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Positivism and the Separation of Law and Jurisprudence

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Comparative Research in
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POSITIVISM AND THE SEPARATION OF LAW AND JURISPRUDENCE^{*}

Dan Priel^{**}

Abstract. This short essay argues that legal philosophy has grown excessively insular. It identifies three ways in which this has happened: jurisprudence has become isolated from legal practice; it has adopted a methodology that encourages a separation between legal philosophy and other interdisciplinary approaches to law as well as other branches of philosophy; and it is committed to the substantive view that looks at law as a distinct social practice. The result has been a discipline that speaks on ever narrower problems mostly with itself. After presenting this state of affairs, the essay proposes various possible ways of changing jurisprudence to make it less isolated and more engaged. They include closer links with legal practice, political philosophy, science, and a rethinking of jurisprudential theories as models rather than a search for the “nature” of law.

I.

The mark of contemporary analytic jurisprudence is its intellectual isolation. I have in mind three kinds of isolation:

(1) *Isolation from legal practice*: legal philosophy is largely uninterested in legal practice. It is not uncommon to find a book in legal philosophy that does not cite a single case or statute and seems little interested in the actual attitudes of legal practitioners. Indeed, the feeling one sometimes gets from jurisprudential work is that referring to actual legal practice is something of a philosophical sellout, that a concern for the everyday workings of a legal system is something that somehow undermines the purity of philosophical inquiry into law. When this attitude is coupled with the view that legal philosophy should focus only on those features that legal systems necessarily have, the result is the kind of inquiry that almost inevitably ignores almost every aspect of law. This attitude is sometimes accompanied by the view that considers looking for practical relevance to jurisprudential inquiries as somehow unnecessary or even wrong. Jurisprudential work is justified as the search for knowledge for its own sake, one that therefore need not have any practical relevance. It is even sometimes suggested that to look for such practical relevance—something that could serve as a check against this sort of isolation in jurisprudential work—is an ‘anti-philosophical’¹ misunderstanding of what jurisprudence is about. The result is that the sort of object that remains for inquiry is not recognizably the law that most lawyers, or lay people, have in mind when they talk about law. Worse still, as a result of this isolation jurisprudence fails at achieving even the more modest aim of illuminating aspects of legal practice. Despite claims for providing a ‘descriptive’ account of the nature of law, the result is something that, I suspect, would be unrecognizable to most practitioners.

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^{*} This essay summarizes in concise form some thoughts developed in other works of mine. For fuller argument see my essays cited below.

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¹ John Gardner, “Legal Positivism: 5½ Myths”, 46 *American Journal of Jurisprudence* 199, 203 (2001). Quite a few great philosophers, including some that Gardner mentions as founders of legal positivism were anti-philosophical according to that standard.

(2) *Isolationist methodology*: the predominant view in legal philosophy is opposed to the relevance of potential insights from the natural and the social sciences.² The main ‘device’ used is conceptual analysis from the so-called ‘internal point of view’. This expression means different things to different scholars, and here I will not try to disentangle all those different meanings. But in different ways they all use this expression to block inputs from other disciplines. For H.L.A. Hart, for example, the internal point of view, among other things, was contrasted with the methods of the natural sciences that he considered ‘useless’ for the purpose of explaining social normative phenomena. What Hart offered instead was armchair sociology. One might have thought Hart’s ‘descriptive’ approach that sought to understand normative behavior by appeal to certain people’s attitudes would look favorably to psychology for some closer insight into the way people actually reason. In reality, however, psychological literature has had little impact on his work or the work of the many legal philosophers who have sought to further develop his ideas.

(3) *Law as distinct from other things*: If the first and second isolations were negative in nature, this one is part of the subject’s positive agenda. A second feature of the isolationist approach is the tendency to try to define law by distinguishing it from other things, instead of focusing on what law does or can do.³ The main focus of attention has been the boundary of law and morality, which consciously or not, has probably contributed to another kind of isolation, this time between legal philosophy and the rest of the legal academia, where it seems, a different boundary—between law and politics—has been the focus of greater attention.⁴

A second, related, debate has been concerned with the boundary between different jurisprudential theories, one between legal positivism and natural law, and increasingly in recent years among legal positivists themselves. At times these debates developed to a meta-debate, not about the boundaries between law and morality, but on the correct way of understanding the boundaries between competing jurisprudential theories. In both cases, after much work, it often seemed that what distinguishes the competing factions is very little indeed.

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² On this matter I say much more in “Jurisprudence between Science and the Humanities”, 4 *Washington University Jurisprudence Review* (forthcoming 2012), available at <http://ssrn.com/abstract=1566858>, and Dan Priel, “Toward Classical Legal Positivism”, unpublished manuscript, available at <http://ssrn.com/abstract=1886517>.

³ Legal positivists have been much influenced here by the work of Joseph Raz. See in particular his “Legal Principles and the Limits of Law”, 81 *Yale Law Journal* 823 (1972). For recent statements on the significance of this inquiry see John Gardner, “Nearly Natural Law”, 52 *American Journal of Jurisprudence* 1, 13-14 (2007); Scott J. Shapiro, *Legality* (Cambridge: Harvard University Press, 2011) ch. 1.

⁴ If we are to believe Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850–2000”, in David M. Trubek & Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 19, 21, then the boundary between law and morality is typically a mid-to-late nineteenth century concern, whereas the concern with the boundary between law and politics is the one dominating discussion in legal circles in this era. I think this is largely correct and reflects the massive growth of law that came with the advent of the welfare state, a development that inevitably forced law into much greater contact with politics. These developments have had no discernable impact on analytic jurisprudence.

II.

Hart, and the brand of legal positivism he inaugurated, played a major role in establishing these isolations (hence my rather unkind homage to the title to his classic essay).⁵ We now know that Hart had relatively little interest in the work of most legal academics;⁶ that he sought to translate the question “what is law?” to the question of the connections and boundaries between law and morality;⁷ that he considered his work as primarily methodologically neutral, and that he explicitly defended a methodology of “understanding” that was designed to fulfill a task scientific method could not.⁸ The way the domain of “general jurisprudence” is currently understood, with its concern with the question of the “nature” of law, with the primary given in it to legal validity, are all products of his isolationist attitude.

In some respect this approach has been a spectacular success story: it effectively created a new area of inquiry. Legal philosophy, as the term is currently understood, did not exist before the twentieth century. This may sound like an audacious claim, and obviously false one—what about Plato, Aristotle, Aquinas, Hobbes, Bentham, Kant (the list goes on and on)? Where they not legal philosophers? In a sense they were, but their work was not within that unique genre that is twentieth century analytic jurisprudence. What I mean by this is an intellectual domain that may be defined as “the philosophical inquiry about law that is (or purports to be) non-normative”. None of these thinkers, nor the many other philosophers who wrote about law throughout the centuries could be said to have engaged in this sort of inquiry. Indeed, before the twentieth century the conscious division between jurisprudence (in this sense) and moral and political philosophy simply did not exist. To see the difference consider between the old and the new jurisprudence note that the concern with legal validity, that is so central to contemporary jurisprudence, is conspicuously absent from earlier works.

As a result the works of many philosophers who do not fit this mold are now often neglected. Bizarrely, not to say perversely, the one pre-twentieth century philosopher whose work is closest in spirit to contemporary jurisprudence is John Austin, a minor figure in the history of thought. Together with Hart he became a founding father of sorts of contemporary jurisprudence,⁹ at the expense of the complete neglect of the work of the much greater lights of,

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⁵ Hans Kelsen probably bears a considerable share as well, but at least in the English speaking world his direct influence is less pronounced. His indirect influence, however, is probably immense, for it is through him, I think, that Anglophone legal philosophy received the idea, developed earlier in German legal positivist circles of making “legal validity” the primary concept of jurisprudence. I make these claims tentatively as they deserve further investigation.

⁶ See Nicola Lacey, “Analytical Jurisprudence versus Descriptive Sociology Revisited” 84 *Texas Law Review* 945, 951-53 (2006).

⁷ See H.L.A. Hart, “Legal Positivism and the Separation of Law and Morals”, 71 *Harvard Law Review* 593 (1958); H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) 7-8. Here it was also the work of Joseph Raz that has been very influential.

⁸ See “Jurisprudence between Science and the Humanities”, *supra* note 2, at 36-38. On the contrast between (humanistic) “understanding” and (scientific) “explanation” see G.H. von Wright, *Explanation and Understanding* (London: Routledge and K. Paul, 1971).

⁹ In my view there has been a subtle and unacknowledged shift from Austin to Hart in the way the domain of jurisprudence has been understood. See Dan Priel, “H.L.A. Hart and the Invention of Legal Philosophy,” 5 *Problema: Anuario de Filosofía y Teoría del Derecho* (forthcoming 2011), available at <http://ssrn.com/abstract=1934953>.

say, David Hume, Adam Smith, Henry Sidgwick, all of whom wrote about law in a manner that does not fit the narrow mold of analytic jurisprudence. Even Thomas Bentham and Jeremy Hobbes, often considered early proponents of legal positivism, had to have many of their ideas ignored and others “Austinified” in order to fit the strictures of contemporary analytic jurisprudence.

Within these strictures, that is, when accepting the three isolations, legal positivism is true almost by definition. Once again, you may think I am exaggerating: aren’t, say, Ronald Dworkin or John Finnis analytic legal philosophers, who are not legal positivists? Analytic jurisprudence, so the argument goes, is a set of research questions (primarily the concern with the question “what is law?”) and a commitment to a particular method of addressing those questions (the application of the methods of analytic philosophy to questions about law). Nothing in that leads inevitably to legal positivism. The truth, however, is that the three isolations go beyond these commitments to subject-matter and method. Dworkin, despite sharing some of the isolationist tendencies identified above, has sought to draw some links to the work of practicing lawyers, to other fields in philosophy, as well as to the work of other legal academics. In the case of Finnis, the way this was done was a bit more subtle: Finnis has engaged in discussion with the more isolationist ‘descriptive’ work of Hart and Raz, but he has made it clear now that his work on natural law is “normative, practical, moral.”¹⁰ but in the very same book he rejected a central tenet of the isolationist attitude: the concern to separate jurisprudence from normative inquiry. In his more recent writings in jurisprudence, he has been more explicit in rejecting the presuppositions of Hart’s work.¹¹

There is thus an ironic twist to Brian Leiter’s claim that “legal positivism stands as victorious as any research program in post-World War II philosophy”.¹² In a sense he is right: as legal philosophy did not exist (in the sense explained above) before the twentieth century and as legal positivism is in effect analytic jurisprudence with the three isolations, there is a sense in which Leiter is clearly right. But, and this is the heart of my argument, this has been a pyrrhic victory, for it was achieved by effectively defining competition away from the debate. The terms of the debate—what was considered as part of the “permissible” moves within it—were set in such a way that legal positivism was bound to end up “victorious.” By defining legal philosophy as concerned primarily with the nature of law, by defining the nature of law as understood by the conditions of legal validity, and by defining legal validity as understood by practitioners (and not as the result of a broader normative inquiry), the “winner” in the debate was simply not in question.

The interesting question, then, is why the isolationist approach has proven so attractive to legal philosophers? This question is, of course, not susceptible to a simple answer. For Hart, for example, part of the story probably had to do with his ethical (or rather metaethical) skepticism. Isolating legal philosophy from moral philosophy allowed him to avoid the need to engage with

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¹⁰ John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011) 418.

¹¹ See John Finnis, “Law and What I Truly Should Decide,” 48 *American Journal of Jurisprudence* 107 (2003); John Finnis, “H.L.A. Hart: A Twentieth Century Oxford Political Philosopher,” 54 *American Journal of Jurisprudence* 161 (2009). I discuss the differences between Finnis’s methodology and that of analytic jurists at greater length in Dan Priel, “Description and Evaluation in Jurisprudence,” 29 *Law and Philosophy* 633 (2010).

¹² Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and on Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007) 2.

a question he felt unsure about.¹³ Via a somewhat different route the same is true of Kelsen (whose ethical skepticism was more strongly and explicitly pronounced). The time in which both wrote their main works in jurisprudence was also a period in which political philosophy was thought “dead,”¹⁴ and so it may have seemed fruitless to attempt to tie legal philosophy to political philosophy. But beyond these rather narrow concerns, there was perhaps also an idea, probably not fully recognized in Hart’s work, but I think increasingly clear and intended as we approach the present, that the isolationist approach could secure legal philosophy from being overtaken by any other discipline. This may have reduced the opportunities for interactions with other disciplines, but—what is in fact the very same thing—those other disciplines could not pose a serious challenge to legal philosophy. In other words, isolationism meant both that from within the “truth” of legal positivism could not be questioned, and from without the questions and methods legal philosophy could not be challenged.

That this was a pyrrhic victory can be seen from the status of the subject in legal academia. It is no secret—and I have encountered such attitudes myself from many people—that analytic jurisprudence is no longer held in high regard in many law schools. I have heard many scholars with background or interest in philosophy saying that they do not find the debates in the area interesting. I have heard it from younger scholars in the United States that work in this area is not likely to get one hired. Even in Britain where analytic jurisprudence is more prominent, in an increasing number of law schools analytic jurisprudence is often considered a spent force. The response one sometimes encounters among legal philosophers is that this lack of interest is due to the fact that most academic lawyers are not philosophically sophisticated enough, or simply not smart enough, to understand the debates. It is notable, however, that other philosophers, including moral and political philosophers, presumably sufficiently intelligent and philosophically astute, and working on close issues, seem equally uninterested in these debates. I have even heard it suggested that general jurisprudence is no longer attractive because its major questions have been, more or less, solved. That, however, to me reflects more an implication of the isolationist attitude noted above than reality. The questions of jurisprudence seem to have been solved only because the isolationist attitude eliminated the possibility of real debate.

A crisp demonstration of the shift that the isolationist attitude has brought about can be gleaned from a subtle but important shift in the meaning of “general jurisprudence.” These days the term typically means that part of jurisprudence that talks about law in general, as opposed to philosophical or theoretical discussion on tort, contract, intellectual property or what have you. It is interesting to compare this to the two close but different contrasts in Bentham’s work. Bentham distinguished between universal and local jurisprudence and between expositor and the censor. The local/universal distinction was about “the law of such or such a nation or nations in particular” as opposed to the “the law of all nations whatsoever.” The expositor/censor distinction was about the distinction between “what the law is” and “what it ought to be,”¹⁵ or in modern more parlance, roughly between the work of the doctrinal (“black letter”) and that of the legal reformer. With regard to the “definition which there has been

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¹³ Hart comes close to admitting that in Hart, *supra* note 7, at 620-21.

¹⁴ For these attitudes toward political theory (especially in Oxford) around this period see Brian Barry, *Political Argument*, 2nd ed. (Berkeley: University of California Press, 1990) xxxi-xxxviii.

¹⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1996) 293-95.

occasion here and there to intersperse” in his discussion, “particularly the definition ... given of the word *law*,” he considered it to belong to universal jurisprudence, although he warned (a warning not always heeded by contemporary legal philosophers) that this usage may be inaccurate since “in point of usage, where a man, in laying down what he apprehends to be the law, extends his views to a few of the nations with which his own is most connected”. It is, rather, in the “censorial line”, the normative domain that considers particular legal areas in which “there is the greatest room for disquisitions that apply to the circumstances of all nations alike”.¹⁶ It is this that allowed Bentham to offer his legislation drafting services for the whole world. In other words, for the most part it was the censorial (normative) work that belonged to universal jurisprudence, whereas the more “descriptive” expository work (what we would now call doctrinal scholarship) that was local.

The redefinition of general jurisprudence as the part of the discussion not concerned with particular legal areas only makes sense, is in fact necessary, to maintain one of the isolation of jurisprudence from political theory.

III.

Legal philosophy can continue to exist in the same way it has been existing for some time now, as a niche subject that interests an ever smaller number of people, devoid of important questions and interesting answers. Alternatively, it can abandon the misguided Platonic search for a set of necessary features that all laws have and join the rest of the academic world. I started with three isolations that pervade contemporary jurisprudence. The first step to renewal would come from trying to adopt their opposites. What this means is for the most part rather self-explanatory, but a few comments may be in order:

(1) *Jurists should take more interest in legal practice and through it in politics and political theory.* Too many debates in jurisprudence are not about law but about the writings of other legal philosophers. This is to a great extent inevitable. Part of the life of any intellectual discipline consists of refining and challenging past ideas. But jurisprudence seems to have lost touch with what it is supposed to be about: law at the expense of often scholastic debates among legal philosophers.¹⁷ Here are some topics that are properly “general” and theoretical but do not fit mainstream views as to what general jurisprudence should be about: the relationship between law and other social institutions; law in a democracy; comparative jurisprudence; law in the welfare state; the role and significance of path dependency in the law; evolutionary ideas in the law; law and well-being; the political aspects of legal taxonomy; what psychological research about morality and politics tells us about the shape law has taken, and many others. All these topics will force legal philosophers to think more and more clearly about the actual practice of law. As I see it, these questions are not merely efforts at diversifying or branching out. Properly thought through they will prove valuable to anyone interested in an answer to the question “what is law?”

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¹⁶ *Ibid.* at 295; cf. Dan Priel, “One Right Answer? The Meta-Edition,” in W.J. Waluchow and Stefan Schiaraffa, ed., *The Nature of Law* (forthcoming 2012), available at <http://ssrn.com/abstract=1835982>.

¹⁷ For similar observations and a call, with which I fully agree, for greater attention to the work of legal theorists who paid more attention to legal practice see Sundram Soosay, “Rediscovering Fuller and Llewellyn: Law as Custom and Process” in Maksymilian Del Mar, ed., *New Waves in Philosophy of Law* (London: Routledge, 2011) 31.

(2) *Jurisprudents should embrace science*: science is the greatest success story of the last three centuries. And the success shows no signs of abating. Area after area that we were once told were beyond the realm of science have proven up to the task. Jurisprudence has gone in the opposite direction. The historical route leading from Hobbes and Bentham to Hart and Raz is one that involves the successive cutting of whatever ties to science were left there by earlier generations of legal philosophers. In its final stages it was the result of a conscious commitment to the view that the fundamental questions of jurisprudence are beyond the ken of science, that philosophical reflection is fundamentally different and in some respect opposed to scientific one. As we have seen this attitude required both a commitment to what properly belonged to jurisprudence and to a certain corresponding methodology. I believe there is little to support this view and many reasons to reject it. Philosophers in other areas increasingly recognize that science is their friend, not their enemy; legal philosophers should follow suit.

(3) *Jurisprudents should attempt to offer models of law instead of identifying its essence or nature*: Instead of the search for necessary conditions for the “nature” of law, instead of looking for the existence conditions that all legal systems necessarily have, legal philosophers should aim to compare what may be called “models” of law. This approach aims to identify not all the features that something must have in order to be law, but rather some features that help explain certain important features about law. The aim here is to recognize that illumination in the explanation of social institutions often comes from isolating certain features and offering a simplified mechanism that explains them. In the context of law this could mean at least two different things. One is the recognition that laws in different environments (pre-modern versus modern; democratic versus non-democratic; in a contemporary welfare state versus before the welfare state; in a globalized world versus the pre-globalized world) have to address different concerns and that therefore concepts like the rule of law, obligation, or coercion, have therefore taken a different shape. Different models can illustrate these differences. The second way is even more interesting: we often recognize that the same function can be performed in different ways. A steam engine and an internal combustion engine both perform a similar function even though the way they do so is different. Similarly, different legal systems may perform the same function through different mechanisms. Once again, jurisprudence could help not only identify functions that legal systems perform but also suggest different models for the different ways in which these functions may be realized.

IV.

If what I said above is true, it *will* mean the death of legal philosophy as the term is currently understood by many of its practitioners. That is not to be lamented. It *may* also lead to the death of legal philosophy in the broader sense of the term—philosophical reflection about law—as a viable object of inquiry. This sort of inquiry might end up subsumed (in the way it used to be subsumed) under moral or political philosophy, or social philosophy, or another discipline altogether (political science, psychology). Perhaps this is the ultimate fate of an attempt at philosophical inquiry of a social phenomenon. Perhaps jurisprudence will be able to reinvent itself in an interesting and novel manner, as the “location” for gathering the insights from various disciplines none of which takes special interest in the law. Jurisprudence thus understood might be the name we give to the attempt to come up with a unifying account of those different perspectives on law. This may prove the end of jurisprudence as we know it. This

means legal philosophers face a dilemma: either continue in the same manner jurisprudence is practiced today, slowly but steadily becoming less and less relevant, less and less read, and less and less cared for; or reinvent it in some way. Paradoxically, it is the former approach that is more likely to keep jurisprudence alive, simply because the three isolations have created such a secure bubble for jurisprudence that no other discipline could challenge it; and as a result of the marginalization of jurisprudence that came with the three isolations, no-one would bother. But in this way jurisprudence will be alive in the same way that a man in a coma is alive. Making jurisprudence relevant risks the eliminating it as a distinct sub-discipline, as it will no longer be able to claim for itself a unique set of questions that are beyond the purview of other disciplines. I think it is a risk worth taking.