Toward Classical Legal Positivism

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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.” 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.” Together these two ideas led to one “simple but vital distinction” between “law as it is [and] law as it ought to be.”

It is not hard to see the problems with Hart’s juxtaposition of these two ideas: 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 the artifice of Lawyers, locked up in an illegible character, and in a foreign tongue.” For him, the only path for true understanding of the law came not from attending to the thick foliage of legal discourse but rather by cutting through it.

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2 *Id.* at 601.
3 *Id.* at 594.
4 See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 21 n.r (1988) (1776). The fictional nature of legal language was a major theme in Bentham’s work, which, he often said, was preserved by lawyers for self-serving reasons. See PHILIP SCHOFIELD, UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM 111–31 (2007).
5 I am less concerned in this essay with the other figure 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., 1995). For more on the difference between Austin and Hart see Dan Priel,
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 link when not facing an audience he suspected would not be sympathetic to conceptual inquiry; or perhaps Hart simply came to recognize the two are quite different. Be that as it may, by the time *The Concept of Law* was published, only four years after delivering the Holmes 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,” but it was presented much more as the result of conceptual analysis and armchair sociology 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'.” 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, it is likely that part of the attraction of 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. On Hart’s foundations it was but a small step to the startling claim made by John Gardner, that even in the case of Bentham himself his preference for legislation over the common law—a view that was closely tied

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*H.L.A. Hart and the Invention of Legal Philosophy, 5 PROBLEMA 301 (2011); see also note 80, infra.* 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.


9 How these two seemingly different projects connect in Hart is explained in Dan Priel, *Jurisprudence between Science and the Humanities, 4 WASH. U. JURISPRUDENCE REV. 269, 303–04 (2012).*


to his utilitarianism—is “totally independent of his legal positivism.” Legal positivism was thus stripped 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.”

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 philosophy; 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.” 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 marginal question 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 turned 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.

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. In response, legal positivists have drawn a distinction between

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12 JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 36–37 (2012). Similarly, faced with the evidence that Bentham was engaged in a different project by refusing to take it at faced value, Hart complained that “at some important points [Bentham’s] utilitarianism gets in the way of his analytical vision.” HART, supra note 7, at 162.


15 See, most famously, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 363–66 (2d ed. 2011). In different ways the claim has been made by others of a broadly natural law view. See, e.g., LON L. FULLER, THE MORALITY OF LAW 153 (rev. ed. 1969); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 89 (rev. ed. 1978). 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 non-moral aspects of law, whereas legal positivism takes a broader
“[t]raditional Natural Law...[which] insist[s] that a putative norm cannot become legally valid unless it passes a certain threshold of morality” and “contemporary Natural Law,” which accepts this idea. As a historical matter this claim is incorrect, arguably getting things backwards. “Traditional” natural lawyers clearly recognized the possibility of unjust laws, whereas it is some contemporary scholars calling themselves “natural lawyers” who argue that unjust laws are not law. The important matter, however, is that if the point of legal positivism, if its supposed “insight,” is something that was recognized by at least some early natural lawyers, it is hard to see the novelty in legal positivism, the way in which 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. As a result what is still treated as the most foundational debate in jurisprudence is one on which there seems to be no argument at all.

In this essay 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

interest in both. See GARDNER, supra note 12, at 168–70, 175–76. This, however, is not how natural lawyers perceive of their enterprise. See, e.g., John Finnis, Law and What I Truly Should Decide, 48 AM. J. JURIS. 107, 111–14 (2003); see also Mark C. Murphy, Natural Law in Jurisprudence and Politics 8–10 (2006).


17 Id. at 42 n.66.

18 For examples of ancient and medieval natural lawyers recognizing the possibility of unjust law see text accompanying notes 24–30, infra.

19 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. & JURISPRUDENCE 201 (2007); Jonathan Crowe, Reviving the Strong Natural Law Thesis (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.

20 Marmor, supra note 16, at 42.


22 What about those who believe, see note 18 supra, that unjust law is not law? 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 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 that 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).
Holmes Lecture, but silently abandoned shortly afterwards. My claim 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* that it was grounded in the very same ideas that have 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 considered the founders of legal positivism saw 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 about human nature in particular. Moreover, in all this they *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 were false, and that it is these errors that have led them to mistaken views on morality, politics, and law.

I have two major aims in this essay. 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 essay, 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 jurisprudence textbooks, is a twentieth-century debate that cannot found be in jurisprudential discussions of past centuries. It is not just that the word “positivism” 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 about the question of whether Hobbes or Bentham were “really” legal positivists or natural lawyers.23

The more meaningful question, and the one I wish to engage in, is to what extent is it 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 to demonstrate how this aspect of their work has been, in my view regrettably, abandoned by contemporary legal positivists. Though all three points are related, in this essay I will say relatively little about the first

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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.” A law thus can be “legally just” (in modern terminology, “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 Cicero, by contemporary classifications natural lawyer par excellence, 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.” 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.” But, clearly, this did not exhaust the domain of jurisprudence. Aquinas, too, recognized the possibility of iniquitous or immoral laws. He could not be clearer when he stated that “laws established by human beings are either just or unjust,” and then went on to provide a typology of the different ways in which they may be unjust. 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,
usually credited with the first use of the slogan “unjust law is not law.” In the sentence preceding these famous words Augustine considers the following hypothetical: “the law bids a soldier to kill the enemy, and if he holds back from the bloodshed he pays the penalties from his commander.” Augustine did not question that the practical 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, but Augustine did not think these implications were relevant for answering the question whether unjust edicts could, from a certain philosophical perspective, be considered as laws.

If that is the case, what was the novelty of the earliest philosophers we now call legal positivists? 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 about his main work in jurisprudence that it was “written for lawyers and primarily had them in mind.” 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 immoral by others) is not something anyone would bother to contest. My point is that, precisely because these claims are empirical and not deeply contested, they are not what separates legal positivists and their opponents.

Such claims become more contested when presented not merely as empirical claims, but as claims about what could count as law. But it is easy to show that such claims are either tautological or circular. If the existence of law must be understood “from the internal point of view” of participants in the legal system, and membership in a legal system (“legal validity”) is determined by standards

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31 Augustine, On the Free Choice of the Will, On Grace and Free Choice and Other Writings 10 (Peter King ed. & trans., 2010) (§ 1.5.11.33).
32 "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 4, at 158.
34 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 machinery 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.”)
adopted by members of that legal community (and not by any external standard to the attitudes of the legal community), it is plain that morality, understood as a set of norms external to those adopted by the community, cannot have any bearing on the status of certain things as law for members of that community. In this sense legal positivism is true by definition. If, on the other hand, the claim depends on certain assumptions on what things in the world count as law and those things include immoral edicts, then legal positivism is circular. The positivist “theory” of law that follows does not show that unjust laws cannot be laws, it presupposes that they are. In any case, either way positivist theories do not engage in natural law theories.

As we have seen, natural lawyers were fully aware of the possibility that what some people will consider law will be seen (from someone else’s perspective) as immoral. Natural lawyers offered their ideas in spite of this possibility, because they were engaged in a different enterprise. Therefore, the real challenge to legal positivism is better understood as a rejection of the idea that legal validity is a key concept in jurisprudence. On this challenge legal positivists have had little to say.

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. I 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 actually his views on morality. Bentham had little patience for most moral discourse, to which he refers with characteristic acerbity: “While Xenophon was writing History, and Euclid teaching Geometry, Socrates and Plato were talking nonsense, on pretence of teaching morality and wisdom.” 35 Bentham was not kinder to later moral philosophers: “With a few 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.”36 If you wonder why that is so, well, “[t]o any such question no answer [the moral philosopher] consider it as incumbent on his to give.”37 And when they do try to give an answer, the results were hardly better. For example, Bentham, dismissed the views of those who appealed to abstract ideas like

35 JEREMY BENTHAM, DEONTOLOGY 135 (Amnon Goldworth ed., 1985). For more invective of that kind see id. at 134–47.
36 Id. at 253.
37 Id. For another criticism of Bentham’s contemporaneous moral philosophers see id. at 157.

Famously, Bentham had a similarly skeptical attitude to 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.”\footnote{Jeremy Bentham, Nonsense Upon Stilts, in RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 317, 330 (Philip Schofield et al. eds., 2002).} As rights were the products of human law, talk of natural rights was akin to talk of “cold heat,” “dry moisture,” or “resplendent darkness.”\footnote{Jeremy Bentham, Supply without Burthen, in 1 Jeremy Bentham, Economic Writings 283, 335 (W. Stark ed., 1952).} He referred to natural law as a “phantom” and a “formidable non-entity.”\footnote{Jeremy Bentham, A Comment on the Commentaries and a Fragment on Government 17, 20 (J.H. Burns & H.L.A. Hart, eds., 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.” Bentham manuscripts, University College London, Box 69, p. 122.} 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 aliment to despotism.”\footnote{Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 28 n.d (J.H. Burns & H.L.A. Hart eds., 1996) (§ 2.14).}

Nonetheless, Bentham did not think that there was no right and wrong in human affairs. (Notice that this very is 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 using the right methodology: “every political and moral question ought to be[ put] upon the issue of fact; and [thus] mankind [would be] directed into the only true track of investigation which can afford instruction or hope of rational argument, the track of experiment and observation.”\footnote{Jeremy Bentham, Observations on the Draughts of Declarations-of-Rights Presented to the Committee of the Constitution of the National Assembly of France, in RIGHTS, REPRESENTATION, AND REFORM, supra note 39, 177 at 189. For more on Bentham’s scientific approach to moral questions see Priel, supra note 9, at 289–292.} And Bentham believed he identified the relevant facts, which he presented most famously 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.”\footnote{Bentham, supra note 42, at 11 (§ 1.1).} 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, Bentham thought, the only to make sense of morality from a truly scientific perspective. He hoped this
discovery would rid moral discourse from much of the fiction and confusion that bedeviled it. It was thus part and parcel of an overall materialist metaphysical worldview.\footnote{On Bentham’s metaphysical outlook see generally ROSS HARRISON, BENTHAM 18–33 (1983); JAMES STEINTRAGER, BENTHAM 1–27 (1977).}

Naturally, Bentham extended this approach to legal theory: “Physical sensibility [is] the ground of law—proposition the most obvious and incontestible [sic].”\footnote{Bentham manuscripts, University College London, Box 69, p. 10, quoted in DOUGLAS G. LONG, BENTHAM ON LIBERTY: JEREMY BENTHAM’S IDEA OF LIBERTY IN RELATION TO HIS UTILITARIANISM 17 (1977).} Scientific inquiry on law had to start from an account of what exists. This—not lawyers’ biased “internal point of view”—that is the right basis for fixing (in both senses of the word “fix”) legal language.\footnote{See JEREMY BENTHAM, OF THE LIMITS ON THE PENAL BRANCH OF JURISPRUDENCE 286–87 (Philip Schofield ed., 2010).} What 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,\footnote{Bentham had plans for and prepared materials on the topic of the “Metaphysics of Jurisprudence.” Bentham manuscripts, University College London, Box 69, p. 214.} 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.\footnote{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 128–36 (1986); Philip Schofield, Jeremy Bentham and HLA Hart’s ‘Utilitarian Tradition in Jurisprudence’, 1 JURISPRUDENCE 147 (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 42, at 74 (§ 7.1), 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 note 12, supra, and accompanying text. I argue that Bentham was not engaged in conceptual analysis at all.} Bentham, like natural lawyers but unlike contemporary legal positivists, derives his views on law from an underlying metaphysical worldview coupled with his views of human nature, not through conceptual analysis (i.e., from observing at the attitudes of participants in legal practice or from careful analysis of the concepts they use). 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.

\footnote{THOMAS HOBBES, THE ELEMENTS OF LAW NATURAL AND POLITIC 21 (J.C.A. Gaskin ed., 1994) (1640) (§ 1.1.1).}

(b) Thomas Hobbes

“The true and perspicuous explication of the Elements of Laws, Natural and Politic,...dependeth upon the knowledge of what is human nature, what is a body politic, and what it is we call a law.”\footnote{THOMAS HOBBES, THE ELEMENTS OF LAW NATURAL AND POLITIC 21 (J.C.A. Gaskin ed., 1994) (1640) (§ 1.1.1).} 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 fundamental elements 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 in a radical departure from the ideas of earlier thinkers. He had no patience for the ideas of the “Schoolmen,” the humanistic scholars who sought to revive the classical (Greek–Roman) natural law tradition; it is with him, for example, that we find, probably for the first time, the idea of liberty as non-interference, and his rejection of the Roman, republican, idea of freedom as non-domination. More fundamentally, and more importantly for my argument, Hobbes saw his views about natural law as part of a broader grand theory. Both in Leviathan and in his earlier works, Hobbes maintained a tripartite structure of inquiry, one that began with metaphysical questions, proceeded to a discussion of human nature, and concluded in discussion of moral and political theory. This was no just out of a desire for clear organization: he saw 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. So radical was this shift in approaching questions of moral and political theory, that Hobbes thought it was only with him these areas actually came into being: “natural philosophy [i.e., natural science] is...but young: but Civil Philosophy yet much younger, as being no older...than my own book De Cive.” 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 of Hobbes’s philosophy in its entirety. In what follows I will


53 For a more detailed discussion see Priel, supra note 9, at 286–88.

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 that came after him.55

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.56 The starting point of his argument is his definition of the natural right to absolute freedom:

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 anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.

By LIBERTY, is understood, according to the proper signification of the word, the absence of external impediments; which impediments may oft take away part of a man’s power to do what he would, but cannot hinder him from using the power left him according as his judgement and reason shall dictate to him.57

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 non-animate 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.”58 The sole purpose of enacting law is limiting that natural right for the sake of peace.59

This was in line with Hobbes’s materialistic perspective on philosophy. In a similar way, 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

55 For illuminating discussions of these issues see PEREZ ZAGORIN, HOBBES AND THE LAW OF NATURE chs.1–2 (2009) [hereinafter ZAGORIN, LAW OF NATURE]; Perez Zagorin, Hobbes as a Theorist of Natural Law, 17 INTELLECTUAL 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.

56 HOBBES, LEVIATHAN, supra note 38, at 231 (ch. 30). He further explains that “by safety here, is not meant a bare Preservation, but also all other Contentments of life...” Id.

57 Id. at 91 (ch. 14).

58 THOMAS HOBBES, ON THE CITIZEN 111 (Richard Tuck & Michael Silverthorne eds. & trans., 1997) (§ IX.9). A similar point is made in HOBBES, LEVIATHAN, supra note 38, at 145–46 (ch. 21).

59 Id. at 185 (ch. 26) (“the 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 (ch. 26).
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 a matter of fact it would not be obeyed in the state of nature. According to Hobbes, Humans have a natural disposition for survival, 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”. In other words, the natural laws are general rules that follow rationally from the natural disposition for survival. As such they “oblige in foro interno,” namely “they bind to a desire that they should take place: but in foro externo; that is, to the putting them in act, not always”. 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). This helps us understand in what sense Hobbes can say that the natural laws are “immutable and eternall” and why their opposites—“Injustice, Ingratitudue, Arrogance, Pride, Iniquity, Acception of persons, and the rest”—“can never be lawfull”: 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.”

If these natural laws are precepts of reason, why are they not followed on their own in the state of nature? Why, in other words, 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 humans naturally seeking their self-preservation they also have a “generall inclination...a perpetuall and restlesse desire of Power after power, that ceaseath onely

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61 HOBBS, LEVIATHAN, supra note 38, at 111 (ch. 15).
62 Id. at 110 (ch. 15). 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.
63 This explains why Hobbes treats drunkenness as a breach of natural law. See HOBBS, supra note 58, at 54 (§ III.27n).
64 HOBBS, LEVIATHAN, supra note 38, at 110 (ch. 15).
65 Id.
in Death".66 For this reason, “the Lawes of Nature...without the terror of some Power, to cause them to be observed, are contrary to our Naturall Passions...”67 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.”68 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 (i.e., what will rationally promote their interests).69 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....”70

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...; whereas Law, properly is the word of him, that by right hath command over others. But yet if we consider the same Theoremes, as delivered in the word of God, that by right commandeth all things; then they are properly called Lawes”.71 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 actions...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...”72

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 scientistic 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

66 Id. at 70 (ch. 11).
67 Id. at 117 (ch. 17).
68 Id. at 117–18 (ch. 17).
69 See id. at 191 (ch. 26) (“there be very few, perhaps none, that in some cases are not blinded by self love, or some other passions, [natural law] is now become of all Laws the most obscure.”).
70 Id. at 239 (ch. 30). There is an alternative answer that is more thoroughly rationalistic, in which the state of nature is akin to a n-person prisoner’s dilemma or another kind of game theoretical construct. On this view fully even rational behavior can lead to a suboptimal social equilibrium. For this reading of Hobbes see, for example, DAVID GAUTHIER, THE LOGIC OF LEVIATHAN (1969). 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.”
71 Hobbes, Leviathan, supra note 18, at 111 (ch. 15). Also: the natural laws "are not properly Lawes, but qualities that dispose men to peace, and to obedience." Id. at 185 (ch. 26).
72 Id. at 223 (ch. 29), also id. at 110 (ch. 15) (“Good and Evill, are names that signified our appetites, and Aversions, which in different tempers, customs, and doctrines of men, are different”).
differences with the work of other contemporary legal theorists who are often classified as natural lawyers in some looser sense: It is, for example, difficult to classify him as a natural lawyer in the sense Lon Fuller considered himself a natural lawyer, i.e. by insisting on certain procedural requirements as condition of legality,73 as 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 owed by every one of the people; and that which every many will have so, no many can say is unjust.”74 The differences between his ideas and those of Ronald Dworkin are profound as well. 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,75 whereas Hobbes had strongly anti-republican views and conceived of law as an imposition of the sovereign on the citizens.76 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,77 whereas Hobbes's point was to provide a materialistic foundations for morality, politics, and law.

While the temptation to classify Hobbes as a legal positivist is understandable after reading passages such as the one quoted in the last paragraph, 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, delve a little deeper and 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 rather challenging, it. His claims about what law, even those that look “positivist,” are not conceptual claims, but rather the conclusions of a political argument,78 which in turn Hobbes believed was grounded in his views on human nature. This difference may seem 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 is 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

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73 See Fuller, supra note 15, at 96–106.
74 Hobbes, Leviathan, supra note 38, at 239 (ch. 30) (emphasis added). Even when the sovereign transgresses against natural law, his transgression is only against God. Id. at 148 (ch. 21).
76 See Skinner, supra note 32.
77 See Ronald Dworkin, Justice in Robes 77 (2006).
78 See notes 104–109 and accompanying text infra for more on this.
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 (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 (i.e., from morality). The opposing view, natural law, has been similarly refashioned as the view that human law has some kind of connection with morality. Much of what has been written on jurisprudence since the publication 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 significant yet unappreciated shift in the foundational debates in legal theory, following a similarly significant shift in thinking what legal theory is about. How did it

79 While Bentham’s tirades against lawyers are well-known, Hobbes apparently did not think much more highly of them. See Thomas Hobbes, A Dialogue Between a Philosopher and a Student, of the Common Laws of England, in WRITINGS ON COMMON LAW AND HEREDITARY RIGHT 1, 48–49 (Alan Cromartie & Quentin Skinner eds., 2005) (1681). Both therefore considered it a mistake to explain law from the lawyers’ perspective.

80 This is explicit in, for example, GARDNER, supra note 12, at 175.

81 For this reason it has often been claimed that (contemporary) legal positivism is agnostic on questions of metaethics. See JEREMY WALDRON, LAW AND DISAGREEMENT 166–67 (1999); HART, supra note 8, at 254; 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.

82 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 JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 168 (2009); GARDNER, supra note 12, at 48–51; Leslie Green, Positivism and the Inseparability of Law and Morals, 83 N.Y.U. L. REV. 1835 (2008); Jules L. Coleman, Beyond Inclusive Legal Positivism, 22 RATIO JURIS 359, 383 (2009). This, together with the recognition that (most) natural lawyers do not deny that legal norms can be immoral, see text accompanying note 18 supra, is another demonstration of the difficulty of finding any meaningful difference between natural law theory and legal positivism. See note 21 supra.
happen? The two people most responsible for this change are H.L.A. Hart and Hans Kelsen, often considered the leading legal positivist thinkers of the twentieth century. Their philosophical outlooks and their theories of law were quite different, but in one respect their accounts resembled each other, even if for different reasons. 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 is a philosophy of a practice. This may sound like something that will require taking human nature into account, and indeed Hart makes occasional remarks on human nature, some of them in fact not very different from what one finds in Hobbes. Yet it is striking just how marginal is the place Hart gives to them. Hart belittles the significance of human nature to his account, describing facts about humans, their nature, or the world they inhabit as “[a] simple contingent fact,” “[a] mere contingent fact which could be otherwise,” or “a merely contingent fact...[that] might have been otherwise.”

The clear sense is 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 on those social practices were a product of human nature, of what makes them possible. 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. The purpose of this inquiry is to understand how the different elements within this world of meanings

83 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.

84 This is still the view of followers of Hart’s today. See, e.g., COLEMAN, supra note 100, at 3–6 (situating legal philosophy as part of a “[p]hilosophical explanation[] of practices”).

85 Cf. N.E. SIMONDS, CENTRAL ISSUES IN JURISPRUDENCE 185–91 (3d ed. 2008) (arguing that Hart did have a metaphysical view and that his theory of law relied on his views on human nature).

86 See HART, supra note 8, at 192–93, 194–95, 219 (“In a population of the modern state, if there were no organized repression and punishment of crime, violence and theft would be hourly expected...”).

87 HART, supra note 8, at 191, 192, 196.

88 On the contrast between explanation and understanding see generally GEORG H. VON WRIGHT, EXPLANATION AND UNDERSTANDING (1971).
hang together.

Hart made it clear 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 behavior as it appears to its participants.” 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 philosophy.” 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.” 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 is in line with a humanistic version of sociology or cultural anthropology that was prominent at around the time Hart was writing. Though the matter is never made explicit in Hart’s work, it is fair to conclude that Hart, like cultural anthropologists at the time, 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.

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 was the practice itself as understood by those engaged in it that his theory sought to elucidate. To be sure, the account Hart offered was intended to be novel, perhaps

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89 H.L.A. Hart, Essays in Jurisprudence and Philosophy 13 (1983) (emphasis added). Hart’s anti-naturalistic view here is not very different from Dworkin’s. See note 77, supra, and accompanying text. On Hart’s views on naturalism see more generally Priel, supra note 9, at 302–04.

90 Hart, supra note 1, at 610–21 (emphasis added).

91 Hart, supra note 89, at 2. See also his words quoted in the text accompanying note 10, supra, as well as the sources cited in note 33, supra. 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).

92 See Clifford Geertz. Interestingly, Geertz drew inspiration to his notion of “thick description” from Gilbert Ryle, Hart’s colleague at Oxford, and another proponent of ordinary language philosopher. See id.

93 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 Charles Taylor, Self-Interpreting Animals, in 2 PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE 45 (1985).
even surprising to practicing lawyers, but it was in no way meant to challenge their practice. It was meant to reveal to participants some unnoticed features about their own practice, something that once it is pointed out to them would seem obviously true. This is a sociological, interpretive, inquiry of people attitudes regarding their ways of life.

In sharp contrast, 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 foul of the fallacy of deriving an ought from an is. Therefore, as he saw it, the only possible solution to this conundrum 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 between 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”94—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.95 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 that path have taken from Kelsen the aim of explaining as general and abstract a theory of law as was possible. This implied that a theory of law had to be as much as possible free from any empirical assumptions about the real world. These legal positivists have abandoned those aspects of Hart’s work that maintained some of the ties it had with the world, namely his attempt to describe law as a practice, reflecting (in words already quoted) “different forms of human life.”96 Instead, they have made a conscious effort to make jurisprudence as unconnected to human nature as possible by turning the question “what is law?” into an a priori inquiry that eliminated from the investigation whatever little room Hart had left for human nature in his theory of law. In this new phase we were told that answering the question “what is law?” might be helped by imagining what law


95 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”).

96 Hart, supra note 89, at 2 (emphasis added).
would be like in a society of angels; or we were told that the social sciences are of little help to the
questions legal philosophers are interested in because social scientists “stud[y] human society” whereas a correct account of the concept of law will have to take into account law “in alien civilizations.”
Whether or not there is value in such an inquiry, whether such questions can even be answered (I, for one, am not sure this sort of inquiry is even intelligible), there can be little doubt that information about human nature and the world they find themselves in is not going to be of much help to this inquiry and is thus 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, but when either view is compared to those of Hobbes and Bentham, it is evident that both involve a radical reorientation of the foundations of jurisprudence, of what, if you wish, it is about. And though in many respects they are at odds with each other, the two approaches underlying contemporary legal positivism share a commitment to a metaphysically narrow and shallow inquiry. Recognizing this helps us understand one of 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 differences between legal positivism and natural law, 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. All this is absent from contemporary legal positivism. And so, in order to have a debate with

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97 See Raz, supra note 34, at 159–60; see also John Gardner, Law’s Aims in Law’s Empire, in Exploring Law’s Empire 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 (unpublished manuscript) at 8–9.

98 Shapiro, supra note 100, at 406–07 n.16; see also Gardner, supra note 12, at 277.

99 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 best explains the source of their disagreement.

100 See Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 197 (2001) (“we 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...”); Raz, supra note 82, 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.”); Scott J. Shapiro, Legality 44 (2011) (“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.

101 There is, more precisely, a debate among contemporary natural lawyers about the proper foundation for natural law
natural law contemporary legal positivists have had to 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.\footnote{This may explain the ease with which they think natural law can be refuted. See the quotes at note 34, supra.} 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 happens only 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 seemingly in agreement on everything the two sides could not be further apart.
The following table summarizes my argument so far:

<table>
<thead>
<tr>
<th>Non-materialist conception of nature</th>
<th>Metaphysical legal philosophy</th>
<th>Non-metaphysical legal Philosophy</th>
</tr>
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</table>
| Natural law                         | Classical legal positivism    | Felix Cohen(?)

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 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 metaphysically shallow versions of legal positivism do not just dominate contemporary debates with natural lawyers, they are 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 a command of the sovereign. Later legal positivists modified this view, maintaining that social conventions, and not the facts about sovereignty, constitute

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103 I mention Felix Cohen in this category tentatively and only for completeness's sake as I do not discuss his 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, 205 (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 that 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.
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 questions about the existence of law and questions of political legitimacy an important step forward in legal theory. To the question of what, despite these differences, classical and contemporary legal positivists shared, Marmor answers that all legal positivists share “[t]he main insight of legal positivism,” which is “that the conditions of legal validity are determined by social facts.”

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. 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. It is hard to assess Marmor’s exegetical claim beyond this because he does not provide any reference to Hobbes’s work in support 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, and he was willing to recognize as law certain things that would not have been accepted as such by the legal community. In the Dialogue, after offering his definition of law, the philosopher, Hobbes’s alter ego, is challenged by the lawyer that it follows from his definition “the Kings Proclamation under the Great Seal of England is a Law” to which the philosopher replies “Why not?”

As I tried to demonstrate above in my outline of his view, the motivation, emphasis and focus of his attention have always been on providing an account of legitimate political authority that builds on the more basic building blocks of what the world and humankind are like. It is true that Hobbes did

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105 Marmor, supra note 16, at 41.
106 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 22, at 21–28.
108 HOBBES, LEVIATHAN, supra note 38, at 186–87, 191–94 (c. 26).
109 HOBBES, DIALOGUE, supra note 79, at 77 [33]; see also the quote accompanying note 100 above. More generally, Hobbes was dismissive of linguistic analysis as a means of discovering by linguistic usage. See HOBBES, LEVIATHAN, supra note 38, at 176 (ch. 25) (“How fallacious it is to judge of the nature of things by the ordinary and inconstant use of words....”).
say some things that to the casual reader may look like a discussion of legal validity. Thus, in *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Hobbes wrote:

[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 Raign, but by Virtue of the Great Seal of England.110

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 non-legal and the legal is not determined by the fact of obedience, but rather on the basis of his political theory.111 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.112 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 like “a sink that with equal facility will swallow any garbage thrown into it.”113 The other arrangement 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.” More specifically, “with regard 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 say so) from, that which may be styled the common end of all of them. The end I mean is Happiness.”114 According to Bentham, then, the natural arrangement of legal materials need not conform with the way law is

111 My conclusion here is similar to that of Jeremy Waldron, *Legal and Political Philosophy*, in *Oxford Handbook*, supra note 51, 352 at 366–68, although more than him I think it shows the sense in which what I call classical legal positivism is fundamentally at odds with contemporary legal positivism.
112 See *Bentham*, supra note 42, at __.
113 *Bentham*, supra note 4, at 25, 26.
114 *Id.* at 25–26.
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, this implied that the common law was not really law,\textsuperscript{115} even though this was clearly different from lawyers’ (hardly impartial) views on the matter.

Because contemporary legal positivists often say that the conditions of legal validity are what distinguishes legal positivists and their detractors,\textsuperscript{116} 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 contrast, legal validity plays no role in a metaphysically deep theory, which does not attempt to explain law in terms of people’s attitudes.\textsuperscript{117}

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 does 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 rupture.”\textsuperscript{118} When Hobbes later defined law as a “Command…addressed to one formerly obliged to obey [the commander],”\textsuperscript{119} 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: "the party bound by a command is bound by the

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\footnote{\textsuperscript{115}For Bentham’s views on the common law see, among many other places, BENTHAM, supra note 42, at 8 (Preface); BENTHAM, supra note 47, 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 id. at 29–32. For further discussion that shows that Bentham was not concerned with explicating the notion of validity see the text accompanying note 47, supra.}
\footnote{\textsuperscript{116}See, e.g., MARMOR, supra note 95, at 4–5, 133; Brian Leiter, Explaining Theoretical Disagreement, 76 U. CHI. L. REV. 1215, 1216 (2009).}
\footnote{\textsuperscript{117}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 22, at 7–14.}
\footnote{\textsuperscript{118}HOBBES, LEVIATHAN, supra note 58, at 93 (ch. 14); see also HOBBES, supra note 58, at 175 (§ XV.7).}
\footnote{\textsuperscript{119}HOBBES, LEVIATHAN, supra note 58, at 183 (ch. 26).}
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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 non-moral ("positivist") account of law’s normativity. This was the single matter on which Hart kept a threadbare connection between his views and those of the classical legal positivists, and its disappearance in the work of later legal positivists tells us something interesting about the intellectual development of legal positivism in the twentieth century. Because of Hart’s focus on legal practice and the corresponding reorientation of jurisprudence towards questions of validity, it was no longer thought that a non-moral 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 it distinguished legal obligation from moral obligation and treated legal obligation as derived from the norm’s legality, but rather that it treated the question of legal validity as separate from the question of law’s normativity. In this version of legal positivism that something is 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. 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. When this point was reached 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 was false, but that is a separate matter.) The insistence that legal philosophy be concerned with conceptual questions pursued for their own sake, that even a concern with the practical significance of jurisprudential debates is

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120 Austin, supra note 32, at 23.
121 See Hart, supra note 8, at 144–47, 158–61.
“fundamentally anti-philosophical,”123 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 the debates,124 and feel that jurisprudence has become an isolated subject.125

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 considered, by contemporary legal positivists themselves, as founders of legal positivism. What is particularly appealing (to me) about their approach 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 positivism.

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 fundamentally sociological question “what is law?,” legal philosophers could turn their attention to questions like “what do the proliferation of studies on the psychology or moral imply for what laws can do?” “What do such studies imply for what laws should laws be?” They open up new possibilities for answering the “Kantian” philosophical

123 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 assistance 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 debased by use.” Jeremy Bentham, Panopticon; or, the Inspection House, in 4 THE WORKS OF JEREMY BENTHAM 37, 117 n.† (John Bowring ed., 1843).

124 Don’t 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 95, at 95 (describing a jurisprudential debate that “degenerated to hair-splitting arguments about something that makes very little difference in the first place”); Coleman, supra note 34, 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); James Allan, A Modest Proposal, 23 OXFORD J. LEGAL STUD. 197, 209 (2003) (jurisprudential debates have become “almost scholastic”). The list of such statements could have been much longer.

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) people’s attitudes on these matters.¹²⁶ 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.

¹²⁶ 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. & JURISPRUDENCE 173, 193–94 (2007).