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## THE DECLINE OF NATURAL LAW AND THE RISE OF EXCLUSIVE POSITIVISM

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*Book Review: The Decline Of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped. By: Stuart Banner. Oxford, 2021. 255 Pages.*

### INTRODUCTION

Stuart Banner's *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* addresses a "fundamental change in American legal thought that took place in the late 19th and early 20th centuries."<sup>1</sup> Prior to this change, lawyers routinely relied on natural law in their arguments, and judges took those arguments seriously.<sup>2</sup> Natural law gave judges "a reservoir of principles . . . to draw upon" in cases that positive law could not cleanly resolve, which made it easy to see judges as *discovering* law in those cases.<sup>3</sup> After the change, however, natural law dropped out of the lawyer's toolkit.<sup>4</sup> Judges continued to rely on moral reasoning to decide hard cases, but they were now thought to be *making* law.<sup>5</sup>

Banner's goal, as his subtitle indicates, is to explain how American lawyers once used natural law and why they stopped.<sup>6</sup> The book is clearly written and a pleasure to read: Banner deftly weaves quotations from a wide variety of sources with analysis of what those sources reveal about the trajectory of natural law in

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1. STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 1 (2021).

2. *See id.* at 1, 11.

3. *Id.* at 2.

4. *Id.* at 1.

5. *Id.* at 2, 68.

6. *See id.* at 2.

the American legal system. He argues, among other things, that an explosion in the number of reported cases available to lawyers in the nineteenth century precipitated the decline of natural law.<sup>7</sup> As more and more cases became available, lawyers came to rely on those cases instead of natural law and, indeed, came to view the cases themselves as sources of law rather than as evidence of what the law already was.<sup>8</sup>

I am not a legal historian, and my aim here is neither to criticize nor affirm the story that Banner tells. My purpose instead is to ask what significance that story has for legal philosophers working in general jurisprudence. If Banner's account is right, what can it tell us about the nature of law—about the sort of thing that law is, wherever and whenever law is found? I will argue that Banner's work has significant implications for both the substance and the methodology of general jurisprudence. With respect to substance, his work suggests an answer to when and why American lawyers' concept of law came to cohere with exclusive positivism—roughly, the view that the existence and content of law necessarily depend on just social facts, not evaluative facts.

More specifically, Banner shows how a change in legal technology (a dramatic rise in the number of reported cases and other positive sources of law) brought about a change in practice (lawyers stopped relying on natural law and turned instead to cases, statutes, and the like).<sup>9</sup> That change in practice, in turn, gradually brought about a shift in American lawyers' concept of law: they went from conceiving of law as depending partly on evaluative facts to conceiving of it as depending on social facts alone.<sup>10</sup> And yet vestiges of an earlier era when lawyers did conceive of law as depending partly on evaluative facts remain part of legal practice even today—e.g., in judges' convention of writing their opinions as if they are discovering what the law requires.<sup>11</sup>

With respect to methodology, Banner's work vividly illustrates how our concept of law is local to our own time, which suggests a more modest role for conceptual analysis of law than is sometimes assumed. Our concept of law is universal in the sense that it is how we conceive of law wherever and whenever law is found. But it is also parochial in the sense that it reflects only how *we* conceive of law and not necessarily how lawyers elsewhere conceive of law or even how lawyers in our own jurisdiction conceived of law in centuries past. Although I do not see this as any reason for legal philosophers to avoid conceptual analysis, it is reason for them to be more careful in specifying *whose* concept of law they are analyzing.

Below, Part I summarizes the pertinent parts of Banner's book. Part II overviews two debates in general jurisprudence: a substantive debate between positivists and antipositivists over the relationship between law and morality and a methodological debate over how to go about resolving the first debate. Part III argues that Banner's account of the decline of natural law helps explain an

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7. *See id.* at 6, 119–28.

8. *See id.* at 4.

9. *See id.* at 4, 6, 119–28.

10. *See infra* Part III.

11. *See* BANNER, *supra* note 1, at 2, 241–46.

apparent shift in American lawyers' concept of law toward an exclusive-positivist concept. I also show how acknowledging this conceptual shift gives exclusive positivists new resources for responding to common objections to their theory. Lastly, Part IV turns to the implications that Banner's account has for the methodological debate.

## I. THE DECLINE OF NATURAL LAW

As noted at the outset, Banner examines a significant change in American legal thought that occurred around the turn of the twentieth century.<sup>12</sup> Before this change, American lawyers regularly relied on natural law; afterwards, they did not.<sup>13</sup> Banner divides his study of this change into three sets of questions, which structure the three parts of his book.<sup>14</sup> The first set concerns how natural law worked in practice: When did lawyers invoke natural law? How did they ascertain its content? How did it relate to positive law?<sup>15</sup> The second concerns when and why lawyers stopped using natural law.<sup>16</sup> And the third concerns what happened after natural law fell into disuse: What took natural law's place? Do traces of natural law remain part of legal practice today?<sup>17</sup>

The first part of the book considers how natural law functioned in practice. According to Banner, "American lawyers of the late 18th and early 19th centuries had no doubt that natural law played an important role in the legal system."<sup>18</sup> What was this natural law? The answer remains somewhat obscure to me, and perhaps it was similarly obscure to lawyers of the time. Natural law had a religious tinge: some lawyers said that it was made by God and impressed on human nature.<sup>19</sup> The core idea, however, seems to have been that natural law consisted of principles of rational conduct, such that one could (at least with the right education) discern its content simply by consulting one's intuitions about what is rational to do.<sup>20</sup>

How did lawyers use natural law? Banner describes two main uses. First, lawyers relied on natural law to interpret statutes whose meaning was unclear.<sup>21</sup>

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12. *Id.* at 1.

13. *Id.*

14. *Id.* at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 11. My brief remarks about natural law here should not be taken to imply that there is nothing more to say about natural-law theory or practice—there is, but it is only tangential to what I argue below. See Mark C. Murphy, *Natural Law Theory*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 15, 18–19 (Martin P. Golding & William A. Edmundson eds., 2005); JONATHAN CROWE, *NATURAL LAW AND THE NATURE OF LAW* 143 (2019); R. H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 2–5 (2015).

19. BANNER, *supra* note 1, at 12–13.

20. *Id.* at 15–17. It seems that lawyers of the time disagreed over how principles of natural law could be discerned: some "cautioned that determining the content of natural law . . . required considerable study," while others said "that the law of nature was something instinctual that could be determined by anyone, simply by attending to one's innate sense of justice." *Id.* at 14–15.

21. *Id.* at 19.

The justification sometimes given for this practice was that the statutes themselves were merely concretizations of natural law and had to be interpreted accordingly.<sup>22</sup> Second, lawyers used natural law to fill gaps left by positive law.<sup>23</sup> For instance, in a case addressing whether a mother had the right to make employment arrangements for her minor children after their father had been missing for years, the New Jersey Supreme Court held that, since “[t]he right is not regulated by statute,” the case turned on “the clear principle of natural law” that a mother has authority over her children.<sup>24</sup>

In the second part of the book, Banner argues that four legal and cultural developments contributed to the decline of natural law: (1) the adoption of written constitutions;<sup>25</sup> (2) increased separation between law and religion;<sup>26</sup> (3) an explosion in the number of reported cases;<sup>27</sup> and (4) disagreement over what natural law required with respect to politically divisive issues of the time, like slavery or race-based segregation.<sup>28</sup> All of these could help explain an apparent shift in American lawyers’ concept of law between the nineteenth and twentieth centuries. But for the sake of brevity, I will focus on the third development—an explosion in the number of reported cases—which strikes me as the most causally significant precursor of this apparent shift.

Banner details the rapid rise in volumes of American case reports during the nineteenth century.<sup>29</sup> By one count, there were 8 such volumes in 1804 but 450 by 1836.<sup>30</sup> Another count estimated that there were 3,100 volumes in 1883.<sup>31</sup> Yet another concluded that there were 8,208 volumes in 1910 (a thousand-fold increase in roughly a century).<sup>32</sup> These numbers seem quaint by today’s standards, but they were alarming to lawyers of the time. As one put it: “[W]e are in a mighty sea of books . . . . We can scarce glance at one, ere another rises to our view . . . .”<sup>33</sup> Not only were these books expensive and inaccessible in parts of the country, one could not possibly read them all; for the first time, lawyers struggled to stay abreast of just the law of their home state.<sup>34</sup>

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22. *Id.* at 22–23.

23. *Id.* at 27–31.

24. *Id.* at 28 (quoting *Osborn v. Allen*, 26 N.J.L. 388, 391, 393 (1857)). Interestingly, lawyers disagreed over whether natural law trumped positive law, in the sense that courts could rely on it to strike down contrary legislation. *Id.* at 71. Banner notes that “[t]here was . . . a steady stream of cases, all though the 19th century, in which courts asserted the authority to strike down statutes contrary to natural law.” *Id.* at 88. At the same time, there were also many cases in which courts took the opposite view. *Id.* Judges never reached consensus on this issue; instead, the issue faded from view as natural law fell into disuse. *Id.* at 95.

25. *Id.* at 71–95.

26. *Id.* at 96–118.

27. *Id.* at 119–36.

28. *Id.* at 137–63.

29. *Id.* at 119.

30. *Id.* at 120–21.

31. *Id.* at 121.

32. *Id.* at 121–22.

33. *Id.* at 121 (quoting JOSEPH WILLARD, AN ADDRESS TO THE MEMBERS OF THE BAR OF WORCESTER COUNTY, MASSACHUSETTS, OCTOBER 2, 1829, at 110 (Lancaster, Carter, Andrews, & Co. 1830)).

34. *See id.* at 126.

As the number of reported cases rose, lawyers began to argue from precedent more often, though many resisted this change.<sup>35</sup> Banner explains that, during the nineteenth century, calling someone a “case lawyer” was an insult; it suggested that a lawyer knew only about reported cases and not the principles of natural law behind those cases.<sup>36</sup> As one judge quipped in 1856: “Put a [difficult] legal question . . . to a mere ‘case lawyer,’ . . . and if he happens to remember a reported case exactly *in point*, he will tell you how it *has been decided*. If he recollects no such case he has no opinion to give.”<sup>37</sup> Another judge complained in 1878 that lawyers had become “mere hunters of cases, instead of thinkers applying the maxims and principles of law.”<sup>38</sup>

Likewise, a lawyer wrote in 1882 that “it is a matter of common remark among the elder school of lawyers and judges that the younger men at the bar rely too much upon books and too little upon the elementary doctrines by which all cases should be decided.”<sup>39</sup> A treatise for trial attorneys stated in 1888: “The lawyers least to be depended upon are those who are in constant pursuit of cases . . . and who, therefore, seldom have sufficient knowledge of principles.”<sup>40</sup> By the twentieth century, however, the term “case lawyer” had faded from use because, as Banner puts it, “all lawyers had become case lawyers. There was no other kind.”<sup>41</sup> “As lawyers relied more on [cases], they relied less on . . . natural law” until they gradually stopped citing it almost altogether.<sup>42</sup>

The third part of the book concerns the hole that natural law left in the legal system: How were judges to decide hard cases if not by looking to natural law? Banner describes two schools of thought on this question. The first, called “classical legal thought,” tried to relocate principles of natural law from nature to judicial opinions: judges could induce these principles from a mass of prior opinions, and then the principles could resolve hard cases.<sup>43</sup> The second, called “legal realism,” simply accepted that there was no legally correct answer in hard cases and that judges therefore had to make law.<sup>44</sup> Although legal realism is often thought of as a reaction to classical legal thought, Banner argues that both schools emerged around the same time as reactions to the decline of natural

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35. *See id.* at 128.

36. *Id.*

37. *Id.* at 129 (quoting ALFRED CONKLING, LEGAL REFORM: AN ADDRESS TO THE GRADUATING CLASS OF THE LAW SCHOOL OF THE UNIVERSITY OF ALBANY, DELIVERED MARCH 27, 1856, at 11 (Albany, W.C. Little & Co. 1856)).

38. *Id.* at 131 (quoting CHARLES D. DRAKE, ADDRESS, DELIVERED MAY 8, 1878, AT THE ANNUAL COMMENCEMENT OF THE CINCINNATI LAW SCHOOL 13 (Washington City, Thomas McGill & Co. 1878)).

39. *Id.* at 130 (quoting J.L. High, *What Shall Be Done with the Reports?*, 3 AM. L. REV. 429, 439 (1882)).

40. *Id.* at 129 (quoting BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, THE WORK OF THE ADVOCATE: A PRACTICAL TREATISE CONTAINING SUGGESTIONS FOR PREPARATION AND TRIAL 58 (Indianapolis, Bowen-Merill Co. 1888)).

41. *Id.* at 134.

42. *Id.* at 136.

43. *Id.* at 188–89, 197.

44. *Id.* at 218–19.

law,<sup>45</sup> with legal realism ultimately becoming the dominant school.<sup>46</sup>

Banner quotes numerous lawyers and judges repudiating the once common view that judges discover the law.<sup>47</sup> A speaker at the American Bar Association's meeting in 1883 called the idea that judges never make law a "resplendent fiction."<sup>48</sup> A guide for law students in 1891 posited that case law was "a creation of the courts."<sup>49</sup> And Justice Holmes wrote in 1917 that "judges do and must legislate."<sup>50</sup> By the mid-twentieth century, "[v]irtually all lawyers agreed that judges make law."<sup>51</sup> Even Justice Scalia—a jurist known for his formalism—said: "I am not so naïve . . . as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it."<sup>52</sup>

Banner closes the book by reflecting on "echoes" of natural law that persist long after lawyers stopped relying on natural law.<sup>53</sup> Natural law, he writes, "lingers on in the voice lawyers and judges adopt in their professional lives."<sup>54</sup> When lawyers argue in court or judges write opinions, they tend to speak as if courts always *discover* what the law requires; and yet in other contexts, they acknowledge that courts must *make* law, at least in hard cases.<sup>55</sup> Banner suggests that "[t]his difference between what lawyers say and what they think is a holdover from an era in which lawyers really did believe that judges found the law. They would gradually stop believing this, but the official discourse of the legal system did not change accordingly."<sup>56</sup>

Something that I cannot convey in this brief summary is the sheer number and variety of sources that Banner uses to support his points—articles, treatises, speeches, letters, and opinions by a broad assortment of lawyers, judges, and law professors. Particularly in light of this array of sources, I find Banner's account of the decline of natural law compelling. But as stated above, I do not intend to criticize or affirm his account here, nor would I be the right person to do so. My interest instead is in what his account, assuming that it accurately portrays a shift in lawyers' attitudes toward law, can teach us about the nature of law. To that end, let us turn next to two debates in general jurisprudence, a substantive debate and a methodological one.

45. *Id.* at 189.

46. *See id.* at 221.

47. *Id.* at 213–21.

48. *Id.* at 214 (quoting JOHN M. SHIRLEY, THE FUTURE OF OUR PROFESSION: A PAPER READ BEFORE THE AMERICAN BAR ASSOCIATION 19 (Philadelphia, George S. Harris & Sons 1883)).

49. *Id.* (quoting EUGENE WAMBAUGH, THE STUDY OF CASES 35 (Boston, Little, Brown, & Co. 1891)).

50. *Id.* at 220 (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting)).

51. *Id.* at 218–19.

52. *Id.* at 219 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment)).

53. *Id.* at 223–49.

54. *Id.* at 246.

55. *Id.* at 213.

56. *Id.* at 246.

## II. DEBATES IN GENERAL JURISPRUDENCE

General jurisprudence is not concerned with the law of some jurisdiction at some time but rather with the nature of law, wherever and whenever law is found.<sup>57</sup> A prominent debate in this area centers on the relationship between evaluative facts (facts about what is good, rational, etc.) and the existence and content of law (whether a legal norm exists and, if so, what it requires or permits).<sup>58</sup> The main camps in this debate are positivism and antipositivism.<sup>59</sup> How to define these camps is itself contentious.<sup>60</sup> But for present purposes, let us say that positivism holds that the existence and content of law do not necessarily depend on evaluative facts, while antipositivism holds that the existence or content of law do necessarily depend on evaluative facts.<sup>61</sup>

So defined, positivism is consistent with law either depending or not depending on evaluative facts. This sets up a division within the positivist camp. On exclusive positivism, the existence and content of law necessarily depend on just social facts (descriptive facts about what people think, say, do, etc.), never on evaluative facts.<sup>62</sup> By contrast, on inclusive positivism, the existence or content of the law may depend on evaluative facts, though only if social facts make evaluative facts relevant to whether a legal norm exists or what it directs.<sup>63</sup> Thus, for exclusive positivists, evaluative reasoning is never required to find out what the law is; but for inclusive legal positivists, evaluative reasoning *may* be required to find out what the law is.

We should also note a division within the antipositivist camp, though it will play no role in our discussion below. On one version of natural law theory, a norm must pass a certain moral threshold to count as a legal norm.<sup>64</sup> It follows that very immoral legal texts, like the Fugitive Slave Act, do not create legal norms. (As Banner rightly observes, lawyers who used natural law in prior centuries need not have subscribed to natural law theory as legal philosophers

57. Andrei Marmor & Alexander Sarch, *The Nature of Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1 (Edward N. Zalta et al. eds., 2019), <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/> [https://perma.cc/KBY9-ERDM].

58. *See id.* at 2–3.

59. *See id.* at 2, 4, 9.

60. For examples of different ways of formulating the positivism–antipositivism divide, see Emad H. Atiq, *There Are No Easy Counterexamples To Legal Anti-Positivism*, 17 J. ETHICS & SOC. PHIL. 1, 1–2 (2020); Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 157–58 (2004); John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 199–201, 207–08 (2001).

61. The relevant notion of dependence here is the sort of metaphysical dependence that metaphysicians call “grounding.” *See generally* Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109 (Bob Hale & Aviv Hoffmann eds., 2010); Jonathan Schaffer, *On What Grounds What*, in METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 347 (David J. Chalmers, David Manley & Ryan Wasserman eds., 2009).

62. *See Marmor & Sarch, supra* note 57, at 10.

63. *See id.*

64. *See Murphy, supra* note 18, at 18–19 (presenting this strong version of natural law theory); CROWE, *supra* note 18, at 143 (same). There are also weaker versions of natural law theory, on which a norm necessarily must pass a certain moral threshold to count as a central or paradigmatic instance of a legal norm. *See Murphy, supra* note 18, at 21; CROWE, *supra* note 18, at 143. These weaker versions are consistent with positivism, as defined here.

understand it today.<sup>65</sup>) A more recent strain of antipositivism, associated with Ronald Dworkin, holds that the content of law depends on the best constructive interpretation of a community's legal and political history—on the interpretation that best fits and justifies that history—which depends on evaluative facts.<sup>66</sup>

Behind the positivism–antipositivism debate is a methodological debate over what these theories aim to achieve. On one view, the aim is to analyze our *concept of law* (put to the side for now whom this “our” refers to).<sup>67</sup> Our concept of law is not some “brooding omnipresence in the sky.”<sup>68</sup> It is simply our shared understanding of the sort of thing that law is. The goal of conceptual analysis is to clarify and systematize our shared, though often inchoate, intuitions about the essential features of law and what counts as law.<sup>69</sup> On this view, then, the subject of the positivist–antipositivist debate is whether law—according to our shared understanding of it or something suitably close to our shared understanding—necessarily depends on evaluative facts.

A second view is that a theory of law aims to give a reductive analysis of *law itself*: the goal is to fully explain one set of facts (law facts) in terms of a more metaphysically basic set of facts (e.g., social facts).<sup>70</sup> Whether this project is separable from conceptual analysis is not clear. Law facts do not come pre-labeled as such. So it seems that conceptual analysis is necessary to determine which facts are law facts and is likely to be dispositive of whether those law facts reduce to social facts.<sup>71</sup> In other words, conceptual analysis seems to be a necessary and likely outcome-determinative precursor to any reductive analysis of law. Still, it is at least clear that these first two views are both descriptive projects, in the sense that neither requires evaluating the object of study—neither requires asking whether law or our concept of it is good or bad.

A third view is *normative*: it claims that a theory of law aims to tell us what our concept of law should be.<sup>72</sup> At least at first glance, this third view need not compete with either of the two prior views: it seems coherent to ask both whether positivism is true of our actual concept of law (or of law itself) and whether

65. BANNER, *supra* note 1, at 4.

66. See RONALD DWORKIN, *LAW'S EMPIRE* 90 (1986).

67. See, e.g., SCOTT J. SHAPIRO, *LEGALITY* 13–18 (2011); JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 17–24 (2009).

68. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

69. Frank Jackson calls this “modest” conceptual analysis. See FRANK JACKSON, *FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS* 42–44 (1998).

70. See, e.g., Andrei Marmor, *Farewell to Conceptual Analysis (in Jurisprudence)*, in *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* 209 (Wil Waluchow & Stefan Sciaraffa eds., 2013); BRIAN LEITER, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, in *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 153, 180 (2007).

71. Cf. JACKSON, *supra* note 69, at 30–31 (“Although metaphysics is about what the world is like, the *questions* we ask when we do metaphysics are framed in a language, and thus we need to attend to what the users of the language mean by the words they employ to ask their questions.”).

72. See, e.g., Scott Hershovitz, *The End of Jurisprudence*, 124 *YALE L.J.* 1160, 1173 (2015); Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 97, 123 (Andrei Marmor ed., 1995); DWORKIN, *supra* note 66, at 49–53.

positivism is true of the concept of law that we should hold.<sup>73</sup> Yet some proponents of this third view make the stronger claim that a descriptive theory of law is impossible—that any theory of law is inescapably normative.<sup>74</sup> There are complex issues here, but for reasons that others have stated before, I do not find this stronger claim persuasive, and I will proceed on the assumption that a descriptive theory of law is possible.<sup>75</sup>

The rest of this Review focuses on exclusive positivism, so it is worth saying a bit more in that regard. There are two main arguments for exclusive positivism. The first argument points to the theory's ability to explain certain aspects of legal thought.<sup>76</sup> For instance, it explains why we distinguish between an argument's legal acceptability and its moral merit or between judges' legal skill and their moral leanings.<sup>77</sup> It also explains why we tend to see law as settled to the extent that we agree on social facts (e.g., what a statute communicates) and as unsettled to the extent that we disagree about those facts.<sup>78</sup> Relatedly, it explains why we tend to see judges as making law insofar as their decisions rest on not just social facts but also evaluative facts.<sup>79</sup>

The second argument, which is owed to Joseph Raz, concerns the role of law in practical reasoning. According to Raz, an essential feature of law is that it claims to give its subjects legitimate authoritative directives.<sup>80</sup> It seems to follow that law must be the sort of thing that has the capacity to give such directives.<sup>81</sup> But for law to have that capacity, we must be able to identify its existence and content without weighing the very reasons that it claims to settle for us; if we had to weigh for ourselves the reasons bearing on how we ought to behave before we could know what the law directs us to do, then the law would not be acting as an authority.<sup>82</sup> The existence and content of law must therefore be identifiable by social facts alone.<sup>83</sup>

Put another way, law necessarily purports to give, and so must be the sort of thing that can give, both first-order reasons to act and second-order *preemptive reasons* not to act based on other first-order reasons.<sup>84</sup> By analogy, an arbitrator will weigh first-order reasons bearing on what the parties ought to do, but once the arbitrator issues a decision, that decision gives the parties (i) a first-order reason to comply and (ii) a preemptive reason not to act based on the first-order

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73. The latter is often called “normative positivism.” See Torben Spaak & Patricia Mindus, *Introduction*, in *THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 1, 12–13 (Torben Spaak & Patricia Mindus eds., 2021).

74. See, e.g., Perry, *supra* note 72, at 123; DWORKIN, *supra* note 66, at 49–53.

75. See generally Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 *OXFORD J. LEGAL STUD.* 683 (2006); Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 *LEGAL THEORY* 117 (2004).

76. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 48–50 (1979).

77. *Id.* at 49.

78. *Id.* at 49–50.

79. *Id.*

80. Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295, 300 (1985).

81. See *id.*

82. *Id.* at 304.

83. *Id.* at 305–06.

84. See *id.* at 297.

reasons that the arbitrator has already weighed.<sup>85</sup> The arbitrator's decision could not give the parties such a preemptive reason if they could only identify it by weighing the very first-order reasons that it purports to preempt.<sup>86</sup> The decision must be identifiable by social facts alone.<sup>87</sup>

So too the law must be identifiable by just social facts, like facts about institutions publishing texts and about what those texts communicate. If that is right, then it is practically inevitable that the law will fail to give determinate direction in some cases. Given defects like ambiguity or vagueness in legal texts and the variety of cases arising before courts, there will sometimes be no single answer to what the law directs a court to decide—the relevant social facts are bound to run out before cases do. There is thus a tight connection between exclusive positivism and legal realism: if exclusive positivism is correct, it is practically inevitable that the law will be indeterminate as to some cases and that courts will have to make law in those cases.

### III. THE RISE OF EXCLUSIVE POSITIVISM

My overview of these debates has, no doubt, been too quick, but let us consider now what light Banner's work can shed in this regard. Below, I argue that (i) Banner portrays a shift in American lawyers' concept of law from an inclusive-positivist or antipositivist concept to an exclusive-positivist one (from conceiving of law as at least potentially depending on evaluative facts to conceiving of it as necessarily depending on social facts alone); (ii) Banner provides a plausible explanation for *why* that shift occurred, which centers on a dramatic rise in the number of written sources of law; and (iii) acknowledging this conceptual shift gives exclusive positivists new resources for responding to common objections to their theory.

As we saw above, Banner contends that American lawyers in the early nineteenth century took certain principles of rational conduct to be part of their legal system and understood those principles to determine what the law directed in some cases.<sup>88</sup> This suggests that lawyers of the time did not consider authority (in the Razian sense) to be an essential feature of law: they did not conceive of law as essentially providing preemptive reasons. Rather, they thought that courts sometimes had to look to principles of rational conduct—to ask what was the rational thing to do—to find out what the law required.<sup>89</sup> They believed that evaluative facts fixed some of the content of their law and thereby determined what the law directed courts to decide in some cases.<sup>90</sup>

Banner clearly believes that this is not true of American lawyers' concept of

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85. *Id.* at 297–98.

86. *Id.*

87. *See id.* at 297.

88. Whether these lawyers thought of natural law as contingently part of their legal system or as necessarily part of every legal system is less clear (though Banner offers some evidence for the latter). *See* BANNER, *supra* note 1, at 13–14. The key for our purposes is that their intuitions about law did not accord with exclusive positivism.

89. *See id.* at 1, 13–14.

90. *See id.*

law today—that American lawyers now share an exclusive-positivist concept of law.<sup>91</sup> Banner is a historian, not a philosopher, so he does not use these terms, but he does imply that contemporary American lawyers conceive of law as necessarily depending on social facts alone.<sup>92</sup> He writes that we “now believe that all the rules of the legal system are created by humans.”<sup>93</sup> What judges once called “natural law,” we today “call policymaking—the explanation of why one rule makes the most sense, in situations where alternative rules are possible.”<sup>94</sup> In such situations, we now describe judges as engaging in “interstitial lawmaking, in the gaps where no law yet exists.”<sup>95</sup>

Admittedly, Banner provides less evidence to support his view of how American lawyers’ conceive of law today than he does to support his view of how they conceived of it in centuries past. For the most part, he seems to think it obvious that lawyers today believe that judges make law to the extent that they base their decisions on evaluative facts.<sup>96</sup> I am inclined to agree; indeed, I think that this is likely part of what lawyers mean by the oft-repeated cliché that “we are all legal realists now.”<sup>97</sup> But I also recognize that not everyone finds this as obvious as Banner and I do,<sup>98</sup> and further empirical study of contemporary lawyers’ attitudes toward the relationship between evaluative facts and the existence and content of law would be needed to prove it.

Regardless, what I find most interesting about Banner’s work, and the reason why I think that it is ultimately good news for exclusive positivists, is that it presents a plausible story for why such a conceptual shift would have occurred.<sup>99</sup> Whereas there were comparatively few written sources of law before the mid-eighteenth century, there has been an amazing proliferation of such sources from that time onward.<sup>100</sup> Whereas there were once comparatively few social facts to fix the content of American law,<sup>101</sup> there is now an abundance. There is thus far less reason for judges to resort to evaluative facts to dispose of cases today, and in those relatively rare cases where judges do resort to evaluative facts, it is much easier to understand them as *making* law.

91. *See id.* at 1.

92. *See id.*

93. *Id.*

94. *Id.* at 3.

95. *Id.* at 247.

96. *See supra* notes 47–56 and accompanying text.

97. *See* Stephen Nayak-Young, *Delimiting the Proper Bounds of the “New Legal Realism,”* 12 INT’L J. CONST. L. 1008, 1017 & n.34 (2014) (collecting uses of the cliché).

98. *See* Emad H. Atiq, *Legal Positivism and the Moral Origins of Legal Systems*, CANADIAN J.L. & JURIS. (forthcoming 2022) (manuscript at 22–24), <https://ssrn.com/abstract=3969405> [<https://perma.cc/P7X3-NXC8>].

99. Atiq contends that, if positivists wish to claim that there has been a shift in our concept of law, they need “an account of conceptual change—how a term with a putatively moral meaning ended up referring to a subject amenable to positivistic analysis.” *Id.* at 4. The next several paragraphs give at least the start of such an account.

100. *See supra* notes 29–34 and accompanying text.

101. There were, of course, a great many social facts about *custom* that could have fixed some of the content of American law prior to the mid-eighteenth century. But unlike written sources of law, facts about custom were more difficult to discern and less likely to yield determinate answers to what the law directed in specific cases.

Our concept of law is a concept of a practice; it makes sense that, as new technology changes the practice, our concept may change too. Banner recounts how a rise in reported cases, from a handful of volumes in the early nineteenth century to thousands by century's end, made it possible for lawyers to argue from precedent far more often than ever before.<sup>102</sup> It seems plausible that this change in behavior could impact their concept of law—that they might, bit by bit, come to see reported cases as *sources* of law rather than as evidence of what the law already was. And from there, it is just a small step to see reported cases and other social facts as the *sole* sources of law and to regard courts as making law insofar as they rest their decisions on anything else.

Banner focuses on the late nineteenth to early twentieth centuries, but further changes in legal technology in the twentieth century may have accelerated or solidified this conceptual shift. Not only did the number of reported cases continue to rise in the twentieth century, this period also saw a movement toward codification and an attendant increase in the number of statutes.<sup>103</sup> The U.S. Code grew from two volumes in 1928 to twenty-nine volumes in 1988, and there was comparable growth in state codes<sup>104</sup>—think, in particular, of widespread adoption of uniform laws like the Uniform Commercial Code or Model Penal Code. This proliferation of statutes may have further encouraged lawyers to view law as necessarily depending on social facts alone.

The twentieth century also saw the expansion of the administrative state and, accordingly, a dramatic rise in the number of regulations. The Code of Federal Regulations grew from 15 volumes when it was first published in 1939 to 110 volumes in 1967.<sup>105</sup> In addition, there are now countless administrative guidance documents.<sup>106</sup> Although not technically sources of law, these documents may be cited in lawyers' briefs and may persuade courts to adopt a certain interpretation of a statute or regulation. Finally, the advent of word-searchable databases like Westlaw and LexisNexis has made it easier than ever before for lawyers to search for cases, statutes, regulations, and the like—that is, to find social facts that speak directly to some legal question.

In sum, whereas there were comparatively few written sources of law two centuries ago, we find ourselves awash in a sea of such sources today, and we

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102. BANNER, *supra* note 1, at 119; *see also supra* notes 29–34 and accompanying text.

103. *Cf.* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (“The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law . . . to one in which statutes, enacted by legislatures, have become the primary source of law.”).

104. *See* Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 105 (2000); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947) (noting a dramatic rise in the number of statutes).

105. OFF. OF THE FED. REG., *A BRIEF HISTORY COMMEMORATING THE 70TH ANNIVERSARY OF THE PUBLICATION OF THE FIRST ISSUE OF THE FEDERAL REGISTER* 4, 10 (2006), <https://www.archives.gov/files/federal-register/the-federal-register/history.pdf> [https://perma.cc/MVB4-83PW].

106. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165, 167–68 (2019) (“Nobody knows exactly how much guidance there is, . . . but its page count . . . is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even two hundred.”).

have the tools to make them accessible and useable. For most legal questions that arise today, it is easy to find social facts that definitively answer the question, and lawyers are in the habit of relying on precisely those facts. While there remain hard cases in which social facts fail to fully determine what the law directs, those cases are far, far rarer than they once were, and that rarity makes it much more palatable to view courts as *making* law in those cases. This is at least the start of an explanation for why American lawyers would come to share an exclusive-positivist concept of law.

Assuming that such a conceptual shift occurred, it goes a long way toward accounting for aspects of contemporary legal practice that might otherwise seem in tension with exclusive positivism. Consider judges' convention of announcing their holdings in hard cases as if they are discovering law rather than making it. Antipositivists take this as a sign that judges understand evaluative facts to resolve what the law requires in such cases, which suggests that our concept of law does not accord with exclusive positivism.<sup>107</sup> The burden is then on exclusive positivists to explain why that is wrong. The story told above gives an answer: this convention is a vestige of a former concept of law, a concept that judges once held but no longer do.

Judges developed the practice of announcing their holdings as if they were discovering the law long ago when they really did take themselves to be discovering law, and they never abandoned it even after our concept of law changed. To be sure, exclusive positivists should also explain why judges never abandoned this practice, but that is not hard to do. One might point to simple inertia (generations of lawyers were introduced to legal reasoning by reading nineteenth-century cases and went on to imitate those cases' style as judges) or to various rhetorical or political reasons (it is more persuasive and more consistent with the prevailing conception of the judicial role for judges to speak as though they are announcing what the law already is).

#### IV. IMPLICATIONS FOR METHODOLOGY

As explained above, conceptual analysis of law aims to explicate *our* concept of law—our shared understanding of the sort of thing that law is. An upshot of our discussion so far is that our concept of law is more parochial—more limited by time and place—than it is sometimes assumed to be. Banner's work illustrates just how different contemporary American lawyers' concept of law is from that of lawyers in the same jurisdiction a mere two centuries ago. In this last part, I argue that (i) our concept of law being parochial in this way does not make conceptual analysis unfit as a methodology for general jurisprudence, and (ii) conceptual analysis of law remains a worthwhile project, notwithstanding its limitations.

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107. See Emad H. Atiq, *Legal Obligation and Its Limits*, 38 *LAW & PHIL.* 109, 144–45 (2019); DWORKIN, *supra* note 66, at 37–39. Acknowledging a shift in American lawyers' concept of law also implies that antipositivists should not rely on nineteenth-century cases to refute exclusive positivism. Cf. DWORKIN, *supra* note 66, at 15–19 (discussing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)).

With respect to the first point, I hope to build on what Raz says about conceptual analysis of law. He explains that, while conceptual analysis aims to elucidate the essential properties of law, it is part of “our common understanding of the law that its nature . . . changes over time.”<sup>108</sup> The way to resolve this tension is by recognizing that conceptual analysis aims only to explicate the concept of law that we hold here and now.<sup>109</sup> It identifies properties that law necessarily has according to our concept, even though we hold that concept only contingently.<sup>110</sup> Conceptual analysis of law is thus “a parochial study of an aspect of our culture;” it is largely about advancing our self-understanding of our own culture’s institutions and practices.<sup>111</sup>

While our concept of law is parochial in the sense that it is our concept and may differ from other communities’ concept, it is universal in the sense that it is our shared understanding of the nature of law, wherever and whenever law exists.<sup>112</sup> A community need not possess our concept of law to have law according to our concept.<sup>113</sup> As long as we bear in mind that we are analyzing our concept, we can sensibly talk about the necessary features of law everywhere and anywhere, including in communities whose concept of law differs from our own.<sup>114</sup> That said, we should remember that, insofar as we look to only our concept, we may not fully understand other communities’ law because we may remain unaware of how they conceive of their law.<sup>115</sup>

The question remains: When we talk about analyzing our concept of law, to whom should this “our” refer? Raz, at times, seems to have in mind a very broad group—something like all of modern Western civilization.<sup>116</sup> That would assume that the same, or a quite similar, concept of law has been shared across many jurisdictions for centuries. I take Banner’s work to suggest that the “our” in question should be construed much more narrowly. Or rather, since whose concept of law we choose to analyze is mostly a function of our theoretical interests, if our goal is to give a definitive answer to the positivist–antipositivist debate, then we should analyze *contemporary American lawyers’* concept of law or a similarly restricted community’s concept.

Another way of putting the same point is that any concept of law that is shared across many jurisdictions and times will likely be too thin to be of much interest—and certainly too thin to resolve the positivist–antipositivist debate. That being so, there are two ways for conceptual analysis to proceed: either conclude that the answer to the question under discussion is indeterminate or check to see whether smaller communities have more determinate concepts of

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108. RAZ, *supra* note 67, at 25–27.

109. *Id.* at 27.

110. *Id.* at 46; *see also* Brian H. Bix, *Raz on Necessity*, 22 L. & PHIL. 537, 549 (2003); Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 LEGAL THEORY 381, 393 n.24 (1998).

111. RAZ, *supra* note 67, at 31–32.

112. *Id.* at 32, 38.

113. *Id.* at 95.

114. *See id.* at 33, 96.

115. *Id.* at 96.

116. *Id.* at 38.

law, and if so, analyze those concepts.<sup>117</sup> I am advocating for the latter route. For conceptual analysis to yield determinate answers to traditional questions in general jurisprudence, the object of study should be a parochial concept of law, e.g., contemporary American lawyers' concept.

Why lawyers' concept and not, say, laypersons' concept? It is lawyers who practice law, so it is generally more illuminating of legal practice to analyze their concept. Also, laypersons' intuitions about the essential features of law and what counts as law may be too indeterminate to yield an interesting theory of law. Most importantly, I suspect that laypersons conceive of law as whatever it is that lawyers think is law—that they outsource, so to speak, their concept of law to the relevant experts.<sup>118</sup> Much the same is likely true of scientific concepts like the concept of electrons. I have the minimal competence required to use the word "electron" correctly on some occasions, but ultimately, I understand electrons to be whatever it is that physicists say they are.

One might worry that, if we start down this path, there is no nonarbitrary end to it. Why stop at contemporary American lawyers' concept? Why not analyze an even more parochial concept, like that of Democrat lawyers, Republican lawyers, New York lawyers, or Republican New York lawyers who served in the first Bush Administration? As already noted, the choice of a concept to analyze is mostly a function of our theoretical interests. It is interesting to see how lawyers, the experts on the law of some system, conceive of law. It is less interesting to analyze more granular groups' concept, particularly as they likely all agree on the sort of thing that law is anyway (even while disagreeing over many moral or political issues adjacent to law).

None of this means that philosophers working in different jurisdictions have nothing to say to each other. Not only is it worth analyzing the concept of law operative in our community, it is worth comparing that concept to the concepts operative in other communities—a sort of "comparative jurisprudence." The key is that we can do this comparative work without trying to describe an overarching concept of law shared by every community. While we should expect significant overlap between different communities' concepts of law (that is why it makes sense to call them all "concepts of law"), we should also expect differences, like that postulated above between the concepts operative in the United States in the nineteenth century versus today.

Some may think this a pyrrhic victory for conceptual analysis: If our analysis is limited to such a parochial concept, why should philosophers engage in it at all? Such analysis seems to be, as Brian Leiter puts it, "banal descriptive sociology of the Gallup-poll variety"—empirical work that is better suited to social scientists than to philosophers.<sup>119</sup> I disagree, and this leads to my second point, which is that conceptual analysis of law remains a worthwhile project even if it is analysis of a parochial concept. Law is one of our most complex and

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117. Cf. Kenneth Einar Himma, *Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology in Legal Theory*, 26 *REVUS* 65, 73 (2015) (discussing these two options).

118. Cf. Hilary Putnam, *The Meaning of "Meaning"*, 7 *MINN. STUD. PHIL. SCI.* 131, 144–45 (1975) (positing a division of linguistic labor with respect to natural-kind words like "gold").

119. LEITER, *supra* note 70, at 177.

socially significant practices. Just clearly formulating questions about the nature of law can be difficult philosophical work (witness the disagreement over how to define positivism).

Most lawyers have given little thought to the essential features of law; their intuitions on the subject may be muddled or even internally inconsistent. It is the job of philosophers to pump our intuitions with cases or thought experiments and then systematize those intuitions as well as possible, perhaps making small refinements along the way to reach a theory that possesses epistemic virtues like simplicity, coherence, etc. Much of this can be done from the armchair by anyone sufficiently familiar with the legal community in question. Yet empirical work—including historical studies like Banner’s or even Gallup-type polls of lawyers—may also be helpful, and philosophers should take such work into account, probably more than they do now.

Not only is this properly philosophical work, it is far from complete. For instance, Mark Greenberg has argued in recent years that positivists lack an adequate account of how legal texts like constitutions, statutes, and judicial opinions contribute to legal content.<sup>120</sup> I agree that positivists have not yet fully answered this challenge.<sup>121</sup> Similarly, Dworkin, and more recently Scott Shapiro, has argued that traditional positivism cannot explain “theoretical disagreements” in legal practice.<sup>122</sup> I at least believe that more needs to be said on the subject.<sup>123</sup> I suspect that further analysis of contemporary American lawyers’ concept of law can answer these challenges and vindicate exclusive positivism, but that work is still in progress.

Finally, analyzing our current concept of law seems to be, if not a necessary, at least an important precursor to understanding whether our concept of law should change. It is hard to know whether our concept of law should change without knowing what it is now. It may even be hard to know the extent to which our concept of law *can* change without first comparing the concepts of law operative in various communities, past or present. So it seems that even philosophers who are primarily interested in the normative project of asking what our concept of law should be—who are primarily interested in conceptual ethics or conceptual engineering<sup>124</sup>—should still have some interest in descriptive analysis of various parochial concepts of law.

120. See Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 72–102 (Leslie Green & Brian Leiter eds., 2011).

121. For the beginning of a response to Greenberg, see Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains that The Moral Impact Theory Cannot*, LEGAL THEORY (forthcoming 2022) (on file with author).

122. See Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 35–43 (Arthur Ripstein ed., 2007); DWORKIN, *supra* note 66, at 4–6.

123. For my position, see Bill Watson, *How to Answer Dworkin’s Argument from Theoretical Disagreement Without Attributing Confusion or Disingenuity to Legal Officials*, CAN. J. L. & JURIS. (forthcoming) (on file with author).

124. For background on conceptual ethics and conceptual engineering, see generally Herman Cappelen & David Plunkett, *Introduction: A Guided Tour of Conceptual Engineering and Conceptual Ethics*, in CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS 1 (Alexis Burgess, Herman Cappelen & David Plunkett eds., 2020).

## CONCLUSION

My main goal in writing this Review has been to bring Banner's excellent book to the attention of legal philosophers by noting the issues that it raises for general jurisprudence. These are complex issues, and I have really only scratched the surface of them here. I have argued for a conclusion that is modest yet surprising. It is modest because I have not shown that there was in fact a shift in American lawyers' concept of law. I have only shown that if Banner's portrayal of lawyers' attitudes toward law in the nineteenth and twentieth centuries is accurate, then it seems likely that such a shift occurred and that there is a plausible explanation for why it occurred: as the number of positive sources of law dramatically increased, and as lawyers relied on them more and more, lawyers slowly came to view such sources as the only sources of law.

My conclusion is surprising because legal philosophers have not properly attended to the possibility that there was such a significant shift in American lawyers' concept of law in the last two centuries. Attending to this possibility could open a new path forward in the age-old debate between positivists and antipositivists, at least insofar as that debate is about conceptual analysis. The result may be that our concept of law is more parochial than we initially thought. But I do not see this as any reason to give up on conceptual analysis of law; I see it only as reason to be more careful in specifying whose concept we are analyzing. We should also be aware that our concept of law is liable to be a moving target, such that our analysis of it may require updating, as advances in technology, cultural changes, and other influences continue to act upon it.