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WHY LEGAL POSITIVISM (Again)?

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Hans Kelsen and H.L.A. Hart, the two giants of 20th-century jurisprudence are long dead. Ronald Dworkin, Hart's most persistent critic, passed away earlier this year. John Finnis, our leading natural law theorist, has recently issued his collected papers and a second edition of his seminal 1980 book *Natural Law and Natural Rights*. Joseph Raz, Hart's torch-bearer, long ago stopped writing primarily about issues in general jurisprudence, in large part because he thought (correctly in my view) that most of the main issues had been settled. Although academic life, in the modern research university, continues to follow Max Weber's century-old diagnosis of increasing specialization, now seems a particularly apt moment to reflect more synoptically upon what we learned from the legal philosophy of the past century given that the major contributors have, as it were, finished their contributions, and almost all recent work on these topics reads as footnotes, sometimes long and painful footnotes, to their contributions.

I propose to add my own long footnote, though hopefully not too painful! Mine shall be less a systematic defense of legal positivism of the Hartian/Razian kind, than a synoptic explanation of what makes that view of the nature of law so plausible, one that all its critics—from Dworkin and Finnis in the past, to Jeremy Waldron and Mark Murphy in the present—find they must contest again and again. A

* Presented as a keynote address at the annual meeting of the Australasian Society of Legal Philosophy at the University of Sydney on August 16, 2013. I am grateful to the audience on that occasion for a useful set of questions and challenges, especially Tom Campbell, Jonathan Crowe, Dale Smith, and Michael Stokes.

frequent target is not necessarily the correct view, to be sure, but in this case, I think it is: the critics return to it again and again because, even fifty years after Hart's seminal book, it is clearly the most sensible view to hold. I conclude with some partly sociological reflections about why resistance to legal positivism remains a live issue in certain quarters.

By "legal positivism" I shall mean a view that explains the crucial question that arises about law: namely, how do we determine which norms in any society are norms of the legal system, that is, norms that are "legally valid." According to the positivist, (1) norms are *legally valid* only in virtue of having certain sources (such as judicial pronouncement or legislative enactment) and without regard for their *merits*, that is, without regard for whether the norms are fair or just or efficient or sensible (call this, borrowing Raz's terminology, the "Sources Thesis"); and (2) the relevant sources of law in each society are fixed by a contingent practice of officials of the legal system (call this the "Conventiality Thesis").¹ One consequence of the Sources and Conventiality Theses is that, as the famous slogan has it, "there is no necessary connection between law and morality," which means, more precisely, that either (1) it is not necessary for a norm to be legally valid that it satisfy a moral criterion (as Hart would have it), or (2) it is necessary that morality *not* be a criterion of legal validity (as Raz would have it). (My statement of the Sources Thesis obviously favors Raz's formulation, and I believe that his version actually has all the virtues I attribute to the positivist theory in what follows.) As Leslie Green and John Gardner have emphasized in recent years²—and as Hart himself acknowledged with his minimum content of natural law thesis some 50 years ago-- there are lots of senses in which law and morality *are* necessarily connected, but the familiar slogan about "no necessary connection" has always been meant to pick out

¹[footnote on rule of recognition as social rule]

² See, e.g., Green, "Positivism and the Inseparability of Law and Morals," *New York University Law Review*, and Gardner, "Legal Positivism: 5 ½ Myths," *American Journal of Jurisprudence*

either Hart's or Raz's theses about the criteria of legal validity, one of which is shared by everyone, I take it, who thinks that legal positivism gives us the best account of the nature of law.

So why accept legal positivism as the correct account of law? Sometimes legal philosophers make extravagant claims on behalf of the theory, and I want to start by scaling back the ambitions of the claim I am making. Julie Dickson, following Raz, says that,

A successful theory of law...is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law....I am using "the nature of law" to refer to those essential properties which a given set of phenomena must exhibit in order to be law.³

Scott Shapiro, an ambivalent or quasi-positivist,⁴ puts the claim even more strongly, declaring that legal philosophers want to "supply the set of properties that make (possible or actual) instances of [law] the things that they are"⁵ and offers the example of water being H₂O: "Being H₂O is what makes water *water*. With respect to law, accordingly, to answer the question 'What is law?' on this interpretation is to discover what makes all and only instances of law instances of *law* and not something else."⁶ In

³Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), p. 17. Dickson faithfully follows Raz's lead here, though he has not always been so immodest. Thus, in the earlier essay "Legal Positivism and the Sources of Law," reprinted in his *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009), Raz notes that it is no part of the argument for the Sources Thesis "that a similar conception of legal systems is to be found in all cultures and in all periods." *Id.* at 50. That is only one kind of theoretical modesty, for one might still think that it is possible to state necessary truths that explain the essential nature of a culturally and temporally bounded human practice; as noted in the text, our experience in the philosophy of science in the 20th-century invites skepticism.

⁴Shapiro self-identifies as a positivist, of course, and in his earlier work—see, e.g., "On Hart's Way Out," *Legal Theory* __ (2008): __-__--offered an important new argument for 'hard' or 'exclusive' legal positivism. But his more recent work concedes so much to the anti-positivist views of Dworkin and Greenberg, in particular, as to make it unclear whether the resulting theory really honors the Sources and Conventionality Theses.

⁵ Scott J. Shapiro, *Legality* (Cambridge, Mass.: Harvard University Press, 2011), pp. 8-9.

⁶ *Id.* at p. 9.

addition, says Shapiro (here again echoing Dickson who is following Raz), “to discover the law’s nature” is also “to discover its necessary properties, i.e., those properties that law could not fail to have.”⁷

Comparing “law” to “water” ought to strike most philosophers as mad: water is a *natural kind*, and law is not; indeed, on most accounts (Dworkin’s is the exception), law is a *human artifact*.⁸ Artifacts can be made of almost anything; natural kinds, by contrast, typically have distinctive micro-constitutions, whether molecular or genetic. To be clear, I am a Quinean about natural kinds: “natural kinds” are just a name for those groupings of stuff about which we can produce lawful generalizations and which groupings we would be especially loathe to abandon given the disruption to the rest of our theoretical picture of the world. That’s the only sense of “natural” that can make sense for empiricists and fallibilists, and it’s the sense I endorse here. That means, of course, that at bottom, “natural kinds” also answer to human interests, and so the difference between them and artifacts will be one of degree, not kind. But differences of degree can still be vast and theoretically and practically significant, and that is true about the way we demarcate stuff with a distinctive micro-constitution from stuff that is notable mainly for how human beings use it.

Things on the artifact side of the divide, needless to say, do not have distinctive micro-constitutions, but perhaps they can have essential or necessary properties of some other kind? Perhaps, for example, the essential property of an artifact is its function? But how do we fix an artifact’s function? Bear in mind that even in biology, ascribing function is vexed. As the philosopher of biology David Hull asked, in an influential paper a quarter-century ago:

⁷ *Id.* The preceding quotations should be read in light of Leslie Green’s surprising claim that “no sensible legal philosopher, today or thirty years ago, is looking for properties of law that will ‘distinguish it from morality in all cases.’” Leslie Green, “The Morality in Law,” p. 35 of manuscript version.

⁸On traditional natural law views, *positive* law is a human artifact, but the moral law, of course, is not.

[W]hat is the normal function of the [human] hand? We can do many things with our hands. We can drive cars, play the violin, type on electronic computers, scratch itches, masturbate, and strangle one another. Some of these actions may seem normal; others not, but there is no correlation between commonsense notions of normal functions and the functions which hands were able to fulfill throughout our existence. About all a biologist can say about the function of the human hand is that anything that we can do with it is 'normal.'⁹

Hull's view is by no means uncontroversial,¹⁰ but I mention it only to underline that even in the biological domain, function talk is complicated. What then of artifacts, which have no biological etiology, how are their functions to be determined?

Often, for artifacts that have identifiable human creators, we appeal to the intentions of the creator, and that works well as long as we have other theoretical reasons for treating the creator's intention as metaphysically decisive. Leslie Green gives the amusing example of a "printer driver"¹¹: "no string of code is a printer-driver," he observes, "unless it is written in order to, or has or could have some capacity, to drive a printer."¹² That seems plausible because if a particular bit of computer code could do nothing other than sync a computer to a printer, then no one would write it except for that purpose, and no one would be interested in it except insofar as it fulfilled that purpose. But "printer

⁹David Hull, "On Human Nature," reprinted in S. Downes & E. Machery (eds.), *Arguing about Human Nature* (London: Routledge, 2013), p. 31.

¹⁰Cf. Edouard Machery, "A Plea for Human Nature," in *id.*, esp. at pp. 65-68 [relevance of etiology to function talk]

¹¹Green, p. 35

¹²Green, p. 35

drivers” are an odd case: very little that people make seem so fixed in their application by the intentions of their creator.¹³

Such considerations will not help, in any case, with law, at least for positivists, since law need not have a creator who intended to create it (think of custom as a source of law, among many other examples). But when we untether artifacts from creators, functions seem hostage to rather variable interests in that artifact. The essential function of a chair, one might say, is to provide support to those who want to sit. But does that mean that the boxes in my new apartment are chairs because I rest on them while getting settled? And does it mean that decorative chairs are not chairs, because no one should or will sit on them? The worry can be generalized: I am not aware of a single, widely accepted analysis of the essential properties of any artifact that does not rely on appeal to intentions of the creator in a context where it seems we should defer to those. If there is one, I would like to hear it.

Sometimes it is said that the “essential” function of law is to guide conduct, but perhaps we should pause for a moment to make clear why this will not work. Many valid laws do not, of course, guide conduct (think of laws against jay-walking, at least in many places). But even if we say the essential function of law is to *try* to guide conduct, there is the obvious problem that morality and advertising, for example, also try to guide conduct, but neither is (necessarily) law. Advertising, one might object, tries to guide conduct indirectly, while law and morality try to do so directly. But law and morality also share that aim with the differing sets of rules that govern the Catholic Mass, dining in a fancy restaurant, and playing cricket. So if law were “essentially” about guiding conduct, that by itself would not pick it out from other normative systems. More problematically, however, law serves other

¹³Perhaps the code in which printer drivers are written will come to have aesthetic significance? Or perhaps the code which connects computers to printers will turn out to have unanticipated wicked applications? Even “printer drivers” could turn out to be ‘up for grabs.’ Even artifacts are self-identical, and Green’s characterization of printer drivers comes close to making this a claim about self-identity.

functions besides attempted guidance of conduct: for example, some laws are meant to signal the values or aspirations of a community, and some are simply ceremonial (think of commemorations of national heroes). Law sometimes guides conduct, often attempts to guide conduct, but it can not claim that as its distinguishing essential function, since it shares guidance and attempted guidance with to many other normative systems, and, itself, discharges other functions.

As I have argued elsewhere,¹⁴ we in general jurisprudence should all be given special pause by the failure of 20th-century philosophy of science to identify the essential features of science, one of the most important human artifacts of modernity.¹⁵ Since the human practice of science is disciplined by far more demanding criteria than the human practice of law—criteria like successful “prediction and control” (the rockets need to go up and come down where expected!)—should we really expect “law” to fare better?

I should here say a word about some criticisms of the preceding considerations recently developed by Leslie Green who, after Raz, is our most sophisticated defender of legal positivism. Green accuses me, in my earlier skeptical attacks, of a *tu quoque* fallacy: “Leiter even holds,” he says, “that it is a necessary feature of something being an artifact that it has no (other) necessary features”¹⁶ and then claims that this shows, *contra* my skepticism, that there is, in fact, a necessary difference between law and morality since, as Green asserts, “morality does *not* owe its existence to human activities intended to create morality.”¹⁷ As stated, the objection is misconceived: it is not an a priori necessity about

¹⁴Brian Leiter, “The Demarcation Problem in Jurisprudence: A New Case for Skepticism,” *Oxford Journal of Legal Studies* __ (2011): __-__.

¹⁵ Larry Laudan, “The Demise of the Demarcation Problem,” in R.S. Cohen & L. Laudan (eds.), *Physics, Philosophy and Psychoanalysis* (Dordrecht: D. Reidel, 1983).

¹⁶Green, p. 36.

¹⁷P. 36

artifacts that they have no other necessary features; it is an a posteriori claim about the artifact-kind distinction as we deploy it in our best-going theories of the world that entities on the artifact side of the distinction do not have essential functional or other properties. But that conclusion is, importantly, a posteriori: if artifacts have essential features that are not hostage to a posteriori discoveries, name them! I am a Quinean, as noted, and it could well turn out that the artifact/natural kind distinction is not a theoretically useful one at the end of the day, but we need some systematic account of why the distinction that our sciences, not to mention Hart's legal philosophy, recognize, should be abandoned. In addition, it is certainly not my view that morality "does not owe its existence to human activities," and therefore is not an artifact. Philosophically, I am most influenced by Marx and Nietzsche, and on either view, morality is an artifact, albeit a different artifact from law, at least some of the time. Green has here interposed his own view—an implausible one, I think—about morality on to my critique of essentialist analyses of law.

Plainly, though, Green's point about morality really depends on the claim that morality is not an *intentional* human creation. If an intentional creation must be one that the subject is self-consciously aware of intending to create, then Green would be correct, but no theorist who thinks of morality as an artifact (certainly not Marx or Nietzsche) thinks of its human source that way. But I do want to concede that Green is correct that I was mistaken in my earlier paper to describe artifacts *per se* as *intentional* human creations.¹⁸ My worry then was about human babies, which are not, it seems, artifacts, but are human creations, although not always intentional. But human babies are biological kinds, just like calves and lion cubs, and so the more sensible way to mark the distinction at issue is between natural kinds, on the hand, and entities that are artifacts in virtue of having two characteristics, namely, that they are not natural kinds *and* are created by human beings, whether or not intentionally. And so

¹⁸Leiter, "Demarcation Problem," p. ___.

understood, morality is an artifact, on my view, just like law. Does that state a necessary truth about artifacts? Only if one thinks, as already noted, that definitions of theoretical terms are unrevisable, come what may, which is not my view, and probably not Green's. Granted that, it is incumbent upon Green or any other skeptic about my skepticism to describe the theoretical landscape in which we have no more need for a distinction between natural kinds and artifacts. There is no indication that Hart meant to challenge the distinction, and since Hart clearly thought law was on the artifact side of the divide, that means those like Dickson and Shapiro who purport to follow him need to explain what could motivate their extravagant claims on behalf of the positivist analysis of law.

Enough by way of a meta-jurisprudential, or methodological, preamble to my defense of legal positivism. Let us deflate our ambitions in a way suitable to the subject matter and the history of attempts to develop essentialist accounts of artifacts. Human artifacts answer to human interests, thus their nature and character is hostage to changing needs and wants. Even so, we can try to take a conceptual snapshot of these artifacts that answers to our current concerns. The snapshot will no doubt have fuzzy borders, and will likely be vulnerable to creative counterfactual intuition pumps, but nothing more can be expected: human interests can be adequately served by imprecise concepts, and law is likely one. But with our theoretical ambitions so deflated, it is easy to say why legal positivism seems our best theory of law, without meaningful competition. Three theoretical desiderata appear decisive and critics of positivism really should make clear which ones they mean to reject.

First, if we take seriously Hart's *explicit* theoretical aim of doing justice to what the ordinary man understands about the modern municipal legal system,¹⁹ then we have no better theory than positivism: it captures remarkably well the familiar distinctions between law and morality, law and policy, and legal

¹⁹ [cite and quote from Hart]

knowledge and moral wisdom, the kinds of distinctions jurists, lawyers, and educated laymen draw all the time. Any controversial court decision in the United States can be met with the charge by its critics that the judges did not apply the law, but were influenced by extra-legal considerations. That charge is not unintelligible, and any serious theory of law should be able to explain it. We all think judges can have legal competence, but bad moral judgment: once again, any serious theory of law should explain the distinction. We all recognize the cogency of the complaint, “there ought to be a law” governing some wrongdoing that involves no legal sanction, but it again supposes that there is a difference between conduct which is normatively objectionable and that which is legally proscribed. I am not aware of any competitor theories to legal positivism that have satisfactory accounts of these “ordinary” distinctions.

Raz’s “authority argument” for positivism has attracted important and interesting criticism over the last generation—from Stephen Perry, Thomas Christiano and Stefan Sciaraffa, Scott Hershovitz, and Michael Sevel,²⁰ among others—but it is less often remembered that Raz’s earliest arguments for positivism turned only on its ability to explain precisely these kinds of distinctions.²¹ Positivism, as he observed, “reflects and explicates our conception of the law,” for example the fact that we distinguish between “the legal skills of the judge” and his or her “moral character,”²² and between “deciding cases regarding which the law is unsettled” and those “where the law is settled” such that judges need only

²⁰Stephen R. Perry, “Political Authority and Political Obligation,” in L. Green & B. Leiter (eds.), *Oxford Studies in Philosophy of Law, Volume 2* (Oxford: Oxford University Press, 2013); Thomas Christiano & Stefan Sciaraffa, “Legal Positivism and the Nature of Legal Obligation,” *Law & Philosophy* __ (2003): __-__; Scott Hershovitz, “The Role of Authority,” *Philosophers’ Imprint* __ (2011): __-__; Michael Sevel, “Authority and Self-Knowledge”... The papers by Perry and Sevel raise, to my mind, the most important issues.

²¹Raz, “Legal Positivism and the Source of Law.”

²²*Id.* at 48.

“us[e] their legal skills in applying the law.”²³ Positivism does so through its Social and Conventionality theses: to have “legal skill,” for example, is to know what the laws are according to the extant conventions, or to know how to find out what they are. Anyone who has ever seen a confirmation hearing for a Justice of the United States Supreme Court can readily confirm that these distinctions are, indeed, central to the popular conception of law in the United States. But in legal systems where the judiciary is more disciplined by virtue of its civil-service character—this is true in Britain and Australia—such distinctions are also quite familiar. Positivism explains the distinctions: as Raz puts it, “the law on a question is settled when legally binding sources provides its solution” and “since it is source-based, [the law’s] application involves technical, legal skills in reasoning from those sources and does not call for moral acumen.”²⁴

Positivism, for similar reasons, also has an easy time explaining the most important fact about modern legal systems: namely, that despite their complexity, there exists massive agreement about what the law is in the vast, vast majority of legal questions that arise in ordinary life.²⁵ If there were not massive agreement on the law, then every modern legal system would collapse under the weight of the disputes that resulted. That there is massive agreement is straightforwardly explained by the positivist Sources and Conventionality Theses: because officials converge on authoritative legal sources, any competent practitioner can determine most of the time what the law does or does not require, and so most legal disputes can be dispensed with quickly since everyone knows what the law does or does not require.

²³ *Id.* at 49.

²⁴ *Id.* at 49-50.

²⁵ Cf. Brian Leiter, “Explaining Theoretical Disagreement,” *University of Chicago Law Review* __ (2009), pp.

__-__.

A second, more abstract theoretical consideration in favor of legal positivism deserves notice. It should count in favor of an account of the nature of law that it complements, and perhaps even wins support from, work in the empirical sciences. In the history of philosophy, one thing we have learned is that armchair confidence about reality often has to retreat in the face of scientific success. Kant took it to be a priori that space necessarily had the structure described by Euclidean geometry; a posteriori discoveries have insured that no one believes Kant any longer. A theory of law that makes explicit the tacit or inchoate concept at play in scientific research is probably to be preferred to its competitors. Positivism is that theory. If one surveys, for example, the now vast empirical literature on adjudication,²⁶ which aims to explore the relative contributions of legal versus non-legal norms to decision-making by courts, that literature *always* demarcates the distinction in positivist terms.²⁷ That empirical researchers depend on the positivist theory of law to frame their research agendas is also further evidence that it discharges the Hartian aim on the (plausible) assumption that social scientific researchers draw on their pre-theoretical or common-sense grasp of concepts in framing their inquiries.

A third, and final, consideration in support of the positivist theory of law pertains to its ontological austerity. In all other domains of inquiry, it is taken to be a theoretical virtue to understand a phenomenon in ways that do not involve unnecessary, controversial or incredible metaphysical commitments. So, for example, it would be a serious problem for a theory of law that it made the nature of law dependent on the will of God, since we have neither good reason to think God exists (and much reason to think he does not), nor reliable epistemic access to his will (if he did exist). It is a virtue of legal positivism that its picture of the world is ontologically austere (though not as austere as some

²⁶ Cite Spaeth & Segal; Sunstein et al.; Miles & Sunstein; etc.; cf. Posner, *How Judges Think* for an overview.

²⁷ Cf. Leiter, *Naturalizing Jurisprudence*, pp. ___-___.

pictures!): it requires only persons and their psychological states to explain the social phenomenon of law.²⁸ Moral truths and transcendental norms play no role in the Hartian picture, though the former are required by the views of Finnis and Dworkin, and the latter by Kelsen's theory. Since the existence of either is controversial at best and incredible at worst, it constitutes a theoretical virtue of Hartian legal positivism that it has no need for such an ontology.

Now admittedly the last two theoretical considerations I have adduced in favor of positivism take for granted what is often called "naturalism" in philosophy. But naturalism, and this bears emphasizing, is *our* world view, where "our" means we post-Enlightenment folk. It is easy to lose sight of the "background" of intelligibility of our theoretical endeavors, since we have no position outside that background from which to leverage or "ground" its credibility. Yet even the most religiously devout respect the epistemic demands of naturalism in their ordinary lives (e.g., sense perception is a reliable way to predict the future course of experience), and since the scientific revolution, the rest of culture and thought has gradually been disciplined by naturalistic considerations in one guise or another. In favoring a theory that explains an artifact naturalistically, we favor a theory that is most likely to find a place within our most general theoretical accounts of how the world works.

What theories, then, stand opposed to the positivism that fares so well by the measures just noted? "Natural law" theories are not really competitors to positivism any longer, I believe. Their most sophisticated proponent, John Finnis, has already conceded that the legal positivist satisfies the first desideratum (roughly, explaining what the common man means),²⁹ and he has never been able to make

²⁸ This was the great innovation of Hart's positivism as against Kelsen's NeoKantian variety, and together with his normative non-cognitivism and anti-behaviorism in psychology, allowed Hart to also displace the Scandinavian Realist theory of law as well.

²⁹ John Finnis, "On the Incoherence of Legal Positivism," *Notre Dame Law Review* 75 (200), p. 1611.

good on the more ambitious claim that no descriptive theory of law is possible.³⁰ Finnis claimed that to do general jurisprudence, one not only needed to focus on the central cases of law—namely, law as understood from an internal point of view—but on the central case of the “internal point of view” itself. And that central case, according to Finnis, was the case in which officials did not simply believe the law to be obligation-imposing, but in which they believed so correctly. Thus, to describe *that* kind of law, one would first have to do normative philosophy to answer the question what kind of legal system would yield genuine moral obligations to comply with its directives. Unfortunately for Finnis, he never explained why the central case of the internal point of view had to be interpreted his way. Hart agrees that to understand a social practice one has to understand the point of view of participants in the practice. And Hart agrees that this internal point of view is central to understanding law, but for descriptive not normative reasons: recall that Hart’s objection to Holmes (and, mistakenly, to the Scandinavian Realists) was not that the point of view of the “Bad Man” was morally wrong, but that it was descriptively false as an account of the internal point of view on law, given that citizens and especially officials talk in terms of an “obligation” to do what the law requires. For Hart, the central case of the internal point of view is the one that is actually present in all modern municipal legal systems, namely, that officials of the system treat the rules of the system as obligation-imposing. That descriptive thesis may be wrong, but Finnis has no argument that it is. Finnitian Natural Law, charitably understood, is just doing something different, trying to explain the features of morally ideal legal systems. That is a good project, even if Finnis’s meta- and normative ethics are, as it seems to me, implausible. But it states no dispute with positivism as a theory of law.

³⁰ See Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007), esp. pp. ___-___. Contemporary natural law theorists have, correctly, focused on attacking the possibility of descriptive jurisprudence as the key issue with positivism [cite M. Murphy, Perry].

If not natural law theory, then what is the alternative to positivism? American Legal Realism, as I have argued for many years, is not only compatible with positivism as a theory of the nature of law, but *presupposes it* in its explanation of the indeterminacy of legal reasoning.³¹ American Realists claimed that judicial decision-making had to be explained by the influence of non-legal norms on the judges, since the legal norms underdetermined the decision required. In so arguing, they assumed that only source-based norms could be legally binding ones, and that the only legally binding ones were those explicitly acknowledged by the courts in their opinions or embodied in statutes. They then argued that since there existed equally legitimate but incompatible ways of interpreting the sources, legal reasoning was indeterminate, at least in some range of cases. Their arguments for legal indeterminacy, in short, presupposed a positivist view of which norms were legally binding on judges.

Scandinavian Legal Realism is also, I believe, orthogonal to the claims the Hartian positivist is defending. Unlike the Americans, the Scandinavians' motivation was explicitly metaphysical and epistemological: they wanted to understand what legal norms could be, and how anyone could know them, in a world that was assumed not to include norms in its ontology.³² The Scandinavians were in many ways severe naturalists, though unlike Quine who thought that only physically observable stuff, like behavior, really exists, the Scandinavians were willing to countenance psychological states in their ontology. Rather than try to capture the common-sensical notion of law, Alf Ross, for example, was explicit that his basic account of law as a prediction of what legal actors will do was stipulative, intended to show how we could make sense of legal systems in a world thought to be norm-free--though not free of psycho-physical facts about human behavior. Ross's aim, in short, was not to make sense of what the

³¹Leiter, *Naturalizing Jurisprudence*, Chapter 2.

³²See Brian Leiter, "Legal Realisms, Old and New," *Valparaiso Law Review* __ (2013) (2012 Seegers Lecture in Jurisprudence).

“ordinary” person knows about the modern municipal legal system, and so, at that level, his theory was in no competition with Hart’s positivism.³³

So that leaves us, as far as I can see, with just one familiar contender against positivism: Dworkin’s theory of “law as integrity,”³⁴ as he came to call it, according to which the law is whatever follows from the best “constructive interpretation” of the institutional history of the legal system, that is, whatever follows from the set of principles that provide the best explanation and justification for what the courts and legislature have done so far. But Dworkin’s theory fails along each dimension of theoretical adequacy noted earlier. For example, not only can it not explain why any judicial reference to morality is not in fact legally binding,³⁵ it even entails the bizarre and counter-intuitive possibility that no one in any legal system actually knows what the law is on any point, since it may be that no one has figured out the best constructive interpretation yet. Dworkin’s theory figures as the background to no empirical research program into adjudication, and it demands that there be objectively right answers to *all* moral questions. It fails, in short, to explain what the ordinary man understands about the modern municipal legal system, and it does so with a theoretical edifice that plays no role in scientific research and which requires highly contentious metaphysical claims.

This is not to deny that Dworkin’s views have enjoyed a kind of popular resonance in many constitutional democracies, though this appears to be mainly due to a superficial understanding of Dworkin’s actual views. Many constitutional lawyers find Dworkin’s theory appealing, for example, because they like that it makes moral considerations obviously relevant to the resolution of momentous

³³Here I have been influenced by the work of Jakob Holtermann.

³⁴Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1996).

³⁵At best, the Dworkinian can say that any particular reference to morality is not *really* part of the best constructive interpretation of the law. But we often think we *know* that some moral references are extra-legal, and on the epistemic point, Dworkin’s theory can not offer any explanation at all.

constitutional questions, and in what appears a principled way. The memorial notice for Dworkin earlier this year by Cass Sunstein, a leading American public law scholar, is illustrative. Here is Sunstein:

Consider a question about which people fiercely disagree: Does the U.S. Constitution require states to recognize same-sex marriages? In answering that question, judges have to deal with many precedents. For example, the Supreme Court has ruled that states can't criminalize sexual acts between people of the same sex. The court has also forbidden states from banning racial intermarriages. At the same time, the court allows states to forbid polygamous marriages.

In resolving the same-sex marriage dispute, how can judges deal with such precedents? Here Dworkin introduced an arresting metaphor. Suppose that you are a participant in writing a chain novel. Others have written earlier chapters. Now it's your turn. How shall you proceed?

Dworkin's answer is that you have to engage in an act of interpretation. You can't disregard what has come before. If your predecessors have started to write a romance, you can't suddenly turn it into a work of science fiction without doing violence to what they have done. You owe a duty of fidelity to their work.

But your task is not mechanical. You have to fit the existing materials, and you have to justify them, by writing a new chapter that makes the emerging novel, taken as a whole, the best it can be.

Dworkin thinks that judging is a lot like that. Precedents are like the existing chapters, and a new case is an opportunity to produce a fresh one. Judges can't just make the law up. But at least in hard cases, they can't merely "follow the law," because there isn't anything to "follow." What they have to do is produce a principle that both fits and justifies the existing legal materials. This is Dworkin's conception of law as integrity.

This does, indeed, seem like one sensible recommendation about how judges should proceed when the law leaves a question unsettled (such that there is no law to “follow,” as Sunstein puts it), and nothing in the theory of law known as legal positivism actually takes issue with such a recommendation. Where the law is unsettled—as it often is in momentous constitutional cases—positivists certainly think moral considerations are pertinent to the best resolution of the question; and even where the law is settled, positivists also think that moral considerations can override the settled law: no serious positivist theory holds that settled law imposes non-defeasible obligations on officials or citizens.³⁶

Dworkin’s theory of law, *contra* Sunstein, is not simply the view that in an area which is “fiercely contested,” one should apply the fit-justification method of interpretation. This simply elides the quite radical and implausible character of Dworkin’s views about the nature of law. According to Dworkin, what the law is (not simply what a court should do in a hard case, but what the law in any given jurisdiction really is) is whatever follows from the best constructive interpretation (in roughly the fit-justification sense glossed by Sunstein) of the institutional history of the legal system, i.e., the prior legislative enactments, court decisions, and so on. That means, among other things, that some prior legislative enactments and prior court decisions *might not really be law*, since they might not follow from the best constructive interpretation of the system. Indeed, it means that no one may actually know what the real law is in the United States, or in any other jurisdiction, since no one may have yet figured out the best justification for the institutional history of the legal system. A theory of law that entails that no one might actually know what the law is faces a serious, shall we say, *reductio ad absurdum* problem.

³⁶What the law is, that is one thing; what the law *ought* to be is another. Every legal positivist from Bentham onwards takes that idea very seriously. One might even say that it is essential to the positivist view to defeat the assumption that legal validity entails moral obligation, by citizen or judge.

The trademark Dworkinian move in his decades-long battle with legal positivism was always to run together questions about what the law is (on which he and positivists had opposing views) with the question how courts should decide particular cases (where positivists could often agree with Dworkin). Here's how I put it in reviewing Dworkin's collection of essays, *Justice in Robes*, a few years ago³⁷:

Dworkin organizes his reply [to Hart's criticisms of Dworkin in the "Postscript" to *The Concept of Law*] around a hypothetical case involving "Mrs. Sorenson", who has been injured by a defective drug whose precise manufacturer she cannot identify because many companies produced the same product. Common-law courts responded to this kind of problem by inventing a new doctrine, "market-share liability," requiring manufacturers to pay damages for harm based on their "market share" of the dangerous product without requiring individualized proof by the plaintiff that defendant's version of the product caused the injuries in question. Dworkin thinks Mrs. Sorenson was legally entitled to this remedy even before clever judges crafted the new rule, and—more to the point here—he thinks Hart was committed to denying Mrs. Sorenson

³⁷Brian Leiter, "The Theory of Esoteric Law," *Journal of Legal Education* __ (2006), pp. __-__. It is perhaps worth noting that in the 2004 version of his essay on Hart's *Postscript*, Dworkin wrote:

Hart's sources thesis [the thesis that "the existence and content of law can be identified by reference to the social sources of law"] is very far from neutral between the parties in Mrs. Sorenson's case....No 'source' of the kind Hart had in mind had provided that people in Mrs. Sorenson's position are entitled to recover damages on a market-share basis, or stipulated a moral standard that might have that upshot or consequence. So if Hart is right Mrs. Sorenson cannot claim that law is on her side....Mrs. Sorenson's lawyers argued to the contrary. They denied the sources thesis: they said that general principles inherent in the law entitled their client to win. So Hart's view is not neutral in the argument: it takes sides. It takes sides, in fact, in every difficult legal dispute, in favour of those who insist that the legal rights of the parties are to be settled entirely by consulting the traditional sources of law.

After I criticized this misreading in a well-known critique of Dworkin—"The End of Empire: Dworkin and Jurisprudence in the 21st Century," *Rutgers Law Journal* 36 (2004), p. __ --Dworkin rewrote the passage to make the mistake less obvious, omitting the last few lines, and now claiming only that for Hart, "So far as the law is concerned, he would have said, she must lose." *Justice in Robes*, p. 144. That is closer to being accurate, but still gives the misleading impression, as does Dworkin's whole discussion, that Hart would have counselled that Mrs. Sorenson lose her case. Unsurprisingly, there was no citation indicating the reason for Dworkin's revision, which was, alas, typical of Dworkin's unscholarly *modus operandi*.

was entitled to such a remedy, since the existing legal authorities did not explicitly establish it.

"Hart and I hold opposite opinions about the same issue", says Dworkin.

But this is false, if the issue is, as it appears to be, the remedy that ought to be awarded Mrs. Sorenson. For Dworkin runs together the question "What is the law in this jurisdiction?" with the question "How ought a particular case be decided?" Positivists have always been clear that a judge's legal duty to apply valid law can be overridden by moral or equitable considerations in any particular case, and Hart's general theory ("the sources thesis") that "laws" are distinguished by their source—by their being enacted, for example, by a legislative body or figuring in the holding of a court—is simply silent on how the wronged Mrs. Sorenson should be treated. On Dworkin's [theory], however, it seems every moral wrong must have a preordained *legal* remedy—even though no one knew the law required it!— so that forward-looking jurists who craft new legal rules in response to real-world problems are really only "discovering" a legal remedy that already existed in Dworkinian Heaven.

Sunstein's Dworkin—who is, I think, the Dworkin that has been influential in most Anglophone constitutional theory—is Dworkin-lite, though I intend nothing pejorative by that label: think "coca cola lite," which is still quite good (it's what I drink) but not the "real thing" as the advertising says. Dworkin-lite is not the real Dworkin, since it obscures from view the counter-intuitive commitments of his conception of the nature of law. But it is the bit of Dworkin that seems most appealing, and helps make sense of one way in which constitutional lawyers and theorists argue. Only atrocious public relations for legal positivism—aided and abetted by decades of misrepresentation by Dworkin—has led so many casual consumers of the jurisprudential literature to think otherwise. This poses an interesting sociological question about jurisprudence, but perhaps not an interesting philosophical one.

Let me take that back, slightly. Philosophers, due to their Socratic delusions, often think there is a hard line between sociological and philosophical considerations. I do not. The sociology of philosophy often illuminates philosophy, because what “intuitions” seem plausible, what “argumentative moves” seem decisive, are often sociological artifacts, not deliverances of reason. That sociological and philosophical considerations are on a continuum does not mean that some considerations are not irrational and that some claims are not just artifacts of professional stratification that we ought to dismiss. It is the middle ground on that continuum about which we need to be careful, and so, in that spirit, I would like to conclude with some speculative reflections on the sociology of jurisprudence.

First, we should be mindful of the effects the sociology of academic life has on scholarly inquiry. PhD students are tasked with making a “contribution to knowledge,” and that means that even if a particular theory is hugely successful and plausible, doctoral students will have reasons of professional self-preservation to find fault with the consensus. In a Millian spirit, this is surely not a bad thing, but it can also cause mischief. Sometimes it is reasonable to treat a philosophical problem as solved, lest philosophy just turn into an endless merry-go-round of sophistical mischief. It is hard for me not to read most of the Dworkinian and natural law critiques of positivism without thinking that sophistical mischief now rules the roost.

Second, there are some odd facts about Anglophone jurisprudence that deserve comment in this regard. There is no other area of Anglophone philosophy apart from general jurisprudence where Oxford reigns supreme: not metaphysics, epistemology, ethics, political philosophy, or philosophy of language, mind, or logic. Dummett, for example, dominated Oxford-style philosophy of language for a generation, yet on my side of the Atlantic the work was often thought to involve confusions of metaphysical and epistemological issues, and so never exerted anything like the influence it did in England. Rawlsian political liberalism has never had any traction in Oxford (to its credit), despite its

huge influence on my side of the Atlantic. Oxford philosophy of mind has had a longstanding hostility to the naturalist approaches that are dominant in America and Australia. And so on.

Oxford, however, has truly dominated Anglophone general jurisprudence from the 1960s to, perhaps, the present. Those of us in the provinces, whether Chicago or Sydney, responded to the pronouncements from those close to High Street. This now appears to be ending, but even so it is important to think about the import of the history. If Dworkin had not ascended to the Professorship of Jurisprudence after Hart, where he was able to influence students to carry his torch, would we still be talking about his criticisms of legal positivism?³⁸ The history could have been otherwise, and perhaps Hart wished it were. As Nicola Lacey revealed in her illuminating biography *The Nightmare and the Noble Dream*, Hart was frustrated by “Dworkin’s fluid and sometimes elusive analytic style” and came to feel “that there was something wilful or even lacking in honesty about Dworkin’s reading of his work”.³⁹ Hart’s posthumously published “Postscript” to *The Concept of Law*, with its painstaking accounting of the multiple instances where Dworkin misstated Hart’s views, betrays an exasperation that must have been embarrassing to its target.

Dworkin, himself, was not adverse to such sociological speculations, we should remember. Late in his career, he levelled a remarkable *ad hominem* charge at legal positivists, namely, that their real motive was to preserve “legal philosophy as an independent, self-contained subject and profession.” In other words, Dworkin suggested that legal positivists accept their view of the nature of law not because they think it is true, but because it makes it possible for them to have a career! Dworkin continued in this vein: “Positivists since Hart...have defended with great fervor a guild-claim: that their work is

³⁸Michael Sevel points out to me, not wrongly, that we might not still be talking as much about Hart’s positivism were it not for Dworkin’s criticisms!

³⁹[cite]

conceptual and descriptive in a way that distinguishes it from a variety of other crafts and professions.” Hart, to be sure, did believe that his work was conceptual and descriptive in a distinctive way, but Dworkin might have noted that Hart did not think this distinguished his method from the craft and profession of *philosophy*, at least as then conceived.

The difficulty with Dworkin’s sociological speculations, in short, is that they are absurd, not that they interject sociology into philosophical disputes. Alas, their absurdity has not stopped some who should know better, like Jeremy Waldron, from repeating them.⁴⁰ But that Dworkin did not lose all credibility for putting forth such silly ad hominem is, itself, telling about the lax intellectual standards in Anglophone jurisprudence and the role that the warped sociology of the field has played in scholarly discussion. For example, it is inconceivable—or at least nomically impossible!—that anyone would have attacked Frank Jackson’s defense of conceptual analysis in ethics and metaphysics 15 years ago on the grounds that it makes philosophy independent of other disciplines, and thus Jackson’s real motivation must be to preserve a professional niche for philosophers! And someone who followed that up with the claim that Jackson had made the subject “boring”—Dworkin’s final salvo at Hart—would have been laughed off as an anti-intellectual Richard Rorty wannabe. But that has not happened in response to Dworkin’s nonsense, or Waldron’s repetition of parts of it, a fact that cries out for sociological explanation.

None of the preceding, of course, shows that Dworkin’s arguments on the merits are not successful. But the defects of those arguments are the subject of a voluminous literature by now, and there is no need to rehearse for this audience the Hart-Dworkin dialectic. Let me then step back from sociology, and return to the main ambition of this talk. Legal positivism, as defined by the Social and

⁴⁰See, e.g., the astonishing first part of Jeremy Waldron, “Can There be a Democratic Jurisprudence?”

Conventionality Theses, gives an illuminating and plausible account of the “ordinary” concept of law, it does so in a way that can be deployed fruitfully in the empirical sciences, and it does so without controversial or incredible metaphysical assumptions. The positivist theory is not immune to clever counterfactual intuition pumps, and it is, like any theory about an artifact, hostage to social, economic, and historical changes that will influence our interests in the subject. But if there is a reason not to be a legal positivist today, it is incumbent upon the critics to identify the theoretical point on which positivism fails. I do not believe they have done so.

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