

REDRAWING THE DIVIDING LINES BETWEEN NATURAL LAW AND POSITIVISM(S)

*Jeffrey A. Pojanowski**

THE citadel of Hartian jurisprudence, while well-defended, is drawing increasing fire. Most besiegers, moreover, do not ride under the banner of Hart's most famous rival, Ronald Dworkin.¹ Rather, a motley coalition of consequentialists, natural lawyers, and others defying standard labels seek to fling open the doors, windows, and drawbridges of analytic jurisprudence to let in the fresh air and light of political and moral theory, history, metaphysics, and even theology.² Others seek to remodel from within, reconstructing Hart's edifice on naturalist foundations, rather than conceptual analysis.³

It is not surprising that many papers at a conference on jurisprudence and history run in this vein. Anglo-American jurisprudence, before it insulated itself in conceptual analysis and defined itself in opposition to broader questions, was properly a "sociable science," to use Professor Postema's phrase from his symposium article.⁴ And, in part due to the exemplars of history, so it may become again. By drawing on Bentham and Hobbes, Professor Dan Priel's *Toward Classical Positivism* points

* Associate Professor of Law and Robert & Marion Short Scholar, Notre Dame Law School.

¹ See Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Guide for the Perplexed*, in Ronald Dworkin 22–55 (Arthur Ripstein ed., 2007) (surveying the famed disagreements between these protagonists).

² See, e.g., Tom D. Campbell, *The Legal Theory of Ethical Positivism* 3 (1996) (emphasizing the systemic moral benefits of a system in which "identification and application of law [is] kept as separate as possible from the moral judgments which go into making law"); Maris Köpcke Tinturé, *Concept and Purpose in Legal Theory: How to "Reclaim" Fuller*, 58 *Am. J. Juris.* 75, 95–96 (2013) (drawing on the work of John Finnis to explain why a natural lawyer values law's positivity); Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 *Ratio Juris* 1, 9 (2010) (criticizing Hartian positivism's narrow focus on "essential" conceptual features while ignoring sanctions and coercion); see also Sean Coyle, *Dimensions of Politics and English Jurisprudence* 9 (2013) ("Jurists and political philosophers ought not to be so impressed with the understandings implied by analytical jurisprudence . . . [For] the question of the city and of the soul is central to the problems of political philosophy.").

³ See Brian Leiter, *Naturalizing Jurisprudence: Three Approaches*, in *The Future of Naturalism* 197–208 (John R. Shook & Paul Kurtz eds., 2009); accord Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 *Legal Theory* 75, 77–80 (2005).

⁴ Gerald J. Postema, *Jurisprudence, The Sociable Science*, 101 *Va. L. Rev.* 869, 869 (2015).

forward toward more fruitful methods of jurisprudence while illuminating the recent history and current state of inquiry.⁵ His article demonstrates the virtues and promise of a more catholic approach to jurisprudence. It also raises challenging questions about the direction to take this rediscovered path, and I am not sure I always agree with his suggested answers. Any misgivings I have about Priel's particular approach, however, do not diminish my appreciation; I find even the points of disagreement to be live and meaningful, and that itself is refreshing.

As the introductory remarks suggest, I welcome Priel's call to broaden jurisprudential inquiry. It seems that the major dispute in jurisprudence as understood today—disagreement between positivists and natural lawyers⁶—can be cogently encapsulated in a pithy essay like Brian Bix's *On The Dividing Line Between Natural Law Theory and Legal Positivism*.⁷ As insightful and persuasive as I find that essay, one is left thinking that there has *got* to be more to general jurisprudence, especially when the central, conventional debate goes not to the relevance of moral considerations, but to whether those concerns pertain to legal philosophy. The standard response to this complaint is that the questioner wants to pursue political or moral philosophy, not general jurisprudence.

Priel does not think he has shown up at the wrong building on campus. He argues for a new dividing line between natural law and positivism, one that does not turn on whether moral criteria are components of the rule of recognition in all possible legal systems. Classical positivists like Bentham and Hobbes agreed with natural lawyers that jurisprudence is inextricably interwoven with theorizing about metaphysics, human nature, morals, and politics, in that order. Classical positivism would not find it strange that even John Finnis, the natural lawyer most likely to speak the language of contemporary jurisprudence, still places moral philosophy, political theory, and human nature at the core of his jurisprudential magnum opus. (Or that he concludes it with a chapter titled "Nature, Reason, God.")⁸

Rather, the dividing line between natural law and classical positivism is metaphysical. For classical positivists, natural lawyers erroneously ac-

⁵ Dan Priel, *Towards Classical Positivism*, 101 Va. L. Rev. 987 (2015).

⁶ Or, more accurately, natural law as imaginatively diminished by positivist interlocutors. See *id.* at 988–89.

⁷ Brian Bix, *On the Dividing Line Between Natural Law Theory and Positivism*, 75 Notre Dame L. Rev. 1613 (2000).

⁸ See John Finnis, *Natural Law and Natural Rights*, chs. 3–8, 13 (2d ed. 2011).

cept a nonmaterialist understanding of nature in general and human nature in particular. Once we start with the right philosophical building blocks and study man and the state as an empirical science, we can better understand law's relation to morality and political theory. More importantly, we can reform law and its practice in light of the human sciences. This last aspect traces another dividing line—the one between classical and modern positivism. Most contemporary positivists seek to understand the concepts and the internal view of legal practitioners, rather than situating and reforming law from the external stance of social science and normative philosophy.

As noted, I applaud Priel's bid to widen the gauge of jurisprudential inquiry.⁹ That said, the article raises questions, some of which suggest friendly amendments, others of which challenge its thesis. First, and perhaps most technically, Priel could explain a bit more how contemporary positivism is not materialist in its conception of nature. This may be true, but it is not as well developed in the article as the metaphysical divide. Another interesting question, perhaps beyond the scope of the article, concerns whether contemporary positivism's metaphysical parsimony is mere methodological bracketing or rather a reflection of skepticism about any richer metaphysics generally.¹⁰ If denial of metaphysics is suggestive of an implicitly materialist metaphysics, perhaps some contemporary positivists should follow their deepest held premises toward the classical form Priel advocates.

A more direct challenge goes to whether Priel's account of classical positivism and natural law, along with his criticism of contemporary positivism, relies too much on an external standpoint. As an interpretive matter, Priel seems correct regarding classical positivism. Bentham and Hobbes, for better or worse, were committed externalists, and Priel is correct to not only underline Bentham's well-known critique of the common law but also to flag Hobbes's underappreciated *A Dialogue Between a Philosopher and a Student, of the Common Laws of England*.¹¹ There is also some truth to his claim that natural lawyers subscribe to the

⁹ See generally Jeffrey A. Pojanowski, *Legal Thought in Enlightenment's Wake*, 4 *Jurisprudence* 158, 162 (2013) (questioning whether contemporary jurisprudence can or should avoid broader questions of morality and even metaphysics).

¹⁰ See *id.* at 170–71 (suggesting this possibility).

¹¹ Thomas Hobbes, *A Dialogue Between a Philosopher and a Student, of the Common Laws of England* (1681), *reprinted in Writings on Common Law and Hereditary Right* 1 (Alan Cromartie ed., 2005).

external perspective in jurisprudence. Some natural lawyers can at times seem pointedly unconcerned with the understanding of legal practitioners and officials. Yet, while situating or even grounding law in matters of metaphysics and political and moral philosophy has its benefits, I wonder if such purely external approaches commit the *inverse* of the error Priel ascribes to contemporary positivists.¹²

Put another way, a general jurisprudence that jettisons either the internal perspective or external considerations seems incomplete. Some natural lawyers, for example, see deep value in the legal practitioner's tendency on a workaday basis to treat legal materials, reasoning, and validity as relatively isolated from general moral considerations.¹³ This specialized, artificial body of practical reason, while ultimately justified on nonlegal requirements like the moral necessity of cooperation and coordination for human flourishing, cannot function if the practitioners primarily view the enterprise in external terms. To be sure, the practitioners must *also* understand that law's peculiar form of reasoning and its frequent focus on legal validity is only valuable in light of those higher purposes, a consideration that leads many natural lawyers to be more likely than contemporary positivists to treat law as presumptively binding as a matter of morality. The sense here, however, is that for law to serve its ultimate purposes—and for the institution to be understood—the creative tension between internal practice and external goals must be managed, rather than theorized away.

Priel is correct to identify the error of treating the internal perspective as exclusively defining the province of jurisprudence, but a general jurisprudence that treats beliefs of legal officials and legally conscious citizens as secondary to the enterprise, or worse, strikes me as problematic. Nor does this objection depend on a commitment to an antipositivist outlook, either. Even Oliver Wendell Holmes, externalist *par excellence* in his academic writings, in practice usually tended the path of law with the careful shears of the jurist, not the bulldozer of a scientific planner. A materialist account in which the attitudes of practitioners are understood

¹² For an illuminating analysis and critique of contemporary jurisprudence's use of the "internal point of view," see Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 Va. L. Rev. (forthcoming 2015).

¹³ See generally Köpcke Tinturé, *supra* note 2, at 83–84 (explaining how lawyers can make law by disregarding morality and other considerations as long as it does not jeopardize the validity of the system, while arguing that even though lawyers can do this, it does not mean they do well as a moral matter).

as vital to the enterprise, even if not entirely constitutive of it, seems highly plausible. In that light, Bentham's sneering survey of the common law might resemble the attitude of the naïve anthropologist who concludes the "natives" under observation are irrational before grasping the texture of the culture and the relationship between social practices and higher commitments.

That said, I find it less likely that natural lawyers would be disposed to undertake a root-and-branch critique and reconfiguration of a legal system in Benthamite fashion. Nor do I see a Hobbesian writing a sympathetic, reconstructive analysis of Blackstone or the declaratory theory of law in the way, say, John Finnis or Albert Alschuler have.¹⁴ Perhaps this difference is contingent: A Hobbesian's or Benthamite's external point of view might ultimately lead the theorist to the way we run and talk about our legal system. But there is a strong vein of skepticism—cynical acid—in classical positivism about the value and determinacy of legal discourse's strange and subtle ways and vocabulary.¹⁵ Accordingly, it is worth wondering whether this difference does, as Priel says, go back to metaphysics. Along Priel's dividing line, the natural lawyer is committed to the existence and reconciliation of two spheres of being—material and nonmaterial—whereas the classical positivist aspires to avoid multiplying entities beyond necessity. It is not surprising, then, that early legal realists saw theology and fictitious entities behind every corner of conventional legal discussion and practice,¹⁶ or that, traditionally, being an earthly lawyer came "naturally" to clergy and Talmudic scholars. If there is some value to the internal point of view in jurisprudence, then, perhaps the natural law tradition, not conceptual positivism, is its most natural home.

¹⁴ See 4 John Finnis, *Blackstone's Theoretical Intentions* 189–210 (1967), *reprinted in* *Philosophy of Law: Collected Essays* 189 (2011); Albert Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 *Pepp. L. Rev.* 491, 492–93 (2009); John Finnis, *The Fairy Tale's Moral*, 115 *Law Q. Rev.* 170, 170 (1999).

¹⁵ Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 462 (1897) (explaining how a vague legal concept "shrinks and at the same time grows more precise when we wash it with cynical acid").

¹⁶ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 809–11 (1935) (deriding the "heaven of legal concepts").

