

## WHAT CAN THE HISTORY OF JURISPRUDENCE DO FOR JURISPRUDENCE?

*Steven Walt\**

THE philosophy of law is a branch of philosophy, and its history is a subspecialty within the history of philosophy. The use to which the history of philosophy can be put, therefore, should also carry over to the history of jurisprudence. As with any other sort of intellectual history, the work of major and minor jurisprudes can be studied for purely antiquarian purposes, for their intrinsic interest. Alternatively, the history of jurisprudence can have instrumental uses, in which it serves the interests of current legal theorists. One instrumental use is to provide arguments for or against contemporary positions, or inspirations for them, with no concern for either the historical context in which a text was produced or the need to make its author and her reasoning appear sensible. The aim instead is to study historical texts to help discover philosophical truths. This is the sort of approach to the history of philosophy that Bernard Williams describes as taking the form of a “triumphant anachronism.”<sup>1</sup> Studying historical texts is an inefficient way to discover philosophical truth, because many and perhaps most positions described in them are false. The anachronistic approach, now in decline, has also produced bad history and is a distraction. In jurisprudence, the practice of relying on Augustine’s dictum that “a law that was unjust would not seem to be law,” and Aquinas’s reliance on it for his conclusion that an unjust law is “not law but a corruption of law,” fits this approach. The dictum and conclusion has been used as a natural law foil for legal positivism’s sep-

---

\* Percy Brown Jr. Professor of Law and John V. Ray Research Professor of Law, University of Virginia School of Law.

<sup>1</sup> Bernard Williams, *Descartes and the Historiography of Philosophy*, in *The Sense of the Past: Essays in the History of Philosophy* 257, 258 (Myles Burnyeat ed., 2006); see Michael Ayers, *Analytical Philosophy and the History of Philosophy*, in *Philosophy and Its Past* 41, 58–62 (Jonathan Réé, Michael Ayers & Adam Westoby eds., 1978). Jonathan Bennett is often identified as a representative of this approach. See 1 Jonathan Bennett, *Learning From Six Philosophers: Descartes, Spinoza, Leibniz, Locke, Berkeley, Hume* 1 (2001) [hereinafter Bennett, *Learning From Six Philosophers*]; Daniel Garber, *What’s Philosophical About the History of Philosophy?*, in *Analytic Philosophy and History of Philosophy* 129, 131 (Tom Sorrell & G.A.J. Rogers eds., 2005). For Bennett’s elaboration of his approach, which in some respects defies the designation, see Jonathan Bennett, *Response to Garber and Réé*, in *Doing Philosophy Historically* 62, 62 (Peter H. Hare ed., 1988) [hereinafter Bennett, *Response to Garber and Réé*].

arability claim. It has taken lots of effort to point out that Augustine and Aquinas, read carefully, only deny that compliance with an unjust law is justified or obligatory.<sup>2</sup>

Other instrumental uses of jurisprudential history are more defensible. Past jurisprudential positions might be used to present alternatives that challenge contemporary jurisprudential assumptions or, more weakly, at least aid in better understanding them.<sup>3</sup> Professor Frederick Schauer employs the views of historically influential legal positivists instrumentally in this way. He suggests that some of their now-neglected views warrant reconsideration of the narrow focus of contemporary positivism: “These commitments [of contemporary positivism] 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.”<sup>4</sup> He therefore relies on the stronger of the instrumental uses of jurisprudential history: history as a goad to reflection on reigning jurisprudential assumptions. According to Schauer, in explicating and defending legal positivism, legal theorists over time retained and emphasized certain views of some historically influential legal positivists and ignored their views about law reform, adjudication, and the place of sanctions in an account of law. These ignored views make contemporary legal positivism more restricted than its classical predecessors, Schauer suggests, both in what it takes to be at the core of positivism and positivism’s implications for other parts of legal theory. Schauer believes that the ignored positions—“paths not taken”—can help inform current legal theory generally.

I am less optimistic about the use of the history of jurisprudence for this purpose. In the case of legal positivism and other positions taken within legal theory, the history of paths not taken is unlikely to change

---

<sup>2</sup> See John Finnis, *Natural Law and Natural Rights* 363–65 (1980); Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in *Natural Law Theory: Contemporary Essays* 105, 108 (Robert P. George ed., 1992); Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas’ Court of Conscience*, 33 *Am. J. Juris.* 99, 114–16 (1988).

<sup>3</sup> For this view of the role of the history of philosophy generally, see Quentin Skinner, *Liberty Before Liberalism* 112–20 (1998) (challenging contemporary assumptions); Daniel Garber, *Does History Have a Future? Some Reflections on Bennett and Doing Philosophy Historically*, in *Doing Philosophy Historically*, supra note 1, at 35–41; Williams, supra note 1, at 259 (aid in understanding). For the history of philosophy’s different role in enabling reflection on the contemporary understanding of doing philosophy, see Garber, supra note 1, at 145–46.

<sup>4</sup> Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 *Va. L. Rev.* 957, 976 (2015).

the minds of legal theorists. Legal theorists likely are moved by theoretical considerations and arguments, not exegetical insights into the works of their predecessors. The character of legal theory, I will suggest, is likely to be the result of argument untied to the consideration of the history of jurisprudence or the revelation of ignored jurisprudential positions.

The suggestion that the history of ignored positions can help inform contemporary legal positivism and legal theory generally is about the likely impact of considering jurisprudential history on contemporary jurisprudence. It is an empirical speculation about the sort of data that will move working jurists to reconsider the scope of their subject and the sort of theories suitable for it. Although the speculation cannot be proven or disproven, the prominence of argument and broadly theoretical considerations in supporting jurisprudential positions make history unlikely to change the way jurists do business.

Consider first the commitment of classical positivists such as Bentham to law reform. It is hard to see what bearing this has on legal positivism's core commitments or other legal theoretical views. For one thing, law reform usually is granular, not global. Should the Statute of Frauds apply to the sale of securities? Should bankruptcy's automatic stay restrict the exception for derivatives to prevent counterparties from terminating a derivatives contract with the debtor and seizing collateral? Should the priority given to purchase money security interests in inventory extend to the proceeds of inventory when they take the form of accounts? These questions ask about particular legal rules that might be changed. Because proposed reforms are specific rules about specific subjects, reform efforts do not need to be, and likely are not, motivated by a concern with jurisprudential questions. True, if someone thought that law and morality ought to be distinct, she might be motivated to reform law to assure that the distinction became a reality. However, the jurisprudential view on which the motive is based already is on offer. Tolerance, reasonable disagreement about moral truth, neutrality, liberty, or some other moral value might justify the proposal to separate law and morality, as some normative positivists have urged.<sup>5</sup> They contend that such values are most effectively pursued by not requiring people to

---

<sup>5</sup> See, e.g., Jeremy Waldron, Normative (or Ethical) Positivism, *in* Hart's Postscript: Essays on the Postscript to *The Concept of Law* 411, 411 (Jules Coleman ed., 2001); Neil MacCormick, A Moralistic Case for A-Moralistic Law?, 20 *Val. U. L. Rev.* 1, 12–15 (1985).

exercise their moral judgment to determine their legal entitlements and duties. Law reform relies on, rather than adds to, the moral values that justify this separation. For this reason, the interest in law reform among some classical positivists cannot help inform current legal theory.

Next consider the place of sanctions in contemporary versions of legal positivism. Legal positivism is an account of the nature of law. Positivists maintain that law consists of certain social facts. Although modern positivists disagree about the sort of social facts that constitute law, they generally reject the notion that coercion is essential to law.<sup>6</sup> Their explanations of the character of law rely on facts other than sanctions attached to legal norms or the reasons sanctions provide for compliance with them. In this respect modern positivists differ from classical positivists, such as Austin and Bentham, for whom sanctions were central to law.<sup>7</sup> What accounts for the difference between classical and modern positivists about the essential role of sanctions in law?

The difference need not reflect a disagreement over whether the concept of law derives from the understandings of participants in legal systems. Law is an institutional practice with a point and importance for the participants, and the concept of law must in some way track the participants' understandings of their practice.<sup>8</sup> The dispute among positivists, therefore, might be one of theory construction: Classical positivists devise a concept of law that is independent of the understandings of participants, while modern positivists develop a concept of law that is more faithful to these understandings. However, this does not explain their disagreement, because classical positivists can also rely on the understandings of participants to fix the practice to which the concept of law refers. It does not follow that the concept fixed in this way has to mimic the beliefs among participants about the role of sanctions in compliance with law. It is even possible that the participants have false or inconsistent beliefs about their own practice. Therefore, the divide between classical and modern positivists is not over whether a concept of law must rely on participants' understandings; it is over the way in which the

---

<sup>6</sup> Kelsen is an exception. See Hans Kelsen, *General Theory of Law and State* 19–20 (Anders Wedberg trans., 1945).

<sup>7</sup> See John Austin, *The Province of Jurisprudence Determined* 21–22 (Wilfrid E. Rumble ed., 1995) (1832); Jeremy Bentham, *Of Laws in General* 133, 196 (H.L.A. Hart ed., 1970).

<sup>8</sup> See, e.g., Gerald J. Postema, *Bentham and the Common Law Tradition* 332–33 (1986); Joseph Raz, *Can There Be a Theory of Law?*, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* 324, 325–26 (Martin P. Golding & William A. Edmundson eds., 2005).

concept relies on participants' understandings of their own practice. Sanction-based and sanction-free concepts of law are both theoretical concepts of law. Whether one concept is better than the other depends on which of the concepts figures in the better explanation of the phenomenon of law.<sup>9</sup>

The disagreement instead is over a criterion of theoretical adequacy an account of law must satisfy. As an explanatory theory, a good account must be coherent, simple, and fit the data. However, modern positivists impose an additional requirement: that the theory account for the phenomenon of law in every logically possible legal system. This is a "modal" requirement of adequacy. According to it, a theory that explains the law in only sociologically possible, or historically actual, legal systems fails as an account of law. Professor Joseph Raz explicitly adopts the modal standard. He requires that a legal theory, to be adequate, must identify "those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. . . . [Legal theory] is concerned with . . . the necessary and the universal."<sup>10</sup> By this modal standard, sanction-based accounts of law are inadequate because coercion is unnecessary in some logically possible legal systems. Raz's reliance on the modal standard is characteristic. He considers and rejects the claim that it is a necessary truth that law provides sanctions for its violation. A society of angels, he adds, still would need to coordinate their behavior while not needing sanctions.<sup>11</sup> Raz's rejection of a sanction-based account of law therefore supposes that an adequate account must provide conditions that obtain in every logically possible legal system. By contrast, sanction-based accounts could well identify features of an institutional practice found in sociologically possible or prevalent legal systems.

It is well worth asking whether the modal standard of theoretical adequacy is too strong. The same standard is not applied to theories in other

---

<sup>9</sup> See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 *Am. J. Juris.* 17, 41–42 (2003).

<sup>10</sup> Joseph Raz, *The Institutional Nature of Law*, in *The Authority of Law: Essays on Law and Morality* 103, 104 (1979).

<sup>11</sup> See Joseph Raz, *Practical Reason and Norms* 158–59 (1975); cf. Scott J. Shapiro, *Legality* 169 (2011) (arguing that sanctions are not necessary in a legal system if all participants "accept the legitimacy" of the system). Hart's view is more complex. Although he acknowledges the need for sanctions in legal systems as a "natural necessity," he denies that litigation and prosecution are the primary means of social control. See H.L.A. Hart, *The Concept of Law* 40, 199 (2d ed. 1994). Hart's denial appears to withdraw the former concession.

domains, and there is no reason why it should apply in legal theory. For instance, a theory of optimal decision making does not fail simply because it assumes as a boundary condition that actual decision makers have limited time and effort in which to evaluate options. But for present purposes, the question is about the bearing of historical work on classical positivism on the contemporary commitment to the standard. Is historical work on these accounts likely to undermine reliance on the modal standard or at least force a better defense of it? I am skeptical. For one thing, the outlines of sanction-based accounts are already well known and rejected. Although further textual work might alter their details by supplying nuances, by itself it is unlikely to alter the contemporary commitment to the modal standard. Sanction-based accounts still will be judged mistaken, in part because sanctions are not a part of every logically possible legal system. Empirical evidence of the predominant role of sanctions in compliance with law, if forthcoming, therefore cannot change this assessment. The assessment therefore likely will change only if the modal standard is rejected. Theoretical considerations about the methodology of legal theory, not historical exegesis, affect the commitment to the modal standard.

There is of course no way to test the reliability of this prediction. Still, salient episodes of philosophical change support it. One is the reception of Professor Saul Kripke's interpretation of Wittgenstein, where broadly theoretical developments rather than exegetical insights drove the change in philosophical view. As background, before Kripke's interpretation appeared, philosophers generally thought that the idea that words have meaning in virtue of rules governing their correct application was unproblematic. They did so because they considered the notions of linguistic meaning and the related notions of a convention and a rule tolerably clear. Although a few philosophers found these notions troubling,<sup>12</sup> most did not.<sup>13</sup> In *Wittgenstein on Rules and Private Language: An Elementary Exposition*,<sup>14</sup> Kripke asked about the kind of fact that fixes the meaning of a term or the following of a rule, so that knowing the meaning of a term or following a rule consists in knowing the conditions of

---

<sup>12</sup> See, e.g., W.V. Quine, Truth by Convention, *in* *The Ways of Paradox and Other Essays* 77, 77 (1979).

<sup>13</sup> See, e.g., Alfred Jules Ayer, Language, Truth and Logic 79–80 (2d ed. 1955); P.F. Strawson, Introduction to Logical Theory 11–12 (1960).

<sup>14</sup> Saul A. Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (1982).

its correct application. In doing so he raised problems with the accepted accounts of rule following and linguistic meaning, and offered a solution (which he did not accept). Kripke presented his arguments in the course of an interpretation and commentary on a set of well-known and opaque paragraphs in Wittgenstein's *Philosophical Investigations*.<sup>15</sup> Kripke's book has generated sizable literature on both his interpretation of these passages and proposed solution to the problem of rule following and meaning.<sup>16</sup> Although much of this literature is critical, philosophers now find accounts of rule following and linguistic meaning problematic in a way that they did not before Kripke's book was published. This change in view was not an immediate result of the publication of the book. Rather, it was the eventual outcome of an evaluation of Kripke's arguments and responses to them that were produced over time. The accuracy of Kripke's exegesis of Wittgenstein's passages (which he acknowledged is loose) did not figure in this process. This unimportant role of history in this episode seems typical of philosophical change.<sup>17</sup>

<sup>15</sup> Ludwig Wittgenstein, *Philosophical Investigations*, §§ 173–242 (G.E.M. Anscombe trans., 2d ed. 1958).

<sup>16</sup> For a sample of critical philosophical literature, see, e.g., Simon Blackburn, *The Individual Strikes Back*, 58 *Synthese* 281 (1984); Warren Goldfarb, *Kripke on Wittgenstein on Rules*, 82 *J. Phil.* 471, 476, 480–81 (1985) (asserting that meaning is a fact about dispositions of speaker with respect to spoken words); John McDowell, *Wittgenstein on Following a Rule*, 58 *Synthese* 325, 325 (1984); Colin McGinn, *Wittgenstein, Kripke and Non-Reductionism About Meaning*, in *Rule-Following and Meaning* 81, 91 (Alexander Miller & Crispin Wright eds., 2002) (asserting that meaning is a primitive mental state of the speaker). See generally Hannah Ginsborg, *Primitive Normativity and Skepticism About Rules*, 108 *J. Phil.* 227 (2011). For critical assessment of Kripke's exegesis of Wittgenstein, see Warren Goldfarb, *Rule-Following Revisited*, in *Wittgenstein and the Philosophy of Mind* 73 (Jonathan Ellis & Daniel Guevara eds., 2012). See generally G.P. Baker & P.M.S. Hacker, *Scepticism, Rules and Language* (1984); Colin McGinn, *Wittgenstein on Meaning: An Interpretation and Evaluation* (1984); G.E.M. Anscombe, *Critical Notice: Saul A. Kripke, Wittgenstein on Rules and Private Language*, 15 *Can. J. Phil.* 103 (1985).

<sup>17</sup> A similar process was involved in the response to Geach's reliance on Frege to criticize ascriptivism: the view that ostensibly truth-stating sentences have a function other than making statements. See P.T. Geach, *Ascriptivism*, 69 *Phil. Rev.* 221, 224 (1960); see also P.T. Geach, *Assertion*, 74 *Phil. Rev.* 449, 449 (1965) (designating criticism of the view as "the Frege point"). Frege pointed out predication and assertion must be different, because unasserted sentences occur in logically valid argument forms. Geach rejected ascriptivism based on what he called "the Frege point," and the rejection became an influential criticism of ascriptivism. See, e.g., H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, at i n.1 (1968). The strength of "the Frege point," not its exegetical accuracy (which was not debated), eventually altered the assessment of ascriptivism. The eventual denial of a useful distinction between analytic and synthetic truth initiated by W.V. Quine's *Two Dogmas of Empiricism*, 60 *Phil. Rev.* 20 (1951), *revised and reprinted in* W.V. Quine, *From a*

Questions about the nature of law, its relation to morality, and the identity of a legal system are only a part of legal theory. Legal theory, understood in even a modestly expansive sense of the term, has a much broader domain. How do sanctions figure among the reasons for compliance with law? How do or should courts decide cases before them? What set of legal materials are they to use in doing so? How are statutes or constitutions properly interpreted, and does their interpretation differ from the interpretation of other legal documents? What features of legislative procedures facilitate deliberation, accountability, and give the product of legislation authority? Although legal positivism does not address any of these questions, legal theorists might take an interest in them. Bentham, for instance, considered and had answers to most of these questions.<sup>18</sup>

However, the history of ignored positions is unlikely to be useful to legal theory, not just to legal positivism. This is because broadly theoretical arguments, not history, determine the character and scope of jurisprudence. Thus, whether an ignored view even counts as a jurisprudential view, rather than a sociological, economic, or other view, is answered by these arguments. Theoretical arguments might even conclude that jurisprudential questions are sociological or economic questions. Whether a position held, even by a historically acknowledged legal theorist, concerns a jurisprudential topic therefore presupposes that it answers questions that theoretical arguments conclude are jurisprudential. Although historical examples are useful in illustrating the conclusions of these arguments, the examples cannot substitute for them. I say this not to make a claim about structure of debates over the scope of jurisprudence, although the claim is true. Rather, my point is “sociological” in an entirely informal sense of the term: Legal theorists are likely to be convinced only by arguments, not historical documentation. In addition, historical work probably will not change the prevailing philosophical opinion about theoretical assumptions or reasonable inferences from them. In this respect, jurisprudential history is no different from the

---

Logical Point of View 20 (1980), also fits this pattern of argument and changed assessment. Philosophical opinion changed after a period in which numerous defenses of the distinction failed. See Gilbert Harman, *Analyticity Regained?*, 30 *Noûs* 392, 396 (1996).

<sup>18</sup> See Bentham, *supra* note 7, at 136–37 (describing legal sanctions as inducements to compliance added by officials); *id.* at 246 (observing that a complete code contains rules governing all possible conduct); cf. Postema, *supra* note 8, at 426–29 (describing role of adjudication in Bentham’s code); 1 Jeremy Bentham, *Constitutional Code* 45 (F. Rosen & J.H. Burns eds., 1983) (barring judicial review of legislation).



2015]

*Commentary*

985

role of Wittgenstein exegesis in the assessment of accounts of rule following and linguistic meaning, the views of some logical positivists about the analytic-synthetic distinction on its usefulness, or Aquinas's views of law on the evaluation of natural law theories.

To be sure, the history of ignored positions might play a more modest role in legal theory. History might serve as a sort of "topic pump": a resource that supplies illustrations of subjects that others once considered to be part of legal theory.<sup>19</sup> However, the value of this resource is limited, partly because the history of jurisprudence is full of views that are considered implausible or, if plausible, rejected. This "topic pump" has limited value also because it is unnecessary when once-held views about the domain of jurisprudence are already represented in contemporary debate. Study of a path not taken therefore is worthwhile instrumentally if the view revealed is not represented in contemporary legal theory and is either convincing in its own right or would change opinion about reigning jurisprudential assumptions. This is likely to be a rare occurrence.

---

<sup>19</sup> For a recent survey of Bentham's remarks on legislative design that in some instances reflect contemporary concerns on the subject, see Jon Elster, *Securities Against Misrule: Juries, Assemblies, Elections* 140–90 (2013).

