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The Legacy of John Austin's Jurisprudence

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Chapter 14

Positivism Before Hart*

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14.1 Introduction

H. L. A. Hart did not invent legal positivism. Nor did his hugely influential version of legal positivism¹ render all earlier versions obsolete or irrelevant. And although the first of these statements is hardly controversial, the second is likely to be perceived in the precincts of modern English language analytic jurisprudence as somewhere between debatable and simply wrong. It is scarcely an exaggeration to observe that most of today's analytic jurisprudence starts with Hart,² treats his arguments against

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¹ Herbert L. A. Hart, *The Concept of Law* (2nd ed.) ed. by Penelope A. Bulloch and Joseph Raz (Oxford: Oxford University Press, 1994).

² Consider the opening two sentences of Jules Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis” in *Hart's Postscript: Essays on the Postscript to the Concept of Law* ed. by Jules Coleman (Oxford: Oxford University Press, 2001) 99–147, at 99: “H. L. A. Hart's *The Concept of Law* is the most important and influential book in the legal positivist tradition. Though its importance is undisputed, there is a good deal less consensus regarding its core commitments, both methodological and substantive.” (footnote omitted).

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Austin³ as conclusive,⁴ and understands Bentham⁵ as a founding father of legal positivism whose more particular insights, like Wittgenstein's ladder,⁶ may have been necessary to get us where we are but retain little continuing importance.⁷ Indeed, even when contemporary practitioners of analytic jurisprudence acknowledge modern legal positivism's roots in Hobbes, Bentham, and Austin, they tend to see at least the Benthamite and Austinian projects through a Hartian lens, attributing to Bentham and Austin an understanding of legal positivism that owes more to Hart and subsequent debates than to what Bentham and Austin actually wrote and likely believed.

My goal in this paper is to support the claims I have so far merely announced, and to show the continuing importance of two conceptions of legal positivism, and indeed of the jurisprudential enterprise, that are substantially at odds with much of the contemporary understanding. In contrast to the common view that legal positivism

³ John Austin, *The Province of Jurisprudence Determined* ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995). Hart's critique is in Hart, *The Concept of Law*, *supra* note 1 at 18–78.

⁴ See, for example, Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83 *New York University Law Review* 1035–1058, at 1049; Leslie Green, "Law and Obligations" in *Oxford Handbook of Jurisprudence and Philosophy of Law* ed. by Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002) 514–547, at 517; Neil MacCormick, "Legal Obligation and the Imperative Fallacy" in *Oxford Essays in Jurisprudence (Second Series)* ed. by Alfred William Brian Simpson (Oxford: Clarendon Press, 1973), 100–129. Recent attempts to defend Austin's focus on sanctions and coercion include Grant Lamond, "Coercion and the Nature of Law" (2001) 7 *Legal Theory* 35–57; Grant Lamond, "The Coerciveness of Law" (2000) 20 *Oxford Journal of Legal Studies* 39–62; Danny Priel, "Sanction and Obligation in Hart's Theory of Law" (2008) 21 *Ratio Juris* 404–411; Frederick Schauer, "The Best Laid Plans" (2010) 1220 *Yale Law Journal* 586–621; Frederick Schauer, "Was Austin Right After All?: On the Role of Sanctions in a Theory of Law" (2010) 23 *Ratio Juris* 1–21.

⁵ Jeremy Bentham, *Of Laws in General* ed. by Herbert L. A. Hart (London: Athlone Press, 1970). Also relevant is Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* ed. by James H. Burns and Herbert L. A. Hart (London: Athlone Press, 1970).

⁶ Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* trans. by David F. Pears and Brian F. McGuinness (New York: Routledge, 1994) 6.54.

⁷ I am describing the general tenor (with details to follow) of, for example, Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001); Joseph Raz, *The Authority of Law: Essays in Law and Morality* (Oxford: Clarendon Press, 1979); Brian H. Bix, "Positively Positivism" (1999) 85 *Virginia Law Review* 889–923, at 903–17; Brian H. Bix, "Legal Positivism" in *The Blackwell Guide to the Philosophy of Law and Legal Theory* ed. by Martin P. Golding and William A. Edmundson (Oxford: Blackwell, 2005) 29–49; Jules Coleman, "Negative and Positive Positivism" in *Markets, Morals and the Law* (Cambridge: Cambridge University Press, 1988) 3–27; Jules L. Coleman and Brian Leiter, "Legal Positivism" in *A Companion to Philosophy of Law and Legal Theory* ed. by Dennis Patterson (Oxford: Blackwell, 1996) 241–260; Green, "Inseparability" *supra* note 4; Leslie Green, "General Jurisprudence: A 25th Anniversary Essay" (2005) 25 *Oxford Journal of Legal Studies* 565–580; Brian Leiter, "Positivism, Formalism, Realism" (1999) 99 *Columbia Law Review* 1138–1164, at 1150–1153; Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral" (2006) 26 *Oxford Journal of Legal Studies* 683–704; Scott J. Shapiro, "On Hart's Way Out" in *Hart's Postscript*, *supra* note 3 at 149–191.

says nothing about adjudication, one of the conceptions I explicate has closer connections to legal decision-making (which is not the same as adjudication, but encompasses it) than many contemporary positivists think possible, and in addition furnishes a useful metric for characterizing and evaluating different legal systems. This conception owes its roots to Bentham, although Austin is a more important figure in this account than is commonly supposed, and it is connected with, but not identical to the other conception I explain and analyze here, the normative version of positivism developed in the work of Tom Campbell,⁸ Neil MacCormick,⁹ Gerald Postema,¹⁰ and Jeremy Waldron,¹¹ among others.¹² But although normative positivism will be the subject of some of what is to follow, my principal focus is on the relationship between legal positivism and legal decision-making. When Postema describes Bentham's promotion of "publicly accessible and empirically justifiable authoritative rules with fixed verbal formulations" as "strongly positivist,"¹³ he therefore comes close to the understanding of positivism to which I am referring. This Benthamite conception of positivism as a characteristic of legal systems and not (only) of legal theories relates closely to the "limited domain" understanding of legal decision-making I have discussed elsewhere,¹⁴ and it is a conception of positivism, intriguingly, that resembles the one employed by Ronald Dworkin in the process of alleging its descriptive inaccuracy and moral undesirability.¹⁵ But my aim here is neither to show that this variety of positivism is represented in one or another actual legal system, nor that it should be understood as a normatively preferable model for any particular legal regime. Indeed, my goal is not even to show that positivism as a characterization of legal decision-making is superior to other forms of positivism.

⁸ Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, UK: Dartmouth Publishing, 1996).

⁹ Neil MacCormick, "A Moralistic Case for A-moralistic Law" (1985) 20 *Valparaiso Law Review* 20–47.

¹⁰ Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986).

¹¹ Jeremy Waldron, "Normative (or Ethical) Positivism" in *Hart's Postscript*, *supra* note 3 at 411–433.

¹² For example, David Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24 *Oxford Journal of Legal Studies* 39–63; Liam Murphy, "The Political Question of the Concept of Law" in *Hart's Postscript*, *supra* note 3 at 371–409; Liam Murphy, "Better to See Law This Way" (2008) 83 *New York University Law Review* 1088–1107; W. Bradley Wendel, "Civil Obedience" (2004) 104 *Columbia Law Review* 363–426, at 383–385.

¹³ Postema, *Bentham*, *supra* note 10, ix.

¹⁴ Frederick Schauer, "The Limited Domain of the Law" (2004) 90 *Virginia Law Review* 1909–1956. See also Frederick Schauer, "Institutions and the Concept of Law: A Reply to Ronald Dworkin (with some help from Neil MacCormick)" in *Law as Institutional Normative Order* ed. by Maksymilian Del Mar and Zenon Bankowski (Farnham, UK: Aldershot, 2009) 35–44, at 41–43.

¹⁵ Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977). For the argument that supports characterizing Dworkin in these terms, see Schauer, "The Limited Domain of the Law" *supra* note 14; Frederick Schauer, "Constitutional Invocations" (1997) 47 *Fordham Law Review* 1295–1312.

It is only to show that this version of legal positivism, as well as normative positivism, have a distinguished historical provenance, considerable contemporary practical importance, and substantial analytical coherence.

The difference between these alternative positivisms and the contemporary mainstream understanding is not simply a matter of terminology. If all that were at stake were the application or non-application of the word “positivism,” little would turn on the resolution of the issue. But the dispute is not entirely about words, although words, which function as labels and sorting devices, do make a difference. Rather, the issue is about the current embodiment of a venerable tradition. Those who claim that their Hartian or post-Hartian understanding of the core commitments of legal positivism is the exclusive (or demonstrably best, even if not exclusive) one, and they are legion,¹⁶ may not only have misinterpreted the history of the tradition by viewing it too much through the lens of modern analytic philosophy of law, but may also, and more importantly, have assumed too easily that the pre-Hartian positivist tradition is irrelevant to contemporary legal theory. This is far from the truth, and the principal goal of this paper is to explain why this is so.

14.2 Some Words About a Word

It is curious that so much of the debate about the nature of legal positivism attaches to the word “positivism.” Although Bentham and Austin, among others, talked about “positive law,” and although the nineteenth century scientific positivism of Auguste Comte was explicitly described as such,¹⁷ the use of the word “positivism” to describe a legal theory, regime, or attitude first surfaced in the early twentieth century¹⁸ and was made substantially more visible by the anti-positivist Lon Fuller in 1940 in *Law in*

¹⁶ See, for example, Bix, “Positively Positivism” *supra* note 7 at 903–015; Coleman in *Hart’s Postscript*, *supra* note 3 (“instructing judges in their decision-making may have been what formalism (and realism) were about, but it was not the purpose of legal positivism, neither in the “classical” times of John Austin, nor in the modern times of Joseph Raz and Jules Coleman.”); John Gardner, “Legal Positivism: 5 ½ Myths” (2001) 46 *American Journal of Jurisprudence* 199–227, at 211–218 (“The legal positivist tradition” [at 200] has no connection with adjudication and is “normatively inert” [at 213]); Kenneth Eimar Himma, “Judicial Discretion and the Concept of Law” (1999) 19 *Oxford Journal of Legal Studies* 71–94; Leiter, “Positivism, Formalism, Realism” *supra* note 7 at 1149–1153 (“positivism is not a theory about what judges do, but about the concept of law”); Marmor, “Legal Positivism” *supra* note 7 (legal positivism “is a whole tradition of thought” [at 685] that “has nothing to do with the question of what judges ought to do” [at 689]).

¹⁷ Auguste Comte, *A General View of Positivism*, trans. by John Henry Bridges (Cambridge: Cambridge University Press, 2009).

¹⁸ Anthony Sebok reports that “no such theory was discussed by name in legal literature before the late 1920s.” See Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (Cambridge: Cambridge University Press, 1998) at 2, but the term appears, with explicit reference to a legal theory, in Josef Kohler, *Philosophy of Law*, trans. by Adalbert Albrecht (Boston: Boston Book Co., 1914) at xliii. Interestingly, Kohler used the term in order to emphasize the dangers of focusing too much on existing law, dangers that were the ones emphasized (probably incorrectly) by Fuller and others in the years to follow.

Quest of Itself.¹⁹ And though inaccuracies about positivism surface here and even more in Fuller's later work,²⁰ he does get one dimension of positivism more or less correctly when he defines "positivism" as a "direction of legal thought which insists on drawing a sharp distinction between the law that is and the law that ought to be."²¹

That few legal theorists, positivist or not, used the word "positivism" prior to Fuller is not merely an interesting historical tidbit. Rather, it is a signal, although no more than a signal, that we are dealing with contested terminological terrain. And by 1970, when Robert Summers urged that the word "positivism" be discarded from legal theory entirely because it had become "radically ambiguous and dominantly pejorative,"²² the degree of contestation had become even greater. Forty years later, of course, the word is no longer a pejorative within serious analytic legal philosophy, although in the halls of some American law faculties it still retains much of the odour it had when Summers was writing and Fuller was thriving.²³ But the point of scanning the etymological landscape is only to emphasize that those who purport to have identified the "core" of legal positivism may have only identified the core of the conception that dominates the thinking and writing of Hart and those who have succeeded him. This may represent an important advance in thinking about the nature of law and the task of legal philosophy, but these gains have not come without costs. Whether Hart's conception is the only one, or even the correct one, or even the best modern version of ideas that started with Bentham and Austin and owe much to Hobbes as well, is sometimes exactly the matter at issue. On the question of how to understand the positivist tradition (as opposed to best understanding the nature of law), therefore, to start with Hart and presuppose his authoritativeness as the central figure in legal positivism is to assume the conclusion of exactly what we may sometimes valuably seek to determine.

14.3 Three Concepts of Positivism

For the sake of clarity, I want to distinguish among three positions, each of them (probably) held by both Bentham and Austin, among others. The first, which we can label, least controversially, as *conceptual positivism*, is very much the modern

¹⁹Lon L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1940).

²⁰See Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CN: Yale University Press, 1969) 110–112, 145–151; Lon L. Fuller, *The Anatomy of the Law* (New York: New American Library, 1968) 184–185.

²¹Fuller, *The Law in Quest of Itself*, *supra* note 19 at 8.

²²Robert S. Summers, "Legal Philosophy Today – An Introduction" in *Essays in Legal Philosophy* ed. by Robert S. Summers (Oxford: Basil Blackwell, 1970) 1–21, at 15–16.

²³See, for example, William Bradford, "Another Such Victory and We Are Undone: A Call to an American Indian Declaration of Independence" (2004) 71 *Tulsa Law Review* 71–123, at 99–106; William N. Eskridge, Jr., "Metaprocedure" (1989) 98 *Yale Law Journal* 945–074, at 962–972; Pierre Schlag, "The Aesthetics of American Law" (2002) 115 *Harvard Law Review* 1047–1071; Jeffrey G. Sherman, "Law's Lunacy: W.S. Gilbert and the *Deus ex Lege*" (2004) 83 *Oregon Law Review* 1035–1096, at 1078; Robin West, "Three Positivismisms" (1998) 78 *Boston University Law Review* 791–834.

understanding, although I bracket interesting variations and disagreements. Still, conceptual positivism focuses on a series of conceptual claims about the relationship between the domains of law and of morality. In its purest and most capacious form, a form coming closest to what in contemporary legal theory is called *incorporationism*,²⁴ *inclusive legal positivism*,²⁵ or *soft positivism*,²⁶ conceptual positivism holds that morality is not a necessary condition of legality in all possible legal systems in all possible worlds.²⁷ Put differently, the inclusive version of conceptual positivism maintains that morality, while often and sometimes even desirably part of law and part of the rule of recognition in this or that legal system, is not a component of the *concept* of law. And inclusive legal positivism's most significant opponent, *exclusive positivism*,²⁸ is also a conceptual thesis, insisting that legality necessarily does not implicate morality, in contrast to inclusive positivism's claim that legality does not necessarily implicate morality.²⁹

Conceptual positivism is typically presented and supported as a descriptive thesis, assuming, for the sake of argument, that there are concepts, that their analysis can provide useful substantive information,³⁰ and that they can be described without taking on any moral or normative freight.³¹ "Positivism" is thus an attribute of a concept, and the conceptual positivist is one who believes that it is in the nature of the concept of law that morality is either no part of it or is not necessarily a part of it.

²⁴ Coleman, in *Hart's Postscript*, *supra* note 3.

²⁵ Wilfrid J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994); Kenneth Einar Himma, "Inclusive Legal Positivism" in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, *supra* note 4 at 125–165.

²⁶ Hart, *The Concept of Law*, *supra* note 1 at 238–276 and at 250–254.

²⁷ Jules Coleman, "Negative and Positive Positivism" *supra* note 7.

²⁸ See Andrei Marmor, "Exclusive Legal Positivism" in *The Oxford Handbook of Jurisprudence*, *supra* note 4, at 104–124; Joseph Raz, "Legal Positivism and the Sources of Law," in *The Authority of Law*, *supra* note 7; Joseph Raz, "Authority, Law and Morality" (1985) 68 *The Monist* 295–324.

²⁹ I borrow this way of expressing the difference between inclusive and exclusive positivism from Waldron, "Normative (or Ethical) Positivism" *supra* note 11 at 414.

³⁰ Doubts about the value of pure conceptual analysis in jurisprudence are prominently expressed in Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007) at 121–202; Brian Leiter, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis" in *Hart's Postscript*, *supra* note 3 at 355–70; Brian Leiter, "The Demarcation Problem in Jurisprudence: A New Case for Skepticism" (forthcoming 2012) 32 *Oxford Journal of Legal Studies*. See also Frederick Schauer, "On the Nature of the Nature of Law" (forthcoming 2012) 98 *Archiv für Rechts- und Sozialphilosophie*.

³¹ The leading challenges to this last assumption are John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 3–22; Stephen R. Perry, "Hart's Methodological Positivism" in *Hart's Postscript*, *supra* note 3 at 311–354; Stephen R. Perry, "Interpretation and Methodology in Legal Theory" in *Interpretation and Legal Theory: Essays in Legal Philosophy* ed. by Andrei Marmor (Oxford: Clarendon Press, 1997) 97–131.

Although recognizing the conceptual separation of law and morality may have advantages (apart from its descriptive accuracy) for a society and for the conceptual positivist herself, the conceptual positivist views these advantages, if indeed they exist, as no more than a fortunate side-effect. Law and morality would be conceptually distinct, the conceptual positivist believes, even if that were a sad fact about the world, and even if it led to injustice. But just as the pernicious effects of typhoid would not lead the rational observer to deny its existence, so too would any putative deleterious effects of the conceptual separation of law and morality be irrelevant to the question of its existence.

By contrast, *normative positivism*, the label chosen by Jeremy Waldron,³² one of its proponents, is the view that the conceptual separation of law and morality is largely a function of *choosing* a concept of law that has this feature. The normative positivist views concepts – or understandings, if you will – as social artefacts, subject to creation and re-creation by the society within which they exist.³³ And thus the normative positivist believes that a positivist understanding of law should be chosen by a society (or, perhaps, by a theorist) because of the good that such an understanding will produce. Normative positivism promotes legal positivism possibly because a positivist outlook facilitates disobedience to iniquitous law (Hart³⁴), possibly

³² Waldron, “Normative (or Ethical) Positivism” *supra* note 11.

³³ See Frederick Schauer, “The Social Construction of the Concept of Law: A Reply to Julie Dickson” (2005) 25 *Oxford Journal of Legal Studies* 493–501. Waldron is unclear about the relationship between the normative part of normative positivism and the ontological status of the concept of law. When he describes normative positivism as viewing the separation of legal judgement as something “to be valued and encouraged,” he does not directly address whether the something that is to be valued and encouraged has an existence antecedent to the valuing and encouraging. That we should value giant pandas and encourage those who would help them thrive does not suggest that giant pandas are socially constructed for normative reasons. Concepts, however, and certainly the concept of law, are social constructions, and to value and encourage the separation of legal and moral judgement might be to encourage the creation or re-creation of the concept of law so that legal and moral judgement will become or will remain separate. This is the position in Schauer, *ibid.*, but it is unclear whether it is Waldron’s as well.

³⁴ Hart’s writings do not resolve conclusively whether he should be understood as sympathetic to normative positivism. That positivism should be *chosen* for instrumental normative reasons is a plausible reading of H. L. A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 *Harvard Law Review* 593–629, and *The Concept of Law*, *supra* note 1 at 209, Hart described the “reasoned choice” between positivism and natural law as a matter of “comparative merit.” Exercising this choice, says Hart, must involve determining which of them “will assist our theoretical inquiries, or advance our moral deliberations, or both.” For Hart, positivism is preferable not because it is an accurate description, but because “nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by *adopting* the narrower concept [of natural law].” (emphasis added). Moreover, he says (at 210), the view “that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.” Hart continues in this vein for two more pages, making clear that for him the moral virtues of a positivist “concept of law” (at 211) provide the best reason for a society to adopt such an understanding. Yet despite the foregoing, Hart elsewhere in *The Concept of Law*, and at times

because it facilitates law reform (Bentham), possibly because it fosters a valuable distance from or non-endorsement of law (Lyons³⁵), possibly because it encourages greater appreciation of the functions of law (Waldron), or possibly for other reasons, but those who hold this position believe positivism is chosen by a society rather than just emerging, and offer reasons why it is better for some purpose other than descriptive accuracy for a theorist to choose positivism over its alternatives.

The normative positivism of Waldron and others is a program of legal understanding and not institutional design. At least for Waldron, although perhaps not for Postema, and certainly not for Campbell,³⁶ positivism is not about adjudication, nor about how non-adjudicative legal decisions should be made, nor about how legal institutions should be designed in order to produce better decisions. And thus normative positivism should be distinguished from what we can call *decisional positivism*, recognizing that those who believe that conceptual positivism is the only genuine positivism will strongly resist applying the “positivism” label to any theory of adjudication or legal decision-making.³⁷ But let us temporarily bracket this objection, because confronting it will be the focus in the ensuing sections. For now, it is sufficient to say only that decisional positivism – some might call it formalism³⁸ – is a view about the design of legal institutions and legal decision-making procedures.³⁹

even in the 1958 article, emphasizes that his primary goal is descriptive accuracy, see Green, “Inseparability” *supra* note 4 at 1039, a view explicitly and persistently reinforced throughout the “Postscript” (e.g. at 240). And thus because there are statements in Hart’s work that would both support and rebut aligning him with normative positivism, it might be preferable to refrain from describing Hart’s view of positivism as either descriptive or normative, in favour of relying on Julie Dickson’s apt description of Hart’s different views about the question as “awkward.” Julie Dickson, “Is Bad Law Still Law? Is Bad Law Really Law?” in *Law as Institutional Normative Order*, *supra* note 14, 161–183, at 164. So even if the warrant for characterizing Hart as a normative positivist is questionable, the justification for claiming that his positivism was entirely descriptive is equally so.

³⁵David B. Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge: Cambridge University Press, 1993) ix–x (where Lyons explains his earlier sympathy with positivism as based on his belief that positivism “embodied a fitting lack of reverence for the law,” a position he then came to question). See also Frederick Schauer, “Positivism Through Thick and Thin” in *Analyzing Law: New Essays in Legal Theory* ed. by Brian H. Bix (Oxford: Oxford University Press, 1998) 65–78; Frederick Schauer, “Positivism as Pariah” in *The Autonomy of Law: Essays on Legal Positivism* ed. by Robert George (Oxford: Clarendon Press, 1996) at 31–56; Frederick Schauer, “Fuller’s Internal Point of View” (1994) 12 *Law and Philosophy* 285–312.

³⁶See Campbell, *The Legal Theory of Ethical Positivism*, *supra* note 8 at 41–68.

³⁷See, for example, the theorists (and quotations) noted above, *supra* note 16. See also Green, “Inseparability” *supra* note 4 at 1036 (“legal positivists were not offering advice. They were trying to understand the nature of law.”).

³⁸See Sebok, *Legal Positivism in American Jurisprudence*, *supra* note 18. On form and formalism more generally, see Robert S. Summers, *Form and Function in a Legal System: A General Study* (Cambridge: Cambridge University Press, 2006).

³⁹David Dyzenhaus, “The Genealogy of Legal Positivism” *supra* note 12, develops an account and defence of what he calls “judicial positivism,” which is in the same neighbourhood as what I describe here. But there is no reason to believe that all or most important decisions of legal application, enforcement, and interpretation are made by judges, and the term I use is intended to emphasize that a positivist theory of how legal actors do or should behave need not be parochially focused on judges alone.

More particularly, it is a view that in its normative aspect seeks to create institutions relying on relatively precise rules, minimizing adjudicative discretion, limiting the law-making power of judges and other law-application officials, restricting legal decision-makers to a limited set of easily identifiable sources, and in general fostering predictability and limiting judicial authority.⁴⁰ Thus, it is a view about the role of posited law in legal decision-making, and it is precisely decisional positivism's view about the role of explicitly and clearly posited law that justifies giving it the positivist label. Bentham plainly held decisional positivist views, and Austin's favourable views about codification place him in much the same camp, albeit less obviously and less famously so.⁴¹ Indeed, it is decisional positivism that best explains Postema's characterization quoted above.⁴²

As exemplified most clearly by Bentham, decisional positivism has a normative agenda, but it is worthwhile emphasizing that the agenda need not have substantive moral or political goals. Bentham used the term "universal jurisprudence" to refer exclusively to questions of legal *form*,⁴³ and although Bentham's concerns with legal form were largely in the service of substantive reform, in theory it would be possible to prefer a decisional positivist view of codification, formalism, and judicial discretion for different substantive reasons at different times and in different places, or for no substantive reasons at all. Moreover, someone could prefer decisional positivism to its alternatives without believing that the legal system needed to be reformed at all, and could simply wish to endorse some legal system's existing approach to the application, enforcement, and interpretation of law.

The foregoing characterization of decisional positivism portrays it as normative, but it can have a descriptive aspect as well. As description, decisional positivism characterizes a legal system as positivist insofar as it relies on, for example, statutes rather than common law, insofar as those statutes are precise rather than vague, insofar as a formalist approach dictates questions of statutory interpretation,⁴⁴ insofar as it limits judicial discretion, and insofar as its domain of acceptable legal sources is a relatively small portion of the array of acceptable social sources. To use

⁴⁰Note that, *pace* Marmor, "Legal Positivism" *supra* note 7, a decisional positivist need not have a view about a judge's *duties*, whether moral or otherwise. Decisional positivism is foremost a view about the design of legal decision-making institutions, and the positivist (or Benthamite, if you will) view of judicial decision-making might, through sanctions or otherwise, attempt to prevent a judge's reliance on her own moral judgements even if, from the judge's perspective, it would be right to rely on those moral judgements when they conflicted with the positive law.

⁴¹John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law* ed. by Robert Campbell (4th edition, rev., London: John Murray, 1873), vol. II, at 108–35 (*Lecture XXXIX*, parts I and II). See also Eira Ruben, "John Austin's Political Pamphlets 1824–1859" in *Perspectives on Jurisprudence* ed. by Ellspeth Attwooll (London: Rowman & Littlefield, 1977) 20–41.

⁴²See text accompanying note 13.

⁴³See Postema, *Bentham*, *supra* note 10 at 304–308.

⁴⁴See Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009) 29–34, 148–170, 228–229; Frederick Schauer, "Formalism" (1987) 907 *Yale Law Journal* 509–541.

positivism as a description, or a scale along which to measure legal systems, is not necessarily to have a view about the desirability of a positivist approach to legal institutional design. A stringently code-based legal system, for example, could be described as positivist even by one who thought such a system a bad idea. Similarly, an approach in which legal decision-makers understood their task as making decisions based on a limited set of pedigreed legal materials rather than on larger conceptions of policy, morality, and pragmatism could be described as positivist even by someone who believed that the characterization was descriptively inaccurate when applied to a particular legal system. When Dworkin in *Taking Rights Seriously* describes his foil as “positivism,” for example, it is decisional positivism he must have in mind, because it is only decisional positivism that would allow characterizing the dissenting opinion in *Riggs v. Palmer*⁴⁵ as positivist, and it is only decisional positivism that could explain Dworkin’s view that positivism has little room for non-pedigreed principles of morality in judicial decision-making.

Thus, decisional positivism has both normative and descriptive dimensions. Normatively, it is the claim that legal systems should be designed to minimize the discretion of judges, police officers, and other legal officials, and descriptively it is the metric along which actual legal systems might be characterized. Descriptively, therefore, the extreme of the civil law ideal type (or, perhaps better, stereotype, or maybe even caricature), better exemplified by Bentham’s aspirations than by the legal system in any real civil law country, might lie at the pole of extreme decisional positivism, and a legal system pervaded by common law methods, instrumentalism, and anti-formalism, arguably instantiated in the contemporary United States, might lie at the opposite pole of minimal decisional positivism.⁴⁶ Decisional positivism in its non-normative aspect is thus the scalar or non-binary measure of just how heavily legal decisions are constrained by the texts of formal legal sources and just how much the array of those sources is a limited subset of the full array of social sources, a subset identifiable by pedigree and not by content.

⁴⁵ 22 N.E. 188 (N.Y. 1889).

⁴⁶ See Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (Oxford: Clarendon Press, 1987); Richard A. Posner, *Law and Legal Theory in England and America* (Oxford: Clarendon, 1996); Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, New York: Cornell University Press, 1982). Among the iconic works of the American instrumentalist and anti-formalist tradition would be Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA: Harvard University Press, 1982); Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, rev. ed. 1969); Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* ed. by William N. Eskridge, Jr. and Philip P. Frickey (New York: Foundation Press, 1994); Oliver Wendell Holmes, Jr., “The Path of the Law” (1897) 10 *Harvard Law Review* 457–478; Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960).

14.4 The Multiple Standpoints of Normative Positivism: A Brief Digression

Scholars have debated whether the purely descriptive pretensions of conceptual positivism are even possible,⁴⁷ but normative positivism does not require that descriptive conceptual positivism be impossible, and normative positivism's desirability does not presuppose its inevitability. Even if it were possible to discover and describe the concept of law in a value-neutral way, it could still be worthwhile to consider whether the concept so described should be endorsed or condemned, promoted or restricted, changed or perpetuated. As long as we acknowledge the socially constructed and thus non-eternal nature of the concept of law,⁴⁸ it is open to the theorist or citizen to consider what attitude to have – and what actions to take on the basis of that attitude – about the product of that social construction, even assuming the ability to describe what has been constructed at some moment in time.⁴⁹ Consequently, it is useful to reflect on the claims behind normative positivism, and, similarly, on the claims behind the normative version of decisional positivism. Partly by way of digression, therefore, a bit more can be said about normative positivism, with specific reference to the fact that it is not always clear from the relevant writings just what it is to be normative, who is to be normative, and what they are supposed to be normative about.⁵⁰

Thus, although the normative is the domain of the “ought” rather than the “is,” the question arises about who it is who ought to do what. Waldron, for example, is not entirely explicit about whether in urging normative positivism *he* is urging that law be understood in a positivist way, or urging other legal theorists to understand law in a positivist way, or describing the fact that legal theorists understanding law in a positivist way have good reasons for that understanding, or whether he is describing or joining those who believe that it would be better for society to understand law in a positivist way. Each of these positions is possible, but it is important to understand the nature of the normative claims that are being advanced.

⁴⁷ Compare, for example, Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001); Marmor, “Legal Positivism” *supra* note 7; Joseph Raz, “Can There Be a Theory of Law?” in *The Blackwell Guide to the Philosophy of Law*, *supra* note 7 324–42; Philip Soper, “Choosing a Legal Theory on Moral Grounds” (1986) 4 *Social Philosophy and Policy* 31–48; Wilfrid J. Waluchow, *Inclusive Legal Positivism*, *supra* note 26 at 86–98, with Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006) at 140–240; Finnis, *Natural Law and Natural Rights*, *supra* note 31 at 3–22; See also texts by Perry, “Hart’s Methodological Positivism” *supra* note 31.

⁴⁸ See Leslie Green, “The Concept of Law Revisited” (1996) 94 *Michigan Law Review* 1687–1717, at 1687–1692.

⁴⁹ The preceding sentences in the text summarize the argument in Schauer, “The Social Construction of the Concept of Law” *supra* note 33.

⁵⁰ A valuable discussion is in Stephen R. Perry, “The Varieties of Legal Positivism” (1996) 9 *Canadian Journal of Law and Jurisprudence* 361–388. See also Leslie Green’s distinction between methodological and object-level claims in Green, “Inseparability” *supra* note 4 at 1038–1039.

Accordingly, if – and it is contested⁵¹ – Hart is taking a normative stance in his debate with Fuller, the normative position he adopts is that it is better for society to understand law in a positivist way not because law and morality just are distinct, but because understanding them as distinct will foster the social good of disobedience to bad laws. Implicit in this view is the assumption that a concept of law is something that society constructs, and that can be constructed in one way or another. With the choice thus open, Hart's normative positivism can be seen as a plea to society to have a particular understanding about law,⁵² and to frame its legal understanding such that law and morality are conceptualized as separate normative domains.

Alternatively, other normative positivists – Bentham is a good example – might be addressing their prescriptions about positivism to theorists and commentators, just as Bentham was, in part, addressing his prescriptions to Blackstone and those who might have been influenced by him. Such normative positivists would prefer that theorists and commentators be positivist for some instrumental reason, perhaps to motivate law reform efforts more effectively, or perhaps just to aid in clarifying their thought. Still, the normative posture is one of urging theorists and commentators to choose, promote, endorse, or encourage positivism for reasons other than descriptive accuracy.

Because normative positivism and one dimension of decisional positivism are normative postures, it is thus important to situate the normative voice in the various versions of these approaches. No particular voice, or standpoint, is necessarily superior to any other, but it is difficult to understand any normative position, including the normatively-focused positivisms I discuss here, without comprehending the source, the target, and the subject of the prescriptions being discussed.

14.5 Bentham's Agenda – And Austin's Too

Before delving into philosophical issues of conceptual priority and causation, it is worthwhile pursuing a largely historical inquiry. Thus, we know that Bentham subscribed to all three dimensions of positivism described above, although of course he never labelled any of them “positivist.” Labels aside, however, there is little doubt that Bentham subscribed to the separation of law and morality, believing that the existence and identification of a norm as a legal one was to be distinguished from its

⁵¹ See Hart, “Positivism and the Separation of Law and Morals” *supra* note 34.

⁵² It would be extravagant to suppose that this plea would have any direct or immediate effect, but the same could be said about the normative voice in almost all of moral and political philosophy. The enterprises of normative moral, political, and legal philosophy are premised on the belief that philosophical progress might eventually and cumulatively translate into social change, but only the delusional participants in these enterprises believe that such change will take place in the short term or as the consequence of the efforts of any single theorist.

moral status or desirability. Moreover, Bentham was not only committed to the separability of law and morality, he believed that morality and positive law were in fact separate, even if, to his constant annoyance, people often failed to recognize it. What it means for law and morality to be separate is frequently contested and far from straightforward, but there is little doubt that Bentham believed law and morality to be distinct domains of thought. And thus if we seek to characterize Bentham in terms of the versions of positivism described above, the conclusion that Bentham was a conceptual positivist should attract little disagreement.⁵³

But Bentham's conceptual positivism was not a function of disinterested observation, and nor, to a significant extent, was Austin's. Both were normative as well as⁵⁴ conceptual positivists by virtue of believing that there was a non-descriptive point in separating law from morality, and that point was to facilitate the reform of the law. Bentham was of course a vehement critic of existing law, both in detail and in the large. The common law was for him anathema, as was judicial legislation and the entirety of the law of evidence,⁵⁵ and these examples demonstrate the scale of Bentham's critique. His objections to English law went to large blocks of it – perhaps all of it – and separating what law is from what law ought to be, and thus separating law and morality, was essential to Bentham's aim of reforming the substance and structure of the English legal system. Moreover, and of particular relevance in the present context, Bentham's normative agenda was not subsidiary to his conceptual or descriptive program. On the contrary, it was his normative agenda that drove the importance of distinguishing law as it is from law as it ought to be. In terms of motivation – which is of course not the same as logical or conceptual priority – there is little doubt that Bentham's conceptual positivism was developed for normative reasons.

Things are not so clear with respect to Austin, who plainly had some goals that were purely descriptive. But Austin also pursued an extensive law reform agenda,⁵⁶ described the advantages of distinguishing the legal is from the legal ought for

⁵³ I bracket the interesting methodological question of whether conceptual and normative positivism are mutually exclusive. If the conceptual positivist believes that there is a pre-existing concept that can be described without having or presupposing normative commitments, and if the normative positivist believes that constructing a concept of law must be based on normative considerations, then the two are incompatible. But if one believes that concepts can be created for normative reasons without themselves being normative, or if one believes that people can have normative reasons for identifying and stressing non-normative concepts, then normative and conceptual positivism can co-exist, and that modest claim is all that I make about Bentham here.

⁵⁴ The “as well as” is important. Coleman warns against “confusing” legal positivism with “programmatically or normatively interested” legal positivism, especially Bentham, might have had, “Negative and Positive Positivism” in *Hart's Postscript*, *supra* note 3, but I do not deny that conceptual and normative positivism are different. I will presently challenge Coleman's claim that only the former is entitled to be called “positivism,” and question his view that the latter (note the word “might”) is contingent and secondary, but I freely acknowledge that the two are different.

⁵⁵ See William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985).

⁵⁶ See Wilfrid E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* (London: The Athlone Press, 1985).

reasons other than descriptive accuracy,⁵⁷ believed that his normative law reform positions were facilitated by his theory of law and that his theory of law flowed from his utilitarianism,⁵⁸ and in his later writings on codification showed an especially strong normative side.⁵⁹ Moreover, there is reason to believe that Austin's reputation as non-normative has been fuelled, in part, by the less normative goals of some of his successors – Thomas Erskine Holland, especially – whose expositions of Austinian ideas stripped away the normative aspects that for Austin co-existed with the descriptive.⁶⁰

Turning from normative to decisional positivism, and returning to Bentham, we see that his proposals for reform reveal him also to be a decisional positivist. Embodying his well-known scorn for judges, Bentham became a champion of codes, of the civil law as he (perhaps mistakenly) understood it, and of a system of law in which judicial discretion was minimized. It was a feature of Bentham's legal codes, therefore, that they attempted to preclude judges and other legal decision-makers in individual cases from making political, policy, economic, or moral judgments. Judicial decision-making was limited, if it had to exist at all, to the application of linguistically clear codes to particular events, with legal outcomes to be reached almost entirely by applying the ordinary meaning of the terms in the legal codes to the facts of particular cases. Determining moral questions was simply not part of the process.⁶¹

Austin was more sympathetic to judicial legislation than Bentham, but not much more. They did differ sharply on whether judicial legislation existed and whether it was part of law properly so called, with Austin believing in the existence of judicial legislation and its status as law,⁶² while Bentham denied that judicial legislation was entitled to be called law at all. With respect to the *desirability* of judicial legislation,

⁵⁷ *Ibid.*

⁵⁸ “Analytical positivism rests, first, on the command or imperative theory of law – that that is law which is laid down by duly constituted political authority – in the case of England, by the sovereign Parliament – and that only that is law. From the command theory of law is *derived* a normative proposition that judges have no business making law, for that is the business of the legislature and it would be usurping the legislator's functions for the judges to do so.” Edward McWhinney, “English Legal Philosophy and Canadian Legal Philosophy” (1958) 4 *McGill Law Review* 213–241, at 226 (emphasis added). Although disagreeing with McWhinney that Austin denied the *existence* of judicial legislation, Austin's biographer William L. Morison does not take issue with the claim that the foregoing claim about the derivation of a view about adjudication from Austin's central descriptive and conceptual claims applies more to Austin than to other nineteenth century analytic philosophers of law. William L. Morison, “Some Myth About Positivism” (1958) 68 *Yale Law Journal* 212–233.

⁵⁹ Austin, *Lectures on Jurisprudence*, *supra* note 41.

⁶⁰ See Morison, *supra* note 58 at 152.

⁶¹ This crude and simple characterization of Bentham's view about judging does not capture the far more sophisticated and nuanced position in Postema, *Bentham*, *supra* note 10, but it is sufficient here simply to stress Bentham's overall skepticism about the virtues of judicial power.

⁶² By virtue of legislative authorization, Austin believed.

however, Austin's views shifted over time. In the *Province of Jurisprudence Determined*, he says very little about judging or judge-made law, but does describe it as "highly beneficial and even absolutely necessary,"⁶³ even while criticizing judges for legislating in a "timid, narrow, and piecemeal manner" and "legislating under cover of vague and indeterminate phrases." But by the time Austin turned his attention more directly to codification, he not only wrote extensively in support of legislative codification generally, but also described it as "expedient," especially in light of the "evils inherent in judiciary law," evils he discussed at some length.⁶⁴ The view that Austin was not critical of judicial legislation thus does not stand up to an examination of Austin's writings, nor to his active promotion of, and involvement in, the codification movement which flourished during his life. Austin supported codification, believed that judicial and parliamentary legislation should be specific and discretion-limiting, and, most importantly, believed that judicial legislation could and should be diminished were Parliament to legislate more clearly, precisely, and comprehensively. Unlike Bentham, Austin did not believe that judicial legislation was not really law or that it could be eliminated entirely. And, again unlike Bentham, Austin believed that codification should consolidate and clarify existing legal principles, rather than starting anew. But if normative decisional positivism is the view that the legal system should be structured so that both the subjects of the law and the legal decision-makers who apply, interpret, and enforce it need have little recourse to morality (or policy, for that matter), then Austin plainly qualifies as a decisional positivist, being far closer to Bentham than to the celebrants of the common law, whether in his time or now.

14.6 The Core Commitments of Legal Positivism

We are now in a position to identify and summarize the areas of common ground and those of disagreement. It is clear that Bentham and Austin, among others, subscribed to conceptual positivism, normative positivism, and decisional positivism. That this is so as historical fact is typically not denied by those who resist understanding both normative and decisional positivism as genuinely positivist. Rather, the critics insist that normative and decisional positivism (or any other view about adjudication) are simply contingent or accidental features of the thought and work of Bentham and Austin.⁶⁵ Only conceptual positivism, they insist, lies at the genuine

⁶³ Austin, *Province*, *supra* note 3 at 163.

⁶⁴ Austin, *Lectures on Jurisprudence*, *supra* note 41 at 108–135 (*Lecture XXXIX*, parts I and II).

⁶⁵ Coleman, *The Practice of Principle*, *supra* note 7 at 11: "Legal positivism makes a conceptual, or analytic claim about law, and that claim should not be confused with programmatic or normative interests certain positivists, especially Bentham, might have had."

core of legal positivism. For the critics, legal positivism is a descriptive claim about the concept of law – about the nature of law – often taking the form of some version of the Separation (or, better, Separability) Thesis⁶⁶ – the view that law and morality are conceptually separate (or, to some, separable).⁶⁷ The fact that Bentham, Austin, and Hart also believed that certain political, moral, and institutional design advantages flowed from understanding law in this way was little more than a fortunate side-effect of identifying the reality of the separability of legality and morality in the concept of law. And the fact that Bentham and Austin were supporters of codification and a limited domain conception of legal decision-making was again only a coincidence, or, more fairly, a feature of their thought not analytically connected with their positivism.

But exactly what kind of claim is the claim that conceptual positivism – or a claim about the nature of law – is the “core commitment”⁶⁸ of legal positivism? The claim is hazy, because there are different notions of what it is for something to be at the “core.” The core, after all, is a spatial metaphor often ill-suited to capture notions of salience, importance, or theoretical centrality, which is why it is not self-evident that the core is the most important part of an apple or the most scientifically significant part of the planet Earth. To say that something is at the core in a non-physical way is thus to make an instrumental claim in need of further clarification. If the claim is historical, and if locating the historical core of positivism is largely an inquiry into motivation, or into the importance or salience of a particular question for particular people, then, as discussed above, it is difficult to deny that decisional or normative positivism and not conceptual positivism is the “core” commitment of legal positivism, at least as understood by Bentham, Austin, and most others of their generation.

Those who claim that conceptual positivism is the historically core commitment of positivism might derive some degree of support from Austin’s occasionally more exclusively descriptive motivations, but their claim is typically a philosophical and

⁶⁶ And/or some variety of the Social Thesis (or, occasionally, the Sources Thesis), the view that what counts as law is a question of social fact. See Leiter, “Legal Positivism” *supra* note 7 at 1141; Raz, “Legal Positivism and the Sources of Law,” in Raz, *The Authority of Law*, *supra* note 7 at 37–52.

⁶⁷ See, for example, Brian H. Bix, “Legal Positivism” in *The Blackwell Guide to the Philosophy of Law*, *supra* note 7 at 31: “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.” Bix goes on to say that positivism does not have anything to say “about how certain ways of operating (...) should be evaluated or reformed” (*ibid.*). Also, “positivism is a theory of law, while formalism is a theory of adjudication. If positivism is one’s theory of law, nothing substantial follows about one’s theory of adjudication.” See his “Legal Positivism” *supra* note 7 at 1149.

⁶⁸ Characterizing the issue in terms of the “core commitments” of legal positivism is ubiquitous. See, for example, Kenneth Einar Himma, “Substance and Method in Conceptual Jurisprudence” (2002) 88 *Virginia Law Review* 1119–1227, at 1152; Andrei Marmor, “Legal Positivism” *supra* note 7 at 685; Scott Shapiro, “Law, Morality, and the Guidance of Conduct” (2000) 6 *Legal Theory* 127–153, at 127 and 129.

not a historical one. More specifically, those subscribing to the view that the core commitment of legal positivism is a conceptual claim about separability make much of the fact that conceptual positivism is a necessary condition of both normative and decisional positivism, and is consequently logically and philosophically prior to them. Against this view, Waldron has insisted that the only conceptual positivism presupposed by normative positivism is a thin one accepted by Aquinas and Austin alike and well beyond controversy.⁶⁹ And Postema argues that treating conceptual positivism as the necessary condition of normative positivism rests on a view of concepts and language that fits poorly with the social nature of concepts in general and the concept of law in particular.⁷⁰ Waldron and Postema may well be correct, but to make things as difficult as possible for my own conclusion let us assume that their arguments are unsuccessful and that the possibility of a conceptual separation of law and morality is a logical prerequisite for normatively urging the conceptual separation of law and morality; and let us also assume that the (actual) conceptual separation of law and morality is a logical prerequisite for advancing the kind of adjudicative regime that Bentham, Austin, and others have urged. Thus I assume that the three varieties of positivism sketched above are in a logical and linear relationship to each other, with conceptual positivism being a prerequisite for both normative and descriptive positivism, and normative positivism being also a prerequisite for decisional positivism. The question then is whether, as a matter of philosophy and not of history, the first should be treated as the core of legal positivism and the second and third as mere contingent offshoots not entitled to the designation “positivist” at all. If the truth of conceptual positivism is a necessary condition for the truth – or falsity – of normative positivism, and so too, *mutatis mutandis*, for decisional positivism, then conceptual positivism is the core of positivism, with normative and decisional positivism being, at best, positivism by derivation, positivism by analogy, or simply perversions of positivism.

This argument assumes that when one thing is a necessary condition for another then the former is the core concept and the latter is merely contingent. But why should that be so? Consider the theory of natural selection. In order for natural selection to be correct, there must exist a mind-independent physical reality. That form of epistemic objectivism, controversial in some circles, is a necessary condition for the evolutionary theory of natural selection, but to describe the claim of a mind-independent physical reality as the core commitment of the theory of natural selection, rather than simply a precondition or presupposition of it, misses the point of the entire theory. Even though the theory of natural selection, like any other scientific theory, is a descriptive one, a descriptive theory – or account – has a point, and we lose the point of a descriptive theory if we treat it as subservient to the sometimes contested facts and theories that are preconditions of its plausibility. Conceptual analysis may well be logically prior to evaluation, as David Lyons argues in this

⁶⁹ Waldron, “Normative (or Ethical) Positivism” *supra* note 11.

⁷⁰ Postema, *Bentham*, *supra* note 10.

context,⁷¹ but it is hardly clear that what is logically prior is more important or closer to some “core.” For that we need further argument.

Not only is it not apparent that preconditions are more central than what they are preconditions of, but it is also not obvious that logical relationships are more important than other types of relationships. It is true that the relationship between conceptual and decisional positivism is neither logical nor conceptual. A conceptual positivist could well reject what I call decisional positivism and he calls formalism. More importantly, one could believe that law and morality are conceptually distinct and that legal decision-makers should make decisions on the basis only of the former, but one could also believe that law and morality are conceptually separate but that legal decision-makers should draw on both in making their decisions or should allow morality to trump positive law in cases of conflict. It is thus true that conceptual positivism as an account or theory of the nature of law in no way *entails* any view about what judges or other legal actors should do.

But why is logical entailment the correct kind of relationship to expect? It is true that *A* being a necessary condition of *B* does not mean that *A* logically entails *B*. And thus the fact that conceptual positivism is a necessary condition of decisional positivism does not deny that it could be a necessary condition of some alternative to decisional positivism as well. To say that conceptual positivism is the core commitment of positivism because it is a necessary condition of both decisional positivism and decisional non-positivism is to make the evaluative judgement that identifying the precondition is more important than the decision between the two consequences, but that determination is hardly logically compelled.

Moreover, there is no reason to believe that logical relationships are necessarily more important than empirical ones. Suppose, for example, that judges contingently internalized something we might call the legal point of view or legal consciousness. Were that the case, then as an empirical matter such judges might be more inclined to make decisions entirely on the basis of positive law in a society with a positivist concept of law than in one with a natural law concept. This relationship would be neither logical nor conceptual, but the contingent empirical connection between the two might explain associating the two in a relationship of probabilistic causality.

There are other types of relationships that might exist as well. John Gardner, for example, argues that the core commitments of positivism are those shared by Hobbes, Bentham, Austin, Kelsen, and Hart,⁷² and secondarily by Coleman and Raz, but it is again curious as to why that which is shared by these admittedly major figures in the positivist tradition should be considered the core commitment positivism. If we can associate certain commitments with some but not all of those figures, are those commitments less important than the ones that all share? Moreover, other commitments – those of normative positivism, for example – are shared by Hobbes,

⁷¹ David Lyons, “Founders and Foundations of Legal Positivism” (1984) 82 *Michigan Law Review* 722–739.

⁷² Gardner, “Legal Positivism” *supra* note 16.

Bentham, Austin, MacCormick, Waldron, Postema, and conceivably (at least according to Waldron) Raz,⁷³ among others. So the question is then whether the commitments shared by some stalwarts of the positivist tradition but not others are the most important, and then we cannot avoid deciding why it is we want to know, as opposed to identifying by fiat the figures whose shared commitments are the most important. Indeed, if we put aside Kelsen and limit our inquiries to the English-language analytic tradition, the only figure on Gardner's primary list who is not associated with normative positivism is Hart, which is not only debatable, but brings us back to the beginning, and back to the question whether Hart's understanding of legal positivism should be considered uniquely authoritative as well as exclusive.

Moreover, perhaps the relationship between conceptual and decisional positivism is historical, psychological, or analogical. Or perhaps it is simply that the questions and issues posed by normative or decisional positivism are at some times and not others more important than those posed by conceptual positivism, although I emphasize the "perhaps," and make no actual claim about relative importance here. Rather, I seek only to show that even if conceptual positivism is a logical prerequisite for normative or decisional positivism, nothing about which lies at the core and which is at the fringe flows from that fact. And since the alleged priority of conceptual positivism follows even less historically than philosophically, there is no reason, at least on the basis of the existing arguments, for treating normative and decisional positivism as less entitled to the positivist mantle than conceptual positivism.

14.7 Conclusion: On the Diversity of Jurisprudential Inquiry

The question is not whether conceptual legal positivism is a true theory of the nature of law. Rather, it is whether the question to which conceptual legal positivism is the answer is the most important⁷⁴ question to be asked about law. It was not for Hobbes, it was not for Bentham, and it may not have been even for Austin. But that is not to say it is not important. Still, if we accept that there are other important questions, that those questions were central to many of the major figures in a positivist tradition that long predated Hart, and that some of those questions are important to us

⁷³Or at least this is the interpretation of Raz offered by Waldron, "Normative (or Ethical) Positivism" *supra* note 11 at 412 fn 7.

⁷⁴I emphasize that I do *not* take "important" to be synonymous with "practically important." There are philosophically important questions that have little or no practical or immediate importance, and there is no reason at all why philosophers of law should not treat such questions as worthy of their attention.