

BOOK REVIEW

METHODOLOGY AND INNOVATION IN JURISPRUDENCE

Elucidating Law

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Jurisprudence aims to identify and explain important features of law. To accomplish this task, what method should one employ? Elucidating Law, a tour de force in “the philosophy of legal philosophy,” develops an instructive account of how philosophers “elucidate law,” which in turn elucidates jurisprudence’s own aims and methods. This Review introduces the book, with emphasis on its discussion of methodology.

Next, the Review proposes complementing methodological clarification with methodological innovation. Jurisprudence should ask some timeless questions, but its methods need not stagnate. Consider that jurisprudence has a long tradition of asserting claims about how “we” understand the law—in which “we” might refer to all people, citizens of a jurisdiction, ordinary people, legal experts, or legal officials. There are now rich empirical literatures that bear on these claims, and methods from “experimental jurisprudence” and related disciplines can assess untested assertions. Today’s jurisprudence can achieve greater rigor by complementing traditional methods with empirical ones.

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INTRODUCTION

To produce knowledge, scholars employ procedures or methods. This is true of any field, including legal philosophy. To investigate the nature of good government, Aristotle began by collecting a sample of constitutions of 158 Greek city-states.¹ To elucidate causation in ordinary life and law, H.L.A. Hart and Tony Honoré marshaled dozens of intuitive, ordinary examples and common law case studies.² Ronald Dworkin tested (and rejected) the theory that law depends only on matters of plain historical fact by providing “sample cases” that seem to be “counterexamples” to that view.³ In a philosophical defense of racial integration as an imperative of justice, Elizabeth Anderson analyzed empirical studies of racial segregation and inequality in the United States, both to test ideal theories of justice and to help generate new conceptions of justice.⁴

1. See Raphael Sealey, *A History of the Greek City States, 700–338 B.C.*, at 4 (1976).

2. See H.L.A. Hart & Tony Honoré, *Causation in the Law* 130–430 (1985). Some have criticized Hart and Honoré’s intuitive methodology. See, e.g., Jane Stapleton, *Law, Causation and Common Sense*, 8 *Oxford J. Legal Stud.* 111, 124 (1988) (reviewing Hart & Honoré, *supra*) (“Bald assertions of what the ordinary person recognizes as causal connection are also objectionable in theory. [Hart & Honoré] do not provide a discussion of the work of social psychologists who have attempted to examine empirically the attribution of causal connection by ordinary people.”).

3. Ronald Dworkin, *Law’s Empire* 31 (1986).

4. Elizabeth Anderson, *The Imperative of Integration* 6–7, 21 (2010) (“In nonideal theory, ideals embody imagined solutions to identified problems in a society. They function as *hypotheses*, to be tested in experience. . . . Reflection on our experience can give rise to new conceptions of successful conduct.”).

Systematically generating knowledge as part of a discipline requires cultivating robust and rigorous methodologies. If questions are the seeds of a successful discipline, methods are its sustenance. Legal philosophy can grow by asking new questions—and much of modern legal philosophy’s excitement stems from its diversifying questions.⁵ But disciplines also flourish with methodological clarification and innovation. This Review explores that methodological possibility for legal philosophy.⁶

This Review begins with Professor Julie Dickson’s *Elucidating Law*, a careful, thoughtful, and exciting contribution to legal philosophy.⁷ Following the book,⁸ this Review uses “legal philosophy,” “philosophy of law,” and “jurisprudence” interchangeably. *Elucidating Law* considers fundamental questions, including: What are legal philosophy’s goals, and with what methods should legal philosophers address the discipline’s questions?⁹ More broadly, the book sketches a modern vision of legal philosophy and its future. Philosophy of law is not dead, and Dickson helpfully clarifies the work that remains and how to do it.

The Review’s Part I summarizes some of *Elucidating Law*’s central ideas. Part II highlights the book’s emphasis on how a legal system’s participants understand law and the relationship between that understanding and legal-philosophical methodology. Part III takes inspiration from the book’s call for innovation in legal philosophy. The Review argues that new empirical methods, especially psychological studies of ordinary people’s understanding of law, provide unique insights

5. See *infra* notes 26–34 and accompanying text.

6. To be clear, jurisprudence’s methodology has not been neglected. See Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 *Legal Theory* 117, 118 (2004) (discussing modern scholarship concerning the varied methodologies in jurisprudence); Michael Giudice, Wil Waluchow & Maksymilian Del Mar, Introduction to 1 *The Methodology of Legal Theory*, at xi, xi–xxv (Michael Giudice, Wil Waluchow & Maksymilian Del Mar eds., Routledge 2016) (2010) (surveying varied methodologies in jurisprudence); Alex Langlinais & Brian Leiter, *The Methodology of Legal Philosophy*, in *The Oxford Handbook of Philosophical Methodology* 671, 671–88 (Herman Cappelen, Tamar Szabó Gendler & John Hawthorne eds., 2016) (discussing varied methodologies in jurisprudence); Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 *Am. J. Juris.* 17, 19 (2003) (“[L]egal philosophers have now given renewed attention to the methodological issues: for it is here that a new vulnerability of legal positivism has been identified.”). Yet much of the current discussion focuses on the methodological commitments of recent influential figures, see, e.g., Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years Off the Point*, 19 *Canadian J.L. & Juris.* 67, 68 (2006) (critiquing the methodologies of legal theory via an analysis of “Dworkin’s anti-positivism”); Stephen R. Perry, *Hart’s Methodological Positivism*, 4 *Legal Theory* 427, 427 (1998) (analyzing Hart’s theory of methodological legal positivism), or takes a critical stance, pointing to flaws or deficiencies in method, see, e.g., Langlinais & Leiter, *supra*, at 677 (exploring critiques of Hart’s “methodology of conceptual analysis”); Leiter, *supra*, at 19 (investigating “methodological issues” that reveal a “new vulnerability of legal positivism”).

7. Julie Dickson, *Elucidating Law* (2022) [hereinafter Dickson, *Elucidating Law*].

8. See *id.* at 1 n.1.

9. See *id.* at 1.

that inform central jurisprudential questions. Legal philosophy has a long tradition of asserting claims about how “we” understand the law.¹⁰ Today, there are rich literatures of empirical work about these understandings across many areas of law and new methods for investigating untested claims. Some of this work flies under the banner of “experimental jurisprudence”;¹¹ this and similar empirical approaches provide rich insight into the understandings of legal participants.

Part III also proposes that the experimental jurisprudence model is consistent with Dickson’s proposed “two-stage” model of legal-philosophical inquiry. It concludes by considering two objections to the proposal to methodologically innovate jurisprudence with empirical methods: Legal philosophy is concerned with (only) expert understandings of law,¹² and legal philosophy is concerned with the nature, not concept, of law.¹³

Of course, empirical methods are not a panacea and they should not “replace” traditional jurisprudence.¹⁴ Nor should jurisprudence abandon its longstanding consideration of how “we” understand our law. Instead, jurisprudence should continue the project of methodological clarification and also welcome a project of methodological innovation: Jurisprudence could elucidate these understandings of law more fully with new data and methods. Today’s jurisprudence would achieve greater rigor by complementing traditional methods with new empirical data and methods.¹⁵

10. See *infra* Part II.

11. See, e.g., Roseanna Sommers, *Experimental Jurisprudence: Psychologists Probe Lay Understandings of Legal Constructs*, 373 *Science* 394, 394 (2021) (noting scholarship that applies psychology research to legal concepts including “causation, consent, [and] reasonableness”); Kevin Tobia, *Experimental Jurisprudence*, 89 *U. Chi. L. Rev.* 735, 736 (2022) [*hereinafter* Tobia, *Experimental Jurisprudence*] (“Experimental jurisprudence is scholarship that addresses jurisprudential questions with empirical data This Article introduces experimental jurisprudence . . . and proposes a framework to understand its contributions.”); Karolina Magdalena Prochownik, *The Experimental Philosophy of Law: New Ways, Old Questions, and How Not to Get Lost*, *Phil. Compass*, art. e12791, Dec. 2021, at 1, 1–2 (discussing “three main lines of research within” experimental jurisprudence).

12. See *infra* section III.C.

13. See *infra* section III.D.

14. See, e.g., Kenneth Einar Himma, *Replacement Naturalism and the Limits of Experimental Jurisprudence*, 14 *Jurisprudence* 348, 350 (2023) (“[E]xperimental jurisprudence can *supplement*, but not *replace*, the traditional philosophical methodology for addressing conceptual questions.”). To my knowledge, no advocate of experimental jurisprudence has proposed that it could or should *replace* (in total) traditional legal philosophy.

15. John Burgess and Silvia De Toffoli’s understanding of “philosophical rigor” is instructive:

Rigor can be seen as an intellectual virtue beyond mathematics. A philosophical argument, for example, is rigorous when it is scrupulous. Outside mathematics, rigor is, however, a much vaguer concept. A rigorous argument can be shared among relevant experts. It is the kind

I. THE AIMS AND METHODS OF JURISPRUDENCE

A. *A Broad, Inclusive, Innovative Jurisprudence*

Elucidating Law's opening sentences reveal its broad scope: “What do we do when we do legal philosophy? This book explores this question and develops and defends my own answer to it.”¹⁶ The book is a tour de force in “the philosophy of legal philosophy.”¹⁷ The “philosophy of legal philosophy” includes the study of “methodology”¹⁸ and “the way in which legal philosophy ought to be done.”¹⁹ But it also includes legal philosophy’s “aims, criteria of success, constraints incumbent upon it, prospects for progress, and indeed how we should determine and understand its very domain and subject matter.”²⁰

For better and for worse, much of today’s legal philosophy has a narrow scope. *Elucidating Law* is an energizing and refreshing contrast, a sweeping but ever-careful meditation on legal philosophy.²¹ Equally refreshing is its inclusive conception of legal philosophy and call for innovation: “[L]egal philosophy about the nature of law is but one part of legal philosophy and is just one valuable approach amongst many to theorizing about law.”²² Moreover, legal philosophy about the nature of law is not “intellectually or otherwise superior to . . . other sorts of legal philosophy.”²³ Rather, it “should be open to, and be willing to explore, various potential complementarities” with other approaches, “including

of thing on which a reasonable subject with the appropriate background training would base a justified belief.

John P. Burgess & Silvia De Toffoli, *What Is Mathematical Rigor?*, 25 *APhEx* (2022), <https://www.openstarts.units.it/server/api/core/bitstreams/8d6603ae-c93c-4e14-8752-c091f15b6348/content> [<https://perma.cc/4VRT-AKCU>] (It.).

16. Dickson, *Elucidating Law*, supra note 7, at 1.

17. See id. at 2.

18. The book occasionally equates “the philosophy[] of legal philosophy” with “methodology.” See id. But more often, the former is interpreted to have a broader scope.

19. Id.

20. Id.

21. The book’s breadth and generality have fueled some others’ critiques. See, e.g., Tsampika Taralli, *Book Review*, 2023 *Law & Phil.*, <https://link.springer.com/content/pdf/10.1007/s10982-023-09485-x.pdf> [<https://perma.cc/QLG5-XN36>] (“To the extent that the book intended to offer a genuine guide for the criteria on successful theories, its argument fails.”); Yi Tong, *The Nature of Law, Self-Understanding, and Evaluation in Legal Theory*, *Jurisprudence* 1, 4 (book review) (forthcoming), <https://doi.org/10.1080/20403313.2023.2224624> [<https://perma.cc/C785-QQ26>] (“As the book develops and the term ‘elucidation’ and its cognates fade out, the reader gradually loses sight of what they are exactly supposed to mean and to what extent the phrase ‘elucidating law’ has the power of illuminating Dickson’s distinctive brand of philosophy of legal philosophy.”). Other reviewers are much more favorable. See, e.g., Robert Mullins, *Book Review*, 134 *Ethics* 127, 131 (2023) (reviewing Dickson, *Elucidating Law*, supra note 7) (“*Elucidating Law* has many virtues, but the most attractive is its inclusiveness.”).

22. Dickson, *Elucidating Law*, supra note 7, at 52.

23. Id.

those which feature empirical and sociological studies about law.”²⁴ Legal philosophy “should both exemplify, and champion, an approach to understanding law wherein the questions of legal philosophy multiply, diversify, change, and innovate.”²⁵ This is a picture of legal philosophy as broad, inclusive, and dynamic.²⁶

This egalitarian conception of legal philosophy is in some tension with the book’s emphasis on one jurisprudential question and tradition. The book mostly discusses general jurisprudence, mostly related to the question of the “nature of law,” and mostly in the context of the esteemed figures of twentieth-century Oxford—H.L.A. Hart, Joseph Raz, John Finnis, and Ronald Dworkin.²⁷ Yet, as *Elucidating Law*’s broader statements recognize, there are many other (equally) worthy legal-philosophical questions, from the general—“What is law?”—to specific contract,²⁸ tort,²⁹

24. *Id.* at 52–53.

25. *Id.*

26. This broad conception is consistent with Dickson’s earlier scholarship, which does not limit legal philosophy to a particular method and includes both descriptive and normative questions. See Julie Dickson, *Ours Is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry*, 6 *Jurisprudence* 207, 209 (2015) (“For in my view, ours is a broad church, and all theoretical accounts able to illuminate and help us understand any aspect of law’s variegated and complex character are (to invoke a Scottish saying) welcome in the main body o’ the kirk.”). It is also consistent with other views of jurisprudence. See Richard A. Posner, *The Problems of Jurisprudence*, at xi (1990) (characterizing jurisprudence as “the most fundamental, general, and theoretical plane of analysis of the social phenomenon called law” and noting that “[p]roblems . . . include whether and in what sense law is objective, . . . the meaning of legal justice, . . . and the problematics of interpreting legal texts”); Tobia, *Experimental Jurisprudence*, *supra* note 11, at 737 (“In the United States, jurisprudence is ‘mostly synonymous with ‘philosophy of law’ [but there is also] a lingering sense of ‘jurisprudence’ that encompasses high legal theory . . . [—]the elucidation of legal concepts and normative theory from within the discipline of law.” (first and second alterations in original) (quoting Lawrence Solum, *Legal Theory Lexicon 044: Legal Theory, Jurisprudence, and the Philosophy of Law*, *Legal Theory Lexicon* (May 30, 2005), https://lsolum.typepad.com/legal_theory_lexicon/2005/05/legal_theory_le.html [<https://perma.cc/ERE3-CMHW>] (last updated May 6, 2018))).

27. For elaboration of this critique, see Dan Priel, *Ways of Explaining Law*, *Modern L. Rev.* (forthcoming 2024) (manuscript at 3), <https://ssrn.com/abstract=4602339> [<https://perma.cc/F63T-2YW4>] (reviewing Dickson, *Elucidating Law*, *supra* note 7); Dan Priel, *Evidence-Based Jurisprudence: An Essay for Oxford*, 2 *Analisi e Diritto* 87, no. 2, 2019, at 87, 90–93.

28. See, e.g., Gregory Klass, *Introduction to Philosophical Foundations of Contract Law* 1, 1 (Gregory Klass, George Letsas & Prince Sapraï eds., 2014); Daniel Markovits & Emad Atiq, *Philosophy of Contract Law*, *Stan. Encyc. of Phil.*, Winter 2021, <https://plato.stanford.edu/archives/win2021/entries/contract-law/> [<https://perma.cc/7A63-PB5P>].

29. See, e.g., John Oberdiek, *Introduction to Philosophical Foundations of the Law of Torts* 1, 4 (John Oberdiek ed., 2014); David G. Owen, *Foreword: Why Philosophy Matters to Tort Law*, *in* *The Philosophical Foundations of Tort Law* 1, 7–9 (David G. Owen ed., 1995); Arthur Ripstein, *Theories of the Common Law of Torts*, *Stan. Encyc. of Phil.*, Summer 2022, <https://plato.stanford.edu/archives/sum2022/entries/tort-theories/> [<https://perma.cc/ZW8N-2HLL>].

property,³⁰ criminal law,³¹ evidence,³² interpretation,³³ tax,³⁴ and constitutional law questions,³⁵ just to name a few. And there are numerous relevant philosophical traditions—analytic philosophy, critical theory, critical race theory, feminist jurisprudence, comparative approaches, sociolegal studies, and so on.

This tension is less a fault than an inevitability of the project's ambitious scope. As an expansive meditation on legal philosophy, the book benefits from its concrete examples, and it is natural to draw examples from the scholarly traditions within which one primarily works. The book's two core examples of its method of "staged inquiry"³⁶ are also close to Oxford, concerning the university's academic dress requirement and tutorial teaching system.³⁷ Perhaps this is the way to square the book's preaching—a magnanimous "broad church" approach to legal philosophy—with its practice—near-exclusive focus on the influential twentieth-century Oxonian tradition about law's nature. The latter is just one example of legal philosophy, but not one "intellectually or otherwise superior to" various other traditions and questions.³⁸

Yet the book also pushes twentieth-century Oxonian general jurisprudence into different territory, such as the philosophy of race and contract law, and into conversation with other traditions, such as critical legal studies (CLS) and critical race theory. A brief discussion of Patricia Williams's *The Alchemy of Race and Rights* calls attention to individuals'

30. See, e.g., James Penner & Henry Smith, Introduction to Philosophical Foundations of Property Law, at xv, xv–xxvii (James Penner & Henry Smith eds., 2013); Jeremy Waldron, Property and Ownership, Stan. Encyc. of Phil., Fall 2023, <https://plato.stanford.edu/archives/fall2023/entries/property/> [https://perma.cc/6SRK-8JFH].

31. See, e.g., R.A. Duff & Stuart P. Green, Introduction to Philosophical Foundations of Criminal Law 1, 1–13 (R.A. Duff & Stuart P. Green eds., 2011); James Edwards, Theories of Criminal Law, Stan. Encyc. of Phil., Fall 2021, <https://plato.stanford.edu/archives/fall2021/entries/criminal-law/> [https://perma.cc/SRG6-GHJE].

32. See, e.g., Christian Dahlman, Alex Stein & Giovanni Tuzet, Introduction to Philosophical Foundations of Evidence Law 1, 1–6 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021); Hock Lai Ho, The Legal Concept of Evidence, Stan. Encyc. of Phil., Winter 2021, <https://plato.stanford.edu/archives/win2021/entries/evidence-legal/> [https://perma.cc/TKY7-MKPV].

33. See, e.g., Lawrence M. Solan & Peter M. Tiersma, Introduction to The Oxford Handbook of Language and Law 1, 1–9 (Lawrence M. Solan & Peter M. Tiersma eds., 2012); Mark Greenberg, Legal Interpretation, Stan. Encyc. of Phil., Fall 2021, <https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation/> [https://perma.cc/299J-CYZG].

34. See, e.g., Monica Bhandari, Introduction to Philosophical Foundations of Tax Law 1, 1–6 (Monica Bhandari ed., 2017).

35. See, e.g., David Dyzenhaus & Malcolm Thorburn, Introduction to Philosophical Foundations of Constitutional Law 1, 1–6 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

36. See *infra* section I.B.

37. Dickson, *Elucidating Law*, *supra* note 7, at 143–51.

38. *Id.* at 52.

differing experiences and understandings of the law.³⁹ Williams responds from a critical race theory perspective to Peter Gabel's "pact of the withdrawn selves," a CLS critique of rights.⁴⁰

Gabel's critique focuses on the alienation that rights produce.⁴¹ For example, when one purchases groceries from a store clerk, rights constrain us within social roles (clerk and customer, who must respect each other's rights), inhibiting deeper human connection. The clerk's scripted "Hi, how are you?" can only be answered with another script, "I'm well; how are you?" To Gabel, rights are alienating.⁴²

Williams's famous response notes that her experience of rights as a Black woman in America is different.⁴³ While Gabel (a white man) could secure a lease with a loose verbal commitment, contract rights are essential for Williams to secure a lease. Rights bring her closer to others and into society—thereby overcoming alienation. Dickson cites this classic debate as an example of law being experience-sensitive and as a justification for legal-philosophical inquiry to attend to those experience-sensitive features, which are critical to fully elucidating law.⁴⁴ A footnote hints that "more remains to be said" about this example, which will be explored in future work.⁴⁵

Again, *Elucidating Law's* broad, inclusive, and innovative conception of legal philosophy is welcome. And in parts, the book practices what it preaches, infusing traditional jurisprudence with insights from multiple traditions and perspectives, shining new light on features of law. Beyond the book's contributions to elucidating law, it is also instructive in elucidating the elucidation of law. It clarifies not just law, but legal philosophy's aims and methods. These methodological questions are the focus of the remainder of this Review.

B. Elucidating Law

What is it to "elucidate law"? The book begins with four main motifs:

(i) the legal philosopher's task is to identify, illuminate, and explain aspects of something—law—which . . . exists in our social reality and has a character that legal philosophy attempts to capture;

(ii) law is a multi-faceted and complex phenomenon, different aspects of which can be illuminated from different

39. See *id.* at 72–73 (citing Patricia J. Williams, *The Alchemy of Race and Rights* (1991)).

40. Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 *Tex. L. Rev.* 1563, 1563 (1984).

41. See *id.*

42. See *id.* at 1567–68, 1576–77.

43. See Patricia J. Williams, *The Alchemy of Race and Rights* 146–53 (1991).

44. See Dickson, *Elucidating Law*, *supra* note 7, at 72–74.

45. *Id.* at 73 n.53.

theoretical directions Accordingly, the questions of legal philosophy are various, diverse, arise in and change over time, and its quest is never-ending;

(iii) Elucidation is an active process and involves bringing out from law its most important and significant features and offering illuminating accounts of those features . . . ;

(iv) developing an explanatorily apt understanding of law can, in turn, help to identify, bring into focus, and shed light on other important issues including other important moral issues.⁴⁶

Law's nature, Dickson says, is not like the nature of natural kinds (e.g., "Jupiter"⁴⁷ or "water"⁴⁸). But law nevertheless has a nature, and legal philosophy's aim is to illuminate that nature from various perspectives. Because law is a social creation, a central legal-philosophical goal is to elucidate the "attitudes, beliefs, actions, intentions, and self-understandings of the human beings whose law it is."⁴⁹ All these phenomena "constitute the explanandum for legal philosophers."⁵⁰

The book's first four chapters develop this picture about law's social nature and legal philosophy's aims. The next four chapters develop a more specific proposal for elucidating law: "indirectly evaluative legal philosophy" (IELP). IELP has six tenets: (1) seeking to explain the nature of law and the methodology of inquiring into law's nature; (2) remaining sensitive to the multiple, diverse, and changing questions of legal philosophy; (3) adopting an "'attitude of due wariness' at the outset of jurisprudential inquiries"; (4) explaining the relevance of and respecting the constraints "imposed by the self-understandings . . . of those who create, administer, and are subject to the law"; (5) limiting the role of moral evaluation until a later stage of jurisprudential inquiry; and (6) engaging in evaluation and reform of law.⁵¹

To elucidate law, Dickson proposes a two-stage method. The first stage involves identifying and analyzing the legal features and concepts that are

46. Id. at 2–3.

47. Id. at 21.

48. Legal philosophers often offer natural kinds like water as analogues: "Being H₂O is what makes water *water*. With respect to law, accordingly, to answer the question 'What is law?' . . . is to discover what makes all and only instances of law instances of *law* and not something else." Scott J. Shapiro, *Legality* 9 (2011). But even natural kinds are not so simple. Philosophers have argued that, chemically, water is not simply H₂O. See, e.g., Michael Weisberg, *Water Is Not H₂O*, in *Philosophy of Chemistry: Synthesis of a New Discipline* 337, 337 (Davis Baird, Eric Scerri & Lee McIntyre eds., 2006). Moreover, psychologists have argued that, conceptually, water is not simply H₂O. See, e.g., Barbara C. Malt, *Water Is Not H₂O*, 27 *Cognitive Psych.* 41, 41–43 (1994); Kevin P. Tobia, George E. Newman & Joshua Knobe, *Water Is and Is Not H₂O*, 35 *Mind & Language* 183, 183–85 (2020) ("Research across philosophy and psychology suggests that natural kind concepts are associated with both . . . superficial properties[] and . . . deeper causal properties." (emphasis omitted)).

49. See Dickson, *Elucidating Law*, supra note 7, at 121.

50. Id.

51. Id. at 82–83.

important in our law.⁵² This stage requires the philosopher to make indirect evaluative judgments about which features are most important in explaining law and thus worthy of analysis.⁵³ The second stage involves direct evaluative judgments about whether those features (or features of those features) are good or bad in light of the first-stage philosophical analysis.⁵⁴

After Chapter 5 introduces the tenets of IELP, Chapter 6 addresses the significance of the “self-understandings” of members of a legal community (the focus of this Review’s next Part). Chapter 7 elaborates and further defends IELP. Dickson distinguishes between directly and indirectly evaluative judgments. The former “take a stance on[] whether and to what extent some X, or some feature of some X, is good or valuable.”⁵⁵ The latter are judgments that “pick out those aspects or features of law that are important and significant to explain.”⁵⁶ Dickson argues that legal philosophy can (and should) proceed in a staged inquiry: first picking out which features of law are important to explain and only in a later stage determining whether those features are good or bad.⁵⁷

Chapter 8 reflects more broadly on the nature of legal philosophy, a “broad church.”⁵⁸ IELP, by distinguishing the indirect identification of important features of law from the direct moral evaluation of those features, “enables legal philosophers to approach law and to begin to understand it in a clear, cool-headed, and unromanticized way[,] which lessens the risk of prematurely assuming law to have the moral value, justifiability, and obligatoriness that it claims for itself.”⁵⁹

II. HOW THOSE LIVING UNDER LAW THINK OF IT

Elucidating Law’s Chapter 6 introduces “self-understandings” and defends their role in legal philosophy. It also highlights methodological challenges concerning legal philosophers’ appeal to self-understandings and begins to outline a new methodological path forward.

A. “Our” Intuitions and Self-Understandings

Dickson notes that “[c]laims regarding the importance of how those living under law think of it . . . are frequently made in one form or another by a variety of legal philosophers.”⁶⁰ Philosophers also regularly make

52. *Id.* at 140.

53. See *id.* at 140–41.

54. See *id.*

55. *Id.* at 137–38.

56. *Id.* at 138.

57. *Id.* at 140.

58. *Id.* at 161.

59. *Id.* at 176.

60. *Id.* at 104.

claims about the substance of those self-understandings: how those living under law think of it or of some aspect of it. Appeal to “intuitions” or “self-understandings” is a transsubstantive feature of legal philosophy—from scholarship in general jurisprudence⁶¹ to that in specific areas like philosophy of criminal law,⁶² tort law,⁶³ and human rights law.⁶⁴

Appeal to shared intuition is also a longstanding philosophical practice. Consider how Socrates relies on common understandings in Plato’s *Republic* to illuminate the nature of justice:

Well said, Cephalus, I replied: but as concerning justice, what is it?—to speak the truth and to pay your debts—no more than this? And even to this are there not exceptions? Suppose a friend when in his right mind has deposited arms with me and he asks for them when he is not in his right mind, ought I to give them back to him? No one would say that I ought or that I should be right in doing so, any more than they would say that I ought always to speak the truth to one who is in his condition.

You are quite right, he replied.

But then, I said, speaking the truth and paying your debts is not a correct definition of justice.

61. See John Austin, *The Province of Jurisprudence Determined* 279 (London, John Murray 1832) (“If [critics of slavery] said that the [slaveowner’s legal] right is pernicious, and that therefore he *ought* not to have it, they would speak to the purpose. But to dispute the existence or possibility of the right, is to talk absurdly.”); Joseph Raz, *Practical Reason and Norms* 164 (Oxford Univ. Press 1999) (1975) [hereinafter Raz, *Practical Reason*] (“We are all sadly familiar with laws which are racially discriminating, which suppress basic individual liberties It is precisely because such obvious laws are ruled out as non-laws by the theory [of natural law] that it is incorrect. It fails to explain correctly our ordinary concept of law”); Brian Flanagan & Ivar R. Hannikainen, *The Folk Concept of Law: Law Is Intrinsically Moral*, 100 *Australasian J. Phil.* 165, 166 (2022) (“The fact that an account [of the nature of law] does not square with some of our intuitions—that it requires us, say, to deny that the Nazis had law—may count against that account.” (alteration in original) (internal quotation marks omitted) (quoting Shapiro, *supra* note 48, at 17)); Langlinais & Leiter, *supra* note 6, at 677 (“[I]n legal philosophy . . . almost everyone, following Hart, employs the method of appealing to intuitions about possible cases to fix the referent of ‘law,’ ‘legal system,’ ‘authority’ and the other concepts that typically interest legal philosophers.”).

62. E.g., Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander’s Unified Conception of Criminal Culpability*, 88 *Calif. L. Rev.* 955, 961 (2000) (appealing to the “intuitions of a community”); Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 *Law & Phil.* 711, 749 (2005) (noting the role of “our moral intuitions” in the proposed analysis of self-defense).

63. E.g., Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311, 311 (1996) (“Latent in our ordinary moral consciousness, and manifest in philosophical reflection, is a distinction between reasonableness and rationality.”).

64. See, e.g., Jeremy Waldron, *How to Argue for a Universal Claim*, 30 *Colum. Hum. Rts. L. Rev.* 305, 313 (1999) [hereinafter Waldron, *Universal Claims*] (arguing that “[i]t is not enough that we have considered what Kant said to Fichte,” as intuitions of legal philosophers are to be assessed against what is in fact “*out there, in the world*”).

Quite correct, Socrates.⁶⁵

Here, Socrates sets out to explore the nature of justice. To achieve that aim, he employs a common method in (legal) philosophy: He offers a thought experiment (“[s]uppose a friend . . .”) and elicits an intuition. Specifically, Socrates observes his own reaction to the thought experiment and asserts that everyone would share his understanding (“[n]o one would say . . .”). That assertion gains some support from Cephalus’s agreement (“[y]ou are quite right, he replied”). And Socrates takes that universal understanding to provide insight into the nature of justice.

Legal philosophers appeal to thought experiments and shared understandings for different reasons.⁶⁶ Some take these intuitions or understandings to reliably track the truth about some mind-independent entity (about, for example, the nature of law as an entity that exists independently of our minds).⁶⁷ For others, including Dickson, the understandings themselves are part of what the legal philosopher seeks to explain:

The self-understandings of those living under and using law play such a weighty role in legal philosophers’ accounts of aspects of law’s nature . . . because those self-understandings simply are part of the data, or the explanandum, that we seek to explain. . . . Law is a human-made social construction. It comes into being, is maintained in being, is applied, executed, altered, etc. by virtue of the attitudes, beliefs, actions, intentions, and self-understandings of human beings whose law it is. All these phenomena, therefore, are precisely what a theory of law attempts to characterize and constitute the explanandum for legal philosophers seeking to identify and explain law’s nature.⁶⁸

65. See Stephen Stich & Kevin P. Tobia, *Experimental Philosophy and the Philosophical Tradition*, in *A Companion to Experimental Philosophy* 5, 6 (Justin Sytsma & Wesley Buckwalter eds., 2016) (emphasis omitted) (internal quotation marks omitted) (quoting Plato, *The Republic* bk. I (c. 370 B.C.E.), as reprinted and translated in 3 *The Dialogues of Plato* 1, 6 (Benjamin Jowett trans., London, Oxford Univ. Press 1892)).

66. See Langlinais & Leiter, *supra* note 6, at 677. For thought experiments about the nature of law, see, e.g., Raz, *Practical Reason*, *supra* note 61, at 159–61 (imagining a society of angels and positing that they could have a legal system, even without sanctions); Shapiro, *supra* note 48, at 407 (introducing a thought experiment about aliens); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 623 (1958) (imagining law operating in a society of invulnerable crabs). For examples concerning legal interpretation, see Lon Fuller, *The Case of the Speluncean Explorers*, 62 *Harv. L. Rev.* 616, 616–19 (1948) (introducing a hypothetical case in which five explorers are trapped in a cave and must decide who to kill and eat to survive); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630, 664 (1958) [hereinafter Fuller, *Positivism*] (providing “[i]t shall be a misdemeanor . . . to sleep in any railway station” as a hypothetical to test one of Hart’s hypotheses (internal quotation marks omitted)); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 *N.Y.U. L. Rev.* 1109, 1124 (2008) (examining Hart’s hypothetical about the indeterminacy of a “no vehicles in the park” rule).

67. See also *infra* section III.D.

68. Dickson, *Elucidating Law*, *supra* note 7, at 121.

Ultimately, “the self-understandings of those who create, administer, and are subject to the law are important ‘data points’ which a successful theory of law must sufficiently take into consideration and do adequate justice to.”⁶⁹ One of the central aims of legal philosophy is to explain (or elucidate) our own understanding of law. In Dickson’s words: “[A] significant part of what we study in philosophy of law are people’s self-understandings[,] and . . . we have a responsibility in our theories of law to accord adequate emphasis to those self-understandings in terms of law held by those living under and administering it.”⁷⁰

B. *Methodology Concerning How We Think of Our Law*

While intuition and legal participants’ understandings are critical to legal philosophy, there remain methodological challenges: What do legal philosophers mean when they appeal to “our” understanding, and are these claims true? Dickson helpfully acknowledges these problems and suggests a path forward through an empirically grounded “active elucidation.”⁷¹

1. *Methodological Challenges.* — *Elucidating Law* acknowledges some of the critical methodological challenges with legal philosophy’s usual appeal to self-understandings. One arises from a lack of clarity. “[A]lthough frequently made, such claims [about self-understandings] are not always clearly explained or understood.”⁷² Often, legal philosophers’ assertions about self-understandings come in the first-person plural: our intuitions, our concept of law, law as we all understand, and so on.⁷³ In these claims, “our” and “we” are often ambiguous. These could refer to the intuitions or self-understandings of all persons, members of the legal community, legal experts, legal officials, or perhaps other groupings of persons.

A second methodological challenge concerns interpersonal conflict. “[D]ifferent legal philosophers make different, and often contested, claims about the content of the self-understandings they draw on in constructing their theories.”⁷⁴ How should we adjudicate among these conflicting proposals?⁷⁵ And even when there is no seeming conflict, an

69. *Id.* at 107.

70. *Id.* at 14.

71. See, e.g., *id.* at 108 (noting concerns that self-understandings may be indeterminate, inchoate, or divided); *id.* at 114 (noting that Dickson is “not advocating a wholesale rejection of . . . experimental philosophy techniques in legal philosophy” and that these data are “at best” a “starting point” for legal philosophers).

72. See, e.g., *id.* at 106 (“[O]thers focus on self-understandings in terms of what we might think of as aspects of the concept of law . . .”).

73. See, e.g., *supra* notes 50–52 and accompanying text.

74. Dickson, *Elucidating Law*, *supra* note 7, at 107; see also Fuller, *Positivism*, *supra* note 66, at 631 (“A rule of law is . . . the command of a sovereign . . . [or] a pattern of official behavior . . .”).

75. See Brian Bix, *Methodology in Jurisprudence*, *Jotwell* (May 19, 2010), <https://juris.jotwell.com/methodology-in-jurisprudence/> [https://perma.cc/N8DZ-QLS4]

expert legal philosopher might hold a false belief about the law.⁷⁶ When a philosopher offers the intuition that “we” all have, do we all share it? Insofar as law is “experience-sensitive,”⁷⁷ these interpersonal conflicts in understanding could also be organized by factors related to such experience sensitivity.

A third methodological concern, less explicit than the first two in *Elucidating Law*, is intrapersonal conflict. The same philosopher might herself have dueling intuitions, either about a thought experiment or some area of law. For example, perhaps when evaluating a “trolley problem,” one simultaneously feels the pull of conflicting consequentialist and deontological intuitions.⁷⁸ Legal philosophers have recognized the pull of intrapersonally conflicting intuitions (e.g., concerning legal consent), asking what “we should do” in the face of them.⁷⁹

Intrapersonal and interpersonal conflict in legal philosophy may be underestimated, as philosophy sometimes discourages revealing such conflicts. Regarding intrapersonal conflict, consider that we often associate theories with theorists, and philosophers are more strongly rewarded for offering a full-throated defense of a theory than an ambivalent analysis. Those defending theory X have a stronger incentive to consider, discover, and report intuitions that favor X than to consider and report intuitions that favor not-X.⁸⁰ A related interpersonal phenomenon can emerge within entire philosophical subfields or debates. If everyone in the seminar, including the powerful and esteemed professor, purports to share an intuition, there is social pressure to conform one’s own intuitive report. Robert Cummins laments that this phenomenon was so strong with respect to the philosophical debate about “Twin Earth” that philosophers with dissenting intuitions were not

(“How can we tell whether ‘we’ have one concept of law or more than one? If there is more than one, should the theorist select just one, and if so, on what grounds should a selection be made?”).

76. See Dickson, *Elucidating Law*, supra note 7, at 44.

77. See id. at 72.

78. See, e.g., Joshua D. Greene, *Why Are VMPFC Patients More Utilitarian? A Dual-Process Theory of Moral Judgment Explains*, 11 *Trends Cognitive Sci.* 322, 322 (2007) (discussing a dual-process theory of moral judgment for patients); Ricardo Andrés Guzmán, María Teresa Barbato, Daniel Sznycer & Leda Cosmides, *A Moral Trade-Off System Produces Intuitive Judgments that Are Rational and Coherent and Strike a Balance Between Conflicting Moral Values*, 119 *Procs. Nat’l Acad. Scis.*, no. 42, art. e2214005119, 2022, at 1, 1 (discussing testing for compromise judgments responding to incentives).

79. Heidi Hurd, *The Moral Magic of Consent*, 2 *Legal Theory* 121 (1996) (discussing conflicting intuitions about consent and asking “[w]hat [we] should . . . do in the face of our conflicting intuitions”).

80. In the social sciences, “pre-registration” attempts to deal with this problem. Before an experimentalist runs a study to test their theory, the materials, hypotheses, and planned analyses are registered publicly. This helps ensure that “unsuccessful” tests are still made public rather than hidden. To my knowledge, there is no similar mechanism in philosophy. Philosophers have been free to discard thought experiments or intuitions that do not support their theory.

“invited” to some of the debates.⁸¹ This interpersonal phenomenon could be active: The powerful party actively “intuition polices” by disinviting or disregarding those who do not share the standard view. But it also could occur more subtly, as the less powerful parties “intuition self-censor.” In either case, genuine diversity and dissensus can be quieted when mistaken for misunderstanding.

When these phenomena interact with the experience sensitivity recognized by *Elucidating Law*, they could lead to especially pernicious effects for the field of legal philosophy. If members of some minority group M tend not to share intuition I (because of their experience sensitivity) while members of a powerful majority group P tend to have intuition I (because of their experience sensitivity) and the field is composed primarily of group P, then disinviting those who do not share or “understand” I results in excluding members of minority group M. Experience sensitivity is critical to law, as Dickson recognizes. But it is also critical to legal philosophy and its methodology.

A final challenge concerns the source of our understandings about law and the method of generating those understandings. Dickson cautions against taking lay views of law “wholesale.”⁸² Legal philosophers differ in how much stock they put in intuition, particularly when weighing a theoretical argument against a counterintuitive conclusion.⁸³ But few adopt either extreme position: that jurisprudence must perfectly reflect all our intuitions or that there is never a reason for jurisprudence to consider our intuitions. More often, legal-philosophical practice falls between these extremes. Legal philosophers report intuitions or “our” understandings, suggesting that these reports have some relevance, but they also recognize that different theorists may have conflicting intuitions and that some intuitions are more reliable than others. This necessitates developing (a) methods for generating good, reliable, and useful intuitions and (b) methods for evaluating the status of asserted intuitions.⁸⁴ This Review’s Part III offers methods from experimental jurisprudence as one path forward. But even if one rejects that suggestion, fundamental methodological questions remain. When legal philosophy asserts “our” understandings of law, should theorists accept those assertions uncritically; if not, what methods should they use to examine the assertions’ truth?

81. See, e.g., Robert Cummins, Reflection on Reflective Equilibrium, *in* *Rethinking Intuition* 113, 116 (Michael R. DePaul & William Ramsey eds., 1998).

82. See Dickson, *Elucidating Law*, *supra* note 7, at 116.

83. Compare Kwame Anthony Appiah, *Experiments in Ethics* 77 (2008) (praising the ability of Jeremy Bentham’s theory to overcome “prevailing moral intuitions of his day about slavery, the subjection of women, homosexuality, and so forth”), with Thomas Nagel, *Mortal Questions*, at x (1979) (“Given a knockdown argument for an intuitively unacceptable conclusion, one should assume there is probably something wrong with the argument that one cannot detect—though it is also possible that the source of the intuition has been misidentified.”).

84. One example Thomas Nagel suggests is to evaluate the intuition’s “source.” See Nagel, *supra* note 83, at x.

More broadly, how should philosophers adjudicate among disagreeing assertions about self-understandings? Most broadly, what procedures should philosophers use to identify self-understandings—and is there good reason to limit the method to individual armchair introspection?

These methodological challenges are difficult ones for legal philosophy: (1) In philosophical claims about “our” intuitions or understandings “we” share, it is not always clear to whom “our” refers; (2) there are interpersonal intuitive conflicts; (3) there are intrapersonal intuitive conflicts; (4) experience sensitivity can give rise to different interpersonal conflicts associated with demographic factors; and (5) it is not clear what method philosophy uses to ensure that these intuitions are useful or to resolve conflicts between them. While answering these challenges is not simple, acknowledging them is a fundamental first step toward jurisprudential progress.

2. *Active Elucidation, “Vox Pop,” and Experimental Jurisprudence.* — In an answer to the question, “[H]ow should the self-understandings of those living under law be used by legal philosophers in their theories?”⁸⁵ Dickson proposes a model of “active elucidation.”⁸⁶ Dickson describes active elucidation, in part, through litotes.⁸⁷ “Vox-pop” interviews are the foil—what legal philosophers should avoid.⁸⁸ Self-understandings “are not to be lifted wholesale or in a ‘vox-pop’ manner from those holding them.”⁸⁹ The legal philosopher should not simply interview people on the street and insert their lay understanding of law directly into law.⁹⁰ Some legal theories propose the opposite—that law should incorporate lay understandings of law to foster compliance or promote democracy⁹¹—but they are not the focus of this Review.

At the same time, Dickson is “not advocating a wholesale rejection of, for example, ‘vox-pop’ or survey data or experimental philosophy techniques in legal philosophy.”⁹² Rather, “such data could at best be a starting point, and something for the legal philosopher to work with, interpret, and extrapolate from.”⁹³ This kind of activity—working with,

85. Dickson, *Elucidating Law*, supra note 7, at 113.

86. See *id.* at 110.

87. *Id.* at 110–11 (describing “an erroneous picture of the role that self-understandings should play” in law that Dickson identifies as undergirding critiques of self-understandings).

88. “Vox pop” is short for *vox populi*, meaning “voice of the people.” In a typical vox pop interview, the interviewer will record people’s answers to short questions: “What is your favorite sports team? [Pause for answer.] Can you name three players on that team?”

89. Dickson, *Elucidating Law*, supra note 7, at 113.

90. See *id.* at 114 (“The self-understandings in question do not come pre-packaged and explicit such that the legal philosopher’s job is merely to record and reproduce them.”).

91. See Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 4 (1995); see also Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 *Nw. U. L. Rev.* 1367, 1405 (2017).

92. See Dickson, *Elucidating Law*, supra note 7, at 114.

93. *Id.*

interpreting, extrapolating—makes the process of consulting people’s self-understandings “active,” not “passive,” in nature.⁹⁴

This is a middle-ground approach to experimental jurisprudence. It recognizes that self-understandings are “data”⁹⁵—whether supported by one philosopher’s introspection, dialogue with a layperson, or larger empirical study. Moreover, such data do not alone suffice to resolve broad legal-philosophical debates.⁹⁶ “It is the theorist’s task to work with that ‘raw material’ and to extract from it what is most important, significant, and revelatory about the character of law. At times, this may involve generating a more fine-grained understanding and set of distinctions than is contained in the ‘raw material.’”⁹⁷ On this view, experimental jurisprudence is a welcome “starting point” temporally—the philosopher looks to empirical data and then builds a philosophical analysis. It is also a “starting point” methodologically—empirical data is not sufficient as legal philosophy; it is but a possible first step.

The next Part defends a stronger conclusion about experimental jurisprudence and related empirical approaches in legal philosophy. As this Part has noted, jurisprudence regularly asserts untested claims about the understandings of all people, ordinary people, legal experts, or legal officials. But the available “data” and methods are no longer the same as in earlier decades. There are now rich empirical literatures that often bear on these claims. Moreover, there are now-standard experimental jurisprudence methods that can assess untested claims. These data and methods, coupled with a process of “active elucidation,” offer a path forward for an innovative and more rigorous jurisprudence.

III. INNOVATING JURISPRUDENCE

Building on Dickson’s call for innovation, this Review proposes a stronger claim: Jurisprudence that asserts how or what “we” understand would be made more rigorous by examining empirical data that bear on the truth of these claims.⁹⁸ Section III.A introduces this claim, section III.B elaborates it in the context of Dickson’s two-stage jurisprudential method, and sections III.C and III.D defend it against two objections: that legal

94. See *id.*

95. See *id.* at 107.

96. See generally Felipe Jiménez, *The Limits of Experimental Jurisprudence*, in *The Cambridge Handbook of Experimental Jurisprudence* (Kevin Tobia ed., forthcoming), <https://ssrn.com/abstract=4148963> [<https://perma.cc/U65A-YEN7>] (“But, by themselves, empirical findings about lay cognition do not support direct inferences or conclusions about legal concepts.”).

97. Dickson, *Elucidating Law*, *supra* note 7, at 114; see also Langlais & Leiter, *supra* note 6, at 678 (“Folk reports about some phenomenon are not infallible guides even to the folk concept of that phenomenon (and for obvious reasons: they can be unreflective, inconsistent, etc.)”).

98. On the meaning of “rigor” here, see generally Burgess & De Tiffoli, *supra* note 15.

philosophy is only concerned with expert understandings and that legal philosophy examines the nature of law, not concepts of law.

A. *Twenty-First Century Jurisprudence*

At first, it might seem that legal philosophy and empirical legal study are mutually exclusive categories. They address different questions: The former addresses abstract, general, and often normative questions about what law is or should be in theory, while the latter addresses concrete, specific, and descriptive questions about what law is in practice. And they are methodologically distinct: The former uses “analytical methods” based in theory rather than observation, while the latter uses empirical methods grounded in observation.

We should reject this picture. Historically, philosophers have pursued philosophical questions with empirical methods.⁹⁹ And although some influential twentieth-century legal philosophy purports to shift to nonempirical territory, one of the pervasive methods of that philosophy is still an empirical one. As *Elucidating Law* recognizes, “[c]laims regarding the importance of how those living under law think of it . . . are frequently made in one form or another by a variety of legal philosophers.”¹⁰⁰ When a philosopher offers an intuition in good faith, as a putatively shared response to a thought experiment or as an observation of a legal participant’s understanding of law, they are already engaging in an empirical methodology. The philosopher treats their intuition as a datapoint that is representative of others. As James Macleod put it, “Hart and Honoré, after all, had a sample size of two: Hart and Honoré.”¹⁰¹ The knowledge produced is not derived from theory but based on observation (e.g., of an observed person’s reaction to the thought experiment); the philosopher is simply the observer and the observed. As such, “experimental jurisprudence,” understood broadly as the use of empirical methods in pursuing questions of legal philosophy,¹⁰² is not new.

The appeal to shared intuition and people’s understanding of law is pervasive in general jurisprudence.¹⁰³ It is also critical across specific jurisprudence. For example, tort law often makes reference to ordinary understandings, and legal philosophers and theorists endorse passing the

99. See, e.g., Taylor Murphy, *Experimental Philosophy: 1935–1965*, 1 *Oxford Stud. Experimental Phil.* 325, 327 (2014) (describing experimental philosophy studies conducted on a range of topics, including legal topics).

100. See Dickson, *Elucidating Law*, supra note 7, at 104.

101. James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 *Ind. L.J.* 957, 1021 (2019).

102. See Tobia, *Experimental Jurisprudence*, supra note 11, at 736.

103. See, e.g., Waldron, *Universal Claims*, supra note 64, at 307. Although, sometimes legal philosophers are careful to note that “our intuition” may be limited to “my” intuition. E.g., Joseph Raz, *The Institutional Nature of Law*, in *The Authority of Law: Essays on Law and Morality* 103, 105 (2d ed. 2009) (noting that “the assumption of the importance of municipal law . . . reflects our, or at least my, intuitive perception”).

buck from law to ordinary morality or reasoning.¹⁰⁴ So too for some doctrines and concepts of criminal law¹⁰⁵ and contract law.¹⁰⁶ There is nothing new about devoting jurisprudential attention to shared and ordinary understandings of law and legal concepts.

What is new is an explosive growth in the breadth and depth of empirical work related to legal philosophy. In the twenty-first century, philosophers seeking legal participants' "self-understandings" of law have access to rich data about topics ranging from the nature of law generally¹⁰⁷ to other topics in general jurisprudence¹⁰⁸ to topics in philosophy of criminal, human rights, constitutional, international, tort, contract, property, evidence, settlement, and disability law.¹⁰⁹ Whether or not the traditional approach (armchair reflection) is "empirically sound,"¹¹⁰ there

104. See, e.g., John Gardner, *The Many Faces of the Reasonable Person*, 131 *Law Q. Rev.* 563 (2015), reprinted in John Gardner, *Torts and Other Wrongs* 271, 285 (2019) ("Understandably, officials of the law are often keen for the law to be in tune with the thinking of ordinary folk."); see also *id.* at 283 (citing Aristotle, *Nicomachean Ethics* 1137b, as an example of the argument for passing the buck from law to non-law); Mark A. Geistfeld, *Folk Tort Law*, in *Research Handbook on Private Law Theory* 338, 338 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) ("Folk law—how lay individuals understand legal obligations—is particularly important for tort law.").

105. See, e.g., John Gardner, *Ordinary Decent Honesty*, 9 *UK Sup. Ct. Y.B.* 290, 295 (2019) (describing criminal law standards as "determined by" the standards of the ordinary honest person, "represented" by the collective judgment of jurors or magistrates (internal quotation marks omitted) (quoting *Ivey v. Genting Casinos* [2017] UKSC 67, [57], [2018] AC 391)); see also *supra* note 91.

106. See Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 *Stan. L. Rev.* 1269, 1290 (2015).

107. See Raff Donelson, *Experimental Approaches to General Jurisprudence*, in *Advances in Experimental Philosophy of Law* 27, 27 (Karolina Prochownik & Stefan Magen eds., 2023) (showing the access to broad legal topics in the twenty-first century).

108. See Guilherme da F.C.F. de Almeida, Noel Struchiner & Ivar Rodriguez Hannikainen, *The Experimental Jurisprudence of the Concept of Rule: Implications for the Hart–Fuller Debate*, in *Advances in Experimental Philosophy of Law*, *supra* note 107, at 44, 52–57; Lucas Miotto, Guilherme FCF Almeida & Noel Struchiner, *Law, Coercion and Folk Intuitions*, 43 *Oxford J. Legal Stud.* 97, 98 (2022) (assessing folk intuitions about the relationship between law and coercion).

109. See Tobia, *Experimental Jurisprudence*, *supra* note 11, at 744–50. The growing field of "experimental jurisprudence" emphasizes the study of people's intuitions and understandings related to legal philosophical questions and debates. But decades of work in empirical legal studies also provides rich insight into law and participants' understanding of it. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Socio. Rev.* 55, 55–56 (1963) (employing interviews of sixty-eight businessmen and lawyers representing forty-three companies and six law firms to demonstrate "the functions and dysfunctions of using contract to solve exchange problems and the influence of occupational roles on how one assesses whether the benefits of using contract outweigh the costs"). See generally Lawrence M. Friedman, *Coming of Age: Law and Society Enters an Exclusive Club*, 1 *Ann. Rev. L. & Soc. Sci.* 1 (2005) (describing "law and society" as a field of legal inquiry and assessing its scope, assumptions, advances, and obstacles).

110. See Brian Leiter, *Introduction to Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 1, 4 (2007) (questioning the soundness of this method).

are now growing literatures of relevant empirical data and accessible empirical methods.¹¹¹

B. *Integrating Experimental Jurisprudence in the Two-Stage Inquiry*

Elucidating Law's critiques of “vox-pop” surveys are instructive: Legal philosophy should not be outsourced to surveys. But most experimental jurisprudence avoids this pitfall, and none explicitly claims that the law is or should be simply whatever laypeople say it is. In fact, much of experimental jurisprudence fits well with *Elucidating Law's* model of two-staged inquiry. This section elaborates this connection.

First, there is a distinction between a “survey” and an “experiment.” Experimental jurisprudence generally does not present “surveys” in the sense of a simple vox-pop interview or poll. Rather, it presents experiments that randomly assign participants to different treatments in an effort to ascertain subtle features of self-understandings. For example, Markus Kneer and Sacha Bourgeois-Gironde have studied whether severity of an outcome influences the lay concept of intent.¹¹² If Joseph performs an action, does our evaluation of whether Joseph intended the action depend on how severe the consequences are? To examine people’s understanding of intent, Kneer and Bourgeois-Gironde presented to some participants a scenario in which the action leads to a minor consequence and to other participants a scenario in which the action leads to a more severe one. That

111. For examples of overviews of research related to general jurisprudence, see generally Guilherme da Franca Couto Fernandes de Almeida, Noel Struchiner & Ivar Hannikainen, Rules, in *The Cambridge Handbook of Experimental Jurisprudence*, supra note 96, <https://ssrn.com/abstract=4421183> [<https://perma.cc/GA5V-4RSK>] (reviewing and commenting on experimental studies that assess how the textual and extra-textual elements of rules influence people’s perception of rules); Donelson, supra note 107 (focusing on how “experimental techniques and empirical findings” can help answer the “questions raised by general jurisprudence scholars”). For overviews of work in causation as it relates to law, see generally Joshua Knobe & Scott Shapiro, Proximate Cause Explained: An Essay in Experimental Jurisprudence, 88 U. Chi. L. Rev. 165 (2021) (using empirical studies to assess how moral considerations influence people’s judgments about proximate cause); David A. Lagnado & Tobias Gerstenberg, Causation in Legal and Moral Reasoning, in *The Oxford Handbook of Causal Reasoning* 565 (Michael R. Waldmann ed., 2017) (employing research in psychology, philosophy, and cognitive science to explore commonsense understandings of causation). For an overview related to tort law, see generally Jennifer K. Robbennolt & Valerie P. Hans, The Psychology of Tort Law, in 1 *Advances in Psychology and Law* 249 (Monica K. Miller & Brian H. Bornstein eds., 2016) (describing the contributions of psychology to tort law). For reviews of many other areas, including ordinary understandings of settlement, health and disability law, and consumer contract law, see generally *The Cambridge Handbook of Experimental Jurisprudence*, supra note 96.

112. See Markus Kneer & Sacha Bourgeois-Gironde, Mens Rea Ascription, Expertise and Outcome Effects: Professional Judges Surveyed, 169 *Cognition* 139, 141–44 (2017). Decades of research have investigated the impact of outcome severity on judgments about concepts like responsibility. For an overview of research on severity effects and responsibility judgments, see generally Jennifer K. Robbennolt, Outcome Severity and Judgments of “Responsibility”: A Meta-Analytic Review, 30 *J. Applied Soc. Psych.* 2575 (2000).

severity manipulation affects attribution of intentionality, suggesting that our understanding of intent is influenced by outcome severity.¹¹³

Unlike surveys, experiments more directly clarify (or “elucidate”) features of lay understandings of law. The above example provides evidence that intent has a severity-sensitivity feature. Other experimentalists have uncovered that lay self-understandings of the “reasonable” are predicted by a complex combination of statistical and prescriptive norms;¹¹⁴ that lay self-understandings of “consent” track essentialist judgment;¹¹⁵ and that lay self-understandings of “law” itself may be sensitive to multiple criteria.¹¹⁶ These subtle features could not be easily identified by armchair introspection or a more superficial survey; the experimental method uniquely furthers the deep, philosophical interrogation of self-understandings that *Elucidating Law* calls for.¹¹⁷

On Dickson’s view, legal philosophizing has both descriptive and evaluative elements. “[T]o elucidate law is *not* merely to shine a flat and invariant intellectual light upon it, and then passively record those attitudes towards, and beliefs about it, which appear.”¹¹⁸ Experimental jurisprudence offers a model of how even stage one (descriptive, not evaluative, philosophical work) is not merely to shine a flat light on lay beliefs. Experimentalists carefully and intentionally design studies that test specific hypotheses that bear on jurisprudential debates. This is an empirical stage of analysis, but it is also a philosophical one. The process of developing thoughtful, important hypotheses and effective experimental design and materials is an active one. This careful descriptive work all precedes the collection of data from laypeople, and thus it generally precedes the normative evaluation of whatever the study reveals.

More broadly, the experimental jurisprudence movement generally aligns with Dickson’s proposed “two-stage” mode of inquiry. Experimental philosophers begin by studying lay understandings of law; only in a later

113. See Kneer & Bourgeois-Gironde, *supra* note 112, at 141–44.

114. See Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 *Ala. L. Rev.* 293, 316–30 (2018) (testing the hypothesis that “reasonableness is a *hybrid* judgment, one that is partly statistical and partly prescriptive” as well as the hypothesis that “ordinary reasonableness judgments are systematically intermediate between the relevant average and the ideal”).

115. See Roseanna Sommers, *Commonsense Consent*, 129 *Yale L.J.* 2232, 2292–95 (2020) [hereinafter Sommers, *Commonsense Consent*] (conducting a survey-based experiment and finding that respondents judged a “more essential, less material lie” to undermine consent more than a “less essential, more material lie”).

116. See Guilherme de Franca Couto Fernandes de Almeida, Noel Struchiner & Ivar Rodriguez Hannikainen, *Rule Is a Dual Character Concept*, *Cognition*, art. 105259, Jan. 2023, at 1, 14 (providing empirical support for the theory that people understand the concept of rules as comprising “two independent sets of criteria,” one that is moral and one that is based on the rules’ text).

117. Much of experimental jurisprudence uses experiments like these. But other empirical methods could also shine new and unique light, including methods from neuroscience, linguistics, behavioral economics, and computer science.

118. Dickson, *Elucidating Law*, *supra* note 7, at 9.

stage does the philosopher assess whether those self-understandings are good or bad. In that second stage, the experimental philosopher does not always endorse (normatively) the lay beliefs about law. For example, Roseanna Sommers finds (at stage one) that laypeople evaluate that some agreements induced by deception are nevertheless “consensual,” but Sommers (at stage two) does not recommend that law adopt this conception of consent.¹¹⁹ Kneer and Bourgeois-Gironde find that laypeople (and legal experts) understand “intent” in law in a way that is sensitive to the stakes of the outcome (at stage one)—and they argue that legal intent should exclude this feature (at stage two).¹²⁰

Inevitably, a theorist’s priors and interests influence the questions they study and the tenor of their typical “stage two” evaluation. Some research programs tend toward critique, while others tend toward a rosier picture of law and ordinary people’s understanding of it. This is true both of traditional jurisprudence and experimental jurisprudence. As examples within the former, consider that both critical legal studies and the New Private Law recognize law’s important connection with ordinary people, despite the approaches’ divergent orientations toward legal doctrine, concepts, and the merit of law’s congruence with ordinary norms and understandings.¹²¹ Within experimental jurisprudence, there are certainly research programs that tend towards criticism of lay understanding of law,¹²² and there may be some future programs that tend to offer more favorable evaluations. These trends—in traditional or experimental jurisprudence—should not necessarily be taken as evidence that theorists are blurring the line between stage one and two. The trends may simply

119. See Sommers, *Commonsense Consent*, supra note 115, at 2248–66, 2301.

120. Kneer & Bourgeois-Gironde, supra note 112, at 144 (“[I]t is less evident how the law could adopt a severity-sensitive concept of intentionality without generating large-scale inner-systematic incoherence.”).

121. Compare Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57, 109–13 (1984) (noting that law is “among the primary sources of the pictures of order and disorder . . . that ordinary people carry around with them and use in ordering their lives,” but retaining a critical stance towards law’s necessary normative congruence with ordinary understandings), with Andrew S. Gold & Henry E. Smith, *Sizing Up Private Law*, 70 *U. Toronto L.J.* 489, 504–05 (2020) (“The set of legal concepts benefits from its congruence with relatively simple local forms of conventional morality. . . . Certainly, contract law can diverge from the morality of promising, just as legislation can go beyond corrective justice. Nevertheless, the ability to draw on simple local morality is an important starting point.”).

122. E.g., Kneer & Bourgeois-Gironde, supra note 112; Markus Kneer, *Reasonableness on the Clapham Omnibus: Exploring the Outcome-Sensitive Folk Concept of Reasonable, in Judicial Decision-Making: Integrating Empirical and Theoretical Perspectives* 25, 25–26 (Piotr Bystranowski, Bartosz Janik & Maciej Próchnicki, eds. 2022) (“[F]olk judgments concerning the reasonableness of decisions . . . depend strongly on whether they engender positive or negative consequences. . . . This finding is worrisome for the law . . .”); Markus Kneer & Izabela Skoczeń, *Outcome Effects, Moral Luck, and the Hindsight Bias*, 232 *Cognition*, no. 105258, 2023, at 1, 17 (“[T]he downstream effects of the hindsight bias constitute a serious threat to the just adjudication of legal trials, in particular in countries where *mens rea* is determined by lay juries . . .”).

reflect that theorists who favor criticism or conceptualism have an eye for questions that bear out these priors.

In sum, experimental jurisprudence is not only complementary to the project of elucidating law; it is precisely the sort of innovation in philosophical method that will help modern philosophers continue to elucidate law. Philosophers' use of the experimental method has helped unearth interesting features of lay understanding of law—many of which are not observable from individual armchair introspection—setting the stage for a second-stage normative inquiry into the merit of those features.

C. *An Objection: Expertise*

This section and the next consider common objections to experimental jurisprudence. There are other objections, which cannot be addressed fully here; for example, that experimental jurisprudence materials do not adequately explain to participants the implications of their responses.¹²³ The objection considered in this section concerns expertise. The objection in the next section concerns the object of study: the nature of law or concepts of law.

Some object to the experimental jurisprudence approach because legal philosophers are not seeking or asserting the common person's understanding. Instead, the argument goes, legal philosophers seek the understanding of legal experts.¹²⁴ This Review offers three responses to this objection.

123. See Himma, *supra* note 14, at 355 (“A poll is not equipped to tell us much about even what subjects *believe* about the law unless the questions expose all of the implications of an answer that might affect how they respond.”). Kenneth Himma critiques Lucas Miotto, Guilherme FCF Almeida, and Noel Struchiner, arguing that in the society-of-angels experiment, participants should have been made aware that answering “This is law” entails that “criminali[zing] harmful acts” is “not a necessary condition for the existence of a legal system.” Himma, *supra* note 14, at 353–56 (citing Miotto et al., *supra* note 108). There are two brief responses to Himma's important critique. First, a follow-up experiment could address this specific hypothesis: When participants are made aware of this implication, do their answers change? If we read Himma's critique narrowly (about just this specific entailment), the critique is primarily a contribution to *experimental jurisprudence*, not a global critique of the method. On this interpretation, Himma agrees that lay views are worthy of study and offers a new, testable hypothesis about the source of those lay views. Second, if the objection is very general in nature (i.e., that experimental jurisprudence is useful only if respondents to a thought experiment are made aware of *every* entailment or a very large set of entailments), it is not clear that the traditional philosophical methodology survives this critique. Moreover, experimentalists may have already conducted a study responsive to Himma's suggestion: Miotto et al., *supra* note 108, at 24–26 (study 5). That study describes a society of humans whose local means of enforcement are temporarily disabled by a terrorist attack. The attack's implications last several years, and without any legal enforcement, crime increases and compliance decreases. Participants tended to agree (rather than disagree) that this society, with no criminal enforcement, “has a legal system.”

124. E.g., Himma, *supra* note 14, at 368–69 (arguing that background information should be included in the poll questions used in experimental jurisprudence studies, but that such information, which is inherently infused with legal experts' views, may push

First, as Hart recognized, often the law is itself concerned with the ordinary person's understanding:

These [ordinary] features need to be brought to light and described in literal terms; for the assertion often made by the courts, especially in England, that it is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned, seems to us to be true. At least it is true that the plain man's causal notions function as a species of basic model in the light of which the courts see the issues before them, and to which they seek analogies, although the issues are often very different in kind and complexity from those that confront the plain man. These notions have very deep roots in all our thinking and in common ideas of when it is just or fair to punish or exact compensation. Hence even lawyers who most wish the law to cut loose from traditional ways of talking about causation concede that at certain points popular conceptions of justice demand attention to them.¹²⁵

Legal philosophers aim to elucidate law, and where the law concerns the plain man's notions (e.g., of causation), legal philosophers should aim to elucidate those ordinary notions.

Second, experimental jurisprudence is not limited to studying ordinary understandings. It can also examine expert understandings. There are different versions of the "expertise defense" of the traditional method—some claiming that the relevant population is legal officials, others claiming that the relevant population is legal philosophers. If legal officials are the relevant source of intuitions or understandings, the dominant twentieth-century method (one philosopher asserting their intuition) also faces a challenge: Most legal philosophers are not legal officials, and it is not immediately clear why legal-philosophical training provides special insight into the understandings of legal officials. But in either case, some extant empirical studies have examined the self-understandings of legal philosophers or legal officials as related to legal philosophical questions.¹²⁶

Third, and most importantly, there are methodological reasons for legal philosophers to examine and elucidate ordinary understandings. Even when law does not clearly employ ordinary understandings, it is entangled with ordinary people and ordinary language. As Dickson's *Elucidating Law* explains, law impacts ordinary people, structuring their

respondents in a certain direction); Jiménez, *supra* note 96 (manuscript at 7–8) (“[T]hose in the driver’s seat regarding legal concepts are legal officials and participants, not laypeople.”).

125. Hart & Honoré, *supra* note 2, at 2.

126. E.g., Kneer & Bourgeois-Gironde, *supra* note 112, at 141–44 (studying how French judges understand intentionality in light of the severity of the associated action); Eric Martínez & Kevin Tobia, What Do Law Professors Believe About Law and the Legal Academy?, 112 *Geo. L.J.* 111, 134–64 (2023) (conducting a survey of law professors’ views on various schools and theories within the legal academy).

families, welfare, employment, freedoms, and responsibilities.¹²⁷ Ordinary people also create law, contributing directly to the production of legal content as jurors deciding mixed questions or as statutory interpreters.¹²⁸ Moreover, any legal expert (whether a legal philosopher or legal official) was once an ordinary person, and it is plausible that they bring some aspects of that ordinary experience and understanding to law. There are similar considerations about legal language: Law is clearly written and expressed with technical language,¹²⁹ but it is not a foreign language to its ordinary citizens. Legal notions—cause, consent, reasonableness, intent—share names with similar notions that we use in ordinary life, whose legal meanings are not entirely distinct from their ordinary ones. Empirical study of ordinary notions and ordinary people can help disentangle the ordinary from the legal. In Dickson’s two-stage terms, in stage one we can begin to unearth facts about ordinary understanding (e.g., of law, cause, consent, or reasonableness), and in stage two we can evaluate (normatively) the value these features have or would have in law.

Beyond the methodological benefits of disentangling the ordinary from the legal, illuminating the ordinary may cast light on the legal. Raz remarked on the connection between legal reasoning and ordinary reasoning:

Legal reasoning is reasoning about the law, or reasoning concerning legal matters. A humble enough activity in which most people regularly engage as part of the conduct of their normal affairs. . . .

. . . Courts’ decisions are legally binding; the decisions of ordinary people are not, at least not normally. But it does not follow that courts reason in a special way. We may—people sometimes do—think of problems which arise before the courts. In reasoning about the merits of the case for plaintiff or defendant we reason—if we reason well—as the courts do, if they reason well. You may say that this is so only because ordinary people imitate the reasoning of the courts. . . .

But that is not legal reasoning. . . . People and courts alike attempt to establish the law, or to establish how—according to law—cases should be settled.¹³⁰

127. See Dickson, *Elucidating Law*, *supra* note 7, at 106 (“[S]elf-understandings in terms of law feature in how both non-legally expert individuals living their lives under law, and legal professionals and legal officials, understand aspects of their lives and of the social reality around them.”).

128. See Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 *Chi.-Kent L. Rev.* 1281, 1282–83 (2003).

129. See Frederick Schauer, *Is Law a Technical Language?*, 52 *San Diego L. Rev.* 501, 501 (2015).

130. Joseph Raz, *On the Autonomy of Legal Reasoning*, 16 *Ratio Juris* 1 (1993), reprinted in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 326, 326–27 (1995).

In sum, there is much common ground between “X-Jurists”¹³¹ and defenders of legal expertise who are skeptical of unfiltered “vox-pop” surveys of laypeople. Both agree that neither law nor legal philosophy should, as a general matter, simply adopt whatever the folk say law is. In fact, no scholar of experimental jurisprudence has endorsed such a strong and general claim. But to elucidate law in a way that takes seriously its social reality, we must elucidate ourselves, including our ordinary and expert understandings—and the complex relationship between them.

To take a concrete example, return again to causation. Legal causation is not simply ordinary causation. In fact, one task of legal philosophy is to disentangle the two and elucidate their relationship.¹³² To do that, one must also elucidate ordinary causation. Some progress can come from the armchair (i.e., by individual introspection). But not all features of ordinary causation have proven accessible from armchair reflection. A rich literature on causation has shown subtle, complex features of the ordinary notion, some of which map in interesting and illuminating ways onto legal notions.¹³³ Philosophical insights from empirical studies are not limited to purely descriptive projects. In evaluating some normative questions about law (e.g., How should law’s causation differ from ordinary causation?), it is beneficial to elucidate the relevant ordinary notions (e.g., What is ordinary causation?). To examine how legal causation should differ from ordinary causation, one should understand ordinary causation.

D. *A Second Objection: Concept vs. Nature*

Another objection begins by claiming that legal philosophy is concerned with natures, not concepts: General jurisprudence studies the nature of law, not our concept of law, and specific jurisprudence studies the nature of legal causation, not our concept of legal causation.¹³⁴

131. I use “X-Jurist” here to refer to scholars working within experimental jurisprudence.

132. See, e.g., Hart & Honoré, *supra* note 2, at 2.

133. E.g., Knobe & Shapiro, *supra* note 111, at 209–34.

134. Consider, for example, the project of studying the *relation* of causation rather than our concept of causation. See generally Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* 5 (2009). Many of these projects, however, still rely on intuition or the corresponding concept to shed light on the object of inquiry. See, e.g., *id.* (“In short, what criminal law and the law of torts mean by ‘cause’ is what we ordinarily mean by ‘cause’ as we explain the world, viz some kind of natural relation. It thus behooves us to enquire after the nature of such a relation.”); *id.* at 76 n.135 (“[T]he exemption seems to allow those acts which intuition tells us are clearly permissible . . .” (second alteration in original) (internal quotation marks omitted) (quoting Judith Jarvis Thomson, *The Trolley Problem*, 94 *Yale L.J.* 1395, 1408 (1985))); *id.* at 417 (“[I]ntuitions in this actual case seem persuasive here . . .”); *id.* at 445 (discussing the “intuition of difference” (internal quotation marks omitted) (quoting Phil Dowe, *Physical Causation* 217–18 (2000))); *id.* at 542 (“Intuitively the first proximate cause doctrine seems correct for this class of cases . . .”).

Accordingly, it is unclear what relevance empirical studies of ordinary understanding have to jurisprudential inquiries about the metaphysical nature of law. The ordinary understanding of gravity does not reveal the nature of gravity; why expect the ordinary understanding of law to illuminate facts about (real) law?

The concept-versus-nature distinction arises outside of legal-philosophical analysis, including in moral philosophy and epistemology. As Alvin Goldman and Joel Pust explain: “Broadly speaking, views about philosophical analysis may be divided into those that take the targets of such analysis to be in-the-head psychological entities versus outside-the-head non-psychological entities. We shall call the first type of position mentalism and the second extra-mentalism.”¹³⁵ Many of the questions that this section addresses about experimental jurisprudence’s relationship to jurisprudence parallel questions about experimental philosophy’s relationship to philosophy.¹³⁶

Kenneth Himma’s recent critique of experimental jurisprudence draws a similar, but not identical, distinction between “modest conceptual analysis” (Modest CA) and “immodest conceptual analysis” (Immodest CA). Modest CA seeks:

[T]o explicate the nature of a kind as it is constructed[—]or determined[—]by our conventions for using the corresponding term together with various shared assumptions about its nature that qualify the application of those conventions in hard cases; the goal is to learn something about the world as our words structure or construct it.¹³⁷

On the other hand, Immodest CA seeks:

[T]o explicate the nature of a kind as determined independently of anything we do with words; the goal is to learn something about the world as it really is, presumably from some sort of objective, or God’s-eye, perspective that is neither conditioned nor limited by anything we do in the world[—]with or without language.¹³⁸

The remainder of this section considers the nature/concept objection as related to different types of jurisprudential projects: (1) those clearly engaged in mentalism or Modest CA; (2) those clearly engaged in extramentalism or Immodest CA; and (3) those not clearly engaged in either project.

1. *Jurisprudence Clearly Engaged in Mentalism or Modest Conceptual Analysis.* — First, consider mentalism or Modest CA in jurisprudence. As

135. Alvin Goldman & Joel Pust, *Philosophical Theory and Intuition Evidence*, in *Rethinking Intuition*, supra note 81, at 179, 183 (emphasis omitted).

136. One’s approaches or answers to these questions need not be the same. For example, one might seek the nature of moral truths while simultaneously seeking to understand our concept of law.

137. Himma, supra note 14, at 350 (emphasis omitted).

138. *Id.* at 351 (emphasis omitted).

this Review has argued, many traditional projects in jurisprudence conduct this type of analysis, seeking to articulate or elucidate our concepts or understandings of law.¹³⁹ This is also a significant part of Dickson's vision for legal philosophy in *Elucidating Law*. For these projects, there may be other objections to experimental jurisprudence (e.g., expertise defenses), but the objection that legal philosophy is concerned only with the natures of mind-independent entities is not relevant.

2. *Jurisprudence Clearly Engaged in Extramentalism or Immodest Conceptual Analysis*. — Jurisprudence's extramentalist or Immodest CA projects present different methodological issues. As Himma explains:

Though critics frequently bemoan the dependence of traditional conceptual jurisprudence on intuitions, the intuitions [Modest CA] relies on are considerably more reliable than those on which [Immodest CA] relies. While [the former] relies on intuitions that we have about the application-conditions of words because and only because we are competent with those words, [the latter] relies on intuitions we have no reason to trust; we have no reason to believe that our intuitions about the nature of a kind as determined independently of anything we do with words can tell us what it is “really” like[—]that is, what that kind is like independent of the conceptual framework we impose on the world with our semantic conventions to talk about it.¹⁴⁰

Himma is right: Some apparently “extramentalist” projects rely on intuitions or appeals to our understanding.¹⁴¹ One essential question for a philosopher engaging in such a project is: What reasons support the claim that your intuition tracks the (mind-independent) truth about (for example) the nature of justice or the nature of legal relations (e.g., causation)? And a second question for a critic of experimental jurisprudence is: Does your answer to the first question not imply that empirical methods also have some usefulness as a complement to individuals' armchair introspection?

Taking inspiration from the “negative program” in experimental philosophy, experimental jurisprudence can examine the reliability of the relationship between armchair intuition and the truth about the nature of law.¹⁴² The claim that “our” intuitions track the truth is subject to empirical scrutiny. If true, we should not expect significant variation or disagreement among people: If some intuit (only) a proposition, P, and others intuit

139. See *supra* notes 58–64 and accompanying text.

140. Himma, *supra* note 14, at 352 (emphasis omitted).

141. See, e.g., Richard W. Wright, Causation: Metaphysics or Intuition?, in *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* 171, 171 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016) (“Although [Michael Moore] purports to disavow . . . reliance on ordinary language usage as an indicator of actual causal relations, his frequent and often heavy reliance on supposed common intuitions to support his arguments belies that disavowal.” (footnotes omitted)).

142. See, e.g., Tania Lombrozo, Explanation, in *A Companion to Experimental Philosophy*, *supra* note 65, at 491, 498–99.

(only) its negation, not-*P*, not all intuitions are truth-tracking.¹⁴³ Similarly, we could examine whether clearly irrelevant factors affect people's intuitions. If people's intuitions about case A differ depending on whether they have previously read case B (an "order effect") and we agree that order of consideration is clearly irrelevant to the truth of an intuition, these order effects would suggest some degree of unreliability in the production of intuitions.¹⁴⁴

Another argument for philosophers concerned with the nature of law to attend to experimental evidence comes from Lucas Miotto, Guilherme Almeida, and Noel Struchiner:

One corollary about metaphysical possibility is that whatever is actual is metaphysically possible. We can, therefore, use our background knowledge and experience of actual scenarios as baselines for metaphysical possibility: the closer a given scenario is from the baseline, the more confident we can be that the scenario is metaphysically possible. When several individuals who have some background knowledge and experience of actual legal systems, for example, voice the intuition that an institution described in a hypothetical scenario is a legal system, this gives us a reason to believe in the metaphysical possibility of the described institution. Of course, the reason is defeasible. But in normal conditions, intuitive judgments (especially those that are vastly shared) are not something that can be dismissed in an argumentative exchange; they give us defeasible reason for metaphysical possibility and must be explained away by opponents.¹⁴⁵

3. *Jurisprudence Whose Aims and Methods Are Unclear or Debatable.* —

There is a final category: jurisprudence whose aims and methodology are unclear between the first two options considered. Philosophers propose that some general jurisprudential debate about law's nature falls into this category. Consider the introduction to the general jurisprudential section from a casebook on the philosophy of law:

For generations, Jurisprudence courses had been organized around the question, "What is Law"—without stopping to consider the fundamental strangeness of that question. What kind of question is it? Legal philosophers are frequently surprisingly coy about the nature of the questions they are asking:

143. Importantly, for a person to "intuit a proposition, *P*" is not identical to a person expressing (in a seminar or on a survey) that they agree with *P*. Perhaps the person has made a mistake about the underlying thought experiment or scenario; or perhaps the question presented was ambiguous, misleading or unclear; or perhaps the person was forced to choose between two options (e.g., "*P*" or "*Q*"), neither of which adequately expresses their views. These are just a few reasons that could explain one group's apparent endorsement of "*P*" and another's apparent endorsement of "not-*P*," which would not raise a challenge about the incompatibility of people's intuitions concerning *P*. Thanks to Guilherme Almeida for calling attention to this set of issues.

144. See Lombrozo, *supra* note 142, at 489–99.

145. Miotto et al., *supra* note 108, at 102–03 (emphasis omitted) (footnotes omitted).

is “what is Law?” an inquiry regarding linguistics, sociology, morality, metaphysics—or all of the above? . . . The common response, that theories of law might be “descriptive” in some sense, only leads to further questions. Legal systems, and people’s experiences of them, are extremely complex. Inevitably, a theory about (the nature of) law can capture only a portion of the relevant facts. Once one accepts the importance of selection in constructing social theories, the focus then turns to the basis on which selection occurs.¹⁴⁶

There is famous disagreement about the aims and methods of philosophers like Hart and what “descriptive” means as a feature of these projects. Yet it is hard to construe most of these projects as entirely extra-mental, unrelated to our ordinary understanding and concepts. Himma’s critique of experimental jurisprudence proposes that both Hart and Raz were engaged in a Modest CA project focused on our concepts of law.¹⁴⁷

Ironically, many of these twentieth-century-jurisprudence figures accuse each other of failing to employ empirical methods in their descriptive projects. Raz accuses Hans Kelsen of “merely paying lip-service to what he regards as a proper methodological procedure. He never seriously examined any linguistic evidence and he assumed dogmatically . . . that law is the only social institution using sanctions (other than divine sanctions).”¹⁴⁸ Dworkin levels a similar critique at one interpretation of Hart’s project: If Hart’s descriptive sociology is really descriptive, then:

[N]either Hart nor his descendants have even so much as begun on the lifetime-consuming empirical studies that would be needed. They have not produced an anthill let alone an Everest of data. . . .
 . . . If we conceive Hart’s theories—or those of his descendants—as empirical generalizations, we must concede at once that they are also spectacular failures.¹⁴⁹

146. Stephen E. Gottlieb, Brian H. Bix, Timothy D. Lytton & Robin L. West, *Jurisprudence: Cases and Materials: An Introduction to the Philosophy of Law and Its Applications* 103 (2d ed. 2006).

147. Himma, *supra* note 14, at 352 n.8 (“Hart clearly understands himself to be doing what we would now describe as [Modest CA]. The same is true of Joseph Raz.”). Moreover, argues Himma, “[i]f there are any prominent theorists who *explicitly* endorse and deploy [Immodest CA], I am unfamiliar with their work.” *Id.*

148. Joseph Raz, *The Problem About the Nature of Law*, 3 *Contemp. Phil.* 107 (1982), reprinted in *Ethics in the Public Domain*, *supra* note 130, at 195, 201; see also Hans Kelsen, *General Theory of Law and State* 4 (John H. Wigmore, Jerome Hall, Lon L. Fuller, George W. Goble, Edward A. Hogan, Josef L. Kuntz, Edwin W. Patterson & Max Rheinstein eds., Anders Wedberg trans., 1945) (“Any attempt to define a concept must take for its starting-point the common usage of the word In defining the concept of law, we must begin by examining . . . [whether] social phenomena generally called ‘law’ present a common characteristic distinguishing them from other social phenomena . . .”).

149. Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 *Oxford J. Legal Stud.* 1, 22 (2004).

More recent scholarship critiques general jurisprudence more broadly: “[T]he question whether . . . [people have a coherent and determinate set of intuitions about law] is an empirical one, and none of the participants in the debate have undertaken any proper empirical research to establish their views.”¹⁵⁰

This description of jurisprudence, as “descriptive” but concerned with something “deeper” about “law’s nature,” beyond just our ordinary intuitions, is opaque but also common. Hilary Nye provides an excellent overview of this possibility as jurisprudence that is “descriptive” in some sense but nevertheless seems to have some “immodest” or thicker metaphysical ambitions:

Theorists usually say or imply that the truths about law they seek are not social-scientific observations about judicial practices or other observable phenomena. Their aim is something deeper—the nature of law. Further, many theorists claim that concepts can help us understand the nature of law. We use the method of conceptual analysis to provide insight not into our concept, but into the nature of the thing the concept represents.¹⁵¹

Moreover, notes Nye, on this picture “our intuitions” and “conceptual analysis” are taken to provide insight into the nature of the thing we study.¹⁵² Scott Shapiro offers a similar view of Hart (that conceptual analysis can determine the “nature” of law).¹⁵³ And some of Raz’s statements seem to fit within this picture.¹⁵⁴

This Review essay cannot sort out all of these methodological issues in traditional jurisprudence. But return to the broader context of the argument here. Some have objected to experimental jurisprudence because jurisprudence studies natures, not concepts. If this means that jurisprudence uses intuitions only in extramentalist or immodest conceptual analysis, there is still a role for experimental jurisprudence.¹⁵⁵ Moreover, much jurisprudence engages in straightforward mentalist or

150. Grant Lamond, Methodology, *in* The Cambridge Companion to Philosophy of Law 17, 34–35 (John Tasioulas ed., 2020).

151. Hilary Nye, Does Law ‘Exist’? Eliminativism in Legal Philosophy, 15 Wash. U. Juris. Rev. 29, 33 (2022).

152. See *id.* at 35–36.

153. See Shapiro, *supra* note 48, at 406 n.16 (“[Hart] seemed to have assumed that *the nature of law* could be determined exclusively by conceptual analysis.”).

154. See, e.g., Nye, *supra* note 151, at 34 (“Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other.” (internal quotation marks omitted) (quoting Joseph Raz, Can There Be a Theory of Law?, *in* The Blackwell Guide to the Philosophy of Law and Legal Theory 324, 325 (Martin P. Golding & William A. Edmundson eds., 2005))); see also Joseph Raz, Two Views of the Nature of the Theory of Law: A Partial Comparison, 4 Legal Theory 249, 255 (1998) (“[T]he explanation of a concept is the explanation of that which it is a concept of.”).

155. See *supra* section III.D.2.

modest conceptual analysis, in which experimental jurisprudence also has a role.¹⁵⁶ For traditional jurisprudential projects that are unclear about their aims and methods, if the ambiguity resolves into one of these two, then experimental jurisprudence has a role. Perhaps there are some remaining projects that offer a different jurisprudential aim and methodology. It would benefit both experimental jurisprudence and jurisprudence more broadly for theorists engaging in those projects to more clearly and precisely articulate the nature of the relevant questions, aims, and traditional methods.

CONCLUSION

In working to achieve jurisprudential knowledge, what methods should we use? This Review commends calls for legal philosophers to attend to the connection between their aims and methods. One longstanding aim is to elucidate our law by elucidating how “we” understand our law. Jurisprudence will (and should) continue to elucidate our self-understandings, but in asking traditional questions it need not limit itself to traditional methods. Today, there is opportunity for methodological innovation. Rich empirical studies cast light on our understandings, and methods from experimental jurisprudence and related disciplines can assess untested claims.

To be clear, this Review has not recommended that experimental jurisprudence replace traditional jurisprudence. Critics caution against such a strong view: Experimental jurisprudence cannot “by itself” resolve jurisprudential debates¹⁵⁷—it is not sufficient as a methodological approach to jurisprudence. No doubt, experimental jurisprudence is not a sufficient method to address all of jurisprudence’s rich questions (nor is any other method).¹⁵⁸

This Review’s claim, however, is stronger than a mere call for methodological pluralism. Some legal philosophers have generously endorsed pluralism, welcoming an empirical approach as one among many or as a “starting point” for jurisprudence.¹⁵⁹ But given jurisprudence’s traditional questions, extant empirical data, and the availability of empirical methods, experimental jurisprudence warrants

156. See *supra* section III.D.1.

157. See, e.g., Jiménez, *supra* note 96 (manuscript at 9); see also Brian Bix, *Conceptual Questions and Jurisprudence*, 1 *Legal Theory* 465, 478 (1995) (noting that empirical data have a place in legal conceptual analysis but cannot be used to solve all questions in legal conceptual analysis).

158. Consider a narrower construal of this critique: Experimental jurisprudence cannot resolve any single jurisprudential debate. I would register disagreement. Even traditional methods only “resolve” local jurisprudential disputes; no one has “resolved” the most general debates about the nature of law or the nature of causation. But with respect to some more local questions (e.g., How does ordinary causation differ from legal causation?), experimental jurisprudence contributes as significantly as traditional methods.

159. See, e.g., Dickson, *Elucidating Law*, *supra* note 7, at 114.

more than the invitation that a hundred flowers bloom. Empirical engagement should be recommended, not merely welcomed, within some jurisprudential debates: When jurisprudence scholarship advances claims about “our” intuitions or understanding of law, the work would be more rigorous if it supplemented individuals’ assertions with evidence (e.g., from relevant empirical studies).

Today’s legal philosophy should improve on that of the past, and methodological clarification and innovation offer avenues of improvement. Of course, this Review’s proposals are not a timeless panacea. Future legal philosophers will likely unearth deficiencies in the emerging methods—as experimental jurisprudence and other branches of modern legal philosophy mature into traditional approaches. They will question unexamined assumptions, call for new methods, ask new questions, and creatively depart from established approaches. Insofar as these further innovations allow legal philosophy to shed more light on law, one cannot hope for a brighter future of the discipline.

