subtopic

Legal Positivism

LEGAL POSITIVISM *and* NATURAL LAW THEORY
James B. Murphy, Dartmouth College

In recent times, a group of legal philosophers using methods of conceptual clarification to make normative claims about law have become known as “legal positivists.” Legal Positivists often claim to be rigorously secular and scientific and often describe their natural law opponents as wholly religious. Before we can begin to understand the relation of legal positivism to natural law theory, we must first see the relation of “legal positivism” to simple “positivism” and “positive” law.

By the strict definition of “positivism,” the only real legal “positivists” would be those who use the empirical methods of the natural sciences to observe and to predict human behavior somehow related to law. “Positivism” was the creation of Auguste Comte, who founded positivism (*positivisme*: 1847) as not only an influential movement within European scientific thought but also as a global religious movement with its own temples, priests, rites, and sacraments. Comtean positivism was more overtly religious than any school of natural law theory. Despite this religious dimension, Comte’s positivism claimed that all valid knowledge was based on sense-data and verifiable by objective and observable means: he promised empirical and logical certainty in knowledge as an escape from what he saw as the mystifications of traditional moral and metaphysical thought. In imitation of that ideal, many scientists and philosophers in the nineteenth and twentieth centuries adopted the Comtean banner of “positivism,” championing what they thought was “scientific” clarity, certainty, and logical rigor; thus we find historical, logical, theological, philosophical, moral, political, and legal positivism. Although the name of legal positivism was inspired by Comte’s “positivism,” the two theories are substantially different, as it will become clear in the course of this essay.

Legal positivism has also been confused with the ancient idea of positive law. Leslie Green (2003), for example, claims that the term “legal positivism” was introduced in medieval legal thought, citing Finnis (1996) as the source of that claim—even though Finnis discusses there not legal positivism but positive law. Actually, it is only in the twentieth century that some influential legal theorists began to call themselves “positivists” and their doctrines “legal positivism,” notably Hans Kelsen (1945), H. L. A. Hart (1961), and Joseph Raz (1986).

Nor is it the case that twentieth-century legal positivism directly stems from traditional theories of positive law: many leading theorists of positive law, such as Thomas Aquinas, are not progenitors of legal positivism, while some leading progenitors of what became known as legal positivism almost never refer to positive law, such as Jeremy Bentham (1782). The leading legal positivists of our day, such as Hart and Raz, almost never speak of positive law while a major theorist of positive law today, John Finnis, is no legal positivist.

Still, we distinguish in order to unite, and there is an important relation between traditional theories of positive law and modern versions of legal positivism. The theory of positive law cannot be understood except by contrast with two other kinds of law. In contrast to customary law, positive law is said to be “posited” or “imposed.” Customary law is thought to emerge spontaneously from below while positive law is thought to be deliberately imposed from above. In contrast to natural law, however, positive law is defined variously as morally indifferent, morally arbitrary, or morally adventitious. Thus, in his discussion of the Mosaic Law, Thomas Aquinas says that the norm “you shall not kill” is of the natural law because it has intrinsic and universal moral force while the norm “you shall not wear garments made of wool and linen woven together” is of the positive law because it lacks intrinsic and universal moral force.

So in one sense, to claim that law is positive is to make a descriptive claim about its source: positive law is imposed and enacted by sovereign legislation. Yet in another sense, to claim that law is positive is to make a normative claim about its content: positive law lacks intrinsic moral force. The problem with much of the traditional discourse of positive law is that Aquinas, Hobbes, and Austin, for examples, never explicitly distinguish these two senses of law's positivity and their accounts oscillate unstably between them (Murphy 2005). It is often difficult to distinguish properties that often co-exist: natural-law norms whose content has intrinsic and universal moral force do not need to be deliberately imposed in order to have whatever moral force they are thought to possess; and the reason we deliberately impose positive laws is that they generally lack such intrinsic moral force. "You shall not kill" does not need sovereign imposition but "drive at 55 M.P.H." does. So it is understandable, then, to associate what is positive in content with what is positive in source.

Nonetheless, our two senses of positive law are logically independent, even if they are often found together. Natural-law norms can be deliberately imposed by sovereign authority, as in parts of the Decalogue, the American Bill of Rights, and the West German Federal Constitution. Although these norms have intrinsic and universal moral force quite apart from these historical enactments, the fact that they were solemnly adopted by legislative authority provides citizens of those polities additional moral reasons for respecting them. These laws, then, are natural in content but positive in source. Conversely, many of the rules of customary or common law lack intrinsic moral force: rules defining the conveyance of property are often just as morally indifferent or adventitious as any set of statutory regulations. So much of customary and common law, then, is positive in content, but not positive in source, because the rules of common law get their force not because they were once "laid down" or imposed but because generations of judges continued to "take them up" in the course of adjudication.

The two most distinctive theses of contemporary legal positivism both stem from the traditional accounts of the two senses of positive law: the "sources thesis" claims that all law can be traced to objective and dateable impositions of legislators and judges; the "no necessary connection" thesis (Raz 1986; Kramer 1999) claims that the validity of law has no necessary connection to moral truth.

In contrast to custom, positive law is imposed by deliberate imposition. Like some traditional theorists of positive law, many modern legal positivists, following the "source thesis," argue that all law stems from objectively verifiable acts of legal officials that (normally) form a unified chain of command. Obviously, the claim that law has its source in deliberate sovereign imposition applies better to some kinds of law than to other kinds: it applies better to statute than to precedents. When Hobbes (1971) argues that all civil law is positive, he means that all civil law is imposed by the sovereign. What about customary or common law? Here Hobbes resorts to an old fiction of the Roman jurists that "whatever the sovereign permits, he commands"; Hobbes thus argues that common law is "the King's law, whosoever pens it." In this view, the fact that a sovereign tolerates a custom or common law judgment means that the sovereign has authorized it. John Austin (1832) similarly argued that common law reflects a kind of indirect legislation: if the sovereign legislator declines to revoke a judicial decision, then the legislator has tacitly endorsed that decision. Later legal positivists, however, have become embarrassed by these crudely Procrustean methods of forcing all kinds of law into a legislative mold. H. L. A. Hart (1961) effectively refuted the argument that whatever the sovereign permits, he commands. Nonetheless, Hart also attempted an explanatory reductionism of law by tracing all legal norms to a unique rule of recognition whereby the whole legal system, from the orders of a police officer to the statutes of Parliament, forms a top-down chain of command. Ronald Dworkin (1978) argued that customary law, though not a major source of law in modern legal systems, "chips away" at the idealized pyramidal structure of Hart's legal positivism, because customs can have legal force quite apart from being authorized by a higher rule of recognition. So the claim that all law is somehow posited by deliberate acts of legal officials continues to fail to make sense of the role of custom as a largely independent source of law.

In contrast to natural law, positive law is morally arbitrary or indifferent. Following the "no necessary connection" thesis, modern legal positivists also strongly distinguish the validity of law from claims

about objective moral truth. Some (exclusive) legal positivists argue that legal validity necessarily excludes appeals to moral truth while other (inclusive) positivists argue that some legal systems (in particular, the American) permit appeals to moral truth in the finding of law (Waluchow: 1994). Lon Fuller (1964) argued against the legal positivists that law necessarily embodies some procedural principles that are moral in content: he is sometimes called a procedural natural law theorist. Ronald Dworkin (1986) argued against the legal positivists by asserting that law includes general principles that can be indentified and deployed only by means of moral argument by judges.

Critics say that what many legal positivists fail to note is that there are several sound natural-law reasons for the positivity of law. Pure moral norms ("you shall not kill the innocent") are too vague and open-ended to serve as reliable guides for human conduct. To coordinate complex human activities, law must descend into concrete particularity: not "drive safely" but "drive at no more than 55 M.P.H." In the abstract, "drive safely" seems to have intrinsic moral force, while "drive at 55" seems morally arbitrary. But in the context of law, to say merely "drive safely" would invite anarchy on the road and thus be deeply immoral while to set a specific limit is morally necessary for actually achieving some driving safely. So natural law shows us why it is morally necessary for law to be largely morally indifferent in content. Similarly, many legal positivists, such as Raz, argue that we must be able to identify legal norms without recourse to moral argument, because the point of a legal system is to provide a framework for social interaction in contexts precisely where there is no agreement about moral principles. Here again, we can see that there are good moral reasons for insisting on objective criteria for identifying valid legal norms, if we hope to sustain a legal order that can be respected by citizens of widely divergent moral views. In short, say natural law theorists, over a wide range of legal norms and institutions, the requirements for valid law identified by legal positivists are not only compatible with, but also find their deepest justification in, natural law theory (Finnis 1980).

Let us now return to the question of what legal positivism has in common with Comtean "positivism." "Positivism" has become a major approach to the scientific study of law understood as an empirical science of legal behavior, but does the positivist science of law have any relation other than merely verbal to contemporary legal positivism as just described? Scientific positivists since Ernst Mach have often asserted that the aim of science is not description or even explanation but prediction. For example, Milton Friedman (1953) famously argued that positivism in economic science means that economics seeks to predict behavior, not to describe or explain it. O. W. Holmes, Jr. (1897), who is often described as a legal positivist, sounds quite Comtean: "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." Brian Leiter (2001) argues that the legal realists were positivists in two very different senses: first, they accept the "sources thesis" of legal positivism; and second, they pioneered a scientific positivism by attempting to identify the ideological or psychological factors that best predict the decisions of appellate judges. In short, the true legal "positivists" (in the Comtean sense) are the myriad social scientists seeking to predict and sometimes explain the behavior of citizens and legal officials; the conceptual analysis and normative arguments of today's "legal positivists" has little if anything in common with such "positivism." Just as Finnis (1980) regrets the moniker of "natural law" for his normative account of law, so many of today's legal theorists might come to regret the equally misleading implications of their "positivism."

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