Rethinking Legal Postivism

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Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 **Ratio Juris**, 1 (2010), available at SSRN, and Frederick Schauer, *Positivism Before Hart*, in M.D.A. Freeman, ed., **John Austin and His Legacy**, available at SSRN.

Survey courses in analytical legal philosophy commonly include brief excerpts from the jurisprudential writings of Jeremy Bentham and John Austin. After a cursory treatment of their work, with emphasis on the "command theory" of law, the focus shifts to H.L.A. Hart's famous critique of Austin and then to Hart's own influential version of legal positivism. The prevailing view has long been that Hart's critique of Austin was decisive and that Hart's own theory of law expresses legal positivism's "core commitments." Both bits of the conventional wisdom come under scrutiny in a pair of provocative recent articles by Frederick Schauer.

In "Was Austin Right After All? On the Role of Sanctions in a Theory of Law," Schauer explains why, contrary to the prevailing view, Austin's account of law may have been more nearly accurate than Hart's. He acknowledges that on many points, Hart identified important deficiencies of Austin's account. Austin focused, for example, on duty-imposing rules, neglecting the critical and sometimes constitutive role of the power-conferring rules so pervasive in advanced legal systems. And his notion of the sovereign oversimplified legal systems in multiple ways by essentially treating all of law on the model of an absolute monarch's imposition of rules on obedient subjects.

Perhaps most important among Hart's criticisms was that Austin failed to account for the normativity of law because his emphasis on sanctions and coercion led him to overlook the committed standpoint of officials who take up the internal point of view, who see the law as giving reasons and creating obligations. It is precisely here that Schauer invites us to reconsider the relative merits of Hart and Austin's theories, suggesting that such a reconsideration may lead to fruitful inquiry into what a theory of law should be expected to accomplish.

Schauer maintains that although Austin erred in overlooking the non-coercive aspects of law, those who have apparently been influenced by Hart may err in dismissing the importance of sanctions or coercion. He suggests at least two difficulties for Hart's critique of Austin. First, he argues, in a modern regulatory legal system, citizens may, for good reason, experience law as more coercive than Hart appreciated. Insofar as a theory of law should capture the most salient features of a modern legal system, insofar as descriptive or empirical adequacy is among the conditions on an adequate theory of law, Hart's view would seem to do worse than Austin's. Of course, many legal philosophers would reject such empirical considerations as irrelevant, arguing that a theory of law should concern itself only with the "essential features" of law—those that would figure in an analysis of the concept of law. Sanctions and coercion may be common to actual legal systems, but they aren't essential. To take such a position is, however, to choose sides in a deeper debate as to the purpose of a theory of law, Schauer stresses, and it is far from obvious that theories of law should concern themselves with the concept of law rather than with common features of paradigmatic legal systems.

Second, Schauer takes issue with Hart's appeal to ordinary language to argue that being *obligated* is different from being *obliged*. The linguistic data, including language from court opinions, is far from unequivocal, and so the appeal to ordinary language provides insufficient grounds for rejecting Austin's understanding of legal obligation. Even if sanctions are not an essential feature of duty generally, they may be an essential feature of distinctively *legal* duty.

In a companion piece, "Positivism Before Hart," Schauer takes on the second bit of conventional wisdom. His aim is to show the continuing relevance of Bentham and Austin's versions of legal positivism to jurisprudential inquiry, contrary

to the prevailing view, which treats Hartian positivism as supplanting these earlier versions. Schauer contends that it distorts the history to treat Hart's as the exclusive or best understanding of legal positivism's core commitments. He distinguishes among three forms of legal positivism, all of which he claims were probably held by both Bentham and Austin. Conceptual positivism, which dominates contemporary understandings, emphasizes the Separability Thesis. Normative positivism treats concepts as social artifacts and holds that the conceptual separation of law and morality depends on a normatively informed choice of a concept of law. Decisional positivism, unlike the other kinds, is concerned not with understanding what law is so much as with institutional design and procedures of legal decisionmaking. This latter, more neglected form of positivism, focuses on limiting the discretion of officials by restricting the sources of law to ones that can be readily identified and by creating legal institutions that operate according to fairly precise rules.

Those who adhere to the received view, Schauer says, will contend that only conceptual positivism expresses what is central to legal positivism, which most fundamentally concerns the concept or nature of law. To the extent that Bentham, Austin, and other legal positivists, including Hart, might have accepted normative and decisional positivism, that is purely incidental. Schauer reminds us, however, that what it is for something to be a "core commitment" is contestable. Conceptual positivism, he insists, has neither historical nor obvious philosophical priority over normative and decisional positivisms, and so without more argument, we have little basis to conclude that the latter are less deserving of the "positivist mantle."

Schauer's opening salvo raises more questions, of course, than it attempts to answer, but that, in the end, is just the point. Treating conceptual positivism as central assumes that there are concepts, that there is such a thing as "analysis," and that the concept of law is sufficiently well formed to admit of analysis. But are these assumptions well founded? With regard to normative positivism, we might wonder whether, in the end, it is a coherent alternative. For if, as many philosophers would insist, concepts are abstract entities, then they are not objects of normative choice and social construction; normative positivism cannot be an alternative to conceptual positivism. As for decisional positivism, we might well wonder whether it can stand on its own independently of conceptual or normative positivism. If not, then arguably it is less deserving of the positivist mantle, though it may be no less deserving of our attention on that account.

Logical space exists, too, for forms of positivism that Schauer does not consider and that might compete for centrality, depending upon what makes most methodological sense and what best answers to the goals of a theory of law. Consider a kind of "reforming positivism" that offers a reforming definition of 'law' as a part of theory construction responsive to certain natural and social facts about human legal practices. Or consider a form of positivism that aims at a "real definition" of law rather than conceptual analysis.

Schauer's essays offer a welcome invitation not only to revisit Bentham and Austin with an eye to their broader jurisprudential concerns. They urge us, in Schauer's typically clear and fair-minded manner, to suspend the received view, while exploring anew a host of questions not only about legal positivism, but also about methodology and theory construction in the philosophy of law.

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