Evidence-Based Jurisprudence: An Essay for Oxford

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Abstract

This essay is part of a broader attempt to put some flesh on the bones of naturalistic jurisprudence. My general aim in this essay is to show that much contemporary jurisprudence takes a very narrow understanding of its subject matter, and gives priority, to the point of exclusivity, to one methodological approach – analytic philosophy – over all others. Unlike naturalistic analytic philosophy that welcomes ideas and data from other disciplines, the approach that dominates jurisprudence sees legal philosophy as concerned with certain questions that are uniquely philosophical and to which other disciplines have little to contribute. Some have challenged my past characterization of analytic jurisprudence as "isolationist." My first aim in this essay is to show that this narrow approach is real. I begin by providing some empirical evidence on the narrowness of work in analytic jurisprudence (with special reference to work coming from Oxford). After showing that, I present some ways in which a naturalistic alternative would build on ideas or data coming from disciplines other than philosophy. In addition, I argue for two additional ways in which naturalistic jurisprudence differs from the current dominant approach. First, I suggest it should take the study of legal practice as central to its endeavor; and second, I suggest that legal philosophers themselves may be a relevant subject of study.

Keywords: Analytic jurisprudence, naturalistic jurisprudence, methodology, nature of law.

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I spent several years at Oxford, and I have fond memories of my time there. It is the perspective that comes with distance that has led to see more clearly the shortcomings of the approach dominant there. This essay is thus meant, as they say, as "constructive criticism". I presented an earlier, and quite different, version of this essay at University College London and I thank participants there for their mostly receptive reactions and comments. I also thank Roger Cotterrell for his comments on that early version. Finally, I thank my hosts at the University of Genoa for the invitation to present some of my ideas on naturalistic jurisprudence (Priel unpublished), and for their great hospitality during my time there.

1. The Bad Old Days

> It used to be, in the Oxford of the sixties, that a delicate shudder of incomprehension stood for an argument. Those days have passed. (Dennett 2007: 202 note 5).

Indeed. It's not that there have not been criticisms of the state of analytic jurisprudence, but for a long time, it seems, the delicate shudder was enough. Perhaps more than enough. At times, it seems, the preferred approach was simply to ignore the criticisms, because those who made them were just not smart enough, or knowledgeable enough, to know what they were talking about. As for criticism based on ideas or information coming from other disciplines, those were considered largely irrelevant for the philosophical inquiries about the nature of law.

At last, the criticisms seem to be starting to sink in. Not yet calling for a radical change, mind you, but at last meriting a response. Perhaps it is the growing volume of the critiques, perhaps it is the fact that it is no longer possible to take seriously the suggestion that the critics don't understand the issues or are not familiar with the relevant literature; or perhaps it is the creeping sense that analytic jurisprudence is in a bad place. The new approach is thus one of conciliatory open-mindedness: «ours is a broad church» (Dickson 2015: 207, 230); «positivists simply believe there to be more than one province in the empire of legal philosophy» (Green 2008: 1037)[1]. The new message is welcoming and inclusive: "Go ahead and do what you want to do, we are not stopping you! There is great value in your work. But by the same token we ask that you let us continue doing our thing." In this spirit of intellectual openness and pluralism, it is those dismissive of conceptual jurisprudence who appear closed minded (Dickson 2015: 219).

That's progress, of sorts, but in my view it does not go nearly far enough. In this essay, I hope to show that in practice the dominant approach to jurisprudence, reflected in purest form by many legal theorists based at Oxford, is not open and inclusive, but isolationist and dismissive. One of the hallmarks of the isolationist approach to jurisprudence is a lack of professional interest, and even ignorance, of ideas and data from disciplines other than philosophy. The assumption, still going strong today, is that however interesting such work may be, most of it is of no relevance for the legal philosophers. After demonstrating with some empirical evidence that this remains the reality within analytic jurisprudence, I turn to presenting some ideas on what an alternative approach would look like. In doing that I hope to contribute to discharging the yet-unfulfilled promise of a naturalistic approach to jurisprudence. Naturalism has come to mean many things; one of them – the focus of my attention in this essay – is that philosophical questions are not special or

[1] Similarly, Gardner (2012: 297 note 75): «[William Twining's] interests strike me as no less legitimate than mine».

unique. They are not to be answered by splendid segregation from the inquiries of other disciplines, nor do they enjoy any kind of logical priority over other questions. I substantiate this claim by presenting examples of how disciplines other than philosophy could be used to address traditional jurisprudential questions.

2. Is "Oxford Jurisprudence" a Real Thing?

> [There exists] some mythical, composite figure whom we may call the compleat Oxonian [who believes] that only those who have received formal training in technical philosophy are entitled to be taken seriously in matters of general legal theory or philosophical jurisprudence. If that were true, the only jurists, past or present, to whom we should pay any attention are Professors H.L.A. Hart and Ronald Dworkin. (Gilmore 1974: 813.)

For those on the inside, the suggestion that Oxford controls what people can write may look like a ridiculous conspiracy theory: «It is not as if there is an Office of Jurisprudence somewhere in Oxford's High Street, or in Washington Square, that gets to license research programmes» (Green 2012: 158). But from the outside, Gilmore's description still rings true. To be sure, some things have undoubtedly changed. In Britain, analytic jurisprudence is not the only game in town. There are different currents and perspectives, but analytic legal philosophy is still a very dominant approach, not least because of its continued perceived prestige and prominence in the leading law schools at Oxford, Cambridge, and London in England, and Edinburgh in Scotland (*cf.* Cotterrell 2014; Duxbury 2004). And within analytic jurisprudence, Oxford remains very dominant, arguably the most influential place in the English-speaking world.

Even if we take analytic jurisprudence to be nothing but the application of the methods of analytic philosophy to questions relating to law, there are certain more specific commitments that seem particularly popular at Oxford. These are loosely derived from the work of Hart, recently described in a book celebrating the fiftieth anniversary of its bible as «the founder of the 'Oxford school' of jurisprudence» (Duarte d'Almeida et al. 2013: 11). One aspect of the Oxford school is a belief in the distinctness of legal philosophy from other interdisciplinary approaches[2], an insistence that legal philosophy is distinct from the rest of the looser category of legal theory (Endicott 1996), and a rather sharp separation of legal philosophy from the practice of law. Not quite part of the official doctrine, but very much part of its everyday practice, is a certain sneering attitude toward all other forms of inquiry

[2] According to Lacey (2006: 953), «Hart was relatively impervious to historical and sociological criticism, precisely because he saw his project as philosophical and therefore immune to the charge of having ignored issues that seem central to historians and social scientists».

about law, including other interdisciplinary approaches. The view is very much that legal philosophy is more philosophy than law, and that only philosophy holds the keys to knowing what law "actually is".

Against this background, Julie Dickson's claim to openness, made in a recent essay, is welcome. For contrary to statements by other legal philosophers, Dickson has said that she considers the words "jurisprudence" and "legal philosophy" synonymous (2015: 214), and that there is no serious basis for distinguishing legal philosophy from broader jurisprudence on the basis of any «alleged disciplinary credentials, and methods of inquiry» (2015: 211). This sentiment is not new. Almost a century ago, Roscoe Pound (1931: 711) wrote that «in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work». Despite the magnanimous tone of these words, Pound wrote them at the end of a scathing attack on the work of the legal realists. But the attack backfired, because, as Llewellyn (1931) has shown, his critique did not target views actually held by the realists. As I argue in this essay, the new mood of open-mindedness in analytic jurisprudence similarly does not match reality.

Dickson's essay from which I have just quoted, itself provides a good illustration of my point, so it may be appropriate to start with it. In describing her broad-mindedness, Dickson writes (2015: 216): «Many […] morally evaluative methodological stances – such as those pioneered and developed by Ronald Dworkin, John Finnis, Jeremy Waldron, Maris Köpcke Tinturé, Stephen Perry and Nicos Stavropoulos, employ rich, subtle arguments regarding the character of evaluative concepts in general, and the character of the concept of law in particular». Later in her essay Dickson mentions another list of scholars – «HLA Hart, Joseph Raz, Ronald Dworkin, John Finnis, Neil MacCormick and Brian Leiter» (2015: 226). These two lists are revealing. All those in her first list passed through Oxford (or are still there). With the exception of Dworkin (who took the Oxford undergraduate degree in law, and of course was Oxford's professor of jurisprudence for many years) all others have an Oxford DPhil with a focus on legal philosophy. Of those on the second list, all except for Leiter have had a long affiliation with Oxford; Leiter himself has a Ph.D. in philosophy. Apparently, inclusion in the broad church of jurisprudence requires either passing through Oxford or acquiring a Ph.D. in analytic (legal) philosophy, preferably both.

These lists are not a coincidental and they are pertinent to the question whether contemporary legal philosophy is isolationist. Dickson's claim, that she and other legal philosophers adopt a "broad church" approach to jurisprudence, is an empirical one. To see whether it is true, it can and should be tested. In order to do that, I compiled a list of all scholars cited in Dickson's *Evaluation and Legal Theory* (2001), and in her recent essay in which she made this claim. There are twenty-eight different people cited in the book, there are twenty three cited in the article. With regard to each of these names, I examined three questions. First, whether they had an Oxford affiliation at one point of their career either as students or as academics (although not

necessarily at the time of writing the cited piece). Second, I examined who on the list had a Ph.D. with a focus on philosophy. I used this as a proxy for interest in analytic philosophy. This is obviously a highly imprecise proxy, as it excludes various historical figures (such as John Austin, Jeremy Bentham, and even Hart) who were philosophers but lived before doctorates became an academic norm. I nevertheless chose it because it is a fairly easily ascertainable measure. (I was also uncertain about some of the people cited. I counted all of them as a "no"). Finally, I identified all analytic legal philosophers. Obviously, this is a less precise category than the previous ones, but I tried to be fairly restrictive in my classification. (The full lists and my classifications are available upon request). The results are presented in Tables 1 and 2.

Table 1: Citations in Dickson, *Evaluation and Legal Theory* (2001)

	Number of people	*Percentage*
Oxford affiliation	11	41%
Doctorate in philosophy	15	56%
Analytic legal philosophers	23	82%

Table 2: Citations in Dickson, 'Ours Is a Broad Church' (2015)

	Number of people	*Percentage*
Oxford affiliation	14	41%
Doctorate in philosophy	15	56%
Analytic legal philosophers	20	82%

Though revealing in themselves, these figures grossly undercount the Oxford legal philosophy focus in Dickson's work for they count each person cited once, regardless of the number of times he or she is cited. When the number of citations is taken into account (something I did only for the book), Dickson's narrow focus becomes much clearer. The *combined* number of citations of all five non-philosophers cited in her book is eight[3]. This number is significantly lower than the number of citations to Ronald Dworkin (thirty-three times), John Finnis (twenty-nine), H.L.A. Hart (twenty-two), Stephen Perry (sixteen), or Joseph Raz (sixty-one times), far and away the person Dickson cites most. A weighted count of citations in *Evaluation and Legal Theory* shows that more than ninety-eight percent of them are to analytic legal philosophers; and at least seventy-five percent of the citations are to people who have had an Oxford affiliation at some point in their lives.

[3] This includes a sociological text written by two writers and cited twice, which is counted as four citations. If counted only twice, the total number of citation to non-legal philosophers is six.

Two quotes, a book and an article, all from a single author, do not yet prove a point, but they are indicative of an attitude that can hardly be described as intellectually "broad". A wider perspective is provided by examining the jurisprudence syllabus available for Oxford students on the Oxford Law Faculty website. Here, presumably, one finds the works deemed most important for providing a balanced introduction to the entire field.

The syllabus I have, from the year 2015, contains one hundred and fifty three items. It is far more revealing than any single book. Using the same three categories used before, Table 3 collects the findings about the syllabus.

Table 3: Items in the syllabus of Oxford's undergraduate jurisprudence course

	Number of items	*Percentage*
Oxford affiliation	94	61%
Doctorate in philosophy	86	56%
Analytic legal philosophers	124	81%

Again, these figures underrepresent the reality. Once again, I used a Ph.D. in philosophy as a proxy for an in analytic philosophy, despite the fact that it excludes people like Hart and Dworkin, as well as Aquinas, David Hume, Jeremy Bentham, and John Stuart Mill. I was fairly restrictive in my characterization of writers as legal philosophers. It would not be preposterous to think of John Rawls, Robert Nozick, Judith Shklar, or Mill as legal philosophers with respect to some of their writings, but they were all excluded from this category. Even with such a conservative classification, only ten percent of the items were written by someone who does not fall into at least one of the three categories. In this category one finds pieces like Holmes's "Path of the Law" (1897) or Kornhauser's article "The Normativity of Law" (1999), which shows how little even these pieces stray outside the narrow boundaries of analytic legal philosophy[4].

Even within the domain of jurisprudence itself, works perceived to be insufficiently "analytic" are ignored. The legal realists' works – perhaps due to the misrepresentations of their views in Hart's *Concept of Law* (on which see Taylor 1972; Livingstone 1988: 156-66) – are still treated as some curious, and perhaps peculiarly American, phenomenon. While one is supposed to have close familiarity with the

[4] The latter piece is particularly interesting: Kornhauser is a legal economist who wrote important, well-known pieces on the influence of legal rules on private ordering and on decision-making in collegial courts (Mnookin & Kornhauser 1979; Kornhauser & Sager 1986). The latter piece has been widely discussed by philosophers writing on joint agency, but it is the only the work on the normativity of law that fits the narrow confines of analytic jurisprudence (as presently understood) that made the cut.

complete works of Hart and Raz, when it comes to the writings of Karl Llewellyn, Jerome Frank, or Felix Cohen, their ideas, if they are to be considered at all, are read through the eyes of others. It is notable that in the Oxford syllabus the realists' works are *never* read; rather they are filtered through someone else's presentation (someone who presumably puts them in a more respectable "analytic" form). Perhaps because their own works are not read, one still finds serious distortions of their views (Priel 2012a)[5].

The heavy focus on people who have had an affiliation with only one university and on analytic legal philosophy does not fit the claims that analytic jurisprudence (at Oxford) is a "broad church". In any other field that claims to provide knowledge, it would be considered statistically improbable that one university is responsible for more than half of all valuable knowledge. This intellectual isolationism is particularly notable given that it comes from scholars who are most insistent on the universality of the claims of analytic jurisprudence and to intellectual openness. With that, it must be just an odd coincidence that more than half of the ideas worth imparting to students come from scholars who passed through a single university, their own, with the *entire* academic world making up the rest[6].

What these data suggest is that Dickson's church metaphor was apt, although not quite for her reasons. Contemporary analytic jurisprudence is a high church, with Oxford as its Vatican. This church considers only a very narrow set of questions, using a very narrow set of methodologies, with answers coming from a very small band of individuals (who as Gilmore suggested decades ago, mostly passed through Oxford), as the right approach to jurisprudence. In this exclusive high church, different theoretical perspectives and other disciplines other than philosophy do not have much to contribute to, let alone challenge, the fundamental framing of the subject.

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[5] Gardner (2005: 332) provides a useful example. He speaks of Hart's «resistance to the Quinean reduction of the conceptual to the empirical, for which the comically self-styled "realists" of American law schools are the muscular henchmen. (Comical because, in Hart's Aristotelian perspective, American Legal Realism stands to reality much as the German Democratic Republic stands to democracy.)» No-one who has read the work of the best-known realists, Karl Llewellyn or Jerome Frank, would have attributed such views to them. Llewellyn (1950: 8) rejected «the contemporaneous polysyllabic professionalized academic discipline, applied to "law"». Instead, he opted for a «general serviceable life-wisdom about some body of material and its homely but basic meaning for life and for man». Frank (1950: 477-479) wrote enthusiastically about Aristotle, and compared him favorably to the legal pragmatists of his age. Both were also fierce critics of approaches we would today call "naturalistic", at least in the sense of seeing value in the application of natural science methods to law (Priel 2018: 467-468).

[6] It will not do to say, as some have suggested to me, that the over-representation of Oxford academics on the syllabus is due to the fact that it attracts scholars with a particular interest in certain questions which the syllabus there tends to focus on. To say this is to affirm precisely what Dickson has sought to deny, namely that there is a fundamental distinction, and no real connection, between analytic jurisprudence and other interdisciplinary approaches to the study of law.

Importantly, this is not just a claim about Dickson and fellow analytic legal philosophers' professional interests. In an era of specialization one might perhaps be forgiven for limiting one's research to a particular set of questions and methods, but the same cannot be said of a broad survey for students, especially if (to quote Dickson again), there is no basis for drawing meaningful distinctions on the basis of "alleged disciplinary credentials, and methods of inquiry". If the church of jurisprudence at Oxford is broad, why are so many theoretical approaches to law end up on its *Index liborum prohibitum* that its students never get to see?

The inescapable conclusion is that there may be many rooms in the broad church of jurisprudence; and by the looks of it there are doors connecting all of them, except for one. The room dedicated to philosophical jurisprudence is a chamber apart. And it is evidently the most important one, so important that students need hardly even hear about what happens in the others. Within that room, some space is reserved for a few heretical voices, but these voices are different in a very restrictive sense. All of them adhere to the methodology of analytic (legal) philosophy and use philosophical writings as their primary source; and almost all of them have passed through the Oxford crucible. Even these writers, it seems, are allowed in only as part of a moral tale on what happens when one strays from the rightful path[7]. Beyond this, works that do not fit the narrow criteria of analytic legal philosophy are not deemed to have anything valuable to contribute to our understanding of law in general.

3. A Naturalistic Alternative

> It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts. (Conan Doyle 2014: 105.)

How can this mismatch between a commitment to an approach that eschews disciplinary distinctions be reconciled with the reality just described? Dickson's own essay provides the answer. For in it she defends a view, very dominant among analytic legal philosophers these days, that presupposes a fundamental distinction

[7] This is almost the official role of Dworkin's work at Oxford, where, for daring to question parts of the catechism, the church suggested excommunication. Dickson herself (2001: 22-23) doubted Dworkin's credentials as an analytic philosopher. Gardner (2004: 173) denied him the title of "philosopher", reducing him to the rank of a mere "theoretically ambitious lawyer". Within the church it is hard to imagine a greater slight. (Gardner 2012: 184 tones down the language ever so slightly.) The year 2011, which marked the fiftieth anniversary of the publication of *The Concept of Law* (Hart 1961), was celebrated with a series of lectures on the book (later published in a book), as well as a new edition of Hart's book. The same year was also the twenty-fifth anniversary of *Law's Empire* (Dworkin 1986). That anniversary passed without mention.

between philosophy and other interdisciplinary approaches to the study of law. Dickson calls it a «staged inquiry» approach (Dickson 2015: 229). Dickson is not the first to defend such ideas on the basis of a fundamental distinction between a conceptual inquiry into the nature of law and a sociological (Raz 2009: 44-45, 103–104) or normative (Dickson 2001: 135-136) one.

This view assumes that knowing what "counts as" law has priority over studying it empirically or evaluating law's merits. Though intuitive, this approach suffers from serious problems (Priel 2010; 2019). I begin my response to it by showing how unusual is the idea of staged inquiry, where theory precedes empirical data. I then present a short survey of various interdisciplinary approaches that, despite claims to intellectual inclusiveness, end up being excluded from analytic jurisprudence. While I do not make any claim here to the "right" way of doing naturalistic jurisprudence, I aim to show that the issues and questions asked by these perspectives are often similar to the ones asked by analytic legal philosophers, only that they are addressed in a more empirically-informed way. If taken seriously, these suggestions lead to quite dramatic changes to jurisprudential practice. I follow this with two further suggestions: The first is that legal philosophers should take a greater interest in legal practice; the second is that a naturalistic approach recognizes that scholars themselves are human, not mere conduits of abstract ideas. This means that a naturalistic perspective should look at legal philosophers themselves, their backgrounds and information, as methodologically relevant information to the examination of the validity of their substantive conclusions.

3.1. *Theory after Practice*

In questioning naturalism in jurisprudence, Dickson has argued that the naturalistic stance amounts to abandoning the very possibility of theorizing about an important aspect of human life. In her words (Dickson 2011: 489), naturalism in jurisprudence implies we should

> abandon the idea that [jurisprudence] can ever come to any adequately supported conclusions about what law is actually like. This seems quite a startling conclusion – that theoretical inquiry regarding a familiar social institution having far-reaching effects on the lives of those living under it cannot yield knowledge of that social institution itself.

Two things immediately stand out. The first is the commitment, so fundamental to jurisprudence influenced by Hart, to engaging in the question "what law is actually like" along with the view, repeated no less frequently, that law is a social or cultural practice. Put any social or cultural practice (examples: marriage, courtesy, football) in the quoted passage and it will be immediately apparent just how odd

this juxtaposition is (Priel 2019, 2020): Not many subscribe today to the view that there is something that marriage is *actually* like; and yet it is assumed without argument that law is different. The second point is that even if there is an answer to this question, it is assumed but never explained why that it is the job of philosophers to find the answer to it with respect to law, but not any other practice.

Again, consider this question: Is there a way of identifying a single "concept" of what marriage is from the compound of different, and often conflicting attitudes to marriage. In addition to popular attitudes, there are sometimes also definitions adopted by some political body entrusted (by whom?) with determining the boundaries of the category. Thus, in the case of the marriage, there are legal definitions, although those differ among jurisdictions and are not always accepted by those subject to the law. Even if one were to try to distill a single concept out of all this, the division of labor between the philosopher and the sociologist would *not* be that the philosopher discovers that pre-sociological nature and the sociologist finds the different attitudes people have with respect to this category. Nor is it going to be to that the sociologist gathers the data and the philosopher then "theorizes" it. If there is a philosophical puzzle here it is whether, and if so how, one can speak of a single concept when all we have are different, possibly conflicting, attitudes of different people. This question too is unlikely going to be answered without empirical input.

Much of the "what law actually is" enterprise rejects this view. The dominant view insists that the answer to this question does not depend on people's views on the matter, but on a priori philosophy (Green 2012, 2016; Marmor 2013: 213; *cf.* Endicott 1997). Dickson's staged inquiry is an affirmation of this, as is her astonishing suggestion in the words quoted in the beginning of this section that naturalistic philosophy undermines the very possibility of theorizing about law. Implicit in this claim is the dismissal of one of the most familiar methods of theorizing phenomena in the world (of which, presumably, law is one), namely by empirically investigating them and generating a theory from the data.

Here is one concrete example. Neuroscientist V.S. Ramachandran was intrigued by the phenomenon of synesthesia. By his own description, he began with an interest in «show[ing] that synesthesia is real», by describing more precisely the ways in which it was manifested in different people. Only then, and on the basis of these empirical findings, he was hoping «to propose a theory of exactly what is going on in [synesthetes'] brain» (2011: 76). He also thought that "as an additional bonus" he could use his ideas to explain the problem of qualia, the subjective feel that conscious experience has (the redness feel of a red shirt, the sweet feel of sugar). Ramachandran thus suggested that even this longstanding philosophical puzzle, the so-called "hard problem" of consciousness, was to be tackled not by a priori reflection, but by theorizing on the basis of empirical data. As he further explained, «[t]his is the way science works: Begin with simple, clearly formulated, tractable questions that can paved the way for eventually answering the Big Questions, such

as "What are qualia", "What is the self", and even "What is consciousness?"» (2011: 115; Ramachandran & Hubbard 2006).

The attitude reflected by this dominant attitude in jurisprudence is not just that it assumes that "theorizing" law is fundamentally different from theorizing other empirical phenomena in the world. It is also how isolated legal philosophy is from very dominant views in the discipline under whose banner legal philosophers claim to march. If, for example, philosophers of mind had taken the same stance as the dominant view to jurisprudence, they would have called for a "staged inquiry" on a whole range of concepts and problems, insisting that they must first determine what mind, consciousness, or memory are, handing over their conclusions to scientists to work with. If the staged-inquiry view implies the rejection of naturalistic jurisprudence, we have to conclude that the scientific (naturalistic) study of the mind, which seems to flourish without waiting for philosophers telling us first what a mind actually is, implies a denial of the very possibility of theorizing about the mind. While views such as this have not completely disappeared (e.g., Hacker 2015, coincidentally or not, based in Oxford, and one of Hart's former students), it is very much the minority in the field. Many works in philosophy of mind these days *build on* works in evolutionary biology, cognitive psychology, developmental psychology, neuroscience, computer science, and more. If a naturalistic approach to the study of the mind does not undermine the possibility of theorizing, one is entitled to ask why Dickson thinks that law is different.

The same is true of examples closer to the study of law. Economic depressions are a social construction, and the same methods used to study and theorize about them, as well as their potential social effects (e.g., on crime, or for the rise of extreme political parties), can be used for theorizing law. Philosophers, including philosophers of economics, do not consider the question what a recession "actually is," or whether a recession and economic depression belong to different ontological categories. That they do not do so does not mean that theorizing these phenomena is impossible. That they do so on the basis of a naturalistic approach does not require them to doubt that the economy is a "social institution having far-reaching effects on the lives of those living under it".

If there is a difference between the study of synesthesia and economic depressions it is that the latter are probably more multifaceted and complex, which is why if one were trying to study what "recessions actually are like", in all likelihood they would encounter the question "what do you mean by this?" (*cf.* Howarth 2000). One can plausibly say that a recession "actually is" many things, not just because there are different kinds of recession, but because it is plausible to disagree about what a recession "actually is about." A microeconomist, a macroeconomist, a political scientist, and a sociologist may have different answers to this question. None of them, however, turn to philosophers to theorize the topic for them first.

Perhaps law *is* different, but this view is not without its costs (Priel 2019), be-

cause it implies that law is a kind of sui generis phenomenon that is hard reconcile with the idea that law is just another "social institution". My methodological point is that because of the isolationist attitude in jurisprudence, there is no recognition of the existence of robust challenges to them outside the narrow confines of analytic jurisprudence. While it is possible that legal philosophers are right and everyone else is wrong, greater openness and awareness even just to other areas of philosophy, would have made it apparent that there are challenges to the staged-inquiry view that need to be answered.

3.2. *Taking Real Interest in Empirical Work on Law*

The naturalistic approach, as conceived of here, assumes there is no good answer to these challenges. It therefore rejects the staged-inquiry approach. This implies that legal philosophers cannot simply say, "ours is one approach among many, albeit one that by its nature need not take much interest in other perspectives". The challenge to this view is precisely that for work in analytic jurisprudence to have any value it must *incorporate* these other perspectives. The aim of this section is to illustrate this claim by showing several ways by which answers to jurisprudential questions could be enriched by engagement with other disciplines.

That such a change is necessary may be bolstered by the fact that any fair-minded assessment of developments in legal theory (broadly conceived) in the last few decades will conclude that contributions by analytic legal philosophers have not been the most notable. Rather, there is a perception, shared by legal philosophers themselves, that their subject now has a «navel-gazing tendency» (Dickson 2004: 117) to engage in «hair-splitting arguments» (Marmor 2011: 95). Opening up to other perspectives may be a way of moving forward.

Economics. Like it or not, economic analysis of law has been the most influential, and arguably the most innovative, *jurisprudential* development of the last fifty years in the English-speaking world. That economics is not classified as part of philosophy (and by implication not part of jurisprudence) is simply the result of academic disciplinary divisions, not of subject matter. Much of economics is an elaboration of a particular moral and political theories. This is why Adam Smith and Jeremy Bentham, who worked before the disciplinary split, are treated as significant figures in both areas. It is true that disciplinary splits often lead to substantive and methodological differences that make cross-disciplinary conversation difficult. But the fact that economics is now treated as a separate subject from moral and political philosophy does not alter the fact that its fundamental questions are the same as those of moral and political philosophers. The point of all this is to say that if moral and political philosophy are deemed relevant for jurisprudence, there is no basis for treating economics differently.

Interestingly, the origins of law and economics are quite old and in part can be

traced to Jeremy Bentham (Posner 1998). Mentioning Bentham in this context is valuable because the way his ideas have been used in contemporary analytic jurisprudence is a good illustration of the narrowness of its focus. Bentham is hailed as a seminal figure in legal philosophy, and yet of his enormous corpus only a tiny fraction, quite literally a few pages that supposedly show him to be a legal positivist[8], is deemed worthy of attention. Everything else Bentham wrote about law, staggering in both quantity and range, but which does not fit jurisprudence properly so called, is ignored.

Returning to our times, economic analysis of law has had considerable influence on academic thinking about law, and yet it has no trace in Dickson's writings (or, for that matter, in the Oxford jurisprudence syllabus). To be sure, the impact of economics on law has been particularly dominant in the United States, but it is now spreading to other countries. It is also undergoing modifications, with a much greater emphasis, like in economics more generally, on empirical studies. In any event, to say that there is no point in discussing these ideas in a university in the UK, because these ideas have not had much impact there, is inevitably to concede that jurisprudential ideas are local. So it must be something else.

The foundations of economics, and economic analysis of law, are broadly consequentialist. In today's divide in the legal academy a "philosophical" approach is almost invariably non-consequentialist and thus placed in opposition to economic approaches. But despite repeated denunciations, consequentialism and utilitarianism remain live philosophical options, and their defenders have written about their relevance to the public domain, even if they should not be considered the basis for interpersonal morality (Kaplow 2007; Goodin 1995). The same is also true of cognate approaches like game theory, rational choice, evolutionary models of social action, and others. These ideas may be relevant to discussions of authority, normativity, legal change, and others. When considering these approaches and perspectives, contemporary analytic legal philosophy once again stands out in comparison to other areas of philosophy, and not in a good way. The same isolationist attitude of legal philosophers one sees in relation to "legal theory" (broadly conceived) is repeated in relation to ideas that figure prominently in contemporary analytic *political* philosophy.

Law and Politics. The twentieth century has seen a significant expansion of the role of the state, and a corresponding expansion in public law. The latter now far surpasses private law in volume and significance. The use of law in this way has eroded the boundaries between law and politics. You will not know this from reading the writings of analytic legal philosophers, either when writing on law in general or when writing on substantive areas of law. There, it is still contract, tort, prop-

[8] Even that tiny bit is based, as Schofield (2003; 2010) has shown, on a misreading of Bentham's work.

erty, and criminal law that more-or-less make up the whole of the law, reflecting (roughly) the state of the law around the middle of the eighteenth century[9]. An aspect of this is the focus on the relationship between law and morality, a relationship that superficially fits better these areas of law, and the almost complete neglect of the vast literature discussing the relationship between law and politics.

To give just one example of its potential relevance to core jurisprudential questions, the literature on law and politics strongly suggests that Hart's account of adjudication in terms of linguistic core and penumbra, with the core dominated exclusively by linguistic meaning, is a poor fit to reality. Hart himself (1983: 5-6, 7-8) acknowledged as much. And yet Hart's views are still taught, and even in broad terms defended (Marmor 2011: ch. 6), without any serious acknowledgement of the impact of politics. Beyond the fact that it is attention to the connection between law and politics that (in different ways, in different places) affects legal interpretation, it also undermines the search for the boundaries of law. Concern with this question is sometimes justified for its potential practical relevance (Green 1994: 208; Shapiro 2011: 25). But this idea loses all its force if the different ways law and politics interact in different jurisdictions (as they arguably do: Priel 2013a) imply that the boundaries of law are similarly different for different jurisdictions.

Another missing area is *comparative law*, or at least *comparative jurisprudence*. The assumption is that law is, for all its apparent differences, a unitary phenomenon, that it has *a* (singular) nature that legal philosophers are trying to explicate. It is assumed that deep down all law has a single nature to be captured by a single account (law as a union of primary and secondary rules, law as a plan). This assumption, which in most work in analytic jurisprudence is simply taken for granted, has been challenged by legal theorists who have engaged in comparative work (Atiyah & Summers 1987: 411-420; Ewald 1998; Priel 2013a, 2017). This point is particularly relevant to discussions within comparative-law literature about the significance of legal culture. It is remarkable that legal philosophers these days insist that «law is a cultural product *par excellence*» (Marmor 2005: 78), that it is a «social construction» (Green 2012b), and yet have nothing to say about this cultural aspect. Consider just how odd it would be to have an account of fashion that insisted that fashion was a social construction and a cultural product but then had nothing to say about the influence of culture on it, but obsessed over the question of boundary ("is street fashion *really* fashion?") and insisted that such questions had a definite, a priori answer. Once again, if we acknowledge the possibility that certain things would "count as" fashion in certain times and places but not in others, an argument is needed

[9] Criminal law is the most obviously public of these "common-law" areas of law. Yet even here, the state has been conspicuously absent in legal philosophers' writings, who treat the subject as applied interpersonal morality. For evidence and critique of this approach see Thorburn (2011) and Chiao (2018).

to explain why the same is not true of other cultural products. At a minimum, the claim that there is no real divide between legal philosophy and other approaches is hard to square with the lack of interest in the cultural aspects of law, which would be revealed by the work of comparative lawyers and historians, not philosophers.

Ignoring these contingent cultural aspects of law also leads to ignoring certain "philosophical" questions. Even assuming that deep down all law has one nature, what role does culture play in it? Indeed, *if* law has one nature, how do its cultural (contingent, local) aspects interact with its universal aspect? Is the universality of the nature of law just a fact, maybe a coincidence? Or is there something deeper about law that guarantees that it will have but a single nature? If such a thing exists, would not *that* feature be an obvious subject of study? If there is no such thing, what is the basis for the assumption that law has a single nature? All these questions are potentially challenging to the whole field of analytic jurisprudence as currently understood. By defining comparative law out of bounds, they can be ignored.

A close subject which by and large is completely absent from analytic jurisprudence is *legal history*, despite its potential for showing how different is the contemporary understanding of law from what it used to be in the past. Similarly, the history of jurisprudence is ignored, despite its relevance for contemporary jurisprudential debates (Barzun & Priel 2015; Postema 2015: 884-893). Legal history, like comparative law, provides a host of examples of law, in ways that can challenge all kinds of universalist claims about law, and cast doubt on the search for a timeless nature of law (Tamanaha 2017). Greater attention to the history of jurisprudence also weakens the image, still popular (e.g., Duarte d'Almeida 2015: 707; although see Priel 2020), of legal philosophy as a kind of progressive science.

In this sense legal history is a source of factual information, more data to help construct better theories of law. But attention to history is not limited to factual information or to the critique of universalistic claims. Time and history are significant for theoretical analyses of law. This may seem surprising, because history and naturalistic jurisprudence may not look like obvious allies. Philosophical naturalism often seeks to model itself on scientific methodology, which is generally impervious to history, including its own (Priel 2012b: 279). But much of science, including some of the natural sciences, is thoroughly embedded in time. Perhaps the most obvious example is biology. As Dobzhansky (1973) put it, in what has since become something of a slogan among evolutionary biologists, «nothing in biology makes sense except in the light of evolution». Even if not taken literally, it captures an important truth. One sentence in Dobzhansky's essay is especially pertinent to the present discussion: «Without [the] light [of evolution, biology] becomes a pile of sundry facts – some of them interesting or curious but making no meaningful picture as a whole» (1973: 129). This remark is significant, because it provides a fundamental challenge to the dominant (anti-naturalistic) view of jurisprudence that assumes that without

identifying a timeless nature we can make no sense of the law[10]. Evolutionary theory shows that the essentialist a priori approach is not the only way of generating order. Another way of doing so is by investigating the history of phenomena.

One may think that these ideas are not easily transferable to human affairs and that they are not particularly related to legal history. But evolutionary ideas have been used in this context as well. There is work in economics and political science that shows the importance of path dependence to the shape of many aspects of our life take, including – of greatest relevance to jurisprudence – to social, political, and legal institutions (e.g., Pierson 2004; Gillette 2000). This work often blends theoretical models with historical narrative.

To give just one example that is particularly relevant to jurisprudence, consider the question of law's authority. This question is one of the holy grails of jurisprudence, and in line with the essentialist ideology of analytic jurisprudence it is usually assumed that there is just one correct answer to it. But just as natural history shows that some organs (most famously, vision organs) have evolved independently more than once, and that these different organs reflect different solutions to the same problem, it is possible that law and legal authority evolved more than once on the basis of different ideas of authority (Priel 2020).

History is also important to the way we classify things, especially artifacts (Bloom 1996). Given current jurisprudential obsession with classification and concepts, it is again a mark of the isolationist attitude in jurisprudence that its practitioners have largely ignored psychologists' work on concepts. To see the potential relevance of such work, consider the question that troubled some legal philosophers interested in discovering the "nature" of law. After concluding their accounts, theorists offering more "positivistic" answers have discovered that their accounts are over-inclusive, in that they have a hard time distinguishing "real" law from other institutional sets of rules, such as rules of clubs, religious organizations, or education institutions. Some (e.g, Raz 1990: 150-54; Shapiro 2011: 218-24) have attempted to add further limiting conditions to their account to distinguish the genuine article from the fakes. These solutions are invariably ad hoc, and easily challenged with counterexamples. The reason they are sought is because in the essentialist view it is assumed that there must be some *real* difference between the two, one that explains why we call one set of institutional rules "law" but not others. An empirically informed view of concepts, one that recognizes that concepts and classifications are often a matter of history rather than a different nature, would show this enterprise of distinguishing law from these other categories as not just pointless, but probably

[10] It is the view captured in Dickson's words mentioned above about the contradiction between naturalism and theorizing about law. It is the view also reflected in Gardner's (2012: 279) remark that «[i]f law is not a valid classification, then nor is Cheyenne law, international law, Scots law, shari'a law, or Roman law».

misconceived. A linguistic category may exist due to an accident of history, or perhaps one that serves certain practical purposes, even if it does not correspond to any "real" categorical distinction. Why do classify the rules issued by a state as *laws* but do not normally include the rules of a university within this category? Convenience, accidents of history, and linguistic path dependence, are a perfectly good answers.

This work on the historical aspect of concepts and categorical classification is a good lead to a more general discussion of *psychology*, perhaps the most obvious area of potential interest for legal philosophers (*cf.* Priel 2011). Following Hart, it is now standard practice to say that legal philosophy must analyze legal practice from the "internal point of view". What Hart meant by this is not entirely clear, because he used the term in somewhat different senses. One of them was his insistence that attitudes are essential for an adequate explanation of human action, and that an account of norm-governed behavior that limited itself to observed behavior will not do.

This idea, although sometimes treated as a major contribution, is just an application of very familiar ideas from other branches of the philosophy (especially the philosophy of social explanation and history). These ideas were quite familiar by the time Hart invoked them (as shown in Priel 2020). Sixty years on, this attitude is still very much with us. Marmor (2013: 227) wrote that «[i]t is difficult, if not impossible, to explain anything in the social realm without invoking people's beliefs (and attitudes shaped by those beliefs, etc.)». This statement is quite clearly false[11], but if one really accepts it, it seems odd not to take any interest in the field dedicated to the study of beliefs.

If there is resistance to turning to psychology, it may be because Hart used the internal point of view in another sense. As Hart later acknowledged, he was alluding here to a hermeneutic approach to the explanation of action, one that historically has been hostile to the application of scientific methods to the study of human affairs.

This attitude was very deeply ingrained at Oxford of Hart's days (on skepticism in Oxford toward psychology see Collins 2012: 203; toward sociology see Halsley 2004: 102; toward political science see Hayward 1991: 93-95). Given the state of the social sciences in the 1950s, such views might have been defensible then. Specifically with respect to psychology, still in the throes of behaviorism, Hart and his contemporaries' skepticism is understandable.

What is now known as "the cognitive revolution" was premised on the idea that people's cognition is not a black box, and that mental processes that can be the subject of scientific study. Starting in the late 1950s, its impact on psychology has been

[11] Large chunks of economics and sociology are premised on the idea that one can explain quite a lot about the "social realm" without invoking people's beliefs. Here is one example, out of hundreds: crime tends to increase with inequality.

profound, and it has also deeply influenced the philosophy of mind as well. These new ideas then migrated to other social sciences, eventually making it to legal scholarship as well. But not to legal philosophy, which still largely operates with a model for the explanation of action based on reasons for action as a rational response to what one finds in the world. Much of the best-known work in cognitive psychology in the last half-century has been dedicated to showing that human action is often driven by unconscious motivations that are sometimes not fully apparent to the humans they motivate. Specifically, people may consciously think they are acting for certain reasons, when they in fact may be acting for others (Wilson 2002; Eagleman 2011).

It is interesting to compare the reaction of economists and legal philosophers to the potential challenge that these and other psychological insights have brought to their methodological assumptions. Economists too used an empirically false account of human action. When psychologists began challenging it, there was initially considerable resistance to implementing their ideas into economic models. With time, however, "behavioral" ideas became part of mainstream economics. (Economic analysis of law incorporated many of these behavioral insights as well.) By contrast, legal philosophers have barely acknowledged the existence of this literature or addressed its potential challenges to the underlying model of human behavior found in much jurisprudential work. Despite legal philosophers' commitment to the importance of the internal point of view, when reading contemporary works in analytic jurisprudence, it is as if the cognitive revolution never happened[12].

One way in which these studies may be relevant to legal philosophers is in explaining the role of law in practical reasoning. Within jurisprudence, the question is analyzed in terms of legal rules as reasons for action. As such, legal rules are said to be weighed against, exclude, or amplify other reasons. But if these possibilities rest on an implausible account of human psychology, they may not adequately explain the ways law influences human action. For example, in an attempt to provide an account of adjudication, Raz conceded (2009: 181) that his account was based on the «accepted theory of the practice rather than the practice itself». While analyzing the theory of the practice is a valuable subject of study, it has obvious limitations. As Raz himself noted, to see whether the account he offered actually matched reality would require an empirical study «going well beyond the examination of the law reports». But such empirically-informed work is not a different topic, one that could be easily separated from an empirical "sociological" study, because what the theory of the practice is, is itself an empirical question, influenced by the practice itself.

[12] Mikhail (2007: 750–5) criticized Hart for ignoring these developments when they were beginning to take shape in the 1960s. What are we to say about the fact that they are ignored more than half a century later?

3.3. Taking Real Interest in the Practice

So far I have suggested that legal philosophers should look beyond philosophy books for insights on law. Now I make a more radical suggestion: that legal philosophers should look more seriously at legal practice. Ironically, legal philosophers could learn *that* by greater awareness of the work of other philosophers. To anyone who turns to the work of philosophers of science after reading legal philosophy, one of the immediately noticeable differences is just how deeply engaged these philosophers are in the scientific questions they discuss. To be a philosopher of science today does not mean abstract ruminations on "what is science?", but requires being able to understand the actual questions and debates that scientists engage in. In the works of philosophers of science, it is not uncommon to find detailed descriptions of experiments, mathematical or chemical formulas, verbal descriptions or visual depictions of scientific models. Close engagement with the subject does not make one a philosophical sell-out (or, at best, a theoretically ambitious scientist), but marks one as a serious scholar.

The jurisprudential equivalent of this would be detailed engagement with the way lawyers construct their arguments or the ways they organize their subject-matter. Of course, works of this sort exist: MacCormick's *Legal Reasoning and Legal Theory* (1978) is a well-known example, but one also notable for not having a significant follow-up. On the contrary, later writers have seemingly repudiated its premise that legal philosophy has much to say on these questions. For if MacCormick has sought to show the connection between jurisprudence and legal practice, the new message is that this is not really philosophy. I mentioned already the chastisement directed at Dworkin for daring to engage with legal practice. As a result, one of the aspects of law that possibly makes it unique in comparison to other social practices, and as such presumably precisely the aspect of law that should be of most interest for legal philosophers, is largely ignored.

One possible reason why this topic has been sidelined is because it is quite evident that modes of argumentation differ from one legal system to another, and as such do not fit the stricture of limiting legal philosophy to the essential and universal. MacCormick was indeed careful to dispel any perception that he discovered «necessary truths about legal reasoning everywhere» (1978: 8). By today's restrictive standards, that would render his study out of bounds. Again, the comparison with philosophy of science is revealing. A lot of work by philosophers of science focuses on the differences in modes of reasoning, methods of investigation, and practices among the different sciences. Models of science that work well for theoretical physics may not necessarily be equally successful for accounting for organic chemistry, and those may be different from what one finds in population biology or macroeconomics. By the same token, not everything about the methods of legal analysis that

explains German law well may be true of English law. Perhaps more intriguingly, not everything true of English law may be true of American law (*cf.* Priel 2017). This does not mean this work should not be of interest to legal philosophers.

3.4. *Legal Philosophers Are Part of the Inquiry*

Following the discovery that science is done by humans and not by truths-generating machines, some philosophers of science have argued that this fact may have some relevance to the core questions of philosophy of science (e.g., Hull 1988)[13]. If scientists are a proper subject of sociological study, and if the actual process of scientific discovery of interest to philosophers of science, then, once again, why are legal scholars or even legal philosophers any different? The kind of problem that a sociological study of science is concerned with is very similar to the one that potentially afflicts legal philosophy. The problem, in brief, is explaining how humans with all their foibles, biases, and limitations, can reach objectively true answers. This is not just a sociological question, but a philosophical one as well.

As mentioned, legal philosophers similarly seek to discover «what law is actually like» (Dickson 2011: 489), or what «counts as» law (Green 2016: 179). And they insist that they are after truths, even timeless truths, about these matters (Marmor 2011: 118). Given these aspirations, similar to those of many scientists, it is fair to ask whether they have reliable methods for doing that. One reason for doubts appears in John Stuart Mill's description of an aspect of the work of Bentham. According to Mill (1969: 102, referring to Bentham 1988: 28) lawyers treat concepts like private property or felony, «words without a vestige of meaning when detached from the history of English institutions», words whose meanings are «mere tide-marks to point out the line which the sea and the shore, in their secular struggles, had adjusted as their mutual boundary» as reflecting «distinctions inherent in the nature of things». In less colorful terms, the charge is that lawyers confuse the familiar with the essential. Precisely because the discovery of essential truths and universal boundaries is the proclaimed aim of legal philosophy, its practitioners face the same problem.

The remarkable achievements of science at increasing our knowledge of the world are the result of the incorporation and refinement over the centuries of certain methods designed to guarantee the reliability of its results, as well as an attitude of doubt toward the familiar, commonsensical, and even the (seemingly) self-evident. There is plenty of evidence that these methods are not infallible, but they have an impressive track record. Jurisprudence cannot claim for itself a sim-

[13] The sociological study of science has been subjected to some very well deserved scorn. But recognizing that scientists are human is potentially highly relevant for the study of scientific method. Kitcher (1998) offers a balanced view from a naturalistic perspective.

ilar record, in part because it is based on accepting the familiar. All we have are repeated assurances that legal philosophers are not studying local, shifting words meanings but are looking for (and somehow finding) what law actually is, the real category. For reasons offered elsewhere, I doubt that what they claim to be finding even exists; but assuming it does, it is necessary to ask for the basis for philosophers' confidence that their methods give them access to these real categories. Because a naturalistic approach to jurisprudence does not think of (legal) philosophers as disembodied minds, but as situated humans, it notes that the problem Bentham and Mill attributed to lawyers potentially afflicts legal philosophers as well. The less one knows about law in the past or in different jurisdictions, the easier it is to think of familiar features of contemporary Western law as «self-evident truisms» (Shapiro 2011: 15-16; but see Tamanaha 2011).

There is thus no reason to question the value of this "sociological" study of legal philosophy, as it is relevant to familiar methodological and epistemological problems. The methodological problem of discovering jurisprudential truths makes it an obvious subject for a naturalistic study of jurisprudence, just as analogous studies have proven valuable for a naturalistic philosophy of science. And the comparison to science poses a serious, potentially devastating, challenge to the entire enterprise of identifying what "counts as" law, *even if such a question has an answer*. To put it simply, legal philosophers have not shown that they have any reliable means for performing this task. Even worse, it is rarely even acknowledged that there might be a problem.

It is true, as Coleman (2002: 350) has said, that the «track record» of the social sciences is weaker than that of the natural sciences, but it is not clear why (as he also argued) this weakens the case for naturalizing jurisprudence in comparison with other areas of philosophy. If this is meant to suggest that the sociological study of law struggles with the same problems of attaining truths, this is true. However, the right comparison is not between the natural sciences and the social sciences, but between the social sciences and analytic jurisprudence. And by that measure, the track record of legal philosophy in answering the question "what is X?" is worse[14].

Given the diversity of legal phenomena and the potentially different attitudes toward it that people of different backgrounds may have (attitudes that may be constitutive of what law is for anyone who thinks that the "internal point of view" matters), the question of the diversity of those who largely rely on introspection for discovering timeless truths about law is clearly pertinent. Here is Dickson's (2011:

[14] Coleman (2002: 350) also conflates naturalism with the idea that a reductive (fine-grained, individualistic) micro-explanation is superior to a more holistic (coarse-grained, social) macro-explanation. But the two are not the same. Many naturalistic philosophers defended the value of macro-explanation (e.g., Jackson & Pettit 1990).

491) response to the charge that Oxford legal philosophers are not a representative sample of society:

> [S]urely this cannot be a contemporary cause of Oxford legal philosophers' intuitions being so allegedly unrepresentative and unreliable? Speaking anecdotally, and based admittedly on only those facts I am aware of regarding colleagues and friends, I detect more variety than homogeneity in the respective social backgrounds of my Oxford legal philosophical colleagues[15].

If the search for what "law actually is" is the search for something that is independent of culture and society, then presumably the diversity of Oxford legal philosophers would not matter. Every human, regardless of his or her background will learn the way of accessing categorical reality after a few years of training at the right university. If, however, law, like all other social practices, is a cultural product, then the scholar should be on alert for the possibility that her perspective may be limited and unrepresentative. Dickson's remarks suggest she thinks that lack of diversity in perspective can lead to an inaccurate theory of law. Her response is not that such concerns are irrelevant, but that the diversity among Oxford legal philosophers is sufficient to address the concern. That, however, is an empirical claim. How plausible is it? A recent article suggested that many of the findings of experimental psychology are suspect if they are thought to tell us about human nature, because they are based on studies conducted on people who are "WEIRD": Western, Educated, Industrialized, Rich, and Democratic (Henrich et al. 2010; also Arnett 2008; of particular relevance for philosophers are Stich 2010). The same point, only much more so, applies to Dickson's response. How many of the Oxford legal philosophers grew up in a developing country? How many grew up in a non-democratic regime? How many of them grew up poor? How many of them have a criminal record? How many spent time in prison? How many of them are high school dropouts? (Probably none.) How many have a university degree? (Undoubtedly all.) What percentage of them are Muslim? What percentage are Chinese or Indian (together more than a third of the world's population)? Are half of them women? How many of them are conservatives? Do the percentages of all those reflective of the general population in Britain? In the world? Even more narrowly, how many of them practiced law? How many have a civil law background?

No general survey of the matter has been conducted, but we do have some empirical data that can help us examine Dickson's hypothesis, and it yields some troubling findings. For we may think of the *scholarship* of legal philosophers as an

[15] Dennett (2013: 53-54) warned against the use of the "surely" as a rhetorical device that hides the absence of an argument in support of a questionable assertion. This passage is no exception. (Hart, incidentally, was a notorious abuser of this adverb-as-argument technique.)

anecdotal survey on views about the nature of law, and though a tiny and highly unrepresentative sample of the population, its findings are revealing. However unrepresentative are legal philosophers of the general population, the scholarship of legal philosophers, even just at Oxford, shows considerable divergence of views on the nature of law even among this small group. The tiny sample of legal philosophers also suggests that the distribution of views on legal philosophy is not entirely random. For example, there seems to be a correlation between one's degree of religiosity and one's acceptance of some version of natural law theory. (I fully acknowledge that this is an empirical speculation based on very anecdotal data which may turn out to be false.) If this is correlation is indeed true, what can explain it? That a legal theorist's personal beliefs on matters that are separate from law affect his or her views about the nature of law has potentially very serious implications on the reliability of any claims to jurisprudential truth made by a legal philosopher.

It seems that the only alternative explanation on offer is that divergent views about law among legal philosophers is due to the fact that some understandings of law are «confused, mistaken, insufficiently focussed or vague» (Dickson 2011: 494). Dickson used these words when referring to lay people who may use the law but fail to have a clear understanding of what it is they are using. But given the deep disagreements among, say, Raz, Finnis, and Dworkin about "what law is", and as no other explanation for these long, persistent disagreements is on offer, we must conclude that the same must be true for at least two of them. And these are just the differences among three Oxford-based legal philosophers. Such problems are everywhere. In the standard story that considers jurisprudence as concerned with timeless truths it is just a wild coincidence that ideas we now identify as "positivist" began to emerge in Europe around the time as the emergence of the modern state; it is equally just a coincidence that Kelsen's ideas remain far more widely discussed in civil-law jurisdictions than in common-law jurisdictions.

These examples cast doubt on philosophical method as a reliable means for discovering timeless truths. A naturalistic approach to jurisprudence considers them as not merely "external" questions about the sociology of jurisprudence, possibly interesting in a gossipy kind of way but out of bounds when it comes to the pure science of jurisprudence. It sees them as serious puzzles, and potential challenges, to the current orientation of the subject.

3.5. With New Approaches Come New Problems

> The sort of people who believe that the important thing is to police the boundaries of law – who think it rewarding to ask whether the "law" applied at the Nuremberg trials of the Nazi war criminals was "really" law […] will come to seem as irrelevant to the theory and practice of law as the lesser medieval canonists whom they resemble. (Posner 1995: 79-80.)

Indeed. The question, then, for legal philosophy is whether it is doomed to irrelevance by continuing to deal with such pointless questions. My suggestion, here and elsewhere, has been that the way to avoid them is by opening up to new ideas. In this essay, I hope to have shown, at a minimum, that the disconnect between much of contemporary legal philosophy and other approaches to the study of law is real. It is a different question whether the isolationist attitude can be defended. I have attempted to show how work from other disciplines is relevant, and often challenging, to jurisprudential works of a more consciously philosophical outlook.

The alternative broached here is not without its own methodological difficulties. I will mention two. The first is the "jurisprudential bazaar" problem, namely the danger that without some kind of order, jurisprudence will end up as nothing more than a huge pile of facts about law (on this problem see Priel 2013b). The second problem is the "what's left?" problem. After legal philosophers have opened up to all other disciplines and incorporated their information and ideas, it may be doubted that there is anything left for them to do. These are not problems I can take up here in any detail. My brief response is that the two problems are related: against the mass of information coming from other disciplines, there is still a job of thinking and showing how it hangs together, and this is the task assigned to general jurisprudence. What exactly this means is something I have attempt to explain elsewhere (Priel unpublished).

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