Evaluation and Legal Theory. By JULIE DICKSON. [Oxford: Hart Publishing. 2001. xii, 144 and (Index) 4 pp. Paperback. £10.00. ISBN 1–84113–081–8.]

As an elementary introduction to some methodological issues that have figured prominently in recent debates among legal philosophers, *Evaluation and Legal Theory* is quite serviceable. In fact, given that undergraduate Jurisprudence students tend to pay far too little attention to methodological questions, the book might turn out to be valuable within its limited objectives. To be sure, even within those modest objectives the volume suffers from some confusion, as will become plain below. Indeed, especially in Dickson's discussions of John Finnis and Frederick Schauer, the confusion occasionally amounts to serious distortion. Any recommendation of this book to one's students should be accompanied by prominent caveats. Nevertheless, if Dickson's lucid introduction helps to draw the attention of undergraduates to certain important issues that they would probably otherwise have ignored, it will prove to be worthwhile.

The central topic which Dickson addresses is encapsulated in her title. Rightly rejecting the idea that any philosophical theory of law can be value-free, she enquires into the implications of the fact that every such theory must draw upon evaluative considerations. Writing as a legal positivist (specifically as a disciple of Joseph Raz), she is especially interested in determining whether the evaluations necessary for jurisprudential analyses must incorporate moral judgments. She delineates three main questions that structure her investigation of the methodology of legal philosophy:

(1) Must every adequate theory of law include moral evaluations of the institutions and norms which it seeks to expound?
(2) Must every adequate theory of law conclude that law is a morally justified phenomenon?
(3) Can the beneficial moral consequences of the adoption of a certain theory of law weigh in favor of that theory's satisfactoriness as an account of its subject matter?

Dickson labels an affirmative answer to the first of these questions as the "moral evaluation thesis", an affirmative answer to the second as the "moral justification thesis", and an affirmative answer to the third as the "beneficial moral consequences thesis". She endeavours to contest each of those theses and to show that the inevitably evaluative character of legal philosophy does not necessitate an acceptance of any of them. In so doing, she is hardly breaking new ground. Rather, she is opting for a methodological stance that has been advocated by many Anglo-American legal positivists during recent decades, who have been inspired in various ways by H.L.A. Hart. Dickson has been especially heavily influenced by her mentor Raz, and indeed her book is largely a conspectus of Raz's views.

Although the basic position staked out by Dickson within this tradition of positivist thought is perfectly sound—consisting both in her repudiation of the notion of value-free theorising and in her rejection of each of the three theses mentioned above—some of her specific ways of articulating and defending that position are dubious. One problem lies in her terminology. In order to explain how positivist theories of law can be evaluative even though they do not engage in moral assessments, Dickson

distinguishes between two broad classes of propositions: the directly evaluative and the indirectly evaluative. Both her "directly"/"indirectly" terminology and her initial exposition of this dichotomy convey the impression that she is differentiating between (i) any proposition that attributes goodness or badness to some phenomenon and (ii) any proposition that singles out some phenomenon for such an attribution without specifying whether goodness or badness is the property to be ascribed. A proposition of the latter type would indicate that something is important, without indicating whether the thing's importance stems from its being good or its being bad. So construed, Dickson's distinction would be misleading and problematic in several respects, not least because it would render mysterious many judgments of importance in the natural sciences. Slightly later, however, Dickson elaborates her distinction in a more perceptive manner (though she retains the unhelpful "directly"/"indirectly" terminology). Departing somewhat from the details of her discussion, we can best understand the matter along the following lines. Any non-neutral evaluative proposition affirms in effect that some specified phenomenon is positively or negatively related to some purpose or goal or desideratum. The purpose or goal or desideratum, which is classifiable as such in application to the person asserting the proposition or in application to any other person(s) with whom the proposition associates it, need not be explicitly designated if the context makes clear what it is. Most important, it need not be moral-political. It can be purely theoretical-explanatory, for example, or it can be internal to some activity such as a game. Thus, for instance, a claim about some institution's importance or unimportance might be based not on any moral considerations but on a judgment about the extent to which the institution should figure in a comprehensive yet parsimonious account of sociopolitical life.

Legal positivists, then, can readily accept that they must make judgments of importance in their analyses of law, while insisting that those judgments are oriented purely toward theoretical-explanatory objectives rather than toward moral-political ideals. Dickson is wise to join many other legal positivists in recognising as much. Far less pertinent, however, are some of her critiques of alternative positions. Correct though she is in sensing that those positions are unsound, she goes astray when she endeavours to expose their weaknesses.

In her attempt to rebut John Finnis's natural-law credo, Dickson runs afoul of an equivocation that pervades her book. From her first chapter onward, she uses the term "law" and the phrase "the law" as if they were interchangeable. In ordinary discourse, to be sure, "law" and "the law" are quite often synonymous. Even in jurisprudential parlance, that term and that phrase are sometimes interchangeable. Frequently, however, jurisprudential theorists distinguish between "law" as a general type of institution and "the law" as a society's particular instantiation of that general type. Such a distinction is crucial for any examination of Finnis's work, which advances a number of claims about law as a general mode of governance rather than about particular regimes of law. Finnis is certainly not attempting to argue that every regime of law engenders a comprehensively applicable moral obligation of obedience. Rather, he highlights certain features of law—most notably its essential role in providing basic security and in coordinating the countless interactions of individuals—and he adverts to those features as his warrant for

maintaining that a regime in which the law does engender a comprehensively applicable moral obligation of obedience is the central case or paradigmatic instance of law. Such a regime promotes the common good and the good of each individual by giving rise to the desiderata for which law is essential, and by doing so without the taint of corrupt or evil mandates that deviate from the benevolent ends for which law is indispensably suited. Finnis holds that, by concentrating on such a system of governance as the central paradigm of law, we can discern the goods that are realised by law even in its less worthy instantiations. His insistence on this point is of course fully consistent with his further contention that the less worthy regimes of law are debased in various respects and that many of their mandates may consequently lack moral obligatoriness. As Finnis declares, laws "made for partisan advantage, or (without emergency justification) in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doing of things that should never be done, simply fail, of themselves, to create any moral obligation whatever" (*Natural Law and Natural Rights* (Oxford, 1980) p. 360). For Finnis, one's attunedness to the morally commendable role of law is perfectly compatible with one's equal attunedness to the morally deplorable substance of the law in some societies.

By running together law and the law, Dickson's rejoinders to Finnis misrepresent his position. Her ripostes teem with statements of the following sort: "For Finnis, then, the methodological stance which the legal theorist must take in order to understand law adequately will result in his theory holding the law to be morally justified" (p. 72). One should not presume that Dickson's slippage between "law" and "the law" is simply a matter of stylistic sloppiness. On the contrary, her whole critique is founded on the erroneous notion that Finnis has sought to vindicate the moral obligatoriness of the norms in every legal regime: "Finnis' arguments for pushing the moral evaluation thesis all the way to the moral justification thesis are going to have to do a lot of work in order to be successful, due to the strength of the conclusion which they are required to substantiate. The important point to note is that Finnis is attempting to establish much more than that every legal system, of necessity, must have at least some moral *merit*.... This perhaps quite plausible claim would ... be compatible with the view that in many instances, the legal system in question also perpetrates such a great deal of evil that its claim that it is morally authoritative and ought to be obeyed is simply false. The further conclusion which Finnis needs ... to establish is that it is in the nature of legal systems that they are morally *justified*, *i.e.* correct in the claims to moral authority and in the demands to be obeyed on their own terms which they make" (pp. 80–81, emphases in original). Dickson quite plainly is not genuinely engaging with Finnis's arguments. Finnis, after all, proclaims that "for the purpose of assessing one's legal obligations in the moral sense, one is entitled to discount laws that are 'unjust' in any of the ways mentioned. Such laws lack the moral authority that in other cases comes simply from their origin, 'pedigree', or formal source" (*Natural Law and Natural Rights*, p. 360). Finnis affirms what Dickson takes him to be denying, and he denies what she takes him to be affirming. Unlike her, he unfailingly keeps in view the distinction between law and the law. Unlike her, then, he can easily reconcile the claim that law is morally obligatory and the claim that the law in any given society may be largely lacking in

moral obligatoriness. (Lest my defence of Finnis against Dickson's baseless strictures be interpreted as an endorsement of his approach, I should remark that I have sustainedly argued against his methodological stance in my *In Defense of Legal Positivism* (Oxford 1999), pp. 233–239.)

Equally distortive is Dickson's principal retort to Frederick Schauer, who has championed legal positivism partly on the ground that a widespread acceptance of positivism's tenets would yield beneficial moral consequences. Having plumped for what Dickson denominates as the "beneficial moral consequences thesis", Schauer undergoes criticism from her for having allegedly argued in the wrong direction. She delivers the following rebuke: "Schauer seems to argue in favour of espousing [legal positivism] on the grounds that so doing will result in the beneficial moral consequence of promoting clearer and more critical thinking about the law. However, the problem with this is that espousing [legal positivism] will only promote the kind of clearer thinking about the law which could assist in subjecting it to critical moral scrutiny *if* [legal positivism] is the *correct* way to go about understanding the way in which law is to be identified. The beneficial consequences which Schauer describes, then, will only follow if it is true that law is to be identified in the way [legal positivism] claims.... In other words, the alleged promotion of clearer thinking about the law which results in an increased ability to subject it to moral scrutiny is a consequence which ensues *if* [legal positivism] is true, and, as such, cannot itself be used to provide argumentative support for its truth. As it stands, Schauer's argument runs in the wrong direction, *from* premises consisting of a claim about the beneficial consequences of espousing a certain theoretical understanding of law, *to* the conclusion that this way of understanding the law is therefore correct" (pp. 88–89, emphases in original). In this passage and in numerous similar statements throughout her discussion of Schauer, Dickson asserts that his aim is to promote clarity of thought about law or the law. Let us for a moment assume that her attribution of this aim to him is accurate. Even then, we could not automatically infer that Schauer has stumbled. We would need to know what is meant by "clear" thinking. If "clear" simply means "precise and orderly," then it does not *per se* denote veridicality—in which case Schauer's fulfilment of his aim would be consistent with the falsity of legal positivism. Only if "clear" is taken to mean not only "precise and orderly" but also "free of fallacies", would Schauer be begging the question by presupposing the truth of legal positivism while endeavouring to establish its truth.

Let us now, however, notice that Dickson has not accurately recounted Schauer's ambition. Her myriad references to clear thinking and clarity of thought are her own invention. Such references convey the impression that Schauer is pursuing the theoretical-explanatory desideratum of veridicality (on top of any practical objectives that he might hope to attain). In fact, his focus lies entirely on the practical goal of averting the prevalence of excessive deference to the law's requirements. He is pondering whether the widespread embrace of a positivist understanding of law would tend to keep people from complying uncritically with nefarious legal mandates. The correctness of an answer to that question is independent of the truth-values of legal positivism's theses. Schauer could hope to achieve his objective even if legal positivism were false. Consider here an analogous situation relating to utilitarianism. Some utilitarians, who maintain that their credo

is uniquely correct as a moral theory, also maintain that the widespread adoption of a non-utilitarian outlook would be morally beneficial. They maintain, in other words, that the widespread embrace of moral beliefs perceived by the utilitarians themselves as fallacious would help to maximise the aggregate utility of people and would therefore tend to realise the true end of morality. In taking such a view, they are hardly presupposing that the perceivedly fallacious moral beliefs are true. The truth-values of those beliefs do not have a decisive bearing on their capacity to generate beneficial moral consequences by maximising people's utility. Schauer similarly is not committed by the logic of his argument to the claim that legal positivism is correct as a theory of law. Instead, he is committed merely to the thesis that positivism is singularly suitable for bringing about the vigilance or wariness which he is recommending. Such a thesis is of course precisely what he ventures to substantiate, through lines of reasoning that are not question-begging.

To be sure, Schauer as a legal positivist does believe that the tenets of positivism are true. The point here is simply that, *pace* Dickson, an affirmation of the truth of those tenets is not a presupposition of his "beneficial moral consequences" argument. Whatever may be the shortcomings of that argument, it does not beg the question or proceed in the wrong direction. (Again, my defence of a position against Dickson's onslaughts should not be construed as an endorsement thereof. I have elsewhere persistently impugned the sort of approach which Schauer favours.)

Dickson's book, marred by distortions in its treatment of certain other theories, is likewise flawed in some less serious respects. In the tenor of its methodological pronouncements, the volume is sometimes too sweeping and rigid. For example, Dickson twice proclaims that "the only way in which we can begin to investigate what [law] is like, and how it differs from other types of social organisation, is by attempting to isolate and explain those features which are constitutive of it, and which make it into what it is" (pp. 19, 89). She emphasises: "Such features can be nothing more nor less than law's essential properties, and it will be necessarily true that law exhibits such properties" (p. 19). Now, although the general position articulated here by Dickson is sustainable and fruitful, it should be resolutely affirmed in the aftermath of one's jurisprudential enquiries rather than at the outset. To lay it down as a firm methodological canon at the outset is to beg the question against a Wittgensteinian approach whose proponents would maintain that the distinctiveness of law consists in certain imbricated family resemblances rather than in any set of significant properties that are common to all possible legal systems. Dickson is right to set herself against the Wittgensteinian approach, but she should be doing so through substantive jurisprudential analyses rather than through methodological ukases.

A comparable instance of regrettable dogmatism emerges when Dickson is commenting on the judgments of importance that underlie anyone's jurisprudential analyses. She holds that such judgments "must ... reflect what those subject to the law regard as important about it" (p. 66). As she states in her most extended discussion of the matter, "any explanatorily adequate legal theory must, in evaluating which of law's features are the most important and significant to explain, be sufficiently sensitive to, or take adequate account of, what is regarded as important or significant,

good or bad about the law, by those whose beliefs, attitudes, behaviour, etc. are under consideration" (p. 43). Again Dickson's basic position is sound, but again it should be established through conceptual analyses rather than through a methodological fiat. With her robust assertions before any substantive theorising has begun, Dickson begs the question against Marxists and other supercilious prigs—who might contend that most people's views about the relative importance of sundry features of law are deluded, and who might submit that those views are therefore to be discounted rather than sensitively reflected. Dickson is right to distance herself from the Marxist standpoint, but an effective contestation of that standpoint has to be conducted at the level of substantive explications rather than at the level of methodological stipulations.

Like some of the methodological pronouncements in *Evaluation and Legal Theory*, some of the book's substantive assertions are marked by overconfidence. For instance, Dickson repeatedly follows her mentor Raz in declaring that "law invariably claims that it has legitimate moral authority" (p. 44). She sometimes merely attributes this thesis to Raz without explicitly endorsing it herself, but at other times she presents it as a truth on which "all can agree" (p. 63). Far from having elicited unanimous approval, the thesis about law's invariable claim to legitimate moral authority is controversial; I myself have argued at length that it is false (in *In Defense of Legal Positivism*, pp. 92–101). Perhaps Dickson can offer arguments to vindicate her Razian stance. If so, however, the arguments do not appear anywhere in the book under review.

Though Dickson's volume is extremely lucid, her style is prolix and somewhat error-prone. The book contains quite a bit of repetition, and there are too many passages in which Dickson tells us what she is going to tell us. She also uses first-person singular pronouns far too frequently. Still, notwithstanding the analytical and stylistic missteps, *Evaluation and Legal Theory* is quite a useful introduction for undergraduates to some methodological complexities that might otherwise remain beyond their ken. The volume's admirably limpid prose will win the gratitude of students, who can quite painlessly get a glimpse of the importance and profundity of methodological problems.

MATTHEW H. KRAMER

Death Talk: The Case against Euthanasia and Physician-Assisted Suicide. By MARGARET SOMERVILLE. [Montreal: McGill-Queen's University Press. 2001. xx, 401, (Bibliography) 2 and (Index) 29pp. $29.95. Paperback. ISBN 0–7735–2245–X.]

The Case against Assisted Suicide: For the Right to End-of-Life Care. Edited by KATHLEEN FOLEY AND HERBERT HENDIN. [Baltimore: Johns Hopkins University Press. 2002. xii, 364 and (Index) 7 pp. Hardback £33.50. ISBN 0–8018–6792–4.]

THE majority of books on euthanasia argue for its decriminalisation. These two books arguing against decriminalisation will help redress the balance.

The book by Professor Somerville, Director of the Centre for Medicine, Ethics and Law at McGill, is a collection of her papers on the subject over the last twenty years, though a few chapters consist of papers by other