 3, at 128.

97 At 129.

98 Leiter, above n 48, at 169 (emphasis in original).

99 At 170.

law without having to provide a value-free description of it. For example, when one considers what ought to be done, and how best to do it, it is possible to identify a moral need for a solution to certain problems. In elaborating an intelligent response to the need, we outline the main features of law and legal order.<sup>100</sup> Finnis suggests we try to think about law as something “that people of any time and place ... have the ... need for and reasons to comply with”.<sup>101</sup> We can recognise the general moral need for law. But he makes it clear that we use the word law because we have “an awareness, linguistic, experiential, and by report, of *the* law of our own time and town or country”.<sup>102</sup> This awareness means we could know that the law involves use of considerable force, that there are courts and legislatures, and that it claims authority. All these things are experiences of *our* law and they help us understand and morally evaluate the concept of law to develop a *general* theory. However, those experiences are not strictly necessary for someone to reason practically and see the value of law.

Leiter is arguing for a fundamental difference between describing law and evaluating its moral worth. He asserts that:<sup>103</sup>

... while it is surely worthwhile to ask whether certain cases of legal systems are *just* and *worthy of obedience* ... that is simply a different question from the descriptive one of what “law” and “legal systems” ... are like.

Leiter is correct in arguing that the moral evaluation of certain cases of legal systems is a distinct question from the description of law and legal systems generally. But we must recall that Finnis is not calling for moral evaluation of certain cases of legal system: he is calling for evaluation of the good reasons there are for having law. Furthermore, Leiter’s comment is simply an assertion that those are two different questions. Linguistically, they certainly

are. But conceptually, Finnis has a strong argument (and not just an assertion) for the proposition that one is not severable from the other.

### Naturalised Methodology

The two previous sections indicate a deep philosophical divide between Leiter and Finnis. Finnis takes the position that human actions and decisions cannot be reduced to occurrences of natural phenomena. Leiter never explicitly outlines his view on the subject of human persons. But it is clear from Leiter’s defence of a naturalistic worldview that he believes human actions and decisions are fully reducible to natural occurrences and can be fully explained with the methodology of the natural sciences. He provides

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100 See Finnis, above n 1, at 260.

101 Finnis, above n 3, at 107.

102 At 107 (emphasis in original).

103 Leiter, above n 48, at 170 (emphasis in original).

examples where the social sciences offer predictive, causative explanations of legal phenomena without recourse to moral evaluation:<sup>104</sup>

[S]ocial scientific approaches give us a picture of courts [an example of a legal phenomenon] which fits them into a broader naturalistic conception of the world in which deterministic causes rule, and in which volitional agency plays little or no explanatory role.

Leiter considers human actions and decisions in a way that removes the importance of their being more or less reasonable, or acts of free will. On Leiter's understanding, there is no such thing as decisions that are more or less reasonable, or actions that are freely chosen. He believes that human persons are completely determined by the physical laws of nature — human social practices, like law, are merely complex instances of physical causes and effects. The significant methodological ramification of this worldview is that deliberating about what ought to be done is pointless. Attempting to understand human social practices with reference to their purposes, as Finnis does, is also precluded.

This view of human persons is closely connected to Leiter's reliance on the natural sciences. Leiter considers that all forms of knowledge require empirical scientific proof. He believes that the sciences are "our most reliable guide to what we can know and what there is",<sup>105</sup> and that "[w]ith respect to questions about *what there is* and *what we can know*, we have nothing better to go on than successful scientific theory."<sup>106</sup> However, this sort of belief relies on the disputed proposition that the natural sciences are the only source of truth. It is this scepticism about our knowledge of truths (except those delivered by science) that Finnis believes is unsound, because it is self-refuting.<sup>107</sup> Leiter states that our only knowledge of truths comes from natural science, but natural science has nothing to say about our only source of knowledge. We must look elsewhere to find a reason to believe the proposition that only science can give us reason to believe anything. Leiter's fragile basis for relying on the natural sciences is that, since the Enlightenment, they have "deliver[ed] the goods" in terms of the modern conveniences of industrial society.<sup>108</sup> Leiter's view is thus completely different to Finnis's recognition of the four orders of reality (and the knowledge we can have of them). Upon the four orders view, the natural sciences are just one order of reality. Leiter's arguments for not recognising other ways of knowing truth are weak when compared to the well-developed practical reasoning that Finnis defends, which is based on the self-evidence of some things being worth knowing or worth acting for.

Leiter wants to make it clear that his naturalised methodology still has

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104 At 135.

105 At 3.

106 At 180 (emphasis in original).

107 See Finnis, above n 5, at 81.

108 Leiter, above n 48, at 273 and 275.

a place for normativity because beliefs about normativity are “ineliminable features of the causal structure of the social world”.<sup>109</sup> The fact a judge feels bound, argues Leiter, is the (physical) cause of certain effects. So normativity, in Leiter’s methodology, is viewed simply as a set of beliefs and feelings that people have in relation to law. This article has already discussed above the problem of generality in legal theory. The way Leiter deals with normativity is a good example. All those beliefs about law will need to be incorporated into the theory in some way. Without being able to make judgements about beliefs (with reference to the principles of practical reasonableness and the basic goods), the theorist must use arbitrary criteria like statistical frequency to determine the relative importance of different beliefs. Leiter states that the concept of law is “the object of a diverse set of propositional attitudes held by those who engage in [it]”.<sup>110</sup> But the subject matter is therefore defined as a concept and the concept is defined as a set of attitudes. Without morality, there is no compelling way of structuring or making intelligible those attitudes. We are drawn to Finnis’s solution, which is to use practical reason to render intelligible the multitude of actions, decisions and beliefs, and to develop a general theory of law.

## VI CONCLUSION

This article has explained correct methodology in jurisprudence by engaging with the dispute over methodology between John Finnis and his critics. Finnis’s position is that legal philosophers can and should develop a fully normative theory of law starting with the question: “what should be done?” Finnis’s argument is that law is a social phenomenon made up of people’s more or less reasonable decisions about what should be done (their practical reasoning) and what forms of social order are worth having. It is difficult to develop a coherent general theory that can take account of people’s varying and inconsistent beliefs, actions and decisions. A theorist’s own practical reasoning enables such a general theory to be developed by allowing the theorist to see some beliefs as more important or central and others as deviant or corrupt. Thus the varying particulars are coherently incorporated into a general theory.

A number of critiques are made of Finnis’s methodology. As this article has demonstrated, it is able to withstand all of them. Finnis’s methodology is consciously dependent on morality. Dickson and Leiter take issue with this argument — they think it is possible and desirable to separate description and evaluation of law. But Finnis’s methodology withstands the criticisms levelled against it with regard to the role of moral evaluation.

Dickson advances a further critique of Finnis’s method. She suggests that there are other ways the theorist can bring order to and evaluate the

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<sup>109</sup> At 4.

<sup>110</sup> At 124.

varying particulars that make up the subject matter. She argues for an indirectly evaluative methodology that she believes Raz adopts. Such a methodology would have the theorist attempt to identify what aspects of the varying particulars are important to explain. However, Dickson fails to provide any legitimate basis upon which to make indirectly evaluative judgements. Furthermore, the purpose of jurisprudence is not merely to identify certain things about law as important, but to explain why those things are important to people generally. That aspect of Dickson's argument is therefore unsuccessful.

Leiter advances similar concerns to Dickson. He thinks that the theorist can determine the importance or significance of data on the basis of epistemic (rather than moral) values. However, on Finnis's account of legal theory, a theorist will always fail to understand or explain the subject matter properly if he or she treats it as completely reducible to a natural science. As has been demonstrated, Leiter has weak arguments for why his self-refuting philosophical beliefs are a better foundation for jurisprudence. Finnis's methodology recognises the different orders of reason in human life and is thus able to offer an intelligible basis upon which to develop an account of human affairs.

A closely related, and fundamental, problem that is left inadequately resolved by Dickson and Leiter is the problem of generality. Dickson argues that it is possible to describe the moral evaluations and beliefs of people without having to share in those evaluations. Finnis accepts that such description is possible. However, the result is not a general social theory — we are no closer to reaching any general truths about human affairs or the concept of law. Such a method can achieve nothing more than a list of the varying beliefs of participants. Finnis confronts this problem and concludes that only the theorist's understanding of the requirements of practical reasonableness can give a social theory generality.

Both Dickson and Leiter regard the purpose of jurisprudence to be to find out what the necessary truths are in relation to law. However, their methods preclude the pursuit of this. In effect, their adoption of alternative methodologies is based on a substantive position in relation to the nature of law. Leiter, for example, may believe that the only thing the legal theorist is attempting to describe and explain is a (complex) set of propositional attitudes in relation to a concept. Whether jurisprudence should turn down that path depends on the soundness of the arguments in favour of Leiter's naturalistic picture of the world. Finnis clearly rejects such a worldview as self-refuting and unintelligible. The issue of generality in legal theory is one that raises substantive concerns about the nature of law. Finnis's methodology has been shown to offer a coherent and intelligible way of proceeding.

Shapiro, Barber, and Leiter all raise concerns about the relevance of popular understandings of law in jurisprudence. Finnis argues, however, that popular understandings of law are of limited importance. They might serve as a guide when the theorist begins to consider the question of what

law is and why law could be a desirable form of social order, but nothing more. Shapiro and Barber, on one hand, think that legal theory should not stray too far from the popular understanding of law, but give little reason to think straying is inappropriate. Leiter, on the other hand, places importance on the popular understanding or paradigm of the concept in his dialogue. However, the proper subject matter of jurisprudence is neither the popular understanding nor particular instances of law. Finnis is clear that the purpose of jurisprudence is to develop an explanatory theory of law, not merely to list popular understandings.

Dickson and Shapiro consider it to be a problem with Finnis's central case method that this method results in no clear distinction between law and non-law. Both Dickson and Shapiro are in error, assuming law is the kind of thing that should be understood as having essential properties or minimum conditions. Of course there are limits to what one can correctly call law, but that is a question for lexicographers, not legal theorists. Finnis argues that law is the kind of thing that has a focused moral purpose and needs to be understood with reference to that purpose. The theorist can only adequately understand that purpose, and thus describe law, if he or she engages with practical reason. It is a mistake, when attempting to describe law, to assume description is possible without moral evaluation.

Finnis's methodology in legal theory survives the criticisms intact. His methodology enables the theorist to resolve the fundamental problem of providing a general theory of a social phenomenon such as law. Only by engaging with, and providing an answer to, the question of why, if at all, we should have anything like law is it possible to describe and explain intelligibly the complex set of human actions and decisions that constitute it.