Towards Classical Legal Positivism

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Abstract. Open almost any textbook on jurisprudence and you will find it beginning with a discussion of natural law and legal positivism. Almost without exception one finds in them two claims. First, what sets legal positivism and natural law apart is a difference on the conceptual question of the relationship between law and morality. Natural lawyers believe that law or legality are necessarily connected to morality, whereas legal positivists deny that. The second claim tells a story about the historical development of legal positivism: according to the familiar story the classical legal positivists like Thomas Hobbes and Jeremy Bentham subscribed to the “command theory” of law according to which law is simply a command of a sovereign. By contrast contemporary legal positivists, following the highly influential account of H.L.A. Hart, have denied that law is a command and a more sophisticated, and more convincing, version of legal positivism. In this essay I challenge both claims. I argue that the difference between legal positivism and natural law has to do with a way inquiries about law should be conducted: natural lawyers seek to understand law by relating it to a broader metaphysical picture or a picture of human nature; legal positivists begin their inquiry with observations at legal practice. Based on this finding I challenge also the historical story about the development of legal positivism. Examining the work of Hobbes and Bentham, I show that unlike contemporary legal positivists they understood their enterprise in ways much closer to those of the natural lawyers: they too thought that a theory of law must be part of a broader inquiry. Where they differed from natural lawyers is that they grounded their theory of law on a profoundly different metaphysical picture. By contrast, contemporary legal positivists have adopted a very different understanding of what a philosophical theory of law should look like: the right way to think about law, according to contemporary legal positivists, is by offering an account of legal practice as understood by those engaged in it. This approach rules out the broad metaphysical inquiry, and results in an explanation that, whatever its merits, is very different from the work of classical legal positivists. Based on this I offer several additional challenges to the prevailing views in legal theory: first, that contemporary legal positivism has not improved on the work of earlier legal positivists but rather failed to engage with it; second, that the debate between contemporary legal positivists and natural lawyers involves, to a great extent, two groups talking past each other. I then argue that contemporary legal positivism suffers from fundamental flaws and suggest that a return to a revamped version of classical legal positivism would be a more fruitful approach to legal theory.

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I. THE ROAD NOT TAKEN

When H.L.A. Hart defended legal positivism in his famous Holmes Lecture, he sought to do so “as part of the history of an idea.”1 In his hands this idea grew out of two philosophical traditions: one was utilitarianism while the other was the “important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies.”2 Together these two ideas led to one “simple but vital distinction” between “law as it is [and] law as it ought to be.”3

It is not hard to see that Hart’s juxtaposition of these two ideas is problematic: Bentham, to whom Hart ascribes both, conceived of his utilitarianism as part of an attempt to ground the domain of morals and politics on the same foundations and conducted with the same rigor as the natural sciences. His empiricism implied that the principles of morals and legislation had to be based on observation, not conceptual or linguistic analysis. It is true that Bentham dedicated many pages to the analysis of language, but this work was concerned not with the analytical study of concepts, but with exposing the extent to which language obscured reality. Legal language in particular came under relentless attack, because Bentham found it riddled with so many fictions, ambiguities, and mysteries. As such it stood in the way of a clear perception of reality, and was thus an obstacle to the betterment of the human condition. As Bentham caustically put it “[a] large portion of the body of the Law was, by the bigotry or the

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2 Id. at 601.
3 Id. at 594.
artifice of Lawyers, locked up in an illegible character, and in a foreign tongue.” For him, the only path for true understanding of the law came not from attending to the thick foliage of legal discourse but rather by cutting through it.\(^4\)

Once we see that utilitarianism and linguistic analysis are not natural bedfellows we can turn Hart’s claim on its head: there are two distinct ways of defending and understanding legal positivism, one is conceptual, the other normative, and they are not easily joined. In fact, it did not take long before Hart abandoned the link between utilitarianism and legal positivism. Perhaps he no longer thought it necessary to draw such a link when not facing an audience he suspected would not be sympathetic to conceptual inquiry;\(^6\) or perhaps Hart simply came to see that the two ideas could not be so easily joined.\(^7\) Be that as it may, by the time The Concept of Law was published, only four years after delivering the lecture, legal positivism’s utilitarian connection was largely gone. It was still presented as a simple idea that (unlike natural law) did not require taking on “much metaphysics, which few could now accept,”\(^8\) but it was now much more the result of conceptual analysis and armchair sociology\(^9\) than the conclusion of any ethical or metaethical inquiry. As late as in the postscript to The Concept of Law Hart wrote: “I still think legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open ... the general question of whether they have ... ‘objective standing’.\(^{10}\) In


\(^5\) I am less concerned in this essay with the other figure Hart ascribes these views, John Austin. Austin’s interests were more different than Bentham’s than is usually appreciated, and was more interested in clear language. But it is worth noting that for all his pedantry over law “properly so called,” Austin did not see himself as concerned with elucidating prevalent linguistic usage and he rejected it when it did not fit into his scheme. See John Austin, The Province of Jurisprudence Determined 26-27 (Wilfrid E. Rumble ed., 1995); see also note 79, infra.

\(^6\) On Hart’s comments on the difference between his approach and that of the Harvard professors and his worries about the reception of his lecture see Nicola Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream 195-96 (2004).


\(^10\) Hart, supra note 8, at 253-54.
other words, one reason to favor legal positivism was that it was not connected to a particular moral theory. Knowing Hart’s personal doubts on questions of the foundations of morality, there can be little doubt that part of the attraction that the conceptual version of legal positivism held for him was exactly the fact that unlike other jurisprudential theories he thought that legal positivism did not force him to take a stand on questions about which he was personally uncertain.  

It is probably due to the influence of The Concept of Law that most defenses of legal positivism in the last fifty years adopted this conceptualist approach. That none of the other prominent legal positivists of the twentieth century was a utilitarian may have contributed to a relative lack of interest in pursuing the question of possible links between positivism and utilitarianism. From here it was but a small step to the startling claim made by John Gardner, that Bentham’s preference for legislation over the common law—a view that was closely tied to his utilitarianism—is “totally independent of his legal positivism.” Legal positivism was thus stripped by most of its contemporary proponents of the particular historical context in which it appeared, of its links to the Enlightenment, of the many ways in which its (alleged) earlier proponents tied it to their political thought, and turned into a proposition. It was defended as a conceptual truth of “general” jurisprudence, the result of nothing more than careful attention to the “study of the meaning of the distinctive vocabulary of the law.”

But if this proposition were to count as a philosophical thesis, not merely an incontestable observational truism, there was a need for a contender. And a contender was duly found; or rather, invented. It was called “natural law.” Of course, natural law is a philosophical tradition with a provenance going back all the way to earliest recorded Western philosophy, but this, historical, natural law is, as Peter Gay put it “infinitely complex; to draw a map of its growth, its multiple ingredients, its changing modes and varied influence, would be like drawing a map of the Nile Delta.” In this vast river one finds discussions on the foundations of political authority, the limits of political obligation, the origins of property rights and the justification of contractual obligations, along with much else. Little of this was acknowledged in the work of Hart or his followers. Instead, a question that was, at best, a marginal concern in the work of some natural law theorists, was turned into the (sole?) defining characteristic of natural

law theory. This broad-ranging family of theories was thus bastardized into a proposition to match the proposition of legal positivism. In its simplest form natural law became the proposition that unjust law is not law.\textsuperscript{14}

There was one difficulty with this approach: most of those who actually called themselves “natural lawyers,” those who saw their work as following in the footsteps of earlier natural lawyers, dissociated themselves from this proposition. They saw no difficulty with accepting the claim that there were immoral or unjust laws.\textsuperscript{15} In response, legal positivists have drawn a distinction between “[t]raditional Natural Law … [which] insist[s] that a putative norm cannot become legally valid unless it passes a certain threshold of morality”\textsuperscript{16} and “contemporary Natural Law,” which accepts this idea.\textsuperscript{17} As a historical matter this claim is incorrect—there are “traditional” natural lawyers who clearly recognized the possibility of unjust laws and there are contemporary natural lawyers who argue that unjust laws are not law.\textsuperscript{18} The important matter, however, is that if the point of legal positivism, if its “insight” as Andrei Marmor called it,\textsuperscript{19} was something that was recognized by at least some early natural lawyers, it is hard to see the novelty in legal positivism, the way in which it posed a

\textsuperscript{14}Hart, \textit{supra} note 8, at 8. Admittedly, later in the book Hart considers a few other ideas associated with natural law, but these ideas were still relatively detached from the work of actual natural lawyers.

\textsuperscript{15}Most famously John Finnis, \textit{Natural Law and Natural Rights} 363-66 (2d ed. 2011). In different ways the claim has been made by others of a broadly natural law view. \textit{See}, e.g., Lon L. Fuller, \textit{The Morality of Law} 153 (rev. ed. 1969); Ronald Dworkin, \textit{Taking Rights Seriously} 89 (rev. ed. 1978). More recently it has been suggested (by a legal positivist) that the difference between natural law and legal positivism is that the former is only interested in the central case of moral law at the expense of marginal cases and the non-moral aspects of law, whereas legal positivism takes a broader interest in both. \textit{See} John Gardner, \textit{Nearly Natural Law}, 52 Am. J. Juris. 1, 18 (2007). This, however, is not how natural lawyers (or at least some of them) perceive of their enterprise. \textit{See}, e.g., John Finnis, \textit{Law and What I Truly Should Decide}, 48 Am. J. Juris. 107, 111-14 (2003); \textit{see also} Mark C. Murphy, \textit{Natural Law in Jurisprudence and Politics} 8-10 (2006).

\textsuperscript{16}Andrei Marmor, \textit{The Rule of Law and Its Limits}, 23 Law & Phil. 1, 42 (2004).

\textsuperscript{17}Id. at 42 n.66.

\textsuperscript{18}For examples of ancient and medieval natural lawyers recognizing the possibility of unjust law see text accompanying notes 24-30, \textit{infra}. By contrast there are contemporary natural lawyers who do claim that unjust law is not law. \textit{See}, e.g., Michael S. Moore, \textit{Educating Oneself in Public: Critical Essays in Jurisprudence} 303-04 (2000); Philip Soper, \textit{In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All}, 20 Can. J.L. & Jurisprudence 201 (2007); Jonathan Crowe, Reviving the Strong Natural Law Thesis (unpublished manuscript, on file with Author). The picture among natural lawyers, whether “traditional” or “contemporary,” is thus more complex than Marmor envisages it and cannot be demarcated along chronological lines. My argument below, however, seeks to identify what unites all (or most) natural lawyers and what separates all (or most) of them from contemporary legal positivists.

\textsuperscript{19}Marmor, \textit{supra} note 16, at 42.
radical challenge to existing theories of law. It is for this reason that when one looks at many of the recent works on the subject, one is struck by just how hard commentators struggle to find something that distinguishes legal positivism and natural law, often conceding in the end that there is not much difference between them. As a result what is still treated as the most foundational debate in jurisprudence—the one that opens virtually all the legal theory textbooks—is one on which there seems to be no argument at all.

In this essay I want to address these questions and offer a very different way of resolving them. I suggest we do so by looking back at the road not taken, the one that links legal positivism to utilitarianism. My claim, however, will not be that legal positivism was a utilitarian position per se, but rather that it was what might be called a metaphorically deep doctrine that was grounded in the very same ideas that led Bentham to his utilitarianism. I will argue that unlike contemporary legal positivism that conceives of itself and the domain of jurisprudence in highly restricted terms, the philosophers now considered its founders saw theorizing about law, just like theorizing about morals, as part of theorizing about nature, and about human nature in particular. Moreover, in all this they agreed with natural lawyers. Where the classical legal positivists differed from natural lawyers was in their views on these matters: quite simply, they thought the metaphysical foundations and the image of human nature assumed by natural lawyers were false. Their disagreements on law were part of, or derived from, their differences on these larger matters.

I have two major aims in this essay. First, I hope to set the historical record straight, so I offer an account of Hobbes’s and Bentham’s work that seeks to identify what they believed, and which presents their views on law as part of their wide-ranging thought. The primary aim of this essay, however, is not historical. My main aim is to contribute

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21 What about those who believe, see note 18 supra, that unjust law is not law? Is there no real debate between them and legal positivists? There are two ways of understanding these debates. If understood as “conceptual” debates about the nature of law, then I believe these debates are in fact misguided because they are grounded in the mistaken belief that there is such a thing as a nature to law, one that can be discovered through conceptual analysis. These supposedly conceptual debates are, in my view, nothing more than verbal disputes. By contrast, the claim that unjust law is not law can make sense if it is understood as part of a normative account that ties law to legitimate political power. In this sense, however, it is a mistake to think that the debate between natural lawyers and legal positivists as a conceptual debate.
to contemporary jurisprudential debates and to suggest that the largely neglected approach of earlier positivists is superior to the view held by most contemporary legal positivists. The two aims are not necessarily congruent. There is an obvious sense in which talk of Hobbes or Bentham as legal positivists is a historical anachronism. The debate between legal positivism and natural law, in the form one finds in contemporary jurisprudence textbooks, is a twentieth century debate that cannot found be in jurisprudential debates of past centuries. It is not just that the term “positivist” is not found in the work of Hobbes, Bentham, or even Austin. It is that the debate as it is understood today was not one that they were engaged in. There is therefore danger in the attempt to match contemporary categories to the ideas of theorists who worked against a very different intellectual framework, and in an important respect it is pointless, and potentially misleading, to debate whether Hobbes or Bentham were “really” legal positivists or natural lawyers.22

The more meaningful question, and the one I wish to engage in, is to what extent is it useful for us to call Hobbes and Bentham “legal positivists.” My answer to this question consists of three interrelated points. The first is that we draw an explicit link between their ideas and the view that (some time later) would come to be known as “positivism,” roughly the view that the methods of the “human sciences” are essentially the same as those of the natural sciences. The second point is that the classical legal positivists’ decisive break with natural law ideas prevalent in their day is to be found exactly here, in their views about metaphysics or human nature. The third point is to demonstrate how this aspect of their work has been, in my view regrettably, abandoned by contemporary legal positivists. Though all three points are closely related, in this essay I will say relatively little about the first point, as I discussed it greater detail elsewhere.23

II. TWO VERSIONS OF LEGAL POSITIVISM

The idea that putative laws can be immoral and still remain (in a certain sense) “valid” did not need the genius of Hobbes or Bentham to be discovered. It was always known, because it is a trivial observation. Aristotle, for example, distinguished between the “legally just” and the “equitable,” which is “a correction of legal justice.”24 A law thus can be “legally just” even though inequitable. This presupposes that the legally unjust

23 Priel, supra note 9.
law is law. Even more clearly Cicero, by contemporary classifications natural lawyer \textit{par excellence},\textsuperscript{25} had no difficulty in distinguishing between “legally binding conditions or how to answer this and that question for our clients”—what legal positivists would now call valid legal norms—and the broader inquiry, in which “we have to encompass the entire issue of universal justice and law; what we call civil law will be confined to a small, narrow, corner of it.”\textsuperscript{26} He had no difficulty in understanding that “as our whole discourse has to do with ordinary ways of thinking, we shall sometimes have to use ordinary language, applying the word ‘law’ to that which lays down in writing what it wishes to enjoin or forbid. For that’s what the man in the street calls law.”\textsuperscript{27} Aquinas too clearly recognized the possibility of iniquitous or immoral laws: “Human laws often bring defamation and injury to human beings.”\textsuperscript{28} Aquinas even provided a typology of the different ways in which they may be unjust.\textsuperscript{29} These thinkers were also fully aware of the, utterly obvious, practical implications of disobeying unjust laws. This is clear even in Augustine, who is usually credited for first use of the slogan “unjust law is not law.” In the sentence just preceding these famous words Augustine considers the following hypothetical: “the law bids a soldier to kill the enemy, and if he holds back from the bloodshed he pays the penalties from his commander.”\textsuperscript{30} The practical implications of failure to comply with an unjust law, exactly the consideration John Austin relied upon in his famous refutation of natural law,\textsuperscript{31} were not in question. But

\textsuperscript{25} “[L]aw in the proper sense [or as we might say today ‘properly so called’] is right reason in harmony with nature. It is spread through the whole human community, unchanging and eternal. … This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded. We cannot be exempted from this law by any decree of the Senate or the people….” Cicero, \textit{The Republic, in The Republic and the Laws} 1, 68-69 (Oxford University Press, Niall Rudd trans., 1998) (III.33).

\textsuperscript{26} Cicero, \textit{The Laws, in The Republic and the Laws, supra} note 25, at 95, 102-03 (I.17).

\textsuperscript{27} \textit{Id}. at 103 (I.19).

\textsuperscript{28} \textit{Aquinas, On Law, Morality, and Politics} 64 (Hackett, Richard J. Regan trans., 2d ed. 2002) (S.T. I-II Q.94 Art.4).

\textsuperscript{29} Id. at 65 (S.T. I-II Q.94 Art.4). In Aquinas’s discussion of the conditions under which laws may be changed, he says that law may be changed when “the existing law is clearly unjust.” Id. At 72 (S.T. I-II Q. 97 Art. 2). Plainly, there would be no need for changing such “clearly unjust” laws if they were not laws. For more on Aquinas’s views on unjust laws see John Finnis, \textit{The Truth in Legal Positivism, in The Autonomy of Law: Essays on Legal Positivism} 195, 201-03 (Robert P. George ed., 1996). For a more general discussion of the role and different senses of positive law in Aquinas’s work see JAMES BERNARD MURPHY, \textit{The Philosophy of Positive Law: Foundations of Jurisprudence} 48-116 (2005).

\textsuperscript{30} \textit{Augustine, On the Free Choice of the Will, On Grace and Free Choice and Other Writings} 10 (Peter King ed. & trans., 2010) (§ 1.5.11.33).

\textsuperscript{31} “Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which
those implications were not seen as relevant for answering the question whether unjust edicts could be laws.

What then was the novelty of the earliest philosophers we now call legal positivists? My argument will be that Hobbes and Bentham offered a distinct approach to legal theory that is very different from the work of contemporary legal positivists and in a way is much closer in spirit to the approach to jurisprudence found among natural lawyers. The hallmark of contemporary legal positivism is its internality: it seeks to offer a theory of law from within legal practice, and as such one that is built around the way law is understood by lawyers. The central concept in the effort to explain the “nature” of law, legal validity, directs the inquiry to identifying what members of the legal community consider to be law. Revealingly, in an interview Hart gave late in his life he said about of his main work in jurisprudence that it was “written for lawyers and primarily had them in mind.” From this point of view the possibility of “valid” immoral or unjust laws is, to put it mildly, not particularly surprising and does not reflect any deep philosophical insight; that lawyers have considered some edicts as “legal” despite these edicts being immoral is a trivial empirical observation. In this sense, however, legal positivism is not a challenge to natural law theories, indeed it does not even engage them: as we have seen natural lawyers were aware of this observation and thought it worthwhile to offer their theory of law in spite of it, not as a description of lawyers’ perspective, but as an alternative, as a challenge, to it.

As I will argue this is characteristic not only of the work of those theorists we now call natural lawyers, but also of those now considered founders of legal positivism. One aim of this essay is to show the significance of this divide in the characterization of legal theory. I begin by describing, in very brief terms, some of the central tenets of the work of Hobbes and Bentham that demonstrate my claim. For ease of exposition I will reverse chronological order and discuss Bentham first.

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have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up.” Austin, supra note 4, at 158.


33 The same can be said of Joseph Raz, Practical Reason and Norms 164 (2d ed. 1990) (“We are all sadly familiar with laws which are racially discriminating, which suppress basic individual liberties such as freedom of speech or of worship. We also know of tyrannical governments pursuing evil goals through the machinery of law. … It is precisely because such obvious laws are ruled out as non-laws by the theory that it is incorrect. It fails to explain correctly our ordinary concept of law which does allow for the possibility of laws of this objectionable kind.”); Jules L. Coleman, The Architecture of Jurisprudence, 121 Yale L.J. 2, 11 (2011) (“If history is to be a guide, one cannot help but be struck by the fact that morally bad law is not merely conceptually possible but all too frequently realized”). As empirical statements about linguistic usage these claims are probably true (at least in some linguistic communities).
(a) Jeremy Bentham

When considering Bentham’s views on law, a good place to start is actually his views on morality. Bentham had little patience for most moral discourse, to which he refers with characteristic acidity: “While Xenophon was writing History, and Euclid teaching Geometry, Socrates and Plato were talking nonsense, on pretence of teaching morality and wisdom.”34 Later moral philosophers were often treated in similar terms: “With a few exceptions, open any book that takes for its subject any part of the field of morals, the following you will find is the state of mind in which he enters upon his subject: … Whatsoever it would be his pleasure they should do, he tells men that they ought to do it: whatsoever it would his pleasure to see them forebear from doing, he tells them that they ought not to do it.”35 If you wonder why that is so, well, “[t]o any such question no answer he consider it as incumbent on his to give.”36 And if they do try to give an answer, the results, in Bentham’s view, were hardly better. For example, the views of those who appealed to abstract ideas like summum bonum (ultimate good) were dismissed as “consummate nonsense.”37

Famously, this attitude extended to talk of natural law and natural rights. Bentham’s basic view on natural rights is found in crisp form in the most famous sentence he ever wrote: “Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts”.38 As rights were the products of human law, talk of natural law was akin to talk of “cold heat,” “dry moisture,” or “resplendent darkness.”39 Natural law was described in similar terms: in the course of his critique of Blackstone Bentham called it a “phantom” and a “formidable non-entity.”40 Such fictional concepts as the law of nature or natural justice were not just confusing but dangerous as they “serv[ed] as cloak, and pretence, and aliment to despotism.”41

34 Jeremy Bentham, Deontology 135 (Amnon Goldworth ed., 1983). For more invective of that kind see id. at 134-47.
35 Id. at 253.
36 Id. For another criticism of Bentham’s contemporaneous moral philosophers see id. at 157.
39 All these come from Jeremy Bentham, Supply without Burthen, in 1 Jeremy Bentham, Economic Writings 283, 335 (W. Stark ed., 1952).
Nonetheless, Bentham did not think that there was no right and wrong in human affairs. (Notice that this very is different from the views of some contemporary legal positivists who were drawn to legal positivism exactly because they thought there was no right answer to such questions.) The crucial point for Bentham is that questions of morals have been discussed in the wrong way: “every political and moral question ought to be[ put] upon the issue of fact; and [thus] mankind [would be] directed into the only true track of investigation which can afford instruction or hope of rational argument, the track of experiment and observation.”42 And Bentham believed he identified the relevant facts, which he presented most famously in the opening sentence of the Introduction to the Principles of Morals and Legislation: “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”43 This, for him, was a matter of fact, a generalization based on observation. It was not meant to be an “internal” description or reinterpretation of people’s attitudes, for obviously it did not reflect folk morality. It was considered a discovery meant to rid us of much of the nonsense and fiction that bedeviled existing moral discourse. It was meant to be a scientific (“external”) discovery, one that in turn was grounded in his materialist metaphysical worldview.44

Not surprisingly, Bentham held a very similar view of law: “Physical sensibility [is] the ground of law—proposition the most obvious and incontestible [sic].”45 To understand law one must start not from within legal practice, but from an account of what exists. In his view, for a well-functioning legal system one had to first have clear perception of what existed in order to fix (in both senses of the word “fix”) legal language accordingly.46 What should be clear from all this is that Bentham’s problem with natural law was not that natural lawyers tried to build legal theory of metaphysical

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43 BENTHAM, supra note 41 at 11 (§ 1.1).


45 Bentham manuscripts, University College London, Box 69, p. 10, quoted in DOUGLAS G. LONG, BENTHAM ON LIBERTY: JEREMY BENTHAM’S IDEA OF LIBERTY IN RELATION TO HIS UTILITARIANISM 17 (1977).

foundations, but that the foundations natural lawyers posited were false. The foundations they posited did not exist, just like cold heat did not exist.

These views are clearly very different from what one finds in the work of most contemporary legal positivists, but they are also different from some revisionist interpretations of Bentham’s work that suggested that Bentham’s views in jurisprudence were motivated by his utilitarianism, and not by conceptual analysis. There can be no doubt that Bentham’s views on law were part of his broader utilitarian outlook. Bentham clearly believed that laws were required for attaining some happiness and avoiding some pain (which shows, by the way, that for him there was a necessary connection between law and morality: law was a necessary means for attaining moral ends). I suspect, however, that contemporary legal positivists would respond that whatever Bentham’s motivations for his views on law had been, what matters (as far as his alleged legal positivism is concerned) is that Bentham accepted the conceptual claim of the separability of law as it is from law as it ought to be.

This, however, is to simply misunderstand what Bentham was concerned with. Bentham, like natural lawyers but unlike contemporary legal positivists, comes to his views about law from an underlying metaphysical worldview, not from observing at the attitudes of participants in legal practice or from careful analysis of the concepts they use. This is why Bentham, despite famously denying the existence of natural law, could write without contradiction that natural law should be better understood as “conformity of the thing in question to the proper standard, whatever that may be,” to which he added his own gloss: “On most occasions … it will be better to say utility: utility is clearer, as referring more explicitly to pain and pleasure.” To suggest that all this is separate from his views on law is simply to ignore almost everything Bentham wrote and ascribe to him a view he never defended.

(b) Thomas Hobbes

“The true and perspicuous explication of the Elements of Laws, Natural and Politic, … dependeth upon the knowledge of what is human nature, what is a body politic, and

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48 “The business of government is to promote the happiness of the society, by punishing and rewarding.” BENTHAM, supra note 41, at 74 (§ 7.1); see also id. at 282 (§ 17.2), and the material quoted in J.R. Dinwiddy, Bentham on Private Ethics and the Principle of Utility, in RADICALISM AND REFORM IN BRITAIN, 1780-1850, at 315, 329 (1992). For further discussion on the role Bentham gave to legislation and government in the pursuit of happiness see L.J. HUME, BENTHAM AND BUREAUCRACY 93-96 (1981); L.J. Hume, Jeremy Bentham and the Nineteenth Century Revolution in Government, 10 Hist. J. 361 (1967).

49 BENTHAM, supra note 41, at 27 n.d (§ 2.14).
what it is we call a law.”

These are the opening words of Hobbes’s early book *The Elements of Law*. Already here we see clearly that explaining law according to Hobbes depends on an account of human nature. We also see what makes Hobbes’s case more complex, one that at first sight looks very different from Bentham’s. For an explanation of law according to Hobbes involves explaining the laws made by political bodies as well as natural laws. And those natural laws, which Hobbes discusses in great detail in all his works, are central ingredients in his argument about the move from the state of nature to civil society. Hobbes’s theory thus seems not only very different in one of its fundamental elements from Bentham’s, but, more significantly for purposes, one that is difficult to categorize as a version of legal positivism. If we are to follow the common characterization of legal positivism as the opposite of natural law, then Hobbes’s repeated invocations of natural law mark him as an opponent of legal positivism, not its seminal defender.

Yet in many respects Hobbes’s interpretation of natural law consisted in a radical departure from the ideas of earlier thinkers. He had no patience for the ideas of the “Schoolmen,” the humanistic scholars who sought to revive the classical (Greek–Roman) natural law tradition; it is with him, for example, that we find, probably for the first time, the idea of liberty as non-interference, and his rejection of the Roman, republican, idea of freedom as non-domination. More fundamentally, and more importantly for my argument, Hobbes saw his views about natural law as part of a broader grand theory. It is instructive to consider the structure of his most important philosophical works: in both *Leviathan* and in his earlier works, Hobbes maintained a tripartite structure that began with metaphysical questions, proceeded to a discussion of human nature, and concluded in discussion of moral and political theory. This was no mere question of neat organization. Throughout his work he was much influenced by the advances in science of his time and thought them relevant not just to the natural

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sciences, but also to questions of morals and politics. So significant was this shift in approaching questions of moral and political theory, that it was only with him, Hobbes thought, that these areas became a science: “natural philosophy [i.e., natural science] is ... but young; but Civil Philosophy yet much younger, as being no older ... than my own book De Cive.”

This is not the place for a detailed of Hobbes’s philosophy in its entirety. In what follows I will try instead to demonstrate the importance of these background ideas to his thought on natural and human law. I wish to show that, for all their differences there is at least one important regard Hobbes’s novel treatment of natural law justifies separating him from much of the natural law tradition that preceded him and placing him close to Bentham that came after him.

It is well known that Hobbes did not think that people could achieve peace on their own and that an authority over them was necessary to prevent life from descending to chaos. Thus, for Hobbes laws were necessary for “the procuration of the safety of the people; to which the sovereign is obliged by the Law of Nature”. The starting point of his argument is his definition of the natural right to absolute freedom:

The RIGHT OF NATURE, which writers commonly call Jus Naturale, is the liberty each man hath to use his own power as he will himselfe for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.

By LIBERTY, is understood, according to the proper signification of the word, the absence of external impediments; which impediments may oft take away part of a man's power to do what he would, but cannot hinder him from using the power left him according as his judgement and reason shall dictate to him.

Thus, in Hobbes’s account natural right is the state of absolute freedom, the ability to do as one wishes in the absence of any laws. This was, for him, not a normative concept, but, in line with his materialistic approach to political theory, a factual statement about what people can (physically) do when there are no external restraints. As he explained “LIBERTY ... is simply the absence of obstacles to motion; as water contained in a vessel

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53 For an extended discussion see Priel, supra note 9.
56 Hobbes, Leviathan, supra note 37, at 231 (ch. 30). He further explains that “by safety here, is not meant a bare Preservation, but also all other Contentments of life....” Id.
57 Id. at 91 (ch. 14)
is not free, because the vessel is an obstacle to its flowing away, and it is freed by breaking the vessel.”

Hobbes also offered a distinct understanding of natural law. It was novel in three respects: first, according to Hobbes natural law is a precept of reason concerned with survival, and not with good and evil or justice; second, natural law is not binding in the state of nature (unless commanded by God); and third, despite people’s natural dispositions to follow it, he claimed that as an empirical matter it would not be obeyed in the state of nature. Hobbes is clear that “every private man is Judge of Good and Evil actions … in the condition of mere Nature, where there are no Civill Lawes…. But otherwise, it is manifest, that the measure of Good and Evil actions, is the Civill Law….”

Likewise, in the state of nature “nothing can be Unjust.”

According to Hobbes, Humans have a natural disposition for survival, and the natural laws are “dictates of Reason … for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves.” As such they “oblige in foro interno,” that is, “they bind to a desire that they should take place: but in foro externo; that is, to the putting them in act, not alwayes”. So Hobbes uses here the word “oblige” in a special sense, roughly that of a combination of rational precept towards self-preservation and a desire for their existence. As humans naturally seek their preservation they can recognize these precepts as conducive to that aim (as

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58 THOMAS HOBBES, ON THE CITIZEN 111 (Richard Tuck & Michael Silverthorne eds. & trans., 1997) (§ IX.9). A similar point is made in HOBBES, LÉVIATHAN, supra note 37, at 145-46 (ch. 21).

59 Id. at 185 (ch. 26) (“the Right of Nature, that is, the naturall Liberty of man, may by the Civill Law be abridged, and restrained; nay, the end of making Lawes, is no other, but such Restraint; without the which there cannot possibly be any Peace.”); see also id. at 200 (ch. 26).

60 Id. at 223 (ch. 29), also id. at 110 (ch. 15) (“Good and Evil, are names that signified our appetites, and Aversions, which in different tempers, customs, and doctrines of men, are different”).

61 Id. at 90 (ch. 13).


63 HOBBES, LÉVIATHAN, supra note 37, at 111 (ch. 15).

64 Id. at 110 (ch. 15). This shows the anachronism in Dyzenhaus’s interpretation, for in Hobbes’s account there is no question of whether to “resolve[] … conflict[s] between positive law and natural law in favour of the latter.” David Dyzenhaus, HOBBES AND THE LEGITIMACY OF LAW, 20 LAW & PHIL. 461, 467 (2001). Likewise Dyzenhaus’s claim that Hobbes’s natural laws are “not about the psychological state of readiness of mind to obey, but about the obligation that stems from having reasons for obedience,” id. at 473, appears to be inconsistent with the tenor of Hobbes’s discussion.
opposed to the drunk and the insane that lose this capacity).65 This helps us understand in what sense Hobbes can say that the natural laws are “immutable and eternall” and why their opposites—“Injustice, Ingratitudue, Arrogance, Pride, Iniquity, Acception of persons, and the rest”—“can never be lawfull”.66 They are immutable and eternal because the natural inclination for self-preservation is immutable (itself a finding Hobbes derives from his observation of humans and animals), and one that Hobbes thinks his natural laws invariably help sustain. When Hobbes says their opposites cannot be made lawful, he means that they cannot be natural laws for a simple reason, that as a matter of fact they are not conducive to self-preservation: “For it can never be that Warre shall preserve life, and Peace destroy it.”67

The cause of the human predicament thus lies in the conflict between this human desire for self-preservation and another desire, the pursuit of power. For in addition to seeking their self-preservation—and to being able to recognize the laws that are instrumentally rational means for this end of self-preservation—humans also have a “generall inclination … a perpetuall and restlesse desire of Power after power, that ceaseath only in Death”.68 In other words “the Lawes of Nature … without the terror of some Power, to cause them to be observed, are contrary to our Naturall Passions….69 It is for this reason that “notwithstanding the Lawes of Nature …, if there be no Power erected … every man will, and may lawfully rely on his own strength and art, for caution against all other men”.70 For this reason Hobbes thinks it is misleading to call the natural laws “law”: “men use to call by the name of Lawes, but improperly: for they are but Conclusions, or Theoremes …; whereas Law, properly is the word of him, that by right hath command over others. But yet if we consider the same Theoremes, as

65 This explains why Hobbes treats drunkenness as a breach of natural law. See HOBBS, supra note 58, at 54 (§ III.27n).
66 HOBBS, LEVIATHAN, supra note 37, at 110 (ch. 15).
67 Id.
68 Id. at 70 (ch. 11).
69 Id. at 117 (ch. 17).
70 Id. at 117-18 (ch. 17).
delivered in the word of God, that by right commandeth all things; then they are properly called Lawes”.71

These are the bare bones of Hobbes’s views on the origins of law. Their essence is an attempt to offer a theory of law on the basis of facts about human nature (their desire for survival, their lust for power), a certain view about liberty (itself derived from a certain scientific or scientistic perspective on the world), and a view on the necessity of law for the sake of maintaining and developing human life. Any attempt to fit his view neatly into the contemporary labels of “legal positivism” and “natural law” faces severe interpretative difficulties. As he sought to break away from the work of earlier natural lawyers, it is no surprising that his account looks very different from the work of contemporary natural lawyers whose work builds on the Aristotelian-Thomist tradition of natural law. There are also significant differences with the work of other contemporary legal theorists who are often classified as natural lawyers of some sort: It is, for example, difficult to classify him as a natural lawyer in the sense Lon Fuller considered himself a natural lawyer, i.e. by insisting on certain procedural requirements as condition of legality,72 as Hobbes explicitly stated that “no Law can be unjust. The Law is made by the Sovereign Power, and all that is done by such Power, is warranted, and owed by every one of the people; and that which every many will have so, no many can say is unjust.”73 The differences between his ideas and those of Ronald Dworkin are profound as well, first because Dworkin denies that there is any metaphysical foundation to morals, but also (and more importantly) because Dworkin’s conception of morals and freedom is broadly republican, whereas Hobbes had strongly anti-republican views.74

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71 Id. at 111 (ch. 15). Also: the natural laws “are not properly Lawes, but qualities that dispose men to peace, and to obedience.” Id. at 185 (ch. 26).
72 See FULLER, supra note 15, at 96-106.
73 HOBBS, LEVIATHAN, supra note 37, at 239 (ch. 30) (emphasis added). Even when the sovereign transgresses against natural law, his transgression is only against God. Id. at 148 (ch. 21). Dyzenhaus tries to turn Hobbes into a precursor of Fuller by highlighting some of the requirements of legality in Hobbes’s text. See Dyzenhaus, supra note 61, at 491; see also ZAGORIN, LAW OF NATURE, supra note 55, at 95. Dyzenhaus’s interpretation is implausible because unlike most people who are bound by the natural laws and by the civil laws that have the same content as well, the sovereign, by definition, is not subject to the civil laws. And given that the requirements of legality are natural laws, they are afflicted by the very same problems that Hobbes thinks will lead to the violation of all other natural laws.
74 For an attempt to argue that we should understand Hobbes as a kind of Dworkinian natural lawyer see Michael Cuffaro, On Thomas Hobbes’s Fallible Natural Law Theory, 28 Hist. Phil. Q. 175 (2011). Cuffaro points out some interesting similarities between Hobbes’s views on interpretation of the law of nature and Dworkin’s views on principles. See id at 181-83. These, however, do not suffice to establish his interpretation. There are two difficulties with his approach. First, if we wanted to match Hobbes with contemporary views, then Cuffaro’s interpretation is consistent with the view that Hobbes was an
Similarly, while the temptation to classify Hobbes as a legal positivist is understandable after reading passages such as the one quoted in the last paragraph, the similarities between his and contemporary positivists’ views are equally tenuous. From a contemporary perspective the latter quotation seems to suggest that Hobbes thought that “legal validity” does not depend on legal content—that law is law regardless of what it says, and that makes him sound like a legal positivist. But we have already seen that this is not a useful mark of legal positivism, because it does not adequately distinguish legal positivism from other views. Furthermore, delve a little deeper and crucial differences appear between Hobbes’s views and those of contemporary legal positivists. Hobbes reached his views on law not from looking at legal practice, but rather by ignoring, or rather challenging, it. His claims about what law, even those that look “positivist,” are not conceptual claims, but rather the conclusions of a political argument, which in turn Hobbes believed was grounded in his views on human nature. This difference may seem slight, but its significance is profound, for the view Hobbes rejects is the essence of contemporary legal positivism: both methodologically, in the sense that a theory of law does not depend on political theory, and substantively, in the sense that the foundational concept of jurisprudence is validity and that the “rule of recognition” is a purely social, not political concept. To the extent that legal positivism is understood by its proponents as part of the politically neutral inquiry of “analytic jurisprudence,” then Hobbes cannot be associated with that endeavor.

III. THE CLOSING OF THE POSITIVIST MIND

(a) From Classical to Contemporary Legal Positivism
The debate between classical legal positivists and natural lawyers was, at bottom a debate about metaphysics and human nature: both sides of this debate agreed that a theory of law must be part of a broader account of what the world was like, but had exclusive legal positivist, a view that Cuffaro does not consider. Second and more important, Cuffaro ignores the sense in which for Dworkin morality is a communal enterprise that is “constructed” in debate. Put somewhat crudely Dworkin has a republican conception of morality and politics, and Hobbes was as anti-republican as one could get. The fact Cuffaro himself stresses, that for Hobbes interpretation cannot alter natural law, see id. at 184-85, is anti-Dworkinian, for whom true (correct) morality and law (the two for him are closely connected) are the product of a process of constant construction. Both the idea of immutable natural laws and of the exclusivity of the sovereign in determining the content of natural law, about which see in particular THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 67 (Joseph Cropsey ed., 1971) (first published 1681, written around 1666) [26-27] [hereinafter HOBBES, DIALOGUE], are fundamentally at odds with Dworkin’s ideas.

\footnote{See notes 97-105 and accompanying text infra for more on this.}
strongly divergent views on what this matter. This is very different from the way the contemporary debate between legal positivism and natural law is usually understood. The contemporary debate is about the sort of connection that exists between natural law and human law. In this version “natural law” is treated as synonymous with morality (a view that would have been considered as, at best, inaccurate by both Hobbes and Bentham) and legal positivism has been transformed to the claim that (human) law is separate or distinct from natural law (i.e., from morality). The opposing view, natural law, has been similarly refashioned as the view that human law has some kind of connection with morality. Much of what has been written on jurisprudence since the publication of The Concept of Law—the debates between positivists and Ronald Dworkin, the debates between legal positivists and Lon Fuller, the proliferation of various strands of legal positivism (especially, “inclusive” and “exclusive” legal positivism)—is based on this contemporary understanding of natural law and legal positivism, one that is largely without a trace in works from earlier periods.

This is a great yet underappreciated shift in the nature of debates in legal theory, indeed on what legal theory is about. How did it happen? The two people most responsible for this change are Hans Kelsen and H.L.A. Hart, who are often considered the foremost legal positivists of the twentieth century. Their projects were quite different, but in one respect their accounts resembled each other, even if for different reasons. Both Kelsen and Hart opted for a metaphysically shallow account that did not try to situate the theory of law within a broader story of human nature.

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76 This is explicit in, for example, Gardner, supra note 15, at 22.
77 For this reason it has often been claimed that (contemporary) legal positivism is agnostic on questions of metaethics. See Jeremy Waldron, Law and Disagreement 166-67 (1999); Hart, supra note 8, at 254; Joseph Raz, Legal Principles and the Limits of Law, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 73, 85 (Marshall Cohen ed., 1984). Such statements are false, or at least inaccurate, with regard to classical legal positivism.
78 In recent years there has been a tendency among self-styled legal positivists to accept that there are necessary connections between law and morality. See Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 168 (2009); Gardner, supra note 12, at 223; Leslie Green, Positivism and the Inseparability of Law and Morals, 83 N.Y.U. L. Rev. 1835 (2008); Jules L. Coleman, Beyond Inclusive Legal Positivism, 22 Ratio Juris 359, 383 (2009). This, together with the recognition that (most) natural lawyers do not deny that legal norms can be immoral, see text accompanying note 17 supra, leaves legal theorists scrambling to find something to separate legal positivism and natural law. See note 20 supra.
79 Another important figure in the story is John Austin, whose work served as the basis for Hart’s work. He was, in some respects, a transitional figure, but the differences between his work and Hart’s are, I think, more significant than is usually assumed. See Dan Priel, H.L.A. Hart and the Invention of Legal Philosophy, 5 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 301 (2011).
Kelsen was interested in explaining law as a normative system. That meant explaining how law and legal obligations were possible. He thought that since law and obligation are normative concepts, factual matters like what the world and human nature were irrelevant. Even people’s attitudes about law had no place whatsoever in his theory. The only thing that he thought belonged properly in a theory of law was an analysis of the logical relations between concepts like law, obligation, coercion and so on. His “pure theory of law” thus sought to exclude from the discussion all factual disciplines—“psychology, sociology, ethics, and political theory”—that intruded on the proper domain of legal theory.

In sharp contrast, Hart tried to explain law as a practice, and thought that this called for explaining the attitudes that went into constituting those practices. This may sound like something that will require taking human nature into account, and indeed Hart makes occasional remarks on human nature, ones that are actually not very different from what one finds in Hobbes. Yet it is striking just how marginal is the place Hart gives to these statements. They are repeatedly described as a “simple contingent fact,” a “mere contingent fact which could be otherwise,” or “a merely contingent fact … [that] might have been otherwise” about humans, their nature, or the world they inhabit. The sense is that as such they are not very relevant for a general theory of law. This impression is strengthened when one considers where those contingent facts are mentioned: they do not form part of Hart’s own account, but are mentioned briefly in his criticism of competing ideas.

When situated in its historical context Hart’s project of understanding legal practice was premised on the view that the world of practices is a world created by words, and as such a world that needs to be understood by careful attention to words. The so-called “linguistic turn” that was taking place across disciplines at the time was, to a large

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80 See, e.g., HANS KELSEN, GENERAL THEORY OF LAW AND STATE 176 (Anders Wedberg trans., 1945) (“From the point of view of [the pure theory of law], the order to pay taxes differs from the gangster’s threat … by the fact that only the tax order is issued by an individual who is authorized by a legal order assumed to be valid.”); contra ANDREI MARMOR, PHILOSOPHY OF LAW 54 (2011) (claiming that Kelsen “clearly recognized” “the internal point of view … as crucial to any account of a normative system”).
82 Cf. N.E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE 185-91 (3d ed. 2008) (arguing that Hart did have a metaphysical view and that his theory of law relied on his views on human nature).
83 See HART, supra note 8, at 192-93, 194-95, 210 (“In a population of the modern state, if there were no organized repression and punishment of crime, violence and theft would be hourly expected….”).
84 HART, supra note 8, at 191, 192, 196.
measure, an attempt to account for this second world created by words that exists alongside the physical world. Understanding what makes this world of words possible, or how it is created, might be thought to call for a discussion of the metaphysical foundations of social practices, or a discussion on how social practices relate to human nature.85 All that, however, seemed to have had little relevance to the question Hart was trying to answer. He was interested not so much in how practices come into being, but rather in what goes on within legal practice. And here, Hart was of the view that turning to the “empirical sciences” was “useless.”86 Likewise, Hart was clear that to argue as natural lawyers do regarding unjust law—to offer a metaphysical argument—“would seem to raise a whole host of philosophical issues before it can be accepted. … So when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.”87 For Hart understanding legal practice was to be attained by a kind of sociological or anthropological attention to the “internal” meaning given to words as a way into this world. That people talk about unjust law as law is a reason, perhaps even a decisive one, when one seeks to explicate the practice.

The understanding of legal philosophy in this narrow and shallow way has been accepted without much argument by subsequent generations of legal philosophers.88 What was sometimes attempted was a kind of combination of the approaches of Hart and Kelsen. From Hart what was taken was the understanding of legal philosophy as an attempt to provide a descriptive account of legal practice.89 What was taken from Kelsen was a desire to provide a general and abstract theory; this manifested itself by a move away from those aspects of Hart’s work that maintained some of the ties it had with the world, namely his attempt to describe law as a human practice. Instead an

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85 Even here some have had doubts. See P.M.S. Hacker, Wittgenstein’s Place in Twentieth-Century Analytic Philosophy 117-23 (1996) (describing Wittgenstein’s repudiation of metaphysics). And compare the words from Raz quoted in note 88, supra, which convey a similar sentiment.
87 Hart, supra note 1, at 620-21 (emphasis added). See also his words quoted in the text accompanying note 10, supra, as well as the sources cited in note 33, supra.
88 See Jules L. Coleman, The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory 197 (2001) (“we are not in the business of carving the universe at its joints; we are not trying to gain access to or pick out metaphysically essential properties of law that are prior to our analysis of the concept, and that serve to orient it….’’’); Raz, supra note 78, at 228 (“Metaphysical pictures are, when useful at all, illuminating summaries of central aspects of our practices. They are, in other words, accountable to our practices, rather than our practices being accountable to them.”); Scott J. Shapiro, Legality 44 (2011) (“For our purposes … the[] deep metaphysical questions [about the origins of a legal system] will largely be ignored”); cf. Gardner, supra note 15, at 22.
89 See, e.g., Raz, supra note 78, at 47; Coleman, supra note 88, at 3-6 (situating legal philosophy as part of a “[p]hilosophical explanation[] of practices”).
attempt was made to turn legal philosophy even more general and abstract by turning the question “what is law?” to an a priori inquiry, avoiding whatever little room Hart left for human nature in his explanation. In fact, we were told that answering the question “what is law?” called for imagining law in a society of angels, or that the social sciences cannot tell us about the concept of law because “it studies human society” where a correct account of the concept of law will have to take into account law “in alien civilizations.” Whether or not there is value in such an inquiry, whether or not it can be sensibly answered, there is little doubt that information about human nature is not going to be of much help in this inquiry.

The result has been a reorientation of the very foundation of jurisprudence, of what it is about. As we have seen, for Hobbes and Bentham the metaphysical foundations led to an account that was often at odds with existing legal practice, whereas for Hart such a disparity was not really possible, since it was the practice itself that his theory sought to explain. To be sure, the account Hart offered was intended to be novel, perhaps even surprising to practicing lawyers, but it was in no way meant to challenge their practice: it was meant only to take it as the object of inquiry and illuminate it.

Recognizing this change helps us understand one of the most curious (and yet, I trust, familiar) aspects of contemporary debates between legal positivists and natural lawyers. What is striking about these debates is that disputants both struggle to find differences between legal positivism and natural law and at the same time seem to be talking past each other. We can now see why. Contemporary natural law theorists often write as though the old debate is going on; hence one finds in their writings the same depth of argument one finds in the work of earlier natural lawyers and in the work of classical legal positivists. Whatever are the differences among them all natural lawyers seek to understand the fundamental philosophical questions of law as part of a broader inquiry, which depends ultimately on one’s views on human nature. By contrast

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90 See Raz, supra note 92, at 159-60; see also John Gardner, Law’s Aims in Law’s Empire, in EXPLORING LAW’S EMPIRE 207, 208-09 (Scott Hershovitz ed., 2006) (relying on the same thought experiment as the basis for an argument about the nature of law).

91 SHAPIRO, supra note 88, at 406-07 n.16.

92 There is, more precisely, a debate among contemporary natural lawyers about the proper foundation for natural law theory, and the place of human nature in it. On one side stand those who believe that a theory of practical reason is relatively independent of an account of human nature. Proponents of the second view believe that an account of practical reason must ultimately be based upon a theory of human nature. For a summary of the different views (and a defense of the former) see Robert P. George, Some Recent Criticisms of Natural Law, 55 U. CHI. L. REV. 1371, 1372-74, 1378-83, 1407-28 (1988) (book review). For an outsider to these debates the differences between the views do not seem huge. It is notable that even proponents of the first view insist that a theory of law can be derived only from engagement in substantive concern with normative questions of value, see Finnis, supra note 15, at
contemporary legal positivism has been transformed into a philosophical standalone, a view that does not depend on any metaphysical worldview; and so in order to have a debate with natural law its proponents had to invent an equivalent version of natural law, a kind of similar, standalone non-metaphysical doctrine. In doing so they have been discussing and trying to refute a view that no-one has ever held. Hence the mismatch at the heart of the debate: at the “conceptual” level—whether there can be unjust laws, or whether morality is a condition of legal validity—there may indeed be little to debate and disagreements, if they exist, seem verbal. But this happens only because what does not get discussed, what indeed is assumed by one side to be irrelevant to the debate, is profoundly different. Because one side grounds its argument in metaphysics while the other insists on not having any, there is a lingering feeling that despite seemingly in agreement on everything the two sides could not be further apart.

The following table summarizes my argument so far:

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<th>Metaphysical legal philosophy</th>
<th>Non-metaphysical legal philosophy</th>
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<tr>
<td>Non-materialist conception of nature</td>
<td>Natural law</td>
<td>Contemporary legal positivism</td>
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<tr>
<td>Materialist conception of nature</td>
<td>Classical legal positivism</td>
<td>Felix Cohen(?)^94</td>
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115, and they do not deny the connection between the foundations of practical reason and a theory of human nature. See id. at 33-34 (accepting that “[t]he basic forms of good grasped by practical understanding are what is good for human beings with the nature they have” and that “’were man’s nature different, so would be his duties’” (quoting D.J. O’CONNOR, AQUINAS AND NATURAL LAW 18 (1967))); George, supra, at 1415-17.

There is no corresponding debate among contemporary legal positivists. Indeed, I suspect most contemporary legal positivists are only dimly aware of this debate among natural lawyers. To the extent that they are aware of it, one judges from their ignoring it that they consider it irrelevant to jurisprudence. Even proponents of legal positivism who have sought to tie their theory of law to an account of practical reason have largely limited themselves in this context to “conceptual analysis … [of the] logical features of concepts like value, reason for action or norm and the nature of the rules of inference governing practical reasoning,” not “[s]ubstantive practical philosophy [concerned with] … arguments designed to show which values we should pursue.” RAZ, supra note 33, at 10.

^93 This may explain the ease with which they think natural law can be refuted. See the quotes at note 33, supra.

^94 I mention Felix Cohen in this category tentatively and only for completeness’s sake as I do not discuss his views beyond this footnote. Felix Cohen was influenced by the work of the logical positivists, who famously rejected all metaphysics. See Felix S. Cohen, Transcendental Nonsense and the Functional...
The table brings out the different ways in which contemporary and classical legal positivism are opposed to natural law, but also the sense in which they are further apart from each other than each is apart from natural law. It also helps us see how one can be both a legal positivist in the classical sense, even a rather extreme one at that, while in another sense a natural lawyer. It is as a result of this analysis that we can see why both legal positivists and natural lawyers have been claiming Hobbes and even Bentham as their own. We also see why there is no need to decide on this matter one way or the other.

(b) The Invented History of Contemporary Legal Positivism

The non-metaphysical version of legal positivism is not just the one that dominates contemporary debates with natural lawyers, it is also projected backwards onto the work of Hobbes and Bentham resulting in interpretations of their work that leave out almost everything they said. Marmor, who as we have seen offered the standard story on the difference between traditional and contemporary natural lawyers, also provides in capsule form the typical account of the historical development of legal positivism:

Early legal positivists followed Hobbes’ insight that the law is, essentially, an instrument of political sovereignty, and they maintained that the basic source of legal validity resides in the facts constituting political sovereignty. Law they thought, is basically a command of the sovereign. Later legal positivists modified this view, maintaining that social conventions, and not the facts about sovereignty, constitute the grounds of law.  

According to Marmor, while the early and later legal positivists differed on this score they shared “[t]he main insight of legal positivism”, namely “that the conditions of legal validity are determined by social facts.”

These passages neatly capture the invented tradition of legal positivism, the one that treats legal validity as the central question of jurisprudence, and then reads this concern

\begin{footnotesize}
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\item [95] Marmor, \textit{supra} note 16, at 41-42. For a similar characterization see Thomas Nagel, \textit{The Central Questions}, \textsc{London Rev. Books}, Feb. 3, 2005, at 12, 12 (reviewing \textsc{Lacey, supra note 6}).
\item [96] Marmor, \textit{supra} note 16, at 41.
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into the work of the classical legal positivists. It is, however, historically and philosophically confused. First, it should be noted that the idea of law as a command did not originate with Hobbes but was familiar long before him. Beyond this, it is hard to assess Marmor’s exegetical claim because he does not provide any reference to Hobbes’s work in support his reading. As far as I know Hobbes did not write anything that could plausibly be interpreted as concerned with the question of legal validity as the term is currently understood. As I tried to demonstrate above in my outline of his view, the motivation, emphasis and focus of his attention have always been on providing an account of legitimate political authority that builds on the more basic building blocks of what the world and mankind are like.

It is true that Hobbes did say some things that to the casual reader may look like a discussion of legal validity. Thus, in *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Hobbes wrote:

[Lawyer:] Are not the Canons of the Church part of the Law of England, as also the Imperial Law used in the Admiralty, and the Customs of particular places, and the by-Laws of Corporations, and Courts of Judicature.

[Philosopher:] Why not? for they were all Constituted by the Kings of England; and though the Civil Law used in the Admiralty were at first the Statutes of the Roman Empire, yet because they are in force by no other Authority than that of the King, they are now the Kings Laws, and the Kings Statutes. The same we may say of the Canons; such of them as we have retained, made by the Church of Rome, have been no Law, nor of any force in England, since the beginning of Queen Elizabeth’s Raign, but by Virtue of the Great Seal of England.

This looks like legal validity, even a precursor of Hart’s rule of recognition. Crucially, though, for Hobbes the difference between the non-legal and the legal is not determined by the fact of obedience, but rather on the basis of his political theory. Hobbes rejected lawyers’ understanding of what constituted law: he rejected Coke’s views that sought to establish the common law as having authority independent of the sovereign’s, and he was willing to recognize as law certain things that would not

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97 It also, erroneously in my view, ascribes this concern with validity on contemporary legal philosophers (such as Dworkin) whose writings clearly are not about validity. This is an aspect of the way in which contemporary legal philosophy is separated from political philosophy. See Dan Priel, *The Place of Legitimacy in Legal Theory*, 57 McGill L.J. 1, 21-28 (2011).


99 HOBSES, *DIALOGUE*, supra note 74, at 62-63 [18]; see also HOBSES, LEVIATHAN, supra note 37, at 184-85, 185-86 (ch. 26).

100 My conclusion here is similar to that of Jeremy Waldron, *Legal and Political Philosophy*, in *Oxford Handbook*, supra note 51, 352 at 366-68, although more than him I think it shows the sense in which what I call classical legal positivism is fundamentally at odds with contemporary legal positivism.

101 HOBSES, LEVIATHAN, supra note 37, at 186-87, 191-94 (c. 26).
have been accepted as such by the legal community. In the Dialogue, after offering his definition of law, the philosopher, Hobbes’s alter ego, is challenged by the lawyer that by his definition, “the Kings Proclamation under the Great Seal of England is a Law” to which the philosopher replies “Why not?”102 The same is true of Bentham, who believed that the entire common law was not really law,103 was equally dismissive of the project of accounting for lawyers’ attitudes.104

Because contemporary legal positivists often say that legal validity is what is at stake in debates between legal positivists and their detractors,105 this is a crucial point: legal validity is a concept that makes sense, if at all, only within the framework of an attempt to report accepted attitudes (typically of lawyers) as to what counts as law. As such it is a concept that is part and parcel and of the contemporary attempt to refashion legal positivism as a non-metaphysical doctrine. Within this effort legal validity serves as the alternative to the metaphysical foundations on which the theories of classical legal positivists were based, but it plays no explanatory role in a metaphysically deep theory.

What about the command theory, the other idea that according to Marmor was embraced by Hobbes and Bentham but rejected by Hart and his followers? Here too, I think, the picture is more complex. In the work of Hobbes and Bentham (and even Austin) the command theory is primarily a view about legal authority. In modern parlance we may say that these theorists tried to show how there is no necessary connection between law and morality with regard to the question of law’s normativity. Consistent with their metaphysical views they sought to offer an account of how law creates obligations that does not depend on moral premises. This was the essence of the command theory: obligations according to Hobbes arise “not from their own Nature, (for nothing is more easily broken than a mans word,) but from Feare of some evill consequence upon the rupture”.106 When Hobbes later defined law as a “Command … addressed to one formerly obliged to obey [the commander]”,107 it was part of his view that political obligation does not depend on morals. Even Austin, who in other respects

102 HOBSES, DIALOGUE, supra note 74, at 71 [33]; see also the quote accompanying note 99 above.
103 BENTHAM, supra note 46, at 25-26; BENTHAM, supra note 43, at 8 (Preface), among many other places. To the same effect is his discussion on the extension of “law” to edicts given by a single monarch as sovereign, where he rejected prevalent linguistic usage. See BENTHAM, supra note 46, at 29-32.
104 More generally, Hobbes was dismissive of linguistic analysis as a means of discovering by linguistic usage. See HOBSES, LEVIATHAN, supra note 37, at 176 (ch. 25) (“How fallacious it is to judge of the nature of things by the ordinary and inconstant use of words….”).
105 See, e.g., MARMOR, supra note 80, at 4-5, 133; Brian Leiter, Explaining Theoretical Disagreement, 76 U. CHI. L. REV. 1215, 1216 (2009).
106 Id. at 93 (ch. 14); see also HOBSES, supra note 58, at 175 (§ XV.7).
107 HOBSES, LEVIATHAN, supra note 37, at 183 (ch. 26).
marks the beginning of the transition towards contemporary legal positivism, is, in this regard, not very different: “the party bound by a command is bound by the prospect of an evil.”

Hart is famous for subjecting the command theory to withering criticism, but he accepted the classical positivist idea that legal obligation is distinct from moral obligation, that legal rights are distinct from moral rights. In his proposed alternative to the command theory—what has come to be known as the “practice theory of norms”—Hart, like the classical legal positivists, sought a non-moral (“positivist”) account of law’s normativity. This was the single matter on which Hart kept a threadbare connection between his views and those of the classical legal positivists. This had an interesting implication on the development of legal positivism after Hart. Because of Hart’s focus on legal practice and the corresponding reorientation of jurisprudence towards questions of validity, it was no longer thought that a non-moral account of law’s normativity is necessary for one’s credentials as a legal positivist. This led to the next stage in the development of the idea of legal positivism: what made one a legal positivist was not as Hart (and the classical legal positivists) thought, that it distinguished legal obligation from moral obligation, but rather that it treated the question of legal validity (what counts as law) as separate from the question of law’s normativity (how law creates obligations and what those obligations are). In the end of this process one could be a legal positivist in good standing in spite of having a moral account of law’s normativity. With this we could say the shift from classical to contemporary legal positivism was complete.

To summarize: the shift from classical to contemporary legal positivism involved not a shift from simpler to more sophisticated explanations of legal validity. It involved a much more fundamental reorientation of jurisprudence from a deep account embedded in a global worldview towards an “internal” explanation of the practice. One implication of this shift was placing legal validity, a notion that plays virtually no role in the work of Hobbes or Bentham at the center of jurisprudence. This led to a reinterpretation of classical legal positivists’ work in order to present it as though it had similar concerns. This was achieved by focusing on a few short passages from their writings that were taken out of context, while ignoring the main thrust of their work. In this way the questions these philosophers were actually interested in have been either ignored, or treated as not really belonging to jurisprudence.

108 AUSTIN, supra note 30, at 23.
109 See HART, supra note 7, at 144-47, 158-61.
IV. WHY CLASSICAL LEGAL POSITIVISM?

Reviving classical legal positivism would require more than a section in an essay. This Part, therefore, does not aim to present a complete argument for this position, but to outline some of the considerations that militate in its favor. Some of what I will present below has already been hinted at, but in this Part I will spell out these ideas in more detail. My argument will consist of two interrelated but distinct steps: in the first I offer reasons for rejecting contemporary legal positivism, in the second reasons for preferring classical legal positivism over natural law theories.

There are many difficulties that afflict all or most versions of contemporary legal positivism. Many of these problems require engagement with the details of the position as defended by a particular author. Instead, I will focus on a few fundamental problems that I believe afflict the work of practically all contemporary legal positivists and go to the heart of their philosophical project. Contemporary legal positivism is thought by its proponent to be a descriptive theory that seeks to answer the question “what is law?” Such theories purport to describe the “nature,” “concept,” or “essence” of law.111 Unfortunately, it remains unclear what is meant by these terms. Presumably the aim is to capture something central to all instantiations of legal practice, real or hypothetical, in virtue of which all those instances of law are law. There are several problems with this approach, and I will mention here the two that seem to me the most serious: first, it is not clear why identifying such features is of any significance. To the extent that an explanation is offered, we are told that the point is to help us identify “our institutions, and through them, our culture.”112 But this presupposes that there is a single culture reflected in law in all times and places. If we narrow our focus to “our” culture, then it is hard to see the difference between this inquiry and what sociologists or historians of law have been doing. If that is what legal philosophers are trying to do, one would expect them to engage in works on history, sociology, comparative law, cultural studies, and so on. But what is striking about the work of contemporary legal positivists is just how inattentive it is to work from all these disciplines. Second, this inquiry is in a

111 See, e.g., HART, supra note 8, at 1-2; RAZ, supra note 78, at 16, 91-92; Leslie Green, General Jurisprudence: A 25th Anniversary Essay, 25 OXFORD J. LEGAL STUD. 565, 567 (2005) (“Whatever else it does, a general theory of law has at its core an account of the nature of law.”). All these writers are legal positivists. Admittedly, some contemporary natural lawyers describe their work in similar terms, see e.g., MOORE, supra note 17, at 309, but that is a minority among them. That shows the influence of contemporary legal positivism on the current jurisprudential scene. To the extent that these natural lawyers hold methodological views similar to those of contemporary legal positivists, their views suffer from the same difficulties.

112 Leslie Green, The Concept of Law Revisited, 94 MICH. L. REV. 1687, 1717 (1996) (reviewing HART, supra note 8); see also MARMOR, supra note 80, at 33-34; but see Dan Priel, Book Review, 122 ETHICS (forthcoming 2012) (reviewing MARMOR, supra note 80).
fundamental sense circular: as what is to be explained are “legal practices,” we must know in advance of our inquiry what count as legal practices. Arguably, however, that is exactly what may be in dispute: if someone believes that unjust practices cannot be law, then she will rule them out in advance of the inquiry ending up a “natural lawyer” (i.e., someone who believes that unjust law is not law); if someone else believes that unjust practices may be law, then the “positivist” conclusion will be warranted. The problem is that each conclusion is justified by presupposing a view that ends up being validated later. To avoid this circularity, the legal philosopher has to have a way of telling how to identify what belongs in legal practice in advance of the inquiry into its nature. To my knowledge, there has not been any attempt to do that. It is simply assumed that there is no disagreement on what belongs in legal practice among legal philosophers, but this assumption is clearly not warranted, as we know that there are disagreements among legal philosophers, but this assumption is clearly not warranted, as we know that there are disagreements among legal philosophers and others on exactly this question.

The more extreme version of contemporary legal positivism, the one that aims to explain the nature of law by appeal to hypotheticals involving otherworldly characters, suffers from another problem. Law is a human product whose conceptual contours are created by human needs. Since we have not encountered a society of angels and have not had to think about whether what they have is “really” law, the application of our concept of law to such societies is indeterminate. The only way this approach can avoid the challenge of the indeterminacy of the applicability of our concepts to such cases is by committing the error of circularity. For our intuitions on alien or angelic societies to be of significance, we must assume that whatever normative structure that governs such societies is a species of the kind of thing we call “law” on Earth. An affirmative answer to this question is essential for the relevance of such example to understanding the concept of law. But we have no warrant to answer this question affirmatively without also presupposing an answer to the question “what is law?” This, however, is exactly the question that this thought experiment was meant to help us answer.

Beyond these problems there is also a growing sense of malaise, a sense that the fruits borne by this approach have not been very nourishing. The track record of jurisprudential inquiry in the fifty years since the publication of The Concept of Law has been disappointing, and legal philosophy has grown increasingly isolated.114

113 Don’t take my word for it. Contemporary legal philosophers are among the harshest critics of some of the debates that currently occupy legal philosophy. See, e.g., MARMOR, supra note 80, at 95 (claiming that a debate between contemporary legal positivists “degenerated to hair-splitting arguments about something that makes very little difference in the first place”); Coleman, supra note 33, at 76 (“Progress [in jurisprudence] has stalled … because too much effort has been devoted to the wrong issues.”); Julie Dickson, Methodology in Jurisprudence: A Critical Survey, 10 LEGAL THEORY 117, 117
Plainly, none of this is yet a case for classical legal positivism. Making such a case requires first answering the question why a theory of law that builds on human nature is necessary at all. The approach underlying Hart’s version of contemporary legal positivism is premised on the view that explaining the practice of law does not require paying attention to metaphysics and human nature because what is being explained is the world of ideas created by words and thoughts from “within,” that it take the “internal point of view.” Central to this view that conceives of philosophy of law as a description of a practice was the view that normative behavior—behavior governed by rules—was not governed by the physical relation of cause and effect but belonged to the domain of reasons. people don’t take action because they were caused to act, but because they think they have a reason to act. An important corollary to this was the view that those reasons are largely unconstrained by human nature. On this view, now known as the “blank slate” view, the world of ideas is limited only by the limits of thought itself. Whatever it is that studies of human nature can tell us about our “animal” side, they had little to say about the sort of distinctively human activities to which legal practices belong. This is in some respects a view about human nature—that it is completely malleable by culture—but it is better described, as Steven Pinker did, as the “denial of human nature.”

The contemporary challenge to this view does not deny that people create worlds of ideas. The dispute revolves around two matters: one is methodological, and it is whether the methods of the empirical sciences can prove helpful in understanding this world. Hart and many of his followers have believed that the answer to this question is no, that the only way to get a sense of human practices is by considering them from the internal point of view. This view is being challenged these days by studies that employ empirical methods to explain exactly those aspects of human life thought to be beyond...
the purview of natural science: norms, culture, emotions, morality, and so on. The second challenge is substantive, and it asks to what extent the world created by language and thought is created on a blank slate. This area is not free from controversy, but there is growing evidence coming from various disciplines (psychology, anthropology, neuroscience, evolutionary biology) that suggests that the denial of human nature is simply wrong, that despite the enormous diversity of the world of ideas, there are constraints on its content, constraints that come from biology.\textsuperscript{118} Such an approach, then, does not try to discover the “nature” of law, least of all to derive them from any view of human nature. It does attempt to say what features, given what the world and human nature are, law is likely to take. It may even be able to tell us what, given what the world and human nature are, law should take if it is to achieve the goals set to it.

If this is along the right lines, the next question is why we should prefer classical legal positivism over the view of natural lawyers. Though in some respects closer in their conception to natural lawyers’ views on the place of a theory of law within a broader philosophical inquiry, the fundamental difference between them has to do with their perspective on what the world is like, and thus by implication, the right methodology for explaining it. Risking oversimplification of a broad range of views, what one finds in much of the work of natural lawyers is commitment to the view that the natural laws that govern the world are rationally discoverable natural by reflection on the nature of the beings to which they apply. What guides such discovery is the view that the world and its constituent elements are a product of God’s purposeful creation and that their natures are to be understood as part of God’s divine plan. A different view, more commonly associated with the “new” natural law thinking, puts primacy on the identification of certain goods that are fundamental to (human) flourishing as the foundation of natural law. Those values, though to some extent dependent on a view of the world and human nature, are discovered in a process of rational reflection in an effort to discover the self-evidently things that are good to pursue for their own sake.\textsuperscript{119}

The position advocated by the classical legal positivists, as I understand it and as I believe should be pursued, rejects such ideas. What was distinctive about the classical legal positivists’ stance was their commitment to a scientific, naturalistic, or if you wish, a positivistic approach to these questions.\textsuperscript{120} Such a perspective therefore shares

\textsuperscript{118}See generally id.; DONALD E. BROWN, HUMAN UNIVERSALS 142-56 (1991).
\textsuperscript{119}The debate mentioned in note 92, supra, between the two strands of natural law thinking, roughly correspond to these two views. The claim that the basic goods are self-evident and discovered through reflection is defended in FINNIS, supra note 14, at 64-69.
\textsuperscript{120}On the connection between these philosophers’ positivism—roughly their commitment to scientific method—and their legal positivism see Priel, supra note 9.
the non-purposive account of nature provided by science: “The more the universe seems comprehensible, the more it also seems pointless,” as physicist Steven Weinberg has famously written.\textsuperscript{121} Similarly, human nature, is no longer perceived as the product of a purposeful creator, but as the product of the random process of evolution by natural selection. At the finer level of detail, scientific research often challenges or refines our understandings of what humans are, how they behave and what motivates them by revealing facts that are difficult to discover by introspection and observation at the behavior of others. As in other areas empirical studies have often challenged long-accepted truths, and classical legal positivism, as I present it, is committed to adopting the best available picture as the foundation for a theory of law.

These brief remarks hardly do justice to what surely deserves longer treatment. One thing, however, should be clear from what was said. In calling for a return to classical legal positivism I am more interested in Hobbes and Bentham’s general approach to legal theory, than in their specific views on metaphysics or human nature. In fact, that one’s theories are always provisional and are always revisable if in conflict with new evidence is a staple of the approach endorsed in this essay, and given the considerable progress made on these matters since the days of Hobbes and Bentham it is possible that much of what they wrote about law is wrong because it was placed on what we now know are mistaken foundations. Though there may be a lot to learn from Hobbes and Bentham’s actual views on law, I take classical legal positivism to be, at its core, a commitment to the view that a theory of law should be understood as part of a broader inquiry, and that that inquiry should be grounded in the best science of the day.

What this approach will amount to is yet to be seen, but it will involve legal philosophers taking a more active interest in the broad range of scientific research on what humans are, how they behave, how they think, what they consider wrong, fair, or just, along with much else. On the other hand, they will not be particularly interested in explaining what law in the societies of angels and alien civilizations. “General jurisprudence” would thus be general not because it seeks to give a single account that captures all law in all times and places, on earth, as well as in philosophers’ imagined lands, but because it would be the place where such questions are asked about law in general rather than in relation to particular areas of law.

V. THREE METHODOLOGICAL COMMENTS

Although a full blown defense of a modern version of classical legal positivism cannot be undertaken here, the last Part provided some of my reasons to favor it. In this last Part I address three questions of method. I will first consider the question whether the two versions of legal positivism may find common ground in a shared methodology. I will consider and reject a suggestion by Brian Leiter that may be interpreted in this way. The second Section is, in a way, an application of my argument of the first. Specifically, I consider there what role, if any, should be given to the internal point of view within classical legal positivism. My conclusion on the matter is rather negative: I argue that the internal point of view is tied to contemporary legal positivism; with its demise much of the motivation for adopting the internal point of view no longer holds much sway. The third subsection moves to a somewhat different territory. I consider there the potential challenge that if my arguments about the substantive and methodological differences between the two versions of legal positivism are correct, it is wrong—it may even be positively misleading—to use the same term for both.

(a) Can Classical and Contemporary Legal Positivism Be Reconciled?

It may be the case that if one is a metaphysical positivist a certain version of legal positivism follows. If this is true, it already somewhat undermines contemporary legal positivists’ attempts to draw allegiance with classical legal positivists because the intellectual motivations for classical and contemporary legal positivism are entirely different: contemporary legal positivists seem motivated by their concern for a clear distinction between law and morality and perhaps more generally between law and non-law when observed from the perspective of legal practitioners, whereas classical legal positivists are there to explain the role of law as part of a potentially legitimate political order when taking (human) nature into account.

Perhaps, then, it could be shown that despite these fundamental substantive differences, the two versions of legal positivism could be accommodated in their methodology. I will examine this question by considering an argument advanced by Brian Leiter that, though not directly addressing this question, may be understood as suggesting such a possibility. Leiter is a leading proponent of the view that seeks to ground legal positivism on metaphysical grounds broadly similar to those of Hobbes and Bentham.122 Leiter seems to think there is a fairly straightforward link between “naturalism”—roughly what I call metaphysical positivism—and contemporary

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122 LEITER, supra note 114. I should say that despite my criticism of some aspects of Leiter’s position, the differences between our positions are not huge. Nonetheless, I find it surprising that he does not seek to reconnect his ideas on legal philosophy, and legal positivism more specifically, to those of Bentham and Hobbes. I find it even more surprising that he is sympathetic to Hart’s work.
“exclusive” legal positivism. My arguments so far show, I hope, why I think this view is mistaken. But in some of his writings Leiter suggests a weaker version of naturalism, and suggests that something like this view could be the basis on which one could bridge contemporary and classical legal positivism. I think this suggestion will not do either, and in this subsection will try to explain why.

Leiter distinguishes between two distinct versions of naturalism, one a set of methodological theses, which, following him, I will call “M-naturalism,” and another a set of substantive theses (“S-naturalism”). Leiter takes it that naturalism is “always first a methodological view to the effect that philosophical theorizing should be continuous with empirical inquiry in the sciences.” Within M-naturalism he further distinguishes between “Results Continuity,” which is the view that “the claims of philosophical theories be supported by the results of successful sciences,” and the more modest “Methods Continuity,” which “demands only that philosophical theories emulate the ‘methods’ of inquiry and styles of explanation characteristic of successful sciences.” By contrast Leiter defines S-naturalism as “either the (ontological) view that the only things that exist are natural or physical; or the (semantic) view that a suitable philosophical analysis of any concept must show it to be amenable to empirical inquiry.” Leiter argues legal philosophers should adopt M-naturalism.

Contrary to Leiter, then, I believe naturalism is first a substantive view, not a methodological one: It makes sense for legal philosophers to adopt the methods of science and be interested in the results of science because the world (nature, human nature) happens to be one way and not another. Let us begin with methods continuity, the narrowest form of naturalism in Leiter’s classification, and see what it amounts to. The idea here seems to be that only what counts as good ways of generating (what we take to be) true scientific propositions should be used in philosophy. Leiter does not elaborate on those methods, but presumably he thinks about the formation of theories based on drawing inferences only if they follow logically from the data or if they are supported by statistically significant evidence. A scientific result is not considered valid

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123 I have argued in the past in greater detail about this point. See Priel, supra note 9.
124 Leiter, supra note 114, at 34. For a similar view see Owen Flanagan, Varieties of Naturalism, in The Oxford Handbook of Religion and Science 430, 434-35 (Philip Clayton & Zachary Simpson eds., 2006).
125 Leiter, supra note 114, at 34.
126 Id.
127 Id. at 35 n.96.
128 In some of his writings Leiter seems to at least allow S-naturalism as a possible foundation for jurisprudence. See id. at 39-40, but more recently he rejected this view and stated that jurisprudence should be limited only to methodological naturalism. See Brian Leiter, Naturalizing Jurisprudence: Three Approaches, in The Future of Naturalism 197, 197-99 (John R. Shook & Paul Kurtz eds., 2009).
until it is replicated, and a putative theory is not considered scientific if it is not testable and refutable.

By these standards, however, virtually all “analytic” philosophers are M-naturalists. Philosophers present theses in which clearly defined premises are meant to lead to conclusions that are thought to follow from them. A philosophical thesis, much like a scientific theory, is refuted by presenting counterexamples to it, which lead either to refinement of the theory or to its abandonment. In other cases a philosophical thesis can be refuted on purely logical grounds, e.g. by showing that its premises are contradictory, that its premises do not entail its alleged conclusion, or that it rests on a logical fallacy. Whenever a philosopher presents an argument she offers it to fellow philosophers for “testing” and “replication” in philosophy departments’ seminar rooms. In this respect legal philosophers are no different from the rest of the philosophical crowd: when Hart or Raz argued that sanctions are not a necessary element of a legal system they did it by offering a counterexample of an imaginary case of something that we would think of as a legal system even though it contained no sanctions. If anything, analytic legal philosophy is even more committed to scientific method in this narrow sense than other branches of analytic philosophy. This is because the mainstream view among analytic legal philosophers is that the primary task of jurisprudence is to provide a general account of the “nature” of law by trying to identify its necessary features in a manner not unlike that of a scientist trying to identify the chemical elements that necessarily make up, say, water.129

So methods continuity on its own is not a very interesting claim. Leiter argues that philosophers can (and should be) also M-naturalists in the sense that their views be supported by the results of science. Again, Leiter provides little explanation as to what he means by “supported” but at one point he offers an example: “A philosophical account of morality that explains its nature and function in ways that would be impossible according to evolutionary theory would not, by naturalistic scruples, be an acceptable philosophical theory.”130 I cannot see how any philosopher, naturalistic or not, could argue with that. I take it that philosophers should advance theses that are consistent with true scientific theories, simply because their theses should be true. If proposition $P$ contradicts proposition $Q$, and we know that $Q$ is true, then $P$ is necessarily false, and it does not matter whether one proposition is “scientific” and the other “philosophical.” So in this sense M-naturalism is obvious. In fact, in this respect the focus in Leiter’s definition on the natural sciences is possibly too narrow.

130 Brian Leiter, Naturalism and Naturalized Jurisprudence, in ANALYZING LAW: ESSAYS IN LEGAL PHILOSOPHY 79, 82 (Brian Bix ed., 1998).
Philosophical theses cannot be true if they contradict any true facts, including social facts, and given legal philosophy’s subject-matter it is much more likely that if it contradicts any true fact, it would be a social fact, not a fact discovered by one of the natural sciences. Whether there are social facts that cannot be reduced to natural facts is, of course, a controversial question, but if we only subscribe to M-naturalism, we cannot assume that all social facts are reducible to natural facts, for that is a controversial substantive thesis. In this sense the claim of M-naturalism is obvious and no philosopher, naturalistic or otherwise, should deny it.

If that is the only constraint imposed by results continuity then contemporary legal philosophers would have no difficulty accepting it. Contemporary positivists’ work explicitly tells us that its truth does not turn on what the world (and humans) happen to be. They can then happily accept that their account is consistent with any results discovered by science while continuing to do more-or-less what they have been doing all along, because the results of science, whatever they may be, do not affect their inquiries. Results continuity, therefore, has to stand for more. Perhaps Leiter means that the scientific findings should figure in jurisprudential theories. This form of M-naturalism would be more significant for our purposes because it would posit classical and contemporary legal positivism as competing views, not merely as two different inquiries that can live side-by-side. While it is exactly my intention to present classical legal positivism as a challenge to contemporary legal positivism, in part because it insists that scientific findings about human nature be part of the theory of law, I think this understanding of results continuity is only tenable if one accepts S-naturalism.

When a natural lawyer, or even a contemporary legal positivist, rejects Leiter’s methods and results continuity she does not, or at least need not, do so because she doubts the correctness of the results, or because she doubts that the scientific methods have had a remarkable success in explaining the natural world. She can do so because she may think those methods and results are irrelevant for explaining other questions that do not belong to the domain of physical objects that science deals with. They belong instead to the “space of reasons,” to the “domain of value,” or whatever. This view is possible because scientific method does not determine its scope of applicability, which is why scientific method cannot say that someone who claims that it is inapplicable to certain questions is wrong. Consequently, anyone who rejects the applicability of M-naturalism to certain domains, anyone who believes that the results of true scientific studies cannot impinge on the right answer to some issues, makes,

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132 See the sources cited in notes 90-91, supra.
implicitly if not explicitly, a substantive claim about what the world is like. The same is true of the opposite position: to say that the methods and results of science are relevant to all questions is to assert a substantive claim, namely that the domains to which these methods and results are supposedly inapplicable do not exist, that the world is such that the methods and results of science are applicable to all of it.\textsuperscript{133}

For this reason it is wrong to suggest, as Leiter \textit{may}, that scientific method is applicable to all domains because “it ‘delivers the goods’.”\textsuperscript{134} Scientific method is good for explaining the things it can explain, but it cannot tell us what it is good at explaining, and definitely not that it is good at explaining all phenomena. To assume that it can explain all phenomena is to make the assumption denied by those who reject naturalism, one that the successes of scientific method do not warrant making. I said “\textit{may}” because the context of Leiter’s words just quoted suggests that he acknowledges that the naturalistic assumption is itself provisional and subject to refutation if it turns out to be false. But a refutable assumption (about the truth of S-naturalism) is still an assumption.

Why does it matter which form of naturalism comes first? I think there are two reasons. First, it is important to make it clear that Leiter’s particular articulation of naturalism derives from a particular view about what the world is like. It is no coincidence that both Leiter’s naturalistic jurisprudence and natural law theory invoke nature in their name: both claim nature to be on their side, but they disagree on what nature happens to be like. It is this disagreement that explains why natural lawyers reject M-naturalism, not the other way around. Second, it is important to stress this difference because it explains why, despite the force with which Leiter has called for jurisprudence to be naturalized, his arguments do not go far enough. His arguments suggest that naturalized jurisprudence will end up with a somewhat revised version of one strand of contemporary legal positivism, called “exclusive” (or “hard”) legal positivism. My view is less conciliatory. As I sought to show classical legal positivism and contemporary legal positivism are on different sides on the question of substantive naturalism, and it is for this reason that they cannot be easily accommodated. Adopting a naturalistic stance like the one held by the classical legal positivists and like the one

\textsuperscript{133} Likewise, Owen Flanagan’s claim, in Flanagan, \textit{supra} note 124, at 434, that there is no inconsistency between being an economist (who is a methodological naturalist) and a theist (an ontological non-naturalist) is true only on certain, clearly non-methodological, assumptions on the ways (if any) in which God controls human affairs. For example, one can be a deist and methodological naturalist, but that deism (and not, say, a form of theism inconsistent with methodological naturalism) depends on taking a stand on the way the world is.

\textsuperscript{134} LEITER, \textit{supra} note 114, at 147.
Leiter espouses will not affirm contemporary legal positivism but will require a radical rethinking of contemporary jurisprudence.

(b) Classical Legal Positivism and the Internal Point of View
The last Section was rather abstract; this one may be seen as its demonstration with the aid of one example, the “internal point of view.” The standard contemporary positivist interpretation of the development of legal positivism from Hobbes to Hart locates the error of classical legal positivists in their adoption of the external point to the explanation of the nature of law. According to this story the result was that the earlier legal positivists all adopted some version of a command theory of law according to which legal obligation depends only on the threat of sanction. This, according to contemporary legal positivists, is a mistake, because it ignores the “internal aspect” of law, the fact that the way law motivates people to act is not (merely) through external threats but by giving them a reason to act in a certain way. As Hart put it, the external perspective “may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules”, but ignores those for whom “the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility.”

This idea has proven extremely influential, but Hart was not very clear in articulating it. Although he did not distinguish clearly between them, his discussion of the internal point of view contains both a substantive claim about the existence-conditions of law and a methodological claim about the correct way to address the fundamental questions of jurisprudence. The substantive thesis is part of his reorientation of jurisprudence towards legal validity: his claim is that for law to exist it must be not merely accepted as a threat but also accepted (by some) as reason for action. We have already seen that the classical legal positivists were not interested in the question of legal validity, which can make sense only if one is interested in a “sociological” account of the practice. Against this approach what the classical legal positivists were doing was indeed “external,” in that they sought to explain law as part of a broader picture of nature and human nature. In that sense, criticizing Hobbes and Bentham for adopting an external perspective is exactly to miss their point.

135 HART, supra note 8, at 90 (first emphasis added).
136 See, e.g., RAZ, supra note 78, at 92 (“[Hart] emphasized the importance of the internal point of view to our understanding of law. That is one aspect of his theory which won universal acceptance, and remains virtually unchallenged.”); Scott J. Shapiro, The Bad Man and the Internal Point of View, in THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 197, 197 (Steven J. Burton ed., 2000) (“the internal point of view is perhaps Hart’s greatest contribution to jurisprudential theory”).
The methodological idea is that the empirical sciences were “useless” for the explanation of normative behavior, because they do not take the internal point of view. But what exactly is the problem with empirical sciences in this context? If one takes Hart to have challenged the explanations of human psychology found in Hobbes’s and Bentham’s writings, based as they are on the science of their day,137 his views may be acceptable. One may even accept such challenges with regard to the state of psychology at the time Hart wrote The Concept of Law. But these days, this attitude seems much less convincing these days when much of cognitive psychology is concerned exactly with explaining reason-based behavior.138 In fact, one of the most accepted findings in cognitive psychology is that reports based on introspection by those engaged in normative activity (what legal philosophers call their “self-understanding”) are often inaccurate, self-serving, or are after-the-fact rationalizations.

The tenor of Hart’s work, however, suggests that Hart’s view was different. The methods of the empirical sciences were not useless for the time being, they were useless, period. In their stead, Hart relied on introspection, from which he surmised that most people, or at least most “officials,” treated law as reason for action. The problem is that saying that law gives people reasons for action, or that people take law to give them reasons for action, leaves explanation unclear so long as we do not know what reasons are, where they come from, and how they affect people’s actions. It is exactly here that the more science-friendly approach of the classical legal positivists might have been thought valuable in addressing these questions, but the resistance to this idea, the insistence that the language of reasons is somehow primitive, shows that underlying the seemingly methodological claim about the uselessness of scientific method, lay more than just method: one finds there the view that the domain of reasons is somehow different from the domain of facts, and for this reason cannot be explained by the methods for determining questions of fact, those of the empirical sciences.139 That is exactly the view rejected by classical legal positivism.


139 That seems to be not just Hart’s view but that of other prominent contemporary legal positivists. See H.L.A. HART & A.M. HONORE, CAUSATION IN THE LAW 50 (1959). Framed somewhat differently, a similar attitude is found in JOSEPH RAZ, ENGAGING REASON: ON THE
The only way to vindicate looking at those self-understandings in the introspective fashion favored by proponents of the internal point of view is if the attitudes revealed by these methods are themselves the object of inquiry. As we have seen, contemporary legal positivism may be understood as an attempt to provide an account of those attitudes, but if that is the case, we see once again, albeit via a different route, that Hart’s challenge to the supposedly “external” approach of earlier legal positivists is not a devastating criticism, but only a reflection of his erroneous characterization of Hobbes and Bentham’s work as an earlier incarnation of his inquiry. But even if we are interested in pursuing the sort of questions Hart was interested in—an account of legal practice as told “from within”—the separation of the two issues Hart discussed under the heading of the internal point of view also helps us see that there is no difficulty in addressing this question while adopting an “external” methodology: Countless empirical studies on such matters precisely, attest that Hart’s doubts may have had little foundation.

(c) What’s in a Name?
Those who have made it all the way through to this point, even if convinced, might have a lingering worry. If contemporary legal positivism and classical legal positivism are such radically different ideas, does it make sense to speak of both as “legal positivism”? It is in fact possible to even argue that the reasons why both are called “positivist” are different. Contemporary legal positivists find the label “positivism” apposite because it insists that all law is posited, or laid down. John Gardner asks, for example, “What should a ‘legal positivist’ believe if not that laws are posited?”140 Similarly, when Joseph Raz speaks of “positivistic standards” as the only legal standards what he has in mind are posited standards.141 By contrast the classical legal positivists, none of whom ever used the word “positivism” or “positivist,” may be thought to be positivists primarily because their views on law derive from a comprehensive methodological/metaphysical picture that could be called positivistic, a particular view about what the world is and a corresponding view about what this implies about the appropriate methods for investigating it. The classical legal positivists are, if you wish, metaphysical positivists who worked out the implications of their positivism to law.

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140 Gardner, supra note 12, at 200. For a more detailed, but in my view unsuccessful, attempt to defend this view see John Gardner, Some Types of Law, in COMMON LAW THEORY 51 (Douglas E. Edlin ed., 2008).

141 RAZ, supra note 110, at 206; see also Hans Kelsen, On the Pure Theory of Law, 1 ISRAEL L. REV. 1, 2 (1966) (“In order to be ‘positive’ a legal norm … must be ‘posited’….”).
That, however, only emphasizes the difference between the two views. Even if we keep these two senses apart as I did here, by carefully distinguishing between the “classical” and the “contemporary,” is it not misleading to use a similar term to describe both? In a sense this is merely a terminological question, for as long as we are clear about the differences between what I called classical and contemporary legal positivism, the names do not matter much. But, especially since the term “legal positivism” did not exist in Hobbes or Bentham’s days and they never used it to describe their views, would it not be more profitable to stop using the term when talking about their views?

It is important for me to stress that I am not here concerned with defending some “canonical” version of legal positivism as the “real” legal positivism. Ideas can be demarcated in different ways which may be useful (or “correct”) for different purposes. I also do not have any strong attachment to the label “legal positivism” and even less so to the views currently defended under it. Since on certain important issues I believe Hobbes and Bentham had the better view, it might be preferable (at least for someone like me) to try and dissociate such views from those defended by contemporary legal positivists. There are, however, at least four reasons why, with all the points just made borne in mind, using the term “legal positivism” may be useful for describing the work of Hobbes and Bentham. First, there may be value in keeping a label that highlights the historical path that leads from Hobbes or Bentham to Hart or Raz. It is a meandering route, in which quite often later theorists misunderstood, misapplied, or explicitly changed the ideas of their predecessors. Consequently the juxtaposition of different “legal positivists” at both ends of this historical path can result in some truly odd couples. But to a story in the development of ideas, there may be value in seeing what Austin took from Bentham, what Hart took from Austin, and what Raz took from Hart, and more generally how one theoretical position could, eventually, beget a view that is in some respects diametrically opposed to it.

Second, there are some ideas that many (not all) legal positivists, classical and contemporary, share, even if they share them for rather different reasons. Perhaps the most important one is the view, although one not accepted by all contemporary legal positivists, that it is possible to offer a non-moral account of law’s normativity, i.e. that it is possible to explain legal obligations without resort to morality. That is a significant component of both approaches, even if the reasons for it are quite different. Furthermore, and related to the first point, we have seen that it is by looking at this issue that we can see the shift from a focus on normativity to a focus on validity and with it the point at which contemporary legal positivism has finally cut its ties with classical legal positivism.142 This issue is therefore important for explanation the historical

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142 See text accompanying note 110, supra.
development from classical to contemporary legal positivism, as well as the fundamental divide that now exists between them.

The third reason for using the same label for both views is even though the term “positivism” was only coined by Auguste Comte in the middle of the nineteenth century, similar ideas have been around for much longer. Using the term “legal positivism” to describe some of Hobbes or Bentham’s ideas may be useful in highlighting the fact that they were (contrary to most contemporary legal positivists) metaphysical positivists, and in this way to highlight the connections between their ideas and broader changes in the intellectual landscape of Western thought, in particular their ties to the Enlightenment.143

Finally, by using an already “occupied” term instead of coining a new one, I wish to indicate that my position is not meant as just another inquiry that could exist alongside the current prevailing approach to jurisprudence. Even though classical and contemporary legal positivism are in important respects very different views that are concerned with different questions, they are not meant to live side by side by side of each other. Classical legal positivism is meant as a direct challenge to contemporary legal positivism, and if one view “deserves” the title, it should be a version of the classical approach.

CONCLUSION

The successes of the scientific method put enormous pressure on other methods of inquiry. Philosophers in particular may have felt a need to justify their methods when many questions that used to belong to philosophy were subjected to a hostile takeover from science. The response adopted by Hart and some of his contemporaries was to turn philosophy into a subject concerned with questions that, they thought, science could not possibly touch. (Tellingly, a rather similar move is discernible in religion.) The adoption of the internal point of view was part of the same move. It insulated (or seemed to insulate) legal philosophy from the potential encroachment of science by delineating certain questions, and by implication the domain of legal philosophy, as a separate from that of science. But this “internalist” approach to legal philosophy has proven destructive for the subject. The insistence that legal philosophy is concerned with conceptual questions pursued for their own sake, that concern with the practical

significance of jurisprudential debates is “fundamentally anti-philosophical,”144 succeeded to secure the subject from intrusion from without only by killing it from within.

Unfortunately this now seems to be the dominant view about the proper domain of jurisprudence, so much so that it is sometimes suggested that this is the only way for doing proper, “analytic” legal philosophy. There is, however, a different response to the challenge posed by science, and that is embracing it. That is the response both Hobbes and Bentham adopted. In mentioning them I am not simply appealing to the authority of great dead philosophers. I would like to think that I would have thought this approach worth pursuing even had Hobbes and Bentham not existed. But it is worth mentioning them in order to demonstrate just how far the contemporary positivist approach is from the ideas of those usually considered, by contemporary legal positivists themselves, as founders of legal positivism.

Ironically, the turn to science could open up the field for what we might call more genuinely “philosophical” questions. Instead of trying to answer the fundamentally sociological question “what is law?,” legal philosophers could turn their attention to questions like “given particular physics and metaphysics, what laws can (and cannot) be?,” or to the kind of “Kantian” philosophical puzzle, “what makes law (legal obligation, legal authority, legal normativity) possible?,” or to a question like “given certain facts about nature (including human nature) what should laws be?” Though such questions will presumably depend on facts about human nature, they are not sociological questions and an answer to them does not depend on people’s attitudes on the matter.145 This is what I take to have been the essence of classical legal positivism. Had this approach to legal philosophy been taken more seriously the views that go by the name “legal positivism” would have looked quite different from what they actually look like these days, no doubt more interesting, and probably more plausible.

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144 Gardner, supra note 12, at 203; see also Matthew H. Kramer, Book Review, 58 CAMBRIDGE L.J. 222, 223 (1999) (contrasting “non-philosophical jurisprudence—a search for a legal theory focused firmly on practical concerns” with “pure philosophical elucidation”). These words, coming from two prominent contemporary legal positivists, could not be more different from Bentham’s view of philosophy: “Philosophy is never more worthily occupied, than when affording her assistance to the economy of common life: benefits of which mankind in general are partakers, being thus superadded to whatever gratification is to be reaped from researches purely speculative. It is a vain and false philosophy which conceives its dignity debased by use.” Jeremy Bentham, Panopticon; or, the Inspection House, in 4 THE WORKS OF JEREMY BENTHAM 37, 117 n.† (John Bowring ed., 1843).

145 More precisely, they are immune to them to the extent that they are not constitutive of legal practice. See Danny Priel, Jurisprudence and Necessity, 20 CAN. J.L. & JURISPRUDENCE 173, 93-94 (2007).