



12-1-1956

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Recommended Citation

Reginald Parker, *Legal Positivism*, 32 Notre Dame L. Rev. 31 (1956).

Available at: <http://scholarship.law.nd.edu/ndlr/vol32/iss1/3>

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LEGAL POSITIVISM

The legal positivist holds that only positive law is law; and by "positive law" he means legal norms by authority of the state. Nothing else is "law" to him, even though he may recognize other normative orders such as the religious or moral orders, or etiquette. Furthermore, everything thus created by state authority is law to the positivist, even though he may deplore the state of the law and seek to change it. The name "legal positivism," incidentally, appears to be preferable to "analytical jurisprudence" or "analytical positivism," which are often used, especially in connection with John Austin's work.¹ The legal thinking of the positivist is no more "analytical" (either in the sense of critical thinking or pertaining to analysis as opposed to synthesis) than that of, say, an adherent of the historical school.

It is beyond the scope of this brief exposition to outline the history of legal thinking, on which there exist many excellent works.² Suffice it here to remind ourselves that until the eighteenth century most, if not all, legal philosophy was steeped in the theory of natural law. We may add the observation that many of the great protagonists of one or another natural law idea, such as Plato,³ Aristotle (to some extent),⁴ Cicero,⁵ St. Thomas Aquinas, Richard

¹ E.g., Friedmann, *LEGAL THEORY* 133 *passim* (3d ed. 1953).

² See, e.g., *ibid.*; Cairns, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* (1949).

³ For two recent studies of Plato's natural law, see: Strauss, *NATURAL RIGHT AND HISTORY* (1953); Wild, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* (1953). But see the somewhat skeptical review of these two books in Friedrich, *TWO PHILOSOPHICAL INTERPRETATIONS OF NATURAL LAW*, 10 *Diogenes* 98 (1955).

⁴ Kelsen, *The Metamorphoses of the Idea of Justice*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 390, 399-409 (Sayre ed. 1947); Cairns, *op. cit. supra* note 2, 77, 118, 121 (1949).

⁵ Who, contrary to some popular notions — e.g., Wilkin, *ETERNAL LAWYER: A LEGAL BIOGRAPHY OF CICERO* (1947) — was not a lawyer but an orator and politician with some legal training. Parker, *Book Review*, 60 *HARV. L. REV.* 1371 (1947); Schulz, *HISTORY OF ROMAN LEGAL SCIENCE* 51, 68-69 (2d ed. 1953).

Hooker, Locke, and Rousseau, were not lawyers but rather general philosophers or essayists and publicists of one kind or another. However, those lawyers of the past who did indulge in legal philosophy did accept the natural law doctrine just as much as their brethren of the purer philosophy. Grotius, Christian Wolff, Samuel Pufendorf, and, of course, Sir Edward Coke,⁶ may be mentioned as examples. The position, however, of some eminent classical lawyers, such as Ulpian or Bracton, can be regarded as dubious despite occasional references to "natural law."⁷

The eighteenth century saw the culmination of the natural law idea, with its ideals of the brotherhood and equality of man and the social contract theory; but it also saw the rise of skepticism. Montesquieu, better known to posterity for his doctrine of separation of powers, can be regarded as the originator of both sociology and comparative jurisprudence.⁸ It was he who first propounded the thesis that both law and basic conceptions of justice are necessarily influenced not only by religion and custom but also by climate and soil. His contemporary, David Hume, "destroyed the theoretical basis of natural law"⁹ by denying both the existence of axiomatic truths in the sphere of human behavior and the idea that there are—*a priori*, as later Kant would have termed it—ascertainable rational principles of human behavior of universal validity. His ideas, expressed more than a hundred years before modern

⁶ In *Dr. Bonham's Case*, 8 Co. 113b, 114a, 77 Eng. Rep. 646, 647 (1610), Coke proposed that unreasonable acts of Parliament be void. It cannot be said, however, that he ever transformed this dictum into a rule of law.

⁷ Ulpian maintained that natural law is that which "nature teaches all animals," *DIG. 1.1.4.*, which, if true, would deprive it of its normative character and constitute it as a mere physical or causal law. Bracton, *BRAC. 1.3.1., 1.4.1.*, states that law is promulgated by prudent men in council and that without law a person cannot be just.

⁸ BARNES, *Social Thought in Early Modern Times*, in *AN INTRODUCTION TO THE HISTORY OF SOCIOLOGY* 29, 46 (Barnes ed. 1948); FRIEDMANN, *LEGAL THEORY* 50 (3d ed. 1953).

⁹ FRIEDMANN, *op. cit. supra* note 8, at 50.

anthropology, are strikingly modern, yet they failed to replace the natural law philosophy with a working system of legal theory. This was first done by Friedrich Karl von Savigny, the founder of the historical school of jurisprudence.¹⁰ His most important disciple (albeit not in every respect) in the world of English law was Sir Henry Maine. Savigny, one of the greatest legal scholars of all times, pointed out that even as language and customs are different in every nation, so do the legal systems of the nations necessarily vary from one another; and that this is indeed desirable, for what is "good" or "correct" law for one nation is not necessarily so for another.

Yet Savigny's historical school, which has had a most profound influence on man's approach to history from the Brothers Grimm down to Toynbee and Spengler,¹¹ while maintaining and indeed forcefully demonstrating that laws are not of universal validity, retains some natural law element. Its founder at least, and some of his followers, insisted that law must be found rather than made—"it is first developed by custom and the people's faith, next by legal science, therefore everywhere by internal, silently operating forces rather than the arbitrary will of a legislator."¹² There is some wisdom in this—some of these thoughts, expressed almost a hundred and fifty years ago, can be applied here and now¹³—but it is an ideology nevertheless. It states the nature and origin of good and desirable law, or at any rate of such law as a German law professor of the Romantic school would find (by listening to the

¹⁰ SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (2d ed. 1828, Hayward's transl. 1840).

¹¹ For instance, nowadays nobody would dream of drawing ideas from Greek and Roman examples for the purpose of introducing a modern constitution, as the authors of *The Federalist* did in 1787.

¹² SAVIGNY, *op. cit. supra* note 10, at *14. (Translation is mine.)

¹³ Cf., in reference to our Administrative Procedure Act, PARKER, *ADMINISTRATIVE LAW: A TEXT* 64-65 (1952); Madden, Book Review, 5 *VAND. L. REV.* 680, 686 (1952); Parker, Book Review, 5 *AM. J. COMP. L.* 146, 149 (1956).

“people’s spirit”) to be good and desirable; but it fails to explain the nature of *law as such*, good, bad, or indifferent. To do this was left to modern positivism.

In the following, the tenets of positivism shall be outlined and its moral value demonstrated. In pursuing this task, however, no attempt shall be made to investigate the various subschools, as it were, that have sprung from the loins of positivism and relativism. Rather, we will confine ourselves to the author’s own views, which are largely influenced by Hans Kelsen.¹⁴ This seems altogether appropriate inasmuch as legal philosophy in this century will be mainly a conversation with Hans Kelsen.¹⁵

It was John Austin who pointed out¹⁶ that law cannot be defined by the inclusion of any ideal of justice and that law must be determined by reference to its source, i.e., the sovereign: “Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a body of sovereign persons . . .”¹⁷ And the sovereign is defined as a “determinate humane superior, not in a habit of obedience to a like superior,” who receives “habitual obedience from the bulk of a given society.”¹⁸ Thus the command of the sovereign, under threat of sanction, is law according to Austin. But the question presents itself: who determines who the sovereign is? Austin’s approach to this obvious problem is blurred by vague references to the constitution of the state. In other words, it is a certain set of laws that

¹⁴ Particularly, KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945), and KELSEN, *Science and Politics*, 45 *AM. POL. SCI. REV.* 641 (1951). The latter is a little masterpiece that should be read by every lawyer.

¹⁵ For a good piece of evidence supporting the above remark, see RECASENS SICHES, COSSIO, AZEVEDO, and MAYNEZ, *LATIN-AMERICAN LEGAL PHILOSOPHY* (1948); BUCKLAND, *SOME REFLECTIONS ON JURISPRUDENCE* (1945).

¹⁶ AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (5th ed., Campbell, with notes of John Stuart Mill, 1885; re-edited by H. L. A. Hart, 1934). The citations in the following notes are to the (undated) British “Library of Ideas” edition.

¹⁷ *Id.* at 193.

¹⁸ *Id.* at 194.

determines who is to make the law! This recognition, far from being wrong, as we shall see, somewhat emasculates Austin's proud sovereign. Moreover, Austin's theory fails to explain the position of the courts, wherefore Gray, another pre-Kelsen positivist, could assert that "in truth" all law is judge-made law, inasmuch as—quite aside even from judicial precedents—it is the courts that give legislative enactments their true meaning and delineation.¹⁹

Kelsen, who incidentally developed his theory while he lived on the Continent and apparently in ignorance of Austin, resolved these and other doubts. Like Austin, he proposed that whether law is "just" (and therefore, in the view of some, "natural") or "unjust" depends on criteria not capable of scientific cognition. Law is enacted for a certain purpose, which the lawmaker, in performing his political task no doubt regards as a good one, but no objective value judgment can be rendered in regard to this purpose, and hence in regard to the law as the social technique to accomplish this purpose. Rather, law like the norms of any normative order, is either valid or not, regardless of whether we like its contents.²⁰

Thus the validity of a legal norm depends, as Austin knew, on its source; it is not a "sovereign" to whom we must look, however, but rather to the legal order itself. It is the legal order that determines the validity of a legal norm.²¹ If, for instance, a city police chief promulgates a new traffic rule, this rule is valid only if the legal order, such as a regulation of the state highway commissioner, authorizes it; and the commissioner's regulation must like-

¹⁹ GRAY, *NATURE AND SOURCES OF THE LAW* 84, 96, 98, 121, 125 (2d ed. 1921). For a further discussion of judge-made law see notes 36-38 *infra*.

²⁰ "Judgments of justice cannot be tested objectively. Therefore, a science of law has no room for them." KELSEN, *GENERAL THEORY OF LAW AND STATE* 49 (1945); AUSTIN, *op. cit. supra* note 16, at 190. On Kelsen's views of Austin, see KELSEN, *GENERAL THEORY OF LAW AND STATE*, preface xv-xvi.

²¹ "It is a peculiarity of the law to regulate its own creation." KELSEN, *Science and Politics*, 65 *AM. POL. SCI. REV.* 641, 654 (1951).

wise be grounded in law, e.g., a statute authorizing him to issue regulations. The lawmaking power of the legislature derives from the state's constitution, which in turn may be based on an older constitution. The original state constitution was again authorized by higher law, in our case the Federal Constitution, which authorizes the states to make law in those fields not reserved to the federal government. This might be a fair outline of the American picture, but it is at once obvious that this system of legal hierarchy is confined neither to this country nor to any particular country or form of government. It is simply a description of the norm-creating process, whether it takes place in America, England, Nazi Germany, or ancient Rome. To say, therefore, that "under our system even government must operate within the law,"²² as one often hears, is too narrow. Not only our government but any government *can* act only within the law. Even Hitler's "will" was law unto the Germans only because the then German constitution provided that he had the supreme lawgiving power.²³ What Justice Douglas' above quotation²⁴ means is that, under a system such as ours, the government may only act within the confines of pre-established, ascertainable law. That is the constitutional situation in what the Germans call a *Rechtsstaat*, which unfortunately is not the state of affairs in several other countries, such as Spain or Arabia. Yet nobody can truly doubt that the legal systems of those and many other autocracies, old and new, constitute "law," too.

Having determined that any law must be based on the constitution — written or unwritten, tyrannical or demo-

²² Justice Douglas in *Yanish v. Barber*, 73 Sup. Ct. 1105, 1108 (1953). For occult reasons the decision has so far not been published in the official reporter.

²³ See the discussion of this kind of law in *In the Matter of the Estate of Leefers*, 127 Cal. App. 2d 550, 274 P.2d 239 (1954).

²⁴ See note 22 *supra*.

cratic — whose mandate thus can be equated with Austin's command of the sovereign, the question can no longer be suppressed: on what is the constitution based? Of course, many a constitution was enacted pursuant to the authority of a previous constitution; and so may our Constitution be based on the Articles of Confederation.²⁵ But who or what authorized the latter? Its force can be said to be grounded in a revolutionary act, as manifested in the Declaration of Independence. Similarly, British law can be traced a long way back; but the laws and decrees of William the Conqueror were not authorized by those who prior to him ruled England. We must concede that it was his act of subjection of England that created what is being called the *basic norm*: "A norm the validity of which cannot be derived from a superior norm we call a 'basic' norm."²⁶ Its assumption stems from the recognition that successful revolutions, conquests, or even military occupations are norm-creating facts. The men who partook in the French or American revolutions were law-violating rebels — until they succeeded: *ex iniuria ius oritur*.

Of course, the basic norm is but an assumption. It is not a logical but an empirical category; and there are those who may dispute it, saying that a wrong, such as a revolutionary act, can never create law. This theory of legitimism, which flourished during the time of the Holy Alliance, would recognize the United States as a legal entity only by virtue of its ratification, as it were, by the peace treaty with England. The awkwardness of this argument is obvious and it has been generally abandoned. More potent, however, is the reference to international law. It

²⁵ Article thirteen of the Articles of Confederation, however, authorized changes of the Articles only upon unanimous assent of the states. The Constitution was declared to be in force after ratification by only nine states. It may be concluded, therefore, that the Constitution became law, like its predecessor, by revolutionary act rather than by authority of existing law.

²⁶ Kelsen, *GENERAL THEORY OF LAW AND STATE* 111 (1945).

can be said that successful conquests and revolutions are norm creating facts because international law so authorizes. If in our above example²⁷ we could have restated the norm (statute), that authorized the highway commissioner to issue regulations, as follows: "whenever the highway commissioner finds that the exigencies of traffic (in regard to such and such stated matters) make the enactment of regulations necessary, he shall promulgate traffic regulations," then international law can be restated as providing that whenever a group of men overthrows the government and disrupts its legal continuity by establishing a new legal order, which is generally accepted (to be efficacious, a revolution must be successful),²⁸ the new legal order is recognized and becomes the law of the land. A new state or system of government has been formed.

It depends on one's political philosophy to choose the force from which the basic norm derives. If it is international law, however — and this is Kelsen's political choice²⁹ — then the search for the basic norm has been merely deferred, for if the law of nations is a legal order, it, too, must have a basic norm. It would be grounded in a provision of customary law, which might be formulated as follows: "The States ought to behave as they have customarily behaved."³⁰ Nothing can demonstrate more forcefully the weak character of international law than its basic norm. As a matter of fact, one may seriously doubt whether the above-quoted sentence, and therefore international law as such, has any normative character.³¹

The basic norm may also be conceived as being of divine

²⁷ See text, page 7 *supra*.

²⁸ Space forbids to discuss the relation between the validity of either a norm as such or a legal system and its efficiency. See KELSEN, *GENERAL THEORY OF LAW AND STATE* 41-42, 118-22.

²⁹ *Id.* at 386-88.

³⁰ *Id.* at 369.

³¹ Cf. my review of Kelsen's book, 41 *ILL. L. REV.* 145, 149 (1946).

origin. Many law givers, ever since Hammurabi and Moses, have so claimed and the pure theory of law, with its basic norm theory, furnishes no *logical* weapon against such an assumption.³² It would be going too far, however, to say that indeed a system of natural law could be deduced from the basic norm hypothesis with equal logical force as a positivist, natural-law denying system.³³ The system of legal hierarchy, outlined above, destroys any such idea. For even if the divine law giver promulgates certain commands, the law appliers at the lower level of the hierarchy are not — at least not generally — claimed to be divine.³⁴ Thus, assuming the command, "Thou shalt not kill," to be a divine one (and *arguendo* equating divine with natural law),³⁵ this merely means that a very general divine norm must be concretized by human beings, after their own fashion, to answer such problems as whether, and to what extent, self-defense shall be an excuse to kill; whether one may, or should, kill the enemy in battle; whether criminals, and if so which kind, should be killed, and so on. The biblical commandment perhaps might claim universality; but without concrete application it remains an empty shell, and the concretization has vastly differed in every civilization.³⁶

The phenomenon of law-applying brings us to the age-

³² FULLER, *AMERICAN LEGAL PHILOSOPHY AT MID-CENTURY*, 6 J. LEG. ED. 457, 461 (1954).

³³ *Ibid.*

³⁴ The Church, for instance, has always carefully stressed the fact that — apart from the Holy Father — her law appliers, judges, tribunals, etc., are fallible human beings. Cf. The tactful and searching study of SANTILLANA, *THE CRIME OF GALILEO* (1955), in part devoted to just this point — that it was not "the Church", that condemned Galileo Galilei, but only organs of the Church which did so.

³⁵ Not all divine law is necessarily conceived as natural law. *CODIX IURIS CANONICI*, *can. 27*, § 1, distinguishes between natural and positive divine law.

³⁶ Cf. PARKER, *Natural Law and Kelsenism*, 13 OHIO ST. L. J. 160, 162-65 (1952).

old dispute as to the position of judges. Do they "find," "make," or "apply" the law? To the positivist, the first answer is of course inadmissible. To "find" law in the sense that it is already here but need only be ascertained (from "self-evident" or other natural-legal sources, or from Savigny's *Volksgeist*) by judges³⁷ somehow better endowed to do so than other mortals is contrary to positivism as defined in our first sentence. But as to the other propositions, the only logically correct answer can be gleaned from our hierarchy theory: a judge, like any other law applier, such as a legislator under the constitution or an administrative agency under a statute, both applies *and* makes law. He applies the higher norm, for instance a statute declaring negligent homicide to be a tort or criminal offense, by making a command — and hence a new, concrete norm — that the defendant shall pay the plaintiff a certain sum of money, or by directing the sheriff to confine the accused in a jail. The law which the judge thus applies by making new law on a lower level may be the constitution or a simple statute. But in the Anglo-American legal system, the applicable higher norm may also be "precedential" law, that is, it may be based on the opinions of judges in previous similar cases.

The existence of this judge-"made" law constitutes no exception to or deviation from our rule that judges make law by applying law. A judge who lays down a new rule of law, does so because — and only insofar as — the legal system of his jurisdiction so authorizes him.³⁸ A judge who must decide a lawsuit based on a cause of action not grounded in existing statutory or precedential law — let us say, on a claim of absolute liability for the handling of explosives in a state where there has never been a decision on this point — may dismiss the action for failure to state a claim upon which relief can be granted, because the legal

³⁷ Or, according to Savigny, by law professors.

³⁸ This may be done either expressly, as in SWISS CIVIL CODE art. 1, or by customary law.

order contains no norm in the plaintiff's favor. In so doing, he might briefly rule that the "doctrine of absolute liability has never been adopted in this state." On the other hand, he may exercise his authority to create a new rule of law and decide in the plaintiff's favor.³⁹ In this case, too, the judge applies law — the rule of law that authorizes judges to create a new rule of law if the existing law is found to be unsatisfactory or unreasonable according to the judge's opinion.

The edifice of legal positivism, as all too briefly sketched in this article, has been criticized on a variety of grounds, most of which concern themselves with this or that phase of the pure theory of law. It is not necessary to discuss them here.⁴⁰ Two attacks, however, appear to go to the heart of positivism and deserve a moment's attention. The first propounds that the pure theory of law is too much what it says: an abstract, purely logical theory "devoid of real life." But this argument is no more valid than it would be against mathematics, which deals with abstract numbers and bodies instead of concrete things, such as apples or bombs. Moreover, it is not accurate to say that, "The analytical lawyer is a positivist. He is not concerned with ideals; he takes the law as a given matter created by the State, whose authority he does not question."⁴¹ His system of legal theory is, indeed, not concerned with ideals; but he, the positivist lawyer himself, is very much concerned with ideals. Although he does not question the authority of the state, he nevertheless questions the desirability and wisdom of its laws, which he, the positivist, like any other human being, may seek to alter, by legal means or even by revolution. Hans Kelsen himself has been a most outstand-

³⁹ The analogous situation will of course arise where the judge for the first time has to rule concerning a defense, *e.g.*, of the defendant's charitable immunity. He may either reject the defense as not grounded in (existing) law or he may grant it and thus exercise his legal authority to make new rules of law. It is up to the judge's political choice to follow either path.

⁴⁰ See FRIEDMANN, *LEGAL THEORY* 112-29, 163-65 (3d ed. 1953).

⁴¹ *Id.* at 163. See also the quotation from Kelsen, note 20 *supra*.

ing example of a jurist concerned with ideals of peace and justice.⁴² Nor of course would any reasonable positivist deny that a lawyer's education, in law school or elsewhere, should concern itself with "ideals," in other words, with politics, political science, and ethics. However, he thinks that political postulates should not be presented in the guise of law.

The second contention is similar but it goes more directly to the moral side of positivism. In divorcing law from ethics, religion and morality, the argument runs that the positivist is actually fostering amorality by treating on an equal level the legal system of, say, the United States or Switzerland with that of Dictator Franco or the Soviet Union. But it is true that Spanish fascist law is law, as was that of Hitler. It is up to man to change the law with a forthright attitude by recognizing it as law that can be altered — not by lulling oneself into believing that it is non-law!

Furthermore, the positivist is essentially a relativist and therefore humble. He does not have the knowledge, which the protagonist of natural law ideas believes to have, that this or that system of law and government is *inherently* better than any other. Rather he tolerantly believes that there does not exist, or is at any rate not within human cognition, a system of law that conforms to the absolute good. And as long as men will be different from another, in preference over the "happy antheap" (as Dostoyevski sarcastically termed the totalitarian society of the possible future), there will be no law in any given state that pleases everybody. The second-best solution⁴³ must therefore suffice: law that pleases the majority. That is the political postulate of democracy.

*Reginald Parker**

⁴² Of his many political-scientific writings that could be listed here, see especially, KELSEN, *PEACE THROUGH LAW* (1944); KELSEN, *Foundations of Democracy*, 66 *ETHICS* 1-101 (1955).

⁴³ Or third-best, if we could list the absolutely good legal order as the most highly desirable one rather than, as we have done, as a transcendental and unattainable ideal.

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