Authority and Methodology: Can Theories "Come out Negative"?[1]

Autoridad y metodología: ¿pueden las teorías "dar resultados negativos"?

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Abstract: This article considers which methodological factors might be relevant in developing and defending accounts of law's authority. It examines whether it should "count against" theories of authority that they "come out negative" in various senses —for example, that they contend that law has little, or none, of the authority that it claims to have. In its opening sections, the article considers whether there is an uphill explanatory task for theories which reach conclusions about the character and extensiveness of law's authority that are significantly at odds with beliefs held about law's authority by those living under and subject to law. As the discussion proceeds, it then explores whether theories of law's authority that hold that there are gaps be-

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tween: (1) the authority law claims, and the legitimate authority that it actually possesses, and (2) law's ideals, and its ability successfully to live up to those ideals, are problematic, and whether such accounts should consider ways in which the apparent gap(s) can be closed. The discussion concludes that while it should not, as a general methodological precept, count against theories of law's authority that they reach negative conclusions in certain respects, that nonetheless such conclusions have relevance for evaluating the success of such theories, and may impose on them explanatory burdens of a certain kind.
Keywords: law; authority; methodology of legal philosophy; law's claims; political obligation.

Resumen: Este artículo analiza qué factores metodológicos podrían ser relevantes a la hora de desarrollar y defender explicaciones sobre la autoridad del derecho. Examina si debería "contraponerse" a las teorías de la autoridad que "resultan negativas" en varios sentidos, por ejemplo, que sostienen que el derecho tiene poca o ninguna autoridad de la que dice tener. En sus primeras secciones, el artículo analiza si existe una difícil tarea explicativa para las teorías que llegan a conclusiones sobre el carácter y el alcance de la autoridad del derecho que están en contradicción significativa con las creencias que tienen sobre la autoridad del derecho quienes viven bajo él y están sujetos a él. A medida que avanza el debate, se explora si las teorías de la autoridad del derecho que sostienen que existen diferencias entre: (1) la autoridad que el derecho reclama y la autoridad legítima que realmente posee, y (2) los ideales del derecho y su capacidad para estar a la altura de esos ideales son problemáticas, y si tales explicaciones deberían considerar formas de cerrar las diferencias aparentes. El debate concluye que, si bien no debe considerarse, como precepto metodológico general, en contra de las teorías sobre la autoridad de la ley el hecho de que lleguen a conclusiones negativas en ciertos aspectos, dichas conclusiones son relevantes para evaluar el éxito de tales teorías y pueden imponerles cargas explicativas de cierto tipo.
Palabras clave: derecho; autoridad; metodología de la filosofía jurídica; pretensiones del derecho; obligación política.

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Summary: I. *Introduction*. II. *Can Theories "Come out Negative"?* III. *The Need to Account for Beliefs About Political Authority*. IV. *The Need to Explain Law's Claims and the Ideals to Which it Aspires*. V. *Conclusion*. VI. *References*.

I. Introduction

What methodological constraints might there be on theoretical accounts of authority? Would it count against an account if it "came out negative" in the sense of yielding the conclusion that there are no, or few, successful instances of persons or institutions having the authority that they claim? Does it count in a theory's favour if it "comes out positive" and is able to explain and justify the authority that institutions claim to have, and are arguably often taken to have, by those subject to their directives? This article explores these and related questions in the context of the political authority of states and other polities, and in the context of the authority of law: the channel through which much of their claimed political authority is exercised.

In work considering the methodological constraints on theories of law more generally, I have cast a sceptical eye over approaches to understanding law that leave insufficient room for things to "come out negative". Ronald Dworkin's exhortation that in order to understand law adequately legal philosophers *must* attempt to put it in its best political and moral light and show how it justifies the imposition of state coercive force (Dworkin, 1986, pp. 90-93, 190) and John Finnis' contention that theories of law *must* approach their subject matter from a point of view that understands and appreciates the distinctive value that only law can bring to human life in political society (Finnis, 1980/2011, 2003) are strong methodological precepts in their respective accounts that —I have argued— problematically close down too early in their inquiries consideration of whether various aspects of law's nature should be seen in a more negative light, for example, as morally bad or morally risky (Dickson 2022, chaps. 5, 7, 8; 2026 (forthcoming)).

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However, although I draw on aspects of my previous work on methodology in legal philosophy in the discussion that follows, I believe that we should be open to the idea that the balance of methodological considerations may come out somewhat differently in the case of the specific topic of the authority of law. One relevant factor in this regard may be that while it is part of the nature of law to *claim* that it has legitimate authority, its *possession* of such authority may not be part of its nature, but rather a key ideal to which it should aspire. If this is so, then some of the methodological constraints that I argue are relevant to understanding aspects of law's *nature* may not apply, or may apply in combination with others in different ways, in the case of accounts of law's authority, if its authority is a key aspect not of what law necessarily is, but of what it (perhaps necessarily) ought to be.

The discussion that follows is exploratory in character. By identifying and considering several interesting lines of inquiry, I hope to set the scene for more detailed future work in this area. In section II, I consider various issues regarding how we should understand the question which forms part of this article's title: can theories "come out negative?". Sections III and IV discuss some possible methodological constraints that might be relevant for legal and political philosophers in developing accounts of law's authority. Section III considers the extent to which theories need to account for and explain commonly held views about law's authority held by those living under law. Section IV then focusses on the relevance for accounts of law's authority of understanding and accounting for law's claims, and the ideals to which law aspires. The concluding section summarises where the discussion has taken us and suggests some interesting avenues of inquiry for the future.

II. Can Theories "Come out Negative"?

On one understanding of this question, the answer is clearly yes. Theories exist which offer negative conclusions regarding wheth-

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er states and their law have the authority that they claim to have, and that, arguably, they are taken to have by many of those living under them. Whether a state or other polity has the authority that it claims is to be understood in this context as a question of it possessing legitimate moral authority rather than just *de facto* authority (Christiano, 2024; Dagger, 2018, section I; Raz 1979/2009, chaps. 1-2). One of the most well-known of these theories takes a very strongly negative stance in this regard: R.P. Wolff contends that states and their law can *never* have *any* of the authority that they claim to have (Wolff, 1970). Other accounts of authority hold that although, under certain conditions, some polities and their law can have legitimate authority, the extent of their authority is less than they claim (Green, 1970, chap. 8; Raz, 1986, chaps. 2-4) and/or that the character of the authority they have differs from the character of the authority they claim (Madden Dempsey, 2021; Gur, 2018).

Clearly, then, it is possible to develop accounts of law's authority which "come out negative" in various senses and to various extents. The issue that I seek to explore, however, is not the bare possibility of such theories, but rather whether, methodologically speaking, it —in some sense(s)— counts against such accounts that they take these stances, and whether it results in them facing an uphill explanatory struggle when it comes to establishing their conclusions. Moreover, as the points above indicate, accounts of law's authority can have negative conclusions in various senses and to various extents. Wolff's *a priori* philosophical anarchism —which holds that no state that does exist or could exist possesses any of the legitimate authority that it claims due to an irreconcilable conflict between our duties to act autonomously and the claims of authority— arguably occupies one end of a spectrum in this regard (Wolff, 1970).[2] One interesting issue that I return to later in the discussion is whether different accounts of law's authority may —metaphorically speaking— face different gradients of an uphill struggle

[2] For A. John Simmons' discussion of the distinction between *a priori* and *a posteriori* philosophical anarchism, see Simmons (2000, chap. 6).

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depending on the sense(s) in which they reach negative conclusions as regards polities and their law having the authority that they claim to have, and/or that they ought to have in order to be legitimate.

But why should we think that reaching negative conclusions on these issues might count against a theory of authority? Surely a theory of authority should aim to be true, and to explain well the phenomenon under consideration, such that it is the character of the explanandum, and not seemingly more abstract methodological considerations, that should drive the criteria of success of accounts of authority? I agree with the main thrust of this thought, but contend that an exploration of possible methodological constraints on a theory of authority remains a viable and interesting undertaking. As I have argued elsewhere, it seems plausible that there are holistic and mutually reinforcing relations between a given methodological approach, and the substantive account of aspects of the nature of law that it supports (Dickson, 2022, pp. 153-155; 2001, chap. 1, section B). Moreover, and crucially, in my view, the most important methodological constraints on accounts of aspects of law are not divorced from but rather are driven by aspects of the character of our explanandum. For example, that law is a concrete, socially instantiated system of institutions and directives that people living under know about, use, and have views about, has various implications for the methodological constraints incumbent on legal philosophers seeking to characterise it (Dickson, 2022, chaps. 5-7).

Several points flow from these observations. There are limits regarding how far a discussion focussing primarily on the methodological constraints on theories of authority can take us,[3] if we do not also attempt to develop and defend a first order theory of what authority is and what, if anything, justifies it (which I have not attempted to do). It is vital to note that I am *not* claiming that any of the potential methodological constraints discussed here are determinative as regards the truth or explanatory adequacy

[3] For a recent and very thoughtful exploration of the methodological aspects of various theories of authority, see Himma (2024, parts I and II).

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of a first order theory of the character and justifications of authority. At most, the factors discussed here would constrain to some extent what counts as a successful theory of law's authority. That a discussion of some matter cannot be conclusive, however, need not mean that it lacks interest or worth. In the present case, if it can shed light on what might be important methodological constraints on an account of authority, then it can be useful and illuminating to that extent.

III. The Need to Account for Beliefs About Political Authority

In developing and defending their views, theorists taking a variety of stances on the character and extent of law's authority pay attention to the existence and relevance of beliefs about such authority held by those living in political societies. Interestingly, despite their different conclusions as regards the possibility and extent of legitimate authority, there is a significant degree of consensus as regards what those theorists consider the content of such beliefs to be: that there is widespread belief amongst persons subject to law that the claims to possess legitimate authority made by their governments are true and that they are under a concomitant general obligation to obey the law. Many theorists also contend that it is important to consider whether the beliefs of those subject to law are in tune with or run counter to their position, and whether this is relevant to the criteria of success of the accounts they offer:

> In order to coincide with what people generally think about their own political obligations, a satisfactory theory should explain why citizens of existing societies —including, most likely, readers of this book— have moral requirements to obey the laws of their societies. (Klosko, 2005, p. 13)

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> It is clearly desirable to develop a theory of obligation consistent with the beliefs of liberal citizens. (Klosko, 2005, p. 13)

> I am, in fact, quite prepared to accept the conclusion that governments do not normally have the right to be obeyed by their citizens, or to force them to obey [...] Again, it is easy to understand the existence of the widespread belief that governments do have these rights, in terms of the not very subtle policies of political indoctrination to which we are all subjected. (Simmons, 1979, p. 196)

> Men everywhere and always impute authority to established governments, and they are always wrong to do so. (Wolff, 1969, p. 608)

> [...] my account has the consequence that political authorities are likely to have a more limited authority than the authority many, perhaps all of them, claim to have, and that people generally believe that they have. This still requires explaining why people are so mistaken [...]. (Raz, 2006, pp. 1008-1009)

What should we make of the attention that theorists pay to these matters? To the extent that a theory of law's authority "comes out negative" in the sense of concluding that law does not have all the authority that it is commonly believed to have, does this count against that theory and/or add to its explanatory burden?

Reflection on this issue may prompt a variety of responses. Some might be tempted to question whether the beliefs of those subject to law have any relevance at all as regards methodological constraints on a theory of authority. Surely we are seeking an explanation of what authority actually is and when law's claims to possess it are justified, not an account of what people happen to believe as regards these matters? As Leslie Green reminds us in discussing this very topic: "In general, «Everyone believes p» neither entails nor provides any ground for «p»". (Green, 2023, p. 291). However, although Green, and also A. John Simmons touch on the possibility that common beliefs about political authority are irrelevant in constructing and defending a theory of authority, in the end they

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demur, and seek to argue respectively that although common opinion may be relevant, such beliefs, and their relation to the explanatory adequacy of an account of authority, need to be explored in a more subtle way than is often the case (Green, 1998, p. 315), or can be explained away, for example as a product of political indoctrination (Simmons, 1979, pp. 195-196; 1996, pp. 119-120).

Some theorists take the view that the relevance of common beliefs about authority rests on the theoretical desideratum of bringing our theoretical accounts into some sort of Rawlsian reflective equilibrium with ordinary persons' considered judgements on certain issues (Klosko, 2005, pp. 9-10, 186-189).[4] In the present discussion, however, I pursue a different, and more law-distinctive tack, in keeping with my view that many of the most significant methodological constraints on understanding law are driven by the distinctive character of legal philosophers' explanandum. One important reason why it is difficult to make the case that beliefs about law's authority held by those living under it are irrelevant is that in legal philosophy our explanandum is part-composed of the beliefs, attitudes, and actions of human beings who create and administer law, and whose conduct law attempts to guide. Legal philosophers of various stripes from H.L.A. Hart onwards have emphasized this feature of understanding law: that we must attempt to understand it taking into account the point of view of those living under it, because law is a concept used by people to understand themselves and their lives in terms of law, and the philosophy of law is in part an attempt to understand certain aspects of ourselves and of our culture (Hart, 1961/2012, chaps. 3-6; Dworkin, 1986, pp. 49-65; Finnis, 1980/2011, chap. 1; Raz, 2009b, pp. 92-94). In my own work on the methodology of legal philosophy, I have emphasized these points, but also sought to interrogate and explore them, because holding that properties of law must be understood *taking into account* how they are thought of by, and how they feature in the lives of,

[4] For Rawls' views on the relations between theoretical accounts and considered judgements, see Rawls (1971, pp. 19-21, 46-53, 578-586).

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those living under it does not of itself provide answers to some difficult issues (Dickson, 2022, chap. 6).

What does it mean to take into account how those subject to law view it, including their beliefs about it, attitudes towards it, and actions in light of it? This methodological precept is argued to operate as a constraint of some kind, but how exactly does it operate, and how constraining is it? What are we to do if the views of those subject to law are divided, and/or vague? How far, if at all, can legal and political philosophers depart from and reshape in their theories aspects of how people understand themselves in terms of law in the service of developing a coherent and cogent theoretical account? In exploring these questions, I have sought to emphasize that paying appropriate attention to and accounting for the self-understandings, attitudes, and beliefs of those living under law is an active rather than passive process (Dickson, 2022, chap. 6). The task of the legal philosopher is not to record and incorporate wholesale into their theories of law those self-understandings, attitudes and beliefs. Rather, they must work with the "raw material" of how people think about their lives under law, extract from it what is most important, significant, and revelatory about law's character, and grant appropriate explanatory weight to those factors in developing and defending their accounts of law (Dickson, 2022, pp. 110-119).

How might these points apply in the current context of considering whether accounts of law's authority can "come out negative" in the sense of coming to conclusions that may be significantly at odds with beliefs about the character and extensiveness of law's authority held by those living under it? The leeway that exists as regards how theorists should take into account how those subject to law view it may come into play in different ways and at different junctures in our inquiries.

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1. *Ascertaining the Existence and Content of Beliefs About Law's Authority*

Some of the theorists quoted at the outset of this section do not provide much in the way of evidence to support their claims that those subject to law overwhelmingly regard it as having legitimate authority over them. This makes it difficult to ascertain how they have identified and interpreted the beliefs and attitudes in question. One question here is whether theorists' statements as regards common understandings of authority are intended to be taken as an appeal to the theorist's own intuitions on the matter, or rather as a claim about what large groups of people subject to law actually believe.[5] Although the answer to this question may vary from theorist to theorist, and may not be clear in the case of some, there are clear indications in certain accounts that it is the latter that is intended. Green and Klosko both point out that where the invocation of beliefs about law's authority and obligatoriness held by those subject to it is to be understood as something distinct from an appeal merely to the theorist's own intuitions on the matter —as both theorists think it should— then it is important to try to ascertain what the views of those living under law actually are (Green, 1998, pp. 304-305; Klosko, 2005, pp. 182-185).

It is important to note, however, that when theorists do consider evidence as to the existence and content of those beliefs, drawing either on studies they have undertaken themselves (Klosko, 2005, chaps. 9 and 10) or on relevant work of others (Green, 1998, pp. 311-315) the "raw data" that such studies provide —for example in the form of surveys or discussions in focus groups— must be clarified and interpreted by the theorist in order to ascertain the content of the beliefs in terms of the questions about political obligation that they theory addresses.[6] Green brings this out well in discussing

[5] I am grateful to David Enoch for raising this point during the discussion referred to in the opening footnote.

[6] Although I cannot discuss this here, for those who regard political obligation as a broader category encompassing more than the topics of the authority of law and the moral obli-

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Tom Tyler's, *Why People Obey the Law* (Green, 1998; Tyler, 1990, 2006). As he points out, although the studies Tyler conducts show that a large majority of respondents believe that they have an obligation to obey the law and regard their beliefs as stemming from their perception of the legitimacy of the legal system, much of the data is not fine-grained enough to allow us definitely to conclude that they believe in an obligation to obey the law in the terms that law itself claims that it ought to be obeyed (Green, 1998, pp. 311-315). For Green, in common with various other theorists who discuss the authority of the state, the obligation to obey the law must be a morally binding obligation that is (1) general in the sense of applying to all laws and to all persons in a given polity, and (2) content-independent in the sense that the fact that law requires us to do something must form part of the reason why we ought to do it, independently of the content and merits of the action (Green, 1988, pp. 225-230). Green argues persuasively that it is extremely difficult to draw the conclusion that the respondents in Tyler's survey view law's authority and obligatoriness in this exact manner from the data Tyler offers. Green's point also illuminates another important and challenging issue: that what counts as a successful account of law's authority will depend to a significant extent on what view one takes of the character of such authority and of the nature of the claims it makes on our practical reasoning. The point is underscored by Klosko's contention, *contra* Green, that a theory positively establishing an extensive political obligation need *not* yield content-independent moral duties (Klosko, 2005, chaps. 1 and 11; 2011). I return to this issue in section IV.

Klosko, who attempts himself to gather and make use of empirical data to ascertain the content of people's beliefs about political obligation and the authority of law (Klosko, 2005, chap. 9) also acknowledges the limitations of so doing and emphasizes the difficulties in interpreting raw data concerning those beliefs. Although

gation to obey the law, "political obligation" in this article should be understood as referring to that part of political obligation that concerns law's authority and the moral obligation to obey the law.

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he adduces evidence in favour of those living under law holding beliefs that can be used to support his fairness-based account of what political obligation requires, he does so with a number of caveats and qualifications, and in the understanding that the theorist has an active task to perform in interpreting such beliefs, and in developing a theory that appropriately takes account of them (Klosko, 2005, pp. 13-16, 198-201, 222).[7]

2. *According Appropriate Weight and/or Significance to Beliefs About Law's Authority*

Even after attempting to ascertain the existence and interpret the content of beliefs about law's authority held by those subjects to it, further judgements must be made as regards the weight and/or significance to be attributed to those views.[8] Theorists differ considerably on this issue. At one end of the spectrum in this regard is, once again, R.P. Wolff.[9] Wolff appears to have no concerns that his account of political authority "comes out negative" (1) in concluding that states never have any of the legitimate authority that they claim to have, and (2) in running so strongly against what he takes to be public opinion on this issue (Wolff, 1970). Moreover re. (2), his account seems to accord no weight to beliefs about authority held by those subject to it, and neither does Wolff appear to think that those beliefs need to be "explained away" to any significant extent, i.e. that his account should at least go some way to explaining how so many people have gone so far astray in believing in what, on his view, are palpable falsehoods. The most that he offers in this regard are some brief throwaway speculations on the role of tradition and societal inculcation in inducing beliefs in the

[7] Similar issues arise, of course, in work relying on empirical data regarding the beliefs and attitudes of those subject to law in movements such as Experimental Philosophy, and Experimental Jurisprudence. For a thought-provoking exploration of the methodology of, and limitations of, experimental jurisprudence, see Himma (2023).

[8] Thanks are due to Ruth Chang for her helpful comments on some of the issues raised in this sub-section.

[9] See also section II above.

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authority of the state that he analogises to irrational holdovers from an age of belief in religion and in superstition, all of which he hopes may soon fade away (Wolff, 1969, pp. 602, 608, 611-612, 616; 1970, pp. 6-11).

A. John Simmons' account of authority is also one that "comes out negative" in the sense of contending that no actual states possess legitimate authority, although he —unlike Wolff (at least in Simmons' reading of him)—[10] holds open the possibility that states could in principle have legitimate authority if certain (stringent) conditions were met (Simmons, 1979, 1996, 2000). Simmons grants more significance than Wolff to commonly held beliefs about authority in the sense that he recognizes the need to engage with the fact that his account may run considerably counter to them, and develops some strategies for explaining how such beliefs may arise and persist despite being false. One such strategy is to consider whether such views are a kind of false consciousness inculcated in us by states, and by powerful political actors within them:

> If it [Simmons' account] runs counter to normal feelings about the citizen-state relationship, I think there are better explanations for this fact than the falsity of my conclusion. For what belief can better serve the interests of one's political leaders than the belief that all are specially bound to support their government and obey the law? (Simmons, 1979, p. 195)[11]

Klosko and Raz, in different ways and to different extents, espouse accounts of political authority according to which things come out considerably less negative than is the case for either Simmons or Wolff. Klosko (2011) contends that a strong prima facie presumption in favour of obeying the law emerges from his primarily fairness-based argument. To the extent that this presumption can be rebutted in either particular cases or in certain areas

[10] See Note 2 and accompanying text regarding Simmons' distinction between *a priori* and *a posteriori* philosophical anarchism.

[11] Simmons considers other possibilities too, but arguably none of them are developed as extensively as they might be —see e.g. Simmons (1996, pp. 119-120).

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of legal regulation, it may not yield quite as extensive an obligation to obey the law as law claims for itself, although Klosko (2011) regards it as yielding "moral requirements for virtually all citizens to behave in accordance with virtually all laws" (p. 498). According to Raz's well-known "service conception" account, the extent to which law possesses the authority that it claims can vary considerably with respect both to areas of law and to persons, depending on the extent to which governments can meet the test set by Raz's normal justification thesis —that persons are likely better to act in accordance with those reasons that apply to them anyway if they follow the government's allegedly authoritative directives than if they try to act in accordance with those reasons directly. Even in the case of a relatively just government the extent to which the normal justification thesis test is met will vary, and Raz also contends that in no case is law's moral authority and concomitant moral obligation to obey it as extensive as it is claimed to be (Raz, 1986, chap. 4; 1994, chaps. 10, 15, especially pp. 347-350).[12]

Klosko regards his view as largely being supported by the beliefs and understandings of those subject to law, once those are properly interpreted (Klosko, 2005, chaps. 1, 9, 10, 11). Raz views his stance as running somewhat counter to the way that law's authority is thought of by those subject to it, to the extent that a given government has, according to his account, less authority than it claims and that it is commonly believed to have (Raz, 2006, pp. 1008-1009). As is discussed below, Raz regards this aspect of his position as standing in need of further explanation.

What are we to make of these very different views as regards the weight and significance to be accorded to beliefs concerning law's authority and our obligation to obey it? As a starting point, we can note that views such as those of Wolff and Simmons which grant little weight to the relevant beliefs would seem to have an uphill explanatory task. Although Simmons takes more seriously than

[12] For thoughtful engagement with the methodological underpinnings of Raz's account of authority, see Himma (2024, 10-14).

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Wolff the need to explain how persons subject to law come to hold what he takes to be prevalent false beliefs, it is important to note the scale of what may be required. Those drawing attention to beliefs that law possesses legitimate authority often contend that such beliefs are widespread, pervasive, deeply held, and persist over time and in the face of putting to their holders both examples, and theoretical accounts, purporting to show their falsity (Klosko, 2005; Raz, 2006; Simmons, 1979, chap. 8; Tyler, 1990, 2006). This seems highly significant in considering the explanatory burden to be discharged by accounts of law's authority as regards the matters discussed in this section.

In light of these points, I propose the following approach: where accounts of law's authority run counter to the beliefs held by those living under and using law to navigate aspects of their lives, theorists' explanatory burden in terms of adequately accounting for those beliefs should be understood on a kind of sliding scale or proportional basis. The greater the extent, and the deeper the character, of the mistaken beliefs that a theoretical account attributes to those living under and guiding their lives according to law, the greater the explanatory burden on the theorist to account for and explain those beliefs as false. Accounts of law's authority that run considerably counter to commonly held beliefs should take seriously the need to explain how so many people have come to hold those beliefs, and to persist in holding them even in the face of apparent counter-arguments and counter-examples.

The beginnings of such an approach can be found in some theorists' work, and, in my view, is worth considering and developing further:

> I believe that evidence of ordinary opinions can play a wider role. In particular, such evidence can serve as a check on the views of political philosophers. I am not making the strong claim that such evidence should be determinative. Rather, it should be a consideration in assessing the force of particular arguments. Once again, the amount of weight we should accord it depends on circumstances. (Klosko, 2005, p. 188)

Problema. Anuario de Filosofía y Teoría del Derecho, (20), 2026, e20493
Julie Dickson | Authority and Methodology: Can Theories "Come out Negative"?
e-ISSN: 2448-7937 DOI: https://doi.org/10.22201/iij.24487937e.2026.20.20493
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> [...] the hurdle of running against popular opinion can be higher or lower. For example, my account has the consequence that political authorities are likely to have a more limited authority than the authority many, perhaps all of them, claim to have, and that people generally believe that they have. This still requires explaining why people are so mistaken, though since the mistake attributed is less far-reaching, the burden of explanation is much less. (Raz, 2006, pp. 1008-1009)

Proceeding along these lines is attractive as it preserves the possibility that people may be wrong in their beliefs regarding law's legitimate authority and moral obligatoriness but also takes seriously the need for theorists to take into account such beliefs, and to consider their significance, weight, and the reasons why people come to hold them. In a domain of inquiry where our subject matter is part-constituted by the beliefs, attitudes, and actions of those creating, administering, and living under law, and where the concept of law is familiar to us and plays an important role in our attempts to navigate our social world, such an approach is apt.

This way of proceeding also brings with it a valuable flexibility as regards how theorists whose account is significantly at odds with common beliefs about the authority of law might go about discharging the explanatory burden of offering an explanation of the holding of false beliefs that is proportional to the scale and character of the attributed mistake. For example, it may be possible to discharge this explanatory burden by offering a false consciousness type of explanation of the sort Simmons mentions,[13] provided that the strength and persistence of the false consciousness and its effects are plausibly explained. On this type of account, where the false consciousness is explained as pervasive, and the difficulties of escaping it severe, the forming and espousing of false beliefs even on a large-scale basis might be successfully accounted for. This point may have particular resonance in the context of law, which several legal philosophers from Bentham onwards have taken

[13] See Note 11 and accompanying text.

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law to be in the business of self-mythologizing, and of inculcating in those subject to it distorted beliefs regarding its character (Burns & Hart, 1977, p. 124; Hart, 1982, essay I; Dickson, 2022, chap. 5).

But other, quite different ways of discharging the explanatory burden would also be possible on this approach. For example, Raz develops a secondary, and supplementary argument to his normal justification thesis account of the extent to which law has legitimate authority that he terms "respect for law" (Raz, 1979/2009, chap. 13). At points in his work, he presents this argument as going some way (in some cases, for some persons) towards "bridging the gap" between the extensiveness of the obligation to obey that people take themselves to be under, and the extensive of the obligation that the normal justification thesis can yield. This way of discharging the explanatory burden does not seek to explain away an extensive set of beliefs in the authority of law as false, but rather explains how for some persons in some circumstances they are correct to believe that they are under a more extensive obligation to obey than the normal justification thesis yields, because respect for law is a morally permissible attitude which can found an extended such obligation, and because they have developed the attitude of respect for law (Raz, 1986, pp. 97-105; 2006, pp. 1028-1029; and, especially, 1989, pp. 1196-1199).

It is my contention, then, based on the discussion in this section, that accounts of law's authority can "come out negative" in the sense of running counter to commonly held beliefs, if they are prepared to take on a proportional burden of explaining the existence and pervasiveness of such beliefs and how they have come to be held.

IV. The Need to Explain Law's Claims, and the Ideals to Which it Aspires

A range of legal philosophers hold that law claims to have legitimate moral authority over us (Bertea, 2004; Dagger, 2018; Finnis,

Problema. Anuario de Filosofía y Teoría del Derecho, (20), 2026, e20493
Julie Dickson | Authority and Methodology: Can Theories "Come out Negative"?
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1980/2011, chap. 10; Gardner, 2012, chap. 5; Green 1988, chaps. 1-3; Raz, 1986, chap. 4, and 1994, chap. 10; Wolff, 1970).[14] Some also contend that law's claim to possess moral authority indicates the ideal to which it should aspire, and sets some of the most important standards by which law should be judged (Raz, 2003, pp. 10-15, 2009b, pp. 103-115; Dickson, 2022, pp. 86-90, 152-153, 167-171; Duke, 2019). How might the question running through this article —can theories of law's authority "come out negative"?— play out in terms of these issues?

1. *Law's Claims*

That law makes certain claims upon us —such as that we ought to obey the directives that it issues, and that where obligations imposed by the law conflict with other obligations in our lives, we should accord precedence to the former— seems a plausible idea. Law is in the business of telling us what we ought to do, and of taking steps to try to ensure that we do it. As Leslie Green reminds us:

> Law is a realm of obligation and duty. It may require us to fight wars, to refrain from assault, to pay taxes, to keep agreements, to take care, to report crimes, to protect the environment, and to take its judgments as binding and final. [...] Legal obligations may conflict, not merely with narrow self-interest, but with many other important obligations. The duty of military service may conflict with the duty to care for one's family, the duty to send one's children to school with one's religious duty to promote the faith. The law's own attitude to such conflicts is clear: its requirements are to take priority, except where it permits otherwise. (Green, 2004, p. 514)

Moreover, that law makes certain claims on our practical reasoning and our conduct is not just one thing amongst many things

[14] For an in-depth and very thoughtful consideration of some doubts, however, see Himma (2001).

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of equal priority that law does. Rather, the claims law makes seem central to its character, and to what it aims to do. This point, as George Duke argues, has methodological implications in terms of legal philosophers offering a sufficiently full and explanatorily adequate theory of law:

> The assumption that law is a normative system intended to provide practical guidance has significant methodological implications if it is true. If law is a normative system intended to provide practical guidance, then it is hard to see how one could give an adequate theoretical elucidation of law that did not involve an assessment —which might have a positive or negative outcome— of whether the claims made by the law on our practical reason are justified. A theory of a normative system, the normativity of which is among its central features, which did not address the distinctively normative aspects of that system would clearly be an incomplete and inadequate theory. (Duke, 2019, p. 13)

As noted earlier, some theorists develop these points further, contending that when law claims authority over us, and claims to provide us with reasons for action, the more precise content of its claims includes that we should take the fact that law has required something as (at least part of) the reason why we ought to do it, i.e. that law's claim to authority should be understood in a content-independent manner (Gardner, 2012, chap. 5; Green, 1988, chaps. 1-3; Raz, 1986, chaps. 2-4, 1994, chap. 10).

While all these points strike me as highly plausible, it is of course the case that there are theorists who doubt and/or reject them. Some question whether law is the sort of thing that can make claims at all (Dworkin, 2002; Greenawalt, 2005; Himma, 2001), while others take a different view as regards the content of the claims in question, contending, for example, that they need not be understood as attempting to institute content-independent duties to do as law says because law says so (Klosko, 2005, chaps. 1 and 11, 2011). This takes us back to an issue that was raised at the end of section III.1, namely that what counts as a successful account of law's au-

Problema. Anuario de Filosofía y Teoría del Derecho, (20), 2026, e20493
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Esta obra está bajo una Licencia Creative Commons Reconocimiento-NoComercial 4.0 Internacional

thority will depend to a significant extent on what view one takes of the character of such authority and of the nature of the claims law makes on our practical reasoning. As was indicated in section II, there are limits as to how far a discussion focussing primarily on the methodological constraints of theories of authority can take us, if we do not also attempt to develop and defend a first order theory of what authority is and what, if anything, justifies it (and I do not attempt this here).

What then, if anything, can be said as regards methodological constraints on a theory of authority stemming from the existence and character of law's claims? Firstly, and obviously, if theorists who argue that law is incapable of making claims at all are correct, then offering an appropriate account of those claims will obviously not be a desideratum of a theory of law's authority, although perhaps explaining away what appear to be claims that law makes as illusory in character might form part of the theorist's task. For my own part, although I cannot defend this view here, I regard John Gardner's argument in favour of understanding law as making claims to possess legitimate moral authority over us —which includes careful consideration and refutation of various objections to different aspects of this view— as convincing (Gardner, 2012, chap. 5). This being so, if we consider —genuinely in my own case, but even if just for the sake of argument at this juncture in the discussion for some readers— that law claims to have legitimate moral authority over us, and is on this basis empowered to issue and enforce directives telling us what we ought to do, then we can examine various angles on the question of "does it count against theories of law's authority if they come out negative in terms of the claims that law makes?".

We can consider first the idea of a theory of law's authority coming out negative in the sense of reaching the conclusion that law's claims to possess legitimate authority over us are *sometimes* false. This position is in fact espoused by several legal philosophers (Raz, 1994, chaps. 10 and 15; Green 1988; Gardner 2012, chaps. 5 and 6). In my view, it seems dubious to hold that such a conclusion should "count against" a theory of law's authority, for the reason

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that this is a substantive conclusion about the character of authority, and the conditions under which it is legitimate, that is argued for and supported by various arguments in these theorists' respective accounts. Indeed, to take the view that it must always, as a general methodological precept, count against a theory of authority that it holds that some of law's claims to authority can be false would seem to beg the question of whether law always possesses the authority that it claims, or certainly to "load the bases" in favour of the view that it does possess the authority it claims.

It should be noted, however, that there are theorists who worry that the existence of a "gap" between the authority that law claims, and the authority which it genuinely has, indicates that something has gone wrong in our attempts to understand law's authority. Philip Soper (1989, *passim*, but see especially p. 210) contends that the authority that law claims is to be ascertained as a descriptive matter by examining the character of how law and its demands are presented and enforced by legal officials acting on law's behalf, whereas the authority that law genuinely has is to be understood as a normative matter, in terms of the justification provided by theoretical accounts of law's authority. He takes the view that any gap that exists between what he understands as the descriptive and the normative side of an account of law's authority is problematic: an example would be a theory of authority such as Raz's that holds that law always claims more extensive authority than it actually has. Soper contends that if this situation occurs then theorists should consider adjusting either their descriptive account of the authority claims that law makes, or their normative account of the possibility and extensiveness of the justified authority that law possesses. At some points in his work, Soper (1989, pp. 211-232) appears to favour adjusting the justificatory account of the authority that law possesses, at others, he favours adjusting our understanding of the character of the claims that law makes (Soper, 1996, pp. 229-239) and he also floats the idea that perhaps each "side" of the

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Julie Dickson | Authority and Methodology: Can Theories "Come out Negative"?
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Esta obra está bajo una Licencia Creative Commons Reconocimiento-NoComercial 4.0 Internacional

"gap" should adjust their conclusions in light of the other (Soper, 1989, p. 212).[15]

The question, however, is why should we take the view that any gap between law's claims, and the extent to which those claims are justified, is a negative counting strongly against theoretical accounts of law's authority? As was noted above, assuming that there ought not to be any such gap appears to beg the question as regards whether and to what extent law's claims are and can be justified, and seems to encourage as a theoretical goal the finding that law is inherently a morally justified phenomenon. This, however, is anathema to many legal philosophers who believe that we ought to approach law in a circumspect manner, sensitive to the possibilities that it is in the business of presenting itself in ways that belie aspects of its reality:

> H.L.A. Hart is heir and torch-bearer of a great tradition in the philosophy of law which is realist and unromantic in outlook [...] His analysis of the concept of law is part of the enterprise of demythologizing the law, of instilling rational critical attitudes to it [...] His essays on "Bentham and the Demystification of the Law" and on "The Nightmare and the Noble Dream" showed him to be consciously sharing the Benthamite sense of the excessive veneration in which the law is held in common-law countries, and its deleterious moral consequences. His fear that in recent years legal theory has lurched back in that direction, and his view that a major part of its role is to lay the conceptual foundation for a cool and potentially critical assessment of the law are evident. (Raz, 1994, p. 210)

It is, of course, possible to take the view that, although some degree of a "gap" between law's claims to authority and the authority it possesses should not automatically be viewed with methodological suspicion,[16] if the gap becomes too large, or appears

[15] I am indebted to Nicos Stavropoulos for emphasizing to me the importance of this issue, and for drawing my attention to these aspects of Soper's work.

[16] For an excellent discussion of some points relevant to this issue which focusses on Soper's work, see Van Der Vossen (2011).

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unbridgeable in principle, then it may indicate an issue with some aspect of the account of authority being offered. As noted earlier in this discussion,[17] some theoretical accounts reach the conclusion that law's claim to legitimate authority is *always* false —either in the case of all existing legal systems (Simmons, 2000, chap. 6), or that it is always *necessarily* false, in principle, of all possible legal systems (Wolff, 1970). These views, too, are, of course, substantive stances taken by their authors regarding the character of authority and conditions, if any, under which it would be legitimate. Once again, then, it would seem question-begging that these negative conclusions should, in virtue of a general methodological precept, count against these theories, provided of course that the conclusions are adequately substantiated by arguments. This said, however, it does seem plausible that in the case of the most radical of these conclusions —for example, Wolff's *a priori* philosophical anarchism which holds that it is impossible in principle for any state and its law to have any of the authority claimed— that there is a significant explanatory burden for the account to discharge due to the extensiveness and seeming unbridgeability of the "gap" between law's claims and law's reality.

The puzzle in such a case will be to explain the longstanding embeddedness in our culture, and in our social, political, and intellectual life, of a concept of the authority of the state and its law which, it turns out, has never been, and can never be, instantiated. This is not to rule out completely the possibility that the concept of state authority might turn out to be incapable of having instances: concepts such as "phlogiston" in chemistry and "the four humours" in medicine were also embedded in our culture and intellectual life for a time. But the task of explaining why there can be no instances of authority, and of explaining the longstanding "stickiness" and embeddedness of the concept of authority in the thinking of those legal officials making claims on law's behalf, those subject to the law, and those who construct legal and political theories

[17] See Sections II and III.

e-ISSN: 2448-7937 DOI: https://doi.org/10.22201/iij.24487937e.2026.20.20493
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seeking to explain aspects of it, would impose a very weighty burden on the theorist concerned. Given this, in my view, it is doubtful whether the brief attempt by Wolff (1970) in the opening chapter of "Philosophical Anarchism" to set up an irresolvable conflict between our duties of autonomy and rationality on the one hand, and our accepting —to any extent— the authority of the state, has done enough to discharge that burden, especially given the development of other approaches that offer ways to dissolve the alleged conflict (see, for example, Frankfurt (1973); Raz, 1979/2009, chap. 1).

The above discussion brings us back to the kind of approach proposed in section III above, applied this time to discrepancies between the claims to authority that law makes, and the legitimate authority that it actually possesses. Theorists should be aware of the extent and character of the "gap" between law's claims and law's reality, and should regard themselves as under an explanatory burden to explain the gap that is in proportion to the gap's extensiveness. We can readily imagine the directions that some such explanations might take, especially where the account claims not that law can never have *any* of the authority it claims, but that it typically has considerably *less* authority than it claims. The capacity for human error, the large-scale bureaucratic character of law, that law may have to frame some matters in a blunt and over-inclusive manner in order to be capable of being applied to the behaviour of millions of persons at once without extensive further guidance, the tendency for those in positions of political power to consolidate and to seek to retain that power, and law's possible interest in presenting itself in ways somewhat at odds with its reality would all appear plausible avenues for any such explanations to explore. As Bentham strove always to remind us, law "shews itself in a mask" (Burns & Hart, 1977, p. 124) and it is the job of legal philosophers to remove that mask, and hence to "draw aside that curtain of mystery which fiction and formality have spread so extensively over the Law" (Burns & Hart, 1977, p. 124).

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However, in one rather different sense of our question, I take the view that it very much does count against a theory of law's authority if it comes out negative in the sense that it does not *pay attention to, and offer an analysis of*, the claims that law makes. Moreover, in my view, not only should a theory of law's authority pay attention to and explore law's claims, it should also consider what would have to be the case for those claims to be true, even if in many instances of actual legal systems they are not true, or not true with the extensiveness that law claims.

Motivating this view is the point raised by George Duke in the passage quoted earlier, which is, in turn, driven by the character of our explanandum —law— itself:

> The assumption that law is a normative system intended to provide practical guidance has significant methodological implications if it is true. If law is a normative system intended to provide practical guidance, then it is hard to see how one could give an adequate theoretical elucidation of law that did not involve an assessment —which might have a positive or negative outcome— of whether the claims made by the law on our practical reason are justified. A theory of a normative system, the normativity of which is among its central features, which did not address the distinctively normative aspects of that system would clearly be an incomplete and inadequate theory. (Duke, 2019, p. 13)

As Duke points out, one centrally important aspect of law is that it is a normative conduct-guidance system that seeks to affect our practical reasoning processes in particular ways. Law presents itself to us as a system of oughts, and claims that it is justified in imposing obligations on us and that we should do as it requires. Law's normative claims over us are central to what it seeks to achieve, and to how we experience it and attempt to navigate its requirements and their impact on our lives. In order to understand law well, we thus have to try to understand the character of its normative claims and the ways they seek to impinge upon our practical reasoning processes (Duke, 2019, 12-15; Raz, 2009b, p107). This being

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so, in my view, it would count against a theory of law's authority if it came out negative in the sense of not granting importance to the claims law makes.

2. *Law's Ideals*

A further point can be drawn out from, and viewed as an extension of, the point made at the close of the sub-section above by way of the quote from George Duke (Duke, 2019, p. 13). It is important for a theory of law to consider law's claims as these reveal, at least in part, what it aims to be, what it intends to be, and so indicates aspects of those ideals to which law aspires, and sets some of the standards by which it should be judged. Law is a normative phenomenon which attempts to guide human conduct by making claims on our practical reason. Exploring those claims, and, crucially, the circumstances, if any, under which they could be justified, will be relevant to evaluating whether law is living up to its self-stated ideals:

> the law necessarily claims legitimate authority. It follows, of course, that where a legal system is in force many, most notably its officials, believe that claim to be justified. What does not follow is that it is justified. Still the fact is crucial to the understanding of the sort of institution the law is, and —from the moral point of view— it sets the standards by which the law is to be judged. The law, as a complex social institution, is to be judged good only if its claim to authority is morally warranted [...]. (Raz, 2009b, p. 112)

As I have argued elsewhere (Dickson, 2022, pp. 89-90, 167-171, and, more generally, chaps. 5 and 8), it is possible —and, to my mind, plausible— that some of the standards by which law ought to be judged are so because of law's nature, even if successfully attaining those standards is not part of law's nature. If, therefore, we want to understand that aspect of the nature of law that concerns law's authority, we will have to investigate not just the character of law's claims, but what they tell us about the ideals to which law aspires, the standards by which it should be judged, and those

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factors which are relevant to determining the extent to which it lives up to them.

Where does this leave us in terms of the question of whether accounts of law's authority can "come out negative?". In my view, it leaves us in a similar position with regard to law's ideals, as previously emerged in section IV.1 regarding law's claims. Coming to a negative conclusion as regards whether a given legal system or indeed law in general *does* live up to those ideals to which it aspires and that it should be held to, should not "count against" a theory of law's authority for the reason that this is a substantive conclusion that will be argued for and supported by various arguments in the accounts offered by theorists taking such a stance. An example of such an account would be Raz's view that although law has a specific moral task to perform arising out of its character as a structure of authority: "*to secure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realised*" (emphasis in original) (Raz, 2003, p. 12), it sometimes fails in this moral task, and so does not live up to this aspect of those ideals to which it should aspire, and those standards by which it should be judged. When this happens, however, in Raz's view it remains law nonetheless (Raz, 2003, pp. 10-15).

The points made previously as regards the theorist's explanatory burden should be borne in mind here too, however. If an account were to conclude that according to the proper understanding of the claims that law makes, that law aspires to an ideal that it can never, even in principle, live up to, then an explanation is needed as to why law is incapable of living up to its ideals, and, perhaps, of why it has persisted and gained a central place in human governance practices given that this is so.

Moreover, and again echoing the discussion in section IV.1, coming to a negative conclusion in the sense of holding *that it is not important to consider* those ideals to which law aspires, whether they should be understood as part of law's nature, and what would

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count as success in attaining them, should count against a theoretical account because these matters are vital in understanding what law aspires to be and is aiming to do.

To round off this sub-section, it is important to gloss the above with the following further points.[18] The ideals to which law should aspire, and the standards by which it should be judged may well not *only* stem from the claims that it makes for itself, such as the claim to possess legitimate moral authority over us. It remains an open question whether there are other standards by which law ought to be evaluated in addition to those indicated by the claims that it makes. As legal philosophers, we may also want to ask, for example, whether law treats those subject to it in a dignified and humane way, and we may wish to evaluate it in terms of the extent to which it exhibits these qualities. We can also ask and evaluate whether a legal system is worthy of the respect of those subject to it, and whether it is something with which they can appropriately identify, feel pride in, and regard themselves as belonging to. The discussion above suggests only that *some* very important ideals of law, and standards in terms of which law should be judged, are set by the claims that law makes over those subject to it, and that these should be considered and explored in theoretical accounts of law's authority.

V. Conclusion: Methodological Constraints on Theories of Authority

As indicated at the outset, the discussion above has been exploratory in character. It takes as its main topic the question of whether, methodologically speaking, it counts against a theory of law's authority that it "comes out negative" and explores this topic from different angles. In section III, I considered whether it counts against an account of law's authority if it yields conclusions about the charac-

[18] For further discussion, see Dickson (2022, chap. 8).

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ter and extensiveness of that authority that are significantly at odds with beliefs about authority held by those subject to and living their lives under law. I contended that while it should not, as a general methodological precept, count against an account of law's authority that it runs counter to the beliefs of those living under law, there is an explanatory burden that such an account must discharge, proportionate to the depth, extensiveness, and persistence of the mistake that it attributes to those holding such beliefs. Section IV.1 then examined whether discrepancies between the authority that law claims, and the authority that it actually possesses, should, in some sense, count against the theory that reveals them and indicate that the theory's view of law's claims, law's actual authority, or both, ought to be adjusted in response. Once again, this question was answered in the negative —it seems question-begging to rule out by means of a methodological precept the possibility that law may fall short of the claims it makes for itself. It was suggested once again, however, that accounts of authority that reveal a "gap" between law's claims of authority, and the authority it actually possesses, should offer an explanation of the persistent over-claiming, and/or the persistent falling short, that law exhibits. Similar points emerged in section IV.2 in the discussion of law's ideals, and of accounts which hold that law can fall short of those ideals while still remaining law. In both sub-sections, however, (IV.1 and IV.2) I also suggested that theories of law which regard it as unimportant to *examine and take an interest in* the character of law's claims, and the character of those ideals to which law aspires, will offer an impoverished account of what law is, and the roles it attempts to play in our lives.

In the course of the discussion, a number of interesting issues ripe for further investigation have emerged. How should we ascertain and interpret the beliefs about law's authority discussed in section III, and the claims about law's authority explored in section IV? What would be sufficient to discharge the proportional explanatory burdens discussed in sections III and IV? The issue of whether our understanding of the claims to authority that law makes,

Problema. Anuario de Filosofía y Teoría del Derecho, (20), 2026, e20493
Julie Dickson | Authority and Methodology: Can Theories "Come out Negative"?
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and our understanding of the reality of what it is for law actually to possess legitimate authority, ought to be adjusted in light of one another, and whether there are limits to the extensiveness of the gap that can exist between them, is intriguing and deserving of further consideration. For present purposes, however, my hope is that the above discussion has highlighted interesting aspects of some methodological considerations relevant to our ongoing attempts to understand the authority of law.

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