Law

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In the United States – and, to a lesser extent, in other common law regimes as well – law, as well as our understanding of it, has stood in a deeply ambiguous relationship with the political power that sometimes produces it, as evidenced, in part, by American legal theory's assiduous avoidance of the topic over the last two centuries. On the one hand, at least sometimes, law both is and appears to be unequivocally the product of legislative or parliamentary political power and is accordingly shaped by the whims, desires, preferences, ideals, or instincts of whoever or whatever wields it. There has always been a strong current of thought in Anglo-American jurisprudence that not only acknowledges this relation – that law is the product of political power – but centralizes it. Thus in the eighteenth and nineteenth centuries the British "legal positivists" held that law is the command of the sovereign, articulating an "imperativist" conception of the relation between law and sovereignty that continues to attract adherents and critics well into the present – both within legal positivism more broadly construed and outside it. A more nuanced version of legal positivism than imperativism (or "the command theory," as it is sometimes called) is still the dominant philosophical approach to law in Great Britain and, notwithstanding significant changes, it continues to assert a causal connection between the authority of politically powerful people or entities and the laws they ultimately produce. According to positivism, both classical and modern, without political power there would be no law. On the other hand, it has seemed relatively clear to most legal theorists of the past century, both positivists and non- or antipositivists, that not *all* law neatly fits the positivist account: broad swaths of the common law, even in parliamentary democracies, seem to be derived from general principles of morality rather than from the command of any sovereign; furthermore, some parts of the common law are seemingly rooted in equitable principles (of whatever kind) that are so old that it is tempting to ascribe their origins to the inherited wisdom of the ages rather than to political power or any other social fact. The very existence of the common law, and certainly the ways in which it evolves, changes, or stays the same, are a problem for classical legal positivism: it is hard to understand its general principles as "commands" and the crossgenerational bench of judges that produced and continue to produce it as "sovereigns," particularly since it contains principles and norms not yet even uttered, much less enforced. Even more damaging, though, at least on this side of the Atlantic, is the fact that the United States constitution, as well as state constitutions and a number of constitutions in other parts of the world, contain provisions that grant individuals certain rights, and almost all of those rights come at the expense of the state's powers to issue commands. Those individuals, then, have some measure of political power. Yet it is just bizarre to call individual citizens "sovereign" because of the rights they possess: that seemingly defeats the point of positivism, which in some way rests on a distinction between the governors with the power of the sword – those who have political power – and the governed – those without it. Still more problematically for positivism, the United States constitution declares itself to be "law," and further declares its point of origin to be "we the people" rather than any particular power holder. The constitution, which is, inarguably, law, and perhaps even the idea of one, seem in their very essence to rebut the central thrust of at least classical legal positivism – to wit, that law is issued by the politically powerful governors for the less powerful governed.

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Both the common law in common law countries and constitutional law and the rights they create in constitutional democracies have proven to be powerful counterexamples to the positivist accounts of law; and countries that are both, such as the United States, as a consequence have an awful lot of law that, at least on first blush, seems to be nonpositivist in origin. Much of law seems rather to have its origin not in the command of any sovereign, but in principles of morality, the will of the people, or both.

Partly for this reason and partly for reasons explored below, non- and antipositivist accounts of law and its origins that in various ways deny, or at least problematize, the causal account above – that law results from political power – have persisted throughout the history of American jurisprudence and have arguably dominated the field in the last two centuries. The different forms of "legal formalism" that spanned the latter half of the nineteenth century and the first part of the twentieth in American jurisprudence seemed to rest on the logical priority and moral superiority of the common law over the product of elected officials, the former being founded in right reason rather than in political power of any sort and being developed by principled judges through deduction and analogical inference rather than mandated by self-interested legislators through the powers of the sword and purse. In the first two decades of the twentieth century, the natural law theorizing of Catholic legal scholars, the Langdellian legal theory held by devotees of the common law, and the social Darwinianism of various interpreters of the constitution's property, liberty, and contract-protecting clauses all sought to elevate both common and constitutional law and then to pose them against – rather than alongside – the mob rule associated with both state and federal legislative power. At the mid-century mark, the Harvard law professor and influential legal philosopher Lon Fuller produced a procedural and secular strand of natural law that presented the rule of law, legalist ideals, court-focused processes, and the law that all of this produced as a *brake* on political power – whether manifested in totalitarian regimes or in overreaching legislatures – rather than as power's consequence or handmaiden. Finally, in the last third of the twentieth century, "liberal legalism" and its celebration of constitutional rights and of the constitution's elaborate system of checks and balances – all of which is meant to curb rather than facilitate the expression of majoritarian political power – clearly dominated United States jurisprudence. Although for very different reasons, from the century's beginning to its end all these movements elaborated an idea and an ideal of law as in some way antithetical to, or at least a counterbalance to, politics and its products. As Dean Pound would famously put the point in a screed against "legal realism" at the beginning of the century, law is not only not the child of power, as the realists ruthlessly held and celebrated, but law is power's antithesis: law, in the hands of wise judges, is the very opposite of "bald power" rather than the natural outgrowth of it. It emanates from the judge's furrowed brow, not from his clenched fist.

Perhaps ironically, in the last two decades of the twentieth century and in the first decade of the twenty-first, various critical movements in legal theory – such as the critical legal studies movement, critical race theory, feminist legal theory, and postmodern legal theories – although a secondary (but nevertheless influential) force in legal thought, have even further complicated the straightforward-seeming and commonsensical classical positivist account of law as derived from the political power of state actors. According to all these theorists (although in very different ways), the sort of power that is needed to make law does not necessarily come from "sovereigns," as understood by positivists, and does not necessarily come in the form of "commands." Law might be the product of power, but that power will often come from private parties or entities – for instance corporations, families, or unions – rather than from states or sovereigns. Power, including lawmaking power, can originate in the domi-

neering inclinations of an entire sex or race or ethnicity or sexual orientation, and can spread through the culture in the form of knowledge or habitual ways of being, rather than in the form of mandates and tax credits. Law may well be the product of power – indeed it is; but then, so is everything else; and, like everything else, law is a product of power found up and down social strata. Hence the bottom line of a number of such critical movements: law may be the result of power, but it is not necessarily the power that emanates from "sovereigns" to subjects that makes law; and, whatever law is, it does not typically come in the form of commands.

Nevertheless, in spite of these strong countervailing forces, legal positivism has unquestionably been the dominant form of jurisprudence in Britain in the last centuries and an important force in the United States at various periods – including in the past couple of decades, during which a form of analytical legal positivism has also gained in strength. Aside from its checkered history, the clarity of its conception of the relation of law and politics makes legal positivism the best logical starting point for a survey of Anglo-American theoretical perspectives on the relation of law to politics and on the relation between legal and political theory.

Legal Positivism: Law as the Product of Political Power

Sometimes at least, law is unequivocally the product of political power: in a monarchy, a king issues an edict; in a parliamentary or republican democracy, a duly elected legislative body passes a statute that is signed by an executive or a city council passes an ordinance. The edict, the statute, and the ordinance all become law, changing behaviors in an intentional way, so as to bring about in the world some change desired by the lawmaker. Legal positivism, with its roots in ancient philosophy and its philosophical foundation in the political theories of Hobbes and Hume, centers on this causal relation.

The modern history of legal positivism begins in the nineteenth century, in the legal and political philosophy of Jeremy Bentham and John Austin. Both men unambiguously defined law as a product of political power. Bentham's formulation, published posthumously, was the more precise, although it might be important primarily because of its influence on John Austin, who followed Bentham and whose views came to define legal positivism for a century and a half. Bentham defined law thus:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state concerning the conduct to be observed in a certain case by a certain person or class of persons who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be the means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question. (Bentham 1970 [1782]: 1)

Bentham's successor John Austin shortened this considerably without losing much of the essence: law, Austin held, is "the command of the sovereign." The "sovereign" in turn was defined as "a person (or determinate body of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other." A "command" is a "wish that something be done, combined with a willingness and ability to impose a sanction if that wish is not complied with" (Austin 1995 [1832]: ch. 1). Putting the three together – the "obedience"-centered conception of the sovereign as one who receives and expects habitual obedience, but does not owe obedience to another, the "sanction-based" conception of the command as a wish that something be done combined with the ability and willingness to impose a sanction if it is not, and the understanding of law as the product of the sovereign's commands – they yield what is sometimes called the "imperativist" or "command" theory of law.

The three also yielded what came to be called, confusedly and unfortunately, the "separability thesis," by which is meant that whether or not a norm or rule is a "law" is not dependent on whether or not it is a good or just law. The separability thesis – briefly, that moral merit is not a precondition of a law's existence or validity – has come to be regarded, rightly, as positivism's enduring contribution to legal philosophy. In the twentieth century, however, this view has come at a cost. In part, perhaps, because of confusion with H. L. A. Hart's simultaneous embrace of the separability thesis and of his political opposition to "morals legislation," the separability thesis is often wrongly taken to mean something much more sweeping than what was stated above: that law and morality have "nothing to do with each other," that they are in no relation whatsoever, that a society's law and legal norms should be independent of that society's held moral beliefs, and so forth. This has never been a part of positivism: positivists from the eighteenth century to the present all have understood that law is often based upon the positive morality of the community, that law can sometimes explicitly reference that morality, and that legal officials, including judges and legislators, often strive to make law that conforms with their ideals for it and should do so continuously. The separability thesis, properly understood, is simply the claim that the existence of a law is not dependent upon its goodness or justice, or, put differently, that an unjust law is every bit as much a law as a just law.

So understood, the separability thesis does indeed go back to Bentham's and Austin's classical version of legal positivism. Bentham spoke in terms of separate projects: the project of "censorial jurisprudence," the point of which was to censor or criticize existing law, and the project of expository jurisprudence, the point of which was to explain the law. He placed extremely high value on the former, and indeed devoted most of his lifelong engagement with the law to radical and liberal criticism of legal doctrine, particularly that contained in common law precedent and procedures. "Question authority" and "criticize freely" were his mantras, and he gave over much of his long life to a full-throttled critique of evidence law, criminal law and procedure, constitutional law, the laws of slavery and of the disenfranchisement of women, and much of civil procedural law that did little but insulate the power of the bench and bar through unduly complex and jargonistic rules, with little or no utility. But to do this work of censorial jurisprudence well, Bentham also thought, required a clearheaded, not rose-colored, articulation of the law – that is, one without the coloration of laudatory hopes for what it could be. The point of analytic jurisprudence, then, was to state what the law is and not what the law could or should be. To confuse the "law that is" with the "law that should be" was either to intentionally blur ideals with reality, thus obfuscating the need for change, or to indulge in "nonsense on stilts," as he mockingly referred to the rights tradition then emerging in France and to the United States constitutional traditions. In either case, anti-positivist confusions hindered liberal and clearheaded reform.

Austin, again, was pithier:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. (Austin 1995 [1832]: lecture V, 157)

Classical positivism was thus a composite of two major theoretical innovations: the command theory, or imperativism, and the separability thesis. Both were reactions, in part, against the prevailing jurisprudence of the era, including the various natural law views of "churchmen." Mostly, though, both Bentham's and Austin's positivist theories were developed as a rebuke to the developed jurisprudence of Sir William Blackstone, Bentham's teacher, who was both a chronicler and an advocate of the common law. Blackstone's jurisprudence

and definition of law explicitly denied both imperativism and separability: municipal law, Blackstone held, is the command of the sovereign, "commanding what is right and forbidding what is wrong" (Blackstone 1766: bk. 1, ch. 1). Against this explicit attempt to identify law, definitionally, with moral goodness, first Bentham and then Austin rebelled: Bentham argued that it led to an unwarranted conservatism or spirit of acquiescence to define law as necessarily that which is aligned with the good and as that which forbids wrongdoing, and Austin argued that the blurring of the legal and the moral led to unnecessary confusion. Law, Bentham and then Austin argued, was simply a social fact – the command of the powerful in a state structure. Whether or not it was good or bad, or just or unjust, was another question entirely. Law itself was the product of power.

In the twentieth century the British legal philosopher H. L. A. Hart radically redefined legal positivism, fundamentally changing some, but not all, of its contours. Basically, Hart retained the separability thesis of Austin and Bentham, making it the defining attribute of contemporary legal positivism, but he argued forcefully against all the prongs of Bentham's and Austin's imperativism or command thesis: the account of sovereignty, the notion of the command, and the definition of law as the content of those commands (Hart 1994). Hart's critical insight regarding the shortfalls of classical positivism is neatly summed up in his complaint that Austinian positivism rendered law indistinguishable from "the gunman situation writ large": both the gunman and the sovereign issue commands to those who habitually obey, and neither is in the habit of obeying others. Law, Hart argued, was both more complex and considerably less dependent on sheer force: law's power depended on its authority, which derived in part from the willingness of the officials – as well as from the willingness of members of a state – to recognize it. Further, many instances of what is clearly recognized as "law" in a developed legal system cannot be fit into the command paradigm: rules that grant individuals the power to form corporations, to enter contracts, to marry, or to write a will and then govern the way those corporations, contracts, marriages, and wills are to be administered and to function are hard to reconceive as commands – other than as highly conditional sorts of command, which fail to comply with linguistic usage. They don't operate as commands and aren't felt as commands; they empower people to do things, and to do things toward the end of cooperation, both between individuals and with the state. They don't seem to be the sort of things that constrain behavior toward compliance with a sovereign's wishes and at the point of a sword. And the Austinian conception of "sovereignty" doesn't seem to fit the facts of legalism, as experienced by law's subjects. Laws seem to emanate not from a single embodied "sovereign" but from a political system, whose validity is itself a function of its societal acceptance and of the compliance of state officials. Imperativism, then, is seemingly both under- and overinclusive: it includes as laws the bald edicts of psychopaths with weapons, and it excludes swaths of law that seemingly expand rather than constrict the freedom and effectiveness of individuals who seek their own impact on the world. It is too crude, and at the same time it misses, in important ways, essential features of law: that law is a set of rules that emanate from a political system that is in large part valid because it is generally accepted, that the rules it validates have authority because of that acceptance, and that many of those rules increase rather than diminish the freedoms, powers, and effectiveness of its subjects. Law does so through rules, not commands, which simply do not lend themselves to restatements as imperatives. Far from constricting freedom, law provides outlets for shared cooperative projects, increasing the liberty and effectiveness of its subjects.

Hart accordingly rejected the Austinian command theory. Instead, he argued, law consists of rules of two sorts: "primary rules," which directly impact behavior, such as rules forbidding homicide or theft, and "secondary rules," which channel behavior by suggesting – but not by mandating – forms of social organization

that are beneficial; such are the rules of contracting, incorporating, or marrying or the rules that direct courts and other officials regarding the means of resolving disputes, for instance the rules of civil or administrative procedure. Both primary and secondary rules, furthermore, are issued by state officials with the authority to do so, and that authority, in turn, is delegated to them by a socially accepted "rule of recognition" that spells out the procedures by which law is promulgated, and the conditions of its validity. Whether or not a norm is a law, then, is not a function of whether it was commanded by a sovereign, but rather a function of whether it was promulgated in accordance with the procedures laid out in the society's rule of recognition. The rule of recognition itself is the only rule the validity of which cannot be a function of its consistency with itself. The rule of recognition, then, is the only law whose validity is a function of societal and official acceptance. The rule of recognition is lawful and binding so long as it is basically accepted by those who come within law's purview, whether as subjects, officials, or both (Hart 1994).

The differences between Austinian and Hartian positivism are significant: Hartian modern positivism views law as a system of rules rather than commands – rules issued in accordance with a rule of recognition whose validity is a function of the rule's acceptance by the society so governed, rather than in accordance with the whims or desires of a "sovereign." Hart retained, however, classical positivism's commitment to the separability thesis and, more broadly, the conception of law as entirely socially constructed: both the law and particular laws remain a social fact, with no necessary moral value. And the rule of recognition is in some way simply a codified version of the lawmaking parts of any society's political system: the American constitution, for example, might be the United States' rule of recognition, with which all primary and secondary rules must comply in order for them to be law. Thus, modern as well as classical positivism retains the central and defining insight that law is a product of a society's political system and that, in consequence, it has no necessary moral valence or moral value. It may be just or unjust, good or bad. But, whatever its moral merit, it is a product of politics.

Natural Law: Law as a Moral Ideal, and Sometimes as a Limit on Power

Both classical and contemporary versions of legal positivism have always stood in some sort of opposition to natural law, either as a matter of definition or as a matter of emphasis. There is not now, nor (likely) has there ever been a core set of natural law beliefs; but a few strands can be described, together with their differences from positivism. Catholic natural lawyers, following Thomas Aquinas, identify "natural law" as God's law revealed through human reason and consider it to be either a limit on the obligation to obey positive law or an ideal toward which positive law should aspire. The spirit of the former notion of natural law is captured in Aquinas's famous claim that "an unjust law is not a law at all," by which he clearly meant that there is no moral obligation to obey an unjust law (Aquinas 1920: q. 95, art. 2). Nevertheless, the sentence is suggestive of something stronger, and it has been interpreted by some natural lawyers, revolutionaries, political activists, and advocates of civil disobedience as making the very strong claim that laws that are terribly unjust – such as the race laws in Nazi-controlled Germany, the apartheid laws in South Africa, or the Jim Crow laws or slavery laws in the American South – are in some important sense not truly laws at all, even though their breach results in sanctions. Martin Luther King famously quoted Aquinas to something like this effect in his "Letter from Birmingham Jail," explaining his reasons for advocating disobedience to the South's Jim Crow regime (King 1963). The idea, if not the letter, of Aquinas's claim was also clearly efficacious in formulating the prosecution's various cases during the Nuremberg Trials.

Natural law, understood in this way, stands as a clear counterexample to the positivist

claim that law is a product of political power. Law may be a product of politics, but only if it is minimally just. If it is not, it is not true law. Therefore, whatever politics produces that calls itself law, it cannot claim the mantle of "law" by virtue of that pedigree alone. Law is thus an admixture of law and moral constraint, and it originates not only in power but in principles of justice. Only those pronouncements that emanate from power *and* are also themselves in accord with justice can be properly called law.

A second strand of the natural law movement, also rooted in Aquinas and best exemplified today in the writing of the Australian contemporary philosopher John Finnis, conceives of natural law not as a limit on positive law or on law's power, but rather as an ideal toward which law ought to strive. Law *ought to* promote the common good and be informed by it – and for the most part it does, at least in developed western societies. The relation, then, between law and political power is simply this: positive law ought to promote the common good, and "natural law" is the idealized set of legal rules that do so. (Note the complete consistency with classical and modern positivism, other than in emphasis.) The elucidation of law, then, ought to proceed by reference to natural law ideals, and not solely by reference to the enumeration of rules issued by a sovereign, promulgated by a rule of recognition, or generated by any other set of "social facts." Although an accounting of law *can* be so narrowly defined, there is no good reason to define it this way and plenty of reasons not to do it – the point of jurisprudence, in fact, should be to understand the law that is just, and why it is just. Articulating the positive law that does in fact align with natural law, and then extrapolating from that core to harder or closer cases is a better project for the jurisprudentially inclined legal scholar. The positive law that corresponds to natural law is the core of law – the part of law that will be generative of rules that sensibly and justly settle human conflicts and that, when understood, justify the existence (generally assumed) of the obligation to obey the law. It is, in other words, the presence of natural law as an ideal and an essence of positive law that accounts for law's goodness (Finnis 1980).

Both versions of classical natural law are in tension with the positivist claim that law is a product of political power – the former of course much more than the latter. To the Catholic natural lawyer, law is a product of God's power as much as it is a product of political power, and it has its origins in principles of justice understood through the use of reason and by reference to the common good; to the secular natural lawyer, law is a product of human reason discerned through reflection, with its origins in universal and categorical moral principles. To know and understand the law requires not simply knowledge of the list of edicts issued by power holders, but reflection on the requirements of the common good or of the relevant moral principles. Law is what we can construct in accordance with God's will or with moral truth to facilitate individual happiness and cooperation. Any understanding of law that lacks an understanding of its goodness and of its potential for goodness is faulty, and in some important measure, metaphorical or not, any law or legal system that lacks a point of contact with the common good is not a law or a legal system at all. Positivists' relentless focus on power and politics thus does little but bar their understanding of law's essence.

American Jurisprudence

Although consistently dominant in British jurisprudence over the last two centuries, legal positivism has had a much diminished presence in American legal theory. There are a number of reasons for this, but the major one is likely the fact that American jurisprudents have focused far more than the British have on the role of judges as both expositors of law and declarers or makers of law – and on judges rather than on legislators or parliamentarians. As a result, the relation between law and ordinary politics does not figure heavily in American legal thought, and consequently legal positivism, the jurisprudence that most

directly ties the two together causally, has had a much more ambiguous reception in the United States than in Britain.

The distinctively American focus on adjudication makes legal positivism seem problematic for several reasons. First, when judges exposit the content of the law, they often seemingly rely on sources of law that do not fit any positivist understanding. Thus, when common law judges decide common law cases and produce law in the process, they are often, seemingly, reasoning in a way that resists positivist conceptions of law. The principles of law that emerge from common law precedent don't seem to have emanated from any sovereign's command; they don't take the form of commands, and often not even that of rules; they sometimes explicitly reference the community's moral norms or an industry's customs; and they often resort explicitly to the community's positive moral sense to fill gaps. The common law itself is a body of legal principles in particular areas of private law that are evolving rather than static, authored by judges rather than by lawmakers, centuries old rather than contemporaneous, partly grounded in explicitly antilegalist principles of "equity" that defy the formalism of rules, and entirely derived from "precedent," the content of which is debatable and the grammatical form of which is virtually never imperativist; its application demands discretion, judgment, and choice from judges, and *in toto* this body doesn't easily fit the positivist criteria of law. But common law is clearly law: common law principles and precedents still form the basis of much of our contemporary law of contract, torts, and property.

But, even more broadly, whether the legal question under consideration is statutory, regulatory, or common law in origin, the varied rules, homilies, bits of folk wisdom, precedents, and general principles of analogy and logic that judges use when reaching decisions don't seem to be the command of the sovereign in any sense, and they don't seem to be generated through any articulable rule of recognition. That a "man may not profit from his own wrong," for example, does not seem to be a command given by a sovereign or generated by a rule of recognition; it seems to be rather a moral principle. Yet just that principle was found controlling in at least one case – one in which a judge forbade a nephew from inheriting from an uncle he had murdered; and it may have been used similarly in similar cases. The "law" so modified in that case was the law of intestacy, a combination of statutory and common law authority. The very existence of these sorts of efficacious principles, seemingly moral in nature, compromise the separation thesis; but they also undercut the more central thrust of positivism, from Bentham to the moderns, that law is, in some sense, the product of political power. That "no man may profit from his own wrong" simply does not have such a pedigree. If it counts as "law" – and at least many American legal theorists believe that it should, together with literally innumerable and unenumerable but similarly moralistic principles – then there is something quite wrong with the basic positivist conviction that law is the product of political power. These principles seem to be law but, far from being the product of power, they are often deployed in ways that suggest very much the opposite: they constrain power, or they rationalize it, or they limit its reach.

A second and perhaps deeper reason for positivism's relatively minor role in American legal theory stems from the weight and influence of American constitutionalism. Everyone involved in American constitutional law at any level and in any way, as judge, commentator, historian, lawyer, scholar or student, understands the constitution itself and the body of opinions it has generated to be, unequivocably, "law." The constitution itself declares itself to be law, courts apply it in this way, and it is received by citizens and state officials as law. Constitutional case law has precedential effect and constrains the behavior of state officials and, where relevant, of individual citizens as well. But both the constitution itself and the body of constitutional principles and case holdings derived from it resist characterization

as the command of a sovereign or a body generated through an articulable rule of recognition. The constitution identifies "we the people" as sovereign and, although that is metaphorical, it nevertheless encapsulates a real difficulty for positivism: it is quite difficult to identify the sovereign in a constitutional democracy. The point of the constitution, after all, is to disperse and separate power, not to concentrate it. Constitutional rights limit the power of purported sovereigns even more explicitly, both at the state and at the federal level; and, even more generally, constitutional principles seemingly have the force of law too. Yet they are in some cases not even fully explicated; much less do they appear as the holding of an identifiable case. The constitution is law, but seemingly not of the positivist sort, and virtually everything about the institutions it has spawned likewise seems ill suited to any positivist accounting: a federal bench ready and willing to enforce its provisions against errant state office holders, a tradition of judicial review by which the "least dangerous branch" – that would be the judiciary – guards against the excess power of the more representative and (presumably) more dangerous branches, and a text that consists in part of general moral and aspirational principles rather than of a set of concrete commands or rules.

For these reasons, and likely others as well – the conceit, for example, that we are a government of laws and not of people, and that in America the law is king – American jurisprudence has gravitated toward a radically antipositivist conception of law as being, if in any relation at all to power, its antithesis, not its product. Both in American jurisprudence and in popular culture, the rule of law is traditionally characterized as being poised *against* the exercise of power. According to American academic conceits, judges, who apply and articulate the law, employ reason and principle, while legislators, who create and posit statutes, ordinances, and "ordinary law," act on the basis of passion, whimsy, irrationality, and self-interest. Law is revered, but only so long as it is of the higher sort – the sort that controls the power of sheriffs, constables, meddling legislators, and errant executives – rather than the lower sort that those political actors create. Common law is lauded as being based on the wisdom of the ages and on the common sense of the people, as being holistic, and as expressing a culture; and it is contrasted with statutory law, which reeks of back room politics. Constitutional law is the highest expression of the highest principles known to the culture and derives from the most revered of sources, while legislation – the kind of law most readily understood as either the command of a sovereign or a body generated through rule of recognition – is suspect and subject to the constraints of constitutionalism and to judicial review. Ordinary law – statutory and administrative – is the stuff of politics and therefore not to be trusted.

The antipathy nourished by American legal theory and theorists to politics and to the claim that political power is the causal root of law is reflected in the relative absence (until quite recently) of legal positivism from the American jurisprudential canon, and also in the antipositivist thrust of virtually every major American jurisprudential movement of the last century. A quick survey follows.

Formalism: Law's Autonomy

"Legal formalism" means several things in American legal theory – a style of opinion-writing, a way of thinking about law, a preference for rules over discretion – but it also refers to a time period in American judging, from the mid-nineteenth century to the early twentieth. During that period, according to a rough consensus of American legal historians, and primarily according to Morton Horwitz of Harvard Law School (Horwitz 1992), a handful of disproportionately influential common law judges adopted a way of judging that came to be described, often by their detractors, as "formalist." The formalism of that era contrasted both with the "classicism" that came before it and with the "legal realism" that followed. Some of the differences were political and ideological: unlike their classical era counterparts from the first half of the nineteenth

century, formalist judges were more likely to eschew communitarian constraints of fairness on individual contract terms in contracts cases and to eschew principles of broad-based responsibility for harms in tort law, thereby ushering in an era of contract law that hewed more closely to purely market-based values and giving legal support to an economic shift toward a purely industrialist economy. By the turn of the century, formalism so understood had flowered into a jurisprudence fully informed by a theory of contract and property law that were themselves premised on often harsh free market principles.

Some of the differences between formalism and the preformalist classical style of judging were stylistic: formalist opinions tended – or at least purported – to be rigorously deductive and analytic, while classical decision-making was considerably more open. But the most important differences, particularly in hindsight, were jurisprudential. "Formalism" became known, above all, as a theory of adjudication that claimed law to be a closed, deductive "science." All cases, according to formalist dogma, could be resolved solely by reference to principles themselves drawn from prior cases, whose holdings could be coherently restated as a general proposition of law, from which particular results could be deduced once the novel facts of the new case were included as a minor premise. Assuming a judge of sufficient intellect and good will, all questions in each area of law could be (and had to be) decisively answered from the principles of contract law, tort law, and property law, which were themselves drawn from prior contract, tort, and property cases. There should be no gaps in the law, no need for judicial discretion, and no need for legislative intervention. The existing cases contained the holdings from which broad principles in each area of law could be induced and from which, at the other end, particular legal questions could be definitely answered as they arose in particular cases (Grey 1983).

Extreme formalism, at the heights of its influence in the legal academy, vigorously denied the causal connection between political power, particularly legislative political power, and law – at least true law. For both Langdellian educators and some Supreme Court justices at the turn of the century, true law originated in the courts and in the exercise of reason and deployment of principle, while politics was the province of the representative branches – and god knows what we should call the product of their work. The judge-made common law was a self-contained and perfect system, with no need either for the exercise of judicial discretion or for legislative enactments – statutes – to fill purported "gaps." Substantively, the common law protected the individual's right to a peaceable (if industrious) existence against threats of assaults or encroachments on privacy by other private parties. Meanwhile the constitution provided protection of those common law rights against overly intrusive, paternalistic, or redistributivist legislators. Thus the common law was the highest, purest form of law, while legislation of all sorts, but particularly legislation that upset or dislodged common law entitlements to property and contract, was presumptively suspect. Legislation was the product of politics benefiting interest groups. The common law was the product of centuries of wise judicial stewardship over a great inheritance, which contributed mightily to the betterment of all.

Legal Realism: Law as an Expression of Judicial Power

The self-styled "legal realists" of the early twentieth century – a group of lawyers and legal scholars consisting primarily of influential legal educators at Yale, Harvard, and Columbia, but also of some judges and eventually Supreme Court justices – not only resisted, but mocked as "transcendental nonsense" the formalists' claims on behalf of the common law: that true law is autonomous from politics; is derived by deduction, analogy, and inferential reasoning; is a complete system that can seamlessly generate answers to all conceivable legal questions solely by reference to its own premises; and is a perfect protection of crystalline rights of

property, liberty, and contract, in no need of either judicial modification or legislative displacement. They famously derided the formalists' constitutional dogma as well: that the constitution's property and contract clauses protect those common law entitlements against the redistributive and paternalistic legislative encroachments of state and federal congresses. Rather, the legal realists argued, the common law is open-textured, with plenty of gaps to be filled by judges who exercise their rightful discretion, hopefully toward the end of accomplishing wise public policy under the guidance of the then nascent social sciences. The constitution, furthermore, does not enact anyone's Darwinian social views, and counsels nothing so much as the wisdom of getting out of the way as Congress enacts the people's will, whether it be toward an overregulated nanny state or toward a shining city on the hill.

But it was the legal realists' jurisprudence that contrasted most sharply with that of their formalist antagonists. In constitutional and common law adjudication, realists consistently argued, judicial judgment requires the use of will and the exercise of choice. The judge has the freedom to decide many if not all cases in accordance with his best understanding of what justice, goodness, or sound public policy requires. Far from denying or running away from that existential reality, the judge should openly acknowledge it and make transparently clear the underpinnings of his reasoning in policy (Holmes 1897). This is what it is (as we now say), but also as it should be: law should be looking forward, toward the greatest possible utility for the society under it, not looking back, at fidelity to precedent. The judge's role should be to exercise his discretion – which should be guided but not dictated by scientific inquiry – as to what will best achieve those consequentialist ends. The lawyer of the future, Justice Holmes famously opined, would be the economics-savvy man of the slide rule, not the Blackstonian man of precedent (Holmes 1897). The judge should be, and should be held, responsible not for fidelity to the past, but rather for the consequences of his free decision. The good judge would know as much and would state the true basis of his decisions accordingly.

Echoing the British classical legal positivists, the American legal realists likewise insisted that law is the product of power, but with a major and, in retrospect, hugely consequential difference: the legal realists, like the formalists and *unlike* the British positivists, tended to view the law they were interested in defining as judicially rather than legislatively created law. Thus the challenging jurisprudential claim the realists entered into the stream of American legal theory was the idea that law is the product of *judicial* power – and not of the political power of legislators. Judges, according to the realists (some of whom were themselves judges), were the true authors of the law: they had the discretion to mold the common law in accordance with their own conception of public policy, and the power to interpret laws written by others, such as legislators. As the branch with the power to interpret, they had the power to create. Therefore law, Holmes opined, is nothing but a prediction of what judges will do in fact, when faced with a legal issue in court. Other realists followed suit: law, according to realist dogma, is what the judge states it to be. Judges have the power to interpret the law, and therefore the power to make it. Judges act as quasi-legislators, stating not just what the law is but, more importantly, what the law will be, according to their own lights. Actual legislation by actual legislators is simply a "source" of law; the law itself is what the judge decides it to be (Holmes 1897). None of this, though, is reason to worry: judges are "wise and just men," Holmes also held – people whose discretion should be trusted. The only danger is that of disingenuousness: it's the danger of the judge who fails to acknowledge to himself or to others the freedom he has and the power he wields (Cohen & Cohen 2002).

The resulting jurisprudential debate between the realists and the formalists set the path of American legal theory for the next century and beyond. Less noticed, though, has been what realists and formalists agreed upon – the dogma

that was not subject to debate. And part of what they agreed on was, in brief, a judge-centered jurisprudence. For formalists and realists alike, the subject of legal theory should be adjudication. And the subject of adjudication is law. It is the courts rather than the legislature that say what the law is, and therefore it is the courts rather than the politically representative branch that say what the law is to be. In the minds of both formalists and realists, the courts' duty to describe the law became a duty to imperatively declare it. For the realists as for classical legal positivists, law owes its origins to power; but, for legal realists in sharp contrast to British positivists, it is judicial power rather than political power that proves to be generative in this way.

The Secular Natural Lawyers: Law as a Moral Limit on Power

Around the middle of the twentieth century, in response to both the rise of legal realism in the United States and the continuing dominance of legal positivism in Great Britain, Lon Fuller authored an influential conception of law that explicitly rejected both, putting forward a secularized version of the natural lawyer's claim that true law must, definitionally, comply with minimal moral criteria. Law, Fuller urged, in order to be true law, must be general, prospective, and intelligible, and much else; it must consist of norms that invite the consent of the governed. If an edict or a mandate or any other type of command fails to satisfy this requirement, it may be coercive and may trigger compliance, but it is not "law." Thus law is not that which derives from political will, but rather that which derives from some sort of political power and is in conformity with these minimal moral conditions. Fuller's antipositivist criteria for the existence of law, unlike those of Catholic natural lawyers, were thoroughly procedural rather than substantive – law must be general, prospective rather than retroactive, intelligible, and must mandate only what is possible. But the criteria are, nevertheless, Fuller insisted, moral criteria. Thus positivism, both of the Hartian and of the classical variety, fails.

Whether these criteria are truly moral criteria is not at all clear and was intensely contested by H. L. A. Hart; this prompted an exchange that became known simply as the Hart–Fuller debate. But, the merits and the details of the debate aside, Fuller's overall intent was clear: procedural natural law was put forward as a rebuke to overly positivistic understandings of law of all stripes, which assert that a command from a sovereign or a rule generated in accordance with a rule of recognition or with a judge's interpretation or with any other form of political power is a sufficient condition for the existence of law. Law, Fuller believed, is just not that. Law is a purposive and deeply moral enterprise, inviting cooperation among its subjects and increasing rather than decreasing individual liberty and freedom. For a system of rules to constitute a body of law, it must conform to those precepts. It is not sufficient that it represent the will or desires of a sovereign, backed by a credible threat (Fuller 1969).

In the 1970s positivism's defining claim of a connection between political power and the promulgation of law was attacked once again, with a quite different sort of attempt to articulate a secular natural law. In a series of essays later collected in a volume entitled *Taking Rights Seriously*, Professor Ronald Dworkin, easily the most influential legal philosopher of the last quarter of the twentieth century, argued that modern legal positivism fails not only to take the existence of rights seriously (as his title suggests), but also to account for the existence of "principles" of law, potentially infinite in number, that permeate all areas of law, and most vividly constitutional law and the common law subjects. Such principles – legal in terms of their consequence, but moral in terms of their content – determine the outcome of innumerable hard cases, and therefore must count as "law." Courts use them almost automatically; furthermore, when cases are being decided, they are hardly as rare as a two-dollar bill. They are not, however, the sorts of things that can be restated, enumerated, articulated, or identified in any way by reference to

their "pedigree," either in politics writ large, a sovereign's command, or in any other "social fact." They were not generated by a rule of recognition (Dworkin 1978).

Rather, according to Dworkin, the principles that partly determine a case's outcome are distinctly moral, subject to argument, and inferable, at best, from a thorough knowledge of all preceding cases that might have some similarity to the case at hand. They don't resemble in any way the commands of any sovereign and cannot be generated through any articulable rule of recognition. Positivism fails to recognize their existence. But they are a vital part of Anglo-American law, and thus positivism fails, at least as an account of the legal system for which it was designed.

Dworkin's substantive and constitutional natural law jurisprudence is in some ways as different from Fuller's proceduralism as it is from Hart's positivism, but the two nevertheless share a resistance to the basic positivist idea that law is a product of politics. Rather, for Dworkin as for Fuller, law has a moral content that cannot be attributed to anyone's political will and cannot be understood by reference to any sovereign's desires, wishes, or whims. For both Dworkin and Fuller, law is an ideal that stands apart from politics, sometimes guiding political activity and sometimes limiting its reach. Law, then, develops in a fundamentally different direction from politics; its precepts are relatively autonomous from, and its normative direction only contingently convergent with, those of politics. By virtue of its content, law is derived in part from moral rather than political sources, it is buttressed by the normative authority possessed by the judiciary, and it sometimes acts as a limit on the reach of political power rather than as a facilitator – much less as its product. Courts reason their way to resolutions of cases by using the powers of persuasion rather than the powers of the purse, or of the sword. They have authority, but they command no armies. Law operates in an altogether different domain from that of political power.

Contemporary Legal Theory: The Dispersion of Choice and Power and the Marginality of Law

Much contemporary Anglo-American legal theory, although in many ways more hospitable to classical positivism than formalism or secular or Catholic natural law, nevertheless problematizes the basic positivist claim that law is a product of politics, although in radically different ways. Economic legal theory (sometimes called "law and economics") is bifurcated into two branches, descriptive and normative; the former provides an account of what law is, the latter of what it should be. On the descriptive side, economic legal theorists agree with positivists that law is a product of power, and they agree with the thrust of the separability thesis that law carries no necessary moral content. Nevertheless, the differences are profound: legal economists tend to view the power that produces law as being economic rather than political. Economic forces, both macro and micro, tend to produce legal decision-making at the individual and adjudicative levels and, as public choice theorists hypothesize, at the public level as well: legal decision-makers respond to economic incentives no differently from ordinary consumers and producers. On the normative side, maximization of efficiency, satisfaction of individual preferences, market-friendly outcomes, and the provision of opportunities for choice should dictate legal decisions, both adjudicative and legislative, rather than any political conception of the common good.

Although sharing with positivism a commitment to the separation thesis and the basic understanding that law is a matter of social fact (whether or not law is a prediction of what judges will do or decide), legal economists are worlds apart from any classically positivist understanding of what should be done with power. Political theorists address the question with an array of normative theories of the good. Economic legal theory, by contrast, is somewhat monochromatically committed to efficiency and to the maximization of benefit

over cost, all as measured by individual market choices, real or hypothetical, as the measure of a law's merit (Posner 1983).

Various contemporary branches of jurisprudence informed by critical theory – critical legal studies, critical feminist legal theory, critical race theory, queer theory, and postmodern legal theory – have closed the gap between law and politics even further. Like legal economists, critical theorists share the positivist conception of the relation of law to some sort of power. But, where positivists unabashedly embraced political power as the source of law and legal economists do the same with respect to economic power, critical theorists quite distinctively eschew embracing either, in favor of a far more ecumenical understanding of the *kind* of power underlying legal activity. Echoing Foucault, critical legal theorists of virtually all stripes see power as widely dispersed, and therefore they see law as emanating from any number of social sources; these include not only judges but also families, patriarchs, subordinate racial or ethnic groups, organized feminism, heterosexual orthodoxy, and so on. The result is that, at least for a generation of legal scholars, critical theory has transformed the relationship between law and politics in ways that are still unfolding.

Thus, early critical legal theorists such as Alan Freeman (Freeman 1978) and Morton Horwitz (Horwitz 1979) saw law as expressing, albeit ambivalently and sometimes in contradictory ways, the powerful position of well-capitalized interests, from nineteenth-century industrialists whose needs for expansion and dangerous machinations were perhaps overrespected by an all too compliant tort law – which carved defenses and exceptions to negligence and strict liability regimes so as to protect those entities against liability for the injuries that those activities occasioned among workers and passengers – to twentieth-century employers, whose freedom to hire and fire at will was constrained by civil rights laws only to the extent that these people acted from explicit racial animus, but otherwise it was given wide berth, even where such discretion unquestionably resulted in disproportionate harms to racial minorities and poor people. At the same time, according to the first generation of critical theorists, law would routinely voice commitments to equality and liberty that belied the force of the doctrine underscoring capitalist and employers' interests. The result was legal doctrines and indeed legal regimes beset by contradiction: the liberal ideals expressed were in tension with the force of the law. According to the more optimistic of the critics, this provided an opening for creative and progressive lawyering, while according to others it provided nothing but material ripe for deconstruction and trashing.

Feminists, and particularly radical feminists such as Catharine MacKinnon (MacKinnon 1989), also viewed law as emanating from power, but they focused on the patriarchal power of men over women's sexuality and reproductive labor, particularly as manifested in families and culture rather than in economic relations such as employment or consumption. That power was then reflected in law in various overt and not so overt ways, for instance in First Amendment doctrines that protected pornographic speech from regulation and even criticism, in family law privacy doctrines that protected domestic violence and marital rape, even in pro-abortion policies that served men's interests in sexual access as much as women's interest in health and reproductive liberty, and in rape law itself, which defined rape so narrowly as to preclude successful prosecution. Although controversial even within feminism, radical feminism successfully pointed to a relation between law and power hitherto unseen: law serves the interests of powerful and sexualized forces, and does so in quite subtle as well as overt ways.

Critical race theorists, notably Derrick Bell (Bell 1987) and Kimberlé Crenshaw (Crenshaw 1988), argued likewise that law emanates in part from the power of whites and reflects their interests in maintaining a racial hierarchy that suppresses African Americans and people of color. Racialized power is manifested even in

liberal, purportedly nondiscriminatory, and post-civil rights era societies through laws privileging settled property regimes that have resulted from generations of wealth deprivation by some and accumulation by others, from privileges in acquiring wealth-enhancing assets such as admissions to prestigious universities, and from rights and privileges that, for decades, flowed only to whites through de jure discrimination and, while they no longer do so, have generated status, wealth, and security through intergenerational transfers such as veterans' benefits and social security entitlements. These privileges are not targeted and are in fact protected by rules against intentionally discriminatory hiring or discrimination in housing and rental markets.

Thus all of these critical theorists, in different ways, share with classically Austinian positivism the focus on power; power, Foucault famously declared, is all there really is that's worth studying. Like legal economists, they too share something of this basic positivist worldview: law is, in some sense, the product of power. They part from positivism, however, and in profound ways, in their understanding of what it means to put the power that produces law under the microscope. Still following Foucault, but very much unlike Austin and his fellow legal positivists, critical legal theorists claim that power is essentially *all there is*. For critical theorists, power, including the power that results in the passage of law and its interpretation in some particular way, emanates from multiple sources and comes through any number of circuitous paths: power is generated by the influence of whites, men, heterosexuals, and capitalists through the media of television, the Internet, school boards, education, advertising, and social norms. It finds expression in law and in legal interpretation. There is thus no terribly meaningful distinction between the power of sovereigns that leads to law and the power of the governed. Power comes from the bottom up as often as from the top down; and, to understand the political source of law, one must understand its origin in multiple political points of origin. Within critical theory, the Benthamic and Austinian view that there is a meaningful distinction to be drawn between the power of the sovereign that results in law and social or cultural power is labeled a "juridical conception" of law and power and is typically derided for fundamental misunderstandings (Brown & Halley 2002).

American legal theory, then, even in its most critical offshoots, has been peculiarly hostile to the distinctively positivist and commonsensical claim that law is the product of political power. Rather, in American jurisprudence, law is conceived, by turns, as that which limits power (Fuller), that which stands as power's ideal (Dworkin), that which is the product of judicial and interpretive power rather than that of political and legislative power (both the legal realists and Dworkin), that which emanates from reason rather than from passion or whimsy, that which responds to economic forces and aims for efficient distributions of resources (law and economics scholars), or that which emanates from multiple nonjuridical loci of individual, local, collective, or cultural constellations of social power (critical theorists). This emphatic, two-century-long rejection of the positivist understanding of law as the product of political power has consequences, not all of them good.

One cost (among others) is that the critical voice from within the discipline of law is muted. This is something of a hindrance even to self-avowedly critical movements in law: it can be difficult to criticize the political power that generates law if one views that power as emanating from cultural or societal forces broadly disseminated. The focus on law and its political points of origin is muted in much critical writing that seeks to demonstrate the origin of repressive legal regimes or doctrines in forces well beyond – and beneath – the traditionally political. Those critical movements, however, forceful as they are, are also still marginal to mainstream American legal thought. Within mainstream jurisprudence, the relative invisibility of straightforward legal positivism is even more of a hindrance, even to the liberal criticism of law and the

politics that generate it. As classical positivists saw clearly, it is indeed difficult to criticize the political power that generates positive law on the basis of external moral standards, if one becomes convinced of the necessary virtue of power holders, be they kings, governing majorities, or Supreme Court justices. By distancing law so profoundly from its political roots and by identifying it so strongly with various virtues – such as principle, reason, dispassionate decision-making, and the accumulated wisdom of past centuries – or with various political forces – such as white supremacy, patriarchy, and capitalism – or with the hidden wisdom of economic markets, American legal theorists risk losing the motivating wisdom of classical positivism, to wit, that a clearheaded criticism of the law requires us not to confuse law with moral value, and the sovereign power (or rule of recognition) that generates law with larger social influence. Perversely, the distinctively American inclination to elevate higher law – both constitutional law and common law – to mythic levels of virtue and to denigrate ordinary law created through ordinary political means both denigrates political decision-making and insulates the higher law, which purportedly controls it, from ordinary critical inquiry.

SEE ALSO: Aquinas, Thomas (1225?–74); Austin, J. L. (1790–1859); Authority; Bentham, Jeremy (1748–1832); Bill of Rights; Blackstone, William (1723–80); Civil Rights; Common Good; Constitutionalism; Constitutional Law, United States; Critical Race Theory; Critical Theory; Dworkin, Ronald (1931–2013); Foucault, Michel (1926–84); Gender and Identity Politics; Hart, H. L. A. (1907–92); Holmes, Jr., Oliver Wendell (1841–1935); King, Jr., Martin Luther (1929–68); Legalism; Natural Law; Rule of Law

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