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# Jurisprudence Between Science and the Humanities

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# JURISPRUDENCE BETWEEN SCIENCE AND THE HUMANITIES

DAN PRIEL\*

## ABSTRACT

*For a long time philosophy has been unique among the humanities for seeking closer alliance with the sciences. In this Article I examine the place of science in relation to legal positivism. I argue that, historically, legal positivism has been advanced by theorists who were also positivists in the sense the term is used in the philosophy of social science: they were committed to the idea that the explanation of social phenomena should be conducted using similar methods to those used in the natural sciences. I then argue that since around 1960 jurisprudence, and legal positivism in particular, has undergone change toward anti-positivism. Central to this trend has been the idea that proper jurisprudential inquiry must be conducted from the “internal point of view.” This view amounted to an attempt to combine a scientific-like aim of neutral description with a humanistic method of inquiry. It thus did not entirely abandon its links with scientific inquiry, but it has radically changed their nature. I show that this stance has had a negative impact of narrowing both the range of issues discussed and the kind of method considered appropriate for discussing these questions. I then argue that to counter these isolationist trends jurisprudence would benefit from reorientation of its midway position between science and the humanities in the opposite direction: its aims should be those traditionally associated with the humanities but it should try to bring new insight to these questions with a methodology much closer to that of the sciences.*

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## INTRODUCTION

In 1959 C.P. Snow published a book and coined a phrase. A scientist turned novelist, Snow felt at home in both the arts and the sciences. Based on his acquaintance with ideas and people of both camps, he argued that there was a growing chasm driving them apart: “constantly I felt I was moving among two groups . . . who had almost ceased to communicate at all, who in intellectual, moral and psychological climate had so little in common that instead of going from Burlington House or South Kensington to Chelsea, one might have crossed an ocean.”<sup>1</sup> In the years that followed, matters only worsened, and they reached a nadir in the 1990s when humanists published articles denouncing scientists for holding naïvely to a discredited model of objective reality, and scientists in turn denounced humanities work as intellectually worthless.<sup>2</sup> And though the air seems calmer now, it is hard to say that there is much debate between the two cultures. Different subject matters, different methodologies, and increased specialization make such conversation all too difficult.

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1. CHARLES PERCY SNOW, *THE TWO CULTURES 2* (Canto ed., Cambridge Univ. Press 1998) (1959). Burlington House is the location of five scientific learned societies; Kensington and Chelsea are neighborhoods associated with the London literati.

2. See PAUL R. GROSS & NORMAN LEVITT, *HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE* (1994); ALAN SOKAL & JEAN BRICMONT, *FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS’ ABUSE OF SCIENCE* (1998).

For a long time philosophy has stood in a rather awkward position between science and the humanities. In university departmental divisions, in bookstores, and, I think, in popular opinion, philosophy is (still) almost invariably classified among the humanities. But if one looks a bit more closely, the impression is quite different. For example, in debates surrounding Derridean deconstruction, most “analytic” philosophers were critical of what two prominent philosophers described as the “the sloppy and naive quality of what passes for philosophical argument in cultural studies . . . .”<sup>3</sup> Perhaps wary of what they perceived as the “anything goes” feel of work in some quarters of the humanities, philosophers sought to imitate the methods of scientists with a style of argumentation that is more reminiscent of the sciences. Philosophical arguments often are advanced using formal languages, and, even when not, precision and clarity are very highly prized.<sup>4</sup> A philosophical article often aims to show that certain conclusions do (or do not) follow deductively from certain premises. Even the “testing” of philosophical ideas bear some resemblances to scientific method: a philosophical thesis is subjected to the philosophical community’s “replication” in the philosophical labs known as seminar rooms, where attempts are made at refuting it by means of counterexamples. If too many counterexamples are found, the thesis is rejected.

The links and similarities do not end here. The wide currency of some views—such as monism in the philosophy of mind and physicalism in metaphysics—is in part the result of certain scientific discoveries. And philosophers have been drawing heavily on science in many other areas of philosophy as well. As for the future, many philosophers believe that the answers to some old philosophical chestnuts depend, to varying degrees, on future advances in science, not philosophy. Most prominently in the philosophy of mind, but also in areas such as ethics and philosophy of action, there are now voices arguing that many of the questions with which philosophers have been struggling for centuries are in fact empirical questions, and that they will ultimately be answered by the empirical methods of science.

It would be wrong, however, to think that this is the whole story. There are other philosophers who argue that the philosophical enchantment with

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3. Paul Boghossian & Thomas Nagel, Letter to the Editor, *LINGUA FRANCA*, July–Aug. 1996, available at <http://linguafranca.mirror.theinfo.org/9607/tsh.html> (last visited May 30, 2012); see also John R. Searle, *Literary Theory and Its Discontents*, 25 *NEW LITERARY HIST.* 637 (1994).

4. For similar observations, see John R. Searle, *The Future of Philosophy*, 354 *PHIL. TRANSACTIONS. ROYAL SOC’Y LONDON B: BIOLOGICAL SCIENCES* 2069, 2071 (1999).

science is a mistake and that the appropriate location of philosophy and the appropriate way of *doing* philosophy should remain firmly within the humanities. Like their fellow philosophers, these writers strive for clarity and precision in argument, but they consider it a mistake to confuse clarity of expression with scientific aims. The reason has to do with perspective: on this view, philosophy, like the rest of the humanities, looks at events from the human perspective, and aims to explain the world from that perspective.<sup>5</sup>

In one form at least, this debate among philosophers will be familiar to legal philosophers, as it is very closely connected to the distinction between the “internal” and the “external” points of view introduced into jurisprudence by H.L.A. Hart.<sup>6</sup> Much has been written on the internal point of view, on what Hart meant by this term, on the significance of the internal point of view to his work, and on its relevance to jurisprudence more generally. But not much has been said on where the distinction between the internal and the external points of view places jurisprudence in the debate between the humanistic and scientific cultures. The purpose of this Article is to explore these issues. Even though Hart’s use of these terms is not very clear,<sup>7</sup> at their core is the distinction between humanistic understanding and scientific explanation of human behavior.<sup>8</sup>

The place of legal philosophy or analytic jurisprudence (I use these terms interchangeably) in relation to science and the humanities is an important subject to explore for at least three reasons. First, contemporary jurisprudential debates should be connected to the history of the subject. Contemporary analytic jurisprudence is strongly a-historical—both in the sense that it cares little for the role of history and tradition within law, and in the little interest many of its proponents display for the history of jurisprudence itself.<sup>9</sup> This is unfortunate because it leads to excessive focus on the work of a few recent writers at the expense of their

5. See, e.g., BERNARD WILLIAMS, *PHILOSOPHY AS A HUMANISTIC DISCIPLINE* 204–06 (A. W. Moore ed., 2006) [hereinafter WILLIAMS, *HUMANISTIC DISCIPLINE*]; see also BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY*, at v–vi (1985) [hereinafter WILLIAMS, *ETHICS*].

6. See H.L.A. HART, *THE CONCEPT OF LAW* 89–91 (2d ed. 1994) [hereinafter HART, *CONCEPT OF LAW*].

7. See, e.g., John D. Hodson, *Hart on the Internal Aspect of Rules*, 62 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 381, 382–88 (1976); Frederick A. Siegler, *Hart on Rules of Obligation*, 45 *AUSTRALASIAN J. PHIL.* 341, 350–55 (1967).

8. Hart was clear on this point when he explained the value of the internal point of view saying that, “[f]or the understanding of [any form of normative social structure] the methodology of the empirical sciences is useless . . . .” H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13 (1983) [hereinafter HART, *ESSAYS*].

9. For clear statements to that effect see ANDREI MARMOR, *PHILOSOPHY OF LAW* 118 (2011) and John Gardner, *Legal Positivism: 5½ Myths*, 46 *AM. J. JURIS.* 199, 199 (2001).

intellectual ancestors, who have often been far more original and interesting—exactly because many of them consciously considered the question of the connections between a theory of law and a more comprehensive explanation of human nature, society, and political theory.<sup>10</sup>

Second, the place of analytic jurisprudence between science and the humanities is important for understanding how this approach to explaining legal phenomena is *currently* practiced. In this Article I cannot discuss all strands of analytic jurisprudence, but I will focus on two very influential jurisprudential traditions, legal positivism and legal realism.<sup>11</sup> By examining the work of prominent legal positivists and legal realists, I hope to highlight the way questions about the right relationship between jurisprudence, science, and the humanities are implicit in the work of many contemporary theorists. One aim of this Article is to demonstrate how underneath the visible substantive debates between legal positivists and their opponents, and perhaps even more so among legal positivists themselves, there is an unacknowledged undercurrent: a debate on the right way of doing philosophy. Indeed, I believe this undercurrent is sometimes the best explanation of the substantive disagreements. I hope to place the jurisprudential debates within the larger enterprise of understanding law as a human practice and in this way connect with the work of earlier legal philosophers who have had similar aims.

With respect to legal realism in particular, such an examination is worthwhile both for understanding important differences among the legal realists and also for seeing their relationships with legal positivism. Brian Leiter has recently made the provocative claim that the legal realists are best understood as legal positivists. He has tried to show that the two approaches, usually thought to be inimical, in fact have a lot in common. I will argue, by contrast, that we can better understand the similarities and differences between legal positivism and legal realism by looking at their views on the place of jurisprudence between science and the humanities.

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10. See Dan Priel, *Towards Classical Legal Positivism*, available at <http://ssrn.com/abstract=1886517>.

11. My decision to focus on legal positivism and legal realism is not accidental. With regard to legal positivism, its connection to analytic jurisprudence cannot be denied. In its early days the term “legal positivism” was often used interchangeably with analytic jurisprudence. See, e.g., Roscoe Pound, *Fifty Years of Jurisprudence*, 1937 J. SOC’Y PUB. TCHRS. L. 17, 25 (contrasting “analytical jurisprudence” with natural law). Today, many, perhaps most, contemporary analytic legal philosophers are legal positivists. The decision to focus also on the work of the legal realists is based on the fact that there has been a great revival of interest in their work, even among legal philosophers who in previous generations tended to be rather dismissive of the legal realists’ work.

This leads to my third reason for engaging in this question—namely, the future of jurisprudence. If, as is plausible, jurisprudence is concerned with the explanation of a certain aspect of human behavior we call “law,” then examining the right methods for explaining human behavior and legal behavior within it are clearly relevant—and the position of analytic jurisprudence in relation to sciences and the humanities is clearly important. I believe there is particular significance in engaging in this question now because analytic jurisprudence seems to have been marginalized within the legal academy in recent years. I will contend that this stems partly from the position many legal philosophers have adopted on the right methodology for jurisprudence.

My argument will develop in three stages. I will begin with an examination of the relationship between legal positivism and the philosophical doctrine known as positivism. Positivism is, roughly, the view that the methods of the natural sciences are the right way to explain social phenomena. I consider whether, as some have suggested, legal positivism is best understood as the legal offshoot of positivism, or whether, as others have argued, positivism and legal positivism share nothing but a name.<sup>12</sup>

In Part II, I will argue that while legal positivism can be associated historically with motivations similar to those at the core of positivism, legal positivism has in the twentieth century undergone an anti-positivist turn, especially due to the enormous influence of H.L.A. Hart’s work. This was not an outright rejection of positivism, but it is crucial for understanding many of the central themes within contemporary legal philosophy in general and legal positivism in particular.

In Part III, I will consider the work of the legal realists. Much of their work is marked by a conscious attempt to overcome the limitations of traditional legal methods by adopting what resembles a positivist outlook. I consider whether this provides a basis for tying legal realism with legal positivism. With the aid of the preceding discussion, I offer a complicated answer. What many legal realists said seems to have strong ties with pre-twentieth century legal positivism, but not (contrary to Leiter’s view) with its more recent incarnations. The historical discussion in Parts I, II, and III helps situate and clarify much of the work done in jurisprudence today.

In Part IV, I will present attempts to find a viable middle-ground between what is perceived to be the excesses of positivism and the “soft”

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12. A note on terminology: the term “positivism” is often used as convenient shorthand for legal positivism. In this Article, for obvious reasons, it does not.

methods of the humanities. I argue that this resting point is unstable, but that turning away from it may come at a high price: legal philosophy seems able to retain a unique role for itself exactly because it can maintain this midway position. A firm shift toward either a more scientific approach or a more humanistic approach seems to lead to something that is no longer recognizably a philosophical enterprise. That would suggest that legal philosophy is doomed whether it keeps its methodological foundations or it changes them. I conclude by offering some suggestions as to what this seemingly difficult result may mean for the future of legal philosophy. In particular, I suggest that there may still be some midway position that legal philosophers could adopt, but it is very different from the one presupposed in most contemporary jurisprudential work.

## I. WHAT IS POSITIVISM?

### A. *The Varieties of Positivism*

Consider the following two passages:

When legal positivists are labeled simply as “positivists,” or it is otherwise insinuated that they tend to share the broader philosophical positions of e.g. Comte or Ayer—beware! It is usually the pot calling the kettle black.<sup>13</sup>

Legal positivists . . . share with all other philosophers who claim the “positivist” label (in philosophy of science, epistemology, and elsewhere) a commitment to the idea that the phenomena comprising the domain at issue (for example, law, science) must be accessible to the human mind. This admittedly vague commitment does little to convey the richness of positivism as a general philosophical position, but it serves to indicate that the label, though acquiring a very special meaning in legal philosophy, is not utterly discontinuous with its use elsewhere in the philosophical tradition.<sup>14</sup>

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13. Gardner, *supra* note 9, at 204 n.10; accord RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 20 n.31 (1990); WILFRID E. RUMBLE, DOING AUSTIN JUSTICE: THE RECEPTION OF JOHN AUSTIN’S PHILOSOPHY OF LAW IN NINETEENTH CENTURY ENGLAND 238 n.10 (2005) (“Comtean positivism . . . has little or nothing to do with legal positivism.”); James Allan, *Positively Fabulous: Why It Is Good to Be a Legal Positivist*, 10 CAN. J.L. & JURIS. 231, 231 n.1 (1997) (using the term positivism is “in no way . . . meant to signify any acceptance of the philosophical doctrine known as ‘logical positivism’ as expounded by thinkers such as Hans Reichenbach, Rudolf Carnap and A.J. Ayer.”).

14. Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO THE PHILOSOPHY OF



These two quotations written by self-identified legal positivists originate from different articles published within five years of each other. The authors wrote these articles to dispel myths and present to an often misinformed and confused world what—before all the differences, factions, and disagreements that exist among legal positivists—the core of legal positivism is. And, still, despite the qualifications in the second passage, they reach very different conclusions on what would seem a fundamental point—whether legal positivism has any family relation to positivism. Yet in neither essay is the question of the relationship between positivism and legal positivism pursued. Nor is it examined by many other legal theorists who have expressed a view on the relationship (or lack thereof) between the two.

Who is right in this debate? As is often the case in such matters, the answer is “it depends.” The problem with assessing these statements is that both “positivism” and “legal positivism” have meant different things to different people at different times. In its narrowest sense, “positivism” refers to the views of Auguste Comte (1798–1857), who coined the term in his *Cours de philosophie positive*, published in 1830. Comte had little influence on the major figures associated with “classical” legal positivism—surely not on Thomas Hobbes (1588–1679), who had been dead long before Comte was born, or on Jeremy Bentham (1748–1832), many of whose active years also preceded Comte. There is also little evidence of Comte’s influence on his contemporary John Austin (1790–1859),<sup>15</sup> or on any major twentieth century legal positivist.<sup>16</sup> At least in

LAW AND LEGAL THEORY 241, 241 (Dennis Patterson ed., 1996). Similar claims are found in MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 210 (1992) (“[T]here is a close family relationship between legal, logical, and ethical positivism . . . .”); Richard Nobles & David Schiff, *Debating with Natural Law: The Emergence of Legal Positivism*, in *INTRODUCTION TO JURISPRUDENCE AND LEGAL THEORY: COMMENTARY AND MATERIALS* 90, 90–91 (James Penner et al. eds., 2002) (drawing links between legal positivism and other kinds of positivism); Tom D. Campbell, *The Point of Legal Positivism*, 9 KING’S C. L.J. 63, 72 (1998) (“there are close ties between legal positivism and the empiricist strand of logical positivism . . . .”); Robert C.L. Moffat, *The Perils of Positivism or Lon Fuller’s Lesson on Looking at Law: Neither Science Nor Mystery—Merely Method*, 10 HARV. J.L. & PUB. POL’Y 295, 308 (1987) (stating that the links between positivism and legal positivism “appear to be strong”); cf. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260, 261–63 (1940).

15. Austin actually knew Comte, and held him in high regard. See RUMBLE, *supra* note 13, at 238 n.10. But there is no indication that he was influenced by Comte’s ideas.

16. There is an intriguing possibility in John Stuart Mill. While not usually considered among the ranks of the legal positivists, never having written much on law (see STEFAN COLLINI, *PUBLIC MORALISTS: POLITICAL THOUGHT AND INTELLECTUAL LIFE IN BRITAIN 1830–1930*, at 256–57 (1991)), Mill wrote two highly favorable reviews on John Austin’s work. See John Stuart Mill, *Austin’s Lectures on Jurisprudence*, in 21 *THE COLLECTED WORKS OF JOHN STUART MILL* 53 (1984) [hereinafter Mill, *Austin on Jurisprudence*]; *id.* at 167. Mill also wrote extensively on Comte. See John

Anglophone legal theory, his direct influence, then, seems negligible.<sup>17</sup>

The term positivism in philosophy is also sometimes used as shorthand for the “logical positivism” of Rudolf Carnap, Moritz Schlick, and other members of the “Vienna Circle,” as well as some contemporaneous British philosophers, most notably A.J. Ayer. It is impossible to describe the ideas of the logical positivists in a sentence, but it is fair to say that what motivated their work was a rejection of what they perceived to be the erroneous concern of philosophers with metaphysics. They perceived two kinds of questions: empirical ones, for which only science can provide the answer, and questions of meaning, for which the only answers possible were tautologies. The logical positivists have argued that many philosophers before them were wrong in thinking that there was a third domain, that of metaphysical questions. The logical positivists sought to show that these metaphysical questions were literally meaningless. And in order to replace them, they sought to clarify the logical foundations of scientific and linguistic inquiry. Once this had been achieved, they believed, there would be no more role for philosophical inquiry.

Here, too, it is hard to find a real connection between the concerns and ideas of the logical positivists and that of the legal positivists. In fact, there are good reasons for thinking that the best known legal positivists of the twentieth century have been opposed to it. In Nicola Lacey’s biography of H.L.A. Hart, she quotes a letter, written by Hart to his wife, in which he harshly criticizes Ayer’s book, *Language, Truth, and Logic*, as staunch a defense of logical positivism as one could possibly find.<sup>18</sup>

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Stuart Mill, *Auguste Comte and Positivism*, in 10 THE COLLECTED WORKS OF JOHN STUART MILL, *supra*, at 261 (1969) [hereinafter Mill, *Auguste Comte and Positivism*]. However, as far as I could find, there is no indication that Mill has drawn a link between Austin and Comte. Two points are worth noting here. First, Austin never uses the term “positivism” or “legal positivism” to describe his views; second and more important, as I will argue below, Austin may have been the first of the theorists associated with legal positivism to break its links with positivist ideas. See text accompanying *infra* notes 86–87. It thus may not be surprising that Mill did not see any important connection between the two. By contrast, Mill did say, although he did not discuss the matter at any length, that ideas similar to Comte’s positivism “formed the groundwork of all the speculative philosophy of Bentham.” Mill, *Auguste Comte and Positivism*, *supra* at 267. This is consistent with my claim below that in Bentham’s work there are obvious links between his positivism and his legal positivism. See text accompanying *infra* notes 68–70.

17. Matters may be different with regard to Francophone jurisprudence. Consider for example the suggestion that “Duguit attempts for the science of law what Auguste Comte attempted for philosophy, to emancipate it from theology and metaphysics.” W. Jethro Brown, *The Jurisprudence of M. Duguit*, 32 LAW Q. REV. 168, 168 (1916).

18. See NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 35 (2004); see also *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 J.L. & SOC’Y 267, 275 (2005) [hereinafter *Hart Interviewed*] (“I reacted against Freddy Ayer. . .”).

Another legal theorist who might be thought to provide the link between the legal and logical positivism is Hans Kelsen, an Austrian-born legal philosopher, who, despite some significant changes in views throughout his long career, remained a lifelong legal positivist. Kelsen was active in Vienna during the same period that the most prominent and influential members of the Vienna Circle developed their ideas. But while it is sometimes tentatively suggested that Kelsen's views may be related to the intellectual milieu in Vienna at the time,<sup>19</sup> and that some of his characterizations of his own approach somewhat resemble ideas defended by logical positivists,<sup>20</sup> I do not think Kelsen could be described as a logical positivist.<sup>21</sup> It would not be surprising to find that the ideas floating around this relatively small intellectual community had some influence on Kelsen. Indeed, I will, later on, suggest just that. But such a link does not amount to an endorsement, on Kelsen's part, of the basic tenets of logical positivism.<sup>22</sup> Apart from Kelsen, I do not think there is basis for any serious suggestion that legal positivism and logical positivism are related in important ways.<sup>23</sup>

### *B. The Elements of Positivism*

All this would suggest that proponents of the view that there is no significant connection between positivism and legal positivism are correct. But the term "positivism" is used in a broader sense, to describe a position with an older provenance than what we find in the work of the logical positivists or even that of Auguste Comte, the inventor of the term.<sup>24</sup> There are variations in detail, but in this broader sense positivism stands for a

19. See, e.g., ALLAN JANIK & STEPHEN TOULMIN, *WITTGENSTEIN'S VIENNA* 15, 133 (rev. ed. 1996); JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 41 (2d ed. 1986).

20. For example, Kelsen described his theory, which he called "the pure theory of law," as a "radically realistic and empirical [science,]" and contrasted it with the natural law approach, which was "metaphysics." See Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 49 (1941) [hereinafter Kelsen, *Analytical Jurisprudence*]; cf. Jes Bjarup, *Legal Realism or Kelsen Versus Hägerström*, 9 RECHTSTHEORIE BEIHEFT 243, 253–54 (1986).

21. See Clemens Jabloner, *Kelsen and his Circle: The Viennese Years*, 9 EUR. J. INT'L L. 368, 378–82 (1998); Stanley L. Paulson, *The Theory of Public Law in Germany 1914–1945*, 25 OXFORD J. LEGAL STUD. 525, 538 & n.77 (2005).

22. See *infra* Part II.A.4 (discussing the relationship between Kelsen and the logical positivism).

23. See Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 147–48 (1982) (reaching a similar conclusion).

24. For this usage of the term positivism see, for example, Anthony Giddens, *Introduction to POSITIVISM AND SOCIOLOGY* 1, 3–4 (Anthony Giddens ed., 1974). See also DAVID PAPINEAU, *FOR SCIENCE IN THE SOCIAL SCIENCES* 1–2, 185 n.1 (1979) (distinguishing different senses of the term "positivism" among scientists and philosophers of science).

combination of methodological and substantive views, which can be summarized in the following terms:

(1) *Materialism*: the belief that the world consists only of physical stuff, and the corresponding denial of the existence of any nonphysical material.<sup>25</sup> Though this is not a matter of logical entailment, materialists are often skeptics about values, or, at least, about robust versions of moral realism. It is not hard to see why: if values are not a separate entity “out there,” then moral and political discourse can only make sense if it is translated to measurable standards like preference satisfaction, maximization of well-being, and so on.

(2) *Scientism*: the methodological view according to which knowledge should be attained by following scientific *methods* and *goals*, especially those of the natural sciences. A central aim of the scientific method is to provide an objective description and explanation of phenomena in the world, one that could be used for prediction future events. There is a range of methods for attaining this goal (with different scientific disciplines sometimes adopting different methods), but one relevant feature they share is the insistence on a separation between the person involved in the inquiry and her object of inquiry.

(3) *Anti-historicism*: Positivists often reject the view that understanding how things are today requires consideration of particular path-dependent historical routes. In the context of human affairs, positivism is the rejection of the value of genealogy or narrative as forms of explanation.<sup>26</sup>

25. I use the somewhat dated term “materialism” instead of the more current, and to an extent overlapping, terms “naturalism” or “physicalism.” “Naturalism” has been used with such a broad range of meanings that using it here is liable to lead to confusion, especially given that in jurisprudential contexts natural law theories are sometimes called naturalistic, even though such theories are often the exact opposite of what most naturalists mean by the term. “Physicalism” is less ambiguous, but may be too strict, and perhaps also a bit anachronistic when used to describe the views of, say, Hobbes. However, the distinction between materialism and physicalism is not clear-cut. The definitions of materialism in J.J.C. Smart, *Materialism*, 60 J. PHIL. 651, 651–52 (1963) and in 2 DAVID LEWIS, PHILOSOPHICAL PAPERS, at x (1986), are very close to what many would nowadays call “physicalism.”

26. (2) and (3) may seem at first like different ways of saying the same thing. But this is not the case. In fact, some of the natural sciences may not be positivistic in the sense with which I use the term here; evolutionary biology is probably the most notable example of a historical science (in biology “everything is the way it is because it got that way,” as biologist D’Arcy Thompson is reputed to have said). Daniel Dennett, *It’s Not a Bug, It’s a Feature*, 7 J. CONSCIOUSNESS STUD., no. 4, 2000 at 25, 25. And as we shall see, many legal philosophers adopt (3) (and (1)) but reject (2).

(4) *Minimal role for the analysis of language in explanation*: The earlier points lead rather straightforwardly to giving a minimal role to the analysis of language. The primary role of explanation is to help in understanding the world by revealing or clarifying the fundamentals of physical or metaphysical reality. Existing linguistic conventions stand in no privileged position regarding these questions. In fact, given the profound ignorance of most language speakers to many of the issues calling for explanation, language should be treated with mistrust for its potential to mislead. For this reason, positivists often argue that scientific explanation should strive to abandon natural languages and adopt instead the more precise languages of mathematics and logic.<sup>27</sup>

There are obvious connections between the four elements. Materialism, for example, leads naturally to the view that the methods of natural science that have been used to explain the material world exhaust the correct methods of explanation because there is nothing else to explain. It also leads to the view that there is little to be gained from the “internal” analysis of language. The combination of (1) and (2) also leads to another view often associated with positivism, that the explanation of phenomena is best made by breaking them into their constituent elements. Related to all of this is the controversial idea of scientific reduction—the view that social phenomena are to be explained in the language of biology—which itself should be explained in the language of chemistry and ultimately in the language of physics.

Many anti-positivists will not quarrel with any of this so long as what is being sought is the explanation of natural phenomena. The difficulty lies with the explanation of human action, which many anti-positivists deny could be adequately explained (or understood) using the methods of science. We can call anti-positivist any view that rejects, in the context of human action and behavior, at least one of the four ideas I associated with positivism in favor of one of the following:

(1\*) *Holism*: Human action can be understood only within the culture within which it took place. Culture is a set of ideas, attitudes, and meanings that affect a person’s perception of reality in a holistic way, and cannot be reduced or broken down to its physical ingredients.

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27. See A.J. Ayer, *Editor’s Introduction* to LOGICAL POSITIVISM 3, 9–10, 24–28 (A.J. Ayer ed., 1959). On the willingness of logical positivists to challenge linguistic practices, see ROBERT VON MISES, POSITIVISM: A STUDY IN HUMAN UNDERSTANDING 332–33 (1951).

(2\*) *Internal understanding*: Unlike natural objects that can be explained by external observation, the mark of intentional action—that is, the mark of what makes humans human—is that it depends on the particular meaning with which it is taken. Meaning is a concept that cannot be understood, let alone explained, by observation.<sup>28</sup> Consequently, the purpose of an explanation of human behavior is not prediction of future behavior, but, rather, understanding the reasons that brought it about. Since there is no way of “translating” reasons for action to causal description, any attempt to offer a scientific account of human action is bound to fail.

(3\*) *Historicism*: the view that a true explanation of how things currently are will necessarily involve an account of how they developed to their current state from their inception, and that any explanation that fails to do that is for this reason inadequate.

(4\*) *Constitutive role for language and, therefore, a central role for the analysis of language in the explanation of human action*: On some anti-positivist views, the goal of philosophical explanation is to provide an account of the way people understand the world, and examining the way people use language is the primary means for doing so. As such, it is properly considered the object of our inquiry. Linguistic usage is not studied to be corrected, but for the evidence to be gleaned from it about people’s understanding. The role of explanation on this view is to make sense, or, to use a word much loved by anti-positivists, to “elucidate” our linguistic usages.<sup>29</sup> Philosophical inquiry takes the linguistic concepts as given and tries to explain, not to challenge, them: “[Philosophical problems] are problems, difficulties, and questions about the concepts we use in various fields, and not problems, difficulties, and questions which arise *within* the fields of their use. (A philosophical

28. See Isaiah Berlin, *The Divorce Between the Sciences and the Humanities*, in *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* 80, 96 (Henry Hardy ed., 1979) (discussing Vico’s ideas).

29. See, e.g., P.F. Strawson, *Carnap’s Views on Constructed Systems Versus Natural Languages in Analytic Philosophy*, in *THE PHILOSOPHY OF RUDOLF CARNAP* 503, 509 (Paul Arthur Schipp ed., 1963) [hereinafter Strawson, *Natural Language*] (“[T]he elucidation of concepts . . . can coexist with perfect mastery of their practical employment. Now this is precisely the need for their philosophical elucidation.”); P.F. STRAWSON, *INDIVIDUALS: AN ESSAYS IN DESCRIPTIVE METAPHYSICS* 9 (1959) (“Descriptive metaphysics is content to describe the actual structure of our thought about the world, revisionary metaphysics is concerned to produce a better structure.”). The similarity between the first quote and what Hart says in HART, *CONCEPT OF LAW*, *supra* note 6, at 2–3, is remarkable.

problem about mathematics is not a mathematical problem.)”<sup>30</sup>  
 Attention should be paid to linguistic usage, then, because language is not merely evidence of social reality; it is a reflection of it.

The contrast between (4) and (4\*) is particularly helpful in highlighting the different intellectual background of the two approaches. The anti-positivist tries to understand the social “world” constructed by humans beyond and outside the physical world, and she argues that the only way to understand this constructed world is from “within”—that is, by using concepts and ideas belonging to this constructed world. Anti-positivists thus need not (and usually do not) deny the existence of a physical world and that science (or scientific method) are reliable methods for knowing what it is. Rather, they contend that there is a separate domain, created by thought and language (the exact relationship or priority between the two being a matter of much debate) that is transparent to scientific method, and as such requires the humanistic methods of judgment and interpretation for understanding it. To the positivist, by contrast, the whole point of explanation is to put all these social phenomena on par with the explanation of other phenomena in the world, and the way to do it is by trying to see how such worlds of meaning are possible within a world described in materialistic terms.

### *C. Positivism and the Separation of “Is” and “Ought”*

Before continuing, we must attend to another idea often associated with positivism, one that is sometimes used as a link between positivism and legal positivism—the distinction between “is” and “ought,” or between fact and value. These two distinctions are not identical, but they are interrelated, and insisting on their significance is sometimes taken to be the mark of both positivism and legal positivism.<sup>31</sup> Thus, the defining slogan of legal positivism, and what I will here take it to stand for, is that “[t]he existence of law is one thing, its merit or demerit is another.”<sup>32</sup> By

30. Strawson, *Natural Language*, *supra* note 29, at 515; *cf.* P.F. Strawson, *Two Conceptions of Philosophy*, in PERSPECTIVES ON QUINE 310 (Robert E. Barrett & Roger F. Gibson ed., 1990). Strawson contrasts two approaches to philosophy but concludes that “[e]ach has validity *on its own terms*.” *Id.* at 318 (emphasis added). Strawson thus seems to turn even the positivist position into a linguistic enterprise.

31. *See, e.g.*, Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 800 n.5 (1993) (considering the is/ought distinction as a link between positivism and legal positivism).

32. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble ed., 1995). *See also* Kelsen, *Analytical Jurisprudence*, *supra* note 20, at 52; Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 204 (1931) [hereinafter Cohen, *Ethical Basis*] (“Law is law,

contrast, one often finds in the work of legal positivism's critics a rejection of the possibility of clearly distinguishing between the two. Lon Fuller, for example, argued that "nature does not, as the positivist so often assumes, present us with the *is* and the *ought* in neatly separated parcels."<sup>33</sup>

It is not difficult to see why positivists would be attracted to the idea that there is a clear distinction between what ought to be the case and what is the case. There is a clear path from the four positivist tenets described above and the view that, in explaining the world, one should strive, as natural scientists do, to understand what exists and distinguish it clearly from what is desired or ought to be the case: there is always room for criticizing the law, but in order to do that one needs to know what it is first. By contrast, those who believe that an account of what things are cannot (or should not) be separated from individuals' understanding or interpretation of events will tend to the view that a clear distinction between description of social phenomena and their evaluation is untenable. This is so because individuals' understandings of what things are will always be colored, however imperceptibly, by their judgments of how things ought to be.<sup>34</sup>

But the distinction between "is" and "ought" can also be misleading, for it is also sometimes used as determinative of whether there is a distinction between factual and evaluative questions. Here, we often see an almost complete reversal of positions between positivists and nonpositivists. The reason is that positivists are materialists, which means that for them there really is only one domain, that of the "is." Consequently, their explanation of normative discourse necessarily gets "translated" into the factual language of preferences, dispositions, likes or dislikes, the sort of stuff that (in principle) could be empirically determined. For example, Jeremy Bentham has argued that the basis of all his work, the principle of utility, is grounded in empirical fact. As the famous opening sentence of his *Introduction to the Principles of Morals and Legislation* puts it, "[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*."<sup>35</sup> A different

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whether it be good or bad, and only upon the admission of this truism can a meaningful discussion of the goodness and badness of law rest").

33. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 7 (1940); accord RONALD DWORKIN, *A MATTER OF PRINCIPLE* 147–48 (1985).

34. See FULLER, *supra* note 33, at 7–10.

35. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11 (H.L.A. Hart & J.H. Burns eds., Oxford Univ. Press 1996) (1780/89); cf. Cohen, *supra* note 32, at 202, 206 (complaining about the absence of "ethical science" (as opposed to the prevalence of "ethical judgment") in legal commentary, and arguing for an inquiry that would be grounded in "judgment[s]



positivist strategy involves explaining normative language in terms of conditionals (“you ought to do this” means “if you wish to attain such-and-such goal, do this”).<sup>36</sup> The practical effect of this strategy, too, is to eliminate the separate domain of “ought.”

The result is often quite confusing: Bentham, a positivist, in fact insisted on the importance of separating law as it is from law as it ought to be, and he heaped criticism on (what he took to be) William Blackstone’s failure to do so. By describing both law and morality as matters of (empirical) fact, Bentham was able constantly to elide the distinction between law and morality while firmly maintaining the distinction between law as it is and law as it ought to be. Similarly, Karl Llewellyn, who insisted on the explanatory value of keeping “is” and “ought” separate, also considered his views to be an embodiment of natural law theory.<sup>37</sup> By contrast, Ronald Dworkin, who has argued that “the flat distinction between description and evaluation . . . has enfeebled legal theory,”<sup>38</sup> has also argued that the domains of fact and value are strictly separate and that it is a fundamental error to confuse them.<sup>39</sup>

There is no inconsistency between these two positions because they deal with separate questions: one with the explanation of social phenomena; the other, with the metaphysics of morality and other evaluative domains. Nonetheless, to avoid possible confusion, I will not rely on the distinction between “is” and “ought” as the basis for distinguishing positivists (legal or otherwise) from non-positivists. Instead, I will only consider the four contrasting headings discussed in the previous Part.

## II. POSITIVISM AND LEGAL POSITIVISM

We can now return to whether the legal positivists are best understood as positivist or anti-positivists. I will show that there is no simple answer

of ethical values whose truth is recognized to be partially dependent upon the accuracy of human scientific knowledge . . .”).

36. See, e.g., VON MISES, *supra* note 27, at 332 (reducing “ought” statements to conditionals).

37. Compare Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236–37 (1931) (stressing the importance of keeping “is” and “ought” apart) and Karl N. Llewellyn, *Legal Tradition and Social Science Method—A Realist’s Critique*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* 89, 98–100 (1931) [hereinafter Llewellyn, *Legal Tradition*], with Karl N. Llewellyn, *One “Realist’s” View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3, 8 (1939) [hereinafter Llewellyn, *Natural Law*] (“[T]he ultimate legal ideals of any of the writers who have been called realists . . . resemble amazingly the type and even the content of the principles of a philosopher’s Natural Law.”).

38. DWORKIN, *supra* note 33, at 148.

39. See RONALD DWORKIN, *JUSTICE IN ROBES* 76–77 (2006).

to this question and that different legal positivists have adopted distinctly different views on the matter.

The term “positive law” is of much older provenance than that of “positivism” or that of “legal positivism.” The term originated around the twelfth century as the opposite of natural law (although the idea of law laid down by humans is obviously much older than that). At that time “natural law” and “positive law” did not represent two competing schools of jurisprudence, but rather two *kinds* of law, the former referring to the laws laid down by God, the latter the laws promulgated by human political authorities. Only centuries later did some scholars begin to question the very idea of natural law and to think that the only law that existed was positive law. It was with them that the distinction between legal positivism and natural law as two competing *theories about* law was born.

The idea of positive law, then, was born independently of positivism and is, in fact, much older than the legal theory now called legal positivism.<sup>40</sup> But this leaves open the question, to which I now turn, whether the emergence of the theory of legal positivism—that is, the rejection of the existence of natural laws—was itself influenced by positivist ideas.

#### *A. Positivist Legal Positivism*

The earliest theorists we now call legal positivists advanced their ideas at a time of great political and intellectual transformation. A period of changing political structure with the emergence of states as the foremost political entities in the international arena, it was the time in which the divine right of kings to rule began to be questioned and rudimentary ideas of representation as the basis for political legitimacy emerged. It was also a period of remarkable advances in the natural sciences. The successes in these areas were an inspiration for the first attempts to use similar methods to explain humans, both in explaining the body in mechanical terms, and, more importantly for our purposes, for explaining social and political phenomena. Among the very first to explicitly pursue such an approach was Thomas Hobbes.<sup>41</sup>

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40. See Roberto Ago, *Positive Law and International Law*, 51 AM. J. INT'L L. 691, 696–97 (1957).

41. See PHILIP BALL, *CRITICAL MASS: HOW ONE THING LEADS TO ANOTHER* 1–37 (2004); RICHARD PETERS, *HOBBS* 43 (2d ed. 1967).

### 1. *Thomas Hobbes*

Whether Hobbes was a legal positivist is a matter of some controversy.<sup>42</sup> No doubt, if legal positivism is contrasted with natural law, then it would seem odd to put on the side of legal positivism a theorist in whose work natural laws and natural rights occupy such a prominent place. But to think in this way is to impose twentieth century categories on a thinker who would have not recognized them.<sup>43</sup> Part of Hobbes's novelty consisted in the role he gave natural law within his account. In at least two important senses his work can be seen as the starting point for a new *political* tradition. First, with respect to the relationship between sovereignty and law-making power, Hobbes insisted (against the view of prominent contemporary common lawyers) that the common law is a form of delegated power from the sovereign.<sup>44</sup> Second, Hobbes thought that justice is the product of human law, not the pre-existing standard by which human law is to be measured.<sup>45</sup> With these ideas Hobbes charted a new direction in both legal and political theory—although to distinguish between these two would also be to read him anachronistically—a direction that conveys many of the motivations found in the work of later legal positivists.

However we label his ideas, what matters is to see how they are related to his positivistic outlook. Hobbes's work displays clear adherence to the four elements of positivism identified above.<sup>46</sup> Hobbes was a materialist who denied the existence of spirits or any other “incorporeal beings.”<sup>47</sup> He sought to explain not only human action in mechanistic terms, but also our mental life, suggesting that our thought, emotions, and feelings of pleasure and pain are the result of motions within our body.<sup>48</sup> His scientism was

42. Compare JEREMY WALDRON, *THE LAW* 33 (1990), George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 965 (1985) (calling Hobbes “a seminal positivist”), and Gardner, *supra* note 9, at 200, with Mark C. Murphy, *Was Hobbes a Legal Positivist?*, 105 ETHICS 846 (1995), Claire Finkelstein, *Hobbes and the Internal Point of View*, 75 FORDHAM L. REV. 1211 (2006), and David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 LAW & PHIL. 461 (2001). For my explanation of the sense in which he was a legal positivist, and that complements the discussion here, see Priel, *supra* note 10.

43. See generally Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969).

44. See THOMAS HOBBS, *LEVIATHAN* 186–87 (Richard Tuck ed., rev. student ed., Cambridge Univ. Press 1996) [hereinafter HOBBS, *LEVIATHAN*].

45. *Id.* at 90 (ch. 13).

46. See generally A.P. MARTINICH, *HOBBS* 24–28 (2005).

47. See JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 11–14 (1986).

48. See Thomas Hobbes, *Elements of Philosophy. The First Section Concerning Body*, in 1 THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY 390, 405, 407 (1839) (1655) [hereinafter

displayed in his distinction between scientific and non-scientific method. The former was based on analysis of the complex in terms of the simpler elements,<sup>49</sup> and was marked by its ability to generate predictions (or “knowledge of Consequences,” as Hobbes called it).<sup>50</sup>

His paradigm for the sort of secure knowledge that science can produce was Euclidian geometry, to which he was first introduced at the age of forty. Hobbes was reportedly amazed at the way simple axioms can lead in a rigorous fashion to conclusions that at first sight seem to bear no relation to the premises.<sup>51</sup> (To accommodate geometry within his conception of science grounded in causes and effects Hobbes had to explain that even geometry is a mechanical science.<sup>52</sup>) Hobbes sought the same approach for his civil science. In his view complex theories were derived from simpler ideas, and, as such, were potentially as secure as a proof in geometry. Civil science must therefore start with precise definitions, which provide precise meaning for the words used and follow them to more complex conclusions. It was an explanation that shows that “the causes of the motions of the mind . . . by proceeding in the same way [as in the natural sciences], come to the causes and necessity of constituting commonwealths.”<sup>53</sup> Hobbes in fact claimed to have been the first to apply scientific method to questions of politics, and went as far as to declare himself the founder of a new science.<sup>54</sup>

By contrast, Hobbes considered non-scientific explanation to be based on dogma. It is here that words “have been abundance coined by Schoolemen, and pusled Philosophers”; but in reality these words “are but insignificant sounds.”<sup>55</sup> Unlike science, here scholars “take up maxims

Hobbes, *Elements*] (§§ XXV.1, XXV.11-12); HOBBS, *LEVIATHAN*, *supra* note 44, at 46 (“Life it selfe is but Motion . . .”) (ch. 6); PETERS, *supra* note 41, at 129–30.

49. THOMAS HOBBS, *ON THE CITIZEN* 10 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) (1647) (“[A] thing is best known from its constituents.”).

50. HOBBS, *LEVIATHAN*, *supra* note 44, at 35 (ch. 5); *accord* Hobbes, *Elements*, *supra* note 48, at 82 (§ VI.13) (“The end of science is the demonstration of the causes and generations of things”); *cf.* THOMAS HOBBS, *THE ELEMENTS OF LAW NATURAL AND POLITIC* 75 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1650) (§ XIII.4).

51. *See* A.P. MARTINICH, *HOBBS: A BIOGRAPHY* 84–85 (1999). Interestingly, Hobbes’s work prior to that period (now largely unread) is of a distinctly humanist flavor. *See* 3 QUENTIN SKINNER, *VISIONS OF POLITICS: HOBBS AND CIVIL SCIENCE* 38, 65 (2002).

52. *See* Douglas Jesseph, *Hobbes and the Method of Natural Science*, in *THE CAMBRIDGE COMPANION TO HOBBS* 86, 87–88 (Tom Sorell ed., 1996).

53. Hobbes, *Elements*, *supra* note 48, at 73–74 (§ VI.7). *See also id.*, at 74 (“[T]he principles of the politics consist in the knowledge of the motions of the mind . . .”). *Contra* TOM SORELL, *HOBBS* 21–24 (1986).

54. *See* M.M. GOLDSMITH, *HOBBS’S SCIENCE OF POLITICS* 228–29 (1966).

55. HOBBS, *LEVIATHAN*, *supra* note 44, at 30 (ch. 4); *see also* HAMPTON, *supra* note 47, at 11 (arguing that for Hobbes “[I]anguages with different domains do not establish independent worlds”

from their education, and from the authority of men, or of custom, and take the habitual discourse of the tongue for ratiocination.”<sup>56</sup> All this could not be the basis for true scientific inquiry, which Hobbes thought should avoid the historicist narrative style found in humanistic work.<sup>57</sup>

The extent to which Hobbes thought he could derive his political philosophy from natural science is controversial among scholars.<sup>58</sup> It must be remembered, however, that the psychology and biology of his day were at a rather primitive stage. Bearing this in mind, it is remarkable how much Hobbes invested in trying to find a basis for his political and legal theory in what he thought were empirical observations about human nature. First and foremost, this is found in his explanation for the *need* for law. In his account of human psychology, people were self-interested beings who are motivated by “a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death,”<sup>59</sup> and it is for this reason that life without an absolute sovereign would be the nightmare of “warre . . . of every man, against every man.”<sup>60</sup> His positivism also informed his view that the authority of law does not derive from reason but rather from an act of will of the sovereign.<sup>61</sup> This, for Hobbes, was an empirical observation, not a theoretical conclusion. In taking this view, Hobbes was one of the first to accept what would become a shibboleth for legal positivism, the separation between legality and content, that is, the separation between the conditions for something being a law and what that law says. In this, Hobbes’s work clearly displays a strong link between early positivism and early legal positivism.

and that “the language of physics . . . can give us a *complete* description of the events of the universe”).

56. HOBBS, *supra* note 50, at 75 (§ XIII.4) (emphasis omitted).

57. Luc Borot, *History in Hobbes’s Thought*, in THE CAMBRIDGE COMPANION TO HOBBS, *supra* note 52, at 305, 306 (“[Hobbes] had to get rid of whatever sounded like a narrative style to achieve the effect of demonstrative science . . .”). For the contrast Hobbes drew between historical knowledge and scientific knowledge, see also *id.* at 310–11; PETERS, *supra* note 41, at 49–50.

58. See Noel Malcolm, *Hobbes’s Science of Politics and His Theory of Science*, in ASPECTS OF HOBBS 146 (2002).

59. HOBBS, LEVIATHAN, *supra* note 44, at 70 (ch. 11). Hobbes also believed that it is “[d]esire of Praise . . . [which] disposeth to laudable actions . . .” *Id.* at 71 (ch. 11).

60. *Id.* at 88 (ch. 13).

61. “It is not Wisdom, but Authority that makes a Law.” THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 55 (Joseph Cropsey ed., 1971) (1681).

## 2. *Jeremy Bentham and John Austin*

It is with Bentham that many scholars find the true, unambiguous beginnings of legal positivism.<sup>62</sup> Though he shared many of his methodological presuppositions with Hobbes,<sup>63</sup> in Bentham's account of law there was no room for that "nonsense upon stilts,"<sup>64</sup> natural rights, that had such a central role in Hobbes's work.

A theme running through Bentham's work is the need to eradicate imaginary "fictions" that bedevil thought, and to restate our knowledge on firm empirical grounds. This first required finding out what really exists.<sup>65</sup> On this question Bentham's answer was clear: he was a materialist who believed that "[t]he only objects that really exist are substances—they are the only real entities."<sup>66</sup> Once what exists was established, the question was how it should be explained, and, here, as John Stuart Mill observed, "Bentham's method may be shortly described as the method of detail; of treating wholes by separating them into their parts, abstracting by resolving them into Things. . . ."<sup>67</sup>

Bentham relies on both this materialist metaphysics and his scientific methodology in his inquiries in the domains of morality and law. When talking of Bentham's work on the law, the focus is often on his critique of

62. Even this characterization has been questioned. See Amanda Perreau-Saussine, *Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist*, 63 *CAMBRIDGE L.J.* 346, 353–54 (2004); Philip Schofield, *Jeremy Bentham, The Principle of Utility, and Legal Positivism*, 56 *CURRENT LEGAL PROBS.* 1, 35 (2003) [hereinafter Schofield, *Jeremy Bentham*]; Philip Schofield, *Jeremy Bentham and HLA Hart's 'Utilitarian Tradition in Jurisprudence'*, 1 *JURISPRUDENCE* 147 (2010). In part, these essays highlight the dangers of anachronism in using contemporary categories to describe the views of theorists who would have not recognized them. In this case, the interpretive difficulty with regard to Bentham's work largely dissipates once we understand that, unlike contemporary legal positivists, Bentham was a positivist. As I said above, perhaps ironically, positivist legal positivists have had little trouble with acknowledging connections between law and morality while insisting on a separation between law as it is and law as it ought to be. See the discussion in *supra* Part I.B.

63. On the methodological similarities between Hobbes and Bentham, see GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 314 (1986); James E. Crimmins, *Bentham and Hobbes: An Issue of Influence*, 63 *J. HIST. IDEAS* 677, 679–80 (2002).

64. See JEREMY BENTHAM, *Nonsense upon Stilts*, in *RIGHTS, REPRESENTATION, AND REFORM*, 317, 317 (Philip Schofield et al. 2002).

65. See ROSS HARRISON, *BENTHAM* 24–46 (1983); PHILIP SCHOFIELD, *UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* 1–27 (2006) [hereinafter SCHOFIELD, *UTILITY*].

66. Schofield, *Jeremy Bentham*, *supra* note 62, at 13 (quoting Jeremy Bentham (unpublished manuscript, on file with University College London as the Jeremy Bentham Papers, box Ixix at 241)).

67. John Stuart Mill, *Bentham*, in *10 THE COLLECTED WORKS OF JOHN STUART MILL* 75, 83 (Univ. of Toronto Press 1969) (1838) (footnote omitted); accord L.J. HUME, *BENTHAM AND BUREAUCRACY* 59 (1981).

the common law for its obscurity, confusion, retroactivity, and much more. But important for our purposes is what this attack tells us about Bentham's philosophical outlook. For example, what Bentham found fundamentally wrong in Blackstone's work was the place he gave to tradition and history, factors that are of no value whatsoever in assessing the merit of the law: "Our business is not with antiquities but with Jurisprudence. The past is of no value but by the influence it preserves over the present and the future. . . . Let us reflect that our first concern is to learn how the things that are in our power *ought to be*. . . ." <sup>68</sup> But even for understanding how things are, there was little room for paying much attention to what lawyers said about it. Bentham had little sympathy for the view that understanding law required adopting the internal perspective of the lawyer because he thought that much of legal discourse was fictional: "[Lawyers] can no more speak at their ease without a fiction in their mouth, than Demosthenes without pebbles. Such is the power of professional prejudice to deprave the understanding."<sup>69</sup> For him, the typical lawyerly tendency to become enclosed within the web of cross-referential legal documents that use their "internal," technical jargon was a sure way of obscuring reality, not grasping it. Blackstone's attempt of rationalizing English law had many faults, but its most fundamental error had been his attempt to make sense of the legal realm and to rationalize the law from within, without ascertaining first which parts of it reflected reality.<sup>70</sup>

Bentham's alternative based law on foundations consistent with his metaphysical worldview. As already mentioned, the starting point for his ethical theory was the observation that "[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*."<sup>71</sup> In this way his utilitarian theory was intended to turn a soft area governed by subjective prejudices and mere "unfounded sentiments" into an objective, quantifiable, and measurable science; in other words, Bentham sought a "*reformation* in the *moral* [world]"<sup>72</sup> along the same line of methods and developments found in the natural world. His goal was that ethics would

68. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 314 (J.H. Burns & H.L.A. Hart eds., Univ. of London Athlone Press 1977) (1776) [hereinafter BENTHAM, COMMENT] (footnote omitted).

69. *Id.* at 58 (footnote omitted).

70. See HARRISON, *supra* note 65, at 32–33; POSTEMA, *supra* note 63, at 271–72. Bentham thought that lawyers adopted these fictions in part because it made their services necessary. See SCHOFIELD, UTILITY *supra* note 65, at 126–28; POSTEMA, *supra* note 63, at 286.

71. BENTHAM, *supra* note 35, at 11.

72. See BENTHAM, COMMENT, *supra* note 68, at 393 (emphasis omitted).

become “as nearly perfectly demonstrable as mathematics” by “transferring the science of number to legislation.”<sup>73</sup>

A scientific endeavor of this sort required understanding human nature, which is why after outlining his goals at the outset of his *Introduction to the Principles of Morals and Legislation*, Bentham turned to an extended discussion of intention, motives, pain, pleasure, and other psychological phenomena.<sup>74</sup> Only after clarifying those Bentham turned to morals and legislation.<sup>75</sup>

Another aspect of Bentham’s work that derives from his positivistic outlook was his conception of legal theory, which is thoroughly practical: the main purpose of law on this view was to assist in achieving the goal of greatest happiness to the greatest number of people,<sup>76</sup> and he thus conceived of jurisprudence as the scientific study of the way to bring about this goal in the most rational manner. It is thus conceived as a “practical science”—the science of curing society of its ills.<sup>77</sup> To the extent that Bentham’s jurisprudence engaged in “conceptual” questions, he did so only as much as he thought necessary for his concern with legal reform. But even here he was faithful to his positivist credo: both his account of what law is and his explanation of its normativity—the way in which law obligates—are thoroughly grounded in observed fact.<sup>78</sup>

73. MARY P. MACK, *JEREMY BENTHAM: AN ODYSSEY OF IDEAS, 1748–1792*, at 269 (1962). She adds:

Throughout his entire life, throughout all the different branches of law, Bentham tried to apply mathematics to morals and legislation: in private substantive law, with attempts to find money equivalents for pleasures and pains; in procedure, by efforts to fix a scale of the probative value of different kinds of evidence; and in private and constitutional law, by considering the numbers of people affected as one test of right and wrong.

*Id.* at 270. In a book by Bentham entitled *Deontology* he says: “The law-giver should be no more impassioned than the geometrician. They are both solving problems by sober calculation.” 2 JEREMY BENTHAM, *DEONTOLOGY; OR THE SCIENCE OF MORALITY* 19 (John Bowring ed., 1834). Though the sentiment is clearly Benthamite, Bentham’s authorship of much of this manuscript, including this sentence, is suspect. See Amnon Goldworth, *Editorial Introduction*, in JEREMY BENTHAM, *DEONTOLOGY* xi, xxx–xxxiii (Amnon Goldworth ed., 1983).

74. HARRISON, *supra* note 65, at 137–38.

75. By contrast, it should not come as a surprise that religion had no place within this enterprise. See JAMES E. CRIMMINS, *SECULAR UTILITARIANISM: SOCIAL SCIENCE AND THE CRITIQUE OF RELIGION IN THE THOUGHT OF JEREMY BENTHAM* 98 (1990) (for Bentham “[w]here religion was opposed to utility it was pernicious, where it agreed with it, it was entirely superfluous”). On Bentham’s religious skepticism see also James E. Crimmins, *Bentham on Religion: Atheism and the Secular Society*, 47 J. HIST. IDEAS 95 (1986); J.E. Crimmins, *Bentham’s Religious Radicalism Revisited: A Response to Schofield*, 22 HIST. POL. THOUGHT 494, 499–500 (2001).

76. See SCHOFIELD, *UTILITY*, *supra* note 65, at 44–48.

77. See MACK, *supra* note 73, at 262, 264.

78. See P.M.S. HACKER, *Sanction Theories of Duty*, in *OXFORD ESSAYS IN JURISPRUDENCE* (SECOND SERIES) 131, 138 (A.W.B. Simpson ed., 1973).



Perhaps most interestingly, the accompanying psychological methodology he came to adopt was “external,” that is, he sought to explain mental life by means of observed phenomena. His reasons for this approach combine the familiar difficulty of knowing what goes on in other people’s minds<sup>79</sup> with the less familiar (and given what we now know, quite prescient) claim that the contents of a person’s mind are often only fuzzily known even to the person herself.<sup>80</sup> This implies that even introspection is an unreliable guide for individuals’ mental states. Bentham’s alternative was to focus on the measurable effects of the law on happiness.<sup>81</sup> In all this he rejected what has become the hallmark of contemporary legal positivism, the “internal point of view.”

John Austin’s theory of law is in many respects indebted to Bentham’s ideas—so much so that it is sometimes suggested that Austin had little originality and that whatever minor fame he now enjoys is due only to the accident of history that his writings on jurisprudence were more available (and perhaps slightly more readable) than those of his greater mentor.<sup>82</sup> There is some truth to this claim—there is no doubt that Austin was much influenced by Bentham—but it obscures their very significant differences. I suspect this error is the result of only considering the surface of both writers’ jurisprudence while ignoring the very different philosophical foundations on which it was built. These differences have led their legal theories in different directions.

Austin and Bentham’s intellectual temperaments were utterly different: Bentham was a political radical, who tirelessly argued for universal suffrage, the separation of church and state, decriminalization of homosexual acts, improvements in prison conditions, and many other causes decades before they became mainstream; Austin was an arch-conservative who opposed most of these reforms.<sup>83</sup> It is perhaps this

79. See MACK, *supra* note 73, at 231.

80. See JEREMY BENTHAM, *THE BOOK OF FALLACIES* 372–75 (1824). This is the orthodox view among psychologists today. See John Mikhail, *Law, Science, and Morality: A Review of Richard Posner’s The Problematics of Moral and Legal Theory*, 54 *STAN. L. REV.* 1057, 1093–94 & n.221 (2002) (book review).

81. See the discussion in SCHOFIELD, *UTILITY*, *supra* note 65, at 24–26, 75–77.

82. See, e.g., ELIE HALÉVY, *THE GROWTH OF PHILOSOPHIC RADICALISM* 483 (Mary Morris trans., 1928); cf. DAVID LYONS, *ETHICS AND THE RULE OF LAW* 10–11 (1984) (suggesting that apart from their differences on the divine foundations of morality Bentham’s “legal and moral theory is otherwise similar to Austin’s”).

83. It is sometimes suggested that Austin was (like Bentham) a philosophical radical. See, e.g., HART, *ESSAYS*, *supra* note 8, at 51–52; TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 4, 74 (1996). But this is a mistake. See Eira Ruben, *John Austin’s Political Pamphlets 1824–1859*, in *PERSPECTIVES IN JURISPRUDENCE* 20 (Elsbeth Atwooll ed., 1977) (demonstrating Austin’s conservatism).

difference that accounts for their divergent attitudes to legal theory. In one of his early critiques of Blackstone, Bentham distinguished between the “expositor,” the scholar who described what the law is, and the “censor,” who focused on assessing the law.<sup>84</sup> Bentham was always a censor and engaged in theoretical abstract work as necessary groundwork for his practical plans for reform. By contrast, Austin envisaged jurisprudence as the study of positive law, and much of his work was concerned with an analysis and clarification of concepts important for understanding what law is. As Mill wrote, Austin saw his task as that of “[t]he untying of intellectual knots.”<sup>85</sup>

It is thus in Austin’s work that we see a transition from the positivism of Hobbes and Bentham to the anti-positivist version of legal positivism that became predominant in the twentieth century.<sup>86</sup> We see an account of law grounded in observable fact: law is the empirically observed command of the empirically observed sovereign (the sovereign is simply the person or group of persons that others are in the habit of obeying but does not obey others); and his explanation of the way law creates obligations (that is, his explanation of law’s normativity) is grounded in the fact that violation of legal rules is habitually followed by sanctions. Methodologically, we can safely ascribe to him a rejection of historicism and scientism in his analysis of law,<sup>87</sup> although he probably has held a less extreme view on materialism.<sup>88</sup>

Crucially, though, in his work we see the birth of what has come to be known as “analytic jurisprudence,” the analysis of fundamental legal concepts from “within.”<sup>89</sup> For his work was primarily concerned with the

84. See BENTHAM, COMMENT, *supra* note 68, at 7–8.

85. Mill, *Austin on Jurisprudence*, *supra* note 16, at 168.

86. One interpreter of Austin’s work has argued that he is better understood as an “empiricist”, a view that would be inconsistent with the reading of Austin that I offer in the text. See W.L. MORISON, JOHN AUSTIN 146–47, 178, 189 (1982); W.L. Morison, *Some Myth about Positivism*, 68 YALE L.J. 212, 223 (1958). But Morison’s reading of Austin has been trenchantly criticized in ROBERT N. MOLES, DEFINITION AND RULE IN LEGAL THEORY: A REASSESSMENT OF H.L.A. HART AND THE POSITIVIST TRADITION 30–37 (1987).

87. See Andreas B. Schwarz, *John Austin and the German Jurisprudence of His Time*, 1 POLITICA 178, 187–88 (1934); Mill, *Austin on Jurisprudence*, *supra* note 16, at 173 (describing Austin’s work as concerned with “stripping off what belongs to the accidental or historical peculiarities” of a particular legal system in order to identify “universal” elements of law).

88. Unlike Bentham, Austin was a religious believer, and his utilitarianism was not Bentham’s scientific theory; it was the irrefutable claim that God wished people to be happy and that human institutions were largely an embodiment of God’s will. See Philip Schofield, *Jeremy Bentham and Nineteenth-Century English Jurisprudence*, 12 J. LEGAL HIST. 58, 63 (1991).

89. On Austin’s place in the emergence of analytic jurisprudence see Dan Priel, *H.L.A. Hart and the Invention of Legal Philosophy*, 5 PROBLEMA: ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 301 (2011). The resemblance between Austin’s work and that of twentieth century ordinary language

delimitation of the domain of positive law and positive morality from the domain of ethics. Once so distinguished, much of his work was dedicated to the analysis of concepts like law, sovereignty, command, sanction, rights, and duties by focusing on their *internal* relations, not their empirical reality.

This focus was fertile ground for adoption by twentieth century philosophers who were preoccupied with conceptual analysis. Indeed, Hart's influential critique of Austin's work was largely dedicated to eradicating the remaining scientific elements Austin had taken from Bentham: he rejected the observable account of obligation in favor of an alternative that sought to explain it from the internal point of view; and he introduced the notion of a "rule" as something whose objective reality cannot be reduced to habits or predictions of behavior, or to the feelings of certain individuals,<sup>90</sup> as an alternative to Austin's observable command. Hart retained, however, Austin's focus on the analysis of concepts and their internal relations instead of Bentham's concern with understanding the legal domain as part of a broader account of reality. It matters little here whether this critique was based on a misunderstanding of Austin's work;<sup>91</sup> what matters is how his work was used as part of a major realignment of legal positivism away from its positivist origins.

### 3. *Alf Ross*

The predominance of Hart's work has led to the relative neglect of the writings of other legal positivists working around the time he was active. One group of scholars, often grouped together as the "Scandinavian legal realists," developed ideas that were very different from Hart's in important respects. As a result of the little interest in their work, there is a tendency to huddle under this banner a diverse group of scholars, even though there are important differences between them.<sup>92</sup> To avoid possible misrepresentation and to keep this discussion to reasonable length, I will

philosophers like Hart led one commentator to argue that Austin could count as one. See Alan R. White, *Austin as a Philosophical Analyst*, 64 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 379 (1978); but see Gerard Maher, *Analytical Philosophy and Austin's Philosophy of Law*, 64 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 401 (1978) (challenging this view).

90. See HART, CONCEPT OF LAW, *supra* note 6, at 57, 88, 138.

91. See MOLES, *supra* note 86, at 16–30, 42–80 (claiming that Hart misunderstood Austin's aims). Although Moles makes some important points, I think he overstates his case in his zeal to rehabilitate Austin.

92. For those differences see Stig Jørgensen, *Scandinavian Legal Philosophy*, 9 RECHTSTHEORIE BEIHEFT 289 (1986); Jacob W.F. Sundberg, *Scandinavian Unrealism: Co-Report on Scandinavian Legal Philosophy*, 9 RECHTSTHEORIE BEIHEFT 305 (1986).

only discuss here the work of Alf Ross, a Danish legal theorist, who is probably the best known scholar in this group.

Ross's work is important for trying to maintain and amplify the connection between positivism and legal positivism and in this way further develop the approach found in Bentham's work. Indeed, in Ross's work one finds some of the clearest links between the two views. Legal positivism, he said, is not just a substantive thesis about the relation between law and morality:

[It is also] a doctrine pertaining to the theory or methodology of legal science. It asserts the possibility of establishing the existence and describing the content of the law of a certain country at a certain time in purely factual, empirical terms based on the observation and interpretation of social facts (human behaviour and attitudes).<sup>93</sup>

For Ross this meant that his "realist jurisprudence" was based on "the desire to understand the cognition of law in conformity with the ideas of the nature, problems and method of science as worked out by modern empiricist philosophy" because "[t]here is only one world and one cognition."<sup>94</sup> This meant that, just like Bentham, Ross sought to clear the discussion from what he took to be meaningless legal talk that "bear[s] a considerable structural resemblance to primitive magic thought concerning the invocation of supernatural powers which in turn are converted into factual effects."<sup>95</sup> The magic involved the introduction of "imaginary rights" "between the juristic fact and the legal consequence."<sup>96</sup>

Ross's theory of law rejected all that and represented a conscious effort to explain legal phenomena and their normative force in terms of empirical facts. He translated the notion of valid law to the empirically testable notion of the predicted future behavior of legal officials.<sup>97</sup> Along similar

93. Alf Ross, *Validity and the Conflict between Legal Positivism and Natural Law*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 147, 149 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998) [hereinafter Ross, *Validity*].

94. ALF ROSS, *ON LAW AND JUSTICE* 67 (1959) [hereinafter ROSS, *LAW AND JUSTICE*]; see also *id.* at 25 ("[Philosophy] is no theory at all, but a method. This method is logical analysis. Philosophy is the logic of science, and its subject the language of science.").

95. See Alf Ross, *Tü-Tü*, 70 *HARV. L. REV.* 812, 818 (1957). Possibly inspired by Horace Miner, *Body Ritual among the Nacirema*, 58 *AM. ANTHROPOLOGIST* 503 (1956), Ross's essay started with a recounting of the strange traditions of a tribe called Noit-cif (get it?) for the sake of revealing the fictional nature of much of legal discourse, and the way in which it could be translated into meaningful language by focusing on the legal consequences of legal rules.

96. Ross, *supra* note 95, at 818.

97. ROSS, *LAW AND JUSTICE*, *supra* note 94, at 39–44; Ross, *Validity*, *supra* note 93, at 161.

lines he argued that law's normativity could not be explained by recourse to morality, for morality was nothing but an expression of an individual's pro- or con-attitude: as he put it "[t]o invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate."<sup>98</sup> Instead, the normativity of law was to be explained in empirical terms. While he rejected the idea that the law could be explained in purely behavioral terms, he believed the explanation had to combine empirical observation of behavior with an investigation into the psychological attitudes that accompany legal rule-following.<sup>99</sup> This may sound rather similar to Hart's "internal point of view," but, unlike Hart, Ross emphasized the *feeling* of being bound by a rule, something he took to be a measurable fact that distinguishes law from a robber's demand.<sup>100</sup>

It should be clear from what has already been said that history played a minor role in the development of Ross's ideas. In his analysis of competing theories, he considered whether historical jurisprudence could be understood as an attempt at "empirical legal-sociological theory of the dependence of law on the community"—but concluded that it could not because it "has nothing to do with the causality of nature,"<sup>101</sup> and, as such, it was nothing but discredited natural law in disguise.<sup>102</sup>

#### 4. *Hans Kelsen*

We already see that the suggestion that there is no connection between positivism and legal positivism is the result of a narrow focus on a small group of legal theorists whose views are in no way representative of the views of many legal positivists. To conclude this Part it is worth considering the unusual work of Hans Kelsen. Though Kelsen spent much of his career in the United States, his ideas developed in a philosophical environment quite different from what he found in there. Equally important, his jurisprudential ideas were rooted in the civil law tradition, and are therefore not always easy to translate to common law concepts more familiar to most Anglophone legal philosophers.<sup>103</sup> Moreover, his

98. ROSS, *LAW AND JUSTICE*, *supra* note 94, at 274.

99. *Id.* at 37, 73–74; ALF ROSS, *DIRECTIVES AND NORMS* 87 (1968) ("Not any disagreeable reaction is a sanction. The notion of a sanction is intimately connected with the feeling of disapproval. A merely external record of behaviour must lead to unacceptable results, by abstracting from the meaning of the reaction and its mental background.").

100. *Id.* at 93, 99.

101. ROSS, *LAW AND JUSTICE*, *supra* note 94, at 346.

102. *Id.* at 249–52.

103. *Cf.* Dan Priel, *Is There One Right Answer to the Question of the Nature of Law?*, in *THE NATURE OF LAW: CONTEMPORARY PERSPECTIVES* (W.J. Waluchow & Stefan Sciaraffa eds.,

work often built upon and discussed the work of earlier European scholars who are virtually unknown in the English-speaking world. It is probably for this reason that his work, which continues to have considerable influence to this day in civil law countries, is not as discussed in Anglo-American circles. Nonetheless, he is widely considered one of the twentieth century's foremost legal positivists, and has advanced a strikingly original version of legal positivism.

At the same time, Kelsen was also a positivist, and a rather extreme one at that. And yet he is in a way an outlier in this group of positivist legal positivists, for he reached radically different conclusions than all the other legal positivists discussed in this Section. Because of the distinctiveness of his view, it is worth discussing it at somewhat greater length. Importantly, as I will try to show, Kelsen's commitment to positivism is crucial for understanding his unusual jurisprudential views.

Kelsen was clearly a materialist who believed that the rejection of "metaphysical dualism" came about "through the advance of empirical science," which gives people "the courage to discard the realm of the transcendent."<sup>104</sup> Gone from this picture is any sense of morality and religion beyond that of a cultural attitude of a particular group.<sup>105</sup> In a short but revealing comment on the impact of scientific inquiry on questions of value, he said:

True science . . . cannot but destroy the illusion that judgments of value can be derived from cognition of reality or, what amounts to the same, that values are immanent in the reality which is the object of scientific study. The view that value is immanent in reality is a characteristic feature of a metaphysical-religious (and this means non-scientific) interpretation of nature and society. It necessarily

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forthcoming 2012), available at <http://ssrn.com/abstract=1835982>, at 20.

104. Hans Kelsen, *Natural Law Doctrine and Legal Positivism*, in GENERAL THEORY OF LAW AND STATE 389, 433 (Wolfgang Herbert Kraus trans., 1945) [hereinafter Kelsen, *Natural Law Doctrine*]. But he immediately expresses a neo-Kantian view inconsistent with logical positivism. See *id.* at 433–34.

105. See, e.g., Hans Kelsen, *What is Justice?*, in WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE 1, 21 (1957) ("If the history of human thought proves anything, it is the futility of the attempt to establish, in the way of rational considerations, an absolutely correct standard of human behavior as the only just one . . . [and that] only relative values are accessible to human reason . . ."); *id.* at 20 ("Norms prescribing human behavior can emanate only from human will, not from human reason . . ."). Another formulation of this idea is his claim that his pure theory cannot answer questions about justice, because as "a science," it cannot answer questions that "cannot be answered scientifically at all," as "judgment[s] of value [are] determined by emotional factors and therefore subjective in character . . ." Kelsen, *Analytical Jurisprudence*, *supra* note 20, at 45.

implies the assumption that both are the creation of God as the personification of the absolute good.<sup>106</sup>

This implied that natural law was wrong because it could not survive the trial at what Kelsen called the “tribunal of science.”<sup>107</sup> By contrast, the right theory was based on the view that “positive law is taken solely as a human product, and a natural order inaccessible to human cognition is in no wise considered as necessary for its justification.”<sup>108</sup>

Kelsen did not deny that it is possible to explain human relations in terms of natural science, that is, in causal terms. He himself explained the resurgence of natural law theory as the result of the events that took place in the early twentieth century and the desire to attain some sense of stability that he associated with the absolute order of value presupposed by natural law theory.<sup>109</sup> But none of this had any bearing on an explanation of what law actually was. For this end one had to turn to the normative science he created.<sup>110</sup>

His theory was interested in human relations only to the extent that they are constituted by law.<sup>111</sup> The resulting account is a “closed” theoretical construct in which, as Kelsen was fond of saying, “law governs its own creation.”<sup>112</sup> This is the idea with which Kelsen also explains how Kelsen sought to explain the normativity of law, the sense in which law creates obligations. As we have seen, many positivists tried to show that there is something in the world that could ground law’s normativity. But Kelsen thought this solution impossible: “An ‘ought’ must always be deduced from another ‘ought’; it never follows from a mere ‘is’.”<sup>113</sup> His answer therefore depended on the *presupposition* of a normative domain. Kelsen posited a hierarchical structure in which each norm is validated by a norm higher up the normative scale: bylaws validated by statutes, and

106. Hans Kelsen, *Science and Politics*, 45 AM. POL. SCI. REV. 641, 648 (1951) [hereinafter Kelsen, *Science and Politics*].

107. Hans Kelsen, *The Natural-Law Doctrine Before the Tribunal of Science*, 2 W. POL. Q. 481, 482–85, 501 (1949) [hereinafter Kelsen, *Tribunal of Science*]; Kelsen, *Analytical Jurisprudence*, *supra* note 20, at 47–48.

108. Kelsen, *Natural Law Doctrine*, *supra* note 104, at 435.

109. *Id.* at 445.

110. HANS KELSEN, PURE THEORY OF LAW 75–76 (Max Knight trans., 1970) (2d ed. 1960). For this reason Kelsen criticized Comte’s positivism. *See* Kelsen, *Tribunal of Science*, *supra* note 107, at 501–02.

111. KELSEN, *supra* note 110, at 70.

112. *See, e.g.*, HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 63 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Clarendon Press 1992) (1934) [hereinafter KELSEN, PROBLEMS].

113. Hans Kelsen, *Value Judgments in the Science of Law*, 7 J. SOC. PHIL. & JURIS. 312, 324 (1942).

statutes by the constitution. But this structure by itself still misses the crucial ingredient that turns words written on a piece of paper into laws that have normative force. Kelsen's solution to this challenge was to posit what he called the "Basic Norm," which "allows legal cognition to supply a meaningful interpretation of the legal material [and which] ultimately . . . guarantees this complex of norms as an order."<sup>114</sup>

The Basic Norm is an essential part of Kelsen's theory, which he called the "pure theory of law." It is pure, among other reasons, because it does not try to explain the normativity of law by appeal to any social fact. The Basic Norm is a theoretical presupposition necessary to explain the normative aspect of law, but the Basic Norm itself is not explained by reference to people's *beliefs* that there is a legal norm in existence or their *feelings* of being under obligation. Such beliefs and feelings may exist, but these are sociological or psychological facts about individuals (and as such a matter of "is") and therefore incapable of explaining the normative aspect of law. A scientific approach, which is what Kelsen was seeking, can only explain law as a hypothetical presupposition observed by a "legal scientist" standing outside the practice.<sup>115</sup> The presupposition guarantees that the normativity of law is not dependent on—indeed it is oblivious to—any empirical fact. As he put it, his work was "describing human behavior; but it does not describe it as it takes place as cause and effect in natural reality."<sup>116</sup>

It follows that for Kelsen there is a fundamental difference between natural science and normative science. The former deals exclusively with the domain of facts, and its object is the discovery of the laws of nature, which are governed by causation; the latter exists purely in the domain of norms, a domain that has no room in it for any facts (including no facts about beliefs or attitudes) and is governed by a relation Kelsen called "imputation."<sup>117</sup> In the same way that in the domain of facts causation is what ties causes and effects, in the normative domain imputation is the relation between a norm and what *ought* to happen, which is different from

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114. Kelsen, *Natural Law Doctrine*, *supra* note 104, at 406–07.

115. Kelsen, *Science and Politics*, *supra* note 106, at 650–51.

116. *Id.* at 651. Marmor is thus wrong to say that Kelsen "clearly recognized" the internal point of view "as crucial to any account of a normative system . . ." MARMOR, *supra* note 9, at 54; *id.* at 23–24. The essence of Kelsen's pure theory was the rejection of any links with "psychology and biology, . . . ethics and theology." KELSEN, PROBLEMS, *supra* note 112, at 8.

117. KELSEN, *supra* note 110, at 76, 86. One problem with natural law theories according to Kelsen was that they sought to explain law in terms of causation, "where cause and effect are connected by the will of a divine creator." *Id.* at 77. See generally Hans Kelsen, *Causality and Imputation*, 61 ETHICS 1 (1950).



what is likely to happen (as many legal norms are not adequately enforced) and from what should happen (as this only reflects a natural fact about people's preferences).

All this superficially resembles the work of the logical positivists, but in fact it represents an inversion of their ideas.<sup>118</sup> The logical positivists' sharp distinction between the domain of science and the domain of philosophy looks a bit like Kelsen's distinction between the domain of empirical investigation on law and the domain of legal norm. But while Kelsen seems to have been content with maintaining jurisprudence as the separate domain of pure norm, the concern of the logical positivists writing on human behavior was with the establishment of a unified science in which, ultimately, the complete description of human behavior would be "framed in the spirit of contemporary physics, e.g., a behavioristic description."<sup>119</sup> Within such an account, Kelsen's separation between the domain of fact and the domain of norm is completely untenable. The contrast between the two approaches is evident, for example, in the way Otto Neurath, a prominent logical positivist, reacted to Kelsen's theory. As Neurath put it, Kelsen's error was his failure to recognize that within a unified science, ethics and jurisprudence "cannot maintain their independence."<sup>120</sup>

It is this insistence on the independence of jurisprudence's that helps explain why so many have found Kelsen's ideas so unhelpful, and, quite frankly, so strange: Kelsen was single-mindedly determined that the task of jurisprudence is *not* to explain law as a social phenomenon. Though he shared both his positivism and his legal positivism with many others, his understanding of these ideas distinguishes his views from almost all other legal theorists, at least within the Anglo-American tradition.

118. This may explain why Alf Ross, who, as we have seen, quite explicitly followed the logical positivists in his work on law, called Kelsen a "quasi-[legal-]positivist." Ross, *Validity*, *supra* note 93, at 159–60; *cf.* ALF ROSS, *TOWARDS A REALISTIC JURISPRUDENCE: A CRITICISM OF THE DUALISM IN LAW* 44 (1946).

119. Otto Neurath, *Sociology and Physicalism*, in *LOGICAL POSITIVISM*, *supra* note 27, at 282, 286 (originally published 1931). See generally Michael Friedman, *The Re-Evaluation of Logical Positivism*, 88 *J. PHIL.* 505 (1991) (outlining the philosophical ideas of the logical positivists and rejecting the claim that they sought to explain the foundations of science in logic).

120. Neurath, *supra* note 119, at 309. See also similar comments on Kelsen's work in VON MISES, *supra* note 27, at 332, 396 n.2. Interestingly, Neurath also added another bit of criticism that sounds as though it could have come from the mouth of any legal realist: "No special discipline . . . is required to test the logical compatibility of the rules for the administration of a hospital. What one wishes to know is how the joint operation of certain measures affects the standard of health, so that one may act accordingly." Neurath, *supra* note 119, at 308.

### B. *Anti-Positivist Legal Positivism*

The discussion so far has sought to show that the rise of legal positivism is related to the rise of positivism. The two often reflect similar underlying attitudes about the world and about the right methods for explaining phenomena in it. However, since the second part of the nineteenth century, and especially since Hart's work in the 1960s, by far the more popular strand within legal positivism has been anti-positivistic. There can be little doubt that the prominence of this approach was in part a reaction to growing suspicion of science and the potential pitfalls of applying scientific method to the study of humans. Especially in the period following World War II, memory of the pseudoscience used to justify Nazi racial laws was still fresh, and fears of nuclear disaster during the Cold War years was on many people's minds. What made Gustav Radbruch cross the lines from legal positivism to natural law,<sup>121</sup> may have also been instrumental to the growing divergence between positivism and legal positivism. Moreover, those who did look to the leading scientific approach to psychology of that age, behaviorism and Freudian psychoanalysis, had good reasons to doubt the validity of both. What is now known as the cognitive revolution in psychology was only beginning to take shape around that time, and there was not much in the work of psychologists that seemed very helpful for understanding the complex human interactions one finds in law and morality.<sup>122</sup> It was thus not

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121. Radbruch was a German legal philosopher, who was a legal positivist but switched sides to natural law after World War II blaming the prevalence of legal positivist ideas on the little resistance among lawyers to Nazi ideology. On Radbruch and his conversion see Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 481–85 (1954) (book review). On the impact of what were perceived to be the scientific excesses of the legal realists on the demise of legal realism see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 162–72 (1973).

122. Psychology at the time was largely dominated by behaviorism and much experimental testing seemed focused on observed bodily reaction to external stimuli. See DANIEL NETTLE, *HAPPINESS: THE SCIENCE BEHIND YOUR SMILE* 8–9 (2005) (“In the mid-twentieth century, psychologists were much more at home discussing rates of eye-blinking than love or joy . . . . Indeed, the folk psychology of ordinary conversation . . . was thought of by professionals as simply *bad psychology* . . . .”); STEVEN PINKER, *HOW THE MIND WORKS* 84 (1997). This may have made it more difficult to see the relevance of psychology to law. The cognitive revolution that took place in the late 1950s has radically changed all that. See George A. Miller, *The Cognitive Revolution: A Historical Perspective*, 7 TRENDS IN COGNITIVE SCI. 141 (2003). For criticism of Hart for ignoring its impact see John Mikhail, “*Plucking the Mask of Mystery from Its Face*”: *Jurisprudence and H.L.A. Hart*, 95 GEO. L.J. 733, 751–57 (2007) (reviewing LACEY, *supra* note 18). Mikhail expresses puzzlement how Hart, despite his obvious interest in language, did not take interest in the breakthroughs in psychology and linguistics that took place at the time. *Id.* at 755. Part of the answer is provided by this essay: Hart was interested in language for its role in providing an anti-positivist, humanistic understanding of human action. From this perspective cognitive psychology probably seemed not very different from behaviorism.

unreasonable to think that science had reached its limits as far as the explanation of human behavior was concerned.

In this Part I examine the methodological foundations of the work of the best known legal positivists of this period and argue that their ideas must be understood, at least in part, as a reaction to these developments.

### 1. *H.L.A. Hart*

Hart was a moral skeptic of sorts: his brief excursion into moral philosophy in *The Concept of Law* sought to give a “natural history” of morality that showed it to be premised on certain contingent facts, minimalist in content and “positivist” in outlook.<sup>123</sup> Though he never wrote much on the topic, Hart was clearly sympathetic to skeptical metaethical views when, later in his life, he had occasion to review three books expressing such ideas.<sup>124</sup> In his jurisprudential work, Hart was concerned to challenge theories based in “obscure metaphysics,” and in particular he criticized natural law theories for their foundation in “much metaphysics which few could now accept.”<sup>125</sup>

Hart’s views, then, have some links to positivism. He sought to provide an account of law grounded in facts, although his focus was on the facts of legal practice, something he thought he could explain without engaging in deep metaphysical questions of the sort that explicitly ground the work of Hobbes and Bentham. His path to understanding law gave very little place to history. It is true that he had a story to tell about the emergence of the legal system, but it was more a thought experiment than a historical account. Fundamentally, Hart saw his project as an attempt to provide a “general” description of what makes something into law in all times and places,<sup>126</sup> and this does not sit well with too much attention to the contingencies of history.

123. HART, *CONCEPT OF LAW*, *supra* note 6, at 191–92; *see also* Danny Priel, *Were the Legal Realists Legal Positivists?*, 27 *LAW & PHIL.* 309, 331–32 & n.48 (2008), although I may have exaggerated Hart’s positivism there.

124. *See* H.L.A. Hart, *Morality and Reality*, N.Y. REV. BOOKS, 9 March 1978 (reviewing GILBERT HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* (1977) and J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONGS* (1977)); H.L.A. Hart, *Who Can Tell Right from Wrong?*, N.Y. REV. BOOKS, 17 July 1986 (reviewing WILLIAMS, *ETHICS*, *supra* note 5).

125. HART, *CONCEPT OF LAW*, *supra* note 6, at 188; *id.* at 84.

126. *Id.* at 239–44. Early on in the book Hart admitted his account was “unhistorical.” *Id.* at 17; *see also supra* note 9 and accompanying text. For a critique of the lack of historical sense in this approach, *see* Morton J. Horwitz, *Why Is Anglo-American Jurisprudence Unhistorical?*, 17 *OXFORD J. LEGAL STUD.* 551 (1997).

While Hart was a positivist in these senses, in other respects that have proven much more influential he rejected positivism. Hart was, at least for a while, a practitioner of ordinary language philosophy, and many of his earlier (and still most widely read) works were, to varying degrees, committed to its methodology. Frequently maligned these days as an attempt to solve metaphysical puzzles by attention to the way people use language, ordinary language philosophy is better understood as an attempt to offer a humanistic alternative to the scientism of the logical positivists. Ultimately, what the ordinary language philosophers sought was an affirmation of the validity of separate “human sciences” alongside the “natural sciences.” And it is this commitment that runs throughout Hart’s work. In a lecture he delivered in 1958 he said that one should avoid “disputable philosophy” when one could find the answer to one’s puzzles in “plain speech.”<sup>127</sup> And as late as 1983, when Hart summarized his philosophical position in an introduction to a collection of his essays, he was still sympathetic to what he called “linguistic philosophy,”<sup>128</sup> an approach that, as von Wright put it, is “intrinsically disposed against positivism.”<sup>129</sup>

The reason for Hart’s affinity with the ordinary language approach is essentially the same reason he was critical of certain aspects of positivism. Hart believed that positivism could not adequately explain human practices. In the course of discussing the work of Alf Ross he wrote “there is much that is questionable, indeed blinding, in the attempt to force the analysis of legal concepts or of any rules into the framework adapted for the empirical sciences.”<sup>130</sup> Some twenty-five years later he expressed this view even less equivocally, saying that for understanding rule-governed human behavior “the methodology of the empirical sciences is useless.”<sup>131</sup>

Hart’s doubts about the application of scientific methods to this domain extended also to social sciences like sociology or psychology.<sup>132</sup> Hart described his book *The Concept of Law* as not just an “essay in analytical jurisprudence,” but also “an essay in descriptive sociology.”<sup>133</sup> The reason

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127. HART, ESSAYS, *supra* note 8, at 78.

128. *Id.* at 2–4.

129. GEORG HENRIK VON WRIGHT, EXPLANATION AND UNDERSTANDING 9 (1971).

130. HART, ESSAYS, *supra* note 8, at 162.

131. *Id.* at 13.

132. See HART, CONCEPT OF LAW, *supra* note 6, 193, where he rather disparagingly calls psychology and sociology “still young sciences. . . .” See also *Hart Interviewed*, *supra* note 18, at 289 (“I was terribly mistrustful of sociology in general. That’s an Oxford disease. . . .”); see also Dan Priel, *Jurisprudence and Psychology*, in *NEW WAVES IN PHILOSOPHY OF LAW* 77, 79–81 (Maksymilian del Mar ed., 2011) (describing a skeptical attitude among Hart and his colleagues towards psychology).

133. HART, CONCEPT OF LAW, *supra* note 6, at vi.

why so many readers found this claim surprising is because there is so little in the book that looks like sociology. But I think the phrase captures something significant about the book: it represented what Hart thought sociology *should* look like. It was descriptive in the sense that it sought to give a politically neutral account of the nature of law, and it was sociology, indeed *good* sociology, exactly because it did not attempt to emulate the methods of the natural sciences (external investigation), their language (explanation by means of general laws that govern human behavior), or their goals (making testable predictions).

The right approach to sociology had to take seriously the “internal point of view”:<sup>134</sup> free from any obscure metaphysics on the one hand and resolutely not following the methodology of the empirical sciences on the other, this approach relied on the examination of language. In *The Concept of Law* Hart quoted J.L. Austin’s explanation of the importance of attending to language, that by focusing on language “we ‘are looking not merely at words . . . but at the realities we use words to talk about. We are using a sharpened awareness of words to sharpen our perception of the phenomena.’”<sup>135</sup> This sentence is revealing not just of a methodological technique. It also gives us a clue as to the *aims* of such philosophy, which are radically different from those set by the positivists: it is not to examine which part of legal discourse is fictional and which part is real, but rather to explain the social reality constituted by discourse. It follows that language is something that *by definition* cannot be mistaken. Linguistic philosophy, in other words, was for Hart sociology properly done. This is a decidedly anti-positivistic idea.<sup>136</sup>

## 2. Joseph Raz

Hart’s ideas on internal explanation have been further developed in a more robust and rigorous treatment of practical reasoning in a series of influential works written by Joseph Raz in the 1970s and 1980s. Focusing on reasons as the central ingredient for understanding rational action allowed Raz to largely ignore scientific explanations of action. In this way, Raz’s position is similar to that of Hart, except that Raz was, if anything, even more forthright in rejecting the few remnants of positivism that Hart

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134. *Id.* at 88–91.

135. *Id.* at 14 (quoting J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC’Y 1, 8 (1956)). The same quote appears also in HART, CONCEPT OF LAW, *supra* note 6, at vi.

136. My views on Hart’s brand of positivism accord with those in Brendan Edgeworth, *Legal Positivism and the Philosophy of Language: A Critique of H.L.A. Hart’s ‘Descriptive Sociology’*, 6 LEGAL STUD. 115, 127–28 (1986).

had retained in his work. In the course of discussing Hart's work, Raz has claimed that its least successful aspects "resulted from [Hart's] adherence to naturalism and to empiricist epistemology, and his rejection of evaluative objectivity."<sup>137</sup> For his part, Raz has argued that normativity consists in being related to reasons for belief, action, moods and so on,<sup>138</sup> and his account of reasons is strongly anti-materialist. Raz has also explicitly rejected the positivist perspective that begins with the correct metaphysical picture of the world and fits humans and their institutions and practices inside it. His opposite view is that "[m]etaphysical 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."<sup>139</sup> Correspondingly, Raz has defended a conception of philosophical inquiry which limits the philosopher's role to the identification of the necessary features of "our" concepts,<sup>140</sup> and, like Hart, he stresses the importance of understanding law from the point of view of those who participate in the practice.<sup>141</sup> He thus adopts what I called holism while rejecting (at least as far as philosophical inquiry is concerned) historicism.

The task of legal philosophy, for Raz, is to clarify from "within" the way legal practices play a role in the practical reasoning of individuals, to put them in clearer light and to highlight their important features. This approach, which seeks to explain human action in terms of practical reasoning, presupposes human action's "discontinuity with science."<sup>142</sup> Legal philosophy built on these foundations does not seek to challenge the human attitudes that constitute legal practices; it "merely explains the concept [of law] that exists independently of it."<sup>143</sup> Its ultimate aim is to help people "understand themselves."<sup>144</sup>

Thus, even though Raz's emphasis on practical reasoning instead of Hart's focus on language gives their respective theories somewhat

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137. JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 52 (2009) [hereinafter RAZ, BETWEEN].

138. JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 67–68 (1999).

139. RAZ, BETWEEN, *supra* note 137, at 228.

140. *See id.*, at 95–96.

141. JOSEPH RAZ, PRACTICAL REASON AND NORMS 170–77 (2d ed. 1990).

142. Stephen Darwall et al., *Toward Fin de siècle Ethics: Some Trends*, 101 PHIL. REV. 115, 132 (1992).

143. RAZ, BETWEEN, *supra* note 137, at 85. This is almost identical to Strawson's words quoted in the text accompanying note 30, *supra*.

144. JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 237 (rev. ed. 1995).

different flavors, what both accept is the distinctness of philosophical method and its relative autonomy from science.

### 3. *Other Legal Positivists*

It is difficult to exaggerate the influence of Hart and Raz on contemporary legal philosophy, and especially on legal positivism. The ringing endorsement to the “internal point of view” found in the writings of contemporary legal philosophers, among both legal positivists and their opponents, is proof of the long-lasting influence of Hart’s anti-scientistic approach.<sup>145</sup> The mainstream view among contemporary legal philosophers is that it is the primary task of jurisprudence to give a descriptively accurate account of the “concept” or “nature” of law, of what the law is, as distinct from what it should be. On what that nature actually is these writers have widely divergent views, but in their adoption of the basic stance of a description from the internal point of view and in their belief in its ability to provide a substantive, general, account of law, they seem to adopt the same anti-positivist approach that characterized Hart’s work.

What is particularly interesting is how this work, which received its first reasonably clear articulation in the late 1950s, has been used to reinterpret the works of earlier legal philosophers. Hart, for example, wrote that one of the things that Bentham and Austin were concerned to show was 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.”<sup>146</sup> But, as we have seen, at least with regard to Bentham this is clearly a mistake. At the same time, Hart often criticized earlier legal philosophers for failing to pay sufficient attention to the way the language of law is used and for ignoring the way people think about legal practice.<sup>147</sup> This criticism makes sense only if one assumes that earlier positivists shared with him the anti-positivist perspective, which, as we have seen, they did not. If this assumption is abandoned, much of Hart’s critique of earlier incarnations of legal positivism can no longer be taken as a glaring oversight on part of earlier legal theorists, but rather as a direct implication

145. See, e.g., Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 *FORDHAM L. REV.* 1171 (2006); Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157 (2006); Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 *FORDHAM L. REV.* 1229 (2006).

146. HART, *ESSAYS*, *supra* note 8, at 57.

147. See HART, *CONCEPT OF LAW*, *supra* note 6, at 36–38, 82–83, 88–89, 102–03, 138.

of their positivist outlook. Hart's failure to address the methodological background of this position renders his criticism of their position rather superficial and lacking in theoretical backing. Indeed, if we take Hobbes's and Bentham's positivism seriously, we have reason to think that Hart did not really address their views. More generally, we have then reason to doubt the traditional story about the development of legal positivism from the supposedly simple theory of law offered by Hobbes to the more sophisticated accounts found in the work of contemporary legal positivists.<sup>148</sup>

Distinguishing the two strands of legal positivism also allows us to assess their fates. Contrary to first impressions one would get from examining contemporary work, I believe it is the positivist strand of legal positivism that has been a success, whereas the anti-positivist one has been a rather dismal failure. True, many today take Hart's criticisms of positivism to be decisive. But the positivist strand is alive and well, outside the narrow confines of analytic legal philosophy. In more and more areas, we see the explanatory power of the external point of view, especially in the work of legal economists and political scientists who, many of them possibly without fully appreciating just how much, have been following Bentham's lead.<sup>149</sup>

By contrast, it is becoming increasingly clear that the attempt to recast legal philosophy as the enterprise of describing the "concept" of "nature" of law has not been a success. Instead of the internal point of view focusing the theorists' attention to the important aspects of law, it seems to have drawn participants into an increasingly insular debate that has not been particularly helpful in helping people understand themselves.<sup>150</sup>

### III. WERE THE LEGAL REALISTS POSITIVISTS?

So far I have shown how examining the relationship between positivism and legal positivism allows us to understand better the different views of different legal positivists and the historical development of this

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148. See Priel, *supra* note 10, for my attempt to a brief retelling of the emergence of contemporary legal positivism from the rather different views of Hobbes and Bentham; cf. James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383, 408–19 (1987).

149. Cf. Richard A. Posner, *Bentham's Influence on the Law and Economics Movement*, 51 CURRENT LEGAL PROBS. 425 (1998).

150. For my detailed arguments as to why this approach is indefensible see Danny Priel, *The Boundaries of Law and the Purpose of Legal Philosophy*, 27 LAW & PHIL. 643 (2008); Dan Priel, *Description and Evaluation in Jurisprudence*, 29 LAW & PHIL. 633 (2010).



idea. But such concerns were not confined only to analytic legal philosophers. Rather, it is a matter of concern for any theorist concerned with the explanation of human behavior. I wish to demonstrate this claim by examining the work of another group of legal theorists, the legal realists, by showing how similar concerns and tensions are found in their work. A further reason for focusing on their work in this context is Brian Leiter's claim that the legal realists are best understood both as "naturalists" (which roughly corresponds to what I called positivists) and as legal positivists.<sup>151</sup> Given what I have said so far, we must ask in response: "*which* legal positivists?" As we shall see, there are in fact two camps among the legal realists—one positivist, the other anti-positivist. I will then argue that, though the positivist strand of legal positivism has obvious links with the legal positivism of Bentham, it is hard to find important links between it and contemporary legal positivism. This should not be very surprising when considered alongside my claim that contemporary legal positivists are anti-positivist; but I will then argue that even the anti-positivist strand of legal realism bears no important connections with contemporary legal positivism.

#### *A. Positivist Legal Realists*

Walter Wheeler Cook, Underhill Moore, Hessel Yntema, and Herman Oliphant are among the best known realists, and they all believed that (to use Llewellyn's phrase) the "next step" in legal scholarship is to adopt the method of the social sciences, which themselves should follow the steps of the natural sciences.<sup>152</sup> Cook was a self-styled behaviorist who "proposed, instead of following the *a priori* method, to adopt the procedure which has proved so fruitful in other fields of science, viz. to observe concrete phenomena first and to form generalizations afterwards."<sup>153</sup> Similarly,

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151. Leiter advanced this view in a series of articles now mostly collected in BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007). For my earlier doubts about this claim see Priel, *supra* note 123. The discussion in the text below accompanies and amplifies this article, although the arguments are different. Whereas in my previous discussion I focused on the *substantive* philosophical views of legal positivists and legal realists, here the treatment focuses more on the legal realists' and legal positivists' *methodological* presuppositions.

152. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–60*, at 20 (1986).

153. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457, 460 (1924); see also Walter Wheeler Cook, *The Present Status of the "Lack of Mutuality" Rule*, 36 *YALE L.J.* 897, 897–900 (1927); cf. Walter Wheeler Cook, *A Scientific Approach to the Study of Law*, in *ESSAYS IN POLITICAL SCIENCE IN HONOR OF WESTEL WOODBURY WILLOUGHBY* 201 (James Mabry Mathews & James Hart eds., 1937) (demonstrating by a series of analogies to scientific inquiry how the law might be improved).

Underhill Moore began one of his articles writing that it “lies within the province of jurisprudence” but also “within the field of behavioristic psychology.”<sup>154</sup> These scholars sought to turn jurisprudential questions into psychological ones by adopting the tools of experimental psychology.<sup>155</sup>

Even those less committed to behaviorism have argued that legal research should follow the social sciences in aiming to formulate general laws, “asserting invariant, or almost invariant relationships among the facts in its specific field,”<sup>156</sup> and that it should adopt the methods of the social sciences. Many of the legal realists were unabashed logical positivists.<sup>157</sup> In some of Felix Cohen’s most influential work, for example, he followed the early work of Ludwig Wittgenstein and the logical positivists of the Vienna Circle to argue that many legal concepts were “nonsense,” because there was nothing in the world to which they referred.<sup>158</sup>

These attitudes were not confined just to theory. Many legal realists, with various degrees of success, tried to both revolutionize the way law is studied and taught as well as the way the law is practiced by aligning it with the rest of the social sciences.<sup>159</sup> Their skepticism regarding the role of legal rules in the legal decision-making process and their emphasis on the influence of factors such as the identities of the parties and the biographical background of the judge on the outcome of cases<sup>160</sup> makes

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154. Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1, 1 (1943); see also Underhill Moore, *Rational Basis for Legal Institutions*, 23 COLUM. L. REV. 609 (1923).

155. Even realists who did not follow the work of the logical positivists suggested experiments to examine the working of the courts. See, e.g., Hessel E. Yntema, *Legal Science and Reform*, 34 COLUM. L. REV. 207, 225 (1934); see also Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925 (1931).

156. Huntington Cairns, *Law as a Social Science*, 2 PHIL. SCI. 484, 489 (1935); see also EDWARD STEVENS ROBINSON, *LAW AND THE LAWYERS* 319–20 (1935) (“[N]othing could be more seriously designed for an eventual reform of the legal institution than a science of jurisprudence which insists upon describing law in naturalistic terms.”).

157. See HUNTINGTON CAIRNS, *THE THEORY OF LEGAL SCIENCE* 74–75, 79–81 (1941); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823–27 (1935) [hereinafter Cohen, *Transcendental Nonsense*]; Underhill Moore’s contribution to *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 201, 203–04 (1941) [hereinafter *MY PHILOSOPHY OF LAW*]; cf. Herman Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 135–39 (1932).

158. Cohen, *Transcendental Nonsense*, *supra* note 157, *passim*; see also Cohen, *Ethical Basis*, *supra* note 32, at 201–02, 203 n.9 (rejecting historicist and evolutionary arguments).

159. See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); S.N. Verdun-Jones, *Cook, Oliphant, and Yntema: The Scientific Wing of American Legal Realism* (pts. 1 & 2), 5 DALHOUSIE L.J. 3, 249 (1979).

160. See, for example, Joseph Walter Bingham’s contribution to *MY PHILOSOPHY OF LAW*, *supra*

sense from a positivist perspective, which gives little weight to legal language in understanding reality. Their project was, in other words, an attempt to break the closed boundaries of legal discourse and connect it with reality. This meant turning the study of law into a social science by testing hypotheses about the operation of the law by examining statistical evidence. These studies were often the subject of ridicule and criticism to future generations,<sup>161</sup> but whether or not they were successful, they clearly reflected a positivist outlook.

### *B. Anti-Positivist Legal Realists*

At the same time, there were other famous legal realists who emphasized the irrational, intuitive, and emotional aspects in humans' mental life. Naturally, these realists were critical of attempts to use the methods of the empirical sciences for predicting judicial behavior.<sup>162</sup> To the extent that they looked for science, their "science" of choice was psychoanalysis, which emphasized the unconscious and irrational in the human mind. For proponents of this view this implied the inapplicability of traditional scientific methods to human behavior. Jerome Frank, the most enthusiastic defender of these ideas, has relied on psychoanalytic ideas to describe lawyers' attachment to formalism,<sup>163</sup> underwent psychoanalytic treatment himself, and has even argued that all judges should be required to do them same in order for them to recognize their own prejudices. In his work, he has argued against the possibility (and desirability) of organizing human affairs using law-like generalizations.<sup>164</sup>

note 157, at 7, 21–23. Leiter takes this to be the "core claim" of legal realism. See LEITER, *supra* note 151, at 21–25.

161. "Students often remember realism from colourful stories about funny men who thought judges [sic] decisions depended on 'hunches' and what they had for breakfast, or who thought the best way to study law was to sit on park benches counting cars." Stephen Livingstone, *Of the Core and the Penumbra: H.L.A. Hart and American Legal Realism*, in THE JURISPRUDENCE OF ORTHODOXY: QUEEN'S UNIVERSITY ESSAYS ON H.L.A. HART 147, 147 (Philip Leith & Peter Ingram eds., 1988); Karl N. Llewellyn, *On What Makes Legal Research Worth While*, 8 J. LEGAL EDUC. 399, 401 (1956) [hereinafter Llewellyn, *Legal Research*]; Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 337 (1988).

162. See Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1330–33 (1947) (rejecting the very idea of "social science," and the hopes of applying scientific method to the law); see also Jerome Frank, *Are Judges Human? Part Two: As Through a Glass Darkly*, 80 U. PA. L. REV. 233, 254–59 (1931). In return, the positivist legal realists were equally skeptical of these realists' ideas. See, e.g., Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 13 (1937).

163. See, e.g., JEROME FRANK, LAW AND THE MODERN MIND 13–21, 69–75 (1930).

164. See Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 BUFF. L. REV. 1127, 1140–44 (2010). Frank's solution was the cultivation of what he called the "scientific spirit." FRANK, *supra* note 163, at 98. But he meant by this term the exact opposite of what most do when attempting to

Frank thought such an approach to law ignores the uniqueness of an irreducibly complex reality, and therefore necessarily leads judges astray. He sought to counter the scientific tendencies in law by adopting a humanistic perspective that emphasized the unique particularity of individual cases.

The most famous other legal realist to have advanced such a view was Joseph Hutcheson, a federal appellate judge, who famously argued that it is intuition, whose powers he described in almost mystical terms, that guides (and should guide) lawyers in finding the right answer to legal questions.<sup>165</sup>

Benjamin Cardozo also deserves mention here. There is some controversy whether he even belongs among the ranks of the legal realists,<sup>166</sup> because he was not generally recognized as a member of the group and was skeptical of some of their ideas. Nonetheless, he explicitly endorsed the prediction theory of legal rules, the most famous of the legal realists' slogans,<sup>167</sup> and he accepted another familiar realist tenet, the idea that for many proposed legal principles one could easily find an opposite within the law.<sup>168</sup> His writings on adjudication emphasized the way psychology challenges accounts of adjudication that describe it as the application of general rules to particular cases.<sup>169</sup> For these reasons, his writings and approach to adjudication can be treated as another example of the anti-positivist strand within legal realism, especially as his writings

introduce science into the law. *See id.* at 96–97. For him, the scientific spirit was an adventurous, free-wheeling inquiry that he thought was the exact opposite of what he found in most scientific inquiry. *See Barzun, supra*, at 1158–66.

165. *See* Joseph C. Hutcheson, Jr., *Lawyer's Law, and the Little, Small Dice*, 7 TUL. L. REV. 1 (1932); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929) [hereinafter Hutcheson, *Judgment Intuitive*]; accord Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 655–56 (1932).

166. *Compare* ANDREW L. KAUFMAN, CARDOZO 203, 451, 457–58, 575 (1998) (arguing that Cardozo held moderate legal realist views, despite ambivalent views towards the work of the realists) with John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1452–53 (1999) (reviewing KAUFMAN, *supra*) (arguing Cardozo was a critic of legal realism).

167. *See* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 33–34, 40 (1924); *id.* at 44 (“We shall unite in viewing as law that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending on in future controversies. When the prediction reaches a high degree of certainty or assurance, we speak of the law as settled . . . . When the prediction does not reach so high a standard, we speak of the law as doubtful or uncertain.”); *id.* at 52.

168. *Id.* at 58–59. *See also* Benjamin Nathan Cardozo, *Jurisprudence*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 7 (Margaret E. Hall ed., 1947) (offering a critical but clearly sympathetic assessment of the ideas of the legal realists).

169. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 165–77 (1921). *Id.* at 167 (emphasizing the influence on adjudication of “forces [that] are seldom fully in consciousness”).

exerted considerable influence on the legal realists with the anti-positivist bent.<sup>170</sup>

What about the most famous of the legal realists, Karl Llewellyn? Llewellyn is not easy to pin down, and, as a representative of this group of scholars, his case shows the difficulties with attempts to associate the legal realists with a particular view or research methodology. On the one hand, he clearly did not endorse Frank's more extreme views,<sup>171</sup> and in some of his writings he clearly thought lawyers could benefit from the input of social science for providing data that traditional legal methods would completely miss.<sup>172</sup> But it would be a mistake, I think, to cast him in the positivist side,<sup>173</sup> for he was often skeptical, sometimes even scornful, of some of the other legal realists' forays into empirical research or jejune attempts at introducing scientific methods into legal research.<sup>174</sup> His concern with the more scientifically minded realists was not limited to how they conducted their research, and went to the heart of the efforts to turn jurisprudence scientific. Llewellyn clearly did not think that value (or ought) statements could be reduced to fact (or is) statements,<sup>175</sup> and in his own work he always remained faithful to the traditional methods of the law and sought to improve rather than eradicate them. His criticism of formalism and lawyers' tendency to present law as a system of rules was a critique of the way people *understood* how the common law worked, not a critique of the method itself, which throughout his life he largely defended by what he thought was a more accurate *internal* explanation. And although he no doubt thought the law had many flaws, he believed it was an important institution for reflecting on, working out, and reinforcing the values people within a particular community hold.<sup>176</sup> He was thus one of the first, at least within the Anglo-American tradition, to explicitly tie the law of a state to its traditions and culture.<sup>177</sup> Correspondingly, in his

170. For Jerome Frank's admiration for Cardozo see KAUFMAN, *supra* note 166, at 458; *see also* Hutcheson, *Judgment Intuitive*, *supra* note 165, at 284–85.

171. *See* K.N. Llewellyn, *Legal Illusion*, 31 COLUM. L. REV. 82, 85–86 (1931) (reviewing FRANK, *supra* note 163).

172. *See* Karl N. Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HARV. L. REV. 1286 (1949) [hereinafter Llewellyn, *Social Sciences*].

173. For such a view see, for example, HORWITZ, *supra* note 14, at 191.

174. *See* Llewellyn, *Legal Research*, *supra* note 161, at 400–01; *cf.* K.N. Llewellyn, *The Theory of Legal "Science,"* 20 N.C. L. REV. 1, 17–18, 22 (1941); K.N. Llewellyn, Book Review, 36 COLUM. L. REV. 505 (1936).

175. *Compare* Llewellyn, *Legal Tradition*, *supra* note 37, at 101–03, *with* Walter Wheeler Cook, *The Possibilities of Social Study as a Science*, in *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES*, *supra* note 37, at 27, 37–47.

176. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 122 (1960).

177. *See* James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's*

discussion of the impact social science should have on the law he emphasized the work of those social theorists who sought to identify the social *meaning* of particular legal institutions.<sup>178</sup>

### *C. Positivism, Legal Positivism and Legal Realism*

Brian Leiter has recently called for the adoption of what he termed “naturalized jurisprudence,” an idea with close ties to positivism. He has also argued that the legal realists were early proponents of this approach. Though significant for turning legal philosophers’ attention to the significance of the work of the legal realists, Leiter’s work remains quite limited to one twentieth century American movement. The longer historical view reveals that what many of the legal realists were interested in was exactly in line with what many before them in the history of jurisprudence were concerned with, namely to use the best science available in their day to explain the law.<sup>179</sup> As “science” transformed from “natural philosophy” to become a distinct discipline, its successes, prominence, and significance mounted, and jurists began borrowing scientific ideas, or, rather, trying to align their subject with advances in science and scientific methodology. These ideas have been, more often than not, most prominent in the work of writers today associated with the legal positivist tradition. It is only around the time of Austin—that is, around the time that the social sciences were born—that jurisprudence started being associated with legal philosophy. By then, and even more so in the decades that followed, jurisprudence became the name for the residual domain of what was left after all other theoretical approaches to the study of law became independent.

Against this historical development Anglophone jurisprudence of the last fifty years (ironically, in spite of the dominance of legal positivism) appears as an aberration. For what is distinctive about it is the almost uniform rejection of ties with science, indeed for defining itself and its methodology in opposition to the sciences. Leiter’s project of showing the compatibility of legal positivism (and legal philosophy more generally) with naturalism is thus reformist only in the present context. When

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*German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987) (describing the origins of these ideas in nineteenth century, very anti-scientific, German romanticism).

178. See Llewellyn, *Legal Research*, *supra* note 161.

179. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST—REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 44–63 (2010). Tamanaha finds many realist-sounding ideas in the generation or two before the emergence of legal realism. My claim is that all those ideas are found at least as early as Bentham. See Felix S. Cohen, *Book Review*, 42 YALE L.J. 1149, 1149–50 (1933).

considered against the longer history of legal theory (which Leiter does not discuss), his ideas look much less radical.

On the other side, Leiter's picture of the legal realists as naturalists is only partially correct, and arguably fails to capture even the views of Karl Llewellyn, the best-known of the legal realists and probably the one with the greatest lasting influence. The discussion above also helps identify both the basis for and the difficulty with the claim that the legal realists were legal positivists. Exactly because the most important defenders of contemporary legal positivism have not been positivists, I do not think legal realists could be counted as legal positivists in the way that term is understood today. This is true of the positivist legal realists and, although for different reasons, for the anti-positivist legal realists as well. If we look first at how members of these respective groups described their views, we find, for example, Hessel Yntema, among the positivist legal realists, saying that "the classification of American legal realism in the category of positivism along with Austin, Kelsen, etc., is so superficial as to border on the perverse."<sup>180</sup> If we compare them to Hart and Raz the differences are even more pronounced. On the side of anti-positivist group Llewellyn expressed affinity to a form of natural law.<sup>181</sup> And he was not alone. Never shy of a dramatic phrase, Jerome Frank said he "do[es] not understand how any decent man today can refuse to adopt, as a basis of modern civilization, the fundamental principles of Natural Law."<sup>182</sup>

My claim is not based only on the realists' self-reports. The emergence of legal positivism as an *a priori* inquiry about the nature of law or as an analytic claim about the concept of law (rather than as an empirical observation or definitional stipulation, as it is in the work of earlier legal positivists) was grounded in a theoretical methodology that was diametrically opposed to the view that the final arbiter on all matters is scientific method.

What is more interesting is that, paradoxically, those legal realists who were themselves anti-positivists were, if anything, even further from contemporary legal positivism. A central tenet of their arguments was the rejection of the possibility of giving a clear account of law in terms of

180. Hessel E. Yntema, *Jurisprudence on Parade*, 39 MICH. L. REV. 1154, 1164 (1941). As Yntema goes on to say, the legal positivist is mostly interested in questions of "logic and form," whereas the legal realists were mostly concerned with the "function, operation, and consequences or, in other words, the substance, of law." *Id.*

181. See the quote from Llewellyn, *Natural Law*, *supra* note 37. See also LLEWELLYN, *supra* note 176, at 122; cf. K.N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205, 207, 211–12 (1934).

182. Jerome Frank, *Legal Thinking in Three Dimensions*, 1 SYRACUSE L. REV. 9, 17 (1949).

rules. As a result, there can be little doubt that Llewellyn, for example, would have found Hart's legal positivism unsatisfactory:

under the traditional approach [to jurisprudence] the bulk of the subject matter of law is exhausted when the writer has expressed in words what ought to be done, or, if he is a legal "positivist," when he has expressed in words what those rules are which in the state he is discussing are *officially accepted* as laying down what ought to be done ("positive law").<sup>183</sup>

On the other hand, Llewellyn emphasized the extent to which law is *not* exhausted by these legal rules, but is influenced by prevalent attitudes, culture, social norms:

the stuff of official legal rules, official legal concepts, etc., presents itself under completely different aspects according to the particular craft-job which is concerned. Thus the judge, the counsellor, the advocate, the legislator, the policy-shaping administrator, the administrative subaltern or private, all see and use the official rule-stuff differently, and the more detailed study of the different crafts, of their craft-skills, -traditions, -ideals, -organization, -morale, -recruiting, presses, and presses hard, for attention.<sup>184</sup>

This is inconsistent with legal positivism not simply because of the view that there is more to legal decision making than legal rules. Legal positivism of the last fifty years assumed that it is possible and important to articulate clearly what separates law from other normative domains.<sup>185</sup> But where legal positivists analyzed legal practice through its linguistic manifestations (most importantly, legal decisions) and saw there a distinction which they thought they could sharpen between the domain of "law" and other domains which are not law (even if they occasionally affect the outcome of legal decisions), the anti-positivist legal realists looked into legal practice, peered into their own minds, and could not see there any clear distinction between the two. Hutcheson's intuitions were a combination of legal rules, common sense, social mores, and probably

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183. Llewellyn, *Legal Tradition*, *supra* note 37, at 95.

184. Llewellyn, *Social Sciences*, *supra* note 172, at 1298. Llewellyn's most serious attempt at an inquiry as the one he described in the text was anthropological and was anti-positivistic in nature. See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

185. See RAZ, *BETWEEN*, *supra* note 137, at 199–200; cf. Leslie Green, *Law and the Causes of Judicial Decisions* (Univ. of Oxford Legal Research Paper Series, Paper No. 14/2009, 2009), available at <http://ssrn.com/abstract=1374608>.



some of the judge's personal prejudices. It was pointless, perhaps even meaningless, to try to separate "the law" from all the rest.

We can summarize this point in the following way: positivist legal realists rejected the idea of analyzing law as practical reason because accepting it was inconsistent with scientific method. By contrast, those realists who were anti-positivists would have found the model of practical reason adopted by contemporary legal positivists to be at best incomplete, and at worst positively misleading, for it gives the impression that adjudication is a much more rationalistic process than they thought it actually was. Either way, legal realists would have found the ideas central to twentieth century legal positivism highly unsatisfactory.

#### IV. WHAT SHOULD LEGAL PHILOSOPHY BECOME?

I have said before that the anti-positivist stance in recent legal positivism has been, in part, a reaction to what may have been perceived as the failures or limits of science of human action. With the passage of time these worries may have subsided to some degree.<sup>186</sup> But I think there was then, and still is, another reason for philosophers, and particularly legal philosophers, to resist the temptations of science. For if the social sciences (and perhaps, in the future, cognitive sciences) could explain social behavior, the need for legal philosophy, or social philosophy more generally, might be put in question. On the positivist picture, philosophy has no substantive role in understanding reality, and, in the extreme case of the logical positivists, it can only properly deal with tautologies. In this picture, philosophers are left with the job of explaining *why* scientific method is the only available method. But even more moderate versions of positivism lead to similar conclusions, at least as far as the study of social phenomena is concerned. Thus, rejecting such views was necessary (although not sufficient) for recognizing the potential for philosophy to make a positive contribution to the understanding of law. By adopting an anti-positivist methodology, legal philosophers could carve for themselves a unique area of inquiry, one that almost by definition was not in danger of infiltration by the scientists.

The Hartian solution to this challenge, probably only partially conscious, has been an attempt to mix the goals of science of an objectively correct and morally neutral description of law with the methods of the humanities—not by resorting to empirical testing of

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186. They have by no means disappeared. See, e.g., MARMOR, *supra* note 9, at 33–34; Green, *supra* note 185, at 4.

hypotheses, but rather by trying to understand the role law plays in human action through introspection. In this way, Hart sought to occupy a methodological halfway house that would avoid the pitfalls of positivism but which was, he thought, rigorous enough to provide an objective description of reality.<sup>187</sup> It steered clear of both the subjectivity of humanistic “narrative” explanation—in which everyone has his or her own story and there is no way of telling which is right—and what he considered to be the explanatory inadequacy of scientific “external” explanation.

There now seems to be a growing sense among legal philosophers that this way of occupying the middle ground is indefensible. Though not couched in these terms, two recent and very different books may be read as a critique of this view, one urging movement toward the humanities, while the other calls for a turn to science. Both take their central point all the way to their title. In *Legal Norms and Normativity: An Essay in Genealogy*, Sylvie Delacroix tries to explain how law creates norms. Her answer, briefly, is that normativity is the result of day-to-day engagement or confrontation with law’s requirements.<sup>188</sup> It is only such “internal” engagement with the law that can “create” its sense of obligation. For our purposes, it is interesting that Delacroix, in effect, calls for an even more anti-positivist stance than Hart’s and other contemporary legal positivists. She does so, first, by rejecting the midway position adopted by many legal positivists of the observer who can explain and understand law’s normativity by looking at legal phenomena from the perspective of participants. Law is not made up of rules that a person can recite as though they apply to her, for such an understanding does not capture the sense in which these rules are obligating. The “dynamic” reality of law can only be understood by participants who engage with the law. Second, contrary to the minimalist role accorded to history in the work of legal positivists like Hart and Raz, to historically situate jurisprudential questions is, on Delacroix’s account, the only way to adequately address them. Philosophy, on this view, aims to help people make sense of their lives or understand themselves, and understand what we are and what we think requires knowing more about how we related (intellectually) to our ancestors.<sup>189</sup> The Hartian approach is mistaken because it seeks to describe

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187. Cf. Mikhail, *supra* note 122, at 744–45 (describing Hart’s tendency to situate his view as a “mean between extremes”).

188. SYLVIE DELACROIX, *LEGAL NORMS AND NORMATIVITY: AN ESSAY IN GENEALOGY* 165 (2006).

189. For a defense of a similar view of philosophy more generally, see WILLIAMS, *HUMANISTIC*

the practice as it is understood by those who are part of it while remaining outside the practice itself. Delacroix argues that the only way of understanding law's normativity is by being seeing it from within.<sup>190</sup>

By contrast, Brian Leiter's *Naturalizing Jurisprudence* is a forceful appeal to moving jurisprudence in the opposite direction. In Leiter's view, legal philosophers should adopt materialism, abandon the internal point of view, and align jurisprudence explicitly with the sciences. As Leiter puts it, his favored approach to jurisprudence is "'naturalized' because it falls into place . . . as a chapter of psychology (or anthropology or sociology)" that will provide "a descriptive/explanatory account of what input . . . produces what output."<sup>191</sup> More concretely, Leiter has been one of the very few legal philosophers to countenance the rejection of the methodological assumption that jurisprudence should be conducted from the internal point of view, and his examples of what naturalized jurisprudence would look like are all drawn from the work of political scientists who study judicial behavior by statistical analysis of their voting patterns. As he acknowledges, in such studies there is little room for examining judges' attitudes.<sup>192</sup>

Both views seem to be united by the implicit recognition that the midway position that much twentieth century legal philosophy tried to occupy does not exist. By contrast, both can point to examples of successful explanations for their favored methodology. On the one hand, we often use historical narrative to make sense of much that goes on in our lives: such narratives are used to explain the eruption of wars, the causes of economic depressions, and the explanation of doctrinal changes in the law. More importantly, people often rely on such historical narratives to explain the sort of obligations they have toward friends, family, or members of their nation. At the same time, they recognize that these

DISCIPLINE, *supra* note 5, at 192–99. Cf. E.M. Adams, *The Mission of Philosophy Today*, 31 METAPHILOSOPHY 349, 361 (2000) (advancing an even more radical view according to which "[s]cience must find its place within a humanistic culture."). Philosophy is not the only discipline that struggles for a place. Sociology has been similarly pulled in different directions by those on one side who advocated sociology as a humanistic discipline (see, for example, PETER L. BERGER, INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE 186 (1963)) and those on the other who called for it to be modeled after the natural sciences (see, for example, Donald Black, *Dreams of Pure Sociology*, 18 SOC. THEORY 343 (2000)). This reflects the general difficulty with finding the right methodology for explaining human behavior.

190. This approach bears close resemblance to Dworkin's. See RONALD DWORKIN, LAW'S EMPIRE 13–14, *passim* (1986). Like Hart, Dworkin employs in this passage the internal point of view, but unlike Hart Dworkin thinks that this internal perspective is only tenable if one engages in substantive legal practice. See *id.* at 78–86.

191. LEITER, *supra* note 151, at 40.

192. *Id.* at 134–35; but see *id.* at 192 (expressing doubts about these studies).

explanations can be difficult for others to fully understand.<sup>193</sup> The explanatory successes of science are widespread and overwhelming, and with much more data at their disposal, social scientists are able to reach interesting and often counterintuitive findings about human action and human nature, even though they are based on purely “external” observations. In contrast, it is not easy to find many successful examples of explaining social phenomena by means of *a priori* reflection.

Interestingly, it may be that both approaches are tenable at the same time and illuminating in different ways. But the problem is that the attempt to turn philosophy into these different disciplines may leave no role for the methods and approaches we traditionally associate with philosophy. Delacroix’s genealogical approach that aims to give philosophy a substantive role in “creating” normativity through engagement in the issues that lawyers use to explain their subject matter is in danger of becoming history<sup>194</sup> (or in the case of particular legal questions, of becoming doctrinal scholarship), and it is unclear whether the positivist approach favored by Leiter leaves any work left for legal philosophers once all questions of jurisprudence are recast as empirical ones.<sup>195</sup>

Consider first Leiter’s claim that “[p]hilosophers, [adopting the naturalistic] approach, are the abstract and reflective branch of empirical science, clarifying the contours and extensions of concepts that have been vindicated by their role in successful explanation and prediction of empirical phenomena.”<sup>196</sup> The problem with this view is that the unique role Leiter gives for philosophy appears to be part of all scientific explanation: science is never content with merely gathering of information. Rather, science is the attempt to organize data in a revealing and illuminating way.<sup>197</sup> In this picture the only substantive role left for the philosopher seems to be the one suggested by Daniel Dennett, another philosophical naturalist, who said that “as a philosopher [he is] concerned

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193. Cf. THOMAS NAGEL, MORTAL QUESTIONS 196–97, 204–05 (1981); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 229–31 (1987).

194. Delacroix recognizes this difficulty. See DELACROIX, *supra* note 188, at 97–99.

195. Leiter acknowledges this challenge. See LEITER, *supra* note 151, at 184–86. Notice that the difficulty for someone who adopts this approach is *not* whether there is value in non-reductive explanation. This is a matter of some disagreement, but it is not the point. Even if we believe that there is value in non-reductive explanation (and Leiter seems to hold this view), the question that remains is whether there is a unique (or, actually, any) role left for any distinctly *philosophical* explanation of social phenomena. *Id.* at 217.

196. *Id.* at 184; accord Brian Leiter, *Introduction*, in THE FUTURE FOR PHILOSOPHY 1, 3 (Brian Leiter ed., 2004).

197. See LEITER, *supra* note 151, at 204–06 (providing Leiter’s account of what would count as a good explanation that takes (natural) scientific explanation as its model).

to establish the *possibilities* (and rebut claims of impossibility)” and as such he can “settle for theory sketches instead of full-blown, empirically confirmed theories.”<sup>198</sup> No doubt a philosopher (like anyone else) can offer her assistance to the scientists and may occasionally be able to offer an insight that escaped the scientists, perhaps exactly because she may have broader but less technical knowledge on a wide range of issues that the specialist scientist may lack.<sup>199</sup> But for the most part it looks like the scientists are perfectly capable of taking care of themselves. Perhaps in the area of the mind and brain (Dennett’s specialty) there is still so much unknown that there is real need for imaginative philosophers to establish big-picture “possibilities” instead of working on the nuts and bolts, or neurons and synapses. But there does not seem to be any mystery of a similar kind in law, no serious possibilities or impossibilities to be examined. There is only a contingent social practice to be explained using the same methods we use for explaining all other phenomena, social or otherwise. There may be a need for a “philosophy” to explain the reasons for a positivistic inquiry about law; but within this picture it does not look as though there are any unique philosophical questions about law. Indeed, whatever one thinks of the work Leiter suggested as examples of naturalized jurisprudence, one thing is clear: even by a stretch it cannot be called “philosophy,” and (leaving terminological foibles aside) it does not look like its practitioners are looking for, or are in need of, philosophers to assist them in their work.

The problem, then, is that taking Leiter’s ideas seriously looks more like admitting that legal philosophy has completed its historical role as a unique intellectual endeavor. I do not mean this as a *reductio* against Leiter’s views. I believe this is a real possibility, and it is one that must be seriously considered. The archaeology of knowledge is full of the decaying remains of disciplines that were gobbled up by others, and it may be that jurisprudence (or, more precisely, analytic jurisprudence) belongs with them.

Given these limited prospects for philosophy being able to make a real contribution to scientific inquiry, adopting the alternative humanistic approach may look more appealing. Consider in this context Bernard Williams’s suggestion that philosophers should abandon their scientific aspirations and think of philosophy as a humanistic discipline, concerned

198. DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 41 (1991).

199. Cf. Philip Kitcher, *A Plea for Science Studies*, in *A HOUSE BUILT ON SAND: EXPOSING POSTMODERNIST MYTHS ABOUT SCIENCE* 31, 33–34 (Noretta Koertge ed., 1998).

with “how to make the best sense of ourselves and our activities.”<sup>200</sup> The problem is how we move from such programmatic claims to specific proposals. Williams’s examples of humanistic philosophy include examples that pay greater concern to history, and a focus on ethical and political concepts in which he believes science holds little promise for progress. But when he gives an example—“how the modern world and its special expectations came to replace the *ancien régime*,” how we came to use certain political concepts in place of ones used before<sup>201</sup>—it is once again no longer clear how much philosophy, as it is practiced today, could contribute. Such work is empirical; only the empirical data it relies on are historical facts. And it is not as though questions or attempts to answer them are in some sense novel. Intellectual historians write on little else.

Most philosophers lack the requisite knowledge of history to address these questions. But the problem is not simply that. Even if we are interested in trying to articulate a contemporary “sense of ourselves” about which philosophers may be better informed, much of philosophy has become, perhaps inevitably, too complex, too esoteric, too far-removed from worldly matters to be helpful to most people. As sales figures (if nothing else) attest, contemporary fiction, cinema, and news media play a far more significant role in all this than the closed circle of professionalized philosophy. Exactly because of their sophistication it seems that philosophers’ accounts are not likely to be particularly helpful (or accurate) as accounts of our collective self-understanding (if there is such a thing).

#### V. TOWARD A NEW APPROACH TO LEGAL PHILOSOPHY?

We have reached what looks like a rather grim conclusion. The existing midway position between science and the humanities is unclear about its aims and about its methodology, and the alternatives do not look much better. Against the expanding domain of science, legal philosophers have adopted, perhaps partly inadvertently, a strategy of narrowing down their conception of what counts as belonging in their domain for the sake of retaining its independence. As other domains encroached upon its province, jurisprudence turned to the question “what is law?” answered by *a priori* reflection as defining its domain because it seemed like the sort of question that would not, indeed could not, be taken by any other discipline. There was safety in this question, for it meant both that much of

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200. WILLIAMS, HUMANISTIC DISCIPLINE, *supra* note 5, at 189.

201. *Id.* at 190.

the empirical work on law was irrelevant (and therefore could be safely ignored), and that the independent existence of jurisprudence so conceived could not be challenged by other disciplines.

Against the challenge from science, the decision to go down this conceptual route seems plausible, but in retrospect I think it is quite clear now that this approach has achieved very little and that its shortcomings are so fundamental that no fine-tuning could salvage it. This conclusion seems to be in line with contemporary work on the methodology of legal philosophy, which expresses unease about the position and job of legal philosophy within other academic legal studies.<sup>202</sup>

What's next, then, for jurisprudence? This may well be a topic for a different essay, but here I wish to propose a tentative solution, one that tries to maintain something of the idea of jurisprudence standing between science and the humanities, but does so in an entirely different way from the currently prevalent approach. As we have seen, the current view combines a scientific aim of description with a humanistic method of inquiry. A more fruitful approach may be the opposite: it would adopt aims similar to those of political philosophy by focusing on questions of normativity and legitimacy, focusing in particular on the question of the legitimacy of law as distinct from the question of the legitimacy of the state, but it would be much more cognizant of scientific work, especially in the domain of cognitive psychology, and its potential significance to answering these questions. This approach could thus maintain the concern with the "internal point of view" by examining the role law plays in people's lives and the way these issues touch on questions of legitimacy but adopt an "external" methodology for answering this question.

There are several important reasons to adopt this approach. One is that science can help us achieve greater clarity among conflicting internalist accounts of law. For example, there are two familiar understandings of law that are both "internalist" in different ways but that seem to be in tension with each other. The first is the view that law has its own internal set of concepts and ideas. It is the sense of "thinking like a lawyer" that students are supposed to learn in law school. The second is the image of the law that aims to be comprehensible to all its addressees, lawyers and non-lawyers alike. So fundamental is this idea is that it makes up one of the central meanings of the rule of law. Which of these is more accurate?

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202. See, e.g., LEITER, *supra* note 151, at 131–35, 164–75; Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years off the Point*, 19 CAN. J.L. & JURIS. 67, 68 (2006); Danny Priel, *Free-Floating from Reality*, 21 CAN. J.L. & JURIS. 429, 443–45 (2008).

Scientific method could help in examining whether learning to think like a lawyer really does change the way lawyers treat legal problems. What matters here is not whether lawyers and non-lawyers use different language in dealing with legal problems: no doubt they often do. The interesting question is whether these terminological differences reflect a deeper way of solving such issues. This is something anyone interested in the “internal” or “legal” point of view should be interested in, but it also looks like a question on which traditional introspective method is singularly incapable of answering. If it turns out that it does, it remains, however, an open question to what extent this is a good or a bad feature of a legal system.

I am not sure what would emerge from this. Perhaps the end result would amount to a change in the subject, perhaps even something that by today’s standards would no longer be called philosophy. It is clear, however, that such change is vital. How exactly it would come about and what jurisprudence would look like afterward should be the biggest questions on jurists’ agendas for the near future.



