

2009

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Recommended Citation

Brian Leiter, "Why Legal Positivism?" (University of Chicago Public Law & Legal Theory Working Paper No. 298, 2009).

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WHY LEGAL POSITIVISM?

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Draft of December 10, 2009

for presentation at the AALS panel on "Legal Positivism: For and Against" with Leslie Green, Mark Greenberg, & Jeremy Waldron, New Orleans, January 9, 2010

Legal positivism is the name typically given to a theory of law that holds that the norms that are *legally valid* in any society are those that emanate from certain recognized *sources* (such as legislatures or courts) without regard for their *merits*, i.e., without regard for whether the norms are fair or just or efficient or sensible. Closely connected to this is the thought that, as the slogan has it, "there is no necessary connection between law and morality," which means, more precisely, that either (1) it is not necessary for a norm to be legally valid that it satisfy a moral criterion (as Hart would have it), or (2) it is necessary that morality *not* be a criterion of legal validity in a legal system (as Raz would have it). As Leslie Green and John Gardner have emphasized in recent years¹—and as Hart himself acknowledged with his minimum content of natural law thesis nearly 50 years ago—there are lots of senses in which law and morality *are* necessarily connected, but the familiar slogan about "no necessary connection" has always been meant to pick out either Hart's or Raz's theses about criteria of legal validity, one of which is shared by everyone, I take it, who thinks that legal positivism gives us the best account of the nature of law.

So why accept legal positivism as a theory of law? Sometimes legal philosophers make extravagant claims on behalf of the theory. Julie Dickson, following Raz, says that,

¹ See, e.g., Green, "Positivism and the Inseparability of Law and Morals," *New York University Law Review*, and Gardner, "Legal Positivism: 5 ½ Myths," *American Journal of Jurisprudence*

A successful theory of law...is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law....I am using “the nature of law” to refer to those essential properties which a given set of phenomena must exhibit in order to be law.²

If these are the criteria for a “successful” theory of law, then I fear there will almost certainly not be any such theories. After all, we have no theories of any human artifacts that satisfy these conditions, not even of science, one of the most developed human practices, about which some of the most thoughtful philosophers of the twentieth-century—like Carl Hempel and Karl Popper—tried valiantly to identify propositions that were “necessarily true” and which explained its “essential properties.” But these accounts all failed, so clearly so that everyone—outside of the ineradicable fringe of every professionalized *Wissenschaft*-- abandoned the project.³ Since the human practice of science is disciplined by far more demanding criteria than the human practice of law—criteria like successful “prediction and control” (the airplanes need to go up and come down where expected!)—should we really expect “law” to fare better? The legion of skeptics are well-known,⁴ and even if some are just amateurs, the apparent consensus about the “nature of law” within the core group of “professionals” is too obviously a sociological artifact—namely, proximity to High Street in Oxford as a necessary condition

²Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), p. 17. Dickson faithfully follows Raz’s lead here, though he has not always been so immodest. Thus, in the earlier essay “Legal Positivism and the Sources of Law,” reprinted in his *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009), Raz notes that it is no part of the argument for the Sources Thesis “that a similar conception of legal systems is to be found in all cultures and in all periods.” *Id.* at 50. That is only one kind of theoretical modesty, for one might still think that it is possible to state necessary truths that explain the essential nature of a culturally and temporally bounded human practice; as noted in the text, our experience in the philosophy of science in the 20th-century invites skepticism.

³ Larry Laudan, “The Demise of the Demarcation Problem,” in R.S. Cohen & L. Laudan (eds.), *Physics, Philosophy and Psychoanalysis* (Dordrecht: D. Reidel, 1983).

⁴ [cite to Tamanaha, Twining, anthropologists, also Finnis, L. Murphy]

for entry into the halls of serious legal philosophy--to constitute wholly adequate countervailing evidence.

So let us deflate our ambitions in a way suitable to the subject matter and the history of attempts to develop essentialist accounts of artifact concepts. Human artifacts answer to human interests, thus their nature and character is hostage to changing needs and wants. Even so, we can try to take a conceptual snapshot of these artifacts that answers to our current concerns. The snapshot will no doubt have fuzzy borders, but nothing more can be expected. So deflated, it is easy to say why legal positivism seems our best theory of law, without meaningful competition. Three theoretical desiderata appear decisive.

First, if we honor Hart's *explicit* theoretical aim of doing justice to what the ordinary man understands about the modern municipal legal system,⁵ then we have no better theory than positivism: it captures remarkably well the familiar distinctions between law and morality, law and policy, legal knowledge and moral wisdom, and settled and unsettled law, the kinds of distinctions jurists, lawyers, and educated laymen draw all the time. Although Raz's "authority argument" for positivism has generated a substantial secondary literature over the last twenty years, it is less often remembered that Raz's earliest arguments for positivism turned on its ability to explain precisely these kinds of distinctions.⁶ Positivism, as he observed, "reflects and explicates our conception of the law," for example the fact that we distinguish between "the legal skills of the judge" and his or her "moral character,"⁷ and between "deciding cases regarding which the law is unsettled" and those "where the

⁵ [cite and quote from Hart]

⁶Raz, "Legal Positivism and the Source of Law."

⁷ *Id.* at 48.

law is settled” such that judges need only “us[e] their legal skills in applying the law.”⁸ Anyone who watched any of the recent confirmation hearings for Justice Sotomayor to the United States Supreme Court can readily confirm that these distinctions are, indeed, central to the public conception of law in the United States. But in legal systems where the judiciary is more disciplined by virtue of its civil-service character—this is true in Britain as well as most of the civil law countries—such distinctions are also quite familiar. Positivism explains the distinctions: as Raz puts it, “the law on a question is settled when legally binding sources provides its solution” and “since it is source-based, [the law’s] application involves technical, legal skills in reasoning from those sources and does not call for moral acumen.”⁹ Positivism, for similar reasons, also explains why there is massive agreement about what the law is in the vast, vast majority of legal questions that arise in ordinary life.¹⁰

Second, it should surely count in favor of an account of the nature of law that it complements, and perhaps even wins support from, work in the empirical sciences. In the history of philosophy, one thing we have learned—I hope!—is that armchair confidence about reality often has to retreat in the face of scientific success. So a theory of law that makes explicit the tacit or inchoate concept at play in scientific research is probably to be preferred to its competitors. Positivism is that theory. If one surveys, for example, the now vast empirical literature on adjudication,¹¹ which aims to explore the relative contributions of legal versus non-legal norms to decision-making by courts, that literature *always* demarcates the distinction in positivist terms.¹² That empirical researchers depend on the

⁸ *Id.* at 49.

⁹ *Id.* at 49-50.

¹⁰ Cf. Brian Leiter, “Explaining Theoretical Disagreement,” *University of Chicago Law Review* __ (2009), pp. __-__.

¹¹ Cite Spaeth & Segal; Sunstein et al.; Miles & Sunstein; etc.; cf. Posner, *How Judges Think* for an overview.

¹² Cf. Leiter, *Naturalizing Jurisprudence*, pp. __-__.

positivist theory of law to frame their research agendas is also further evidence that it discharges the Hartian aim on the (plausible) assumption that social scientific researchers draw on their pre-theoretical or common-sense grasp of concepts in framing their inquiries.

Third, it is always a theoretical desideratum to understand a phenomenon in ways that do not involve controversial or incredible metaphysical commitments. So, for example, it would be a serious problem for a theory of law that it made the nature of law dependent on the will of God, since we have neither good reason to think God exists (and much reason to think he does not), nor reliable epistemic access to his will (if he did exist). It is a virtue of legal positivism that its picture of the world is metaphysically austere (though not as austere as some pictures!): it requires only persons and their psychological states to explain the social phenomenon of law.¹³ Moral truths and transcendental norms play no role in the Hartian picture, though the former are required by the views of Finnis and Dworkin, and the latter by Kelsen's theory. Since the existence of either is controversial at best and incredible at worst, it constitutes a theoretical virtue of legal positivism that it has no need for such an ontology.

Now admittedly the last two theoretical considerations in favor of positivism are driven by what is often called naturalism. But naturalism, and this is key, is *our* world view, where "our" means we post-Enlightenment folk. It is easy to lose sight of the "background" of intelligibility of our theoretical endeavors, since we have no position outside that background from which to leverage or "ground" its credibility. Yet even the most religiously devout respect the epistemic demands of naturalism in their ordinary lives (e.g., sense perception is a reliable way to predict the future course of experience), and since the scientific revolution, the rest of culture and thought has gradually been disciplined by

¹³ This was the great innovation of Hart's positivism as against Kelsen's NeoKantian variety, and together with his normative non-cognitivism and anti-behaviorism in psychology, allowed Hart to also displace the Scandinavian Realist theory of law as well.

naturalistic considerations in one guise or another. In favoring a theory that explains an artifact naturalistically, we favor a theory that is most likely to find a place within our most general theoretical accounts of how the world works.

So what theories stand opposed to the positivism that fares so well by the measures just noted? “Natural law” theories are not really competitors to positivism any longer, I believe. Their most sophisticated proponent, John Finnis, has already conceded that the legal positivist satisfies the first desideratum (roughly, explaining what the common man means),¹⁴ and he has never been able to make good on the more ambitious claim that no descriptive theory of law is possible.¹⁵ Finnitian Natural Law, charitably understood, is just doing something different, trying to explain the features of morally ideal legal systems. That is a good project, even if Finnis’s meta- and normative ethics are implausible. But it states no dispute with positivism as a theory of law.

If not natural law theory, then what is the alternative to positivism? American Legal Realism, as I have argued at length, is not only compatible with positivism as a theory of the nature of law, but *presupposes it* in its explanation of the indeterminacy of legal reasoning.¹⁶ So that leaves us, as far as I can see, with just one familiar contender: Dworkin’s theory of “law as integrity,”¹⁷ as he has come to call it, according to which the law is whatever follows from the best “constructive interpretation” of the institutional history of the legal system, that is, the set of principles that provide the best explanation and justification for what the courts and legislature have done so far. But Dworkin’s theory fails along

¹⁴ John Finnis, “On the Incoherence of Legal Positivism,” *Notre Dame Law Review* 75 (200), p. 1611.

¹⁵ See Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007), esp. pp. ___-___. Contemporary natural law theorists have, correctly, focused on attacking the possibility of descriptive jurisprudence as the key issue with positivism [cite M. Murphy, Perry].

¹⁶ Leiter, *Naturalizing Jurisprudence*, Chapter 2.

¹⁷ Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1996).

each dimension of theoretical adequacy just noted. For example, not only can it not explain why every judicial reference to morality is not in fact legally binding, it even entails the bizarre and counter-intuitive possibility that no one in the United States actually knows what the law is on any point, since it may be that no one has figured out the best constructive interpretation yet. Dworkin's theory figures as the background to no empirical research program into adjudication, and it demands that there be objectively right answers to *all* moral questions. It fails, in short, to explain what the ordinary man understands about the modern municipal legal system, and it does so with a theoretical edifice that plays no role in scientific research and which requires highly contentious metaphysical claims.

Those who take Dworkin's theory seriously are usually not legal philosophers. Many constitutional lawyers, both in the U.S. and in other countries, find Dworkin's theory appealing because they think it makes moral considerations relevant to the resolution of momentous constitutional questions. Dworkin does think moral considerations are relevant to the resolution of such questions, but so do Hart and Raz—indeed so does everyone else who is a positivist in the sense being discussed here. Where the law is unsettled—as it often is in momentous constitutional cases—positivists of course think moral considerations are pertinent to the best resolution of the question; and even where the law is settled, positivists of course think that moral considerations can override the settled law: no serious positivist theory holds that settled law imposes non-defeasible obligations on officials or citizens. Only atrocious public relations for legal positivism—aided and abetted, of course, by decades of scandalous misrepresentation by Dworkin—has led so many casual consumers of the jurisprudential literature to think otherwise. This poses an interesting sociological question about jurisprudence, but not an interesting philosophical one.

Positivism is our best-going theory of law, for the reasons already noted. It may be that law will change in ways that make positivism obsolete; or it may be that our epistemic desiderata in theory

construction will change in ways that make positivism obsolete. But neither change has transpired yet, which is why almost all legal philosophers are positivists. The only puzzle today is why everyone who hasn't thought carefully about the nature of law is not a legal positivist. I trust at least two of my co-panelists will provide us some insight into this curious state of affairs.