Special Issue
The Many Fates of Legal Positivism

Is Post-Positivism Possible?

By Karen Petroski[*]

A. Introduction

In some of his last published works, Neil MacCormick began to refer to his theoretical position as "post-positivist."[1] In light of the widely perceived limitations of the "positivist" label, this self-identification might seem prudent.[2] Was it anything more? Was MacCormick's position really post-positivist? In this paper, I argue that it was not, but that this need not be viewed as a failing of MacCormick's work, since there is a sense in which modern jurisprudence cannot and need not hope to become generally post-positivist. More specifically, given the institutional context in which legal scholarship is produced, positivism is likely to be an inevitable (if not necessarily dominant) mode of theorizing about law. Yet much informative work remains to be done under the positivist rubric—not just along the lines suggested by MacCormick, but along others as well.

My ultimate point concerns the institutional possibility and desirability of a shift to a theoretical position called "post-positivism." Addressing this point requires me to take a position not only on what that phrase means, but also on what legal positivism itself is. As a result, in this paper, I recapitulate aspects of the debates regarding the nature or identity of legal positivism, but I also address topics beyond the traditional scope of those debates.

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[1] *See* NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY (2007) [hereinafter MACCORMICK, INSTITUTIONS]; NEIL MACCORMICK, H.L.A. HART (2007) [hereinafter MACCORMICK, HART].

[2] *See, e.g.*, Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 1, 8 (Robert P. George ed., 1996) (noting use of "positivism" label for "summary condemnation"); Frederick Schauer, *Positivism as Pariah*, *in* THE AUTONOMY OF LAW, ESSAYS ON LEGAL POSITIVISM 31, 35; Wilfrid J. Waluchow, *The Many Faces of Legal Positivism*, 48 U. TORONTO L.J. 387, 390 (1998) (discussing "meaningless[ness]" of debates within legal positivism). Much of twentieth-century positivist legal theory has sought to redeem the term from its use as an epithet. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615–21 (1957) (discussing post-World War II critique of legal positivism by Radbruch, among others); ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 2, 23 (1998) (discussing derogatory use of "positivist" label).

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press

My discussion has important limitations. First, since MacCormick's work is my point of departure, I focus on the Anglo-American legal positivist tradition within which he wrote.[3] The continental tradition of legal positivism associated in the twentieth century with Hans Kelsen lies largely beyond the scope of my argument. Second, my focus is on the institutional conditions of production of legal theories, rather than on assessment of their content. This essay is not a contribution to positivist jurisprudence, although it arguably builds on a tradition that is positivist in a more general sense. Finally, my thesis is the modest one that, as long as the current institutional conditions of legal and academic endeavors persist, some form of legal positivism is also likely to persist, making post-positivism difficult to attain. I do not argue that all, or even most, legal theory must be positivist.

My discussion has three main sections. Section B seeks to clarify the nature of the legal positivism beyond which MacCormick sought to move and the reasons for his desire to move beyond it. I am hardly the first person to consider the question of the nature of legal positivism; in Section B.I, I describe some previous efforts to address it, identifying the principal areas of overlap of these efforts. (I call these prior attempts to identify the nature of legal positivism "second-order" accounts, because they are not accounts of the nature of law as such, but rather theoretical accounts of other "first-order" accounts of the nature of law.) The second-order accounts I consider in Section B.I suggest that applying the "positivist" label to a theory of law has been considered appropriate when the theory characterizes its subject matter in a particular way. I conclude Section B by examining why the move beyond positivism might seem attractive to a legal theorist, given the context within which such theorists produce their theories, and the related question of what it might mean to be "post-positivist."

Some of the second-order accounts I consider note that the first-order legal theories they discuss seem to share important features with the subject matter, law, for which the theories seek to account. In Section C, I consider this parallel from a different perspective. I argue that given the modern institutional setting of scholarly activity, something resembling the positivist mode of inquiry, and debates over its propriety and details will always be part of legal theory. Indeed, the existence of positivist legal theory appears to be a product of social and institutional forces very similar to those engendering the features identified by legal positivists as characteristic of legal systems. In this section, I also briefly explore how this argument clarifies the work of major figures in the Anglo-American positivist tradition. I conclude Section C by considering some potential objections to my argument; Section D addresses another potential objection—that if it is not possible to move beyond positivism, legal theorists will run out of interesting questions to investigate. In fact, legal positivism has important contributions to make to other areas of legal scholarship. In Section D, I examine two areas in which a positivist-influenced

[3] *See* NEIL MACCORMICK & OTA WEINBERGER, AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM (1986) (identifying MacCormick's work, in contrast to Weinberger's, as in the British tradition of legal positivism).

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press

vocabulary could enrich debates proceeding, and perhaps stalling, without the benefit of that vocabulary.

B. Defining Positivism and Post-Positivism

Attempts to clarify the nature of legal positivism have multiplied in recent decades. In this section I examine the general landscape of these attempts at clarification and some of their limitations.

As suggested above, accounts of legal positivism may be considered examples of second-order legal theory, since they theorize about the nature of first-order theories, those concerned with the nature of law itself. Section B.I offers something like a third-order account of these second-order theories, describing first their general characteristics and then their main points of agreement on the nature of legal positivism. From this agreement, I draw a set of consensus attributes of legal positivism—my own second-order account of legal positivism. In Section B.II, I distinguish my account from a few of the accounts to which it may seem to bear some superficial similarities. In Section B.III, I consider the possible reasons for seeking to avoid the "positivist" label, as MacCormick appears to have done.

I. Existing Accounts of Legal Positivism

1. Types of Second-Order Account

Since the early 1980s, the volume of Anglo-American commentary on the nature of legal positivism itself has increased significantly.[4] Individual examples of this commentary have varied aims and characteristics. Some, for example, appear as preambles to new or revised theories of the nature of law, which need not themselves be positivist. In the second half of the twentieth century, this type of work has been done by H.L.A. Hart, Ronald Dworkin, Joseph Raz, and MacCormick, to name only some of the most notable figures. While these accounts of legal positivism have a critical, normative component, others are more descriptive, aiming mainly to clarify the landscape of theories of law or to correct misapprehensions about such theories.

[4] These decades were marked, for example, by the publication of monographs on legal positivism and many symposia and anthologies on the topic. *See, e.g.*, TOM CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM (1996); HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* (Jules Coleman ed., 2001) [hereinafter HART'S POSTSCRIPT]; RUTH GAVISON, ISSUES IN JURISPRUDENCE: THE INFLUENCE OF H.L.A. HART (1987) [hereinafter ISSUES IN JURISPRUDENCE]; THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (Robert P. George ed., 1996) [hereinafter THE AUTONOMY OF LAW]; POSITIVISM TODAY (Stephen Guest ed., 1996); MATTHEW KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS (1999); GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986); SEBOK, *supra* note 2; WILFRID WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994); *Symposium: The Hart-Fuller Debate At Fifty*, 83 N.Y.U. L. REV. 993 (2008). Many other instances of second-order accounts of legal positivism by these authors and others appeared as stand-alone articles and are cited in the footnotes to this Section.

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press

One approach common in this work uses the idioms of analytic philosophy, explaining legal positivism as a matter of conceptual commitment to particular theses. If Hart initiated the twentieth-century link between analytic philosophy and legal theory,[5] Dworkin appears to have initiated this thesis-based approach in his early critiques of Hart.[6] The objectives of this kind of work are consistent with the conventions of philosophical writing, but still diverse; indeed, the heterogeneity of the debates in this area is often cited as a good reason to try to move beyond positivism.[7] Thus, some work of this kind draws on the theses purportedly underlying the legal positivist position in order to demonstrate their incoherence,[8] their identity with natural law theses,[9] or, from a less critical perspective, their logical entailments.[10] Other work stresses either the superior descriptive power of the theses[11] or their absence of descriptive power.[12]

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[5] *See* Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 945, 947–50 (2006).

[6] *See* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17–18 (1967) describing as the "skeleton" of legal positivism as three "central and organizing propositions."

[7] *See infra* notes 44–45 and accompanying text.

[8] *See, e.g.*, Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *in* HART'S POSTSCRIPT, *supra* note 4, at 99; David Dyzenhaus, *Positivism's Stagnant Research Programme*, 20 OXFORD J. LEGAL STUD. 703 (2000); John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597 (2000); Klaus Fueßer, *Farewell to 'Legal Positivism': The Separation Thesis Unravelling*, *in* THE AUTONOMY OF LAW, *supra* note 4, at 119, 152; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982).

[9] *See, e.g.*, Brian Bix, *On the Dividing Line Between Natural Law and Legal Positivism*, 75 NOTRE DAME L. REV. 1613, 1624 (2000) (suggesting that positivists differ from one another as much as they differ from natural-law theorists); Timothy A.O. Endicott, *Herbert Hart and the Semantic Sting*, 4 LEGAL THEORY 283 (1998) (describing overlap of assumptions between Hart and Dworkin); Philip Soper, *Searching for Positivism*, 94 MICH. L. REV. 1739 (1996) (review of WALUCHOW, *supra* note 4); Jeremy Waldron, *Normative (or Ethical) Positivism*, *in* HART'S POSTSCRIPT, *supra* note 4, 410.

[10] *See, e.g.*, Matthew D. Adler, *Constitutional Fidelity, the Rule of Recognition, and the Communitarian Turn in Contemporary Positivism*, 75 FORDHAM L. REV. 1671 (2006) (exploring nature of the conventions regarding a rule of recognition that must exist in the U.S. constitutional order); Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); KRAMER, *supra* note 4; Andrei Marmor, *The Separation Thesis and the Limits of Interpretation*, 12 CAN. J.L. & JURIS. 135 (1999).

[11] *See, e.g.,* Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1087–88, 1092 (1997); Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1951–54 (2004).

[12] *See, e.g.*, David Dyzenhaus, *The Demise of Legal Positivism?*, 119 HARV. L. REV. F. 112 (2006); Robert P. George, *Natural Law and Positive Law*, *in* THE AUTONOMY OF LAW, *supra* note 4, at 321; Jeffrey D. Goldsworthy, *The Self-Destruction of Legal Positivism*, 10 OXFORD J. LEGAL STUD. 449 (1990); Leslie Green, *Positivism and Conventionalism*, 12 CAN. J. L. & JURISPRUDENCE 35 (1999); Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 LEGAL THEORY 329 (1998); Philip Soper, *Law's Normative Claims*, *in* The AUTONOMY OF LAW, *supra* note 4, at 215.

The other set of prominent academic conventions followed by accounts of the nature of legal positivism are those associated with the work of legal and social historians. Some genealogical accounts of this kind describe a coherent legal positivist *tradition*, resting on an essential continuity of attitude, method, vocabulary, or conceptual commitment among those self-identified or described as legal positivists.[13] Others point to the incoherence of the positions espoused by the same figures—either to deny the absence of any such tradition, a way of confirming claims about the meaninglessness of the "positivist" label,[14] or to point out particular theorists' misinterpretations of their predecessors' positions, a way of redescribing the tradition.[15] While some of these accounts focus on aspects of the institutional setting within which particular legal theorists have written,[16] none relates that context to the debates about legal positivism itself in any sustained way.

2. Where Second-Order Accounts Agree

As the above discussion suggests, theoretical accounts of legal positivism disagree on many points. They do not only disagree about the academic conventions according to which legal theory should be done, or the other disciplinary resources it should draw on. They disagree about the nature of legal theory itself, and about whether positivism is a

[13] *See, e.g.*, Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 CAN. J.L. & JURIS. 17 (1999) (tracing legal positivism to Hobbes); Owen M. Fiss, *The Varieties of Positivism*, 90 YALE L.J. 1007 (1981); John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199 (2001); Neil MacCormick, *A Moralistic Case for A-Moralistic Law?*, 20 VAL. U. L. REV. 1 (1985); Stephen Perry, *Hart's Methodological Positivism*, *in* HART'S POSTSCRIPT, *supra* note 4, at 311; Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 LEGAL THEORY 75 (2005); William Twining, *General and Particular Jurisprudence—Three Chapters in a Story*, *in* POSITIVISM TODAY, *supra* note 4, at 119; Jeremy Waldron, *All We Like Sheep*, 12 CAN. J. L. & JURIS. 169 (1999).

[14] *See, e.g.,* Deryck Beyleveld & Roger Brownsword, *Normative Positivism: The Mirage of the Middle Way*, 9 OXFORD J. LEGAL STUD. 462, 462 (1989) (concluding that modern "normative" positivism is "incoherent"); David Dyzenhaus, *The Genealogy of Legal Positivism*, 24 OXFORD J. LEGAL STUD. 39 (2004); Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years off the Point*, 19 CAN. J. LAW & JURIS. 67 (2006).

[15] *See, e.g.,* James Allan, *A Modest Proposal*, 23 OXFORD J. LEGAL STUD. 197 (2003); Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003); David Lyons, *Review, Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415, 424–25 (1977); Michael S. Moore, *Hart's Concluding Scientific Postscript*, 4 LEGAL THEORY 301 (1998); Schauer, *supra* note 2, at 31; Brian Z. Tamanaha, *The Contemporary Relevance of Legal Positivism*, 32 AUST. J. LEG. PHIL. 1 (2007).

[16] *See, e.g.,* Martin Krygier, *The Concept of Law and Social Theory*, 2 OXFORD J. LEGAL STUD. 155, 155–67 (1982); Lacey, *supra* note 5, at 947–49; Andrew Lewis, *Legal Positivism—Some Lessons from Legal History*, *in* POSITIVISM TODAY, *supra* note 4, at 65, 67–73; Philip Schofield, *Jeremy Bentham and Nineteenth-Century English Jurisprudence*, 12 J. LEGAL HIST. 58, 61–75 (1991); Twining, *supra* note 13, at 119, 123–31.

descriptive or normative theory.[17] They also disagree on the precise boundaries of legal positivism (such as whether Ronald Dworkin may be considered a positivist).[18] And, of course, they disagree on whether legal positivism, however understood, is descriptively true or theoretically coherent or useful. Despite all of this disagreement, there is also implicit agreement among these accounts about certain features of legal positivism. These areas of overlap are, however, different from those, such as the "separability thesis"[19] or the "sources thesis," often associated with legal positivism.[20]

First, all seem to agree that to the legal positivist (and perhaps to any legal theorist, positivist or not), law can be differentiated from other things that exist.[21] (Of course, certain legal theorists nearly universally understood not to be positivists also subscribe to this view.[22] I return to the question of whether these points uniquely distinguish legal positivists below.) Second, positivists are described as agreeing that an important aspect of law is its character as a social phenomenon made up of interrelated communicative acts involving the identification and provision of reasons for action. In other words, law is a discursive and normative system.[23] Third, as a result of these first two premises, second-order accounts seem to agree that to the legal positivist, the system of law has limits; it does not coincide with the universe of experience or the full range of ordered behavior. Different accounts put this point in different ways. Some focus on the phenomenon

[17] *See, e.g.,* Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural-Law Theory and Legal Positivism*, 5 OXFORD J. LEGAL STUD. 1, 31 (1985) (arguing that "the ultimate reason for choosing between natural-law theory and positivism is not the moral reason but the reason of theoretical superiority").

[18] Dworkin characterized his theory as a "general attack on positivism." Dworkin, *supra* note 6, at 20; *see also* Dyzenhaus, *supra* note 8, at 712, 716 (noting that a "Dworkinian" judge would not be a legal positivist). But others have argued that Dworkin is nevertheless a legal positivist in some sense. *See, e.g.,* Leiter, *supra* note 15, at 27; Perry, *supra* note 13, at 317; Stephen Perry, *The Varieties of Legal Positivism*, 9 CAN. J.L. & JURIS. 361, 361 (1996).

[19] *See, e.g.,* Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1035–36 (2008); Gerald Postema, *Law's Autonomy and Public Practical Reason*, *in* THE AUTONOMY OF LAW, *supra* note 4, at 79, 80.

[20] *See, e.g.,* Coleman, *supra* note 10, at 140; Gardner, *supra* note 13, at 199.

[21] This point is related to but distinct from the so-called separability thesis. Voluminous citations would be required to support this assertion fully and specifically; in identifying these points of agreement, I have drawn on the sources in surrounding footnotes.

[22] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 14 (1980) (describing law as "a significantly differentiated type of social order").

[23] Commitment to this position does not imply a normative or descriptive aim, a particular mode of argument or description, or any particular characterization of the acts in question. Since Hart, this aspect of the positivist position has probably most often been discussed in terms of the following of rules, but work on rule following is best understood as a particular way of discussing the reason-seeking function of law.

identified by Hart in his 1957 essay on the separation of law and morals.[24] Others focus on the distinction between norms that are intentionally generated and others that are not. Still others focus on the "exclusionary"[25] or "limited"[26] nature of legal reasons for action. All of these are different ways of making the same point. Finally, second-order accounts of legal positivism in the Anglo-American tradition agree that for the positivist, law necessarily involves some form of higher-order discourse that both concerns and carries out the acts of delimitation constitutive of legal systems, what Hart called "secondary rules."[27] (This position is commonly associated with Hart; below, I discuss how pre-Hart theorists also described law as necessarily involving some such higher-order content.)[28]

In addition, a point increasingly common to these accounts of legal theory is the observation that all positivist theories of law are necessarily partial accounts of their subject matter, so that any given theorist can only hope to capture one or a few aspects of the nature of law. Both theorists of the nature of law and accounts of these theories have, more and more, come to acknowledge this point explicitly.[29]

II. What This Account Adds

My account is consistent with but extends both the accounts surveyed above and other more specific positions taken by particular legal theorists. In this section I clarify how my perspective is related to these other positions.

To recapitulate, the points of agreement among the accounts of legal positivism discussed above are (1) to the positivist, law is an actually existing social phenomenon necessarily including a discursive system including practices of identifying and providing reasons, and it is usefully considered as such; (2) to the positivist, this system is limited; and (3) to the

[24] Hart, *supra* note 2, at 599, 601 n.25.

[25] *See, e.g.,* JOSEPH RAZ, PRACTICAL REASON AND NORMS 35–48 (1990).

[26] *See* Schauer, *supra* note 11, at 1915–16.

[27] H.L.A. HART, THE CONCEPT OF LAW 94 (1994).

[28] *See infra* notes 99–107 and accompanying text.

[29] *See* H.L.A. Hart, *Comment*, *in* ISSUES IN JURISPRUDENCE, *supra* note 4, at 35, 39; *but see* Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 97, 120 (Andrei Marmor ed., 1995) (arguing that Hart saw his theory of law as the only "possible conceptual analysis of law"). Joseph Raz makes this point often. *See, e.g., The Problem About the Nature of Law*, 21 U. W. ONTARIO L. REV. 203, 218 (1982); *On the Nature of Law* [hereinafter Raz, *On the Nature*], *in* BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON [hereinafter RAZ, BETWEEN] 91, 97–98 (2009) ("While the law has many essential features we are not aware of all of them. . . . The study of jurisprudence is never-ending, for the list of the essential properties of law is indefinite."). *See also* FINNIS, *supra* note 22, at 17; KRAMER, *supra* note 4, at 216–27.

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positivist, legal systems include mechanisms for sustaining their own boundaries, or effectuating these limits on the system, in the form of communications referring to the system and the reasons it offers. Further, although this point is not universally acknowledged, no theorist has captured all of the features of law in a single account.

I will take these points to constitute the core of "legal positivism" as it is understood by contemporary Anglo-American legal theorists. It is possible that none of these points distinguish legal positivists from legal theorists in general, a question to which I return in Section C.II.3 below. In addition, the understanding of legal positivism proposed here is not entirely derived from these earlier accounts, which share two related blind spots. With a few exceptions, these theories of legal theory have not explored the social contexts in which positivist legal theory has been produced; the exceptions have explored only the contexts within which specific theorists have worked.[30] These second-order accounts have also largely failed to explore the curious parallel between the characteristics of law, on the positivist account, and the characteristics of theoretical discourse about law.[31] The discussion in Section C suggests that considering these issues—one a positivistic concern, the other a formal one—indicates that post-positivism is not necessarily a realistic goal.

Features of the account presented here also closely resemble, but depart from, specific positions taken by particular legal theorists. My distinction between first- and second-order theories, for instance, recalls Stephen Perry's distinction between methodological and substantive positivism, although my conclusions differ from his.[32] Perry pointed out that the term "positivism" has been used to refer to two types of position, one a substantive position about the nature of law (the position that there is no necessary link between moral normativity and legal normativity), the other a methodological position about the nature of legal theory (the position that legal theory should be purely descriptive, rather than normative).[33] This distinction is more specific than my distinction between first- and second-order theory. Perry's main point in making it is that it is conceptually inconsistent to defend a substantively positivist position using methodological positivism, since this amounts to treating a normative subject in a way that cannot account for its normativity.[34] In contrast to Perry, I argue below that the conditions

[30] *See supra* note 16.

[31] Some second-order accounts of positivism have explored the relationship between "external" and "internal" legal theory, and the relationship between this distinction and the necessarily partial nature of legal theory. *See, e.g.,* Perry, *supra* note 29. Others have explored the contexts in which legal theory is produced. *See, e.g.,* Lacey, *supra* note 5, at 947–48; Schofield, *supra* note 16, at 69–70, 82, 85. But the link between these two topics has been much less scrutinized.

[32] *See* Perry, *supra* note 13; Perry, *supra* note 18; Perry, *supra* note 29.

[33] Perry, *supra* note 13, at 311.

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encouraging the production of what he calls methodological positivism may actually encourage (without requiring) substantively positivist positions.

Finally, my position may also at times seem reminiscent of the claim, often attributed to Hart, that a satisfactory account of the concept of law must proceed from an "internal point of view."[35] On one account, this is the claim that, to give a full account of law, a theorist must grasp the way law is experienced by legal professionals. This requirement arguably leads legal theory to develop formal or systematic characteristics mirroring those of its subject matter, although it need not do so.[36] I seek to make the related but distinct point that because law and academic legal theory are practices that historically developed in parallel, we should not be surprised to find that they share certain characteristics (rather than that legal theory must account for a particular subset of these characteristics in order to give an informative account of law).

In coming to this conclusion, I am indebted on the one hand to works that have looked at the institutional context within which legal positivist theory has been produced[37] and at the connection between this context and the social and institutional history of law itself,[38] and on the other to a literature on the sociology of academic and legal expertise that is seldom linked to metatheoretical debates in jurisprudence.[39] This work indicates that the partiality of legal theory, and some of its specific characteristics, are usefully considered as functions of the social and institutional context within which it is created.

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[34] *Id.* at 347, 354.

[35] *See* Perry, *supra* note 29; HART, *supra* note 27, at 91 (opining that "all our criticisms of the prediction theory of obligation may be best summarized as" the criticism that they "define . . . out of existence" "the internal aspect of obligatory rules").

[36] *See* Perry, *supra* note 29. *See also* HART, *supra* note 27, at 91, 243–44.

[37] *See* Krygier, *supra* note 16; Lacey, *supra* note 5; Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)); Schofield, *supra* note 16.

[38] *See, e.g.,* Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894 (1977); Lewis, *supra* note 16; David Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, *in* LEGAL THEORY AND COMMON LAW 26 (William Twining ed., 1986).

[39] *See, e.g.,* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988) [hereinafter ABBOTT, SYSTEM OF PROFESSIONS]; ANDREW ABBOTT, CHAOS OF DISCIPLINES (2001) [hereinafter ABBOTT, CHAOS]; TONY BECHER, ACADEMIC TRIBES AND TERRITORIES: INTELLECTUAL ENQUIRY AND THE CULTURES OF DISCIPLINES (1989); HARRY COLLINS & ROBERT EVANS, RETHINKING EXPERTISE (2007); RANDALL COLLINS, THE SOCIOLOGY OF PHILOSOPHIES: A GLOBAL THEORY OF INTELLECTUAL CHANGE (1989).

III. Why Seek Post-Positivism?

Having clarified what I take to be the core of "legal positivism" as it is understood by Anglo-American legal theorists, and the scope of my objectives, I turn in this section to a final background question: the reasons a legal theorist might seek to move beyond positivism, to become a "post-positivist." So far, Neil MacCormick is most visible Anglophone legal theorist to have applied this label to himself repeatedly and to have explained in detail why he considers himself a "post-positivist." In this section, I briefly identify several possible reasons for the impulse to label oneself "post-positivist," not all of them cited by MacCormick. A number of these reasons are intimately linked to the phenomenon described above—the staggering proliferation of first- and second-order legal theories over the past several decades, the precise period within which MacCormick wrote. This section provides a foundation for my examination, in Section C, of how, if at all, MacCormick's position differs from the legal positivist commitments discussed above.

As it has been used from the mid-twentieth century on, first in literary criticism and then in many other areas, the "post-" label signifies the desire for a fresh start, based on disillusionment with existing tradition.[40] Use of the prefix implies that the root tradition is no longer viable in its original form. This is how MacCormick uses the term.[41] A legal theorist might conclude that the root tradition—legal positivism—is no longer viable for either conceptual or prudential reasons. Conceptual reasons for seeking to move beyond legal positivism could include (1) dissatisfaction with the increasingly narrow questions addressed by positivists and their apparently increasingly trivial conclusions[42] or (2) a conclusion that one or more of the premises or methods of legal positivism have been discredited or are irreconcilable. (Note that this second reason, while it is a common critical approach in legal theory,[43] cannot be a sound reason for rejecting legal positivism unless the theorist has exhaustively identified the premises or methods of legal positivism.) Prudential reasons for identifying a position as post-positivism might include (3) a desire to free the theorist's work from the pejorative connotations associated with the "legal

[40] *See* Malcolm Bradbury, *What Was Post-Modernism? The Arts in and after the Cold War*, 71 INT'L AFFAIRS 763, 767–74 (1995) (discussing Irving Howe's initial use of the prefix in 1959 and its subsequent shifts in meaning in different contexts and periods).

[41] *See* MACCORMICK, INSTITUTIONS, *supra* note 1, at v (explaining abandonment of "positivist" label as a result of debates over the issue).

[42] *See, e.g.,* Twining, *supra* note 13, at 123–25 (suggesting that John Austin's work initiated this narrowing of the issues addressed by legal theory); R. George Wright, *Does Positivism Matter?*, *in* THE AUTONOMY OF LAW, *supra* note 4, at 57, 57, 68 (arguing that legal positivist positions are trivial).

[43] Many legal theorists have taken this position, but prior to MacCormick they described themselves, and would most likely have been described as, anti-positivist rather than post-positivist. *See, e.g.,* WILLIAM E. CONKLIN, THE INVISIBLE ORIGINS OF LEGAL POSITIVISM: A RE-READING OF A TRADITION 3, 68, 304 (2002); Fueßer, *supra* note 8, at 119, 120; George, *supra* note 12, at 321, 330; Tamanaha, *supra* note 15, at 35–36.

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positivism" label;[44] (4) exhaustion with the volume of material produced under the positivist rubric; and/or (5) a desire to mark the theorist's work as original rather than derivative, that is, a strategy of reputational or theoretical branding.[45]

The distinction between conceptual and prudential reasons for using the post-positivist label is important because the theory in question is more likely to be genuinely post-positivist—transcending or fundamentally departing from the core positions outlined above—if the use of "post-positivist" label is supported by conceptual, rather than just prudential, reasons. As I suggest below, it seems that MacCormick's chief reasons for applying the label to himself were probably, in fact, prudential, and that powerful incentives will continue to deter any widespread rejection or denunciation of the core preoccupations of legal positivism.

C. The Possibility of Post-Positivism

In this section, I argue that legal positivism is both a defensible mode of theorizing about law and an inescapable one. We cannot hope to eliminate it entirely from the landscape of legal theories, as long as that theorizing proceeds within an institutional context similar to its present one. This is because modern legal theorists, positivist and non-positivist, are always simultaneously concerned with two domains: (1) that of law, about which they theorize, and (2) that of academic theoretical inquiry, within which they produce their work. Both of these domains affect the scope of what it is possible for legal theorists to think and write. All legal theorists write from within the second domain; legal positivist theorists happen to produce theoretical accounts from that second domain that bear some of the same characteristics they also ascribe to the first domain, law. This parallel is sometimes represented as a deliberate theoretical choice, but deliberate or not, it is encouraged by the parallels between the social and institutional histories of the two domains, parallels that in turn generate parallel incentives for the production of higher-order commentary.

My discussion in this section has three parts. In Section C.I, I argue that the reasons suggested by MacCormick for moving beyond legal positivism are not compelling. I also argue that MacCormick did not succeed in this goal. Section C.II examines some of the factors that make post-positivism a quixotic goal, through a review of the history of the

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[44] *See, e.g.,* Greenawalt, *supra* note 2, at 19 (noting that "the label 'legal positivism' may be mainly a matter of rhetorical force, now usually negative"); SEBOK, *supra* note 2, at 2 (noting that the "positivist" term has "in recent years . . . become a pejorative in modern American legal circles"); Schauer, *supra* note 2, at 32–35 (discussing pejorative uses of "positivist" label).

[45] *Cf.* BECHER, *supra* note 39, at 70.

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press

legal positivist negotiation of the two domains identified just above. In Section C.III, I begin to address possible objections to my argument, a project continued in Section D.

I. MacCormick's Post-Positivism

As noted, it seems that for MacCormick, prudential motivations for resort to the "post-positivist" label might have been paramount.[46] He does not take the position that the premises of legal positivism have been discredited;[47] indeed, he consistently identified his work as "in the same tradition" as that of Hart.[48] Nor does he seem troubled by the nit-picking details of legal positivist controversies, since he engages in and acknowledges the relevance of many of those quarrels.[49] MacCormick in fact admits that the justifications he provides for his self-labeling as post-positivist do not really distinguish his position from legal positivism. He writes that he identifies himself as post-positivist because he believes that "law is necessarily geared to some conception of justice," a moral concern.[50] But he concedes that it is only the "more austere and rigorous forms" of legal positivism that "absolutely exclude the possibility that there is any moral minimum that is necessary to the

[46] MacCormick's use of the label may also be related to terminological bleeding from one specialty to another. The term "post-positivist" is not uncommon in work on international law and international relations, another field in which MacCormick wrote. *See, e.g.,* INTERNATIONAL THEORY: POSITIVISM AND BEYOND (Steve Smith, Ken Booth & Marysia Zalewski eds., 1996); Thomas Biersteker, *Critical Reflections on Post-Positivism in International Relations*, 33 INT'L STUD. Q. 263 (1989); Stan Gontarek, *International Legal Theory: Positivist, Naturalist, and Much More*, 1 INT'L LEGAL THEORY 5 (1995). In this subfield, the term is used not to refer to a position beyond or following legal positivism but in a manner borrowed from its meaning in the philosophy of science, where it refers to post-logical positivist theoretical positions. *See, e.g.,* RUTH GROFF, CRITICAL REALISM, POST-POSITIVISM, AND THE POSSIBILITY OF KNOWLEDGE (2004); JOHN H. ZAMMITO, A NICE DERANGEMENT OF EPISTEMES: POST-POSITIVISM IN THE STUDY OF SCIENCE FROM QUINE TO LATOUR (2004). Larry Laudan is known for having argued that these "post-positivist" positions share important assumptions with the positivism they claim to move beyond and are largely an extension of positivism rather than a true departure from it. *See* LARRY LAUDAN, BEYOND POSITIVISM AND RELATIVISM: THEORY, METHOD, AND EVIDENCE (1996).

[47] For example, he maintains that "law and morality are conceptually distinct." MACCORMICK, INSTITUTIONS, *supra* note 1, at 261, 264.

[48] MACCORMICK, INSTITUTIONS, *supra* note 1, at 278–79. *See also* MACCORMICK, HART, *supra* note 1, at 16, 167; MACCORMICK & WEINBERGER, *supra* note 3, at 7.

[49] *See, e.g.,* MACCORMICK, INSTITUTIONS, *supra* note 1, at 25–30 (discussing various aspects of theoretical debates over rules, norms, exclusionary reasons, discretion, and standards); *id.* at 56–57 (offering critique of received understanding of Hart's Rule of Recognition concept); *id.* at 62–73 (clarifying distinction between rules and habits); *id.* at 161–65 (discussing validity and defeasibility of legal norms).

[50] MACCORMICK, INSTITUTIONS, *supra* note 1, at 264. *See also id.* at 4 (writing that he believes that "some minimum of justice is essential" to legal validity). MacCormick also points to his incorporation of positions associated with legal theorists identified as natural law theorists as well as legal positivists. *Id.* at 279. But as has often been discussed, many legal positivists have moderated their position to accommodate criticisms offered by natural law theorists or non-positivists, without relinquishing their commitment to the positions described above in Section B.I.2. *See, e.g.,* Robin Bradley Kar, *Hart's Response to Exclusive Legal Positivism*, 95 GEO. L.J. 393 (2007).

existence of law as such."[51] (I am not the first to note that the theory articulated in *Institutions of Law*, which is a restatement of theories MacCormick began developing much earlier, is best understood as an extension of legal positivism, one that draws on theoretical sources outside the mainstream tradition of legal positivism, rather than a movement beyond its basic perspective.)[52]

But none of the details of MacCormick's position in *Institutions of Law*, his final summation of his theoretical commitments, distinguishes those commitments from the core legal positivist commitments described above. MacCormick identifies the heart of his "institutional" theory of law as the proposition that law is an "institutional normative order"[53] that is "heteronymous [i.e., providing reasons for action external to agents], as well as authoritative and institutional," in contrast to morality, "which is autonomous, discursive, and controversial."[54] Thus, MacCormick describes law as a social phenomenon, systemic in character, involving the communication and suspension of particular (autonomous or moral) reasons for action. He also understands legal systems and institutions as necessarily containing self-referential components; in this aspect of his account, he draws on the social systems theory of Niklas Luhmann and Gunther Teubner.[55] Indeed, one of the primary ways in which MacCormick moves "beyond" legal positivism in this final work is by considering the work of theorists outside the legal positivist canon, such as Luhmann, Teubner, Karl Popper, Michel Foucault, and Sundram Soosay.[56] But the use of a vocabulary that is partly novel does not cause MacCormick's theory to differ more from admittedly positivist positions than those positions already differ from one another.[57]

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[51] MACCORMICK, INSTITUTIONS, *supra* note 1, at 278.

[52] *See* Huib M. De Jong & Wouter G. Werner, *Continuity and Change in Legal Positivism*, 17 L. & PHIL. 233, 240, 249 (1998). To be sure, there are some ways in which MacCormick moves beyond the concerns of prior legal positivists, as outlined above. He suggests, for example, that law might not be reducible to discourse. See MACCORMICK, INSTITUTIONS, *supra* note 1, at 62–73. He also suggests that judgments regarding the legal validity of norms occur on a continuum rather than being binary judgments. *Id.* at 161–65, 257–58. And as noted below, he draws on a wider range of theoretical material than the traditional legal positivist does. *See infra* note 56 and accompanying text.

[53] MACCORMICK, INSTITUTIONS, *supra* note 1, at 1, 60.

[54] *Id.* at 255. *See also* Neil MacCormick, *The Concept of Law and The Concept of Law*, in THE AUTONOMY OF LAW, *supra* note 4, at 163, 164–71. MacCormick uses the term "discursive" in a narrower sense than I do, to refer to a disputational setting rather than to practices of verbal articulation.

[55] MACCORMICK, INSTITUTIONS, *supra* note 1, at 24, 177–78, 184, 289, 302–03. MacCormick claims that his theory is not "derived from" or
"entailed by" Luhmann's systems theory, but that the two are "strikingly mutually compatible." *Id.* at 302.

[56] MACCORMICK, INSTITUTIONS, *supra* note 1, at 65, 154, 292–93.

It seems, then, that MacCormick can only be using the "post-positivist" label for one of the prudential purposes I identified above: as a device for avoiding unwanted negative connotations or for asserting that his intellectual position is distinguishable from others. As suggested above, these reasons for using the label cannot themselves establish the conceptual or functional difference of a particular theoretical position from legal positivism.

Still, even if MacCormick did not distinguish his position sufficiently from legal positivism to justify labeling his position "post-positivist," it is possible that a differently formulated first-order theory might achieve this distinction so conclusively as to make positivist-style commitments seem truly obsolete. Below I consider whether it is feasible to expect that legal theory will pass beyond positivism in this sense.

II. The Possibility of Post-Positivism

Within legal theory, perhaps especially including the tradition of legal positivism, there is an established practice of drawing on sociological concepts to flesh out accounts of law, even where the primary conceptual vocabulary comes from other analytical or philosophical work.[58] As noted above, there is also a limited tradition of reflection on the relationship between the discourse of legal theory, including legal positivism, and the discourse of law itself.[59] But most of the work reflecting on this parallel is descriptive,

[57] MacCormick comes close to acknowledging this when he acknowledges that scholarship can only ever hope to provide a partial account of its subject matter. MACCORMICK, INSTITUTIONS, *supra* note 1, at 301–02 (asserting that scholarship cannot claim "to have found some 'Archimedean' point outside, perhaps 'above,' the practical activity from which it looks down on the activity and sees that it represents nothing real. Rather, as Luhmann points out, it involves a kind of self-observation of the legal system from within it, but an observation that is not aimed directly at the solution of particular current practical problems arising within it").

[58] *See, e.g.,* Lacey, *supra* note 5, at 950–57; Perry, *supra* note 29, at 97 ("As a discipline jurisprudence claims . . . to be both a branch of practical philosophy . . . and a social science of a certain kind."). *But see* Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 J.L. & SOC'Y 171 (1998). MacCormick's incorporation of Luhmannian systems theory into his account of law can be viewed as a logical extension of this tradition. *See* MACCORMICK, INSTITUTIONS, *supra* note 55 and accompanying text.

[59] *See, e.g.,* Krygier, *supra* note 16, at 164, 167 (noting how different disciplinary commitments of analytical theorists and social scientists studying law lead them to identify different characteristics of legal systems); Lacey, *supra* note 5, at 950–57 (providing critique of H.L.A. Hart's respect for and disciplinary allegiance to analytic philosophy); Lewis, *supra* note 16, at 65, 70–71 (presenting descriptive account of parallel histories of valorization of autonomy in legal practice and legal theory); Schauer, *supra* note 37, at 858–69 (discussing disciplinary commitments and dimensions of twentieth-century positivism in the wake of Hart); Twining, *supra* note 13, at 129–30 (describing history of particularizing conclusions of post-Bentham legal theorists, and parallels between particularization in legal practice and in jurisprudence). Some work, to be sure, has rejected the thesis that the legal domain involves the kind of partiality or suspension identified by legal positivism, while acknowledging that legal theory is necessarily partial, and draws from these premises the conclusion that legal positivism in one or more of its varieties is intellectually incoherent. But this work argues that the positivist description of law is inaccurate; it does not seek to refute the idea that legal positivism is an inevitable form of legal theory in the world we inhabit. *See, e.g.,* Goldsworthy, *supra* note 12, at 451–52 (arguing that the only plausible legal position

simply identifying analogies between legal practice and legal theory. In this section, I use the first of these techniques to extend the analysis begun by the second, looking at the social and institutional context within which legal theory is produced and the factors encouraging producers of theory to give their work positivist traits.

1. Two Domains

In a 1981 article, Owen Fiss explored a question related to my concern here: whether commitment to the enterprise of generating a theoretical account of law (or "cognitive positivism," identified by Fiss with pure description) logically entails commitment to legal positivist conclusions, chiefly the so-called "separation thesis" (or "ethical" positivism).[60] Fiss concluded (as others have since[61]) that no such relation is necessary, but suggested that the lack of a well-developed critical literature on the practices of legal scholarship made it impossible for him to venture any firm conclusions about the necessary shape of legal theory.[62]

In the years since Fiss wrote, the literature on practices of legal scholarship and academic expertise more generally have grown significantly.[63] (The consensus emerging from this literature is reflected in the increasingly common position, noted above, regarding the necessary partiality or incompleteness of legal theory.[64] But that observation is just one of a larger set of common observations about the Western academic domain.) This literature agrees that, starting in the early modern period, the academic domain has been more and more characterized by the policing of membership through extensive discursive indoctrination[65] and the evaluation of various forms of discursive performance.[66]

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from the "internal point of view" is a natural law position); Perry, *supra* note 13, at 347 (arguing that methodological positivism is inconsistent with the normativity of its descriptive object, law); Postema, *supra* note 8, at 165–66 (arguing that history of legal philosophy is a history of attempts to reconcile irreconcilable theses regarding legal normativity and social existence of legal institutions); Waldron, *supra* note 9, at 426, 432–33 (discussing "asymmetry" between legal theory as grasped by actors within the legal system from the internal point of view and as grasped by academic theorists).

[60] Fiss, *supra* note 13, at 1008.

[61] *See, e.g.,* Perry, *supra* note 13, at 312–14 (discussing Hart's mixture of methodological and substantive positivism); Waldron, *supra* note 9, at 432–33.

[62] Fiss, *supra* note 13, at 1016.

[63] *See, e.g.,* sources cited *supra* note 39; Sugarman, *supra* note 38; Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 L. & SOC'Y REV. 911 (2000).

[64] *See supra* note 29 and accompanying text.

[65] *See* BECHER, *supra* note 39, at 32–44; COLLINS & EVANS, *supra* note 39, at 14, 24; Catherine Kemp, *The Uses of Abstraction: Remarks on the Interdisciplinary Efforts in Law and Philosophy*, 74 DENVER U. L. REV. 877, 879–85

According to this literature, the modern university, one of the institutions that has emerged from this dynamic, has distinctive material and conceptual features. Materially, those acting within the institution depend to some extent on external support and must therefore justify their activities to social actors outside the institution.[67] At the same time, the institutional structure is largely self-reproducing, both materially and conceptually, and its self-reproduction occurs primarily through discourse.[68] These features make the structure a competitive arena, and the resulting competition encourages academics to draw distinctions between their positions and those of their forebears and contemporaries.[69] Sociologist Andrew Abbott calls this characteristic of academic discourse the drawing of "fractal distinctions."[70] Although Abbott focuses on the fractal conceptual structure of the social sciences, others have made similar observations about academic philosophy[71] and the academic study of law.[72] The nature of these distinctions is such as to encourage the use of a rhetoric of innovation, even when a theorist is not truly making a novel point.[73] And these features also encourage an implicit normative hierarchy of intellectual positions, one in which abstract, conceptual, or higher-order accounts of a subject matter attain higher prestige, both within each specialty and across fields,[74] despite the acknowledged impossibility of attaining a "theory of everything." For the academic, a high measure of self-awareness and facility with abstract self-referential discourse is a prized and rewarded trait.

(1997); WALTER J. ONG, RAMUS, METHOD, AND THE DECAY OF DIALOGUE: FROM THE ART OF DIALOGUE TO THE ART OF REASON 306 (2nd ed., 2004).

[66] *See* ABBOTT, CHAOS, *supra* note 39, at 130–31, 137–38, 140–42; COLLINS & EVANS, *supra* note 39, at 45–76; COLLINS, *supra* note 39, at 25–36.

[67] ABBOTT, CHAOS, *supra* note 39, at 141; COLLINS & EVANS, *supra* note 39, at 9.

[68] *See* ABBOTT, CHAOS, *supra* note 39, at 130, 140, 147–49; COLLINS & EVANS, *supra* note 39, at 7, 24–27, 30–31, 39, 86; COLLINS, *supra* note 39, at 25–36.

[69] ABBOTT, CHAOS, *supra* note 39, at 137 (noting that "[k]knowledge experts compete with one another through redefinition of each other's work"); COLLINS, *supra* note 39, at 31, 71, 80.

[70] ABBOTT, CHAOS, *supra* note 39, at 11–13, 138, 148.

[71] *See, e.g.,* COLLINS, *supra* note 39, at 31, 76, 80–81; HANS-JOHANN GLOCK, WHAT IS ANALYTIC PHILOSOPHY? 245–46 (2008).

[72] FIONA COWNIE, LEGAL ACADEMICS: CULTURES AND IDENTITIES 134, 198 (2004); Sugarman, *supra* note 38, at 26, 29, 34; Tomlins, *supra* note 63, at 926–64.

[73] ABBOTT, CHAOS, *supra* note 39, at 140–42, 148; BECHER, *supra* note 39, at 70.

[74] *See, e.g.,* ABBOTT, CHAOS, *supra* note 39, at 145–47; ABBOTT, SYSTEM OF PROFESSIONS, *supra* note 39, at 52–57, 79–85, 102–104, 110–11, 118–21 (discussing phenomenon of "professional regression" into high-status positions of pure reflection on abstract knowledge linked with professional group); BECHER, *supra* note 39, at 57; COWNIE, *supra* note 72, at 198.

Similar features characterize the modern legal domain as a set of social institutions. Attaining expertise in this domain involves indoctrination into discursive practices.[75] Like the academy, this set of institutions is both materially and conceptually self-perpetuating. Materially, lawyers' expertise in the discourse used to navigate the institutions regulating state power ensures their continued support by non-lawyers. Andrew Lewis has argued, along these lines, that lawyers have an inherent interest in taking a theoretical perspective on their activities, since such a perspective allows them to "exclude the practical consequences" of their judgment from consideration and thus insulate themselves from criticism by outsiders and withdrawal of support. [76] In these ways, lawyers' maintenance of their discursive expertise shapes legal discourse, ensuring not only that it requires certain reasons for action to be set aside,[77] but also that it contains higher-order discourse about law itself.[78] As in the academic domain, legal discourse thus takes a "fractal" form, even at the level of what Hart called primary rules.[79] And as in the academic domain, the proliferation of higher-order discourse reflects and creates a status hierarchy. Those who work with such higher-order legal discourse—such as appellate and constitutional lawyers and judges—are widely accorded a higher status than their primary-rule counterparts.[80] At the same time, legal discourse contains a significant element of what Harry Collins and Robert Evans call "interactional expertise," that is, fluency in the discursive conventions of other specialties.[81] Indeed, legal practice seems to be one of the types of expertise that Collins and Evans describe as "almost entirely devoted to gaining interactional expertise in other specialisms," since it borrows its content and meaning from responses to and discourse about other social phenomena.[82]

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[75] COWNIE, *supra* note 72, at 128–29; ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 12–30, 207–23 (2007).

[76] Lewis, *supra* note 16, at 66.

[77] *Id.*

[78] HART, *supra* note 27, at 94.

[79] *See* J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986). Using a different vocabulary, Niklas Luhmann has explored this phenomenon extensively. *See, e.g.,* NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 41–48, 73–83 (1972).

[80] Angela P. Harris & Marjorie M. Schultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1777 n.14 (1993) (noting prestige of appellate judges compared to trial judges in America, and of certain substantive fields of law involving more secondary-rule content and valuing "rationality" over "emotion"); Deborah Jones Merritt, *Who Teaches Constitutional Law?*, 11 CONST. COMMENT. 145 (1994) (concluding that constitutional law is high-prestige specialty among American legal academics).

[81] COLLINS & EVANS, *supra* note 39, at 35–39.

Legal theory generally and legal positivist theory in particular—the subject of Section B.I—are generated from within the first of these domains, the academic, and seek to describe or account for the second, the legal. Thus, legal theory is both a manifestation and a description of what Andrew Abbott calls the "fractal fecundity" of certain cultural and intellectual phenomena.[83] The characteristic assumptions of legal positivism, outlined in Section B.I.2, observe these facts about law, but they usually do so without turning those observations back upon the theoretical enterprise itself. If we engage in such self-reflection, we can see that legal positivist theory fixates on qualities of its subject matter that have analogues in the institutions within which the theorists themselves are operating—a preoccupation with reason-giving, the systematic suspension of certain considerations, communicative self-reference. My point is not that legal theory inevitably adopts these features because it is impelled to take on the features of the subject-matter it is explaining (either because this is necessary for a complete explanation or because it is a kind of irresistible temptation).[84] It is, rather, that because of the parallel social functions and historical paths of these two practices—legal practice and theoretical inquiry—they in fact share certain features, at least when they are regarded from a certain perspective. Moreover, the institutional and conceptual dynamics within each domain provide strong incentives for those working in each to fixate on just these features. The assumptions of legal positivism are therefore over determined; those assumptions are demonstrably accurate, if partial, descriptions of legal reality, and they are also types of descriptions encouraged by the nature of the institution within which they are formed.[85]

In the next section, I further explore, from a more historical point of view, how the positions associated with legal positivism started to circulate just as both the modern enterprise of theoretical inquiry and Western legal systems were starting to take their modern form.[86] Before proceeding, however, I would like to clarify that I am not arguing

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[82] COLLINS & EVANS, *supra* note 39, at 38. *See also* Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 J.L. & SOC'Y 163, 189–90 (2004) (noting that most interdisciplinary legal scholarship is theoretical rather than empirical, probably because of structural and conceptual similarities between theory and doctrinal work).

[83] ABBOTT, CHAOS, *supra* note 39, at 53–55.

[84] *Cf.* The discussion of Hart's argument for the necessity of adopting an internal point of view in Perry, *supra* note 29, at 97, 99–100.

[85] Thus, theory mirrors practice not because "to study metaphors, one must do so metaphorically," the assumption criticized by Michael Moore in *Interpreting Interpretation*, *in* LAW AND INTERPRETATION, *supra* note 29, at 1, 26, but because, in fact, law does have these features (along with others), and academic theorizing also does, in fact, have these features (along with others).

[86] My position is not inconsistent with Gerald Postema's argument that jurisprudence is an inherently practical inquiry, since his sense of "practical"—having to do with normativity and with reasons for action—overlaps with my sense of "theoretical," which refers only to the abstract accounting for or explaining of a subject matter, regardless of whether the account or explanation is normative or descriptive. Postema, *supra* note 12.

either that the discourse identifiable as legal positivism can be generated only by academic theoreticians or that all academic legal theory is necessarily positivist. On the first of these points, I believe that the description of judges as positivist is both meaningful and more interesting than is usually realized; I return to this issue in Section D.I. I explain how my argument differs from the position that all legal theory is necessarily positivistic in Section C.III below.

2. The Legal Positivist Bridge

In this section, I briefly survey how five key figures in the development of the Anglo-American tradition of legal positivism—Hobbes, Bentham, Austin, Hart, and Raz—fit into the analysis presented above.[87] (Because I have already discussed MacCormick's position, I do not repeat that summary in this section.) In addition, this discussion helps to confirm the features of legal positivism outlined in Section B.I.

Each of the five figures in this list wrote within the type of competitive intellectual context described in the previous section, even though that context was still in the process of formation for the earlier figures in the series. Collectively, the work of these figures has supplied much of the basic conceptual vocabulary available in the domains of both academic inquiry and law. For instance, while Hobbes did not write from the academic domain as we know it today, he was one of the architects of the discourse that has shaped that domain, as well as the Anglo-American legal one.[88] Bentham, too, was a key figure in the development of the modern academic and legal domains.[89] Austin devoted much of his career to the establishment of "the study of positive law as an autonomous scientific discipline" within the academy.[90] All of the most influential twentieth-century proponents of first-order positivist legal theory—Hart, Raz, and MacCormick—have benefited from Austin's efforts in this regard and have been, first and foremost, successful academics in the modern competitive mold.[91]

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[87] Although some accounts of legal positivism trace its origins to pre-modern Europe, see, for example, CONKLIN, *supra* note 43, at 14–32 (discussing Greek distinction between nomos and physis as analogous to positive law-natural law dichotomy), most accounts of legal positivism identify Thomas Hobbes as the first modern legal positivist. *See, e.g.,* Bix, *supra* note 13, at 18; Dyzenhaus, *supra* note 8, at 708; 58–60; Gardner, *supra* note 13, 204–05; Waldron, *supra* note 13, at 171.

[88] *See* STEVEN SHAPIN & SIMON SCHAFFER, LEVIATHAN AND THE AIR-PUMP: HOBBES, BOYLE, AND THE EXPERIMENTAL LIFE 100–02 (1985); Steve Fuller, *Disciplinary Boundaries and the Rhetoric of the Social Sciences*, 12 POETICS TODAY 301, 320 (1991).

[89] *See* NEGLEY HARTE & JOHN NORTH, THE WORLD OF UCL 1828–2004 (2004).

[90] Twining, *supra* note 13, at 123.

[91] On Hart, see LACEY, *supra* note 37, at 112–208. *See also* Schauer, *supra* note 11, at 1951–53 (classing Austin with Bentham and Kelsen as being concerned primarily with the "demarcation of law from its neighbors").

All of these figures wrote in part to win authority for their subject-matter, a goal not fully distinguishable from winning personal and institutional security for the writers themselves. Describing one's subject-matter as differentiable from other subject-matters reflects positively on the describer's authority to make the description.[92] At the same time, that differentiation cannot be too fine-grained; the differentiator has an interest in claiming as much intellectual territory as possible.[93] The incentives to keep differentiations of subject-matter (a focus on law) general are in tension with incentives to differentiate theoretical positions (a focus on the attributes of law associated with legal positivism, and on each writer's differences from his predecessors). This tension has been continuously modulated by these writers' consistent description of law as basically discursive, normative, and systemic. Hobbes explained law as necessitated by the transition into a post-natural state of language and as existing only to the extent the sovereign's commands are articulated.[94] Bentham, similarly, defined "a law" as "an assemblage of signs declarative of a volition conceived or adopted by the sovereign."[95] Austin referred to the question of the nature of law as a question of identifying "the principles, notions, and distinctions which are common to systems of law."[96] Hart, of course, differentiated his account from Austin's in part by pointing out that Austin's account paid insufficient attention to the variety and nuances of legal discourse.[97] And Raz, while critical of aspects of Hart's account, has similarly described law as "the authoritative voice of a political community."[98]

All of these figures have also described law as a system of a particular kind: one that suspends the operation of certain reasons for action and that has self-referential features. For Hobbes, the Leviathan's commands forbid certain actions and justifications as asocial even though (or because) they are "natural";[99] these commands contribute to the maintenance of an artificial body created through language referring to that artificial body

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[92] *See* COLLINS, *supra* note 39, at 31.

[93] *See* ABBOTT, CHAOS, *supra* note 39, at 147; COLLINS & EVANS, *supra* note 39, at 70–76.

[94] *See* CONKLIN, *supra* note 43, at 73, 81–91, 98–88.

[95] JEREMY BENTHAM, OF LAWS IN GENERAL 1 (1782). Indeed, Bentham has been described as "anticipat[ing] various trends in twentieth-century philosophy of language (including Frege's and Wittgenstein's 'context principle', some views of logical positivists, and the development of speech act theory)." *See* Timothy Endicott, *Law and Language*, Stanford Encyclopedia of Philosophy, *available at* http://plato.stanford.edu/entries/law-language/.

[96] JOHN AUSTIN, THE USES OF THE STUDY OF JURISPRUDENCE 365, 367 (1863).

[97] HART, *supra* note 27, at 82–94.

[98] Raz, *On the Nature*, *supra* note 29, at 99.

[99] *See* CONKLIN, *supra* note 43, at 96.

and its operations.[100] Bentham's expository jurisprudence—which anticipated in some respects what Perry calls methodological positivism—sought to describe law as a system of specific reasons, including higher-order reasons relating to the generation of those reasons.[101] Austin, too, though faulted by Hart for inadequate attention to the structure of secondary rules,[102] did consider the constraint of legal systems by the higher-order discourse of constitutional law,[103] and suggested that law is inherently self-referential in its inability to represent the sovereign's pure will.[104] Hart described his claim that legal reasons must be distinguishable from moral reasons as entailed by the practices of referring to something called "law"[105] and, of course, identified the inclusion of self-referring norms as a defining feature of a legal system.[106] And Raz has further advanced Hart's discussions of the normative and exclusionary functions of legal discourse.[107]

Each of these theorists (among many others not discussed here) built on and modified his predecessors' ideas, while continuing to attribute certain consistent characteristics to the subject-matter he addressed. The pattern of modification of predecessors' ideas has as much to do with the gradually solidifying academic institutional system within which these theorists functioned as it does with the (inherent) incompleteness of their predecessors' explanations. Indeed, we could see this pattern of attributing a consistent set of characteristics to the subject-matter as a kind of confirmation that this conceptualization meaningfully corresponds to an identifiable aspect of experience. This perspective offers

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[100] *Id.* at 82–86.

[101] In the Fragment on Government, for example, Bentham stresses the need to acknowledge higher-order norms or reasons when he criticizes Blackstone for excessive focus on the law-making power of the government ("the right of Government to make Laws") to the neglect of the rules governing and restricting that power ("the duty of the Government to make Laws" and "the British Constitution"). *See* JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 6–7 (1776); *id.* at 53–55 (discussing sovereign's subjection to law). *See also* Schofield, *supra* note 16, at 59–60; Twining, *supra* note 13, at 121.

[102] HART, *supra* note 27, at 18–25, 91–99.

[103] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 257–58 (1863) (discussing constitutional "principles or maxims which the sovereign habitually observes," which it "is bound or constrained to observe," and which are known to those who might apply (nonlegal) sanctions to the sovereign in the event of its failure to observe these principles).

[104] CONKLIN, *supra* note 43, at 143–44.

[105] *See* Hart, *supra* note 2, at 614–15, 620.

[106] HART, *supra* note 27, at 79.

[107] *See, e.g.,* Raz, *supra* note 25, at 35–48, 141–48, 170–77.

another reason to suspect that the traits attributed to law by positivists are likely to remain compelling focal points for theoretical accounts of legal phenomena.[108]

III. Must Legal Theory Be Positivist?

My goal is to suggest that a broad "post-positivism" is neither desirable nor truly possible given the current institutional context of scholarly production in general and legal theory in particular. In arguing that the theoretical position associated with legal positivism is both accurate and compelling, however, I do not necessarily mean that it is impossible for an academic legal theorist to be anything but a legal positivist, or that Anglo-American legal theory is trapped within a single paradigm, the implications of which are already or soon to be exhausted, leaving nothing of interest for legal theorists to do. In this section, I address the first of these possible concerns; Section D addresses the second.

My argument might be taken to suggest not only that post-positivism is not desirable but also that all legal theory is positivistic. Brian Bix has argued that such a position is untenable because understanding legal theory as a "one-party state" of this kind is not illuminating.[109] There are two problems with this contention from the perspective advocated here. First, Bix's conclusion regarding the desirability of a multi-party state of legal theory may be unrealistic and inconsistent with the nature of theoretical discourse. It is possible that we not only do but must in some sense have a kind of "one-party state" in legal theory, if all legal theorists must embrace some or all of the premises identified above in order to be comprehensible to and recognized by other legal theorists.[110] Second, even if we assume that Bix is using the term more narrowly and accept his conclusion about the undesirability of a one-party state, his objection does not undermine my argument if it is possible to identify features distinguishing legal positivism as I have described it from other forms of theoretical inquiry into law. This is possible by virtue of the features I have identified with legal positivism in Section B.I.2. Conceivable non-positivist approaches to the academic study of law include specific recommendations for the reform of particular legal institutions; accounts denying one or more of the assumptions described in Section B.I.2, such as the distinctiveness of law, the characterization of legal institutions as systemic, or the existence of meaningful differences between first- and second-order legal discourse; and interdisciplinary accounts of law, like sociological and anthropological ones.

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[108] *See, e.g.,* MACCORMICK, INSTITUTIONS, *supra* note 1, at 292–93 (discussing law, following Karl Popper's terminology, as a "World III" "thought-object"). *See also* RAZ, BETWEEN, *supra* note 29, at 265, 269.

[109] Bix, *supra* note 13, at 29.

[110] Thus, John Finnis self-identifies and is identified by others as critical of legal positivism, yet he embraces a perspective on the nature of law similar in many ways to that described above. *See* Finnis, *supra* note 22. *See also* Bix, *supra* note 9, at 1613, 1624.

All of these are possible positions, and many of them have been advanced by legal theorists. The very fractal logic identified by Abbot that, I argue, ensures the perpetuation of debates within what we think of as a legal positivist paradigm also ensures the proliferation of such competing varieties of legal theory.

In other words, I am proposing not that legal positivism is the only possible mode of academic discourse about law, or even the dominant one, but that without significant institutional change in the academy, Anglo-American legal theory is not likely ever to exit the debate over whether the best explanation of law involves acknowledgment of its discursive, normative, systemic, suspensive, and self-referential characteristics. The nature of theoretical discourse and the dynamics of the institutions within which it is produced encourage attention to and efforts to clarify these characteristics of law—not to the exclusion of other perspectives, but because these characteristics are especially well suited as topics for the kind of theoretical discourse rewarded in these settings.

D. New Paths for Positivist Inquiry

My contention that legal positivism is probably here to stay does not imply that we must resign ourselves to the endless recycling of familiar debates. Any number of interesting theoretical questions and concrete legal phenomena remain largely unexplored from the perspective I identify as positivist. In this section, I briefly discuss two examples: the phenomenon of positivist adjudication (Section D.I), and the implications of the exclusivity of legal and theoretical discourse (Section D.II).

I. Positivist Adjudicators

Ronald Dworkin's work has been read as a critique of the accuracy of legal positivism as a description of actual practices of adjudication.[111] Yet real-life adjudicators, including judges in the United States—the system about which Dworkin wrote—have adopted a rhetoric in their written opinions that resembles the idioms of legal positivism.[112] Some

[111] *See, e.g.,* Coleman, *supra* note 10, at 145–46; Soper, *supra* note 12, at 507–08, 512. *Compare* Dyzenhaus, *supra* note 8, at 712, 716 (noting that a "Dworkinian" judge would not be a legal positivist) *with* Leiter, *supra* note 15, at 27 (noting that Dworkin might be considered an applied positivist seeking to describe adjudicative process), Perry, *supra* note 13, at 317 (noting that Dworkin might be classed as a methodological positivist).

[112] I am not the first to make this observation, but I hope in this section to suggest some implications that have not been noted before. For previous characterizations of particular adjudicators and judicial rhetoric as examples of legal positivism in practice, see, for example, G. Todd Butler, *A Matter of Positivism: Evaluating the Legal Philosophy of Justice Antonin Scalia Under the Framework Set Forth by H.L.A. Hart*, 12 HOLY CROSS J.L. & PUB. POL'Y 47, 48, 59 (2008) (concluding that Scalia is a positivist because his opinions betray his adherence to the social-facts thesis and the separation thesis, identified by Butler as the "two fundamental tenets" "share[d]" by "all legal positivists"); Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623 (1991); Anita J. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 693–94 (1992) (describing both Justice Scalia and Justice Thomas

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press

commentators have even suggested that judicial rhetoric is by its nature positivistic.[113] More common is the identification of certain judges as positivist. U.S. Supreme Court Justice Hugo Black has been referred to in this way,[114] but Justice Antonin Scalia is the adjudicator now most commonly labeled a positivist.[115] If, as I have argued, the legal positivist characterization of law is intimately tied to the academic institutional context in which legal theory is produced, can a judge, who necessarily writes from a different institutional position, truly be a legal positivist? In this section, I first consider the ways in which a judge such as Justice Scalia may be considered a legal positivist in the sense I have outlined here. Analysis of this question suggests new ways of connecting currently disparate areas of legal scholarship to generate interesting new questions.

In the context of the framework presented here, calling a judge like Justice Scalia a positivist might mean one of two things: that the judge speaks from an academic domain despite his or her role as a judge, or that the judge adopts the rhetoric of the academic domain. The latter seems to be the more accurate description of Justice Scalia. To be sure, Justice Scalia was an academic before becoming a judge, and the application of the legal positivist label to him is due in part to his scholarly work.[116] But references to Justice Black as a positivist cannot be explained in this way, and Justice Scalia has continued to be identified as a positivist even after leaving the academy (although the precise sense in which the term "positivist" is being used is not always clear). At any rate, while Justice Scalia is more of a public intellectual than many judges are,[117] he does not now work an academic context. Rather, references to him as a legal positivist, and his self-identification as such, appear mainly to refer to certain characteristics of his written opinions, that is, to his adoption of a rhetoric of positivism. These characteristics include a stress on statutory and constitutional text and precedent as the only legitimate reasons to offer in support of

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as positivists); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1307, 1310, 1308, 1339 (1990) (referring to Scalia as positivist).

[113] *See, e.g.,* Gerald B. Wetlaufer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555 (1990).

[114] Brock, *supra* note 112, at 632.

[115] *See* sources cited *supra* note 112.

[116] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997); Antonin Scalia, *Morality, Pragmatism, and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123, 125 (1986) ("I have never been able to isolate obligations of justice, except by defining them as those obligations that the law imposes."). Similarly, Justice Scalia's dictum that "[t]here are times when even a bad rule is better than no rule at all" can be taken as an articulation of the separability thesis. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) [hereinafter Scalia, *The Rule of Law*].

[117] *See* David M. Zlotnick, *Jusice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1427–28 (1999) (arguing that Justice Scalia is more accurately characterized as a politician than as a judge); Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N. Y. L. SCH. L. REV. 907 (2006).

a judicial decision and a disavowal of reliance on "policy" (i.e., moral or practical) considerations[118] and "emotion."[119] In other words, in his opinions, Justice Scalia represents the law as a discursive system in which some types of reasons are suspended or excluded, and he does so through statements referring to the system itself.[120]

References to Justice Scalia as a positivist are based on his repeated use of statements of this kind, rather than on his occupation of a particular institutional role.[121] This does not mean that Justice Scalia's opinion-writing technique offers support for the claim, often attributed to Dworkin, that every judge is a jurisprude.[122] Rather, it suggests that Justice Scalia deploys in his opinions what Harry Collins and Robert Evans have called "interactive expertise" in the academic-theoretical discourse of legal positivism. Collins and Evans define interactive expertise as "the ability to master the language of a specialist domain in the absence of practical competence" (the latter would permit the contribution of novel propositions in the discourse of the domain—for example, Justice Scalia would exhibit practical competence if he were to contribute to one of the theoretical debates on legal positivism).[123] Alternatively, because of his academic background, Justice Scalia's rhetoric might be understood as a form of "referred expertise," "the use of an expertise learned in one domain within another."[124]

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[118] *E.g.*, Carden v. Arkoma Assocs., 494 U.S. 185, 196 (1990) ("The resolutions we have reached . . . can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations . . . but . . . that has been the character of our jurisprudence in this field.").

[119] *E.g.*, Penry v. Lynaugh, 492 U.S. 302, 359 (1989) (Scalia, J., concurring in part and dissenting in part) ("It is an unguided, emotional 'moral response' [in juries] that the [majority opinion] demands be allowed—an outpouring of personal reaction . . ., an unfocused sympathy. Not only have we never before said the Constitution requires this, but [in prior decisions we have] sought to eliminate precisely the unpredictability it produces."). Commentators have noted that this disavowal is belied by Justice Scalia's use of colorful language to characterize views with which he disagrees. *See generally* Newman, *supra* note 117.

[120] In line with H.L.A. Hart, Justice Scalia has argued that the exclusion of certain considerations from the domain of legitimate legal reasons advances certainty and predictability. *Compare* Scalia, *The Rule of Law*, *supra* note 116, *with* HART, *supra* note 27, at 42, 252 (arguing that a benefit of a rule of recognition is its enhancement of certainty and predictability).

[121] Because we can only detect the occupation of a legal positivist position through statements like those made by Justice Scalia, the difference between occupying the institutional position associated with the generation of legal positivist discourse and the use of positivist rhetoric by one functioning within another institution may not be all that significant. *Cf.* COLLINS & EVANS, *supra* note 39, at 86.

[122] RONALD DWORKIN, LAW'S EMPIRE 90 (1986) ("Jurisprudence is the general part of adjudication, silent prologue to every decision at law.").

[123] COLLINS & EVANS, *supra* note 39, at 14.

[124] *Id.* at 15.

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A judge could borrow discursive expertise from the academic domain for use in the judicial for many reasons, most of them prudential: to better understand or explain the judicial domain, to contribute to the expansion of the intellectual territory claimed by that domain,[125] to facilitate communication with experts in both domains, or to confer some of the status or authority associated with the academic domain on the judicial one. Indeed, to a non-expert audience, "referred" or "interactive" expertise is indistinguishable from what Collins and Evans call "contributory expertise,"[126] and when the status or legitimacy of a borrowing discourse is questionable, the use of this kind of "parasitic" expertise may be virtually the only method of legitimating the discourse in question.[127] In light of other characteristics of his jurisprudence, it seems most likely that Justice Scalia borrows positivist idioms to confer status, authority, and legitimacy on his opinions.[128]

This understanding of Justice Scalia's positivism helps to clarify the nature of the parallels between the academic and legal domains discussed above. Justice Scalia is considered a positivist judge because of the statements he makes in his opinions about the proper kind of reasons to provide in support of a legal decision. But the type of discursive self-reference involved in these statements is not the same as the discursive self-reference that is, on the legal positivist account, inherent in law. Instead, it is a self-reference that imports the higher-order discourse of another institutional setting, that of theories of legal justification, reasoning, and authority.[129]

Considering the phenomenon of positivist adjudication in this light raises several interesting questions. One is the basic question of how typical Justice Scalia's method is. If positivist judging is defined as a matter of the deployment of interactive expertise, or as a matter of discursive performance, then the content analysis of judicial opinions should be able to tell us how often it occurs.[130] In itself, information about how often judges use the language of positivism might not be of great interest. But contextualized properly, such information would have significant practical and political, not to mention theoretical,

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[125] *Id.* at 70–76.

[126] *Id.* at 52–54, 60–63.

[127] As Collins and Evans argue, "distance lends enchantment," that is, "the more distant one is from the locus of the creation of knowledge in space and time the more certain will the knowledge appear to be." *Id.* at 20.

[128] *See generally* Kannar, *supra* note 112; Zlotnick, *supra* note 117. *See also* Matthew Kramer's argument that legal officials often act for prudential rather than moral reasons, KRAMER, *supra* note 4, at 64–77, and Jamal Greene's argument, not limited to Justice Scalia, about the reasons for the use of originalist rhetoric in judicial and popular discourse, Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

[129] *See supra* notes 116 & 117.

[130] For an overview of work taking this type of approach, see Mark Hall & Ron Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2006).

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press

implications. One question to ask would be whether judges using the language of positivism tend to decide cases in a way that differs systematically from the decisions of non-positivist judges.[131] Without relying on the terminology of positivism and expertise used here, a number of scholars have already sought to determine whether there are any correlations between particular types of judicial rhetoric and case outcomes.[132] But so far, this work has remained largely ad hoc, due to the lack of any consensus on the conceptual relationship between judicial rhetoric and legal decisionmaking.[133] The existing literature on this subject would surely benefit from the sophistication that academic legal positivists and other legal theorists have brought to bear on questions of justification and authority.[134] Those attracted by the problems circulating in the literature of legal positivism could likewise preserve the relevance of their inquiry into these issues by contributing to the development of a theoretical framework for this empirical investigation.[135]

The above discussion of judges' possible prudential motivations for using positivist rhetoric in opinions also raises another empirical question. Regardless of whether and how it relates to case outcomes, does use of this rhetoric serve an effective legitimating function? Answering this question requires analysis not of the content of opinions, but of popular reactions to and opinions about the judiciary. In this area, too, there is a long tradition of empirical work lacking a unifying theoretical paradigm,[136] which could benefit from the

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[131] This is similar to, but not quite the same as, the question of the descriptive accuracy of the positivist account of law. *See, e.g.,* Bix, *supra* note 13, at 21 (noting that debate between Dworkin and Raz should be ultimately empirically resolvable); Benjamin C. Zipursky, *The Model of Social Facts*, *in* THE AUTONOMY OF LAW, *supra* note 4, at 219, 243.

[132] *See, e.g.,* James G. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971 (2007); Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841 (2006); John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49:2 POL. RESEARCH Q. 245 (June 1996); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Intepretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

[133] Compare the assumptions of DENNIS PATTERSON, LAW AND TRUTH (2000), with EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008).

[134] *See, e.g.,* Moore, *supra* note 15, at 321–24; Philip Roberts, *Observations on Method in Legal Theory and Linguistics*, *in* POSITIVISM TODAY, *supra* note 4, at 77, 81–92.

[135] *Cf.* Brian Leiter's call for a "naturalized jurisprudence" in *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 266 (1997).

[136] *See, e.g.,* Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for*

conceptual sophistication brought to bear on questions of authority and legitimacy by legal theorists, and particularly by legal positivists.[137]

II. Law, Theory, and Exclusion

Justice Scalia's opinion-writing rhetoric often criticizes elitism and touts the greater populism and democratic value of the putatively positivist approach to justification that he endorses.[138] As I have described legal positivism in this paper, however, it is in a number of ways not an inclusive but an exclusionary discourse. For one thing, it is a theoretical discourse describing its object (correctly, but partially) as effectuating the exclusion of certain considerations. It is also a theoretical discourse that itself effectuates a parallel exclusion (of, for example, assumptions contrary to its premises). And those able to understand and contribute to the discourse are specialists, privy to vocabulary, knowledge, and know-how inaccessible to others. Lawyers become lawyers on the basis of their grasp of what is properly excluded from legal analysis, argument, and reasoning—what count as reasons in legal discourse and what do not—and their ability to use that knowledge.[139] Experts in a scholarly field, including academics who produce theoretical discourse, are similarly defined as such by their knowledge of how to put forth a scholarly assertion—which reasons to invoke, which not to invoke, and where to push the envelope.[140] Thus, on the legal positivist account, law is an exclusionary discourse. And as a matter of social fact, Western legal systems and academic institutions require expertise and are in this sense exclusionary institutions.

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the Supreme Court, 35 AM. J. POL. SCI. 635 (1992); Gregory Casey, *Popular Perceptions of Supreme Court Rulings*, 4 AM. POLITICS Q. 3 (1976); Robert H. Durr, *Andrew D. Martin, & Christina Wohlbrecht, Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768 (2000); Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89 (2000); Dean Jaros & Robert Roper, *The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy*, 23 AM. POLITICS Q. 85 (1980); Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299 (1998); John Kessel, *Public Perceptions of the Supreme Court*, 10 MIDWEST J. POL. SCI. 167 (1966); John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAVIOR 181 (2001).

[137] *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1983).

[138] *See, e.g.,* David A. Strauss, *On the Origin of Rules (with Apologies to Darwin): A Comment on Antonin Scalia's The Rule of Law as a Law of Rules*, 75 U. CHI. L. REV. 997, 998–99, 1002 (2008); Zlotnick, *supra* note 117, at 1382–87.

[139] This is a broader articulation of the point underlying Hart's practice conception of the rule of recognition. The issue is explored from different perspectives in, for example, Adler, *supra* note 10; Lewis, *supra* note 16; Andrei Marmor, *Legal Conventionalism*, *in* HART'S POSTSCRIPT, *supra* note 4, at 193, 209–10.

[140] *See, e.g.,* BECHER, *supra* note 39, at 38, 44; GLOCK, *supra* note 71, at 205, 223–24; Kemp, *supra* note 65 (noting that the evaluation of interdisciplinary work is hampered by use of the same terms in different disciplines in different senses, incomprehensible to non-specialists).

Justice Scalia's linking of his methodological statements to the advancement of populism and predictability[141] is thus an oversimplification, perhaps even a misrepresentation, in that it attributes to his legal pronouncements an accessibility they do not truly have. But a denial of the exclusionary tendencies of law is not necessarily entailed by a positivist perspective. Among others, Leslie Green and Jeremy Waldron, while critical of positivism, commended positivists such as Hart for noting how the social practice we call law has grown increasingly esoteric and exclusionary.[142] Indeed, from the perspective advanced here, it seems likely that legal practice and the generation of academic theory are high-status activities in part because of their exclusivity, as well as their cognitive portability.[143] If non-experts in both areas did not exist, neither lawyers nor theorists would be able to make a living.

Justice Scalia's appeal to populist values is powerful because it is consistent with the premise, shared by moral philosophers and laypeople alike, that it is desirable for all members of a society to be on mostly equal footing regarding their capacities and opportunities for communication and practical reasoning. If this premise is granted, then the esoteric nature of law and theoretical inquiry appears pernicious—even in the abstract, regardless of their manifestation in any particular legal systems or theoretical discourse. Is there a way out of this dynamic? Is there anything a lawyer or theorist can do to counter the esotericism of their respective enterprises?

This is a different question from the familiar one concerning so-called normative or ethical positivism. Normative positivism in its classic form seeks to describe what would be necessary for a minimally pernicious legal system, but does not seek to eradicate its exclusionary nature, which is accepted by the positivist as a constituent feature of law.[144] The question asked here is whether, taking this exclusionary nature as a given, the expert can counter its negative implications. This approach to the question suggests that the most direct response would be for experts to commit themselves to practices disregarding

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[141] *See supra* notes 116, 138 and accompanying text.

[142] *See* Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1698–700 (1995) (review of HART, *supra* note 27) (noting that Hart did not exalt secondary rules or formal legal systems as a better form of law, but only described them as functionally necessary to sustain certain forms of social life); Green, *supra* note 19, at 1056–58 (noting that Hart described law as, by nature, prone to decay and vice, chiefly the vice of the alienation of law from its subjects); Waldron, *supra* note 13, at 175, 179, 181 (noting that Hart's account of law implied that the emergence of a legal system allows the more efficient perpetuation of injustice, and that the development and elaboration of secondary rules tends to make the population increasingly less familiar with primary rules). In *The Concept of Law*, Hart acknowledged that the general public usually does not have access to or subscribe to the rule of recognition. HART, *supra* note 27, at 59–60, 110–11.

[143] *Cf.* Lewis, *supra* note 16, at 66. *See also supra* notes 69–73, 127–128 and accompanying text.

[144] *See, e.g.,* MacCormick, *supra* note 13; Liam Murphy, *The Political Question of* The Concept of Law, *in* HART'S POSTSCRIPT, *supra* note 4, at 371; Perry, *supra* note 13; Waldron, *supra* note 9.

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press

the boundaries of their expertise—specifically, to help non-experts seek and obtain interactional expertise in legal and theoretical discourse.

This kind of activity is already institutionalized in the systems in which both lawyers and academics participate. But the teaching faces of law and theory are low-status compared to conversations among experts.[145] To combat the esotericism of their respective domains, experts must consciously act contrary to the incentives provided by the status hierarchies in those domains. While counter to self-interest, this is not necessarily a self-defeating activity, nor is it incompatible with continued engagement in the elaboration of theoretical and legal discourse. Continuing to examine and describe the shape and conditions of theoretical discourse, in both law and philosophy, will allow us better to understand the mechanisms by which the practices about which we theorize suspend consideration of the non-legal. This, in turn, will better allow us to understand both the temptations of the discourse and those parts of it that non-experts need to know in order to participate in the conversation.

E. Conclusion

Neil MacCormick's positing of a post-positivist legal theory is quixotic but unnecessary. The conditions of production of legal and theoretical discourse make it inevitable that something resembling what we now call legal positivism will always be a part of legal theory, whether we choose to use that term for it or not. Those conditions frustrate aspirations to have the last word in legal theory, but they also ensure the continued opening of new inquiries with potentially meaningful practical implications.

[145] *See, e.g.,* ABBOTT, SYSTEM OF PROFESSIONS, *supra* note 39, at 52–57, 79–84; COWNIE, *supra* note 72, at 58–69; Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765 (1998).

https://doi.org/10.1017/S2071832200017053 Published online by Cambridge University Press