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PROPTER HONORIS RESPECTUM

ON THE INCOHERENCE OF LEGAL POSITIVISM

*John Finnis**

Legal positivism is an incoherent intellectual enterprise. It sets itself an explanatory task which it makes itself incapable of carrying through. In the result it offers its students purported and invalid derivations of *ought* from *is*.

In this brief Essay I note various features of legal positivism and its history, before trying to identify this incoherence at its heart. I do not mean to renege on my belief that reflections on law and legal theory are best carried forward without reference to unstable and parasitic academic categories, or labels, such as “positivism” (or “liberalism” or “conservatism,” etc.). I use the term for convenience, to pick out a loose family of theories and theorists who are part of our contemporary conversation and who have used the term to describe their own theories, or the legal theories of writers they wish us to admire.

I

The notion that there are no standards of action save those created—put in place, posited—by conventions, commands, or other such social facts was well known to Plato¹ and Aristotle.² Developing a sustained critique of any such notion was a primary objective of these philosophers, and to some extent of successors of theirs such as Cicero.³ Today the promoters of this radical kind of “exclusive positivism” are the followers, conscious or unconscious, of Nietzsche or of others who like him reduce ethics and normative political or legal theory to a search for the “genealogy,” the historical (perhaps partly or wholly physiological) sources of ethical, political, or legal standards.

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1 See PLATO, LAWS IV.

2 See ARISTOTLE, NICOMACHEAN ETHICS bk. I, § 13.

3 See CICERO, DE FINIBUS 1.7, 3.20.

These sources, they assume or assert, can only consist in exercises of the will of charismatic individuals or power-seeking groups, or in the supposedly will-like sub-rational drives and compulsions of domination, submission, and so forth.

Legal positivism is in principle a more modest proposal: that state law is, or should systematically be studied as if it were, a set of standards originated exclusively by conventions, commands, or other such social facts. As developed by Bentham, Austin, and Kelsen, legal positivism was officially neutral on the question whether, outside the law, there are moral standards whose directiveness (normativity, authority, obligatoriness) in deliberation is not to be explained entirely by any social fact. Bentham and Austin certainly did not think that the utilitarian morality they promoted depended for its obligatoriness upon the say-so of any person or group, even though Austin held that the whole content of utilitarian moral requirements is also commanded by God. Kelsen's official theory, until near the end of his life, was—at least when he was doing legal philosophy—that there may be moral truths, but if so they are completely outside the field of vision of legal science or legal philosophy. His final position, however, was one of either complete moral scepticism⁴ or undiluted moral voluntarism: moral norms could not be other than commands of God, if God there were. These final positions of Kelsen are the consummation not only of the seam of voluntarism running through all his theorising about positive law, but also of every earlier theory which took for granted that law and its obligatoriness are and must be a product of the will and coercive power of a superior.

What is often called “modern natural law theory” exemplifies, in large part, such a theory. This tradition emerges clearly by 1660, when Samuel Pufendorf published in The Hague his *Elements of Universal Jurisprudence*.⁵ Characteristic features of this kind of natural law theory can be studied there, or in John Locke's long-unpublished *Questions Concerning the Law of Nature*⁶ (c. 1660–1664). Both writers are clearly derivative in some ways from Hugo Grotius and in other ways from Thomas Hobbes. Very tellingly, Pufendorf describes Hobbes's *De Cive* (1642) (On Being a Citizen), a work announcing the

4 See, e.g., HANS KELSEN, *GENERAL THEORY OF NORMS* 226 (Michael Hartney trans., Oxford Univ. Press 1990).

5 2 SAMUEL PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* (William Abbott Oldfather trans., Clarendon Press 1931) (1672).

6 JOHN LOCKE, *QUESTIONS CONCERNING THE LAW OF NATURE* (Robert Horwitz et al. trans., Cornell Univ. Press 1990) (1664).

main moral and jurisprudential theses of Hobbes's more famous *Leviathan* (1651), as "for the most part extremely acute and sound."⁷

From Grotius's massively influential *On the Law of War and Peace* (1625), Locke and Pufendorf take the well-sounding but quite opaque idea that morality and the law's basic principles are a matter of "conformity with rational nature."⁸ The questions how this nature is known, and why it is normative for anyone, these writers never seriously tackle. Such fundamental questions are confronted and answered by Hobbes. But his answers treat our practical reasoning as all in the service of motivating sub-rational passions such as fear of death and desire to surpass others—motivations of the very kind identified by the classical tradition as in need of direction by our reason's grasp of more ultimate and better ends, of true and intrinsic goods, of really intelligent reasons for action.

"[N]o law without a legislator."⁹ No obligation without subjection to the "will of a superior power."¹⁰ "Law's formal definition is: the declaration of a superior will."¹¹ "The rule of our actions is the will of a superior power."¹² Law is in vain without (the prospect of) punishment.¹³ These definitions and axioms (Locke's) are meant by the founders of modern natural law theory to be as applicable to natural law, the very principles of morality, as to the positive law of states.¹⁴ So obligation is being openly "deduced" from fact, the fact that such and such has been willed by one who has power to harm. To be sure, when natural law (morality) is in issue, the superior, God, is assumed

7 2 PUFENDORF, *supra* note 5, at xxx.

8 HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* bk. I, at 38 (Francis W. Kelsey trans., William S. Hein & Co. 1995) (1625).

9 LOCKE, *supra* note 6, at 193.

10 *Id.* at 167; *see also id.* at 159.

11 *Id.* at 103.

12 *Id.* at 205.

13 *See id.* at 193.

14 *See, e.g.*, 2 PUFENDORF, *supra* note 5, at 89.

For, if you have removed God from the function of administering justice, all the efficacy of . . . pacts, to the observance of which one of the contracting parties is not able to compel the other by force, will immediately expire, and everyone will measure justice by his own particular advantage. And assuredly, if we are willing to confess the truth, once the fear of divine vengeance has been removed, there appears no sufficient reason why I should be at all obligated, after the conditions governing my advantage have once changed, to furnish that thing, for the furnishing of which to the second party I had bound myself while my interests led in that direction; that is, of course, if I have to fear no real evil, at least from any man, in consequence of that act.

Id.

to be wise. But the idea of divine wisdom is given no positive role in explaining why God's commands create obligations for a rational conscience. God's *right* to legislate is explained instead by the analogy of sheer power: "Who, indeed, will say that clay is not subject to the potter's will and that the pot cannot be destroyed by the same hand that shaped it?"¹⁵

Locke, like Hobbes, is uneasily though dimly aware that "ought" cannot be inferred from "is" without some further "ought." That is to say, he is uneasily aware that the fact that conduct *was* willed by a superior, or indeed by a party to a contract, does not explain why that conduct is *now* obligatory. So he sometimes thinks of supplementing his naked voluntarism (oughts are explained by acts of *will*) by the rationality of logical coherence: fundamental moral principles are tautologies, norms which it would be *self-contradictory* to deny.¹⁶ Hobbes had ventured a similar account of the obligatoriness of contracts (such as his fundamental social contract, of subjection to the sovereign). Still, his official and prominent explanation was of the form, "clubs are trumps" (will backed by superior force, i.e. capacity to harm).¹⁷ Such an appeal to coercion tacitly admits that the fact that someone else has *willed* or *ordered* me to do something provides of itself no reason for me to act, no normativity or directiveness for my deliberations.

Moreover, as Kelsen argues, reliance upon the will of a superior to explain law and its normativity leaves, in the end, no room for a requirement of logical consistency in the law, or for any attempt to reason from a general rule ("murder is to be punished") to a normative conclusion ("Smith, having murdered Jones, is to be punished").¹⁸ Hence Kelsen's final position, distressing to many of those who wish to be positivists: the only source of normativity, and therefore of the normativity of a particular norm, is positivity, that is, the actual willing of that norm by a superior. On this assumption, even the rationality of logic and uncontroversial legal reasoning can never yield normativity: nothing but a will-act can do that.¹⁹

15 LOCKE, *supra* note 6, at 167; see also *id.* at 164–66 ("[P]atet . . . posse homines a rebus sensibilibus colligere superiorem esse aliquem potentem sapientemque qui in homines ipsos jus habet et imperium. Quis enim negabit lutum figuli voluntati esse subjectum, testamque eadem manu qua formata est.") (emphasis added).

16 See *id.* at 178–79 (This passage was deleted by Locke in 1664).

17 See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 348–49 (1980).

18 See KELSEN, *supra* note 4, at 189–93, 211–51.

19 See *id.* at 6 ("In general terms: No Ought without a will (even if it is only fictitious).").

Kelsen's final positions cannot be written off as eccentricities, of merely biographical interest. Still, the legal positivism—sometimes called “exclusive legal positivism”—defended today by legal philosophers such as Joseph Raz, is very different. While affirming that all *law* is based upon and validated by social-fact sources—the affirmation which makes it exclusive legal positivism—it accepts also that judges can and not rarely do have a legal and moral obligation to include in their judicial reasoning principles and norms which are applicable because, although not legally valid (because not hitherto posited by any social-fact source), they are, or are taken by the judge in question to be, *morally true*.²⁰

II

Classical natural law theory does not reject the theses that what has been posited is positive and what has not been posited is not positive. (Indeed, the very term “positive law” is one imported into philosophy by Aquinas, who was also the first to propose that the whole law of a political community may be considered philosophically as *positive law*.²¹) But the theses need much clarification. What does it mean to say that a rule, principle, or other standard “has been posited by a social-fact source?” Does it mean what Kelsen finally took it to mean, that nothing short of express articulation of the very norm in all its specificity—and no kind of mere derivation (inference) or derivability—will suffice? Virtually no other positivist can be found to follow Kelsen here. But if not, which kinds of consistency-with-what-has-been-specifically-articulated by a social-fact source are necessary and sufficient to entitle a standard to be counted as “posited”? By what criteria is one to answer that last theoretical question?

Clearly, then, legal theorists have little reason to be content with any notion that legal theory should merely report the social facts about what has and has not been expressly posited, by actual acts of deliberate articulation, in this or that community. Raz himself goes well beyond so confined a project when he affirms that courts characteristically have the legal and/or moral duty to apply non-legal standards.

Now consider the judicial or juristic process of identifying a moral standard as one which anyone adjudicating a given case has the duty to apply even though it has not (yet) been posited by the social facts of custom, enactment, or prior adjudication. This specific moral

20 See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 190–91 (1994).

21 See John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW* 195–214 (Robert P. George ed., 1996).

standard will usually be a specification of some very general principle such as fairness, of rejecting favourable or unfavourable treatment which is arbitrary when measured by the principles that like cases are to be treated alike, unlike cases differently, and that one should do for others what one would have them do for oneself or for those one already favours. But such a specification—a making more specific—of a general moral principle cannot proceed without close attention to the way classes of persons, things, and activities are already treated by the indubitably posited law. Without such attention one cannot settle what cases are alike and what different, and cannot know what classes of persons, acts, or things are already favoured, or disfavoured, by the existing positive law. The selection of the morally right standard, the morally right resolution of the case in hand, can therefore be done properly only by those who know the relevant body of posited laws well enough to know what new dispute-resolving standard really fits them better than any alternative standard. This selection, when thus made judicially, is in a sense making new law. But this judicial responsibility, as judges regularly remind themselves (and counsel, and their readers), is significantly different from the authority of legislatures to enact wide measures of repeal, make novel classifications of persons, things, and acts, and draw bright lines of distinction which could reasonably have been drawn in other ways. This significant difference can reasonably be signalled by saying that the “new” judicially adopted standard, being so narrowly controlled by the contingencies of the existing posited law, was in an important sense *already part* of the law.²² Exclusive legal positivism’s refusal to countenance such a way of speaking is unwarranted and inadequately motivated.

III

For a judge, and for a lawyer trying to track judicial reasoning, the law has a double life.

One of its lives (so to speak) is (i) its existence as the sheer fact that certain people have done such and such in the past, and that certain people here and now have such and such dispositions to decide and act. These facts provide “exclusive legal positivism” with its account of a community’s law. (But note that legal positivists rightly begin to leave behind the view that legal theory should attend only to what is posited in social-fact sources when they affirm that law is systemic: the content of what counts as “expressly posited” is settled by the content of *other* norms and principles of the system, with the result that, even if these other standards are each posited by social facts, no

22 See John Finnis, *The Fairy Tale’s Moral*, 115 LAW Q. REV. 170, 174–75 (1999).

law-makers, judicial or otherwise, do or can settle by themselves the legal content and effect of their act—the social fact—of positing.)

The other life of the law is (ii) its existence as standards directive for the conscientious deliberations of those whose responsibility is to decide (do justice) according to law. From this “internal” viewpoint, the social facts of positing yield both too little and too much. Too little, because in cases of legal *development* of the kind I have sketched, those facts, while never irrelevant, must be supplemented by moral standards to be applied because true. And too much, because sometimes the social-fact sources yield standards so morally flawed that even judges sworn to follow the law should set them aside in favour of alternative norms more consistent both with moral principle (full practical reasonableness) and with all those other parts of the posited law which are consistent with moral principle.

“Inclusive legal positivists” are unwilling to sever the question “What is the law governing this case?” from the question “What, according to our law, is my duty as judge in this case?” If the community’s law, taken as a whole, explicitly or implicitly requires or even authorises the judges, in certain kinds of cases, to ask themselves what morality requires in circumstances of this kind, then the moral standard(s) answering that question—or at least the moral conclusions applicable in such circumstances—have legal as well as moral authority. The moral standard(s) are so far forth, and for that reason, to be counted as part of our law. They are, as some people say, “included” within or “incorporated” into the community’s law. The exclusive legal positivist (to recall) insists that such standards, even if controlling the judges’ duty in such a case, remain outside the law, excluded from it by their lack (at least hitherto) of social-fact pedigree.

The disputes between exclusive and inclusive legal positivists are, I suggest, a fruitless demarcation dispute, little more than a squabble about the words “law” or “legal system.” One may indeed consider law in general, and the law of a particular community past or present, as (i) a complex fact about the opinions and practices of a set of persons at some time. Those who consider the law in precisely this way not unreasonably tend to prioritise the beliefs and practices of those members of the community who are professionally concerned with law as judges, legal advisers, bailiffs, police, and so forth. In describing this complex fact, they (like Hart) may well treat law as a reason for action, and describe the law as a set of reasons (some authorising, some obligating, some both) which are systematised by interrelationships of derivation, interpretative constraint, or other kinds of interdependence, and which purport to give coherent guidance. Still, since theorists of this kind are concerned with the facts about a set of

people's belief and practice, they need make no judgments about whether the system's standards are indeed coherent, or whether its most basic rules of validation, authorization, origination, or recognition satisfyingly account for the system's other standards or give anyone a truly reasonable, rationally sufficient reason for acting in a specific way, whether as judge, citizen, or otherwise.

One may, however, consider law and the law of a particular community precisely as (ii) good reasons for action. But, when deliberation runs its course, the really good and only truly sufficient *reasons* we have for action (and forbearance from action) are moral reasons: that is what it is for a reason to be moral, in the eyes of anyone who intends to think and act with the autonomy, the self-determination and conscientiousness, that the classical tradition makes central.²³ And it is obvious that, *for the purposes of this kind of consideration*, nothing will count as law unless it is in line with morality's requirements, both positive and negative. A sound morality certainly requires that we concern ourselves with making, executing, complying with, and maintaining positive, social-fact source-based and pedigreed laws, and that we keep them coherent with each other. Such positive laws add something, indeed much, to morality's inherent directives. That something added is specific to the community, time, and place in question, even if it is, as it doubtless often should be, the same in content as other specific communities' positive-law standards on the relevant matters.

Classical natural law theory is primarily concerned with this second kind of enquiry. But it has every respect for descriptive, historical, "sociological" considerations of the first kind, and seeks to benefit from them. Classical natural law theory also offers reasons²⁴ for judging that *general* descriptions of law will be fruitful only if their basic conceptual structure is, self-consciously and critically, derived from the understanding of *good reasons* which enquiries of the second kind seek to reach by open debate and critical assessment.

Anyone who makes and adheres steadily to this basic distinction between (i) enquiries about what *is* (or *was*, or *is likely*) and (ii) enquiries about what *ought* to be will notice that much of the debate among legal positivists arises from, or at least involves, an inattention to the distinction. Indeed, much of the contemporary jurisprudential literature seems to swing helplessly back and forth between the rigorously descriptive ("external" to conscience) and the rigorously normative ("internal" to conscience), offering various but always incoherent

23 See PLATO, GORGIAS; THOMAS AQUINAS, SUMMA THEOLOGIAE I-II Prologue; JOHN FINNIS, AQUINAS 20, 124-25 (1998).

24 See FINNIS, *supra* note 17, at 3-22.

mixes of the two. What entitles "exclusive" legal positivists to assert, or even to concede, that the judge sometimes has a duty to *go outside the law* and apply moral standards? How can a "positivism" devoted to (as they say) *the facts* include propositions about moral duty?

A rigorously descriptive understanding of Ruritania's law can do no more than report the more or less wide *acceptance* in Ruritania that in certain circumstances the judges should settle cases by applying standards which they judge morally true even though unpedigreed—i.e., not hitherto certified by any social-fact source of law. Now suppose that the rule of recognition so reported includes in its own terms the statement that any unpedigreed standard which the judges are required or authorized by this rule of recognition to apply (because considered by them to be morally true) shall be taken and declared by the judges to be *an integral part of the community's law*. What reason have exclusive positivists to say that such a rule of recognition is somehow false to the nature of law?

Suppose, on the other hand, that the Ruritanian rule of recognition stipulates that, where judges are required or authorised to apply an unpedigreed standard because they consider it morally true, they shall in doing so treat that standard *not* as part of Ruritanian law, but rather as analogous to those rules of foreign states which are applicable in Ruritanian courts by virtue of the choice-of-law rules in Ruritania's law of Conflicts of Laws. (This stipulation could well have legal consequences, e.g. in cases concerning the retrospective applicability of the standard, or its use in assessing whether there has been a "mistake of law" for the purposes of rules of limitation of action, or restitution.) What reason have "inclusive legal positivists" to assert that such a rule of recognition is somehow false to the nature of law? But if they concede that it is not somehow false to the nature of law, what is "positivist" about their position? And can a dispute between rival "isms" in legal philosophy have serious theoretical content if it could be affected by what a particular community declares to be its law?

No truth about law, I suggest, is systematically at stake in contemporary disputes between exclusive and inclusive legal positivists. The central dispute is not worth pursuing. Provided one makes oneself clear and unambiguous to one's readers, it matters not at all whether one defines positive law as (all and only) the *pedigreed* standards or instead as (all and only) the standards *applicable by judges* acting as such.²⁵ Either definition has its advantages and inconveniences.

25 For an example of a dispute about which of these alternatives is right, see Ronald Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORIN AND CONTEMPORARY JU-

Counting as law only what has been pedigreed has the inconveniences already mentioned: (a) the relationship between legal duty and the duty of courts seems to fall outside the "science" or "philosophy" of law, and (b) there seems no way of specifying precisely what counts as "pedigreed" ("derived," "derivable," etc.) short of the late-Kelsenian amputation of most of juristic thought and method—all reasoning from one standard to another, or from systematic consistency—by virtue of the demand that there be a specific act of will to pedigree each and every proposition of law. Counting as law whatever standards the courts have a judicial duty to enforce has the inconvenience that it cannot be done well—critically and sufficiently—without undertaking precisely the task, and following substantially the route, of classical natural law theory.

IV

Law's "positivity" was first articulated, embraced, and explained, as I have noted, by the classical natural law theorists. Legal positivism identifies itself as a challenge to natural law theories. It has had, say, 225 years²⁶ to make its challenge intelligible. The best its contemporary exponents can offer to state its challenge is, "there is no necessary connection between law and morality."²⁷ But classic law theory has always enthusiastically affirmed that statement. Some laws are utterly unjust, utterly immoral; the fact that something is declared or enacted as law by the social sources authorized or recognized as sources of valid law in no way entails that it is (or is even regarded by anyone as) morally acceptable or is even relevant to a consideration of someone's

RISPRUDENCE 261 (Marshall Cohen ed., 1984), and Joseph Raz, *Legal Principles and the Limits of the Law*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 84–85.

26 That is, since Jeremy Bentham. See JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds., Humanities Press 1977) (1776).

27 Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241, 241 (Dennis Patterson ed., 1996). They add one other "central belief" and one further "commitment": (i) "what counts as law in any particular society is fundamentally a matter of social fact or convention ('the social thesis')." *Id.* The classical natural law theorist will comment that this is equivocal between (a) the tautologous proposition that what is counted as law, in a particular society, is counted as law in that society and (b) the false proposition that what counts as law for fully reasonable persons (e.g., fully reasonable judges) deliberating about their responsibilities is all and only what is counted as law by others in that society—false because *ought* (e.g., the ought of reasonable responsibility) is not entailed by *is*; (ii) "a commitment to the idea that the phenomena comprising the domain at issue (for example, law . . .) must be accessible to the human mind"; classical natural law theory fully shares this commitment, since it defines natural law as principles accessible to the human mind, and positive law as rules devised by human minds.

moral responsibilities (whether in truth, or according to some conventional or idiosyncratic understanding). Thus there is no necessary connection between law and morality or moral responsibility. The claim that natural law theories overlook some of the social facts relevant to law is simply, and demonstrably, false.

So the statement meant to define legal positivism is badly in need of clarification.²⁸ More fundamentally still, no genuine clarification is possible without considering *both* terms of the alleged disjunction: law *and* morality. That there is *no* necessary connection, in any relevant sense of “connection” and “necessity,” cannot be rationally affirmed without steady, critical attention to *what morality has to say* about law, either in general or as the law of particular communities. What basis is there for asserting, or implying, or allowing it to be thought, that lawyers, judges, and other citizens or subjects of the law should not, or need not, be concerned—precisely when considering how the law bears on their responsibilities as lawyers, etc.—with the question what *morality* has to say about law, and about what is *entitled* to count as law? And where is a student of law going to find such a steady, critical attention to morality as it bears on law, and on the very idea of law, and on particular laws, other than in an enquiry which, whatever its label, extends as ambitiously far as classical natural law theory does?

Consider the following argument offered recently by Jules Coleman and Brian Leiter:

Now we can see the problem with the natural lawyer’s account of authority. For in order to be law, a norm must be required by morality. Morality has authority, in the sense that the fact that a norm is a requirement of morality gives agents a (perhaps overriding) reason to comply with it. If morality has authority, and legal norms are necessarily moral, then law has authority too.

This argument for the authority of law, however, is actually fatal to it, because it makes law’s authority redundant on morality’s . . . if all legal requirements are also moral requirements (as the natural lawyer would have it) then the fact that a norm is a norm of law does not provide citizens with an additional reason for acting. Natural law theory, then, fails to account for the authority of law.²⁹

The criticism here launched by Coleman and Leiter entirely fails. No natural law theory of law has ever claimed that “in order to be law, a norm must be required by morality,” or that “all legal requirements are also”—independently of being validly posited as law—“moral requirements.” Natural law theorists hold that the contents of a just and

28 See Finnis, *supra* note 21, at 203–04.

29 Coleman & Leiter, *supra* note 27, at 244.

validly enacted rule of law such as “do not exceed thirty-five m.p.h. in city streets” are NOT required by morality until validly posited by the legal authority with jurisdiction (legal authority) to make such a rule. The centrepiece of natural law theory of law is its explanation of how the making of “purely positive” law can create moral obligations which did NOT exist until the moment of enactment.

Unfortunately, Coleman and Leiter’s error, thoroughgoing as it is, has many precedents. Kelsen, particularly, used to claim that, according to natural law theory, positive law is a mere “copy” of natural law and “merely reproduces the true law which is already somehow in existence”³⁰; the claim has been shown to be mere travesty.³¹ Like Coleman and Leiter, Kelsen cited no text to support his claims about what natural law theory says, because (as he had every opportunity to know) none could be cited.

As the fifty-five years of Kelsen’s jurisprudence abundantly illustrate, positivism’s efforts to explain the law’s authority are doomed to fail. For, as Coleman and Leiter rightly say, “a practical authority is a person or institution whose directives provide individuals with *a reason for acting* (in compliance with those dictates),”³² and they might have added, a reason that is not merely a replica, for each individual, of that individual’s self-interested “prudential” reasons for so acting. But, as they ought (but fail) to acknowledge, no fact or set of facts, however complex, can by itself provide a *reason for acting*, let alone an “ought” of the kind that could speak with authority against an individual’s self-interest. (To repeat, “authority” that does no more than track the “I want” of self-interest is redundant for the individual addressed and futile for the community.) No *ought* from a mere *is*. So, since positivism prides itself on dealing only in facts, it can offer an adequate understanding neither of reasons for action (oughts), nor of their only conceivable *source*, namely true and intrinsic values (basic human goods, and the propositional first principles of practical reason that direct us to those goods as to-be-pursued, and point to what damages them as to-be-shunned).

V

The incoherence of positivism—its inherent and self-imposed incapacity to succeed in the explanatory task it sets itself—is nicely illus-

30 HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 416–17 (Anders Wedberg trans., Harvard Univ. Press 1945).

31 See FINNIS, *supra* note 17, at 28.

32 Coleman & Leiter, *supra* note 27, at 243 (emphasis added). For “dictates” read directive or prescription (enactment, judicial judgement, etc.). See FINNIS, *supra* note 23, at 256 n.4.

trated by Coleman and Leiter's effort to explain "the authority of the rule of recognition."³³ Since they preface this explanation with the remark that "we all recognize cases of binding laws that are morally reprehensible (for example, the laws that supported apartheid in South Africa),"³⁴ we can conveniently test their explanations of this bindingness, this authoritativeness, by asking how such explanations could figure in the deliberations of an official (say Nelson Mandela in the 1950s) in South Africa in those days. Young Mandela (let us imagine) asks Coleman and Leiter why the South African rule of recognition, which he knows is the propositional content of the attitudes accompanying and supporting the massive fact of convergent official behaviour in South Africa, gives him a reason for action of a kind that he could reasonably judge authoritative. How does this fact of convergent official behaviour, he asks, make the law not merely *accepted as* legally authoritative but actually *authoritative as law* for him or anyone else who recognizes its injustice?

Coleman and Leiter's explanation goes like this: (1) Often your self-interest requires you to co-ordinate your behaviour with that of these officials or of other people who are in fact acting in line with those officials. (But Mandela is enquiring about authoritative directions, not guides to self-interest. Self-interest requires co-operation with local gangsters, but their directions are not authoritative.) (2) Moreover, if you think that those officials are trying to do what morality requires, you have reason to follow their lead. (Mandela will not think so, and will be right.) (3) You may "believe that the rule of recognition provides something like the right standards for evaluating the validity of norms subordinate to it."³⁵ (He rightly does not.) (4) "[Q]uite apart from [your] views about the substantive merits of the rule of recognition itself, the avoidance of confusion and mayhem, as well as the conditions of liberal stability[,] require co-ordination among officials."³⁶

Here at last, in (4), Coleman and Leiter offer a reason of the relevant kind, a reason which could be rationally debated by being confronted with reasons of the same kind. The requirement asserted in the quoted sentence goes far beyond the "fact of convergent behaviour"; it acknowledges strong evaluations of order, peace, and justice ("liberalism"); it is indeed nothing if not a moral requirement. It is *available* to explain the law's authoritativeness only if the "separability

33 Coleman & Leiter, *supra* note 27, at 248.

34 *Id.* at 243.

35 *Id.* at 248.

36 *Id.*

thesis" is recognised as an equivocation between defensible and indefensible theses, and if Coleman and Leiter's favoured "positivist" interpretation or version is abandoned as the mistake it is. In jurisprudence, there is a name for a theory of law that undertakes to identify and debate, openly and critically, the moral principles and requirements which respond to *deliberating persons'* requests to be shown why a legal rule, validly enacted, is binding and authoritative *for them*, precisely as law: That name (for good and ill) is "natural law theory."

Coleman and Leiter might reply that I am confusing legal with moral authority. But this kind of reply depends upon their mistaken view, already discussed, that positive law, as understood in natural law theory, adds nothing to pre-existing moral requirements. Once we acknowledge that very many (not all!) legal requirements would not be moral requirements unless legally created in accordance with the law's own criteria of legal validity, we can readily see the sense in saying that the law's authoritativeness, in the focal sense of "authoritative," is nothing other than its moral authoritativeness. To repeat, most of our laws would have no moral authority unless they were legally valid, positive laws. So their moral authority is also truly *legal* authority. Laws that, because of their injustice, are without moral authoritativeness, are not legally authoritative in the focal sense of "authoritative." Their "authority" is in the end no more than the "authority" of the Syndicate, of powerful people who can *oblige* you to comply with their will on pain of unpleasant consequences, but who cannot create what any self-respecting person would count as a genuine obligation.

Natural law theory's central strategy for explaining the law's authority points to the under-determinacy (far short of sheer indeterminacy) of most if not all of practical reason's requirements in the field of open-ended (not merely technological) self-determination by individuals and societies. Indeed, the more benevolent and intelligent people are, the more they will come up with good but incompatible (non-compossible) schemes of social co-ordination (including always the "negative" co-ordination of mutual forbearances) at the political level—property, currency, defence, legal procedure, etc., etc. Unanimity on the merits of particular schemes being thus practically unavailable, but co-ordination around *some* scheme(s) being required for common good (justice, peace, welfare), these good people have sufficient reason to acknowledge authority, that is, an accepted and acceptable procedure for selecting particular schemes of co-ordination with which, once they are so selected, each reasonable member of the community is morally obligated to co-operate *precisely because they*

have been selected—that is, precisely as *legally* obligatory for the morally decent conscience.

This is the source of the content-independence and peremptoriness that Hart, in his late work, rightly acknowledged as characteristic of legal reasons for action, and as the essence of their authoritative-ness.³⁷ And as the explanation shows, this content-independence and peremptoriness is neither unconditional nor exceptionless. A sufficient degree of injustice in content will negate the peremptoriness-for-conscience. *Pace* Coleman and Leiter, the laws of South Africa, or some of them, were not binding, albeit widely *regarded and treated and enforced as binding*.

Positivism never coherently reaches beyond reporting attitudes and convergent behaviour (perhaps the sophisticated and articulate attitudes that constitute a set of rules of recognition, change, and adjudication). It has nothing to say to officials or private citizens who want to judge whether, when, and why the authority and obligatoriness *claimed and enforced* by those who are *acting as* officials of a legal system, and by their directives, are indeed *authoritative reasons* for their own conscientious action. Positivism does no more than repeat (1) what any competent lawyer—including every legally competent adherent of natural law theory—would say are (or are not) intra-systemically valid laws, imposing “legal requirements,” and (2) what any street-wise observer would warn are the likely consequences of non-compliance. It cannot explain the authoritative-ness, for an official’s or a private citizen’s conscience (ultimate rational judgment), of these alleged and imposed requirements, nor their lack of such authority when radically unjust. Positivism is in the last analysis redundant.

For all its sophistication, contemporary positivism cannot get beyond the position adopted by Austin in his brutal account of the authoritative-ness of wicked laws: if I say that laws gravely contrary to morality are not binding, “the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.”³⁸ What it is most important to understand is that Austin’s account is farcically *irrelevant*, unresponsive, to any of the genuine questions that might be asked about the law’s authority.

37 See H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243–68 (1982).

38 JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 185 (H.L.A. Hart ed., Noonday Press 1954) (1832); see also FINNIS, *supra* note 23, at 355.

