

THE PATH-DEPENDENCE OF LEGAL POSITIVISM

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INTRODUCTION

ONE advantage of not being a professional (or even amateur) historian is that such non-professional status allows one to be unashamedly instrumental about history. Although genuine historians bridle at the thought that we should investigate history because it makes us better people or better decision makers, as opposed simply to providing knowledge for its own sake, the rest of us have the freedom to use history for a wider range of other and more instrumental purposes.

Among the instrumental uses of history is the way in which historical inquiry can often allow us to recover, for current use, ideas whose past currency has been extinguished by the passage of time. And although ideas can be lost for many reasons, including of course their unsoundness, one of the most interesting ways in which potentially valuable ideas of the past can be forgotten is through the mechanism of intellectual path-dependence. If an idea at some time in the past possessed, say, two valuable features, and if one of those features becomes popular, salient, interesting, or important, the popular or salient or interesting or important feature will likely be discussed, explicated, and embellished. These explications and embellishments will themselves then be discussed and further explicated and embellished, and so on, in a manner that resembles the branches of a tree as they generate further branches and then twigs and then twiglets and leaves. But just as looking at all of the smaller sub-branches of one main branch may blind us to the existence of other main branches, so too may a focus on the subsequent elaborations of one part of some main idea lead us to ignore the other parts, parts whose importance may be forgotten precisely as a consequence of the process of path-dependence just described. And thus the path-

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dependence I posit here is largely a sociological or psychological, rather than formal, process. It is not that focusing on one of multiple facets of an idea makes the other facets unavailable in a logical or inexorable sense. But the earlier selective attention does serve to make those other facets sociologically and psychologically more obscure with the passage of time, rendering the other facets less salient, more difficult to retrieve, and, most importantly, increasingly harder to use.

And so it is with legal positivism. My goal in this Article is to examine three important topics in legal theory and to expose how they were all at one time part of the perspective that was once understood as legal positivism, and which bears an ancestral relationship to modern legal positivism. The first of these dimensions is the relationship between legal theory and legal reform. Specifically, that an account of the nature of law might be developed not simply as an aid to understanding or accurate description, but instead as a way of facilitating reform of law itself or reform of how a society understands the idea of law. And thus the view that theories or accounts of law might be generated for the purpose of conceptual or legal reform is the first of the three dimensions of yesterday's legal positivism that appears largely to have been obscured or even buried by the passage of time.

Second, legal positivism, at the time of its late nineteenth-century (or perhaps even earlier) origins, was focused on the importance of coercion, force, and sanctions as central components of law. But as with the creation of legal theories for the purpose of legal reform, this emphasis on the coercive side of law has also been banished to a kind of jurisprudential purgatory, for reasons and with consequences that deserve further examination.

The third lost element of earlier versions of legal positivism is its focus on judicial decision making and the role of judges. Modern legal positivists, for whom 1961 is all too often the beginning of useful thought about the nature of law,¹ do not, with few exceptions, consider theories of judicial decision making to be a necessary or even important part of the positivist perspective.² But it was not always so. Previously,

¹ 1961, was, of course, the year of initial publication of H.L.A. Hart, *The Concept of Law* (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012). And on the sociological claim in the text about the nature of contemporary legal theory, see Frederick Schauer, *Positivism Before Hart*, 24 *Can. J.L. & Juris.* 455, 456 (2011).

² Indeed, with the obvious exception of Ronald Dworkin (see, e.g., Ronald Dworkin, *Justice in Robes* (2006) [hereinafter Dworkin, *Justice in Robes*]; Ronald Dworkin, *Law's Em-*

the view that we should understand the judicial function in terms of the freedom (or lack thereof) of the judge to depart from the limited domain of formal positive law in making her decisions was a topic dear to the heart of legal positivists, but again that focus seems to have been erased.

My aim in this Article is to focus on the history of thinking about law in the context of the three topics just sketched, and to try to show that the continuous development of the theory of legal positivism, however useful it may have been or may still be, has possibly caused us to ignore other aspects of what was originally part of the positivist picture.³ My concern here is not that modern legal positivism is in any way mistaken on its own terms.⁴ That agenda is best left for other occasions. Here my only goal is to argue that modern legal positivism is but one branch of the historically important positivist perspective. As a result, the path of development of legal positivism, even if sound according to its own modern lights, appears to have caused us to lose the independent importance of several other paths, an importance that remains worthwhile even today to emphasize.

I. JEREMY BENTHAM ON NORMATIVE JURISPRUDENCE

There are interesting historical questions to be asked, and that have sometimes been asked, about the roots of legal positivism. Did it begin with Thomas Hobbes, and his focus on obedience and the role of law as

pire (1986) [hereinafter Dworkin, *Law's Empire*]; Ronald Dworkin, *Taking Rights Seriously* (1977)), it is not too much of an exaggeration to suggest that concern with judicial decision making—adjudication—has not been a major concern of modern jurisprudence, whether positivist or not.

³ Thus my goal here is consistent with that in Gerald J. Postema, *Legal Positivism: Early Foundations*, in *The Routledge Companion to Philosophy of Law* 31 (Andrei Marmor ed., 2012) [hereinafter Postema, *Legal Positivism*], where Postema understands himself to be describing, especially with respect to Jeremy Bentham, a “positivist road not taken or only recently considered.” *Id.* at 36.

⁴ “Modern legal positivism” is an egregious over-simplification, and one which masks not only differences between legal positivism as it is discussed in the Anglo-American tradition and the usually Kelsen-centered discussions, Hans Kelsen, *Pure Theory of Law* (Max Knight trans., 1967), that pervade non-Anglo-American jurisprudence, but also between many contemporary debates even within the modern Anglo-American positivist tradition. For the flavor of some of these debates, especially those between so-called exclusive and inclusive positivists, see Hart’s *Postscript: Essays on the Postscript to The Concept of Law* (Jules L. Coleman ed., 2001); Stephen R. Perry, *The Varieties of Legal Positivism*, 9 *Can. J.L. & Juris.* 361, 361 (1996).

a coordinating device?⁵ Can we go back earlier, to Aquinas's important but often-ignored distinction between human law and natural law?⁶ Or perhaps we should go back even further to Justinian and other Romans who implicitly adopted a conception of law broadly compatible with the positivist distinction between law as it is and law as it ought to be, and with the positivist idea that law is ultimately a set of social rules resting on a foundation of social fact.⁷

But although all of these figures, along with others, are plausible candidates for the role of Father of Legal Positivism, the individual most associated with the origins of legal positivism in the modern and analytic jurisprudential tradition is Jeremy Bentham. And because this Article is itself situated within that tradition,⁸ I start with Bentham.

Bentham, as is well known, had a great deal to say about law, very little of it complimentary. As one of history's great haters, Bentham was unrelenting in his hatred of the English legal system, especially its common law design and the lawyers and judges who populated it. Never one to mince words, he described the use of legal fictions, for example, as pestilential and syphilitic,⁹ and the language he used to characterize

⁵ See David Lyons, *Ethics and the Rule of Law* 116 (1984); Andrei Marmor, *Philosophy of Law* 4 n.3, 8, 41 (2011); Gerald J. Postema, *Law's Autonomy and Public Practical Reason*, in *The Autonomy of Law: Essays on Legal Positivism* 79, 80 (Robert P. George ed., 1996).

⁶ See Brian Bix, *Natural Law Theory*, in *A Companion to Philosophy of Law and Legal Theory* 223, 225 (Dennis Patterson ed., 1996); R. George Wright, *Does Positivism Matter?*, in *The Autonomy of Law*, supra note 5, at 57, 62.

⁷ See Postema, *Legal Positivism*, supra note 3, at 31–36; see also George C. Christie, *Jurisprudence: Text and Readings on the Philosophy of Law* 292–459 (1973) (identifying the early roots of legal positivism); Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* 82–84 (1953) (describing the history of imperative conceptions of the law); Brian H. Bix, *Legal Positivism*, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* 29, 29 (Martin P. Golding & William A. Edmundson eds., 2005) (identifying early roots of legal positivism); John Finnis, *The Truth in Legal Positivism*, in *The Autonomy of Law*, supra note 5, at 195, 207 n.2 (describing Justinian's view on the distinction between human law and natural law as recognized even within the natural law tradition).

⁸ And of course there is path-dependence at work here as well, in focusing on this jurisprudential addition to the exclusion of others that might be equally valuable, even if in different ways.

⁹ “[T]he pestilential breath of Fiction poisons the sense of every instrument it comes near.” 1 Jeremy Bentham, *A Fragment on Government* (1776), reprinted in *The Works of Jeremy Bentham* 227, 235 (John Bowring ed., Edinburgh, William Tait 1843). “[I]n English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness.” 5 Jeremy Bentham, *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law* (1821), reprinted in *The Works of Jeremy Bentham*, supra, at 61, 92. “Every criminal uses the weapon he is most practised in the use of: the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical

lawyers, judges, and the structure of the common law was scarcely less critical.¹⁰

The connection between Bentham's contempt for the English legal system of the late eighteenth century and his adoption of what we now think of as a positivist perspective is not difficult to discern. Bentham was, above all, a reformer.¹¹ He thought it important to be able to identify the characteristic features of law,¹² but for Bentham the careful identification of law, and of the idea of a "complete" law,¹³ was in the service of the belief that the legal system could be improved, or, perhaps, torn down and rebuilt.¹⁴ Just as rebuilding a house requires knowledge of the house that is to be rebuilt as well as knowledge of the goals of the rebuilding, so too, at least for Bentham, did rebuilding the edifice of law require knowledge of that edifice, kept separate from what the rebuilt edifice of law would look like.¹⁵ And thus, although Bentham was undoubtedly committed to the development of a descriptive account of law—insistently distinguishing what the law is from what it ought to

lawyer his lies. Unlicensed thieves use pick-lock keys: licensed thieves use fictions." 4 Jeremy Bentham, *Rationale of Judicial Evidence* 307–08 (1827).

¹⁰ Thus Bentham criticized the pervasive retroactivity of common law change—the application of the change to the very case that prompted the change—as “dog-law,” likening common law change to the way in which dogs are trained, or so Bentham thought, by punishing them after the fact for misdeeds whose wrongness they could not have apprehended prior to being punished for them. 5 Jeremy Bentham, *Truth Versus Ashhurst: Or, Law as It Is, Contrasted with What It Is Said to Be* (1823), *reprinted in* *The Works of Jeremy Bentham*, *supra* note 9, at 231, 235. And on Bentham's negative views about the common law and about the English legal system of the late eighteenth century more generally, see Gerald J. Postema, *Bentham and the Common Law Tradition* 267–301 (1986) [hereinafter Postema, *Common Law Tradition*].

¹¹ On Bentham's overall reformist commitments, see Nancy L. Rosenblum, *Bentham's Theory of the Modern State* 3 (1978); James Steintrager, *Bentham* 25–29, 44–61 (1977); Postema, *Legal Positivism*, *supra* note 3, at 36–40.

¹² Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence* 24–197 (Philip Schofield ed., 2010) (c. 1780).

¹³ See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* 50–59, 70–92 (2d ed. 1980).

¹⁴ See H.L.A. Hart, *The Demystification of Law*, *in* *Essays on Bentham: Studies in Jurisprudence and Political Theory* 21, 26, 36 (1982).

¹⁵ “Bentham and Austin . . . devoted much attention to the analysis of basic legal concepts because they held that law could not be criticized intelligently unless its fundamental features were first identified and understood.” Lyons, *supra* note 5, at 69.

be¹⁶—his descriptive project was developed in the service of his normative one.¹⁷

The identification of a jurisprudential enterprise as normative, however, remains susceptible to multiple interpretations. One view is that the very enterprise of identifying the concept of law is itself necessarily normative. Because the act of identification—of description—necessarily involves picking out those features of some social phenomenon that are thought to be important, the argument has been advanced, an argument whose soundness is not relevant here, that the very act of identifying these important features has a normative component. Thus, so the argument goes, when a theorist attempts to describe law, or the concept of law, or even a single law, she is necessarily engaged in an irreducibly normative enterprise.¹⁸

This was not Bentham's view. Bentham firmly believed in the distinction between fact and value—between description and prescription—and thus would have strongly resisted the notion that describing the concept of law or describing a legal system was *necessarily* a normative or evaluative enterprise.¹⁹ So although Bentham engaged in his descriptive enterprise for normative or moral reasons, he plainly accepted the possibility of engaging in the simple practice of description, and might have accepted that someone could conceivably wish to engage in this practice purely, for example, to satisfy his own curiosity, or just because doing so gave him pleasure.

Yet even if one accepts the possibility of non-evaluatively describing law, a law, or the concept of law, there remain several normative possi-

¹⁶ See Bentham, *supra* note 12, at 16 (distinguishing expository from censorial jurisprudence).

¹⁷ See Julie Dickson, *Evaluation and Legal Theory* 5–8 (2001); see also Hart, *supra* note 14, at 23 (describing Hart's demystification of the law as a necessary prerequisite for normative judgments).

¹⁸ As described in the text, the argument is commonly associated with Dworkin, *Justice in Robes*, *supra* note 2, at 141; Dworkin, *Law's Empire*, *supra* note 2, at 410–13. Thus, Neil MacCormick has described Dworkin's goals as attempting to "re-unify" the expository and the censorial. Neil MacCormick, *Dworkin as Pre-Benthamite*, in Ronald Dworkin and *Contemporary Jurisprudence* 182, 183 (Marshall Cohen ed., 1983). But the most careful development of the claim that much of allegedly descriptive jurisprudence has a strong normative dimension is in the work of Stephen Perry. Stephen R. Perry, *Hart's Methodological Positivism*, in *Hart's Postscript*, *supra* note 4, at 311, 311; Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *Law and Interpretation: Essays in Legal Philosophy* 97, 100 (Andrei Marmor ed., 1995).

¹⁹ See Jeremy Bentham, *A Fragment on Government* 98–99 (F.C. Montague ed., Oxford, Clarendon Press 1891) (1776).

bilities. One is that we might describe the concept of law in order to recommend improvements to the concept itself. Because law is a human creation, so too is the concept of it. And if we put to one side the questions about just what a concept is,²⁰ or even whether concepts exist, we can, in more straightforward language, ask about how a society understands the idea, the phenomenon, or the institution(s) of law. And thus one possible normative enterprise is the act of prescribing just how a society ought to understand or conceive or grasp the idea and the phenomenon of law.²¹

Although the point is contested,²² it is arguable that both H.L.A. Hart and Lon Fuller were engaged in just this kind of normative or prescriptive enterprise. Under this understanding, which seems to have considerable textual support,²³ Hart argued that a society *ought* to understand the phenomenon of law in a positivist way—separating law as it is from the law as it should be—because were this understanding to be prevalent, it would be easier for that society’s citizens and officials to resist the

²⁰ A useful discussion is Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 121, 123 (2007).

²¹ See Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 *Oxford J. Legal Stud.* 493, 493 (2005). Although with more qualification, similar claims can be found in Liam Murphy, *Better to See Law This Way*, 83 *N.Y.U. L. Rev.* 1088, 1089 (2008); Liam Murphy, *The Political Question of the Concept of Law*, in *Hart’s Postscript*, supra note 4, at 371–72.

²² See Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 *N.Y.U. L. Rev.* 1035, 1039 (2008); see also Marmor, supra note 5, at 111 (arguing that Hart’s approval of the moral consequences of his account of the nature of law was independent of Hart’s belief in the descriptive truth of that account).

²³ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 615–21 (1958). Even clearer is Hart, supra note 1, at 209–12, where Hart argues that choosing between alternative conceptions of law involves deciding which will best, in part, “advance and clarify our moral deliberations.” *Id.* at 209. Even more clearly, Hart argues that the question is, again in part, one of “stiffening of resistance to evil,” *id.* at 210, and that the dispute between positivist and natural law views about legal validity is to be determined, again in part, by “[w]hat . . . is most needed in order to make men clear-sighted in confronting the official abuse of power.” *Id.*; see also Neil MacCormick, *H.L.A. Hart* 36 (2d ed. 2008) (interpreting Hart as arguing that “one basis for adhering to the positivist thesis of the conceptual differentiation of law and morals is itself a moral reason”). Hart appears to soften these claims considerably in the *Postscript*, Hart, supra note 1, at 238–76, which has a much more descriptive flavor, and thus it is perhaps best to follow Julie Dickson’s lead in understanding Hart’s position about whether a concept of law should be adopted on normative grounds as “awkward.” Julie Dickson, *Is Bad Law Still Law? Is Bad Law Really Law?*, in *Law as Institutional Normative Order* 161, 164 (Maksymilian Del Mar & Zenon Bankowski eds., 2009).

commands of unjust law. And when Fuller, in response, argued that law should be understood in a way somewhat closer to his own procedural version of the natural law tradition²⁴—that law that was unjust in some way was simply not law at all—he too argued that his way of understanding the idea of law would produce a lesser inclination by citizens and officials to obey morally iniquitous directives emanating from official authority.²⁵ And so although Hart and Fuller differed in which concept of law would better facilitate, if prevalent in a society, resistance to immoral official directives, they appeared to agree that prescribing what a society's concept of law should be was a plausible understanding (even if by no means the only plausible understanding) of the jurisprudential enterprise.

Neither of these conceptions of normative jurisprudence was Bentham's. He did not believe that description was necessarily normative. Nor did he believe, except in the indirect way to be discussed presently, that it was worthwhile to tell a society what its concept of law ought to be. He did believe, however, that describing the idea of law in a way that withheld moral approval would best facilitate redesign of the legal system. Bentham was of course a profound critic of much—maybe almost all—of the actual design of the English legal system. He had unbounded contempt for the common law, despised legal fictions, mocked the bar and the judiciary by using the label “Judge & Co.,”²⁶ and in many other respects made clear that prescribing change in how the law operated and how the legal system was structured was one of his central goals.

So we know that Bentham was an inveterate reformer in general, that he thought that reform of the legal system and the content of the law was

²⁴ The idea is developed at greater length in Lon L. Fuller, *The Morality of Law* 96 (rev. ed. 1969). An important analysis of the relationship between Fuller's version of natural law and the more conventional ones is in Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* 30–31, 45–46, 68–73 (2012).

²⁵ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630, 648–61 (1958).

²⁶ See Postema, *Common Law Tradition*, *supra* note 10, at 275; Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* 158 (1983). See also 5 *Jeremy Bentham, Scotch Reform* (1808), *reprinted in* *The Works of Jeremy Bentham*, *supra* note 9, at 1, 9, where Bentham proposed that it ought to be unlawful to give legal advice for money, thereby removing the incentives for lawyers to try to make law more complex for their own benefit, and 5 *Jeremy Bentham, Rationale of Judicial Evidence, Specially Applied to English Practice* 302 (London, C.H. Reynell 1827), where Bentham caustically observes that “English judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice.”

of the highest importance, and that he offered an understanding of the nature of law that, for him, was certainly devoid of endorsement and devoid as well of any moral evaluation at all.²⁷ What he said about the distinction between expository and censorial jurisprudence, and the distinction between the existence of a particular law and its moral worth, applied just as fully to the distinction between the existence of a legal system, or the existence of law itself, and its moral status. The existence of the very idea of law is one thing, he might have said, and whether law so understood is good or bad is something else entirely.

The question then arises about the connection between Bentham's non-evaluative understanding of the nature of law and his plainly normative—that is, moral and political—law reform goals. And when we focus on this link, we can acknowledge that the two positions need not necessarily be conjoined. That is, one can engage in description of the important features of the concept of law and one can prescribe overhaul of the law, or even of the concept of law, without there being any necessary connection between the two. And thus the most charitable understanding of Jules Coleman's observation that there is no connection between Bentham's legal positivism and the political views that Bentham happened to hold²⁸ is that someone, including Bentham, *could* have had Bentham's understanding of legal positivism but still have had different political commitments, or that someone with the same political commitments did not need to be a legal positivist at all.

Coleman's claim appears true as a matter of logical entailment, but the absence of logical entailment, either from positivism to certain political views or from certain political views to positivism, is also consistent with Bentham's reform goals—and Bentham's political commitments—

²⁷ On the way in which legal positivism might offer a morally advantageous way of distancing oneself from the law, see David Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* ix–x (1993) (“When I first encountered legal theory, I thought that the tradition called ‘legal positivism’ embodied a fitting lack of reverence for the law. . . . I am not so sure anymore.”). For a less tentative endorsement of this idea, see Frederick Schauer, *Fuller's Internal Point of View*, 13 *Law & Phil.* 285, 285–86 (1994); Frederick Schauer, *Positivism as Pariah*, in *The Autonomy of Law*, supra note 5, at 32; see also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 194 (1994) (arguing that an “excessive veneration” of the law, which Bentham and Hart resisted, has “deleterious moral consequences”). And for discussion of Raz's position in this regard, see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* 2–4 (2d ed. 2010).

²⁸ Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. Legal Stud.* 139, 145–47 (1982).

having been, for him, strongly causal of his legal positivism. Coleman offers no evidence to the contrary, and thus he ought to be open to the empirical possibility that for Bentham and others the adherence to legal positivism and a morally inspired goal of legal reform are not nearly as distinct as he might be understood as suggesting. That the two are not logically linked does not mean that they cannot be, and were not in fact, contingently, empirically, and indeed, causally, connected.

The strongest evidence for the existence of a contingent empirical connection between Bentham's descriptive positivism and his normative law reform goals is simply the fact that there is no evidence that Bentham *ever* engaged in description or conceptual analysis purely for its own sake, or for the simple purpose of advancing knowledge or understanding. Virtually everything that Bentham did or wrote was in the service of advancing his utilitarianism-grounded vision for a better society, and there is no indication that what Bentham said or wrote about law was an exception.

From this perspective we can accept that Bentham was engaged in normative jurisprudence of one variety—engaging in seemingly demoralized description or conceptual analysis of law in order to support a normative moral project.²⁹ Just as Neil MacCormick famously argued for a moralistic case for an amoralistic understanding of the nature of law,³⁰ so too can we understand Bentham, relatedly, as implicitly making the moral case for an amoralistic understanding of the jurisprudential enterprise.³¹ Insofar as conceptual analysis might be thought of as the necessary condition for accurate description, and accurate description understood as the necessary condition for well-targeted prescription, then we might well understand Bentham to have engaged in conceptual analysis and descriptive jurisprudence for just this normative reason. Although John Austin³² may have taken up and developed Bentham's

²⁹ See Rosenblum, *supra* note 11, at 88–89. For a general consideration of the nature of law from the perspective of the reformer, see Michelle Madden Dempsey, *On Finnis's Way In*, 57 *Vill. L. Rev.* 827, 842 (2012).

³⁰ Neil MacCormick, *A Moralistic Case for A-Moralistic Law?*, 20 *Val. U. L. Rev.* 1, 1 (1985).

³¹ See David Lyons, *Founders and Foundations of Legal Positivism*, 82 *Mich. L. Rev.* 722, 730 (1984) (reviewing H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982) and W.L. Morison, *John Austin* 38–48 (1982)).

³² John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed., 1995) (1832).

conceptual and descriptive program for less normative reasons,³³ there is little reason to believe that Austin's often non-normative program had ever been, at least in this respect, Bentham's. And thus insofar as the non-normative understanding of the nature of law is one form of legal positivism, it seems fair both to label this as normative positivism,³⁴ and to conclude that Bentham's legal positivism was normative in just this sense.

The existence of normative reasons for engaging in non-normative description or conceptual analysis is only one form of normative jurisprudence. There may be other varieties of normative legal positivism, and indeed of Bentham's normative legal positivism. More particularly, although Bentham never used the word "positivism," it not having emerged in the context of law until more than a century after Bentham was writing about law,³⁵ it is apparent that Bentham had a clear conception of the idea of positive law, it consisting largely of statutes and to some extent of those common law rules created by judges with the plain authorization of Parliament.³⁶ And Bentham also had a view about what judges should do with respect to that law. If the law generated a clear answer, Bentham is commonly thought to have believed, then judges should reach that result.³⁷ And if the law was unclear, judges ought to,

³³ Whether Austin was (or became) interested in description and classification for its own sake or in the service of broader normative aims is the subject of some dispute. Compare Postema, *Legal Positivism*, supra note 3, at 36, 40–43 (viewing Austin as a largely "pedestrian" thinker who may have been enamored with classification as an end in itself), with Robert N. Moles, *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition* 12–22 (1987) (stressing Austin's concerns with the relations among law, morality, and ethics). And on Austin as reformer (or not), see Lotte and Joseph Hamburger, *Troubled Lives: John and Sarah Austin* 191 (1985); Morison, supra note 31, at 122–32; Wilfrid E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* 13–14 (1985); Wilfrid E. Rumble, *Did Austin Remain an Austinian?*, in *The Legacy of John Austin's Jurisprudence* 131, 152 (Michael Freeman & Patricia Mindus eds., 2013); Brian Bix, *John Austin*, Stan. Encyclopedia Phil. (last updated Feb. 21, 2014), <http://plato.stanford.edu/entries/austin-john/>.

³⁴ See Jeremy Waldron, *Normative (or Ethical) Positivism*, in *Hart's Postscript*, supra note 4, at 411, 411–12.

³⁵ The earliest reference I have been able to locate is in Josef Kohler, *Philosophy of Law* xliii (Adalbert Albrecht trans., 1914).

³⁶ See Postema, *Common Law Tradition*, supra note 10, at 403–64.

³⁷ That Bentham believed in more or less mechanical judging is the conventional wisdom, a conventional wisdom influentially challenged in Postema, *Common Law Tradition*, supra note 10, at 421–34.

under some circumstances, suspend judgment until the legal question was resolved by Parliament.³⁸

Bentham's views about judging were vastly more complex than this, and I shall return to them presently. But for now it may be useful to recapitulate the larger claim in this Part. Thus, although the modern conception of legal positivism tends to see positivism as a purely descriptive claim about the nature of law or about the nature of the concept of law,³⁹ there are three conceptions of positivism that are substantially more normative. One is that positivism is an account of law that is chosen by a culture rather than pre-existing it, and that it may be desirable for moral or other normative reasons to choose legal positivism rather than its most common opponents. And although I confess to substantial sympathy with this version of normative positivism,⁴⁰ it appears to have little pre-Hart historical provenance. By contrast, Bentham's positivism seems to have been just as normative, though in a related but different way. Bentham appears to have been unconcerned with what conception of law was adopted by society at large, but was highly interested in what conception might be adopted by commentators and others who were engaged in the process of prescribing reform of the law. For them, Bentham argued, legal positivism was to be preferred because it facilitated separating description from prescription, and thus facilitated the radical legal reform to which Bentham was so committed.

Thus, we can now comprehend three versions of normative positivism—the development of a descriptive legal theory in order to facilitate law reform; the inculcation of a distinction between what the law is and what the law ought to be in order to produce morally desirable results for some population; and the normatively-driven promotion of a certain posture of judges vis-à-vis positive law in order to produce a more morally desirable array of judicial and societal outcomes.

Thus, assuming that the distinction between what the law is and what the law ought to be is one understanding of one of the (or the only) core commitments of legal positivism, choosing to have this understanding of the jurisprudential enterprise and of law itself might be based on the way

³⁸ On these “emendative” and “sistitive” powers and responsibilities, see *id.* at 435–37; see also J.R. Dinwiddy, *Radicalism and Reform in Britain, 1780–1850*, at 366–67 (1992) (elaborating on Bentham's views on these powers).

³⁹ See, e.g., Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 *Oxford J. Legal Stud.* 683, 683 (2006).

⁴⁰ See Schauer, *supra* note 21, at 495.

in which it is simply correct, normative goals aside.⁴¹ Or it might be based on the way in which having that understanding, whether by theorists or commentators or the public, is facilitative of certain other goals, goals that are themselves morally or politically defined. And although there can be little doubt that the former understanding characterizes the views of Joseph Raz,⁴² Julie Dickson,⁴³ and many others,⁴⁴ there can be equally little doubt that the latter, in one form or another, comes far closer to Bentham's views.

II. ON THE ROLE OF SANCTIONS IN UNDERSTANDING LAW

As developed by Bentham, the account of law that we now call "legal positivism" was not only one that was conceived for normative rather than purely descriptive purposes, but was also an account that featured sanctions—coercion, force, threats, and the like—as the centerpiece of its definition of law. But it turns out that philosophical or jurisprudential attention to law's coercive dimensions has also been largely lost in much of modern thinking.⁴⁵ Path-dependence again might be the best explanation, but here the mechanism has been somewhat different.

Bentham's conception of the role of force in law was a rich and complex one. Common caricatures of his views notwithstanding, Bentham did not view all human motivation as self-interested.⁴⁶ He believed that people often acted for reasons of direct self-interest, but he also believed that they sometimes acted for reasons of the common good, where individual self-interest would be served only insofar as what might be best

⁴¹ See Philip Soper, *Choosing a Legal Theory on Moral Grounds*, in *Philosophy of Law* 31, 32 (Jules Coleman & Ellen Frankel Paul eds., 1987).

⁴² Joseph Raz, *Can There Be a Theory of Law?*, in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, supra note 7, at 324.

⁴³ Dickson, supra note 17, at 83–84.

⁴⁴ See, e.g., Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 175 (2001).

⁴⁵ Or at least until recently. Recent exceptions include Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* 262 (1999); Frederick Schauer, *The Force of Law* (2015); Grant Lamond, *The Coerciveness of Law*, 20 *Oxford J. Legal Stud.* 39, 39 (2000); Danny Priel, *Sanction and Obligation in Hart's Theory of Law*, 21 *Ratio Juris* 404, 404 (2008); Nicos Stavropolous, *The Relevance of Coercion: Some Preliminaries*, 22 *Ratio Juris* 339, 339 (2009); Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 *Yale L.J. Online* 293 (2011), <http://www.yalelawjournal.org/forum/enforcement-and-the-concept-of-law>.

⁴⁶ A good antidote for the common caricatures is David Lyons, *In the Interest of the Governed: A Study of Bentham's Philosophy of Utility and Law* 69–74 (rev. ed. 1991).

for the collectivity would benefit the individual to the extent of that individual's proportionate share of the collectivity. To use a modern example, a person might work to have his community adopt zoning laws not only because such laws might make the community *qua* community quieter, prettier, or healthier, but also because the individual would receive herself a proportionate benefit from living in a quieter, prettier, or healthier community.

In addition, Bentham also believed that individuals sometimes acted for genuinely altruistic reasons, doing good because it was the right thing to do for the beneficiaries, even if the agent herself received no benefit at all. But although Bentham believed that people sometimes acted for reasons of altruism and sometimes to promote the collective good, he believed as well that reasons of self-interest were typically more important in the calculus of actual human motivations. And thus he believed that a central function of law was to supply the incentives necessary to adjust, modify, or steer actual human motivations to the demands of the law. Indeed, given Bentham's dim views of the legal system and of the actual laws it had produced, it is possible to understand Bentham's focus on incentives as especially important precisely because the laws he knew were not only often inconsistent with the subject's self-interest, but also, with a frequency that surely annoyed him, inconsistent with rationality itself.

Although both Bentham and Austin understood that rewards as well as punishment could serve to adjust human motivation, they both focused on the latter to the explicit exclusion of the former.⁴⁷ This might now seem stipulative and distorting, but may perhaps make more sense in the context of late eighteenth- and then nineteenth-century England. That was a society, after all, in which government employment was rare, public housing and health care and even education essentially nonexistent, and publicly funded retirement benefits hardly even a distant dream. As a result, the world that Bentham and Austin knew was a world in which the state's power to punish was considerable and its ability to reward largely insignificant.

⁴⁷ Austin, *supra* note 32, at 23; 1 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), *reprinted in* *The Works of Jeremy Bentham*, *supra* note 9, at 1, 144; see also H.L.A. Hart, *Legal Powers*, in *Essays on Bentham: Jurisprudence and Political Theory*, *supra* note 14, at 194, 201 (acknowledging that Bentham's treatment of rewards is "lesser known").

Even putting aside the issue of rewards, the focus on sanctions in understanding law seemed incomplete even by the early years of the twentieth century. John Salmond, most prominently, criticized the account for ignoring what we now think of as power-conferring rules,⁴⁸ and Roscoe Pound, among others, joined the chorus shortly thereafter.⁴⁹ And so the failure of the so-called command theory of law to explain the legal rules that constituted contracts, wills, trusts, corporations, and even the law itself, and that empowered people to use such devices, was by 1961 very much part of the conventional wisdom. Still, it was not until Hart's critique that the coercive account of the phenomenon of law was deemed definitively dead and buried.

Yet although Hart's critique of Austin has been profoundly influential,⁵⁰ it is worth remembering two dimensions of that critique. First, Chapter One of *The Concept of Law* has a pervasively anti-essentialist tone.⁵¹ The entire chapter reeks of J.L. Austin⁵² and the later Wittgenstein,⁵³ from its attention to law having core and fringe applications to the suggestion that the concept of law may be a family resemblance concept, and thus with no essential or necessary features at all. It is true that some of this anti-essentialism appears tempered in later chapters of *The Concept of Law*, but if one were looking for an argument that attempting to focus on the essential features of the concept of law is a fool's errand, one could do much worse than starting with Hart's first chapter.

⁴⁸ See Sir John Salmond, *Jurisprudence* 527–28 (7th ed. 1924).

⁴⁹ Roscoe Pound, Book Review, 23 *Tex. L. Rev.* 411, 417 (1945) (reviewing Jeremy Bentham, *The Limits of Jurisprudence Defined* (1945)); see also Carleton Kemp Allen, *Legal Duties*, 40 *Yale L.J.* 331, 346 (1931) (asserting that gray areas in the law render sanctions an incomplete enforcement mechanism). And, even earlier, see John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 *Harv. L. Rev.* 21, 26 (1893); Edwin M. Borchard, Book Review, 28 *Yale L.J.* 840, 842 (1919) (reviewing Henri Lévy-Ullmann, *Éléments d'Introduction Générale à l'Étude des Sciences Juridiques* (1917)).

⁵⁰ But not, it should be noted, without dissenters. See Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* 153–54 (1978); Philip Mullock, *Nullity and Sanction*, 83 *Mind* 439, 441 (1974); Richard Stith, *Punishment, Invalidation, and Nonvalidation: What H.L.A. Hart Did Not Explain*, 14 *Legal Theory* 219, 220 (2008); Richard H.S. Tur, *Variety or Uniformity?*, in *Reading H.L.A. Hart's The Concept of Law* 37, 47–50 (Luís Duarte d'Almeida, James Edwards & Andrea Dolcetti eds., 2013).

⁵¹ See Frederick Schauer, *Hart's Anti-Essentialism*, in *Reading HLA Hart's The Concept of Law*, supra note 50, at 237, 243.

⁵² See J.L. Austin, *How to Do Things with Words* (J.O. Urmson ed., 1962).

⁵³ See Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe trans., 3d ed. 1973).

In addition, Hart acknowledges that coercion is a “natural necessity” in all actual legal systems,⁵⁴ and then proceeds to explain why this is so. Joseph Raz,⁵⁵ Scott Shapiro,⁵⁶ and others may have subsequently explained why law would be necessary even in a community of angels needing no coercion at all, but it is important to recognize that this is decidedly a post-Hartian development. Although the non-necessity of coercion in a community of angels might not be directly incompatible with Hart’s focus on the union of primary and secondary rules and the official internalization of the ultimate rule of recognition, it is telling that Hart noted and explained the natural necessity of coercion but that many of his successors have treated coercion with even less solicitude.

And thus we can retrace the path not taken. Salmond and Pound and others point out that many aspects of law as we know it are not coercive in any direct sense, even though they could hardly deny that much of law is indeed coercive.⁵⁷ And then Hart, also recognizing that coercion is an important part of all actual legal systems, offers a convincing account of noncoercive law. Thereafter others take the position that anything not essential to the concept of law in all possible legal systems in all possible worlds is neither part of the concept of law nor, as Raz makes explicit,⁵⁸ part of the enterprise of doing legal philosophy, which for Raz and Shapiro and others is necessarily an essentialist enterprise.⁵⁹ And thus sanctions, which were so important to Bentham and Austin, which are thus very much a part of the positivist tradition viewed historically, and which fit closely with an ordinary conception of law,⁶⁰ find themselves on the path not taken. The role of sanctions is relegated to the sidelines of jurisprudential interest, often thought undeserving of philosophical examination precisely because they are not strictly essential to the con-

⁵⁴ Hart, *supra* note 1, at 199 (emphasis omitted).

⁵⁵ Joseph Raz, *Practical Reason and Norms* 159 (2d ed. 1990).

⁵⁶ Scott J. Shapiro, *Legality* 395–98 (2011).

⁵⁷ For my own extensive elaboration of the coercive dimensions of law, see Frederick Schauer, *The Force of Law* (2015).

⁵⁸ “Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.” Joseph Raz, *The Authority of Law: Essays on Law and Morality* 104–05 (1979).

⁵⁹ “It seems to me a mistake . . . to consider sanctions to be a *necessary* feature of law. There is nothing unimaginable about a sanctionless legal system” Shapiro, *supra* note 56, at 169.

⁶⁰ See Lyons, *supra* note 5, at 40–41 (noting the similarity between Bentham and Austin’s focus and “everyday thinking about [law]”).

cept of law itself. What are, at best, contested philosophical questions about the nature of concepts and the nature of doing philosophy find themselves at the center of rejecting an aspect of law as we know it that was so central a part of the origins of the modern positivist tradition. And this is not because sanctions are any less important to law now than they were in 1780. Rather it is because an influential, albeit contested, notion of what it is to do jurisprudence made what seemed, for so long, important to understanding law to become a topic thought best left to the sociologists and the psychologists.

III. POSITIVISM AND THE NATURE OF LEGAL DECISION MAKING

Jeremy Bentham did not use the phrase “Judge & Co.”⁶¹ without reason. For him, and apart from the question whether he was right or wrong, an account of the nature of law was intimately related to an account of the role of the judge vis-à-vis the law. Although Gerald Postema offers a nuanced account of Bentham’s views about the role of the judge, and seeks to explain some of the tensions between this account and Bentham’s enthusiasm for codification, at the very least it is fair to say that Bentham distrusted judicial law-making power and sought in general to restrict the process of judging to a limited domain of statutes and other sources that he thought of as “the law.”⁶² And thus although Bentham did not put it this way, we might understand his full account of the nature of law as including a normative component in which judges were expected in the ordinary course of things to restrict their activities to interpreting and applying a constrained range of sources.⁶³

If this abbreviated account is at least in the neighborhood of Bentham’s views, we can see how it is usefully contrasted with a number of

⁶¹ See, among the many times Bentham used the phrase, 5 Jeremy Bentham, *Justice and Codification Petitions* (1829), reprinted in *The Works of Jeremy Bentham*, supra note 9, at 41, 512.

⁶² See Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging* 127 (2010). Because any reference to “the law” in this context is inevitably contested and theory-laden, I find some attraction in Ruth Gavison’s phrase—“first stage law”—as a way of referring for some purposes to a simple, direct, and common-sense view of law including statutes, reported cases, official regulations, constitutional provisions, and similar materials. Ruth Gavison, Comment, *in* *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* 21, 30–31 (Ruth Gavison ed., 1987). On the same point, see Frederick Schauer, *Official Obedience and the Politics of Defining “Law,”* 86 *S. Cal. L. Rev.* 1165, 1189–93 (2013).

⁶³ See Frederick Schauer, *The Limited Domain of the Law*, 90 *Va. L. Rev.* 1909, 1951 (2004).

contemporary alternatives. Most obviously, it stands in contrast to Dworkin's capacious understanding of the idea of law, in which the law includes a large number of norms that others would understand as political or moral but not legal. And thus in refusing to accept a distinction so important to Bentham and Austin, Dworkin was right to understand himself as a non-positivist.⁶⁴

Things become more complicated, however, when we look at the modern incarnations of legal positivism. Under so-called inclusive positivism,⁶⁵ for example, there is no source that is excluded *tout court* from the domain of law. It is for a society to decide what sources will be recognized by the rule of recognition, and if that society, as a contingent social fact, recognizes morality, politics, or for that matter even astrology as part of its law, then it is law. Period. Inclusive legal positivism, sometimes called incorporationism,⁶⁶ claims to be in the positivist tradition precisely because it holds that morality is not a *necessary* component of legality in all possible legal systems in all possible worlds. As such it stands in contrast to some natural law views, perhaps including those of Cicero and Blackstone, that it is a necessary feature of the concept of law that it include moral criteria in its test of legal validity. But incorporationism is thus compatible with the view that morality is a criterion of legality in some legal systems, or even of all actual legal systems, as long as we recognize that it could be otherwise, and that there *could* be a legal system properly so called in which morality was not a criterion of legality.

Bentham would have had none of this. For him, keeping (at least some) legal actors out of the morality business was crucial, precisely because he did not trust them to *do* morality with any reliability. Better to restrict those actors to a precise and clear code, even if morally suboptimal results occasionally ensued.

But because Bentham, arguably unlike Hart, was quite concerned with judicial decision making, he would also have resisted at least some of the moves of the contemporary exclusive positivists.⁶⁷ Exclusive positivism is indeed concerned with the law-morality distinction, and unlike inclusive positivism, believes that the distinction is essential to the very

⁶⁴ Dworkin, *Justice in Robes*, supra note 2, at 187.

⁶⁵ See, e.g., W.J. Waluchow, *Inclusive Legal Positivism* (1994).

⁶⁶ Coleman, supra note 44, at 105 n.9.

⁶⁷ See Andrei Marmor, *Exclusive Legal Positivism*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 104, 105 (Jules Coleman & Scott Shapiro eds., 2002).

idea of law. But having defined law in a way that appears to exclude, at least directly, moral considerations, exclusive positivists, most notably in this regard Joseph Raz, then draw a distinction between law and legal reasoning,⁶⁸ arguing that nothing about their conception of law entails anything about what judges should actually *do*. That too is for others to think about, and the task of legal philosophy, for Raz as it was earlier for Hans Kelsen,⁶⁹ is to identify the universe of law as such, putting to one side questions about the role of law so understood in dictating, constituting, or even constraining the decisions of judges.

As should be obvious, that approach would have been no more palatable to Bentham than inclusive positivism. Bentham's understanding of law was, for him, inseparable from the question of what legal actors, especially judges, were going to do with it, and it is hard to imagine Bentham being satisfied with a conception or definition of law that remained agnostic on the question of what judges were to do. Here again the normative dimensions of Bentham's positivism emerge, precisely because for him the question whether judges should restrict themselves to the formal written-down law was not only an essential question of jurisprudence, but also part of the reason why he developed the account of law he did in the first place. And thus it should come as little surprise that the view just described—that judges ought, whether presumptively or absolutely, depending on the theory and theorist, to follow the written-down positive law—is often described as normative (or ethical) positivism.⁷⁰

CONCLUSION

And thus we have seen three aspects of Bentham's legal positivism, and indeed historical legal positivism more generally, that are not now generally taken to be part of legal positivism—its normative dimension; its attention to sanctions and coercion; and its normative view about

⁶⁸ Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in *Hart's Postscript*, supra note 4, at 1, 37.

⁶⁹ Hans Kelsen, *Pure Theory of Law* 1 (Max Knight trans., 2d ed. 1967).

⁷⁰ See Tom D. Campbell, *The Legal Theory of Ethical Positivism* 2 (1996); Tom Campbell, *Democratic Aspects of Ethical Positivism*, in *Judicial Power, Democracy and Legal Positivism* 3, 6 (Tom Campbell & Jeffrey Goldsworthy eds., 2000); see also Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 196 (1991) (using the term "presumptive positivism" to describe a legal system in which judges presumptively make decisions according to settled legal rules recognized by a rule of recognition).

what judges and other legal actors ought to do, and on what they should base their decisions.

None of these ideas is self-evidently sound. But nor are any of them self-evidently unsound. Rather, they have been pushed to the side of jurisprudence because of how jurisprudence understands itself. And they have been pushed to the side of an understanding of legal positivism because contemporary legal positivism has been defined in part by the methodological commitments of contemporary jurisprudence.

It is tempting to conclude that nothing much turns on the label “legal positivism,”⁷¹ or even on the labels “jurisprudence” or “philosophy of law.” But that would be a mistake. These labels denote traditions. They connect the theories and theorists of the present with those of the past. And they demarcate academic departments and disciplines. There is, to repeat, nothing amiss if unsound ideas from earlier eras have been rejected because of their unsoundness. But it turns out that some of the insights and proposals of Bentham, and even of Austin, have been lost not because of their unsoundness, but because their designation as unsound is dependent on certain contemporary and contingent methodological and disciplinary commitments. These commitments may serve their purposes, but if they have also caused our understanding of the phenomenon of law to be truncated, then the benefits may not be worth the costs. More particularly, there are important parts of the legal positivist tradition whose examination and application even today may well increase our understanding of law and legal institutions. That we have lost some of those parts, not because of their lack of usefulness, but as a consequence of a complex process of intellectual path-dependence, is an outcome far more to be lamented than celebrated.

⁷¹ Thus Robert Summers urged almost fifty years ago that the term “positivist,” at least in legal philosophy, be discarded because “it is now radically ambiguous and dominantly pejorative.” Robert Summers, *Legal Philosophy Today—An Introduction*, in *Essays in Legal Philosophy* 1, 16 (Robert Summers ed., 1968). Although the term no longer has as many pejorative connotations as it did even twenty years ago, see Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *The Autonomy of Law*, supra note 5, at 1, 24; Frederick Schauer, *Positivism as Pariah*, in *The Autonomy of Law*, supra note 5, at 31, 32, the understandable pressure to avoid the use of such a contested term continues. But labels, even contested ones, are markers of traditions and receptacles for connected ideas, and it may be important to keep the label “legal positivism” alive if only to keep our grip on a longstanding tradition that still has much, even in its earlier versions, to teach us.