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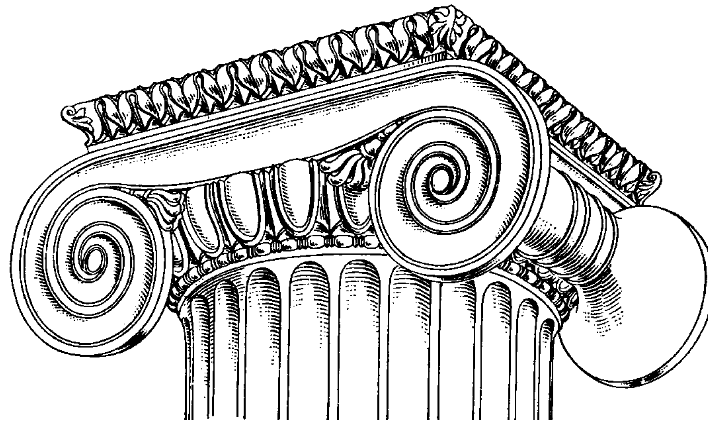

Legal Positivism

Brian Bix

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Chapter 2: Legal Positivism

1. History and Context

The history of ideas is often written in terms of schools of thought, that come in and out of fashion, that prevail in struggles over particular issues, or are defeated. In legal philosophy as elsewhere in the history of ideas, we have schools of thought that have risen and fallen, sometimes with little explanation. Some have faded from the scene but without any obvious reason – such as historical jurisprudence (whose prominent advocates included Friedrich Carl von Savigny (1779-1861) and Sir Henry Maine (1822-1888)). As Joseph Raz has written: "Because legal theory attempts to capture the essential features of law, as encapsulated in the self-understanding of a culture, it has a built-in obsolescence, since the self-understanding of cultures is forever changing." (Raz, 1996, p. 6) While some schools of thought have faded in a matter of decades, by contrast at least one approach to legal theory, natural law theory, has been around literally for millenia, yet remains vibrant. Legal positivism is neither thousands of years old nor the product of recent fashion. As a recognizable approach to the nature of law, legal positivism is almost two centuries old, though aspects of the approach can be traced back further, certainly to Thomas Hobbes (1558-1679), and perhaps even to Thomas Aquinas (1224-1274)) (Finnis, 1994, pp. 195-200). While in some circles, legal positivism now seems the dominant approach to the nature of law, this dominance has never meant that the approach was without critics. This Chapter will outline the current state of legal positivism, consider major criticisms, and reflect on what may be necessary for this approach to remain a vibrant part of the debate about the nature of law.

There is a danger whenever one speaks about a "school" or "general approach," and the danger may be particularly acute with discussions of legal positivism. The risk arises from the effort to speak in general terms about a wide variety of theorists, whose views overlap but may diverge sharply on any particular question. As will be mentioned later, some quite distinct approaches to law share the label "legal positivism," and any effort to create a quick summary representation of the approach faces the chance of constructing a weakened perspective and one that no single theorist would adopt in full. (Raz, 1998, p. 1) Nonetheless, an effort will be made to speak about this collection of theories and theorists, making all efforts to be respectful of the differences between the theorists that share this label.

The first task is to place legal positivism into a historical context: one that refers both to its own history of development, and to the larger history of ideas within which it evolved. The usual summary of legal positivism comes from a few lines stated in 1832 by John Austin (1790-1859), the person frequently seen as the founder of legal positivism:

> The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. (Austin, 1994, p. 157)

If one looks at Austin's work – and, similarly, if one prefers to trace the roots of legal positivism to the early writings of Jeremy Bentham (1748-1832) (Bentham, 1970; Bentham, 1996) or the work of the English political theorist Thomas Hobbes (Hobbes, 1996) – then the purpose of proposing a legal positivist position seems straightforward: it is an effort to establish a study of the nature of law, disentangled from proposals and prescriptions for which laws should be passed or how legal practice should be maintained or reformed.

One might push a little further, and discuss how Austin (2002, vol. 2, pp. 1107-08), and, some decades later, Hans Kelsen (1881-1973), emphasized the objective of making law into a "science" (though, as regards Kelsen's work, it should be noted that *Wissenschaft* in German has a much broader extension, and fewer implications, than "science" in English). Kelsen was reacting against sociologists of law; he sought a way of studying law "as such," purified of history, social theory, etc. (Kelsen, 1992, pp. 7-8) Kelsen was thereby taking the concerns of Austin and Bentham a step further: to exclude not only practical and theoretical disquisitions about how governments should be organized, but also to exclude more academic discussions about the history or sociology of the law, and the like. These were times when there was great optimism that the same sort of rigor and objectivity could be applied to the study of human behavior that had been applied to the physical sciences, and that perhaps the same level of progress could be made. While this sort of optimistic "delusion" about the human sciences is at least as old as the Enlightenment (*e.g.*, Berlin, 1997, pp. 326-58), a similar sort of optimism has dominated thinking about law at various more recent periods – not only in Christopher Columbus Langdell's (1826-1906) quasi-scientific thinking about law and legal education that notoriously grounded his new "case method" at the end of the 19th century and the beginning of the 20th century (see Twining, 1985, pp. 11-12), but also in the writings of American legal realists (and the post-realists) of the early and middle decades of the 20th century, when these writers offered "policy science" as the way to make law "modern" and "objective."

We may treat such views as naive, or at least misguided; we may think that it only tends to hide or disguise the political aspects of law and the inevitable biases of its commentators to use a term like "science" which (in English at least) implies a level of objectivity and disinterestedness that we are

unlikely to attain in the study of how societies regulate their citizens through rules and institutions. However, if we consider the search for a "science" of law at a more general or more metaphorical level, the objective is simply a *separate study* of law – a study in the "scientific spirit" of independent observation and analysis, separate from the important, but quite different, striving for legal reform and justice. And, so understood, the objective seems neither misguided nor naive – though it may yet turn out to be unobtainable.

There seems less significance (and less urgency) today than there was two hundred years ago to an argument urging the separate study of "law as it is." We are living at a time where we are surrounded by law schools – almost certainly too many rather than too few – devoted to the graduate-level study of law and legal practice, and journals devoted to every aspect of law and every conceivable approach to its investigation. It should be remembered that things were much different as recently as 200 years ago (around the time when legal positivism had its beginnings) – a time when there was little university-based legal education, either in the United States or in England. The first time a law school appeared as a professional school within an American University was in 1817 (at Harvard University). Prior to that date, law schools were largely proprietary institutions, set up independent of university education – though there was a *professorship* in law somewhat earlier, at the College of William and Mary in 1779. (Warren, 1908, vol. 1, p. 1) In England, the first university instruction in the common law came as late as 1753, with Sir William Blackstone's Oxford University lectures (Holdsworth, 1903-1938, vol. 12, p. 91); the first Chair in Law outside of Oxford and Cambridge was given to John Austin in 1826, and it was Austin's lectures there that would eventually form the foundation of modern legal positivism. (In looking at the contemporary situation, one could comment

that though there are now many institutions, academics, and journals devoted to law, there are arguably few signs of a "pure science of law" or a study of law "as it is" separated sharply from "law as it ought to be." However, that is a topic for another day.)

If legal positivism is not about the importance of the separate and "scientific" study of law, or at least not about that *today*, one might wonder what its purpose and meaning is. One suspects that legal positivism's distinctiveness and its point have become more elusive, even as it has become more established within English-language analytical jurisprudence ... perhaps *because* it has become more established in analytical jurisprudence. Maybe "we are all legal positivists now" much the way "we are all legal realists now" – in both cases the approaches to law have prevailed to so great an extent that their views have been coopted by the mainstream, leaving it hard to recall or discern what their distinctive point is or was.

2. Clarifications

It is important, as an initial matter, to clear up what legal positivism *is not*. During the early decades of the 20th century, legal positivism was accused of advocating a wooden perspective on judicial decision-making and legal interpretation – a view of legal positivism that has re-emerged with regularity in the decades since (*e.g.*, Cover, 1975, pp. 28-29; Sebok, 1998, pp. 17, 107), though rarely with much basis in fact. This picture is a bad mis-characterization of legal positivism, or, at best, a pejorative borrowing of the label for an entirely dissimilar perspective in a different area. (Bix, 1999d, pp. 903-15) The mistake is arguably attributable to a certain American bias: because judicial review is so important to the legal and political life in the United States, American legal theorists tend to ask of *all*

legal theories what they have to tell us about judicial reasoning in general and constitutional interpretation in particular; and they tend to see legal theories through that lens even when the theories do not purport to touch those subjects. (This tendency to mis-read legal theories as theories of judicial reasoning has in fact caused misunderstandings of natural law almost as often as it has caused misunderstandings of legal positivism. (*cf*. George, 1999, pp. 110-11)) Legal positivism is a theory about the nature of law, by its self-characterization a descriptive or conceptual theory. By its terms, legal positivism does not have consequences for how particular disputes are decided, how texts are interpreted, or how institutions are organized. At most, the theory may have something to say about how certainly ways of operating are *characterized* (is it "law" or is it, for some reason, "not law"?), but not on how they should be evaluated or reformed.

Legal positivists have also been accused of asserting some version of "might makes right" as applied to law. Or, the indictment softened slightly upon confrontation with the facts, critics sometimes claimed that if the legal positivists did not actually assert such positions, this is nonetheless where their views led. Legal positivism was attacked for causing legal professionals to be too deferential to the State, and thus too willing to obey even unjust laws. After World War II, a strong debate ensued on what role German legal positivism played, if not directly in the rise of the Nazis, at least in the way that German lawyers and judges did so little to resist the creation and application of evil Nazi laws. (*e.g.*, Paulson, 1994) This too reflects, at best, a misunderstanding of what is claimed and what is at stake in the debate about legal positivism. (One should remember that most of the key early figures in legal positivism were law reformers, not apologists for the status quo.) In the context of such accusations, the famous 1958 debate between H. L. A. Hart and Lon Fuller (Hart, 1958; Fuller, 1958) was, to a

large extent, a discussion about the role that legal positivism did play, and could play, in the resistance to evil laws and evil regimes. Some have even portrayed both theorists as trying to *ground* the arguments for legal positivism and the alternatives on which approach would be best, instrumentally, in encouraging the resistance to evil laws. (Schauer, 1994) Hart argued for what would then have been considered a paradoxical position: that legal positivism is in fact *better than* natural law theory in encouraging resistance to evil. The argument went that a legal positivist knows that the validity of law is one thing, its merit another (pointing to the roots of legal positivism in the work of the law reformer, Jeremy Bentham), while natural law theory, with its equation of legal status with moral status ("an unjust law is no law at all") encourages a confusion among the populace between whether a rule is moral just because it happens to be treated as valid. As it happens, upon closer inspection, there are probably no strong arguments, either logical or psychological, for favoring legal positivism *or* natural law theory (or any other alternative) for the resistance to evil law. (Soper, 1987; Schauer, 1996) Similarly, though one might find a political motivation behind the development of legal positivism (Dworkin, 2002, pp. 1677-78) – however, even here, the argument is much easier to make for Bentham than for Austin – it remains more misleading than helpful to evaluate legal positivism in terms of its political motivations (or effects) rather than its status as a theory about the nature of law.

Even to this day, one can find some quite able commentators mis-reading certain legal positivist theorists as abdicating the moral criticism of legal rules and legal systems. Jes Bjarup (7 NATURAL LAW THEORY - CONTINENTAL PERSPECTIVES) even locates an obscure text (Austin, 2002, vol. 1, pp. 275-76 n.s) where Austin appears to endorse Hobbes' view that "no law can be unjust." However, in the course of that text, Austin makes clear (whatever might be the proper interpretation of

Hobbes) that he means "justice according to law" as a relative standard of evaluation, and that legal rules and legal systems remain always subject to "conformity or nonconformity to the ultimate measure or test: namely, the law of God." (Austin, 2002, vol. 1, p. 276 n.s)

Recently, some commentators have lamented that legal positivism is irrelevant to important debates within law or legal philosophy. (*e.g.*, Wright, 1996; Dyzenhaus, 2000; *cf.* Dworkin, 2002, pp. 1678-79) The complaint is that legal positivism does not entail any particular answer to the important questions of law and practical reasoning: questions relating to constitutional interpretation, the proper response to evil laws, the objectivity of morality, and the role of judges within society. This complaint is not so much wrong as a misunderstanding. One should no more expect theories about the nature of law to guide behavior or answer difficult ethical questions than one should expect day-to-day guidance in life from theories of metaphysics (and, many would add, an inability of general philosophical theories to answer mundane ethical questions is no reason to dismiss such inquiries as worthless).

While it is true that one prominent legal theorist, Ronald Dworkin, has argued that there should be no sharp line between a theory of the nature of law and views about legal practice in a particular legal system, and that one's jurisprudential theory will and should have implications for daily legal practice (Dworkin, 1987, p. 14), that view is exceptional among theorists writing on the nature of law. The burden seems naturally to be placed on those who would maintain that an investigation into the (abstract) nature of a social practice has immediate implications for how individuals should live their lives, or how practitioners within a practice should resolve difficult disputes within that practice. To claim otherwise is to challenge, at least in this one instance, many entrenched views about keeping "is" and "ought" ("description" and "prescription") separate, understanding that the second cannot be

derived from the first. (Dworkin has arguments for why these presumptions and distinctions should not be given deference in jurisprudence, but this is not the place to consider in detail the merits and shortcomings of those arguments.)

3. Alternative Legal Positivisms

In Anglo-American legal theory, legal positivism has become, in a sense, merely a series of elaborations, emendations, and clarifications of H. L. A. Hart's work, in particular his work, *The Concept of Law* (1994). Though, like the claim that modern Western philosophy is "merely" a series of footnotes on the works of Plato and Aristotle, this need not be seen as a dismissal, just a recognition of the importance of Hart's remaking of the legal positivist tradition.

If the dominant strand of English-language legal positivism clearly follows the work of Hart (subdividing into "inclusive legal positivism" and "exclusive legal positivism," as will be discussed below, in Section 5), there remain other strands in legal positivism that deserve mention. Historically, the first strand is the command theory which both Austin (1994, 2002) and Bentham (1970, 1996) offered. This approach reduced law to a basic picture of a sovereign (someone others are in a habit of obeying, but who is not in the habit of obeying anyone else) issuing a command (an order backed by a threat). Though the command theory (in particular, Austin's version of it) was subjected to a series of serious criticisms by Hart and others (*e.g.*, Hart, 1994, pp. 18-78), this approach continues to attract adherents. (Moles, 1987; *cf.* Schauer, 1994b; Cotterrell, 1989, pp. 52-82) Its potential advantages compared to the mainstream theories are: (1) it carries the power of a simple model of law (if, like other simple models of human behavior, it sometimes suffers a stiff cost in distortion); (2) its focus on

sanctions, which seems, to some, to properly emphasize the importance of power and coercion to law; and (3) because it does not purport to reflect the perspective of a sympathetic participant in the legal system, it does not risk sliding towards a moral endorsement of the law.

The second strand is that of Hart and his followers. Hart's approach can be summarized under its two large themes: (1) the focus on social facts and conventions, and (2) the use of a hermeneutic approach, emphasizing the participant's perspective on legal practice. Both themes, and other important aspects of Hart's work, are displayed in the way his theory grew from a critique of its most important predecessor. Hart built his theory in a conscious contrast with Austin's command theory (Hart, 1958; Hart, 1994), and justified the key points of his theory as improvements on points where Austin's theory had fallen short. Where Austin's theory reduced all of law to commands (by the Sovereign), Hart insisted on the variety of law: that legal systems contained both rules that were directed at citizens ("primary rules") and rules that told officials how to identify, modify or apply the primary rules ("secondary rules"); and legal systems contained both rules that imposed duties and rules that conferred powers – conferring powers not only on officials, but also on citizens, as with the legal powers conferred in the ability to create legally binding contracts and wills.

A key element of Hart's theory, "the rule of recognition," will be discussed in greater detail in the next Section. For present purposes, it is sufficient to understand that this is a secondary rule that specifies the criterial of legal validity within a legal system. For Hart, a legal system exists if there is a rule of recognition *accepted* by the system's officials, and if the rules valid according to the system's rule of recognition were *generally obeyed*. (Hart, 1994, p. 116)

As earlier mentioned, Austin's work can be seen as trying to find a "scientific" approach to the study of law, and this scientific approach included trying to explain law in empirical terms: an empirically observable tendency of some to obey the commands of others, and the ability of those others to impose sanctions for disobedience. (*e.g.*, Austin, 1995, pp. 21-26) Hart criticized Austin's efforts to reduce law to empirical terms of tendencies and predictions (an effort that would be duplicated in different ways in the work of the Scandinavian legal realists (*e.g.*, Olivecrona,1971); and Hart would criticize those theorists for those attempts (Hart, 1983, pp. 161-69)); for to show only that part of law that is externally observable is to miss a basic part of legal practice: the acceptance of those legal norms, by officials and citizens, as giving reasons for action. (Hart, 1994, pp. 13, 55-58, 82-84, 88-91, 99). The *attitude* of those who accept the law cannot be captured easily by a more empirical or scientific approach, and the advantage of including that aspect of legal practice is what pushed Hart towards a more "hermeneutic" approach. The possibility of popular acceptance (whether morally justified or not) is also what distinguishes a legal system from the mere imposition by force by gangsters or tyrants.

While Austin and Hart sometimes made casual references to their theories as "scientific" (*e.g.*, Austin, 2002, vol. 2, pp. 1107-08) or "descriptive" (*e.g.*, Hart, 1994, p. v; Hart, 1987, p. 37), it would be left to some of the later theorists working within this tradition to work out the extent to which one could or could not claim "descriptive" – or at least "morally neutral" – status for a legal theory. In recent work, it has become almost a commonplace that legal theory cannot be "descriptive," if by that it is meant that there is no evaluation of the data considered. Description without evaluation would become, in the words of John Finnis, "a conjunction of lexicography with local history." (Finnis, 1980,

p. 4)

Some basis is required for selection, and this is a point realized even by Hart: that law should be analyzed in its fullest and richest sense (not what is universal to all instances we might be inclined to call "law"), and that the analysis of a legal system should take into account the perspective of someone who accepts the legal system. (Hart, 1994, p. 98; Finnis, 1980, pp. 6-7). Finnis re-characterizes the process (using ideas from Aristotle and Max Weber) as one of seeking the "ideal type" or "central case" of law. (Finnis, 1980, pp. 9-11) Other theorists, emphasize other aspects of the process of selection within theory-production: *e.g.*, that one should prefer theories that are simple, comprehensive, and coherent (Waluchow, 1994, pp. 19-29), and that a legal theory should strive to identify the "central, prominent, important" features of law (Raz, 1985b, p. 735; *cf.* Raz, 1994, pp. 219-21; Dickson, 2001). Legal positivists emphasize that such evaluation should not be confused with moral evaluation (*e.g.*, Coleman, 2001, pp. 175-197; Dickson, 2001); this argument, and the question of whether a morally neutral form of legal positivism is possible, will be revisited below, in Section 8.

To return to the typology, the third strand of legal positivism is that of Hans Kelsen (Kelsen, 1967; Kelsen, 1992), who published much of his work in German, and remains better known and more influential on continental Europe (and Latin America and South America) than he ever has been in England and the United States. Kelsen's work has certain external similarities to Hart's theory, but it is built from a distinctly different theoretical foundation: a neo-Kantian derivation, rather than (in Hart's case) the combination of social facts, hermeneutic analysis, and ordinary language philosophy. (Kelsen's ideas developed and changed over the course of six decades of writing; the claims made about his work here apply to most of what he wrote, but will generally not apply to his last works

(Kelsen, 1991), when he mysteriously rejected much of the theory he had constructed during the prior decades. (Hartney, 1991, pp. xxxvii - liii; Paulson & Paulson, 1998, p. vii; Paulson, 1992a))

Kelsen applied something like Kant's Transcendental Argument to law: his work can be best understood as trying to determine what follows from the fact that people sometimes treat the actions and words of other people (legal officials) as valid norms. (*e.g.*, Paulson, 1992b) Kelsen's work can be seen as drawing on the logic of normative thought. Every normative conclusion (*e.g.*, "one should not drive more than 55 miles per hour" or "one should not commit adultery") derives from a more general or more basic normative premise. This more basic premise may be in terms of a general proposition (*e.g.*, "do not harm other human beings needlessly" or "do not use other human beings merely as means to an end") or it may be in terms of authority ("do whatever God commands" or "act according to the rules set down by a majority in Parliament"). Thus, the mere fact that someone asserts or assumes the validity of an individual legal norm ("one cannot drive faster than 65 miles per hour") is implicitly to affirm the validity of the foundational link of this particular normative chain ("one ought to do whatever is authorized by the historically first constitution of this society").

Like Austin, but unlike Hart, Kelsen is a "reductionist": trying to understand all legal norms as variations of one kind of statement. In Austin's case, all legal norms were to be understood in terms of commands (of the sovereign); in Kelsen's case, all legal norms are to be understood in terms of an authorization to an official to impose sanctions (if the prescribed standard is not met).

As Kelsen's work comes from a different tradition and a different form of analysis than Hart's, Kelsen's work is not vulnerable to the same lines of criticism that are offered against Hart and his successors. However, Kelsen is (unsurprisingly) subject to a different set of criticisms, many related to

the particular neo-Kantian approach he adopts. (Tur & Twining, 1986; Paulson & Paulson, 1998) Not least, Kelsen's work, because largely abstracted from the social facts and practices of existing legal systems, frequently struggles with the ontological nature of (legal) norms, along with the logical relations among them. For Kelsen, the validity of legal norms derives from a basic norm, and that basic norm is in turn "presupposed" by those seeing legal orders as normative. As a legal positivist, Kelsen does not mean to ground the normative force of his basic norm or his legal norms on their moral validity, but by making his theory "pure" even of sociological (or practice-based) elements, it is hard to see what it means to say that norms "exist" or are "binding." (*e.g.*, Bulygin, 1998) As regards the logic of norms, as the content of norms derives, however indirectly, from the actions of officials, within Kelsen's approach there is no basis for assuming that normal rules of logic and inference (*e.g.*, rules of non-contradiction) apply. (*e.g.*, Kelsen, 1973, pp. 228-53; Conte, 1998; Hartney, 1991, pp. xlii - lii)

As mentioned, most discussions of legal positivism in contemporary English-language legal scholarship skip over the Austinian and Kelsenian strands of legal positivism, and focus solely on the legal positivism of Hart and his successors. Unless otherwise noted, this will be the focus of the discussions in this chapter as well.

4. The Rule of Recognition and the Basic Norm

There are roughly analogous concepts central to both Hart's and Kelsen's work that have attracted a great deal of discussion – Hart's rule of recognition and Kelsen's Basic norm (*Grundnorm*) – but the analogous general role of those concepts too frequently has gotten lost in fights over the details. It is certainly important to note the distinctly different natures of Hart's and Kelsen's theories of

law (the difference between a theory grounded on social practices versus one grounded in a neo-Kantian analysis of legal normativity), but there is also something to be learned from certain convergent elements in the two theories.

As discussed above, H. L. A. Hart had argued that all (modern or mature) legal systems have secondary rules – rules about rules, rules that allow for the identification, modification, and application of "primary rules." As Hart saw it, these rules are necessary, for though some small or close-knit communities might survive on a set of primary rules alone, that community's rule system would be static, and there would likely be problems of uncertainty and inefficiency in the system, all problems that can be solved by the presence of secondary rules. (Hart, 1994, pp. 92-95). Most significantly within Hart's analysis, legal systems have a "rule of recognition," which comprises the basic criteria of legal validity within the legal system in question: the rule of recognition "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts." (Hart, 1994, p. 94) The basic role or nature of the rule of recognition is established by the legal system's being a normative system: a structured system of "ought" statements. Any individual norm stating what individuals can and cannot do, according to law, must be grounded on a more basic or more general normative statement, and so the chain of normative justification goes, until one reaches a norm for which there is no further justification. Under Hart's approach, one looks at the behavior of legal officials (especially judges) to determine what the ultimate criteria of validity are. (The Sovereign plays a similar role in Austin's command theory. All the valid norms in the legal system, according to this approach, can be traced back to a direct or indirect command by the Sovereign (indirect commands include the Sovereign's

authorization that judges can make new law in the Sovereign's name).)

Similarly for Kelsen: as discussed earlier, under his approach, one derives the Basic norm from the citizens' treatment of certain acts as normative. However, Kelsen's Basic norm is *derived* from treating a rules as legal norms, while Hart's rule of recognition is discovered in the actual practices of legal officials. (As earlier noted, in his last works, Kelsen seemed to shift his views on many subjects radically, and this included moving from a neo-Kantian theory of the Basic norm, to one based more on Hans Vaihinger's "as if" theory. (Kelsen, 1991; Paulson, 1992a).)

Both the rule of recognition and the Basic norm rest on the idea of chains of normative validity: a particular legal norm is only valid because it has been authorized by a more general or more basic legal norm. This chain of validity must end somewhere, with a foundational norm that carries no further justification, other than its "acceptance" (Hart, 1994, pp. 100-10) or its having been "presupposed." (Kelsen, 1992, p. 59) It is again important to note the difference of approach and methodology here: Hart's theory is meant as an analytical description of actual practices, while Kelsen sought a theory purified even of sociological observation, and is best understood as a neo-Kantian transcendental deduction from the fact that we treat certain rules as legal norms. (*e.g.*, Paulson, 1992b)

Both the idea of a (single) rule of recognition and a (single) Basic norm derive from assumptions that societies' legal regulations occur or are viewed as occurring in a systematic way – all the norms fitting within a consistent, hierarchical structure of justification. If one does not think that legal systems must be systematic in this way, then one could conclude that there could be more than one rule of recognition (Raz, 1980, pp. 197-200) or more than one Basic norm. (Raz, 1979, pp. 122-45)

Hart's rule of recognition may play an additional general role in his theory which is not echoed in Kelsen's Basic norm. For many theorists writing about Hart's theory, either in support or in criticism, the rule of recognition has come to be equated with the ability to determine the validity of a legal norm by recourse only to the process by which it was enacted or promulgated (the norm's "source" or "pedigree") without consideration of its content. When Dworkin famously offered the existence of legal principles as a purported rebuttal to Hart's theory of law, Dworkin argued that Hart's rule of recognition could not account for the legal status of such principles, or at least that any rule of recognition that *could* differentiate principles that were part of the legal system from those that were not would no longer be able to serve the purposes behind Hart's rule of recognition. (Dworkin, 1977, pp. 39-45, 68-74) Hart, in his posthumously-published postscript, rejected the claim (Hart, 1994, pp. 250-54, 259-268), mostly by adopting the "inclusivist" interpretation of his own work. As will be discussed in the next Section, this is a defense that may carry significant costs.

5. The Divisions Within Contemporary Legal Positivism

In contemporary Anglo-American legal positivism, which has focused on elaborating the Hartian strand of legal positivism, much recent discussion has been on an internal debate between "inclusive legal positivism" (also sometimes called "soft" or "incorporationist" legal positivism) and "exclusive legal positivism" (also known as "hard" legal positivism). The debate between the two camps involves a difference in interpreting or elaborating one central point of legal positivism: that there is no *necessary* or "conceptual" connection between law and morality. Exclusive legal positivism (whose advocates have included Joseph Raz (1994, pp. 194-221), Andrei Marmor (2002), and Scott

Shapiro (1998)) interprets or elaborates this assertion to mean that moral criteria can be neither sufficient nor necessary conditions for the legal status of a norm. In different terms: exclusive legal positivism states that "the existence and content of every law is fully determined by social sources." (Raz, 1979, p. 46)

The most prominent argument for exclusive legal positivism is one offered by Joseph Raz based on the relationship between law and authority. This argument depends, in part, on accepting Raz's distinctive views on both the nature of law and the nature of authority. (*cf.* Waluchow, 2000, pp. 47-52) First, as regards law, Raz argues that legal systems, by their nature, purport to be justified (legitimate) practical authorities. (Raz, 1994, p. 199; Raz, 1996, p. 16) (He does not say that it is in the nature of law *to be* justified practical authorities; that would be contrary to the basic tenet of legal positivism that one can determine status as law without recourse to moral tests; it would also be in tension with Raz's argument elsewhere that legal rules, even in generally just legal systems, do not impose a *prima facie* moral obligation (Raz, 1994, pp. 325-38)).) Raz has argued for what is sometimes called "the service conception of authority": that the "role and primary normal function [of authorities] is to serve the governed." (Raz, 1990, p. 21) Authorities are to consider the same reasons for action that would apply to the subject, and the subject ought to act as the authorities suggest if that person "is likely better to comply with reasons that apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly." (Raz, 1985a, p. 19 (italics removed)) This analysis of authority is by no means universally accepted; it has been challenged both on descriptive and normative grounds. (*e.g.*, Lukes, 1990; Dworkin, 2002, pp. 1671-76)

Continually with Raz's approach to authority: those subject to an authority "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle." (Raz, 1994, p. 219) In the context of law, this means that with legal rules, which are meant to make authoritative decisions on matters on which citizens would otherwise be subject to various moral (and prudential) reasons for action, we must be able to ascertain their content without recourse to further moral evaluation. According to Raz, law purports to play a particular role in citizens' practical reasoning – legal rules are to be "pre-emptive reasons" or "exclusionary" reasons for action. (Raz, 1994, pp. 199-204; *cf.* Raz, 1990, pp. 35-48, 73-84, 178-99) Following this analysis, inclusive legal positivism must fail, it is argued, because it is inconsistent with a core aspect of law, the legal system's purporting to be a justified practical authority.

Among the responses to Raz's attack on inclusive legal positivism have been the following: (1) that legal rules and legal systems may be authoritative even when the content of the rules are sometimes determined in part by moral reasons (*e.g.*, Waluchow, 1994, pp. 129-40; Waluchow, 2000, pp. 47-71); and (2) Raz's argument does not work where the moral criteria for validity (usually part of a constitutional standard) are different from the moral reasons that would normally apply to citizens (*e.g.*, the reasons for not murdering are different than the equality or "no cruel punishment" reasons that may be the basis of invalidating a certain murder statute). (*e.g.,* Coleman, 2001, pp. 125-27)

Another argument that has been offered for exclusive legal positivism derives from a claim about the nature of rules. Scott Shapiro (1998) has emphasized that it is in the nature of rules, including legal rules, that they make a difference in our practical reasoning, and that inclusive rules of recognition would fail to make a difference in this way, as they would merely point us towards moral evaluations

already applicable to our choices. This claim has evoked a number of responses (*e.g.*, Coleman, 2001, pp. 134-48; Waluchow, 2000; Kramer, 2000; Himma, 2000), and the debate is still evolving. One response is that it is sufficient that the legal system *as a whole* make a difference in our practical reasoning, and this will continue to be the case if the moral criteria of an inclusive rule of recognition were the sufficient conditions for *some* of the valid norms of the legal system, but not for all of them. (*e.g.*, Waluchow, 2000, pp. 76-81)

Inclusive legal positivism (whose advocates have included Jules Coleman (1982, 1998, 2001), Wil Waluchow (1994), Philip Soper (1977), David Lyons (1977), and H. L. A. Hart (1994, pp. 250-54)) interprets the separation of law and morality differently, arguing that while there is no *necessary* moral content to a legal rule (or a legal system), a particular legal system may, by conventional rule, make moral criteria necessary or sufficient for validity *in that system*. (*e.g.*, Waluchow, 1994; Coleman 1982) In the posthumously published "Postscript" to *The Concept of Law*, Hart indicated that he saw inclusive legal positivism as better reflecting his own views and intentions. (Hart, 1994, pp. 247-54)

The strongest argument for inclusive legal positivism seems to be its fit with the way both legal officials and legal texts talk about the law (though at least one advocate of the inclusive approach has disclaimed such reliance on "fit" (Coleman, 2001, p. 109)). Morality seems to be a *sufficient* grounds for the legal status of a norm in many common law cases (and decisions in which legal principles play a large role (Dworkin, 1977, pp. 14-45)), where a legal norm is justified only or primarily on the basis that morality requires it. (Of course, exclusive legal positivists have no objection to judges *declaring new law* based on moral considerations; it is the argument that something is *currently valid law*

because of its moral merit that would run counter to exclusive legal positivism.) The more familiar example for inclusive legal positivism is not about *sufficient* grounds for legal validity, but *necessary* grounds: when constitution-based judicial review of legislation (*e.g.*, in the United States and Canada) requires or authorizes the invalidation of legislation that runs afoul of moral standards codified in the constitution (*e.g.*, regarding equality, due process, or humane punishment), this appears to make moral merit a necessary, but not sufficient, basis for legal validity.

Additionally, the inclusive view allows theorists to accept many of Dworkin's criticisms of legal positivism without abandoning what these same theorists consider the core tenets of legal positivism (its grounding in social facts and conventions). Inclusive legal positivism accepts that moral terms can be part of the necessary or sufficient criteria for legal validity in a legal system, but insist that the use of moral criteria is *contingent* – and derived from the choices or actions of particular legal officials – rather than part of the nature of law (and thus present in *all* legal systems).

Various legal positivist theorists have offered a series of modifications and clarifications to try to secure their views against the criticisms of Dworkin and of other legal positivists. For example, in response to Dworkin's argument that judges do not have discretion, but instead are obligated to apply legal principles (which are determined in part by their moral content, and thus could not be picked out by a Hartian rule of recognition), Joseph Raz has argued that not every norm judges are obligated to apply in deciding legal disputes is thereby "law." (Raz, 1983, pp. 83-85) Raz elsewhere (Raz, 1994, p. 317) offers the example of a court being directed to resolve a dispute by reference to the laws of another country or the internal rules of an association; but whether such an analysis can fairly be applied also to (*e.g.*) the moral standards incorporated in constitutional requirements may raise a more difficult

question. Another example: to Dworkin's argument that there is no Hartian rule of recognition in modern constitutional democracies that could adequately serve the purported function of such rules – helping citizens to identify what is and is not valid law – Jules Coleman and Brian Leiter have argued that the rule of recognition should be seen as having a validation function even if it does not have, within some legal systems, an identification function. (Coleman & Leiter, 1996, p. 252) And numerous other epicycles have been added to the basic legal positivist view to try to respond to critics within and without. The problem is that the defenders of legal positivism may have become too clever for their own good. With all the intricate modifications, clarifications, and addenda, the positivists may have won the battle but lost the war. The theory may be able to beat off all attacks, but the fortified product is one that sometimes seems to be neither recognizable nor powerful. (*cf.* Dworkin, 2002, pp. 1656-65; Bix, 1999c)

6. Debates and Distinctive Views

As already noted, a useful approach to understanding a theory or a school of thought is to consider its origins, seeing that to which it was reacting or responding. For Bentham and Austin, the key provocation for early legal positivism was the sloppy natural law thinking of William Blackstone: in Blackstone's claim ("no human laws are of any validity, if contrary to [the law of nature" (Blackstone, 1979, vol. 1, p. 41)), some discerned an implication that whatever was law (whatever rules the common law judges had developed over time) was right and reasonable. In response, Bentham in particular saw the need to distinguish clearly between the statement of what the law was, and the evaluation of its merits. Bentham as reformer could then present a clear case for *changes* in the law.

(Bentham was thus also the strong advocate of codification and a strong opponent of the common law and judicial legislation; as for legal reform, Bentham was also one of the founders of Utilitarianism, so he had a moral system ready to guide the lawmakers in their reforms. (Bentham, 1996))

The path of legal positivism in the decades after Austin and Bentham broadly followed this initial track: legal positivism as a contrast to natural law theory. However, the boundary lines and conflict lines between that great tradition and legal positivism tend to become elusive upon closer inspection. (Bix, 2000) It is hard to locate natural law theorists who actually disagree with the legal positivist position, when the position is carefully stated. (*cf*. Finnis, 1994) One can find some sloppy language by some peripheral figures which might be intended to equate legality and moral validity in a naive way (or which at least invites that mis-reading) – John Austin (1994, pp. 157-59) pounces on just such a remark by Blackstone in his *Commentaries* (quoted earlier). However, such examples are rare, and fighting such occasional sloppiness is hardly enough to justify a whole school of jurisprudence. Most natural law theorists are as anxious as most legal positivists to separate questions of validity within a legal system and questions of moral value. Natural law theorists may argue that immoral laws are not "laws in their fullest sense" (in that they do not create *prima facie* moral obligations), but that is quite different from saying that they are "not 'law' at all." (Kretzmann, 1988) (Nor need a legal positivist disagree with that conclusion – at least in the sense that no disagreement seems required by the "tenets" of legal positivism. (MacCormick, 1992))

There likely still are points of disagreement between legal positivism and natural law theory, but they tend to come on relatively peripheral or marginal points. For example, modern legal theorists tend to agree that a theory of law should take into account the perspective of a participant in the legal

process. (Hart, 1994, pp. 89-91) The idea is that law, like other social practices, is a purposive activity, and an account of the nature of law that can take into account the views of participants is thereby a better theory than one that does not do so. While natural law theorists have come to agree with that view (*e.g.*, Finnis, 1980, pp. 3-6), natural law theorists and legal positivists disagree on whether an ability to distinguish morally legitimate law and law which falls short of that mark should be built into that participant's perspective.

Both advocates and critics of legal positivism sometimes discuss the way in which legal positivism succeeds or fails in "explaining the normativity of law." There is a deep ambiguity to that phrase, which hides important questions about the nature of the claims legal positivist do and should be making about law. One view, following Kelsen and a possible interpretation of Hart, is that legal positivism is best understood as accepting the "fact" of normativity, that is, as starting from *the assumption* that some large percentage of officials and citizens within a legal community accept the law as establishing reasons for action (people viewing the legal norms as offering reasons for action means more than being "persuaded" to act by the coercive force the system may use to enforce its standards; in that case, it would be the sanctions, and not the legal norms themselves, that would be the reasons for action). Hart famously criticized Austin's command theory for being unable to distinguish a legal system from a gunman's threats, writ large. (Hart, 1994, pp. 20-25). Hart's line of argument, in the context of a critique of Austin's command theory, can be seen merely as describing better and worse descriptive theories: that a good descriptive theory will be one that can take into account the differences between a gangster's imposition and a system that is (rightly or wrongly) accepted as legitimate by some or most of its officials and citizens. Austin's theory, with its focus on the tendencies

of sanction and obedience, cannot discern the difference; Hart's theory, incorporating the internal point of view, allows for this distinction. Thus, legal positivists *observe* the fact of normativity, and account for it only in the sense of constructing a legal theory that can take that fact into account. Under this view, legal positivists do not "explain normativity" in the sense of showing how such views can be justified or legitimate, for that sort of "explanation of normativity" is just the type of moral or evaluative judgment that legal positivism leaves to other types of analysis – *e.g.*, political theory or moral theory.

Some commentators, perhaps unwisely, have tried to read more into Hart's critique of Austin (and other similar comments), and have thought that it *was* legal positivism's task to "explain normativity," in the evaluative sense of explaining in what sense the legal system could legitimately give its officials and citizens additional reasons for action. Such explanations, when attempted, have tried various paths, including arguments about legal rules and standards as coordinating conventions (*e.g.*, Coleman, 1998) or as (in Michael Bratman's terminology (Bratman, 1992)), a "shared cooperative activity." (Coleman, 2002, pp. 74-102; *cf.* Shapiro, 2002; Bratman, 2002) One suspects that these sorts of explanations may be doomed to failure – for whenever they venture from the sociological project of *observing* normative behavior to the task of *justifying* such behavior, they risk the error David Hume pointed out long ago, of improperly trying to derive an "ought" from an "is." (*cf.* Finnis, 2000) There may be interesting work to be done in trying to ground moral obligations in the coordination of behavior, but intertwining these arguments with the core views of legal positivism may be more likely to invite confusion than insight.

7. Critiques of Legal Positivism

Every leading approach to law has its strong points and its weak points, aspects of legal practice it accounts for very well and other aspects less well. The parts of legal practice that legal positivism (or at least "exclusive" forms of legal positivism, see *supra*, Section 5), seems to account for or explain less well, and that sometimes motivate scholars towards alternative theories, include the following:

(1) Common law reasoning (*e.g.*, Perry, 1987; Postema, 1996, pp. 95-96). While there are a variety of theories of what is or should be going on in traditional forms of common law reasoning, one could reasonably argue that this form of reasoning gives instances of a norm being valid law *because* of its moral content rather than being based on a social source.

(2) Purposive interpretation – the way that statutes and constitutional provisions are interpreted in line with their purposes (or with the broader purposes of particular areas of law) has seemed to some to be evidence that the distinction between "law as it is" and "law as it ought to be" is not as sharp as legal positivists make out. (Fuller, 1958, pp. 661-669; *cf.* Hart, 1958, pp. 606-15).

(3) Customary law – legal systems which recognize "customary law" often characterize the judges applying such laws as merely recognizing already existing legal standards. Again, the question is whether to treat such "recognitions" at face value, or to treat them as judicial legislation. Austin (1994, pp. 34-36) wrestles awkwardly with fitting customary laws into a system based on commands (concluding that customary norms, because not commands, cannot be legal rules, but that they can become legal rules when adopted by judges – which he then characterized as indirect commands of the sovereign).

(4) "Landmark cases" where courts change radically what most judges and commentators had assumed the law to require, but the courts insist that they are merely discovering or clarifying the existing law. (*e.g.*, Dworkin, 1977, pp. 22-31) The English tort law case, *Donoghue v. Stevenson* ([1932] A.C. 562), and a comparable American case, *MacPherson v. Buick Motor Co.* (217 N.Y. 382, 111 N.E. 1050 (1916)), are paradigmatic examples. While a legal positivist (at least of the "exclusive" variety) could simply refer to these cases as instances of judicial legislation, the judges and commentators frequently resist such characterizations, preferring the view that the law "works itself pure" (*Omychund v. Barker* (1744) 26 E.R. 15 at 23), thus blurring the legal positivist's line between "what law is" and "what law ought to be."

As the above four categories exemplify, to varying degrees, in general legal positivism does better explaining those aspects of law that derive from "will," the choice of some identifiable law-maker, and less well in explaining those aspects of law that seem to derive from "reason," the derivation of legal standards directly or indirectly from moral standards. Alternative approaches, like Ronald Dworkin's interpretive approach and some versions of natural law theory, tend to have the opposite problem: they are better with the "reason" side of law, and weakest in dealing with the "will" (or "authority") aspects of law. (*cf.* Bix, 1999b, pp. 121-26; Bix, 2002, p. 68) (See 6 NATURAL LAW THEORY; 15 ADJUDICATION) This contrast may be most sharply visible in Hans Kelsen's work, where a judge's application of a general norm to a particular case (*e.g.*, "no one can park on this street," therefore "James was not allowed to park on this street") was considered the creation of a new norm. That is, the specific norm was law because, and only because, it was so willed by the judge; prior to that act of judicial law-making the specific norm was not law, even though it might be connected to a general legal

norm by the simplest of logical operations. (Kelsen, 1992, pp. 67-68; *cf.* Finnis, 2000, pp. 1600-01).

Fuller summarized the will/reason distinction and its significance for understanding law:

> "When we deal with law, not in terms of definitions and authoritative sources, but in terms of problems and functions, we inevitably see that it is compounded of reason and fiat, of order discovered and order imposed, and that to attempt to eliminate either of these aspects of the law is to denature and falsify it." (Fuller, 1946, p. 382)

As has been discussed elsewhere in this Chapter, legal positivism *can* account for the "order discovered" aspect of law, on the basis that such "discoveries" do not become significant for a legal system until announced by the duly appointed officials (though the debate remains whether the standards should be thought of or treated as having been valid law *prior* to this promulgation). Legal positivism's focus on the authoritative sources and officials also has the virtue of accounting for the inevitable disagreement and fallibility in ascertaining what the implicit or eternal order is. On the other hand, Fuller's point, echoed by other critics of legal positivism, is that refusing to give equal emphasis to the (implicit or eternal) order which lawmakers aspire to ascertain and apply is to miss something basic in the nature of law.

To resume the list of objections:

(5) Significant disagreement – as Dworkin has pointed out (*e.g.*, Dworkin, 1986, pp. 120-39; Dworkin 2002), the appearance of pervasive disagreement among legal officials and legal scholars about even basic aspects of practice within many legal systems (including those in the United States and Britain) raises serious questions for a legal theory that seems to be grounded on conventional agreement.

(6) Legal mistake – the problem of "mistake" can cause problems for legal positivism, but probably no more than for almost any alternative theory. *Whatever* criteria one chooses for legal validity, there will be occasions when judges or other legal officials seem to act contrary to those criteria, most frequently from a sincere but mistaken application of the criteria, but sometimes from corruption or other wicked motives. The reality of such deviations can tempt theorists to say that the only criterion of validity is the decision of the ultimate decision-maker (*e.g.*, the most recent decision on the issue by the United States Supreme Court or the House of Lords). However, this recourse has even greater difficulties, difficulties which Hart satirized through his description of "scorer's discretion" (an intentional mis-interpretation of games which have rules for when a goal has been scored but where referees have the final word on whether a goal has in fact been scored). As Hart pointed out, it badly mischaracterizes what is going on to declare the relevant norm to be that a goal is scored if and only if the scoring judge declares it to have occurred (Hart, 1994, pp. 141-47)). This ("scorer's discretion" or "what the judges say, is law") view of practices with final arbiters who purport to apply norms misses the extent to which the ultimate decision-maker considers himself or herself bound by standards, and the extent to which other actors, or the same decision-maker at a later date, may criticize the initial decision by reference to those standards.

There is no reason to believe that these items, individually or collectively, form a conclusive case against legal positivism. They are rather, as earlier noted, weak points, and competing approaches to the nature of law will have their own, different, weak points. (Roger Shiner (1992) has shown how the weak points in legal positivism could lead one towards a natural law approach, but that the weak points in natural law theories would lead one back to legal positivism.)

8. Two Critics Ronald Dworkin and John Finnis

The most incisive criticisms of legal positivism in recent years have come, first, from Ronald Dworkin (1977, 1985, 1986, 2002) (and some other prominent theorists, *e.g.*, Stephen Perry (1995, 1996, 1998, 2002), developing a comparable line of criticism), and, second, from the natural law theorist John Finnis. This Section will offer a brief overview of these critiques.

A. Ronald Dworkin

Dworkin's challenge to legal positivism has had three general themes: (1) a challenge to the picture legal positivism gave (or seemed to give) that legal systems were merely systems of rules; (2) an argument that legal positivism was wrong in believing that questions of legal validity are, by their nature, separate from considerations of the content or the merit of purported legal norms; and (3) a challenge to the general belief that law and legal validity are conceptually separate from questions of morality and moral worth. (Dworkin has also argued that legal positivism is best understood as a "semantic" theory (Dworkin, 1985, pp. 31-44) – attempting only to determine the meaning of the word "law" – but this has been rejected by all contemporary legal positivists as both uncharitable and unwarranted. Legal positivists have never been mere lexicographers, mere dictionary writers, they have tried, if not always with success, to say something about a certain social institution or a certain concept. (*e.g.*, Hart, 1994, pp. 239-248))

In his earlier works, Dworkin argued that Hart's version of legal positivism must be rejected because it assumes a view of a legal system that consists entirely of legal rules, when legal systems contain "principles" as well. Legal principles differ from legal rules, in Dworkin's critique, in that

principles are moral propositions, grounded in the past actions of legal officials, that are not conclusive for the cases to which they apply: instead, they add varying levels of weight to the argument for the outcome one way or the other. There can thus be, and frequently will be, legal principles on both sides of a difficult case. (Dworkin, 1977, pp. 22-28) Because the questions of whether legal principles apply in a particular case, and what weight they have in that case, are factors relating to the content of the principle, and not merely based on the principle's "source" or "pedigree," Dworkin argued that a Hartian rule of recognition could not identify valid legal principles and still play the role Hart needed the rule of recognition to play within a legal positivist theory of law. (Dworkin, 1977, pp. 28-31, 39-48, 64-68)

While there was much contemporary debate of Dworkin's rules/principles critique of legal positivism (*e.g.*, Raz, 1983), that discussion has largely fallen away, in large part because Dworkin's later work offered a view of the law that did not turn on the distinction between rules and principles, but rather on a more nuanced interpretive theory of social practices. (Dworkin, 1986) However, variations of Dworkin's initial critique, questioning whether a legal positivist rule or recognition can account for all the valid norms within the legal system ("rules," "principles," or otherwise) survives, though it has mostly been transformed into the detailed infighting between inclusive and exclusive legal positivism, which has already been discussed (*supra*, Section 5).

A more productive line of critique has been offered by Stephen Perry, whose version of Dworkin's non-neutrality critique argues that Hart was wrong to believe that a "descriptive" – morally neutral, non-evaluative – theory of law was possible. (Perry, 1995, 1996, 1998, 2002) Perry's argument, in rough summary, is that in the construction of a theory of law, choices must be made;

theories cannot be just an accumulation of facts. These choices have often been justified by some argument regarding the *purpose* of law, but different theorists have put forward different purposes (*e.g.*, Dworkin often refers to the justification of state coercion, while a number of the legal positivists have preferred to see law's purpose as guiding citizen behavior). How can one choose between one purpose and another, a foundational question within the theory, except on the basis that one is morally superior to the other? To put the question differently, what morally-neutral principle, what simple principle of theory-construction, would be sufficient to adjudicate between competing theories about the primary purpose of law?

There are a number of thoughtful responses as to how neutral principles of theory construction or conceptual analysis *could* be sufficient (*e.g.*, Coleman, 2001, pp. 197-207; Waluchow, 1994, pp. 19-29; Dickson, 2001). Whether these responses are adequate to rebut the Dworkin/Perry challenge regarding the impossibility of a neutral theory remains highly contested and unsettled.

Dworkin has raised other challenges to legal positivism: In his later work (*e.g.*, *Law's Empire* (1986)), as mentioned earlier, Dworkin argued that legal positivism (at least in the Hartian tradition) could not adequately account for pervasive disagreement within legal practice. He argued that the model of law based on a pedigree-based (content neutral, no moral evaluation) rule of recognition could at best be understood as a kind of "conventionalism" that placed great value on stability and predictability within legal practice, and that Hart's theory as a whole was most charitably understood as explicating the (often unstated) shared criteria officials and citizens have regarding the meaning of legal practices, concepts, and propositions. Dworkin argued that Hart's model of law falls short, both descriptively and morally, compared to his own interpretive theory of law. (Dworkin, 1986, pp. 33-46,

114-50). In turn, Hart and others have rejected this interpretation of legal positivism, and Dworkin's critique of legal positivism more generally. (*e.g.*, Hart, 1994, pp. 238-76; Coleman, 1998) It is the response to this line of criticism by Dworkin that has prompted the development of "inclusive legal positivism" and driven much of the debate between it and "exclusive legal positivism" (see *supra*, Section 5).

B. John Finnis

A different line of criticism has recently emerged from the traditional opponent of legal positivism – natural law theory. John Finnis (Finnis, 2000; Finnis, 2002), the most prominent legal theorist working within the natural law tradition, argues that law must be understood both in terms of (1) a description of the past acts of legal officials and (2) reasons for action (for officials and citizens alike). However, a full and proper analysis of the second aspect of law, its giving reasons for action, cannot be accomplished without a focus on what constitutes *good* (moral) reasons for action. Only a theory (like a natural law theory) that takes into account moral argumentation can appropriately come to terms with the way that actions by officials *can* affect the moral obligations of citizens (and why such actions sometimes *fail* to change our moral rights and duties). And once the discussion of law becomes separated from questions about the law's (moral) authority, it can do no more than "report[] attitudes and convergent behavior" (Finnis, 2000, p. 1611). (See 6 NATURAL LAW THEORY)

One possible response was touched upon earlier – that legal positivists should not worry about not being able to account for *the moral force* (if any) of law, because that was never the purpose of this approach. Finnis' challenge would remain: questioning whether there is anything useful that can be

stated about the nature of law *without* purporting to evaluate legal rules and legal systems normatively (and without being reduced to a mere sociology of law-related behaviors). This question is touched upon in the next Section in a more general way, and can be summarized, briefly, as follows: should a theory about the nature of law should focus (in a morally neutral way) on law's status *as a kind of social institution*, as legal positivism arguably does; or should it instead focus (as natural law theory arguably does) on law's status *as a reason for action* that can affect people's moral obligations (and is there any theoretical approach to the nature of law that can fully capture both aspects of law's nature)?

9. Methodological Questions and the Way Forward

This brief overview of the debates involving legal positivism connects to a question about the purpose of legal theory (and of philosophy). What do we expect legal theory *to do*? How can we distinguish good legal theories from bad ones? We cannot test theories about the nature of law the way we test scientific theories: by setting up controlled experiments to see if the events predicted by the theory come about or not. Nor can we even apply the test of historical theories: judging theories by the extent to which they match with the facts in the past. Neither conventional approach to verification or falsification works with theories about the nature of law, because such theories do not purport to be (merely) empirical theories, but rather conceptual claims, claims about what is "essential" to the concept (or "our concept" of) "law."

However, if legal positivism is not about some simply-factual claim about the systems we call "law," the question returns more sharply: what are the criteria of success? how do we tell a good or successful theory of law from a less good or less successful theory?

A good theory *explains*. A good theory would be one that tells us something significant – that says something interesting about the category of phenomenon we call "law." Even if it is not a claim that can be verified or falsified, one can still feel that a theory either does or does not give us an insight onto the practice or phenomenon that we did not have before. A theory that offers to tell us something about the "nature of law" needs, of course, to reflect, to a substantial extent, the way citizens and lawyers perceive and practice law – it must "fit" our legal practice, though the fit need not be perfect, though significant deviations from the participants' understanding of a practice must be justified by some insight offered. This relates to the second point: a theory should offer more than general descriptive fit – it should also tell us something about the practice that even regular participants in the practice might not have been able to articulate, but which they would recognize when confronted with the theory.

Legal positivism, if it is to continue to be a tenable and valuable theory of law, must seek out a position that offers insight, and this must also be a position with which reasonable persons might disagree (otherwise the theory reduces to an everyday truth, unworthy of discussion). This is the advantage that exclusive legal positivism has over inclusive legal positivism: whatever its relative merits in the debates with natural law theory and Dworkinian theory, exclusive legal positivism has the advantage of a distinctive statement about the nature of law and its role in society. Exclusive legal positivism emphasizes the differences between law as it is, and law as it ought to be (a distinction Dworkin's theory fogs, when it does not erase it entirely), and it emphasizes the connection between law and the role of authority in governance (in democratic regimes, that officials make choices in the name of the people, which other officials must then enforce). This is not a conclusive argument for exclusive legal positivism, but it is a significant factor in its favor (exclusive theorists still face the

challenge that they maintain a distinctive view of law at the cost of too large a gap between their characterization of the practice and how practitioners understand their own legal systems).

If legal theories in general, and legal positivism in particular, are merely a contestable way of characterizing the nature of law, if there is no clear "right" or "wrong," and no sense in which "fitting the facts" is a strict criterion of success, there is a temptation to ask why anyone should care about such things. If theorizing about the nature of law is not a search for "the truth," narrowly understood, like pure physics, and it is not meant to respond to some particular view of social justice, what is the point?

The controversial claim and the interesting claim of legal positivism may be at its foundation: that it is both possible and valuable to offer a descriptive or conceptual theory of law. The claim that one can create a descriptive (or, at least, morally neutral) theory of law will be met by those (like Ronald Dworkin) who claim that nothing interesting can be said at the level of law in general, and thus that legal theory should be theories of *particular legal systems*. (Dworkin, 1987, p. 16) And, as already discussed, the claim that there can be a descriptive (or morally neutral) theory of law will also be met by those (*e.g.*, Dworkin, 1986, pp. 31-113; Perry, 1988, 1995, 1996, 2002) who argue that controversial moral choices are inevitable even in a purportedly descriptive theory. (Here, though, there is a thin line between evaluative standards which are selective, but arguably not morally evaluative, and standards that do seem morally evaluative or political.)

It is important for legal positivists – indeed, for all theorists about the nature of law – to spend more time thinking of their project in the broader context of social theory, and the problem of the social sciences. For example, the view that there can be a fully descriptive theory of law may be open to attack on the grounds that social theory can never be neutral in that way. (*e.g.*, Lucy, 1999) Legal

positivists are well-advised to look to the nature of comparable debates within social theory, when making their arguments in defense of their approach to the nature of law.

While law can be seen as a subset of social institutions and practices on one hand, it is also, on the other hand, a subset of reason-giving practices (along with religion, morality, and perhaps etiquette), as mentioned in the previous Section, in discussing John Finnis's critique of legal positivism. For this broader category of theorizing about reason-giving practices, there would be obvious tensions in any effort to create a "descriptive" or "neutral" theory of an intrinsically evaluative practice. At the least, there are evident arguments for preferring a perspective on reason-giving practices that would reflect on their merits according to their ultimate purposes (*cf.* Finnis, 2000, 2002). It may well be that law's double nature – as a social institution and as a reason-giving practice – makes it impossible to capture the nature of law fully through any one approach, with a more "neutral" approach (like legal positivism) required to understand its institutional side, and a more evaluative approach (like natural law theory) required to understand its reason-giving side.

Finally, legal positivists who offer a *conceptual* theory of law will be met by those (like Brian Leiter) who challenge the possibility, or at least the value, of conceptual analysis (Leiter 1998a, 1998b, 2002; *cf.* Harman, 1994). Once again, the question should not be seen as one peculiar to *legal* theory. Brian Leiter has rightly reminded legal theorists that they are part of a larger world of philosophy, and the abandonment of conceptual analysis elsewhere in philosophy (abandoning "armchair metaphysics" for more empirically-grounded inquiries) should give legal theorists pause. However, while conceptual analysis may have been largely discarded in some areas of philosophy, like epistemology, the direct comparison is not whether conceptual theory is still considered useful for a theory of knowledge, but

rather whether conceptual theory is still considered useful for *social theory* – for that is arguably the closest topic in general philosophy for theorists working on the nature of law. Some legal theorists have already offered reasons for believing that the attack on conceptual analysis in social theory generally, and jurisprudence specifically, can be rebutted. (*e.g.*, Coleman, 2001, 210-17) However, even if conceptual analysis is considered appropriate for jurisprudence, there is still work to be done to elaborate what is meant by speaking of the "nature" or "essence" of law; to explain whether or in what way there are "necessary truths" about law; and to analyze whether there has only been one concept of law throughout history or, to the contrary, different societies have had different concepts (many of these issues are discussed by Joseph Raz (1 LEGAL THEORY)).

10. Conclusion

Many people approach legal positivism with a strong presumption in its favor. After all, how could one reasonably be against having a descriptive (or at least morally neutral) study of a social institution and practice, separating what is from what should be, and allowing other disciplines to discuss normative or historical or sociological aspects of the same social institution and practice? However, as this Chapter has indicated, under further critical examination, there are questions that can and should be asked about the possibility and value of this type of inquiry. First, approaches to the nature of law should be understood within the context of larger debates regarding theories of other social practices and institutions, and theories of other reason-giving practices. Broader inquiries will include, on the one hand, the question of the possibility of a morally neutral theory, and, on the other hand, the viability of "conceptual" theory.

A more precise set of questions might be derived from the above general considerations: What does it mean to talk about the nature of law?, and What does it mean to succeed or fail in having a theory of law? To answer these questions, in light of the general concerns outlined, is the challenge that legal positivism must meet if it is going to warrant our continuing attention. If this challenge is not met, legal positivism will become, one fears, just another interesting topic in the history of ideas, rather than a vibrant debate in our current reflections on what it means to have and maintain a legal system.[*]

References

Austin, J. (1994). The Province of jurisprudence determined (W. E. Rumble, ed.). Cambridge: Cambridge University Press (Original work published 1832).

—. (2002). Lectures on jurisprudence or the philosophy of positive law (2 vols.) (fourth ed., rev. and ed. by R. Campbell). Bristol: Thoemmes Press. (Original work published 1879).

Bentham, J. (1970) Of Laws in general (H. L. A. Hart, ed.). London: University of London, The Athlone Press.

—. (1996). An Introduction to the principles of morals and legislation (J. H. Burns & H. L. A. Hart, eds.). Oxford: Clarendon Press (Original work published 1789).

Berlin, I. (1997) The Proper study of mankind (H. Hardy & R. Hasuheer, (Eds.)). London: Random House.

Bix, B. (1999a). H. L. A. Hart and the hermeneutic turn in legal theory. 52 S.M.U. Law Review, 52, 167-199.

—. (1999b). Jurisprudence, theory and context (2nd ed.). London: Sweet & Maxwell.

—. (1999c). Patrolling the boundaries: Inclusive legal positivism and the nature of jurisprudential debate. Canadian Journal of Law and Jurisprudence, 12, 17-33.

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—. (1999d). Positively positivism. Virginia Law Review. 85, 889-923.
—. (2000). On the dividing line between natural law theory and legal positivism. Notre Dame Law Review, 75, 1613-1624.
—. (2002). Natural law theory: the modern tradition. In J. L. Coleman & S. Shapiro (Eds.) & K. E. Himma (Assoc. Ed.). Oxford handbook of jurisprudence and philosophy of law (pp. 61-103). Oxford: Oxford University Press.

Blackston, W. (1979). Commentaries on the laws of England (4 vols.). Chicago: University of Chicago Press. (Original work published 1765-1769).

Bratman, M. E. (1992). Shared cooperative activity. Philosophical Review, 101, 327-341.
—. (2002). Shapiro on legal positivism and jointly intentional activity. Legal Theory, 8, 511-517.

Bulygin, E. (1998). An Antinomy in Kelsen's pure theory of law. In S. L. Paulson & B. L. Paulson (Eds.). Normativity and norms: critical perspectives on Kelsenian themes (pp. 297-315). Oxford: Clarendon Press.

Coleman, J. L. (1982). Negative and positive positivism. Journal of Legal Studies, 11, 139-164.
—. (1998). Incorporationism, conventionality, and the practical difference thesis. Legal Theory, 4, 381-426.
—. (2001). The practice of principle: In defence of a pragmatist approach to legal theory. Oxford: Oxford University Press.

Coleman, J. L. & Leiter, B. (1996). Legal positivism. In D. Patterson (Ed.). A Companion to the Philosophy of Law and Legal Theory (pp. 241-60). Oxford: Blackwell.

Conte, A. G. (1998). Hans Kelsen's deontics. In S. L. Paulson & B. L. Paulson (Eds.). Normativity and norms: critical perspectives on Kelsenian themes (pp. 331-341). Oxford: Clarendon Press.

Cotterrell, R. (1989). The Politics of jurisprudence. London: Butterworths.

Cover, R. (1975). Justice accused: antislavery and the judicial process. New Haven: Yale University Press.

Dickson, J. (2001). Evaluation and legal theory. Oxford: Hart Publishing.

Dworkin, R. (1977). Taking rights seriously. Cambridge, Mass.: Harvard University Press.
—. (1985). A Matter of principle. Cambridge, Mass.: Harvard University Press.
—, (1986). Law's empire. Cambridge, Mass.: Harvard University Press.

—. (1987). Legal Theory and the Problem of Sense. In R. Gavison (Ed.). Issues in Contemporary Legal Philosophy (pp. 9-20). Oxford: Clarendon Press, 1987.
—. (2002). Thirty years on. Harvard Law Review, 114, 1655-1687.

Dyzenhaus, D. (2000). Positivism's stagnant research programme. Oxford Journal of Legal Studies, 20, 703-722

Finnis, J. (1980). Natural law and natural rights. Oxford: Clarendon Press.
—. (1994). The Truth in legal positivism. In R. P. George (Ed.). The Autonomy of law: essays on legal positivism (pp. 195-214). Oxford: Clarendon Press.
—. (2000). On the incoherence of legal positivism. Notre Dame Law Review, 75, 1597-1611.
—. (2002). Natural law: the classical tradition. In J. L. Coleman & S. Shapiro (Eds.) & K. E. Himma (Assoc. Ed.). Oxford handbook of jurisprudence and philosophy of law (pp. 1-60). Oxford: Oxford University Press.

Fuller, L. L. (1946). Reason and fiat in case law. Harvard Law Review, 59, 376-395.
—. (1958). Positivism and fidelity to law – a reply to Professor Hart. Harvard Law Review, 71, 630-672.

George, R. P. (1999). In Defense of natural law. Oxford: Clarendon Press.

Harman, G. (1994). Doubts about conceptual analysis. In M. Michael & J. O'Leary-Hawthorne (Eds.). Philosophy in mind: the place of philosophy in the study of mind (pp. 43-48). Dordrecht: Kluwer Academic Publishers.

Hart, H. L. A. (1958). Positivism and the separation of law and morals. Harvard Law Review, 71, 593-629.
—. (1983). Essays in jurisprudence and philosophy. Oxford: Clarendon Press.
—. (1987). Comment [on Dworkin]. In R. Gavison (Ed.). Issues in contemporary legal philosophy (pp. 35-42). Oxford: Clarendon Press.
—. (1994). The Concept of law (2nd ed.). Oxford: Clarendon Press.

Hartney, M. (1991). Introduction. In H. Kelsen. General theory of norms (M. Hartney, ed.) (pp. ix - liii). Oxford: Clarendon Press.

Himma, K. E. (2000). H. L. A. Hart and the practical difference thesis. Legal Theory, 6, 1-43.

Hobbes, T. (1996). Leviathan (R. Tuck (Ed.)). Cambridge: Cambridge University Press. (Original work published 1651).

Holdsworth, W. S. (1903-1938) A History of English law (12 vols.). London: Methuen & Co. Ltd.

Kelsen, H. (1967). Pure theory of law (M. Knight, trans.). Berkeley: University of California Press.
—. (1973). Essasys in legal and moral philosophy (O. Weinberger, ed., P. Heath, trans.). Dordrecht: D. Reidel Publishing Co.
—. (1991). General theory of norms (M. Hartney, ed. and trans.). Oxford: Clarendon Press.
—. (1992). Introduction to the problems of legal theory (B. L. Paulson & S. L. Paulson, trans.). Oxford: Clarendon Press. (Original work published 1934).

Kramer, M. (2000). How moral principles can enter into the law. Legal Theory, 6, 83-108.

Leiter, B. (1998a). Naturalism and naturalized jurisprudence. In B. Bix (Ed.). Analyzing law: new essays in legal theory (pp. 79-104). Oxford: Clarendon Press.
—. (1998b). Realism, hard positivism, and conceptual analysis. Legal Theory, 4, 533-547.
—. (2002). Naturalism in legal philosophy. In E. N. Zalta (Ed.). Stanford encyclopedia of philosophy, http://plato.stanford.edu.

Lucy, W. (1999). Understanding and explaining adjudication. Oxford: Oxford University Press.

Lukes, S. (1990). Perspectives on authority. In J. Raz (Ed.). Authority (pp. 203-217). New York: New York University Press.

Lyons, D. (1977). Principles, positivism, and legal theory. Yale Law Journal, 87, 415-435.

MacCormick, N. (1992). Natural law and the separation of law and morals. In R. P. George (Ed.). Natural law theory: contemporary essays (pp. 105-33). Oxford: Clarendon Press.

Marmor, A. (2002). Exclusive legal positivism. In J. L. Coleman & S. Shapiro (Eds.) & K. E. Himma (Assoc. Ed.). Oxford handbook of jurisprudence and philosophy of law (pp. 104-24). Oxford: Oxford University Press.

Moles, R. N. (1987). Definition and rule in legal theory. Oxford: Basil Blackwell.

Olivecrona, K. (1971) Law as fact (2nd ed.). London: Stevens & Sons.

Paulson, S. L. (1992a). Kelsen's legal theory: the final round. Oxford Journal of Legal Studies, 12, 265-274.
—. (1992b). The Neo-Kantian dimension of Kelsen's pure theory of law. Oxford Journal of Legal Studies, 12, 311-332.

—. (1994). Lon L. Fuller, Gustav Radbruch, and the 'positivist' theses. Law and Philosophy, 13, 259-284.

Paulson, S. L. & Paulson, B. L. (Eds.). (1988). Normativity and norms: critical perspectives on Kelsenian themes. Oxford: Clarendon Press.

Perry, S. R. (1987). Judicial obligation, precedent, and the common law. Oxford Journal of Legal Studies, 7, 215-257.
—. (1995). Interpretation and methodology in legal theory. In A. Marmor (Ed.). Law and interpretation (pp. 97-135). Oxford: Clarendon Press.
—. (1996). The Varieties of legal positivism. Canadian Journal of Law and Jurisprudence, 9, 361-381.
—. (1998). Hart's methodological positivism. Legal Theory 4, 427-467.
—. (2002). Method and principle in legal theory. Yale Law Journal, 111, 1757-1813.

Raz, J. (1979). The Authority of law. Oxford: Clarendon Press.
—. (1980). The Concept of a legal system: an introduction to the theory of legal system (2nd ed.). Oxford: Clarendon Press.
—. (1983). Legal principles and the limits of law. In M. Cohen (Ed.). Ronald Dworkin and contemporary jurisprudence (pp. 73-87). Totowa, New Jersey: Rowman & Allanheld.
—. (1985a). Authority and justification. Philosophy and Public Affairs, 14, 3-29.
—. (1985b). The Morality of obedience. Michigan Law Review, 83, 732-749.
—. (1990). Practical reason and norms. Princeton: Princeton University Press.
—. (1994). Ethics in the public domain. Oxford: Clarendon Press.
—. (1996). On the Nature of law. Archiv für Rechts- und Sozialphilosophie 82, 1-25.
—. (1998a). Postema on law's autonomy and public practical reasons: a critical comment. Legal Theory, 4, 1-20.
—. (1998b). Two views of the nature of the theory of law: a partial comparison. Legal Theory, 4, 249-282.

Schauer, F. (1994a). Fuller's internal point of view. Law and Philosophy, 13, 285-312.
—. (1994b). Critical notice. Canadian Journal of Philosophy, 24, 495-510.
—. (1996). Positivism as pariah. In R. P. George (Eds.). The Autonomy of law: essays on legal positivism (pp. 31-55). Oxford: Clarendon Press.

Sebok, A. J. (1998). Legal positivism in American jurisprudence. Cambridge: Cambridge University Press.

Shapiro, S. J., (1998). On Hart's way out. Legal Theory, 4, 469-507.
—. (2002). Laws, plans, and practical reason. Legal Theory, 8, 387-441.

Shiner, R. (1992). Norm and nature: the movements of legal thought. Oxford: Clarendon Press.

Soper, E. P. (1977). Legal theory and the obligation of a judge: The Hart/Dworkin dispute. Michigan Law Review, 75, 473-519.
—. (1987). Choosing a legal theory on moral grounds. In J. Coleman & E. F. Paul (Eds.). Philosophy and law (pp. 31-48). Oxford: Basil Blackwell.

Tur, R. & Twining, W. (Eds.). (1986). Essays on Kelsen. Oxford: Clarendon Press.

Twining, W. (1985). Karl Llewellyn and the realist movement. Norman, Oklahoma: University of Oklahoma Press.

Waluchow, W. J. (1994). Inclusive legal positivism. Oxford: Clarendon Press.
—. (2000). Authority and the practical difference thesis: a defense of inclusive legal positivism. Legal Theory, 6, 45-82.

Warren, C. (1908). History of the Harvard law school and of early legal conditions in America. (3 vols.). New York: Lewis Publishing.

Wright, R. G. (1996). Does positivism matter? In R. P. George (Ed.) The Autonomy of law (pp. 57-78). Oxford: Clarendon Press.

Suggested Further Reading

Bix, B. (1993). Law, language and legal determinacy. Oxford: Clarendon Press.
—. (1996). Jules Coleman, legal positivism, and legal authority. Quinnipiac Law Review, 16, 241-254.
—. (2001). John Austin. In E. N. Zalta (Ed.) Stanford encyclopedia of philosophy, http://plato.stanford.edu.

Campbell, T. D. (1996). The Legal theory of ethical positivism. Aldershot: Dartmouth Publishing.
—. (Ed.) (1999). Legal positivism. Aldershot: Ashgate Publishers.

Coleman, J. L. (1998). Second thoughts and other first impressions. In B. Bix (Ed.). Analyzing Law: New Essays in Legal Theory (pp. 257-322). Oxford: Clarendon Press.
—. (Ed.) (2001). Hart's postscript: essay on the postscript of the concept of law. Oxford: Oxford University Press.
—. (2000). Constraints on the criteria of legality. Legal Theory, 6, 171-183.

Dare, T. (1997). Wilfrid Waluchow and the argument from authority. Oxford Journal of Legal Studies, 17, 347-66.

Endicott, T. A. O. (1998). Herbert Hart and the semantic sting. Legal Theory, 4, 283-300.

Fuller, L. L. (1969). The Morality of law (rev. ed.) New Haven: Yale University Press.

Gardner, J. (2002). Legal positivism: 5½ myths. American Journal of Jurisprudence, 46, 199-227.

George, R. P. (Ed.). (1994). The Autonomy of law: essays on legal positivism Oxford: Clarendon Press.

Green, L. *The Concept of law* revisited. Michigan Law Review, 94, 1687–1717.
—. (1999). Positivism and conventionalism. Canadian Journal of Law and Jurisprudence, 12, 35-52.
—. (2003). Legal positivism. In E. N. Zalta (ed.) The Stanford encyclopedia of philosophy, http://plato.stanford.edu.

Himma, K. E. (1999). Incorporationism and the objectivity of moral norms. Legal Theory, 5, 415-434.
—. (1999). Waluchow's defense of inclusive positivism. Legal Theory, 5, 101-116
—. (2002). Inclusive legal positivism. In J. L. Coleman & S. Shapiro (Eds.) & K. E. Himma (Assoc. Ed.). Oxford handbook of jurisprudence and philosophy of law (pp. 125-65). Oxford: Oxford University Press.
—. (2002). Substance and method in conceptual jurisprudence and legal theory. Virginia Law Review, 88, 1119-1228.

Kramer, M. H.. (1999) Coming to grips with law: in defense of positive legal positivism. Legal Theory, 5, 171-200.
—. (1999). In Defense of legal positivism: law without trimmings. Oxford: Oxford University Press.
—. (1999). In the Realm of legal and moral philosophy. London: Macmillan.
—. (1999). Requirements, reasons, and Raz: legal positivism and legal duties. Ethics, 109, 375-407.
—. (2002). Throwing light on the role of moral principles in the law: further reflections. Legal Theory, 8, 115-143.

Lyons, D. (1984). Ethics and the rule of law. Cambridge: Cambridge University Press.
—. (1993). Moral aspects of legal theory. Cambridge: Cambridge University Press.

MacCormick, N. (1985). A Moralistic case for a-moralistic law? Valparaiso University Law Review, 20, 1-41.
—. (1994). Legal reasoning and legal theory (rev. ed.). Oxford: Clarendon Press.

MacCormick N. & Weinberger, O. (Eds). (1986). An Institutional theory of law. Dordrecht: D. Reidel Publishing Company.

Marmor, A. (1998). Legal conventionalism. Legal Theory, 4, 509-531.
—. (2001). Positive law and objective values. Oxford: Clarendon Press.
—. (2002). "The Pure theory of law," In E. N. Zalta (Ed.). Stanford encyclopedia of philosophy, http://plato.stanford.edu/

Moore, L. (2002). Description and analysis in *The Concept of Law*: a response to Stephen Perry. Legal Theory, 8, 91-114.

Moore, M. (1998). Hart's concluding scientific postscript. Legal Theory, 4, 301-327.

Murphy, L. (2001) The Political question of the concept of law. In J. L. Coleman (Ed.). Hart's postscript (pp. 371-409). Oxford: Oxford University Press.

Perry, S. (1989). Second-order reasons, uncertainty and legal theory. Southern California Law Review, 62, 913-94.

Postema, G. J. (1998). Jurisprudence as practical philosophy. Legal Theory, 4, 329-357.

Schauer, F. (1991). Rules and the rule of law. Harvard Journal of Law and Public Policy, 14, 645-94.
—. (1998). Positivism through thick and thin. In B. Bix (Ed.). Analyzing law: new essays in legal theory (pp. 65-78). Oxford: Clarendon Press.

Shapiro, S. J., (1998). The Difference that rules make. In B. Bix (Ed.) Analyzing law: new essays in legal theory (pp. 33-62). Oxford: Clarendon Press.
—. (2000). Law, morality and the guidance of conduct. Legal Theory, 6, 127-170.

Shiner, R. (2002). Legal positivism and the concept of morality. (unpublished manuscript, presented at the Annual Meeting of the American Philosophical Association, Pacific Division).

Smith, D. (2001). Authority, meaning and inclusive legal positivism. Modern Law Review, 64, 795-808.

Soper, E. P. (1998). Two puzzles from the postscript. Legal Theory, 4, 359-380.

Stavropoulos, N. (1996). Objectivity in law. Oxford: Clarendon Press.

Summers, R. S. (1968). Legal philosophy today – an introduction. In R. S. Summers (Ed.). Essays in legal philosophy (pp.1-21). Oxford: Basil Blackwell.

Waldron, J. (1996). Kant's legal positivism. Harvard Law Review, 109, 1535-1566.

Waluchow, W. J. (1998). The Many faces of legal positivism. University of Toronto Law Journal, 48, 387-449.

—. (2002). In Pursuit of pragmatic legal theory. Canadian Journal of Law and Jurisprudence, 15, 125-150.

—. (2002). Legal positivism, inclusive versus exclusive. In Routledge on-law encyclopedia of philsoophy. http://www.rep.routledge.com/.

BRIAN H. BIX

Notes on Contributor Entry

Brian H. Bix is the Frederick W. Thomas Professor of Law and Philosophy at the University of Minnesota. J.D., Harvard University; D. Phil., Balliol College, Oxford. His other publications include *Jurisprudence: Theory and Context* (Sweet & Maxwell, 3rd ed., 2003) and *Law, Language and Legal Determinacy* (Oxford U. Pr. 1993).