

## TOWARD CLASSICAL LEGAL POSITIVISM

*Dan Priel\**

## I. THE ROAD NOT TAKEN

WHEN H.L.A. Hart defended legal positivism in his famous Holmes Lecture, he sought to do so “as part of the history of an idea.”<sup>1</sup> In his hands this idea grew out of two philosophical traditions. One of them was utilitarianism, the belief that the moral assessment of states of affairs must be based on their contribution to happiness, while the other was “the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies.”<sup>2</sup> Together these two ideas led to a “simple but vital distinction” between “law as it is [and] law as it ought to be.”<sup>3</sup>

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

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<sup>1</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 594 (1958).

<sup>2</sup> *Id.* at 601.

<sup>3</sup> *Id.* at 594.

the artifice of Lawyers, locked up in an illegible character, and in a foreign tongue.”<sup>4</sup> For him, the only path for true understanding of the law came not from paying attention to the thick foliage of legal discourse but rather by cutting through it.<sup>5</sup>

Once we see that utilitarianism and linguistic analysis of the kind Hart championed are not natural bedfellows, we can turn Hart’s claim on its head: The history of jurisprudence reveals two distinct versions of legal positivism which are not easily joined. And indeed, it did not take long for Hart himself to abandon the link between utilitarianism and legal positivism. Perhaps he no longer thought it necessary to draw such a strong link between the two when no longer facing an audience he suspected would be unsympathetic to conceptual inquiry;<sup>6</sup> or perhaps Hart simply came to recognize the two are quite different.<sup>7</sup> Be that as it may, by the time *The Concept of Law* was published, only four years after delivering the Lecture, legal positivism’s utilitarian connection was largely gone. It was still presented as a simple idea that (unlike natural law) did not require taking on “much metaphysics, which few could now accept,”<sup>8</sup> but it was now much more the result of conceptual analysis and

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<sup>4</sup> Jeremy Bentham, *A Fragment on Government* 21 n.r. (J.H. Burns & H.L.A. Hart eds., 1988) (1776). The fictional nature of legal language was a major theme in Bentham’s work. He often accused lawyers of keeping legal language complex for self-serving reasons. See Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* 114–31 (2006).

<sup>5</sup> I am less concerned in this Article with the other figure to whom Hart ascribes these views, John Austin. Austin’s interests were more different than Bentham’s than is usually appreciated. See John Austin, *The Province of Jurisprudence Determined* 26–27 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832). For more on the difference between Austin and Hart, see Dan Priel, *H.L.A. Hart and the Invention of Legal Philosophy*, 5 *Problema* 301, 311–16 (2011). Austin clearly was interested in getting one’s language right, but for all his pedantry over law “properly so called,” Austin did not see himself as concerned with elucidating prevalent linguistic usage and he rejected it when it did not fit into his scheme.

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

<sup>7</sup> See his somewhat different characterization of Bentham’s enterprise in H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 21–39 (1982); cf. P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* 256 (1987) (“[U]tilitarianism all but dropped out of English legal theory in the latter part of the nineteenth century, and instrumentalism never did have much place in English positivism.”).

<sup>8</sup> H.L.A. Hart, *The Concept of Law* 188 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

armchair sociology<sup>9</sup> than the conclusion of any ethical or metaethical inquiry. Decades later, when Hart wrote the postscript to *The Concept of Law*, he said: “I still think legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open . . . the general question of whether they have . . . ‘objective standing.’”<sup>10</sup> In other words, one reason to favor his linguistic approach to legal philosophy was precisely that it was *not* connected to a particular moral theory. Knowing Hart’s personal doubts on questions relating to the foundations of morality,<sup>11</sup> it is likely part of the attraction that conceptual legal positivism held for him lay in the fact that it allowed him to remain agnostic on questions about which he was personally conflicted.

One of the marks of the extraordinary influence of *The Concept of Law* is that most defenses of legal positivism in the last fifty years have adopted this conceptualist approach. From here it was but a small step to the startling claim made by John Gardner, that even in the case of Bentham himself his utilitarianism and his legal positivism were completely separable: Bentham’s preference for legislation over the common law—a view that was closely tied to his utilitarianism—is “totally independent of his legal positivism.”<sup>12</sup> Legal positivism was thus stripped by most of its contemporary proponents of the particular historical context in which it appeared, of its links to the Enlightenment, of the many ways in which its (alleged) earlier proponents tied it to their political thought, and turned into a proposition. It was defended as a conceptual truth about the “nature” of law, the result of nothing more than careful attention to the “study of the meaning of the distinctive vocabulary of the law.”<sup>13</sup>

For this proposition to count as a philosophical thesis, not merely an incontestable, observational truism, there was a need for a contender. And a contender was duly found; or, more accurately, invented. It was called “natural law.” Of course, natural law is a philosophical tradition with a provenance stretching back to earliest recorded Western philoso-

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<sup>9</sup> How these two seemingly different projects connect in Hart is explained in Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 Wash. U. Juris. Rev. 269, 303–04 (2012).

<sup>10</sup> Hart, *supra* note 8, at 253–54.

<sup>11</sup> See Neil MacCormick, *H.L.A. Hart 207* (2d ed. 2008).

<sup>12</sup> John Gardner, *Law as a Leap of Faith: Essays on Law in General* 36–37 (2012). In rather similar fashion Hart complained that “at some important points [Bentham’s] utilitarianism gets in the way of his analytical vision.” Hart, *supra* note 7, at 162.

<sup>13</sup> Hart, *supra* note 1, at 601.

phy, but this historical, natural law is, as Peter Gay once put it, “infinitely complex; to draw a map of its growth, its multiple ingredients, its changing modes and varied influence, would be like drawing a map of the Nile Delta.”<sup>14</sup> In this vast river one finds discussions on the foundations of political authority, the limits of political obligation, the origins of property rights, the justification of contractual obligations, the permissibility of capital punishment, along with much else. Little of this was acknowledged in the work of Hart or his followers. Instead, a question that was, at best, marginal in the work of a few natural law theorists, was turned into the (sole?) defining characteristic of what came to be known as “natural law theory.” A broad-ranging family of ideas was thus bowdlerized into a proposition to match the proposition of legal positivism. In its simplest form natural law became the proposition that unjust law is not law.<sup>15</sup>

There was one difficulty with this approach: Most of those who actually called themselves “natural lawyers,” those who saw their work as following in the footsteps of earlier natural lawyers, dissociated themselves from this proposition. They saw no difficulty with the claim that there were immoral or unjust laws.<sup>16</sup> In response, legal positivists have

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<sup>14</sup> Peter Gay, *The Party of Humanity: Essays in the French Enlightenment* 199 (1963). For detailed surveys of its more modern incarnations, see Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (1996); J.B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* 17–166 (1998); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights and Church Law, 1150–1625* (1997).

<sup>15</sup> See Hart, *supra* note 8, at 8. Admittedly, later in the book Hart considers a few other ideas associated with natural law, but these ideas still bore relatively little resemblance to the work of actual natural lawyers. See Cristóbal Orrego, *H.L.A. Hart’s Understanding of Classical Natural Law Theory*, 24 *Oxford J. Legal Stud.* 287 (2004).

<sup>16</sup> See, most famously, John Finnis, *Natural Law and Natural Rights* 363–66 (2d ed. 2011) [hereinafter *Finnis, Natural Law*]. In different ways the claim has been made by others of a broadly natural law view. See, e.g., Ronald Dworkin, *Taking Rights Seriously* 89 (rev. ed. 1978) (“No one thinks the law as it stands is perfectly just.”); Lon L. Fuller, *The Morality of Law* 153 (rev. ed. 1969) (contending that, while law may support a wide range of policies and still maintain its “internal integrity,” the “internal morality” of law does not permit the pursuit of just any substantive aim). More recently it has been suggested (by a legal positivist) that the difference between natural law and legal positivism is that the former is only interested in the central case of moral law at the expense of marginal cases and the nonmoral aspects of law, whereas legal positivism takes a broader interest in both. See Gardner, *supra* note 12, at 168–70, 175–76. This, however, is not how natural lawyers (or at least some of them) perceive of their enterprise. See, e.g., Mark C. Murphy, *Natural Law in Jurisprudence and Politics* 10–13 (2006) (exploring the idea of legal defectiveness); 4 John Finnis, *The Truth in Legal Positivism* 174–88 (1996), *reprinted in* *Philosophy of Law: Collected Essays*

drawn a distinction between “[t]raditional Natural Law . . . [which] insist[s] that a putative norm cannot become legally valid unless it passes a certain threshold of morality”<sup>17</sup> and “contemporary” natural law theorists, who accept this idea.<sup>18</sup> As a historical matter this claim is incorrect; if anything, it gets things exactly backwards. “Traditional” natural lawyers clearly recognized the possibility of unjust laws,<sup>19</sup> whereas it is some contemporary scholars calling themselves “natural lawyers” who argue that unjust laws are not law.<sup>20</sup> The important matter, however, is that if the point of legal positivism, if its supposed “insight,”<sup>21</sup> is something that was recognized by at least some early natural lawyers, it is hard to see in what way it posed a radical challenge to older theories of law. It is for this reason that when one looks at many of the recent works on the subject, one is struck by just how hard commentators struggle to find something that distinguishes legal positivism and natural law, sometimes admitting failure in the end.<sup>22</sup> As a result, what is still treated as the most foundational debate in jurisprudence—the one that opens virtually all the legal theory textbooks—is one on which there seems to be no argument at all.<sup>23</sup>

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174 (2011) (discussing recognition of law’s positive aspects in the work of natural law theorists).

<sup>17</sup> Andrei Marmor, *The Rule of Law and Its Limits*, 23 *Law & Phil.* 1, 42 (2004).

<sup>18</sup> *Id.* at 42 n.66.

<sup>19</sup> For examples of ancient and medieval natural lawyers recognizing the possibility of unjust law, see *infra* text accompanying notes 26–32.

<sup>20</sup> See, e.g., Michael S. Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* 303–04 (2000); Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 *Can. J.L. & Juris.* 201, 202–03 (2007); Jonathan Crowe, *Reviving the Strong Natural Law Thesis* 8–13 (unpublished manuscript, on file with author). The picture among natural lawyers, whether “traditional” or “contemporary,” is thus more complex than Marmor envisages it. My argument below, however, seeks to identify what unites all (or most) natural lawyers and what separates all (or most) of them from contemporary legal positivists.

<sup>21</sup> Marmor, *supra* note 17, at 42.

<sup>22</sup> See, e.g., Gardner, *supra* note 12, at 51–53, 169–70, 174–76; David Lyons, *Ethics and the Rule of Law* 105 (1984); Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* 278–79 (2007); Murphy, *supra* note 16, at 22–24; Brian Bix, *On the Dividing Line Between Natural Law Theory and Legal Positivism*, 75 *Notre Dame L. Rev.* 1613, 1621–23 (2000) (focusing on methodological differences); Marmor, *supra* note 17, at 42–43; J.S. Russell, *Trial by Slogan: Natural Law and Lex Iniusta Non Est Lex*, 19 *Law & Phil.* 433, 434 (2000).

<sup>23</sup> What about those who believe that unjust law is not law? See *supra* note 20. Is there no real debate between them and legal positivists? There are two ways of understanding these debates. If understood as “conceptual” debates about the nature of law, then I believe these debates are in fact misguided because they are grounded in the mistaken belief that there is

In this Article, I want to revisit these questions and offer a different way of addressing them. I suggest we do so by looking back at the road not taken, the one briefly suggested by Hart in his Holmes Lecture, but silently abandoned shortly afterwards. My claim, however, will not be that legal positivism was a utilitarian position per se, but rather that it was what might be called a *metaphysically deep doctrine*, one that was grounded in the very same ideas that led Bentham to his utilitarianism. I will argue that unlike contemporary legal positivism, whose proponents defend it (and the domain of jurisprudence) in highly restricted terms, the philosophers nowadays consider the founders of legal positivism as theorizing about law as part of a broader inquiry. More concretely, they saw theorizing about law as part of theorizing about morals and politics, and they saw the latter inquiry as part of theorizing about nature, and more specifically, about human nature. Moreover, in all this, these thinkers *agreed* with natural lawyers. Where these “classical” legal positivists differed from natural lawyers was on the correct metaphysical foundations and the image of human nature their legal theories assumed. To put it simply, they thought the views of the natural lawyers on nature, human nature, and the nature of morals and politics were all false. Their disagreements on law were part of, or derived from, their differences on these larger matters.

I have two major aims in this Article. First, I hope to set the historical record straight, so I offer an account of Hobbes’s and Bentham’s work that seeks to understand their views on law not by isolating it from the rest of their wide-ranging body of work, but by understanding their jurisprudential work as part of a broader project. The primary aim of this Article, however, is not historical. My main aim is to contribute to contemporary jurisprudential debates and to suggest that the largely neglected approach of earlier positivists is superior to the view held by most contemporary legal positivists. These two aims are not necessarily congruent. There is an obvious sense in which talk of Hobbes or Bentham as legal positivists is a historical anachronism. The debate between legal positivism and natural law, in the form one finds in contemporary

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such a thing as a nature to law, one that can be discovered through conceptual analysis. These supposedly conceptual debates are, in my view, nothing more than verbal disputes. By contrast, the claim that unjust law is not law can make sense if it is understood as part of a normative account that ties law to legitimate political power. In this sense, however, it is a mistake to think of the debate between natural lawyers and legal positivists as a conceptual one. See Dan Priel, *The Place of Legitimacy in Legal Theory*, 57 McGill L.J. 1 (2011).

jurisprudence textbooks, is a twentieth-century debate that cannot be found in jurisprudential discussions of past centuries. It is not just that the word “positivist” is not found in the works of Hobbes, Bentham, or even Austin; it is that the debate as it is understood today was not one that they were engaged in. Therefore, it is in some sense pointless and in some sense misleading to worry too much over the question whether Hobbes or Bentham were “really” legal positivists or natural lawyers.<sup>24</sup>

The more meaningful question, and the one I wish to engage in, is to what extent it is useful *for us* to call Hobbes and Bentham “legal positivists.” My answer to this question consists of three interrelated points. The first is that we draw an explicit link between their ideas and the view that (some time later) would come to be known as “positivism,” roughly the view that the methods of the “human sciences” are essentially the same as those of the natural sciences. The second point is that the classical legal positivists’ decisive break with natural law ideas prevalent in their day is to be found exactly here, in their views about metaphysics and nature. The third point is that this aspect of their work has been, in my view regrettably, abandoned by contemporary legal positivists. Though all three points are related, in this Article I will say relatively little about the first point, as I discussed it in greater detail elsewhere.<sup>25</sup>

## II. TWO VERSIONS OF LEGAL POSITIVISM

The idea that putative laws can be immoral and still remain (in a certain sense) “valid” did not need the genius of Hobbes or Bentham to be discovered. It was always known, because it is a trivial observation. Aristotle, for example, distinguished between the “legally just” and the “equitable,” which is “a correction of legal justice.”<sup>26</sup> A law thus can be “legally just” (in modern terminology, “it is just according to law”) even though it is inequitable (“morally unjust”). To be able to say this, one *must* presuppose that the inequitable law is law. Even more clearly, Cic-

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<sup>24</sup> Cf. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *Hist. & Theory* 3, 52 (1969) (warning of the dangers of anachronism in intellectual history).

<sup>25</sup> See Priel, *supra* note 9.

<sup>26</sup> Aristotle, *Nicomachean Ethics* bk. V, at 98–99 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.); see also Aristotle, *The Art of Rhetoric* § 5.1.13, 125 (H.C. Lawson-Tancred ed. & trans., Penguin Books 1991) (recognizing the possibility of a just act though forbidden by law).

ero, by contemporary classifications a natural lawyer *par excellence*,<sup>27</sup> had no difficulty in distinguishing between “legally binding conditions or how to answer this and that question for our clients”—what legal positivists would now call valid legal norms—and the broader inquiry, in which “we have to encompass the entire issue of universal justice and law; what we call civil law will be confined to a small, narrow, corner of it.”<sup>28</sup> He had no difficulty in understanding that “as our whole discourse has to do with ordinary ways of thinking, we shall sometimes have to use ordinary language, applying the word ‘law’ to that which lays down in writing what it wishes to enjoin or forbid. For that’s what the man in the street calls law.”<sup>29</sup> Aquinas, too, clearly recognized the possibility of iniquitous or immoral laws. He states as clearly as possible that “laws established by human beings are either just or unjust,”<sup>30</sup> and then goes on to provide a typology of the different ways in which they may be unjust.<sup>31</sup> These “traditional” natural law theorists were also fully aware of the utterly obvious practical implications of disobeying unjust laws. This is clear even in Augustine, who is credited with the idea that unjust law is not law. In the sentence preceding these famous words Augustine considers the following hypothetical: “[T]he law bids a soldier to kill the enemy, and if he holds back from the bloodshed he pays the penalties from his commander.”<sup>32</sup> Augustine did not question that the practical

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<sup>27</sup> Cicero writes:

[L]aw in the proper sense [or as we might say today ‘properly so called’] is right reason in harmony with nature. It is spread through the whole human community, unchanging and eternal . . . . This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded. We cannot be exempted from this law by any decree of the Senate or the people . . . .

Cicero, *The Republic*, in *The Republic and the Laws* bk. III, para. 33, at 68–69 (Niall Rudd trans., Oxford Univ. Press 1998) (c. 54 B.C.E.).

<sup>28</sup> *Id.* bk. I, para.17, at 103.

<sup>29</sup> *Id.* bk. I, para. 19, at 103.

<sup>30</sup> Thomas Aquinas, *On Law, Morality, and Politics* S.T. I–II q.96 art. 4, at 64 (Richard J. Regan trans., Hackett Publishing Co. 2d ed. 2002).

<sup>31</sup> *Id.* at 65. When he later discusses the conditions under which laws may be changed, he mentions the case when “the existing law is clearly unjust.” *Id.* S.T. I–II q.97 art. 2, at 72. Plainly, there would be no need for changing such “clearly unjust” laws if they were not laws. For more on Aquinas’s views on unjust laws see John Finnis, *The Truth in Legal Positivism*, in *The Autonomy of Law: Essays on Legal Positivism* 195, 201–03 (Robert P. George ed., 1996). For a more general discussion of the role and different senses of positive law in Aquinas’s work, see James Bernard Murphy, *The Philosophy of Positive Law: Foundations of Jurisprudence* 48–116 (2005).

<sup>32</sup> Augustine, *On the Free Choice of the Will, On Grace and Free Choice and Other Writings* § 1.5.11.33, at 10 (Peter King ed. & trans., Cambridge Univ. Press 2010) (c. 395).



implications of the soldier's failure to comply with a law is that he would be punished, regardless of whether the law in question was just. This is exactly the consideration John Austin relied upon in his famous refutation of natural law,<sup>33</sup> but Augustine did not think these implications were relevant for answering the question whether there was an important sense in which unjust edicts were not law.

If that is the case, what was the novelty of the earliest philosophers we now call legal positivists? My argument will be that Hobbes and Bentham offered a distinct approach to legal theory that is very different from the work of contemporary legal positivists and in a way is much closer in spirit to the approach to the work of their natural law predecessors, whose work they criticized. The hallmark of contemporary legal positivism is its internality: It seeks to offer a theory of law from within legal practice, and as such one that is built around the way law is understood by lawyers. The central concept in the effort to explain the "nature" of law is legal validity, and it directs the inquiry to identifying what some members of the legal community consider to be law. Revealingly, in an interview Hart gave late in his life he said of his main work in jurisprudence that it was written "very much with lawyers in mind."<sup>34</sup> From this point of view the possibility of "valid" immoral or unjust laws is, to put it mildly, not particularly surprising and does not reflect any deep philosophical insight. That lawyers have considered some edicts as "legal" despite these edicts being immoral (or, even more trivially, despite these edicts being *considered by others* as immoral) is not something anyone would bother to contest.<sup>35</sup>

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"Surely we will not dream of calling these laws unjust—or rather, not to call them 'laws' at all, for a law that is not just does not seem to me to be a law." Id.

<sup>33</sup> Austin writes:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up . . . .

Austin, *supra* note 5, at 158.

<sup>34</sup> Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman, 32 *J.L. & Soc'y* 267, 291 (2005); see also Joseph Raz, *The Authority of Law: Essays on Law and Morality* 44 (1979); Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 *Va. L. Rev.* 1179, 1192 (2015).

<sup>35</sup> The same can be said of similar statements in the same vein. See, e.g., Joseph Raz, *Practical Reason and Norms* 164 (2d ed. 1990) ("We are all sadly familiar with laws which are racially discriminating, which suppress basic individual liberties such as freedom of speech or of worship. We also know of tyrannical governments pursuing evil goals through the ma-

If there is a deeper philosophical claim here, it is that what counts as law must be understood “from the internal point of view” of participants in the legal system, that membership in a legal system (“legal validity”) is determined by standards adopted by members of that legal community (and not by any external standard to the attitudes of the legal community). But the truth of this claim is supported by appeal to examples of things in the world that are purported to be laws but are immoral. That, however, renders legal positivists’ claims circular, for it is precisely the status of these immoral edicts as laws that the natural law can contest.

For this reason I think it is implausible to suggest that the natural law challenges to legal positivism should be understood as offering an alternative theory of legal validity, but as a more fundamental challenge to the centrality of legal validity to understanding the nature of law. On this challenge legal positivists have had little to say. My claim in this Article is that this challenge can be found not only of the work of those theorists we now call natural lawyers, but also of those now considered founders of legal positivism. To demonstrate this claim I begin by describing some of the central tenets of the work of Hobbes and Bentham. I will argue that they did not think that their views on what law is were fixed by what “ordinary lawyers” thought; rather, they believed that understanding what law is required detachment from the views of insiders. For ease of exposition I reverse chronological order and discuss Bentham first.

#### *A. Jeremy Bentham*

When considering Bentham’s views on law, a good place to start is his views on morality. Bentham had little patience for most moral discourse, which he described with characteristic acerbity: “While Xenophon was writing History, and Euclid teaching Geometry, Socrates and Plato were talking nonsense, on pretence [sic] of teaching morality and wisdom.”<sup>36</sup> Bentham was not kinder to later moral philosophers:

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chinery of law. . . . It is precisely because such obvious laws are ruled out as non-laws by the theory that it is incorrect. It fails to explain correctly our ordinary concept of law which does allow for the possibility of laws of this objectionable kind.”); Jules L. Coleman, *The Architecture of Jurisprudence*, 121 *Yale L.J.* 2, 11 (2011) (“If history is to be a guide, one cannot help but be struck by the fact that morally bad law is not merely conceptually possible but all too frequently realized.”). Legal positivism is not vindicated quite so easily.

<sup>36</sup> Jeremy Bentham, *Deontology* 135 (Amnon Goldworth ed., 1983) (1834). For more invective of that kind, see *id.* at 134–47.

With few if any exceptions, open any book that takes for its subject any part of the field of morals, the following you will find is the state of mind in which he enters upon his subject . . . . Whatsoever it would be his pleasure they should do, he tells men that they *ought* to do it: whatsoever it would his pleasure to see them forbear from doing, he tells them that they *ought not* to do it.<sup>37</sup>

To the reader who wonders why that is so, Bentham in effect says, do not hold your breath: “To any such question no answer does [the moral philosopher] consider it as incumbent on him to give.”<sup>38</sup> And if they do try to give an answer, the results are hardly better. For example, Bentham dismissed the views of those who appealed to abstract ideas like *summum bonum* (ultimate good) as “[c]onsummate [n]onsense.”<sup>39</sup>

Famously, Bentham’s skeptical attitude extended to talk of natural law and natural rights. Bentham’s view on natural rights is crisply encapsulated in the most famous sentence he ever wrote: “Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.”<sup>40</sup> As rights were the products of *human* law, talk of natural rights was akin to talk of “cold heat,” “dry moisture,” or “resplendent darkness.”<sup>41</sup> He used similar terms to refer to natural law, describing it as a “phantom” and a “formidable non-entity.”<sup>42</sup> Such fictional concepts as the law of nature or natural justice were not just a hindrance to clear thinking; they were dangerous as they “serv[ed] as cloak, and pretence, and alimn ent to despotism.”<sup>43</sup>

<sup>37</sup> Id. at 253.

<sup>38</sup> Id. For another criticism of Bentham’s contemporaneous moral philosophers, see id.

<sup>39</sup> Id. at 134. Incidentally, Hobbes held the same view. See Thomas Hobbes, *Leviathan* 70 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651) [hereinafter Hobbes, *Leviathan*].

<sup>40</sup> Jeremy Bentham, *Nonsense upon Stilts* (1816), *reprinted in* Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution 317, 330 (Philip Schofield et al. eds., 2002) [hereinafter Rights, Representation, and Reform].

<sup>41</sup> 1 Jeremy Bentham, *Supply Without Burthen* (1795), *reprinted in* Jeremy Bentham’s Economic Writings 283, 335 (W. Stark ed., 1952).

<sup>42</sup> Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government* § I.2, at 17, 20 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1977). In one particularly forthright statement Bentham said: “There is no such thing as an offence against the Law of Nature: because there is no such thing as any Law of Nature.” Jeremy Bentham, *Preparatory Principles: Inserenda* 3, at 122 (unpublished manuscripts, on file with the University College London Bentham Project), available at [http://www.ucl.ac.uk/Bentham-Project/tools/bentham\\_online\\_texts/ppi/summ\\_contents](http://www.ucl.ac.uk/Bentham-Project/tools/bentham_online_texts/ppi/summ_contents) [hereinafter Bentham Manuscripts].

<sup>43</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* ch. II, § 14, at 28 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789).

Nonetheless, Bentham did not think that there was no right and wrong in human affairs. (Notice that this is very different from the views of some contemporary legal positivists who were drawn to legal positivism exactly because they thought there was no right answer to such questions.) The cause of all the nonsense in matters moral and political was due to the fact that they were not considered to be using the right methodology: “[E]very political and moral question ought to be [put] upon the issue of fact; and [thus] mankind [would be] directed to the only true track of investigation which can afford instruction or hope of rational agreement, the track of experiment and observation.”<sup>44</sup>

Bentham also believed he identified the relevant facts, which he presented in the opening sentence of the *Introduction to the Principles of Morals and Legislation*: “Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”<sup>45</sup> This, for Bentham, was a generalization based on observation. It was not meant to be an “internal” description or reinterpretation of people’s attitudes, for obviously it did not reflect folk morality. It was considered a discovery meant to rid us of much of the fiction that bedeviled existing moral discourse. It was meant to be a scientific discovery, one that was grounded in turn in Bentham’s materialist metaphysical worldview.<sup>46</sup>

Naturally, Bentham extended this approach to legal theory: “Physical sensibility [is] the ground of law—proposition the most obvious and incontestible.”<sup>47</sup> It follows that to understand law one must start not from within legal practice, mired as it is with lawyers’ interests and confusions. Scientific inquiry on law had to start from an account of what exists. This—not lawyers’ biased “internal point of view”—is the right basis for fixing (in both senses of the word “fix”) legal language.<sup>48</sup> What

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<sup>44</sup> Jeremy Bentham, *Observations on the Draughts of Declarations-of-Rights: Presented to the Committee of the Constitution of the National Assembly of France (1789)*, reprinted in *Rights, Representation, and Reform*, supra note 40, at 179, 189. For more on Bentham’s scientific approach to moral questions, see Priel, supra note 9, at 289–92.

<sup>45</sup> Bentham, supra note 43, ch. 1, § 1, at 11.

<sup>46</sup> On Bentham’s metaphysical outlook, see Ross Harrison, *Bentham 48–75* (1983); James Steintrager, *Bentham 20–40* (1977).

<sup>47</sup> Bentham Manuscripts, supra note 42, at 10, quoted in Douglas G. Long, *Bentham on Liberty: Jeremy Bentham’s Idea of Liberty in Relation to His Utilitarianism 17* (1977).

<sup>48</sup> Hart, supra note 8, at 98; see Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence* § 6, at 286–87 (Philip Schofield ed., Oxford Univ. Press 2010).

should be clear from all this is that Bentham's problem with natural law was not that natural lawyers have sought to explain law from a perspective external to legal practice, on the basis of deep metaphysical foundations,<sup>49</sup> *but that the foundations they posited were false.*

These views are clearly very different from what one finds in the work of most contemporary legal positivists who claim to be Bentham's heirs.<sup>50</sup> Bentham, like natural lawyers but unlike contemporary legal positivists, arrived at his views about law from an underlying metaphysical worldview, not by conceptual analysis (that is, by investigating the attitudes of participants in legal practice or from careful analysis of the concepts they use). Bentham's view of law as a command is presented as a "definition" derived from "simple ideas."<sup>51</sup> In other words, it is not just that Bentham's entire work on jurisprudence was inextricably connected to his reformist ideas, it is that he did not think of legal theory as a conceptual inquiry at all. Just as in the context of morals and politics Bentham presented utilitarianism as a replacement and improvement upon existing moral discourse, he offered his theory of law as an improvement to prevailing ideas about law.

### *B. Thomas Hobbes*

"The true and perspicuous explication of the Elements of Laws, Natural and Politic . . . dependeth upon the knowledge of what is human na-

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<sup>49</sup> Bentham had plans for and prepared materials on the topic of the "Metaphysics of Jurisprudence." See Bentham Manuscripts, *supra* note 42, at 214.

<sup>50</sup> They are also somewhat different from some revisionist interpretations of Bentham's work that suggested that Bentham's views in jurisprudence were motivated by his utilitarianism and not by conceptual analysis. See, e.g., Gerald J. Postema, Bentham and the Common Law Tradition 328–36 (1986); Philip Schofield, Jeremy Bentham and HLA Hart's 'Utilitarian Tradition in Jurisprudence, 1 Jurisprudence 147, 151–56 (2010). There is no doubt that Bentham's views on law were part of his broader utilitarian outlook. He thought that "[t]he business of government is to promote the happiness of the society, by punishing and rewarding," see Bentham, *supra* note 43, ch. 7, § 1, at 74, and publicly promulgated laws were a primary means of attaining that goal. This view still makes it possible to hold that Bentham thought of his jurisprudential views as conceptual claims about law that are distinct from his utilitarianism, as contemporary legal positivists claims. See *supra* note 12 and accompanying text. I argue that Bentham was not engaged in conceptual analysis at all.

<sup>51</sup> In his unpublished manuscript, after presenting his own "definition" of law, Bentham wrote: "I cannot say that a Statute is not a Law: for if I did, usage would contradict me. But this I say that it does not correspond to *the idea I would wish to have exclusively annex to the word law.*" Bentham Manuscripts, *supra* note 42, at 98 (emphasis added).

ture, what is a body politic, and what it is we call a law.”<sup>52</sup> These are the opening words of Hobbes’s early book *The Elements of Law*. Already here we see clearly that explaining law according to Hobbes depends on an account of human nature and politics. We also see what makes Hobbes’s case more complex, one that at first sight looks very different from Bentham’s. For an explanation of law according to Hobbes involves explaining the laws made by political bodies as well as natural laws. And those natural laws, which Hobbes discusses in great detail in all his works, are central ingredients in his argument about the move from the state of nature to civil society. Hobbes’s theory thus seems very different in one of its basic ingredients from Bentham’s. More significantly for our purposes, if we are to follow the common characterization of legal positivism as the opposite of natural law, then Hobbes’s repeated invocations of natural laws and natural rights seem to mark him as an opponent of legal positivism, not as its seminal thinker.

Yet in many respects Hobbes’s interpretation of natural law consisted of a radical departure from the ideas of earlier thinkers. He had no patience for the ideas of the “Schoole-men,” the humanistic scholars who sought to revive the classical (Greek-Roman) natural law tradition;<sup>53</sup> it is with him, for example, that we find, probably for the first time, the idea of liberty as noninterference, and his rejection of the Roman, republican idea of freedom as nondomination.<sup>54</sup> More fundamentally, and more importantly for my argument, Hobbes saw his views about natural law as part of a broader grand theory. It is instructive to consider the structure of Hobbes’s most important philosophical works. Both in *Leviathan* and in his earlier works, Hobbes maintained a tripartite structure of inquiry,

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<sup>52</sup> Thomas Hobbes, *The Elements of Law Natural and Politic* § 1.1.1, at 21 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1640).

<sup>53</sup> Hobbes, *Leviathan*, supra note 39, at 59, 85; cf. John Finnis, *Natural Law: The Classical Tradition*, in *The Oxford Handbook of Jurisprudence and the Philosophy of Law* 1, 5–6 (Jules L. Coleman & Scott J. Shapiro eds., 2002) [hereinafter *Oxford Handbook*] (arguing that contemporary work in the natural law tradition is continuous with the classical tradition of, say, Aquinas and rejects the natural law ideas found in Hobbes). Interestingly, Hobbes adopted these antihumanistic views relatively late in his life. On this shift in Hobbes’s approach, see Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* 215–326 (1996).

<sup>54</sup> To consider a discussion of both issues, see Quentin Skinner, *Hobbes and Republican Liberty* 127–28, 140–42, 211–13 (2008). Bentham shared this conception of liberty. See Postema, supra note 50, at 170–71; Philip Pettit, *Law and Liberty*, in *Legal Republicanism: National and International Perspectives* 39, 39–42 (Samantha Besson & José Luis Martí eds., 2009).

one that began with metaphysical questions, proceeded to a discussion of human nature, and concluded in a discussion of moral and political theory. This was not just out of a desire for clear organization: Hobbes considered the opening discussions on nature and human nature as necessary building blocks for his subsequent arguments about politics and law. Moreover, throughout his work he was much influenced by the advances in science of his time and thought their methods and findings relevant not just for investigating natural phenomena, but also to questions of morals and politics.<sup>55</sup> So radical was this shift in approaching questions of moral and political theory, that Hobbes thought it was only with him that these areas actually came into being: “Natural Philosophy [that is, natural science] is . . . but young; but Civil Philosophy yet much younger, as being no older . . . than my own book *De Cive*.”<sup>56</sup> All earlier works in the field, because they did not rest on a sound scientific basis, he deemed completely worthless.

This is not the place for a detailed discussion of Hobbes’s philosophy in its entirety. In what follows I will limit myself to demonstrating the importance of these background ideas to his thought on natural and human law. I hope to show that there is at least one important regard in which Hobbes’s novel treatment of natural law justifies separating him from much of the natural law tradition that preceded him and placing him close to Bentham, who came after him.<sup>57</sup>

It is well known that Hobbes did not think that people could achieve peace on their own and that an authority over them was necessary to prevent life from descending to chaos. Thus, for Hobbes laws were necessary for “the procuration of *the safety of the people*; to which [the sovereign] is obliged by the Law of Nature.”<sup>58</sup> The starting point of his argument is his definition of the natural right to absolute freedom:

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<sup>55</sup> For a more detailed discussion, see Priel, *supra* note 9, at 286–88.

<sup>56</sup> 1 Thomas Hobbes, *The Author’s Epistle Dedicatory to Elements of Philosophy* (1662), *reprinted in* *The English Works of Thomas Hobbes*, at vii, ix (William Molesworth ed., London, Longman, Brown, Green, & Longmans 1839); accord 7 Thomas Hobbes, *Letters and Other Pieces* (1662), *reprinted in* *The English Works of Thomas Hobbes*, *supra*, at 443, 471 (1845).

<sup>57</sup> For illuminating discussions of these issues, see Perez Zagorin, *Hobbes and the Law of Nature* chs. 1–2 (2009); Perez Zagorin, *Hobbes as a Theorist of Natural Law*, 17 *Intell. Hist. Rev.* 239 (2007). I do not, however, fully agree with his reconciliation of Hobbes’s natural law and legal positivism, as in *id.* at 253.

<sup>58</sup> Hobbes, *Leviathan*, *supra* note 39, at 231. He further explains that “by Safety here, is not meant a bare Preservation, but also all other Contentments of life.” *Id.*

The RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.

By LIBERTY, is understood, according to the proper signification of the word, the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what hee would, but cannot hinder him from using the power left him, according as his judgement, and reason shall dictate to him.<sup>59</sup>

Thus, in Hobbes's account natural right is the state of absolute freedom, the ability to do as one wishes in the absence of any laws. This was, for him, not a normative concept, but a factual statement about what people can (physically) do when they are not subject to external restraints. In fact, it applied even to nonanimate objects: "LIBERTY . . . is simply the *absence of obstacles to motion*; as water contained in a vessel is not *free*, because the vessel is an obstacle to its flowing away, and it is *freed* by breaking the vessel."<sup>60</sup> The sole purpose of enacting law is *limiting* that natural right for the sake of peace.<sup>61</sup>

This was in line with Hobbes's materialistic perspective on philosophy. In a similar fashion, Hobbes offered a distinct understanding of natural law. It was novel in three respects: First, according to Hobbes natural law is a precept of reason concerned with survival, and not with good and evil or justice; second, natural law is *not binding* in the state of nature (unless commanded by God); and third, despite people's natural dispositions to follow it, Hobbes claimed that as an empirical matter it *would not be obeyed* in the state of nature. Why? Hobbes's starting point

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<sup>59</sup> Id. at 91.

<sup>60</sup> Thomas Hobbes, *On the Citizen* 111 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1997) (1642) [hereinafter Hobbes, *On the Citizen*]. A similar point is made in Hobbes, *Leviathan*, supra note 39, at 145–46.

<sup>61</sup> Hobbes, *Leviathan*, supra note 39, at 185 (“[T]he Right of Nature, that is, the naturall Liberty of man, may by the Civill Law be abridged, and restrained: nay, the end of making Lawes, is no other, but such Restraint; without the which there cannot possibly be any Peace.”); see also id. at 200 (“*Civill Law* is an *Obligation*; and takes from us the Liberty which the Law of Nature gave us.”).



is that humans have a natural disposition for survival,<sup>62</sup> and the natural laws are “dictates of Reason . . . for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves.”<sup>63</sup> In other words, the natural laws are general reasons that follow rationally from the natural disposition for survival. As such they “oblige *in foro interno*,” that is, “they bind to a desire they should take place: but *in foro externo*; that is, to the putting them in act, not alwayes.”<sup>64</sup> Hobbes says here that the word “oblige” has two senses. In its “internal” sense, obligation roughly means a certain rational precept coupled with a desire for its existence; but the word “oblige” also has an external sense, where the precept is coupled with action. As humans naturally seek their preservation they can recognize these precepts as conducive to that aim (as opposed to the drunk and the insane who do not have this capacity).<sup>65</sup> This helps us understand in what sense Hobbes can say that the natural laws are “Immutable and Eternal” and why their opposites—“Injustice, Ingratitude, Arrogance, Pride, Iniquity, Acception of persons, and the rest, can never be . . . lawfull.”<sup>66</sup> They are immutable and eternal because the natural inclination for self-preservation is immutable (a finding Hobbes derives from his observation of humans and animals), and it rationally entails certain precepts on how one ought to behave. When Hobbes says their opposites cannot be made lawful, he means that they cannot be natural laws because *as a matter of fact* the opposites of natural law are not conducive to the natural inclination to self-preservation: “For it can never be that Warre shall preserve life, and Peace destroy it.”<sup>67</sup>

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<sup>62</sup> “[T]he greatest of goods for each is his own preservation. For nature is so arranged that all desire good for themselves.” Thomas Hobbes, *On Man* (1658), *reprinted in Man and Citizen* 33, ch. 11, para. 6, at 48 (Bernard Gert ed., Charles T. Wood et al. trans., Hackett Publ’g Co. 1991).

<sup>63</sup> Hobbes, *Leviathan*, supra note 39, at 111.

<sup>64</sup> *Id.* at 110. This shows the anachronism in Dyzenhaus’s interpretation, for in Hobbes’s account there is no question of whether to “resolve[] . . . conflict[s] between positive law and natural law in favour of the latter.” David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 *Law & Phil.* 461, 467 (2001). Likewise Dyzenhaus’s claim that Hobbes’s natural laws are “not about the psychological state of readiness of mind to obey, but about the obligation that stems from having reasons for obedience,” *id.* at 473, appears to be inconsistent with the tenor of Hobbes’s discussion.

<sup>65</sup> This explains why Hobbes treats drunkenness as a breach of natural law. See Hobbes, *On the Citizen*, supra note 60, at 54.

<sup>66</sup> Hobbes, *Leviathan*, supra note 39, at 110.

<sup>67</sup> *Id.*

If these natural laws are precepts of reason, why are they not followed on their own in the state of nature? Why are they obliging differently internally and externally? The source of the human predicament is the conflict between the human desire for self-preservation and another desire, the pursuit of power. For in addition to the natural human pursuit of self-preservation humans also have a “generall inclination . . . a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death.”<sup>68</sup> For this reason, “the Lawes of Nature . . . without the terrour of some Power, to cause them to be observed, are contrary to our naturall Passions.”<sup>69</sup> Or in another formulation, that “notwithstanding the Lawes of Nature . . . if there be no Power erected . . . every man will, and may lawfully rely on his own strength and art, for caution against all other men.”<sup>70</sup> More generally, Hobbes posits a constant conflict within humans between rationality and irrationality. Blinded by short-term partiality, they fail to fully comprehend the requirements of natural law (that is, what will rationally promote their interests).<sup>71</sup> In this account “the use of Lawes . . . [is] to direct and keep [people] in such a motion, as not to hurt themselves by their own impetuous desires, rashnesse, or indiscretion.”<sup>72</sup>

That is why Hobbes thinks it is misleading to call the natural laws “law”:

These dictates of Reason, men use to call by the name of Lawes, but improperly: for they are but Conclusions, or Theoremes . . . wheras Law, properly is the word of him, that by right hath command over others. But yet if we consider the same Theoremes, as

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<sup>68</sup> Id. at 70.

<sup>69</sup> Id. at 117.

<sup>70</sup> Id. at 117–18.

<sup>71</sup> See id. at 191 (“[T]here be very few, perhaps none, that in some cases are not blinded by self love, or some other passion, [natural law] is now become of all Laws the most obscure.”).

<sup>72</sup> Id. at 239. There is an alternative answer that is more thoroughly rationalistic, in which the state of nature is akin to an  $n$ -person prisoner’s dilemma or another kind of game theoretical construct. On this view even fully rational behavior can lead to a suboptimal social equilibrium. For this reading of Hobbes, see, e.g., Jean Hampton, *Hobbes and the Social Contract Tradition* 58–63 (1986). For the purposes of my argument, that seeks only to highlight the way Hobbes characterizes natural law and the place it has in his argument, it matters little *why* natural law will fail to create order. Notice that in any case both arguments are thoroughly “naturalistic.”

2015]

*Toward Classical Legal Positivism*

1005

delivered in the word of God, that by right commandeth all things; then are they properly called Lawes.<sup>73</sup>

Since the laws of nature are not really binding in the state of nature, Hobbes makes it clear that in the state of nature “*every private man is Judge of Good and Evill action . . . in the condition of meer Nature, where there are no Civill Lawes . . . . But otherwise, it is manifest, that the measure of Good and Evill actions, is the Civill Law . . . .*”<sup>74</sup>

These are the bare bones of Hobbes’s views on the origins of law. Their essence is an attempt to offer a theory of law on the basis of facts about human nature (their desire for survival, their lust for power), a mechanistic view of liberty influenced by a scientific or scientific perspective on the world, and a view on the necessity of law for the sake of maintaining and developing human life. Any attempt to fit this view neatly into the contemporary labels of “legal positivism” and “natural law” faces severe interpretative difficulties. As Hobbes sought to break away from the work of earlier natural lawyers, it is not surprising that his account looks very different from the work of contemporary natural lawyers whose work builds on the Aristotelian–Thomist tradition of natural law. There are also significant differences with the work of other contemporary legal theorists who are often classified as natural lawyers in some looser sense. For example, while Ronald Dworkin’s conception of morals and freedom is broadly republican, one that sees all citizens as participants in the enterprise of lawmaking as an enterprise of self-government,<sup>75</sup> Hobbes had strongly anti-republican views and conceived of law as an imposition of the sovereign on the citizens.<sup>76</sup> More importantly, Dworkin denies that there is any metaphysical foundation to morals, especially not a naturalistic one, explicitly stating that the physical and the normative form separate domains.<sup>77</sup> Taken together the difference is significant. Hobbes’s law is by definition imposed by the sovereign on its subjects; Dworkin, on the other hand, saw law as founded

<sup>73</sup> Hobbes, *Leviathan*, supra note 39, at 111. To the same effect: The natural laws “are not properly Lawes, but qualities that dispose men to peace, and to obedience.” Id. at 185.

<sup>74</sup> Id. at 223; see also id. at 110 (“*Good, and Evill, are names that signifie our Appetites, and Aversions; which in different tempers, customes, and doctrines of men, are different . . . .*”).

<sup>75</sup> See Dan Priel, *Are Jurisprudential Debates Conceptual? Some Lessons from Democratic Theory*, 50 *Osgoode Hall L.J.* 359, 365–68 (2012) (demonstrating Dworkin’s republicanism).

<sup>76</sup> See 3 Quentin Skinner, *Visions of Politics: Hobbes and Civil Science* 216–25 (2002).

<sup>77</sup> See Ronald Dworkin, *Justice in Robes* 76–78 (2006).

on ideas of self-government, one in which all members of a political community (ideally) take part.<sup>78</sup> Though I think there are more positive links between Hobbes's views and those of Lon Fuller, the way they reach them is so utterly different, and premised on such different intellectual foundations, that the ties between them are largely coincidental.<sup>79</sup> To the extent that one reads Fuller as insisting on the existence of certain procedural requirements as a condition of legality,<sup>80</sup> then it is hard to see much contact between this view and Hobbes's. Hobbes explicitly stated that "no Law can be Unjust. The Law is made by the Sovereign Power, and *all that is done by such Power, is warranted, and owned by every one of the people*; and that which every many will have so, no many can say is unjust."<sup>81</sup>

While the temptation to classify Hobbes as a legal positivist is understandable after reading passages such as the one just quoted, the connection between his and contemporary positivists' views is similarly tenuous. From a contemporary perspective the latter quotation seems to suggest that Hobbes thought that "legal validity" does not depend on legal content—that law is law regardless of what it says, and that makes him sound like a contemporary legal positivist. But we have already seen that this is not a useful mark of legal positivism, because it does not adequately distinguish legal positivism from other views. Furthermore, when one delves a little deeper, crucial differences appear between Hobbes's views and those of contemporary legal positivists. Hobbes reached his views on law not from looking at legal practice and trying to understand it from legal participants' "internal point of view," but rather by ignoring, or challenging, it. His claims about what law is, even those that look "positivist," are not conceptual claims, but rather the conclusions of a *political* argument,<sup>82</sup> which in turn Hobbes believed was grounded in his views on human nature. This difference may seem

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<sup>78</sup> On the significance of this difference, see Dan Priel, *Is There One Right Answer to the Question of the Nature of Law?*, in *Philosophical Foundations of the Nature of Law* 322, 330–34 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

<sup>79</sup> For example, Fuller rejected the liberal, "negative" conception of freedom. See, e.g., Lon L. Fuller, *Freedom—A Suggested Analysis*, 68 *Harv. L. Rev.* 1305, 1310–13 (1955). It was a central ingredient in Hobbes's view. See Skinner, *supra* note 54 *passim*.

<sup>80</sup> See Fuller, *supra* note 16, at 96–106. But see *id.* at 242 (suggesting he should not be read to offer an account of the conditions of legal validity).

<sup>81</sup> Hobbes, *Leviathan*, *supra* note 39, at 239 (emphasis added). Even when the sovereign transgresses against natural law, his transgression is only against God. See *id.* at 148.

<sup>82</sup> See *infra* notes 109–15 and accompanying text for more on this.

slight, but its significance is profound, for the view Hobbes rejects is the essence of contemporary legal positivism: both methodologically, in the sense that a theory of law does not depend on political theory, and substantively, in the sense that the foundational concept of jurisprudence as validity is a purely social matter of fact, rather than a conclusion of a political argument. To the extent that legal positivism is understood by its proponents as part of the politically neutral inquiry of “analytic” or “conceptual” jurisprudence, then Hobbes cannot be associated with that endeavor.

### III. THE CLOSING OF THE POSITIVIST MIND

#### *A. From Classical to Contemporary Legal Positivism*

The debate between the “classical” legal positivists and natural lawyers was, at bottom, a debate about metaphysics and human nature: Both agreed that a theory of law must be part of a broader account of what the world was like, but had strongly divergent views on the correct account of the latter question. This is very different from the way the contemporary debate between legal positivism and natural law is usually understood. The contemporary debate is about the sort of connection that exists between natural law and human law. In this version of the debate, the term “natural law” is treated as a synonym of true morality<sup>83</sup> (a view that would have been considered as, at best, inaccurate by both Hobbes and Bentham) and legal positivism has been transformed to the claim that (human) law is separate or distinct from natural law (that is, from morality).<sup>84</sup> The opposing view, natural law, has been similarly refashioned as the view that human law has some kind of connection with morality.<sup>85</sup> Much of what has been written on jurisprudence since the publi-

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<sup>83</sup> This is explicit in, for example, Gardner, *supra* note 12, at 175.

<sup>84</sup> For this reason it has often been claimed that (contemporary) legal positivism is agnostic on questions of metaethics. See Hart, *supra* note 8, at 254; Jeremy Waldron, *Law and Disagreement* 166–67 (1999); Joseph Raz, *Legal Principles and the Limits of Law*, in Ronald Dworkin and *Contemporary Jurisprudence* 73, 85 (Marshall Cohen ed., 1984). Such statements are false, or at least inaccurate, with regard to classical legal positivism.

<sup>85</sup> In recent years there has been a tendency among self-styled legal positivists to accept that there are necessary connections between law and morality. See Gardner, *supra* note 12, at 48–51; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* 168 (2009); Jules L. Coleman, *Beyond Inclusive Legal Positivism*, 22 *Ratio Juris* 359, 383 (2009); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 *N.Y.U. L. Rev.* 1035, 1038, 1044–54 (2008). This, together with the recognition that (most) natural lawyers do not deny that legal norms can be immoral, see *supra* text accompanying

cation of *The Concept of Law*—the debates between positivists and Ronald Dworkin, the debates between legal positivists and Lon Fuller, the proliferation of various strands of legal positivism (especially, “inclusive” and “exclusive” legal positivism)—is based on this contemporary understanding of natural law and legal positivism, one that is largely without a trace in earlier jurisprudential works.

There has been, then, a fundamental yet unappreciated shift in the foundational debates in legal theory, following a similarly significant shift in thinking about what legal theory is about. How did it happen? The two people most responsible for this change are H.L.A. Hart and Hans Kelsen,<sup>86</sup> often considered the foremost legal positivists of the twentieth century. Both Hart and Kelsen opted for a metaphysically shallow account of law, one that did not try to situate the theory of law within a broader story of human nature.

Hart tried to explain law as a *practice*, and thought that this called for explaining law in terms of the human attitudes that went into constituting those practices. For him the philosophy of law was a philosophy of a practice.<sup>87</sup> This may sound like something that will require taking human nature into account,<sup>88</sup> and indeed Hart makes occasional remarks on human nature, some of them in fact not very different from what one finds in Hobbes.<sup>89</sup> Yet it is striking that Hart gives them so marginal a place. Again and again Hart belittles their significance, describing them as “[a] simple contingent fact,” “a mere contingent fact which could be otherwise,” or “a merely contingent fact that” might have been otherwise<sup>90</sup> about humans, their nature, or the world they inhabit. The clear sense is

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note 19, is another demonstration of the difficulty of finding any meaningful difference between natural law theory and legal positivism. See *supra* note 22.

<sup>86</sup> Another important figure in the story is John Austin, whose work served as the basis for Hart’s work. He was, in some respects, a transitional figure, but the differences between his work and Hart’s are, I think, more significant than is usually assumed. See Priel, *supra* note 5, at 311–16.

<sup>87</sup> This is still the view of Hart’s followers today. See, e.g., Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 3–6 (2001) (situating legal philosophy as part of a “[p]hilosophical explanation[] of practices”); Gardner, *supra* note 12, at 276 n.14; Raz, *supra* note 85, at 47.

<sup>88</sup> Cf. N.E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* 185–91 (4th ed. 2013) (arguing that Hart did have a metaphysical view and that his theory of law relied on his views on human nature).

<sup>89</sup> See Hart, *supra* note 8, at 192–93, 194–95, 219 (“In a population of a modern state, if there were no organized repression and punishment of crime, violence and theft would be hourly expected . . .”).

<sup>90</sup> *Id.* at 191–92, 196.

that they are not very relevant for a general theory of law, and indeed they never form part of Hart's own account; rather, they are mentioned briefly in his criticism of competing ideas.

Hart's positive ideas on law, by contrast, are premised on the view that the world of practices is a world created by words, and as such it was a world that needed to be understood by careful attention to words. The so-called "linguistic turn" that was taking place across disciplines at the time was, to a large measure, an attempt to account for this second world of meaning, created by words and existing alongside the physical world. Understanding what makes the world of words possible, or how it is created, might be thought to call for a discussion of the metaphysical foundations of social practices, or for a discussion of those social practices that were a product of human nature, of what makes them possible.<sup>91</sup> But, at least in his writings, Hart seemed relatively uninterested in *explaining* how this second world of words came about, in the metaphysics of the social world in general. Hart saw his project as an attempt at *understanding* how practices appeared to the people engaged in them.<sup>92</sup> The purpose of this inquiry is to understand how the different elements *within* this world of meanings hang together to form a more-or-less coherent "conceptual scheme."<sup>93</sup>

Hart made it clear that for someone with such aims, "the methodology of the empirical sciences is useless; what is needed is a 'hermeneutic' method which involves portraying rule-governed behaviour *as it appears to its participants . . .*"<sup>94</sup> Similarly useless was the approach of the natural lawyer who has sought to offer an account of law that starts with deep metaphysical foundations. Such an approach "would seem to raise a whole host of philosophical issues before it can be accepted. *So . . . when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable*

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<sup>91</sup> For a recent example of one such effort, see John R. Searle, *Making the Social World: The Structure of Human Civilization* (2010).

<sup>92</sup> On the contrast between explanation and understanding, see generally Georg Henrik von Wright, *Explanation and Understanding* (1971) (contrasting the scientific and hermeneutic approaches to explaining human behavior).

<sup>93</sup> Cf. P.F. Strawson, *Individuals: An Essay in Descriptive Metaphysics* 9 (1958) ("Descriptive metaphysics is content to describe the actual structure of our thought about the world.").

<sup>94</sup> H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 13 (1983) (emphasis added). Hart's antinaturalistic view here is not very different from Dworkin's. See *supra* note 77 and accompanying text. On Hart's views on naturalism see Priel, *supra* note 9, at 302–04.

*philosophy.*<sup>95</sup> In a retrospective reflection on his own views, Hart similarly maintained that his approach has sought to solve “longstanding philosophical perplexities . . . not by the deployment of some general theory but by sensitive piecemeal discrimination and characterization of the different ways, some reflecting different forms of human life, in which human language is used.”<sup>96</sup> For Hart, understanding legal practice was to be attained by paying careful sociological or anthropological attention to the meaning and significance given to the words that constitute human practices. This view is in line with a humanistic version of sociology or cultural anthropology that was dominant at around the time Hart was writing.<sup>97</sup> Though the matter is never made explicit in Hart’s work, it is fair to conclude that Hart, like many cultural anthropologists of his day, believed that the world of human practices was relatively unconstrained by the physical world, and that humans were relatively free to mold social practices in any way they wanted.<sup>98</sup>

As we have seen, for Hobbes and Bentham, the supposed founders of modern legal positivism, the metaphysical foundations led to an account that was often at odds with existing legal practice, and especially with the attitudes of legal practitioners. In contemporary versions of legal positivism such a disparity is not really possible, since it is the practice itself (as understood by those engaged in it) that his theory seeks to elucidate. To be sure, the account Hart offered was intended to be novel, perhaps even surprising to practicing lawyers, but it was in no way meant to challenge their practice. It was meant to reveal to participants

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<sup>95</sup> Hart, *supra* note 1, at 620–21 (emphasis added).

<sup>96</sup> Hart, *supra* note 94, at 2. See also his words quoted in *supra* text accompanying note 10, as well as the sources cited *supra* note 34. These statements reflect Hart’s broader commitments to ordinary language philosophy popular at the time in Oxford. Proponents of this approach have sought to avoid metaphysical questions by paying careful attention to language usage. See Lynd Ferguson, Oxford and the “Epidemic” of Ordinary Language Philosophy, 84 *Monist* 325 (2001); see also P.M.S. Hacker, Wittgenstein’s Place in Twentieth-Century Analytic Philosophy 117–23 (1996) (describing Wittgenstein’s repudiation of metaphysics).

<sup>97</sup> See Peter L. Berger, *Invitation to Sociology: A Humanistic Perspective* (1963); Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (1973). Interestingly, Geertz borrowed the idea of “thick description,” now associated with his own work, from Gilbert Ryle, Hart’s colleague at Oxford and another practitioner of ordinary language philosophy. See *id.* at 6.

<sup>98</sup> This is the blank slate view that dominated the social sciences around that time. See Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (2002). From this perspective the most central, important element of human nature is humans’ capacity for self-understanding. See 1 Charles Taylor, Self-Interpreting Animals, in *Philosophical Papers: Human Agency and Language* 45, 45 (1985).



some unnoticed features about their own practice, something that once it was pointed out to them would seem obviously true. This is a sociological, interpretive inquiry of people's attitudes regarding their ways of life.

The other prominent influence on the shape of contemporary legal positivism has been the work of Hans Kelsen. In sharp contrast to Hart, for Kelsen, explaining law as a practice was a fundamental error. The most basic question in jurisprudence was explaining law's normativity, the problem of explaining how legal obligations were possible given that they were a human creation. He thought that any attempt to answer this question in terms of *any* set of facts (including facts about practices) would fall afoul of the fallacy of deriving an ought from an is. Therefore, as he saw it, the only way to avoid this fallacy was to exclude *all* facts from the discussion. The correct approach had to envisage law in purely normative terms, and correspondingly, the only thing that properly belonged in a theory of law was an analysis of the logical relations among concepts like law, obligation, coercion, and so on. Kelsen famously dubbed this approach the "pure theory of law," and he meant it. All factual disciplines—"psychology, sociology, ethics, and political theory"<sup>99</sup>—had to be kept out of the proper, purely normative domain of legal theory. Even facts about people's attitudes about law had no place whatsoever in his theory.<sup>100</sup> While those were very useful in informing us about certain aspects of law in the real world, they could not help in answering the fundamental question of jurisprudence. It follows from this view, that even facts about what the world and human nature are like were completely irrelevant to his inquiry.

Those who followed these ideas have taken from Kelsen the aim of jurisprudence as explaining law in as general and abstract a fashion as possible. This implied that a theory of law had to be as much as possible devoid of particular facts about law as it is in the real world. Those who adopt this approach have abandoned those aspects of Hart's work that

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<sup>99</sup> Hans Kelsen, *The Pure Theory of Law* 1 (Max Knight trans., 2d ed. 1960). In writing on natural law theory, Kelsen was critical of the idea that an account of human nature could provide the basis for moral norms. See Hans Kelsen, *What is Justice?*, in *What Is Justice?: Justice, Law, and Politics in the Mirror of Science* 1, 20–22 (1971).

<sup>100</sup> See, e.g., Hans Kelsen, *General Theory of Law and State* 176 (Anders Wedberg trans., 1945) ("From the point of view of [the pure theory of law], the order to pay taxes differs from the gangster's threat . . . by the fact that only the tax order is issued by an individual who is authorized by a legal order assumed to be valid."). Contra Andrei Marmor, *Philosophy of Law* 54 (2011) (mistakenly claiming that Kelsen "clearly recognized" "the internal point of view . . . as crucial to any account of a normative system").

maintained some of the ties it had with reality, namely his attempt to describe law as a practice, reflecting (in words already quoted) “different forms of *human* life.”<sup>101</sup> Instead, some legal philosophers made a conscious effort to make jurisprudence as unconnected to humans and human nature as possible by turning the question “what is law?” into an a priori inquiry. In this new phase we were told that answering the question “what is law?” might be helped by imagining what law would be like in a society of angels,<sup>102</sup> or we were told that the social sciences are of little help to jurisprudence because social scientists “stud[y] *human* society,” whereas a correct account of the nature of law must be able to account for law “involving alien civilizations.”<sup>103</sup> Whether or not there is value in such an inquiry, whether such questions can even be answered (I, for one, am not sure it is even intelligible), there is little doubt that information about nature or human nature is not going to be of much help to this inquiry. As such, this inquiry is quite consciously radically different from the sort of theorizing one finds in the work of Hobbes and Bentham.

We thus have two approaches to contemporary legal positivism that are the result of two rather different methodological commitments,<sup>104</sup> but when either view is compared to those of Hobbes and Bentham, it is evident that both involve a radical re-orientation of the foundations of jurisprudence, of what, if you wish, it is about. And though in many respects these two contemporary versions of legal positivism are also at odds with each other, they share a commitment to a metaphysically narrow and shallow inquiry.<sup>105</sup> Recognizing this helps us understand one of

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<sup>101</sup> Hart, *supra* note 94, at 2 (emphasis added).

<sup>102</sup> See Raz, *supra* note 35, at 159–60; see also John Gardner, *Law’s Aims in Law’s Empire*, in *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* 207, 208–09 (Scott Hershovitz ed., 2006) (relying on the same thought experiment as the basis for an argument about the nature of law). I believe this is a bad argument. See Dan Priel, *Making Some Sense of Nonsense Jurisprudence* 8–9 (unpublished manuscript, on file with author).

<sup>103</sup> Scott J. Shapiro, *Legality* 406–07 n.16 (2011); see also Gardner, *supra* note 12, at 277 (arguing that Hartian legal positivism is unaffected by empirical, sociological facts about the actual practice of law).

<sup>104</sup> Those familiar with intra-positivist debates will surely notice that these methodological differences align fairly precisely with the two camps known as inclusive and exclusive legal positivism. Even though these two camps do not present their disagreement in methodological terms, I believe it is the difference described in the text that best explains the source of their disagreement.

<sup>105</sup> See Coleman, *supra* note 87, at 197 (“[W]e are not in the business of carving the universe at its joints; we are not trying to gain access to or pick out metaphysically essential properties of law that are prior to our analysis of the concept, and that serve to orient it.”);

the most curious (and yet, I trust, familiar) aspects of contemporary debates between legal positivists and natural lawyers. As already mentioned, what is striking about these debates is that disputants struggle to find any real differences between these two views. And yet at the same time, they go on debating, often seeming to be talking past each other. We can now see why. Contemporary natural law theorists often write as though the old debate is going on; hence one finds in their writings the same metaphysical depth of argument one finds in the work of earlier natural lawyers and in the work of classical legal positivists. Whatever are the differences among them, all natural lawyers seek to understand the fundamental philosophical questions of law as part of a broader inquiry, which depends ultimately on one's views on human nature.<sup>106</sup> All this is absent from contemporary legal positivism. And so, in order to have a debate with natural law, contemporary legal positivists have had to

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Raz, *supra* note 85, at 228 (“Metaphysical pictures are, when useful at all, illuminating summaries of central aspects of our practices. They are, in other words, accountable to our practices, rather than our practices being accountable to them.”); Shapiro, *supra* note 103, at 44 (“For our purposes . . . the[] deep metaphysical questions [about the origins of a legal system] will largely be ignored.”); cf. Gardner, *supra* note 12, at 175 (“[E]ngagement with moral norms is an inescapable part of human nature . . . . [E]ngagement with legal norms is *not* an inescapable part of human nature.”).

<sup>106</sup> There is, more precisely, a debate among contemporary natural lawyers about the proper foundation for natural law theory, and the place of human nature in it. On one side stand those who believe that a theory of practical reason is relatively independent of an account of human nature. Proponents of the second view believe that an account of practical reason must ultimately be based upon a theory of human nature. For a summary of the different views (and a defense of the former), see Robert P. George, *Recent Criticism of Natural Law Theory*, 55 *U. Chi. L. Rev.* 1371, 1372–74, 1378–83, 1407–28 (1988) (book review). For an outsider to these debates the differences between the views do not seem huge, especially as even proponents of the first view insist that a theory of law can be derived only from engagement in substantive concern with normative questions of value, see Finnis, *Natural Law*, *supra* note 16, at 115, and they do not deny the connection between the foundations of practical reason and a theory of human nature. See *id.* at 33–34 (accepting that “[t]he basic forms of good grasped by practical understanding are what is good for human beings with the nature they have” and that “were man’s nature different, so would be his duties” (quoting D.J. O’Connor, *Aquinas and Natural Law* 18 (1967))); George, *supra*, at 1415–17.

There is no corresponding debate among contemporary legal positivists. Indeed, I suspect most contemporary legal positivists are only dimly aware of the existence of this debate among natural lawyers. To the extent that they are aware of it, one judges from their ignoring it that they consider it irrelevant to jurisprudence. Even proponents of legal positivism who have sought to tie their theory of law to an account of practical reason have largely limited themselves in this context to “conceptual analysis . . . [of the] logical features of concepts like value, reason for action or norm and the nature of the rules of inference governing practical reasoning,” rather than “[s]ubstantive practical philosophy [concerned with] . . . arguments designed to show which values we should pursue . . .” Raz, *supra* note 35, at 10.

invent a version of natural law, a kind of similar, non-metaphysical doctrine, which as we have seen, they did. But in doing that, contemporary legal positivists have been discussing and trying to refute a view that no one has ever held.<sup>107</sup> Hence the mismatch at the heart of the debate: At the “conceptual” level—whether there can be unjust laws, or whether morality is a condition of legal validity—there seems to be little to debate, and disagreements often appear more verbal than real. But this only happens because what does not get discussed, what in fact is assumed by one side to be irrelevant to the debate, is profoundly different. Because one side grounds its argument in metaphysics while the other insists on not having any, there is a lingering feeling that despite being seemingly in agreement on everything, the two sides could not be further apart.

The following table summarizes my argument so far:

	<i>Metaphysical legal philosophy</i>	<i>Non-metaphysical legal philosophy</i>
<i>Non-materialist conception of nature</i>	Natural law	Contemporary legal positivism
<i>Materialist conception of nature</i>	Classical legal positivism	Felix Cohen and the Scandinavian legal realists(?) <sup>108</sup>

The table brings out the different ways in which contemporary and classical legal positivism are opposed to natural law, but also the sense in which they are further apart from each other than each is apart from natural law. It also helps us see how one can be both a legal positivist in the classical sense, even a rather extreme one at that, while in another

<sup>107</sup> This may explain the ease with which they think natural law can be refuted. See the quotes cited supra note 35. It also explains why those who consider themselves natural lawyers remain completely unmoved by these critiques.

<sup>108</sup> I mention Felix Cohen and the Scandinavian realists in this category tentatively and only for completeness's sake as I do not discuss their views beyond this footnote. Felix Cohen was influenced by the work of the logical positivists, who famously rejected all metaphysics. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 827 (1935) (“The task of modern philosophy is the salvaging of whatever significance attaches to the traditional concepts of metaphysics, through the redefinition of these concepts as functions of actual experience.”). At the same time Cohen expressed some views we would now associate with legal positivism, see, e.g., Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 *Yale L.J.* 201, 204 (1931) (“Law is law, 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.”). But basing his views on logical positivism puts him in quite a different category from that of contemporary legal positivists: He may have held the view that all metaphysical discourse, unless empirically redefined, is meaningless. This is quite different from the view that metaphysics is meaningful but irrelevant to legal philosophy.

sense a natural lawyer. It is as a result of this analysis that we can see why both legal positivists and natural lawyers have been claiming Hobbes and even Bentham as their own. We also see why there is no need to decide on this matter one way or the other.

*B. The Invented History of Contemporary Legal Positivism*

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

Early legal positivists followed Hobbes' insight that the law is, essentially, an instrument of political sovereignty, and they maintained that the basic source of legal validity resides in the facts constituting political sovereignty. Law, they thought, is basically the command of the sovereign. Later legal positivists have modified this view, maintaining that social conventions, and not the facts about sovereignty, constitute the grounds of law.<sup>109</sup>

According to this view, then, the major difference between classical and contemporary legal positivism, and the major advance of contemporary legal positivism, is the replacement of a simplistic command theory of law with a more sophisticated account of law as grounded in social convention. More strikingly, Marmor considers the separation between "conceptual" questions about the existence of law and "normative" questions of political legitimacy an important step forward in legal theory.<sup>110</sup> To the question of what, despite these differences, classical and contemporary legal positivists have in common, Marmor's answer is that all legal positivists accept "[t]he main insight of legal positivism," which is "that the conditions of *legal validity* are determined by social facts."<sup>111</sup>

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<sup>109</sup> Marmor, *supra* note 17, at 41–42. For a similar characterization see Thomas Nagel, *The Central Questions*, London Rev. Books, Feb. 3, 2005, at 12 (reviewing Lacey, *supra* note 6).

<sup>110</sup> It is precisely this attitude that made Hart complain that Bentham was sometimes confused for letting his "utilitarianism get[] in the way of his analytical vision." Hart, *supra* note 7, at 162.

<sup>111</sup> Marmor, *supra* note 17, at 41.

These passages neatly capture the invented tradition of legal positivism, the one that treats legal validity as the central question of jurisprudence, and then reads this concern into the work of the classical legal positivists.<sup>112</sup> It is, however, historically and philosophically confused. First, it should be noted that the idea of law as a command did not originate with Hobbes but was familiar long before him.<sup>113</sup> It is hard to assess Marmor's exegetical claim beyond this because he does not provide any reference to Hobbes's work in support of his reading. As far as I know Hobbes did not write anything that could plausibly be interpreted as concerned with the question of legal validity as the term is currently understood. Hobbes rejected lawyers' understanding of what constituted law: He rejected Coke's views that sought to establish the common law as having authority independent of the sovereign's,<sup>114</sup> and he was willing to recognize as law certain things that would not have been accepted as such by the legal community. In his *A Dialogue Between a Philosopher and a Student, of the Common Laws of England*, after offering his definition of law, the philosopher, Hobbes's alter ego, is challenged by the lawyer that it follows from his definition that "the Kings Proclamation under the Great Seal of *England* is a Law" to which the philosopher replies "Why not?"<sup>115</sup>

As I tried to demonstrate above in my short outline of his view, the motivation, emphasis, and focus of his attention has always been on providing an account of legitimate political authority that builds on the more basic building blocks of what the world and mankind are like. It is true that Hobbes did say some things that to the casual reader may look like a discussion of legal validity. Thus, in the *Dialogue*, Hobbes wrote:

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<sup>112</sup> It also, erroneously in my view, ascribes this concern with validity on contemporary legal philosophers (such as Dworkin) whose writings clearly are not concerned with legal validity. This is an aspect of the way in which contemporary legal philosophy is separated from political philosophy. See Priel, *supra* note 23, at 21–28.

<sup>113</sup> See Gerald J. Postema, *Law as Command: The Model of Command in Modern Jurisprudence*, 11 *Phil. Issues* 470, 471–74 (2001).

<sup>114</sup> Hobbes, *Leviathan*, *supra* note 39, at 186–87, 191–94.

<sup>115</sup> Thomas Hobbes, *A Dialogue Between a Philosopher and a Student, of the Common Laws of England* (1681), *reprinted in* *Writings on Common Law and Hereditary Right* 1, 31 (Alan Cromartie ed., 2005) [hereinafter *Hobbes, Dialogue*]. More generally, Hobbes was dismissive of linguistic analysis as a means of discovering by linguistic usage. See Hobbes, *Leviathan*, *supra* note 39, at 176 ("How fallacious it is to judge of the nature of things, by the ordinary and inconstant use of words . . .").

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

[Philosopher:] Why not? for they were all Constituted by the Kings of *England*; and though the Civil Law used in the Admiralty were at first the Statutes of the *Roman* Empire, yet because they are in force by no other Authority than that of the King, they are now the Kings Laws, and the Kings Statutes. The same we may say of the Canons; such of them as we have retained, made by the Church of *Rome*, have been no Law, nor of any force in *England*, since the beginning of Queen *Elizabeth's* Reign, but by Virtue of the Great Seal of *England*.<sup>116</sup>

This looks like a discussion on legal validity, even a precursor of Hart's rule of recognition. Crucially, though, for Hobbes the difference between the nonlegal and the legal is not determined by the fact of obedience, but rather on the basis of his political theory.<sup>117</sup> Hobbes would thus have considered the separation of legal theory from questions of political legitimacy not an advance, but a mistake. Once this mistake is avoided it is easy to see that a philosophical account of law may be at odds with lawyers' judgments of what counts as law.

In rather similar fashion, Bentham dismissed attempts to present the law (as he thought Blackstone had done) according to the "technical arrangement" of the law, the one that retained the "technical nomenclature" used by lawyers in favor of what he called a "natural arrangement," one that corresponded to facts about the world.<sup>118</sup> This technical arrangement, he said, "can never be otherwise than *confused* and *unsatisfactory*," because anything can be made to fit into it and as such it is

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<sup>116</sup> Hobbes, *Dialogue*, supra note 115, at 19–20 (editor's footnote omitted); see also Hobbes, *Leviathan*, supra note 39, at 184–85, 185–86 ("[T]he Judgement of what is reasonable, and of what is to be abolished, belongeth to him that maketh the Law, which is the Sovereign Assembly, or Monarch.").

<sup>117</sup> My conclusion here is similar to that of Jeremy Waldron, *Legal and Political Philosophy*, in *Oxford Handbook*, supra note 53, at 352, 366–68, although I think more than he does that it shows the sense in which what I call classical legal positivism is fundamentally at odds with contemporary legal positivism.

<sup>118</sup> For more on this theme, see Xiaobo Zhai, *Bentham's Natural Arrangement and the Collapse of the Expositor–Censor Distinction in the General Theory of Law*, in *Bentham's Theory of Law and Public Opinion* 143 (Xiaobo Zhai & Michael Quinn eds., 2014). See in particular the discussion of Bentham's critique of reliance on ordinary language as the basis for jurisprudence. *Id.* at 148–54.

like “a sink that with equal facility will swallow any garbage that is thrown into it.”<sup>119</sup> The superior arrangement of the law is “*natural*,” which means one based on what “men in general are, by the common constitution of man’s *nature*, disposed to attend to: such, in other words, as *naturally*, that is, readily, engage, and firmly fix the attention of any one to whom they are pointed out.”<sup>120</sup> More specifically,

[W]ith respect to actions in general, there is no property in them that is calculated so readily to engage, and so firmly to fix the attention of an observer, as the *tendency* they may have *to*, or *divergency* (if one may so say) *from*, that which may be styled the common *end* of all of them. The end I mean is *Happiness*[.]<sup>121</sup>

According to Bentham, then, the natural arrangement of legal materials need not conform with the way law is understood from the internal point of view, in the manner accepted by lawyers. Jurisprudence is valuable not for repeating what lawyers consider “valid” laws, but for providing a normative account that explains the place of law as part of a political theory. For Bentham, such an inquiry led him to believe that the common law was not really law,<sup>122</sup> making him clearly out of line from lawyers’ attitudes on the matter.

Because contemporary legal positivists often say that the conditions of legal validity are what distinguishes legal positivists and their detractors,<sup>123</sup> this is a crucial point: Legal validity is a concept that makes sense, if at all, only within the framework of an attempt to report accepted attitudes (typically of lawyers) as to what counts as law. As such it is a concept that is part and parcel of the contemporary attempt to refashion legal positivism as a non-metaphysical doctrine. Within this effort *legal validity serves as the alternative to the metaphysical foundations on which the theories of classical legal positivists were based*. By con-

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<sup>119</sup> Bentham, *supra* note 4, at 25, 26.

<sup>120</sup> *Id.* at 25.

<sup>121</sup> *Id.* at 25–26.

<sup>122</sup> For Bentham’s views on the common law see, among many other places, Bentham, *supra* note 43, at 8; Bentham, *supra* note 48, at 25–26. To the same effect is his discussion on the extension of “law” to edicts given by a single monarch as sovereign, where he rejected prevalent linguistic usage. See Bentham, *supra* note 48, at 29–32. For further discussion that shows that Bentham was not concerned with explicating the notion of validity, see *supra* text accompanying note 48.

<sup>123</sup> See, e.g., Marmor, *supra* note 100, at 4–5, 133; Brian Leiter, Explaining Theoretical Disagreement, 76 U. Chi. L. Rev. 1215, 1216 (2009).



trast, legal validity plays no role in a metaphysically deep theory, which does not attempt to explain law in terms of people's attitudes.<sup>124</sup>

What about the command theory, the other idea that, according to Marmor, was embraced by Hobbes and Bentham but rejected by Hart and his followers? Here too, I think, the picture is more complex. In the work of Hobbes and Bentham (and even Austin), the command theory is primarily a view about legal authority, not legal validity. In modern parlance we may say that these theorists tried to show how there is no necessary connection between law and morality with regard to the question of *law's normativity*. Consistent with their metaphysical views they sought to offer an account of how law creates obligations that do not depend on moral premises. This was the essence of the command theory: Obligations according to Hobbes arise “not from their own Nature, (for nothing is more easily broken than a mans word,) but from Feare of some evill consequence upon the rapture.”<sup>125</sup> When Hobbes later defined law as a “[c]ommand . . . addressed to one formerly obliged to obey [the commander],”<sup>126</sup> it was part of his view that political obligation does not depend on morals. Even Austin, who in other respects marks the beginning of the transition towards contemporary legal positivism, is, in this regard, not very different: “[T]he party bound by a command is bound by the prospect of an evil.”<sup>127</sup>

Hart is famous for subjecting the command theory to withering criticism, but he accepted the classical positivist idea that legal obligation is distinct from moral obligation and that legal rights are distinct from moral rights. In his proposed alternative to the command theory—what has come to be known as the “practice theory of norms”—Hart, like the classical legal positivists, sought a nonmoral (“positivist”) account of law's normativity.<sup>128</sup> This was the single matter on which Hart kept a threadbare link between his views and those of the classical legal positivists; its disappearance in the work of later legal positivists tells us something interesting about the intellectual development of legal posi-

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<sup>124</sup> One crucial implication of this view is that it is wrong to claim that the debate between contemporary legal positivists and non-positivists (especially Ronald Dworkin) is about the question of legal validity. For a detailed explanation see Priel, *supra* note 23, at 7–14.

<sup>125</sup> Hobbes, *Leviathan*, *supra* note 39, at 93; see also Hobbes, *On the Citizen*, *supra* note 60, at 175 (“It is this . . . kind of obligation, i.e. fear, or awareness of one's own weakness . . . that in the natural kingdom of God gives rise to our obligation to obey him.”).

<sup>126</sup> Hobbes, *Leviathan*, *supra* note 39, at 183.

<sup>127</sup> Austin, *supra* note 5, at 23.

<sup>128</sup> See Hart, *supra* note 8, at 144–47, 158–61.

tivism in the twentieth century. Because of Hart's focus on legal practice and the corresponding re-orientation of jurisprudence toward questions of validity, it was no longer thought that a nonmoral account of law's normativity is necessary for one's credentials as a legal positivist. This led to the next stage in the development of the idea of legal positivism: What made one a legal positivist was not (as Hart and the classical legal positivists had thought) that one's theory distinguished legal obligation from moral obligation and treated legal obligation as derived from the norm's legality. Rather, the mark of legal positivism was that it treated the question of legal validity as separate from the question of law's normativity. In this version of legal positivism, the fact that something is considered a valid law says nothing about its obligatoriness. On this view the latter question is a purely moral question to be determined on the content of the law.<sup>129</sup> Thus, in the end of this process one could be a legal positivist in good standing in spite of having a moral account of law's normativity. With this view the shift from classical to contemporary legal positivism was complete.

#### CONCLUSION: TOWARD CLASSICAL LEGAL POSITIVISM

The successes of the scientific method in explaining the world put enormous pressure on other methods of inquiry. Philosophers in particular may have felt a need to justify their methods when many questions that used to belong to philosophy were subjected to a hostile takeover from science. The response adopted by Hart and some of his contemporaries was to turn philosophy into a subject concerned with questions that, they thought, were beyond the ken of science. (Tellingly, a rather similar move is discernible in religion.) A key element in this move was the adoption of the internal point of view as the right perspective for jurisprudence, one to which science could not contribute. (Cognitive psychology and neuroscience show that even this belief may be mistaken, but that is a matter for another occasion.<sup>130</sup>) The insistence that legal philosophy be concerned with conceptual questions pursued for their own

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<sup>129</sup> See Gardner, *supra* note 12, at 36; Raz, *supra* note 35, at 158. Raz rejected Hart's views on legal obligation in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 269–82 (rev. ed. 1995).

<sup>130</sup> See R.E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 *Psychol. Rev.* 231 (1977); see also Leonard Mlodinow, *Subliminal: How Your Unconscious Mind Rules Your Behavior* (2012); Timothy D. Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* (2002).

sake, that even a concern with the practical significance of jurisprudential debates is “fundamentally anti-philosophical,”<sup>131</sup> insulated legal philosophy from intrusions from without only by killing the subject from within. It is not just that many outsiders think of jurisprudence as uninteresting (something that some legal philosophers seem to relish), it is that even insiders do not see the point in many of the debates,<sup>132</sup> and feel that jurisprudence has become an isolated subject.<sup>133</sup>

The views of Hobbes and Bentham—the real ones, that is—can provide a cure. For they have shown the potential for an “open” jurisprudence, one that seeks to explain law from a broader perspective. In mentioning them I am not simply appealing to the authority of great dead philosophers. I would like to think that I would have thought this approach worth pursuing even had Hobbes and Bentham not existed. But it is worth mentioning them in order to demonstrate just how far the contemporary positivist approach is from the ideas of those usually consid-

<sup>131</sup> Gardner, *supra* note 12, at 24; see also Matthew H. Kramer, Book Review, 58 Cambridge L.J. 222, 223 (1999) (contrasting “non-philosophical jurisprudence—a search for a legal theory focused firmly on practical concerns” with “pure philosophical elucidation”). These words, coming from two prominent contemporary legal positivists, could not be more different from Bentham’s view of philosophy:

Philosophy is never more worthily occupied, than when affording her assistances to the economy of common life: benefits of which mankind in general are partakers, being thus superadded to whatever gratification is to be reaped from researches purely speculative. It is a vain and false philosophy which conceives its dignity to be debased by use.

4 Jeremy Bentham, *Panopticon; or, the Inspection House (1791)*, reprinted in *The Works of Jeremy Bentham* 37, 117 n.† (John Bowring ed., Edinburgh, William Tait 1843).

<sup>132</sup> Do not take my word for it. Contemporary legal philosophers are among the harshest critics of some of the debates that currently occupy legal philosophy. See, e.g., Marmor, *supra* note 100, at 95 (describing a jurisprudential debate that “degenerated to hair-splitting arguments about something that makes very little difference to begin with”); James Allan, *A Modest Proposal*, 23 Oxford J. Legal Stud. 197, 209 (2003) (jurisprudential debates have become “almost scholastic”); Coleman, *supra* note 35, at 76 (“Progress [in jurisprudence] has stalled . . . because too much effort has been devoted to the wrong issues.”); Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 Legal Theory 117, 117 (2004) (complaining about “navel-gazing” in jurisprudential debates). The list of such statements could have been much longer.

<sup>133</sup> The world of contemporary jurisprudence has been described as “small, hermetic—and rather incestuous.” Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy 2* (2007). On the isolation of contemporary jurisprudence see Dworkin, *supra* note 77, at 34; Frederick Schauer, *Re(Taking) Hart*, 119 Harv. L. Rev. 852, 868–69, 882–83 (2006) (reviewing Lacey, *supra* note 6); Dan Priel, *Positivism and the Separation of Law and Jurisprudence* (Osgoode Hall Law Sch. Research Paper Series, 2011), available at <http://ssrn.com/abstract=1951912>.

ered, by contemporary legal positivists themselves, as founders of legal positivism. What is particularly appealing about their approach, to me at least, is that they based it on the idea that humans belong to nature, and as such the methods of inquiry needed to explain their lives should not be any different from those involved in other inquiries about the world. It is this approach that separates them both from natural lawyers and from contemporary legal positivists.

Ironically, the turn to science could open up the field for what we might call more genuinely “philosophical” questions. Instead of trying to answer the question “what is law?,” a question that is, in the end, a sociological question, legal philosophers could turn their attention to questions like “what do the proliferation of studies on the psychology of morality imply for what laws can do?” “What do such studies imply for what laws *should* be?” They open up new possibilities for answering the “Kantian” philosophical puzzle, “what makes law (legal obligation, legal authority, legal normativity) possible?” Though such questions will presumably depend on facts about human nature, unlike contemporary legal positivism, answering them in no way depends on explicating (or speculating about) people’s attitudes on these matters.<sup>134</sup> This is what I take to have been the essence of classical legal positivism. Had this approach to legal philosophy been taken more seriously, the views that go by the name “legal positivism” would have looked quite different from what they actually look like these days, no doubt more interesting, and probably more plausible.

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<sup>134</sup> More precisely, they are immune to them to the extent that they are not constitutive of legal practice. See Danny Priel, *Jurisprudence and Necessity*, 20 *Can. J.L. & Juris.* 173, 193–94 (2007).