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Jurisprudence and (Its) History

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Jurisprudence and (Its) History
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Charles Barzun and Dan Priel

Abstract:

It is not obvious that philosophers and historians of law should take much interest in the scholarly enterprises of the other. Many legal philosophers understand their task as one of clarifying the meaning of such familiar legal concepts as “right,” “duty,” or “law” by offering analyses of them that purport to be general, abstract, and timeless. Meanwhile, historians tend to be suspicious of speculative claims ungrounded in fact and so often prefer to focus on the concrete, particular features of actual legal regimes.

But surface appearances can deceive. Unlike some other areas of philosophy, the subject matter of jurisprudence is at least partially (if not entirely) a social phenomenon. For this reason, legal philosophers since at least H.L.A. Hart have recognized their task to be a “hermeneutic” one — one which aims to discern or make explicit the “self-understanding” of legal actors. At the same time, legal historians aim not simply to record legal rules that existed at some given point in history, but to unearth the meaning that actual people have attached to law. Perhaps, then, philosophical and historical inquiries about law share the same ultimate scholarly goal and subject matter.

This essay serves as the Introduction to a symposium in the Virginia Law Review that explores just this possibility. Its purpose is both to highlight some of the themes common to the symposium’s essays and comments, and, more ambitiously, to suggest that these papers show how philosophers and historians of law might bring their respective disciplinary methods to bear in answering the same kind of question. In particular, both methods are useful for answering questions about what best explains the endurance or disappearance of an idea, theory, or set of concerns in legal thought or practice. Our claim is not that legal historians and philosophers of law should agree in the answers they give to such questions. They will and should often disagree. Rather, our goal is to show how scholars from the two disciplines may plausibly be seen as joining issue in a productive debate, rather than simply talking past one another.

Keywords:

Guarantees, sureties, suretyship, secured transactions, indemnities, creditor, debtor, lending, financing, liability, liabilities

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JURISPRUDENCE AND (ITS) HISTORY

*Charles Barzun and Dan Priel**

I

IT is not obvious that philosophers and historians of law should take much interest in the scholarly enterprises of the other. Many legal philosophers understand their task as one of clarifying the meaning of familiar legal concepts, such as “right,” “duty,” “authority,” and, of course, “law” itself. For such an inquiry, history—either of law itself or of philosophical thinking about law—seems irrelevant.¹ Meanwhile, historians, ever on guard against speculative claims ungrounded in fact, often prefer sticking to the fine-grained details of actual legal regimes.² Whereas legal philosophers offer “analyses” that aim to be general, abstract, and timeless, legal historians offer “thick descriptions” of what is particular, concrete, and time-bound.³

But surface appearances can deceive. Perhaps unlike other areas of philosophy, the subject matter of jurisprudence is at least partially (if not

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¹ See Andrei Marmor, *Philosophy of Law* 118 (2011) (“The motivation for claiming that *P* is one thing, and the truth of *P* is another. The former is the business of intellectual historians. Philosophy should be interested in truth.”).

² See Thomas S. Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* 5 (1977). But cf. David Armitage, *What’s the Big Idea? Intellectual History and the Longue Durée*, 38 *Hist. Eur. Ideas* 493, 493–96 (2012) (arguing that “big history” is making a comeback).

³ John Henry Schlegel, *Commentary, Philosophical Inquiry and Historical Practice*, 101 *Va. L. Rev.* 1197, 1198 (2015) (“Historians, at least my kind of historians, like what Clifford Geertz called ‘thick description.’”); see Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *The Interpretation of Cultures* 3, 6–10 (1973).

entirely)⁴ a social phenomenon. Courts, legislatures, judicial orders, and statutes are the products of human efforts, both collective and individual, and they only exist *as* legislatures, courts, and the like insofar as they possess the meaning they do in the eyes of at least some social group.⁵ For this reason, legal philosophers since at least H.L.A. Hart have recognized their task to be a “hermeneutic” one—one which aims to discern or make explicit the “self-understanding” of legal actors.⁶ At the same time, legal historians aim not simply to record legal rules that existed at some given point in history, but to unearth the meaning that actual people—judges, lawyers, politicians, and ordinary citizens—have attached to law.⁷ When they do so, they might be seen as uncovering evidence of those same “self-understandings” that philosophers claim constitute law.

Perhaps, then, philosophical and historical inquiries about law do not differ so radically from each other after all.⁸ They share the same ulti-

⁴ Of course, whether it is exclusively a social phenomenon is what is arguably in dispute between positivists and antipositivists, or at least between Hart and Dworkin. See Jules L. Coleman, *Beyond Inclusive Legal Positivism*, 22 *Ratio Juris* 359, 359–61 (2009).

⁵ For Hart, that group need only include the officials of the regime. H.L.A. Hart, *The Concept of Law* 113 (1961) (explaining that a system’s “rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials”).

⁶ H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 13 (1983). On the role of a group’s self-understanding for jurisprudence, see Joseph Raz, *Ethics in the Public Domain: Essays on the Morality of Law and Politics* 237 (rev. ed. 2005); Marmor, *supra* note 1, at 33–34 (“The philosophical question about the nature of law is one about a scheme of interpretation; it is a question about the collective meaning and self-understandings of a complex social reality.”).

⁷ See, e.g., Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 *UCLA L. Rev.* 1393, 1486 (2005) (engaging in an in-depth historical study of the lawyers working for the NAACP in the 1940s and arguing that “[r]econstructing the NAACP’s labor-related cases in the 1940s reveals that the meaning of civil rights was up for grabs in the decade and a half before *Brown*”); Hendrik Hartog, *Pigs and Positivism*, 1985 *Wis. L. Rev.* 899, 934 (offering a detailed account of a criminal prosecution for pig-keeping in early nineteenth-century New York City, where the practice of pig-keeping persisted in spite of its formal illegality, in support of the thesis that law is properly understood “as an arena of conflict within which alternative social visions” contend); see also James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 *Harv. L. Rev.* 1332, 1335–36 (1993) (book review) (defending the method of “pragmatic hermeneutics,” which “attempts to understand . . . the conditions of a text’s production, the meanings its author intended, the ways in which it was interpreted by contemporaries, and also the meanings it has for us today”).

⁸ Cf. Bernard Williams, *Philosophy as a Humanistic Discipline*, 75 *Phil.* 477, 491–93 (2000) (arguing that historical understanding can aid in efforts to answer philosophical questions).

mate scholarly goal and subject matter—to study legal phenomena with the hope of gaining a clearer and deeper view of them⁹—and differ primarily in the tools they use to reach that goal, as well as in the relative abstractness of the conclusions they offer. True, legal historians focus on the attitudes of people in the past, whereas legal philosophers remain more interested in the attitudes of those in the present; but that only means the objects of their attention differ, not the nature of their projects. And, to the extent that contemporary self-understandings require interpretation of past ones,¹⁰ the distinction between the two enterprises becomes fuzzier still. If that is right, then the mutual disregard of the two fields suggested at the outset may not be justified. Instead, there may be reason to think that turning to history could broaden the boundaries, and raise the ambitions, of a field that many lawyers, judges, and even legal scholars have written off as esoteric and dominated by concerns remote from their own.¹¹

The articles and commentaries in this symposium explore just this possibility. Some do so by taking up methodological questions directly, while others offer examples of what a genuinely historical form of jurisprudence might look like. Still others point to some of the difficulties that any such effort entails. The aim of this introductory Article is both to highlight some of the themes common to the various papers and, more ambitiously, to argue that the papers show how philosophers and historians of law might use their respective disciplinary methods to try to answer the same kind of question. That question is about why certain ideas in and about law persist or disappear in history. Our claim is not that legal philosophers and historians agree as to how to answer this question;

⁹ As John Henry Schlegel puts it in his commentary, the question of *meaning* lies at the heart of both philosophy and history, “so holding this conference is not a mistake.” See Schlegel, *supra* note 3, at 1199.

¹⁰ See Jessica K. Lowe, *Radicalism’s Legacy: American Legal History Since 1998*, at 10 (Nov. 7, 2014) (unpublished manuscript, available at <http://ssrn.com/abstract=2520545>) (observing that “one of the special attributes of legal history is that, especially given common law’s penchant for precedent, the past often still structures the world we live in”); see also Quentin Skinner, *Liberty Before Liberalism* 116–117 (1998) (“The intellectual historian can help us to appreciate how far the values embodied in our present way of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds.”).

¹¹ See, e.g., Ronald Dworkin, *Justice in Robes* 34 (2006) (observing that analytic legal philosophers “talk mainly to one another and have become marginalized within the academy and the profession”). Of course, it may also be true that a turn toward jurisprudence could improve legal history, but that is not the focus of this symposium.

to the contrary, they do and should often *disagree*. The point, however, is that they can plausibly be seen as joining issue in a productive debate, rather than simply talking past each other. Admittedly, our suggestion along these lines raises deep and knotty questions about the nature of meaning and truth to which we cannot possibly offer adequate answers. But we hope to show that the symposium at least pushes the inquiry in the right direction.

Doing so first requires considering how jurisprudence can or should make use of history and why doing so might be philosophically profitable. These questions are taken up directly in the contributions of Gerald Postema and Nicola Lacey. Drawing in part on a largely forgotten essay by Michael Oakeshott,¹² Postema argues that jurisprudence ought to strive to be a more “sociable” science than the currently dominant analytic style of jurisprudence allows.¹³ That philosophical method, which relies heavily on our ordinary intuitions about the meaning of legal concepts, is both too narrow in its scope, because it seals itself off from other disciplinary methods, and too complacent in its aims, because it fails to question the validity of those intuitions.¹⁴ If we look to earlier philosophers of law, who strove to offer what were, for Oakeshott, the only properly *philosophical* explanations of law, namely those that relate its subject matter to the “totality of experience,” then we can see how jurisprudence can broaden and deepen its aspirations.¹⁵ Moreover, such a historical approach to theorizing about law is particularly warranted in the realm of *legal* philosophy since law itself is a reflective practice that must not reflect only on itself and on its past, but also on its own prior reflections of itself.¹⁶

Lacey, too, argues that law is a practice that constantly demands engagement with, and interpretation of, its own past.¹⁷ Also like Postema, she emphasizes the way in which history and other social sciences offer

¹² See Michael Oakeshott, *The Concept of a Philosophical Jurisprudence* (pts. 1 & 2), 3 *Politica* 203, 214, 221, 345, 352 (1938).

¹³ Gerald J. Postema, *Jurisprudence, the Sociable Science*, 101 *Va. L. Rev.* 869 (2015).

¹⁴ See *id.* at 871 (2015).

¹⁵ Oakeshott, *supra* note 12, at 352; Postema, *supra* note 13, at 879–80.

¹⁶ Postema, *supra* note 13, at 885. As David Luban observes, this is a theme that Postema has also explored in the past in Gerald J. Postema, *Melody and Law’s Mindfulness of Time*, 17 *Ratio Juris* 203, 207–208, 221, 223 (2004). See David Luban, *Commentary, Time-Mindedness and Jurisprudence*, 101 *Va. L. Rev.* 903, 910–11 (2015) see also Gerald J. Postema, *On the Moral Presence of Our Past*, 36 *McGill L.J.* 1153, 1156–57 (1991).

¹⁷ Nicola Lacey, *Jurisprudence, History, and the Institutional Quality of Law*, 101 *Va. L. Rev.* 919, 920 (2015).

the legal theorist resources with which to develop more critical understandings of current practices.¹⁸ For Lacey, however, the critical edge derives at least in part from showing the historical contingency of current practices and the assumptions that underlie them.¹⁹ Once one sees how a complex interplay of interests, institutions, and ideas have shaped our current understandings of various legal concepts, those concepts no longer appear as universal or timeless as philosophers sometimes assume. In other words, history reminds us that what strikes us as “natural,” “necessary,” or “essential” only appears so from the vantage point of a particular point in history. Thus, whereas Postema focuses on the historical development of ideas within jurisprudential discourse, Lacey takes up more directly the developments within legal practice—the object of jurisprudential reflection.

In short, for both Postema and Lacey, philosophizing about law requires a historical approach at least in part because of law’s own dependence on its past. They also concur in suggesting that a turn towards history promises to make the field *broader* in its scope, *deeper* in its underlying explanations, and *more critical* of contemporary legal thought and practice. So framed, however, such virtues remain highly abstract, and thus their concrete meaning is hard to discern. How exactly do historical materials figure into the inquiry? And what role must they play to deliver the benefits described? To get a firmer grip on such questions, it may help to look at some actual uses of historical materials for jurisprudential purposes.

II

Broadly speaking, the articles and commentaries in this symposium make use of history in one of two ways. First, history is used in a negative or critical way in order to cast into doubt some of today’s legal practices or assumptions underlying those practices. Second, historical figures are invoked in a more positive or constructive vein as guides for how to conduct philosophical inquiry going forward, or what to focus that inquiry on. Below we briefly describe these approaches and their potential virtues, offering examples of each. We then consider whether these two uses of history conflict with one another. In fact, they do stand in a certain tension with one another, but we argue that the tension is a

¹⁸ Id. at 924–26.

¹⁹ Id.

healthy one because it points toward the kind of historical question on which both historical and philosophical methods may be usefully brought to bear in answering.

The first use of history invokes historical facts, events, and ultimately, explanations, in order to reveal the *contingency* of our current practices. The idea is that doing so liberates us from our current assumptions and practices by showing us that things could have been otherwise. The goal is to reveal the way in which the past was different from the present and to demonstrate that the concepts and values we take for granted today arose for reasons unrelated to their intrinsic truth or coherence. We might dub this the “contingency argument.”

As already noted, Lacey endorses the contingency argument as a general matter, but she also demonstrates its power through the example of criminal responsibility. Specifically, she shows how the doctrinal and philosophical debates that take place today about criminal responsibility all assume that responsibility is constituted by various cognitive and volitional states of mind. This conception of responsibility, however, is historically a relatively recent one, and it arose along with, and as result of, the development of various legal institutions, which themselves were the consequence, at least in part, of the British government’s desire to use the criminal law to protect and legitimize its own authority.²⁰ Once we see the way in which our understandings today developed within such institutional structures and as a result of such ideological campaigns, we realize that our “intuitive” understandings of criminal responsibility are neither as natural nor as necessary as we might otherwise think.

Frederick Schauer also makes use of a contingency argument in his contribution to the symposium. Although much of his article is devoted to showing the importance of Jeremy Bentham’s views on various jurisprudential questions, he also argues (as his title suggests)²¹ that those views have been neglected *not* because analysis and scrutiny have revealed them to be unsound, but rather because the self-conception of legal philosophers has evolved in such a way as to make Bentham’s concerns appear to be outside the bounds of jurisprudence.²² Thus, for instance, Bentham’s claims about the importance of coercion to law

²⁰ Id. at 939–41.

²¹ Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 Va. L. Rev. 957, 957 (2015).

²² Id. at 973–75.

have been understood, by Hart and subsequent theorists, to be about a topic “best left to the sociologists and the psychologists.”²³

The contingency argument displays some of the benefits a historical approach promised to offer. First, the argument has genuine critical bite. It not only serves to weaken our commitment to the particular concept under scrutiny (for example, criminal responsibility), freeing us up to consider radically different ways of conceptualizing human action; it also suggests that legal concepts in general are often the contingent products of historical forces, not the universal and timeless entities contemporary legal philosophers take them to be.²⁴

Second, the contingency argument seems particularly well suited to the historical study of *legal* concepts since the question of whether, and if so how, the meaning of particular concepts has changed over time is of special importance to courts and legal scholars. For this reason, these days this kind of argument is probably the most common way in which legal historians have invoked history as a basis for criticizing current legal practices.²⁵

One limitation of this approach, however, is that it seems to be almost exclusively critical. Although it may help weaken some of our convictions about contemporary values or ideas, it offers little with which to replace them. Furthermore, taken to its logical conclusion it denies a vantage point from which the ideas of a different time (or culture) can be criticized. We do things one way because of our philosophy (of law); our ancestors did it another because they had a different philosophy. Nor does it point the way to a deep or broad explanation of legal phenomena of the sort Postema suggests Oakeshott sought. To the contrary, its function is to shrink our horizons by emphasizing the extent to which even

²³ Id. at 973.

²⁴ Lacey, *supra* note 17, at 927; see Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in *Meaning and Context: Quentin Skinner and his Critics* 29, 67 (James Tully ed., 1988) (“A knowledge of the history of such ideas can then serve to show the extent to which those features of our own arrangements which we may be disposed to accept as traditional or even ‘timeless’ truths may in fact be the merest contingencies of our peculiar history and social structure.” (citation omitted)).

²⁵ See Lowe, *supra* note 10, at 10 (endorsing the view that contingency “is one of the major gifts that history has to offer law: the reminder that things don’t have to look the way they do, that there have been many options, many possibilities”). Classics of this sort of historical critique include, among many others, Morton Horwitz, *The Transformation of American Law, 1780-1860* (Oxford Univ. Press 1992) (1977); and Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *Yale L.J.* 1017 (1981).

our most fundamental assumptions about law are particular to our own time and place.²⁶

Such limitations motivate a turn to the other, more constructive use of history. This approach draws on the work of historical figures in order to provide guidance as to what jurisprudential questions we ought to be asking today or how we ought to be pursuing answers to those questions. The aim here is to reinterpret a tradition of thought by suggesting alternative paths that the tradition could have taken and should still take today.²⁷ Precisely because our values and perspectives are influenced by our history, there is value in mining it for new ideas and perspectives to challenge prevailing ones. It does so by pointing either to neglected figures or to neglected aspects of the thought of already-established figures. We might class such uses of history as efforts in “canon reconstruction.”²⁸

Dan Priel’s contribution to the symposium can be seen as such an effort with respect to the work of Jeremy Bentham and Thomas Hobbes. Today, those theorists are considered “legal positivists,” because they were highly critical of the natural law view endorsed in their day. But what today’s scholars tend to ignore is how different were the grounds of their rejection of natural law. Unlike today’s positivists, who criticize

²⁶ A further problem is that this approach encourages a highly schematic view of history (of ideas), one in which people in a particular historical period subscribe to a particular philosophy, only to see it replaced a generation or two later by another dominant view to which all seemingly subscribe. See, e.g., Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *The New Law and Economic Development: A Critical Appraisal* 19, 21 (David M. Trubek & Alvaro Santos eds., 2006).

²⁷ We take Schauer to have had something like this in mind when he explained at the symposium that he aimed in his paper to “designate a tradition of thought,” namely legal positivism. Frederick Schauer, *Address at the Program in Legal and Constitutional History and Virginia Law Review Association Symposium: Jurisprudence and (Its) History* (Sept. 20, 2014).

²⁸ We borrow this term largely from Richard Rorty, who describes such a philosophical use of history as “canon-formation.” Richard Rorty, *The Historiography of Philosophy: Four Genres*, in *Philosophy in History* 49, 56 (Richard Rorty et al. eds., 1984). According to Rorty, scholars who adopt this approach are concerned with determining which philosophers are the truly great ones. In so doing, they ask such questions as “‘Why should anyone have made the question of—central to his thought?’ or ‘Why did anyone take the problem of—seriously?’” *Id.* at 57. For an example of a more literal sense of canon formation in the legal context, see *The Canon of American Legal Thought* (William W. Fisher III & David Kennedy eds., 2006). See Steven Walt, *Commentary, What Can the History of Jurisprudence Do for Jurisprudence?*, 101 *Va. L. Rev.* 977, 978. (2015) (“Past jurisprudential positions might be used to present alternatives that challenge contemporary jurisprudential assumptions or, more weakly, at least aid in better understanding them.”).

natural lawyers for wrongfully injecting metaphysical or normative questions into what they think are properly conceptual questions, Bentham and Hobbes rejected the natural law theories of their time because they thought they were based on a false metaphysics and had unattractive normative implications.²⁹ Priel thus suggests that reading Bentham and Hobbes reminds us that there are deeper and more pressing questions than those that contemporary jurists take to be central to the philosophy of law, such as what the conditions of “legal validity” are—something primarily of interest to lawyers.³⁰

Alice Ristroph makes a similar point about Hobbes, though she focuses on Hobbes’s theory of punishment. Ristroph recognizes that Hobbes’s view of punishment cannot easily be placed on today’s jurisprudential landscape, where “retributiv[ist]” theories of punishment tend to be distinguished from those based on “deterrence” rationales. Nevertheless, she insists “the fault lies in our categories, and not in Hobbes.”³¹ For what concerned Hobbes was not the ground on which punishment might be justified but rather whether citizens have a right to resist punishment even when the state has the authority to command it. According to Ristroph, when Hobbes says that the right of self-preservation is one we cannot give up even when we enter into civil society, he was neither making a psychological claim nor a descriptive, conceptual claim about the nature of obligation; rather, he was making a *normative* claim about our obligations to each other and to the state.³² Furthermore, the fact that Hobbes was deeply engaged in the politics of his day supports rather than detracts from this interpretation, since it suggests that for him legal theory was a moral and political activity through and through.³³

Using history to reconstruct or reinterpret canonical figures of a tradition also offers some of the benefits described above by Lacey and Postema.³⁴ Like the contingency argument, it denies that we should accept today’s intuitions as the fixed data to be explained, but unlike that

²⁹ See Dan Priel, *Toward Classical Legal Positivism*, 101 Va. L. Rev. 987, 995, 999, 1000–01 (2015).

³⁰ *Id.* at 996. But see Jeffrey A. Pojanowski, *Commentary*, 101 Va. L. Rev. 1023, 1026 (2015) (responding to Priel by arguing that a general jurisprudence ought not dismiss entirely the attitudes and concerns of “legal officials and legally conscious citizens”).

³¹ See Alice Ristroph, *Sovereignty and Subversion*, 101 Va. L. Rev. 1029, 1030 (2015).

³² *Id.* at 1035–36.

³³ *Id.* at 1052–53.

³⁴ Postema himself has engaged in canon reconstruction in his reading of Bentham’s legal positivism. See Gerald J. Postema, *Bentham and the Common Law Tradition* 302–36 (1986).

approach it offers a vantage point from which to criticize current practice. In doing so, efforts in canon reconstruction can challenge not just certain prevailing ideas but the whole canon built around certain historical classics. A canon is often constructed in such a way that later works are seen as improvements upon, or corrections of, previous works. Since this process depends on accepted readings of those older works, new interpretations that challenge those readings might destabilize, or even decanonize, more recent works. But this approach seeks to do more. That Hobbes and Bentham challenged the conventional wisdom of their day on fundamental questions of human psychology and morality, for instance, is helpful for us today when those questions are frequently cast aside as a distraction.

Finally, insofar as this approach draws on historical materials as a genuine source of guidance, it seems to fit naturally with traditional legal methods of reasoning. Consider, for instance, John Mikhail's contribution, which is in many ways an effort in canon reconstruction in the context of substantive law.³⁵ In taking issue with the prevailing assumption that the United States Constitution grants the federal government only enumerated powers, Mikhail argues that judges and scholars have long misinterpreted the Necessary and Proper Clause of Article I. In offering a novel reading of that clause, he not only engages in a philosophical analysis of textual evidence from the constitutional convention, but also argues that our misreading of the clause owes in part to our focus on the wrong Framers: We have been looking to James Madison to guide our understanding of the provision, rather than to James Wilson, who actually drafted it.³⁶ Once we understand how Wilson's background as a business lawyer informed his efforts to draft that clause, we can see that it grants a great deal of power to the United States government to fulfill its corporate purpose of providing for the general welfare.³⁷

The question facing any effort in canon reconstruction, however, is whether it can itself withstand the challenge of contingency. If, as the contingency argument suggests, even the questions that past thinkers asked arose in particular contexts, either as "moves" within a particular

³⁵ See John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implication, and Implied Powers*, 101 Va. L. Rev. 1063, 1076–81 (2015).

³⁶ *Id.* at 1084–91.

³⁷ *Id.* at 1085–91.

political or ideological struggle,³⁸ or as a response to particular institutional pressures,³⁹ then there is little reason to think that they will have much philosophical payoff outside of that historical context.⁴⁰ Indeed, this is precisely why historians tend to be skeptical about such efforts and worry that they entail distortion, rather than genuine discovery, of the relevant historical texts.⁴¹

The articles discussed so far thus appear to present us with two different and incompatible approaches to the history of ideas. The apparent incompatibility stems from the fact that they seem to depend on contradictory assumptions. The contingency argument assumes that particular philosophical or jurisprudential texts cannot transcend their times or places, whereas efforts in canon reconstruction assume that they can and do. One can see how this conflict maps onto, and in part explains, the diverging scholarly self-understandings of philosophers and historians noted at the outset. Whereas the historian assumes ideas and meanings to be local, contingent, and contextual, philosophers assume them to be universal, necessary, and timeless. It seems we are back where we started.

Thankfully, the contradiction is merely apparent. That is because it arises only if one assumes at the outset that a particular relationship between ideas and the historical contexts in which they develop holds *in general*, and such an assumption is not necessary. Instead, what that precise relationship is *in any particular case* ought to be precisely the issue in dispute. That is, it ought to be an open question whether any particular text, idea, theory, or set of concerns is best understood as merely a

³⁸ See, e.g., Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* 12–13 (1992) (arguing that the democratic justification for the protection of free speech was strategically formulated by political Progressives in order to provide a theory for the protection of speech that did not also justify protection of the contract and property rights to which they were ideologically opposed).

³⁹ See, e.g., Lacey, *supra* note 17, at 928; *supra* text accompanying note 17.

⁴⁰ This is, for example, the view expressed by philosopher Gilbert Harman as described in Tom Sorell, *On Saying No to History of Philosophy*, in *Analytic Philosophy and History of Philosophy* 43, 43–44 (Tom Sorell & G.A.J. Rogers eds., 2005) (“For the most part the problems that historical writers were concerned with are different from the problems that current philosophers face. There are no perennial philosophical problems.”).

⁴¹ Skinner, *supra* note 24, at 57 (criticizing philosophical analyses of past philosophical works that focus exclusively on the texts and suggesting as an alternative an approach that recognizes “that our ideas constitute ‘a *response* to more immediate circumstances’, and that we should in consequence study not the texts in themselves, but rather ‘the *context* of other happenings which *explains* them”).

contingent product of certain historical circumstances, or instead as something whose development or endurance is due to its coherence or truth. Under this view, rather than assuming that some legal term such as “right” or “law” describes a general concept with certain essential features, the scholar must try to determine whether in fact it has multiple, shifting meanings, depending on the time and place. By the same token, rather than assuming that today’s legal terms meant something different in the past, the scholar must look and see whether they share common elements with older versions. More generally, as David Luban emphasized at the symposium conference, the degree of continuity between the past and the present, or between different periods in the past, ought to be an open question, settled after investigation rather than prior to it.⁴²

So understood, the tension between the two uses of history for jurisprudence found in the symposium articles and commentaries does not so much expose methodological incompatibility as it does reveal the kind of question a genuinely historical jurisprudence might focus on. That question is: *What best explains either the endurance or disappearance of some idea, theory, question, or set of philosophical concerns?* The assumption underlying the question is that it counts in favor of that idea or set of understandings that it has endured through time, *but only if* it has so endured for the right kinds of reasons. Of course, a lot depends on what one means by the “right kinds of reasons,” but that just goes to show that it is a question which is properly investigated using philosophical as well as historical methods.

An example may help show what we mean. In the case of criminal responsibility, if historical arguments purporting to show that our current understandings of responsibility have only taken the shape they have because of powerful economic and political forces—which we have little reason to think track the truth or coherence of those understandings—then such explanations may reveal them to be local, contingent, transitory, and hence less worthy of our (philosophical) attention and respect.⁴³ At the same time, though, philosophical arguments showing how those understandings hold together or could reasonably have held appeal to

⁴² David J. Luban, Comments at the Program in Legal and Constitutional History and Virginia Law Review Association Symposium: Jurisprudence and (Its) History (Sept. 19, 2014).

⁴³ See Charles Taylor, *The Hermeneutics of Conflict*, in *Meaning & Context: Quentin Skinner and His Critics*, supra note 24, at 218, 224. Taylor dubs “neo-Clausewitzian” the view of history according to which “the relevant factors in explaining how ideas become prevalent or die away have nothing to do with truth.” *Id.*

those who endorsed them would suggest an *intellectual*, rather than political or economic, explanation for its endurance. In so doing, such an explanation bolsters the credentials of today's understandings of responsibility as a philosophically coherent and enduring conceptual framework for analyzing and evaluating human action.⁴⁴

In short, our suggestion is that the two uses of history contained in the articles and commentaries that follow might fruitfully be seen as two distinct methods of inquiry, both of which aim at the same sort of scholarly question. The two methods are antagonistic with one another when brought to bear on the same set of ideas or understandings, but they may also complement each other, such as when demonstrating that the contingency of one idea or understanding is used to clear a path for the reconstruction of another one.⁴⁵ In either case, the questions raised are historical in the sense that they are about what explains the endurance over time of a particular idea or set of ideas; but they are philosophical in the sense that the kinds of explanations offered are understood to bear on the philosophical value or status of those ideas. When taking up such questions, the relationship between jurisprudence and its history becomes itself part of the scholarly enterprise.

III

We conclude this introduction by raising an objection to the kind of historical jurisprudence described above. The objection takes the form of a dilemma with respect to the role history plays in such an inquiry. Specifically, it alleges that the method of canon reconstruction either treats historical figures and texts as jurisprudential authorities, thereby under-

⁴⁴ Such an explanation of modern-day notions of criminal responsibility, for instance, is arguably implicit in Kim Ferzan's conclusion that, in her kind of history, responsibility is "the fixed star—the constant over space and time—that shines light on the truth of when individuals ought to be punished and casts shadows when our practices have led us astray." Kimberly Kessler Ferzan, Commentary, *Of Weevils and Witches: What Can We Learn From the Ghost of Responsibility Past?*, 101 Va. L. Rev. 947, 956 (2015).

⁴⁵ Schauer makes use of both methods in this complementary way. He argues both that the important role coercion plays in law has been neglected for reasons of "path dependence" (contingency argument) and that Bentham's insights about the role of coercion in law (among other things) remain not only intelligible but also persuasive today (canon reconstruction). Each argument reinforces the other. Schauer, *supra* note 21, at 972–73, 976.

mining its philosophical credentials, or treats them in a purely instrumental way, thereby undermining its historical credentials.⁴⁶

To see how this dilemma arises, it may help to go back to the legal analogy. Recall our suggestion above that it counts in favor of the uses of history just described that courts and scholars use history in a similar way when interpreting substantive law. But one might object that the defect of traditional legal argument is precisely that it conflates and confuses descriptive and normative claims. In his contribution, for instance, Lawrence Solum distinguishes between *constitutional interpretation*, which involves interpreting the communicative content of a given legal text, and *constitutional construction*, which involves determining the practical legal effect of that communicative content.⁴⁷ Although judges must engage in both sorts of activity, the natures of the two enterprises are very different. The former is primarily a *factual* inquiry about what particular people intended to communicate, whereas the latter is primarily a *normative* one about the role that those communicative intentions ought to play in constitutional adjudication. Thus, Solum might say in reference to John Mikhail's article that we should frankly recognize the difference between (1) the meaning James Wilson intended to convey (or was understood to have conveyed) by drafting the Necessary and Proper Clause in the way he did (a factual claim—if an admittedly difficult one to discover), and (2) what the legal consequences of his communicative content properly are (a normative or theoretical claim).⁴⁸

The particular question Solum is concerned with is whether, or in what sense, intellectual historians aim to recover such communicative intentions, which is an issue with important consequences for how legal theorists use intellectual history. Whatever the answer to that question, however, it is not hard to see that there are important similarities between the notion of constitutional construction and what we have called efforts in canon reconstruction. Both activities require determining how exactly certain words and actions from the past bear on the normative

⁴⁶ As explained below, the contingency argument faces a comparable dilemma. See *infra* pp. 863–64.

⁴⁷ Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 Va. L. Rev. 1111, 1118–20 (2015).

⁴⁸ Indeed, Deborah Hellman suggests that, under Mikhail's reading of Wilson, according to which Wilson may have been deliberately obscure in his choice of words, the legal consequences might be that the Constitution itself is illegitimate since it would imply that the people who ratified it did not understand what they were ratifying. See Deborah Hellman, *Commentary, Unintended Implications*, 101 Va. L. Rev. 1105, 1108–10 (2015).

question of what we should do (or believe) today. In that way, the distinction forces upon the defender of a historically informed jurisprudence a difficult question: Of what *philosophical* significance is it that a particular person or group of people in the past voiced certain ideas or made certain arguments?

Unfortunately, looking to traditional legal reasoning does not seem to help us answer this question, because the legal analogy appears to break down. Whereas the communicative intentions of past legal actors are treated as constitutionally (or, more generally, legally) authoritative for reasons of political morality—whether those related to democratic legitimacy, the rule of law, or both—it is hard to see why past jurisprudential texts should carry any comparable authoritative weight with respect to philosophical thinking about law today. The concerns of the philosopher of law are theoretical, one might argue, rather than practical in the way that those of the judge or the lawyer are.

One possible answer is that canon reconstruction involves genuine deference to a theoretical authority.⁴⁹ Under this view, since Bentham was more intelligent than most of us, we should defer to his judgment about what is true and important.⁵⁰ But that answer is deeply unsatisfying. For one thing, we know a lot more today about a lot of things relevant to law and legal theory than Bentham did.⁵¹ Besides, appeals to authority traditionally have been seen to be inconsistent with the philosophical spirit of free and open inquiry.

Another possibility is that we simply need philosophical heroes to keep us going, so that we turn to them for inspirational or emotional

⁴⁹ See Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 *Minn. L. Rev.* 1003, 1032 (2006) (“Theoretical authorities are experts whose knowledge and understanding of the matter on which they are authorities is both exceptionally extensive and remarkably systematic and secure, making them reliable guides on those matters.”).

⁵⁰ See Aloysius Martinich, *Notes and Discussions: Philosophical History of Philosophy*, 41 *J. Hist. Phil.* 405, 406 (2003). (“[T]he major figures of the history of philosophy are better philosophers than all but a few of our colleagues. So careful attention to what those philosophers have said probably has a better payoff than merely using their words as an inspiration for our own thoughts. If one thousand living philosophers possess more philosophical truth than earlier philosophers, it is because, exceptions excepted, they are dwarves sitting on the shoulders of giants.”).

⁵¹ Bentham himself would concede as much: “As between individual and individual living at the same time and in the same situation, he who is old possesses, as such, more experience than he who is young. But, as between generation and generation, the reverse of this is true.” Jeremy Bentham, *Handbook of Political Fallacies* 44, 45 n.1 (Harold A. Larrabee ed., 1952).

purposes.⁵² We care about what questions Bentham and Hobbes were asking, for instance, because they are the Great Thinkers in a long and storied intellectual tradition from which we derive inspiration and self-validation. But again, that seems an insufficiently *philosophical* justification for attending to their ideas.

Yet another possibility is that there is an essential, rather than merely contingent, connection between a thinker's canonical status within a tradition and the relative breadth and depth of his or her philosophical aims. Under this view, it is no mere accident that Bentham and Hobbes grounded their theories of law in larger moral and metaphysical frameworks but twenty-first-century theorists no longer feel the need to do so.⁵³ Our legal practices have developed in such a way as to make certain assumptions about, for instance, the important differences between law and morality, seem natural and intuitive, but that is true in part *because of* the influence of thinkers like Bentham and Hobbes. Thus only by recovering the arguments they felt compelled to make at a time when such assumptions could not be taken for granted can we get an adequate sense of the philosophical stakes involved. At least one of us (Barzun) is drawn to this approach. Even so, it is not clear that it offers a genuine alternative to treating canonical thinkers as authoritative, rather than just a more attractive basis for doing so.

Thus, one horn of the dilemma seems to require the defender of historical jurisprudence to justify her interest in the past as a form of deference to authority in a way that is philosophically unpalatable. The other horn requires conceding that the fact that a particular thinker from the past wrote a text or developed certain arguments is not of any intrinsic significance at all. All that matters is the substantive philosophical value of the author's text or argument.

Consider, for instance, Brian Leiter's contribution to the symposium. Leiter argues that it counts in favor of Hart's positivist theory of law that

⁵² See Rorty, *supra* note 28, at 73 (“[W]e cannot get along without heroes. We need mountain peaks to look up towards. We need to tell ourselves detailed stories about the mighty dead in order to make our hopes of surpassing them concrete.”).

⁵³ See Charles Taylor, *Philosophy and its History*, in *Philosophy in History*, *supra* note 28, at 17, 27 (“[T]he fact that our practices are shaped by formulations, and that these impart a certain direction to their development, makes it the case that self-understanding and reformulation sends us back to the past: to the paradigms which have informed development, or the repressed goods which have been at work.”).

it fits Marx's theory of historical change better than its rivals do.⁵⁴ The reason is that only a positivist account of law can account for both ideological forms of law in a capitalist society and nonideological laws in a more advanced communist society.⁵⁵ The same cannot be said for a theory of law, such as Ronald Dworkin's, which makes the existence of law depend on its satisfaction of moral criteria. Leiter emphasizes, however, that the reason its natural fit with Marx's theory is a "data point" in favor of Hartian positivism is because Marx's theory contains genuine insight.⁵⁶ That is, for Leiter's purposes, it hardly matters that Marx lived in a particular time or had a specific kind of influence on subsequent thinkers; what matters is the intrinsic explanatory power of his theory.

Under this view, then, history drops out of the inquiry fairly quickly. We might look to Bentham or Hobbes, for instance, to get interesting ideas about what issues to take up or what topics might call for philosophical scrutiny; we might study their works because we think that they contain valuable insights.⁵⁷ But the fact that those thinkers lived in the past or occupy a certain status in the history of jurisprudential thought has little bearing on the evaluation of their arguments. To borrow the evocative phrase Steven Walt used at the symposium conference, history serves as little more than a "topic pump."⁵⁸

If Walt's suggestion is that history's philosophical value is exhausted by its role as a topic pump for current philosophers, then the effort to articulate a genuinely historical form of jurisprudence will have largely failed. Under this view, efforts in canon reconstruction consist of little more than purely instrumental uses of texts from the past. Such uses can therefore be openly anachronistic and unconcerned with the context in

⁵⁴ Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 *Va. L. Rev.* 1179, 1179 (2015). Or at least positivism fits more comfortably than does Dworkin's interpretive approach. At the symposium conference, Mark Murphy suggested that a natural law theory of law might fit even better with Marx's theory than does positivism. Mark C. Murphy, *Comments at the Program in Legal and Constitutional History and Virginia Law Review Association Symposium: Jurisprudence and (Its) History* (Sept. 20, 2014). For Leiter's response, see Leiter, *supra*, at 1189–91.

⁵⁵ Leiter, *supra* note 54, at 1193.

⁵⁶ *Id.* at 1179.

⁵⁷ It is a notable and interesting fact about Hobbes, however, that for all the admiration in which he is held by many contemporary philosophers, very few actually accept his actual substantive views.

⁵⁸ Steven D. Walt, *Comments at the Program in Legal and Constitutional History and Virginia Law Review Association Symposium: Jurisprudence and (Its) History* (Sept. 20, 2014).

which the texts were written.⁵⁹ Meanwhile, contingency arguments are rendered philosophically impotent because what matters for assessing theories and arguments is not who happened to endorse them or why they did so, but rather whether those theories and arguments themselves can survive the application of *today's* philosophical criteria (whether epistemic or moral). The fact that people in the past held different views from ours in no way undermines our own views so long as we have reason to think them better than those of our predecessors.⁶⁰

It seems, then, that the hopes for a genuinely historical form of jurisprudence are stuck on the horns of a dilemma. Either the history of jurisprudential thought does no work, as such, in evaluating philosophical ideas about law or, insofar as it does do work, it reduces to a (philosophically suspect) claim to authority. How can one escape this dilemma?

Rather than trying to answer this question conclusively ourselves, we invite readers to consider it as they read through the articles and commentaries that follow. But we do offer tentatively one further possible line of response. Recall that we were only forced to choose between history-as-authoritative-source and history-as-mere-topic-pump because we accepted the distinction Solum draws between the communicative content of the text of a past legal actor (or theorist) and the present-day legal (or jurisprudential) significance we attach to it. But perhaps properly interpreting texts from the past requires making philosophical evaluations of them today.⁶¹ Indeed, such a possibility is implicit in our suggestion above that philosophical argument can itself be an aid in answering historical questions about how and why ideas endure or fail to endure over time.

This suggestion is deeply controversial (to put it mildly), not least because it appears to entail an untenable form of historical idealism in

⁵⁹ See Introduction to Philosophy in History, *supra* note 28, at 1, 6 (“To say that such histories are anachronistic is true but pointless. They are *supposed* to be anachronistic.”). Philosophers’ use of history in this way is of course analogous to the lawyer’s much-derided “law office history.” See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *Sup. Ct. Rev.* 119, 132.

⁶⁰ Cf. Ferzan, *supra* note 44, at 7 (discussing various trials of animals in the past and concluding: “I don’t see the caterpillars as having criminal responsibility. I see that our best moral theories about what is required for responsibility, rationality and volitional capacities, yield that the criminal justice system was being used for misguided ends.”).

⁶¹ See G. Edward White, *Commentary, Intellectual History and Constitutional Decision Making*, 101 *Va. L. Rev.* 1165, 1168–71 (2015) (questioning whether discerning the communicative content of a constitutional provision is entirely a factual inquiry, as Solum suggests).

which ideas lie latent in texts undiscovered even by those who wrote them. In this way, it seems to endorse a long-discredited “Whig history” in which history marches to a beat of some inexorable unfolding of certain ideas.⁶² True, the common law method of adjudication has sometimes been understood to be premised on something like this idea—a view under which courts decide cases on the basis of reasons even they have not fully articulated to themselves.⁶³ But many today regard that interpretation of common law decision making, and the form of analogical reasoning it seems to depend on, as largely a smokescreen for what is a much more conscious and willful process.⁶⁴ Perhaps taking a genuinely historical approach to jurisprudence requires one to engage in the same sort of debate. If so, then it would turn out that longstanding debates about the nature and validity of traditional forms of legal reasoning recur at the level of legal theory.⁶⁵ That in itself may count as an interesting connection between law, its history and historicity, and jurisprudence.

⁶² See Herbert Butterfield, *The Whig Interpretation of History*, at v–vi (1931); see also Skinner, *supra* note 24, at 67.

⁶³ See Lon L. Fuller, *A Rejoinder to Professor Nagel*, 3 *Nat. L.F.* 83, 98 (1958) (offering up hypothetical common law cases as examples of what Fuller called “the collaborative articulation of shared purposes,” by which he meant that such cases, even if separated by half centuries, could “show that communication among men, and a consideration by them of different situations of fact, can enable them to see more truly what they were all trying to do from the beginning”).

⁶⁴ See, e.g., Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 *U. Chi. L. Rev.* 573, 585 (2000).

⁶⁵ Cf. Schlegel, *supra* note 3, at 1199 (“[U]nlike historians (and lawyers, I might add) [analytic philosophers] do not much like analogy as a form of understanding.”).

