

Taking Theory Out of a Participatory Cul-De-Sac

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Jeff Pojanowski, *Reevaluating Legal Theory*, 130 **Yale L. J.** 1300 (forthcoming, 2021), available at [SSRN](#).

Reevaluating Legal Theory, by Jeff Pojanowski, is a review essay on Julie Dickson's work on indirectly evaluative legal theory takes in her 2001 book, [Evaluation and Legal Theory](#), and her subsequent writing on the topic. More than this, it situates Dickson's work within wider jurisprudential debates, preceding and continuing after her contributions. The essay amounts to a detailed guide through the terrain of jurisprudential methodology, which is both informative and stimulating, both cautious and boldly innovative. The reader is invited on a journey to be undertaken with less than favourable weather conditions, taking place under the menacing clouds gathering from the positivist/anti-positivist conflict. The route has been selected not so much as to feature moments of breathtaking vistas, as to require the reader to trudge through disappointing locations which have not lived up to their proclaimed attractions. We have to confront a dead end, or cul-de-sac (Pp. 1300, 1306), as well as admitting to being on the road to nowhere. (P. 1324.) Disappointing as this may be, one has to admire the instructive commentary accompanying each mis-step along the journey. Ultimately, this prepares us for the promise of a brighter destination, which holds out the hope of delivering what previous stopping points have failed to deliver.

Pojanowski characterizes what Dickson has sought to achieve by her indirectly evaluative approach as a dilemma for her: in reconciling within a concept of law "features of law that are (a) necessary or essential to all legal systems, based on (b) what those subject to the legal system find important and significant about law (c) without imposing a morally evaluative filter on those important and significant theoretical necessities." (P. 1313.) At the heart of this dilemma is the need to bridge the contingent, relativistic, or particularistic perceptions discoverable at (b) with the universal features required at (a). (Pp. 1315, 1320, 1307, 1322.) This is exacerbated by a tension, or even outright conflict, between the participant perception and the theorist perception of what features are significant at (b). (Pp. 1317 n.86, 1319, 1323, 1328.) There is no easy fix available to the theorist so as to be able to impose uniformity on the range of participant perceptions of those features.

If those features of law are not to be identified by a moral filter (as (c) insists), then it appears resort must be had to a social theoretical approach. (Pp. 1304, 1313.) However, Pojanowski's survey of options on offer in Part II clearly returns the verdict of not plausible. A naturalist approach cannot be squared with the emphasis Dickson places on participants' perceptions. (Pp. 1317-18.) A hermeneutic approach does not lend itself to the normative neutrality and essentialism required by Dickson. (P. 1319.) Nevertheless, Pojanowski commends Dickson for her "resistance to both the naturalist's externalist approach to law and the hermeneut's radical particularity." (P. 1321.)

Still, Dickson's basic dilemma remains unresolved. Pojanowski spends a number of pages expanding on the radical particularity and debilitating relativism of deep hermeneutics (Pp. 1321-24), concluding: "What universal, non-normative framework allows Dickson to transcend this particularity is a question unasked and therefore unanswered." (P. 1324.)

Pojanowski's own proposal for a way out of the cul-de-sac is advanced unapologetically from the natural-law side of the conflict where Dickson is found in the opposing camp. Yet it is made without forceful

polemics, in a measured and, even, tentative manner. (Pp. 1326, 1329-30.) It relies on a number of steps to break out of the “hermeneutic circle.” (P. 1324.) First, he follows Alasdair MacIntyre’s insistence that the participant’s self-understanding needs to be supplemented by the theorist. (P. 1325.) Secondly, he acknowledges with Charles Taylor the presence of a “value slope” present in theoretical accounts of social behaviour. (P. 1326.) This amounts to “an overarching judgment about the point of the practice” that theorists “cannot help but presume to share with the participants whose actions they seek to understand.” (P. 1327.) Thirdly, he amplifies this teleological aspect with a central case methodology. (P.1327-29.)

Finally, Pojanowski retains the need for a viable social theory which can genuinely present the participant perspective while evaluatively refining its central case as incorporating essential characteristics of law – requiring “a metaphysics and ontology that is richer than reductive naturalism and more realistic and hardheaded than the subjectivity of social constructionism.” (P. 1329.) For this he suggests the resources of critical realism. (P. 1329-30.) By this point, it is evident that Pojanowski is not resolving but disposing of Dickson’s dilemma, in permitting the directly moral evaluation which she sought to banish at (c).

The culmination of Pojanowski’s approach is found in his proclamation of a “moral and social universe” shared between theorists and participants in the practice. (P. 1329.) Before this is dismissed as nothing more than resorting to base polemics by the natural-law camp, it is important to note two observations he makes, indicating a less bellicose and more reasonable engagement in debate. One is to suggest that the rejection of moral evaluation within an understanding of law by positivists such as Bentham and Hart was tied into their own wider philosophical commitments, accompanied by a related value slope. (P. 1330-31.) The other is to admit that his approach is tied to his own “moral and even metaphysical commitments.” (P. 1331.)

Given the thoughtful and modest tone of Pojanowski’s proposal, this essay deserves careful attention and should stimulate further exploration of the important issues it raises. Foremost, perhaps, among these is the suggestion that the effective realization of analytical necessity may be conditional upon metaphysical commitment.

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