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Educational materials for Legal Positivism

In this essay, James Murphy gives a brief history of the concept of legal positivism. The term "positivism" has its origins in the quasi-religious philosophy promoted by the 19th-century Frenchman, Auguste Comte. Legal positivism and Comtean positivism are very different, but they have in common a rejection of moral and physical arguments in favor of arguments based in empirical fact. Legal positivism has two main theses: 1) that law can always be traced to objective acts of legislation or judging, and 2) that law has no necessary connection to natural law or to any ethical principle. Recently, however, some scholars have criticized the notion of legal positivism; arguing that natural law theories allow for positive law, and that many legal positivists make arguments that are implicitly based on a concept of natural law.



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H.L.A. HART

Herbert Lionel Adolphus Hart was born in Harrogate, England, in 1907 to a Jewish tailor and his wife. Consistently brilliant, he spent his childhood education at Bradford Grammar School and Cheltenham College. He earned his bachelor's degree from New College at Oxford University in 1929 and was admitted to the bar in 1932. He practiced law in the Chancery courts of London for several years, during which time he declined an offer from Oxford to become a philosophy tutor.

In World War II Hart served with the British intelligence division, known as the M15, where he worked closely with Oxford philosophers Gilbert Ryle and Stuart Hampshire. He married Jenifer Williams, with whom he had four children, and by the end of the war, Hart had finished the requirements for a Masters degree from Oxford. From 1946-1952, Hart became Fellow and Tutor in Philosophy at Oxford. In 1952, he was appointed Chair of Jurisprudence and remained Professor Jurisprudence until 1968. In that period he traveled to different universities and wrote a large body of work. He was a visiting professor at Harvard University from 1956-1957 and at the University of California, Los Angeles from 1961-1962. From 1959-1960 he also served as president of the [Aristotelian](#) Society.

Hart's most famous work is *The Concept of Law* (1961), which was edited into a second edition published posthumously by his student and eminent legal scholar Joseph Raz. Hart's scholarship is primarily a defense of legal positivism; some of his other works include *Definition and Theory in Jurisprudence* (1953), *Causation in the Law* (1959), *Law, Liberty and Morality* (1963), *The Morality of the Criminal Law* (1964), and *Punishment and Responsibility* (1968). Hart died in 1992.

HANS KELSEN

Hans Kelsen was born in Prague in 1881. Just before receiving his law doctorate in 1906 at the age of 25, he converted to Catholicism from Judaism in hopes of securing a better academic job, even though he remained an agnostic his entire life. In 1905 he published his first work, *Die Staatslehre des Dante Alighieri* (*Dante Alighieri's Theory of the State*), and in 1911, he published a more substantial 700 page study on the theory of public law, *Hauptprobleme der Staatsrechtslehre* (*Main Problems in the Theory of Public Law*), which earned him a professorship at the University of Vienna. In 1914, Kelsen started and edited the *Austrian Journal of Public Law*. In 1919 he became full professor of public and administrative law at the university.

During World War I, Kelsen served as legal adviser to the war minister. He remained politically neutral but sympathetic to the Social Democrats. In 1919 he was also asked to draft the new Austrian

constitution and served on the Austrian Constitutional Court until 1930. He taught at the University of Cologne for three years, during which time he began to write on positive international law and continued to develop his work on the relationship between international law and state law. In 1934, he published a large part of his international law theory in *Reine Rechtslehre (Pure Theory of Law)*.

The Nazis' rise to power in the 1930s threatened Kelsen's academic career, and at the beginning of World War II, he moved to the United States with his family. From 1940-1942, he lectured at Harvard University, and in 1942, he became a visiting professor at the University of California, Berkeley. From 1945-1952, he taught as a full professor at Berkeley. At the beginning of this period he served as legal advisor to the United Nations War Crimes Commission. In 1952, he became an American citizen and published his *Principles of International Law*. He died in 1973 at the age of 92.

To read more about the life and works of Hans Kelsen, please click [here](#).

JOSEPH RAZ

Joseph Raz was born in Mandate, Palestine in 1939. He graduated with a Master of Jurisprudence degree from Hebrew University in 1963. After studying under H.L.A. Hart at Oxford University, he received his doctorate in philosophy in 1967. He returned to teach at Hebrew University, and in 1971 he was tenured and promoted to Senior Lecturer there. Today he is Professor of Philosophy of Law and Fellow of Balliol College at Oxford, as well as Professor of Law at Columbia Law School.

Like Hart, Raz centers his scholarship on the theory of legal positivism. He has continued Hart's work since his death in 1992, and at present he has edited and authored nine books, including *The Concept of a Legal System* (1970), *Practical Reason and Norms* (1975), *The Authority of Law* (1979), *The Morality of Freedom* (1986), *Authority* (1990), *Ethics in the Public Domain* (1994), *Engaging Reason* (1999), *Value, Respect and Attachment* (2001), and *The Practice of Value* (2003).

To read more about Raz, please click [here](#).



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adjudication:

the process of reaching a judgment, or hearing and deciding a legal case

adventitious:

added from outside; not inherent; accidental

[American Bill of Rights:](#)

the first ten amendments to the [Constitution of the United States](#), which guarantee such rights to the people as freedom of speech, assembly, and worship. These amendments were introduced by James Madison to the First United States Congress in 1789 and, upon ratification, came into effect on December 15, 1791.

Austin, John:

(1790 – 1859) an English jurist. Influenced by utilitarianism, he devised a theory of positive law without reference to natural law or moral norms. He argued, in essence, that “might makes right”—that law is justified by the power to enforce it.

Bentham, Jeremy:

(1748 – 1832) an English philosopher, economist and jurist. Bentham was a proponent of utilitarianism, a philosophy which teaches that the ultimate goal of society and the individual is to bring about, through calculation, the greatest happiness of the greatest number of people.

common law:

the law of a country or state based on custom, usage, and the decisions and opinions of law courts. See also [CUSTOMARY LAW](#).

Comte, Auguste:

(1798 – 1857) a French philosopher and the founder of positivism. Comte claimed that all valid knowledge, unlike traditional moral and metaphysical thought, was based on sense-data and was verifiable by objective and observable means.

customary law:

law that is not enacted or imposed by sovereign legislation, but is held by custom. Customary law is thought to emerge spontaneously from the bottom up, rather than enacted by the government or legislative body. See also [COMMON LAW](#).

Decalogue:

the Ten Commandments; the ten moral laws revealed to Moses on Mount Sinai.

Dworkin, Ronald:

a contemporary American philosopher of law and scholar of constitutional law, born in 1931.

Finnis, John:

a contemporary Australian philosopher of law, born in 1940. Finnis teaches jurisprudence, political theory, and constitutional law at Oxford and the University of Notre Dame. For more information about John Finnis, and his contribution to the natural law tradition, please see the section of this website on "[The New Natural Law Theory](#)."

Hobbes, Thomas:

(1588 – 1679) an English philosopher known for his political philosophy, which laid the foundation for social contract theory. Hobbes lived during the tumult of the English Revolution and wrote his *Leviathan* to justify firm monarchical power. Like legal positivists, Hobbes did not look for any transcendental justification for his political theory. For more information on Thomas Hobbes and his relationship to the natural law tradition, please see the section of this website on "[Thomas Hobbes: From Classical Natural Law to Modern Natural Rights](#)."

Holmes, Oliver Wendell:

(1841 – 1935) an American legal scholar who was an associate justice of the US supreme court from 1902-1932, and whose thought has exerted a great influence on American constitutional law. For more information on Justice Holmes, please see the section of this website on "[Oliver Wendell Holmes, Jr. and the Natural Law](#)."

normative:

having to do with norms, standards, or the establishment thereof

positive law:

law understood either 1) as a human creation, formally enacted by a government, or 2) as having no necessary connection to any account of natural or transcendent law

positivism:

an epistemological theory which holds that the only valid knowledge is that which is based on sense-experience and positive verification. The concept was developed in the early 19th-century by Auguste Comte. See also [COMTE, AUGUSTE](#).

precedent:

an act, statement, legal decision, case etc. that may serve as an example, reason, or justification for a later one

Procrustean:

demanding that all things conform to an unrealistic standard; from Procrustes, a mythical giant said to have seized travelers, tied them to a bedstead, and forced them to fit it perfectly by stretching them or by cutting short their limbs.

statute:

a written law

tacit:

unspoken, not explicitly stated

West German Federal Constitution:

also known as the *Grundgesetz*; the constitution established for the new West German government after the Second World War. Acutely aware of the inhumanity of the Nazi regime, the authors of the *Grundgesetz* included in it clauses the protection of inalienable natural rights.



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I. Introduction: legal positivism is a modern school of legal thought that generally claims to be strictly scientific, and regards natural law as religious dogmatism.

II. Origins of the concept: legal positivism grew out of, and is distinguished from, earlier uses of the word “positive.”

A. Comtian positivism

1. Auguste Comte coined the word “positivism” to refer to his quasi-religious movement that celebrated science and rejected all but empirical knowledge.
2. The label of “positivism” was adopted in various fields, e.g. logical, philosophical, or legal positivism. These “positivisms” were not always related to Comte’s movement.

B. Positive law

1. Legal positivism is often confused with positive law. They are not the same, however: some thinkers discuss positive law and reject legal positivism; others advocate legal positivism and ignore positive law.
2. "Positive law" is used to refer to two different concepts.

a. Positive law can be understood, in contrast to customary law, as law that is formally enacted by a legal authority.

b. Positive law can be understood, in contrast to natural law, as law that has no universal moral force.

3. Discussion of positive law often confuses these two senses, but they are not the same. Law that is "positive" in one of these senses is not necessarily "positive" in the other.

III. Legal positivism: there are two main theses of legal positivism.

A. The "source thesis."

1. The "source thesis" contends that all law stems from objectively verifiable acts of legal officials that form a unified chain of command.
2. Defenders of the "source thesis" find it difficult to explain common law; generally they argue that by failing to overturn traditional customs and precedents, the sovereign has enacted them.
3. Ronald Dworkin points out that custom is an independent source of law that ultimately cannot be understood according to the "source thesis."

B. The "no necessary connection thesis." Some legal positivists maintain that law never has any connection to morality; others hold a more moderate view that it does not *necessarily* have such a connection.

IV. Criticism of legal positivism.

A. Some critics of legal positivism point out that natural law theorists already admit that not all necessary laws can be directly derived from the natural law. Natural law, in other words, demands a certain degree of positivity in law.

B. Other critics of legal positivism point out that, inasmuch as legal positivists want to promote a harmonious and law-abiding society, they are motivated by principles that ultimately come from the natural law.

V. Conclusion: "legal positivism" is a misleading term. "Positivism" originally referred to scientific prediction; "legal positivism," in this sense, would refer not to philosophy of law but to social science.



Part I. Basic Interpretation of Legal Positivism

If you are interested, after reading James Murphy's essay, in pursuing the thought of the legal positivists, please go to the [Primary Source Documents](#) to read some of the works of legal theorists like Austin, Bentham, [Hobbes](#), and [Holmes](#) that relate to the article. Biographies of Hans Kelsen, H.L.A. Hart, and Joseph Raz are also available. As you go back to the primary sources, keep in mind the following questions:

1. What is the chief principle of Auguste Comte's positivism?
2. What is the relation of legal positivism to positive law?
3. How is positive law distinct from natural law and customary law?
4. How do legal positivists account for common law, custom, and other forms of law that do not seem to have their origin in positive law?
5. Why do legal positivists argue that law has little to do with morality? What arguments have been made against this position?
6. What role does precedent play in shaping the law, according to legal positivists?
7. In Hobbes's [Dialogue](#), the character of the Philosopher makes a distinction between justice and equity. In [The Path of the Law](#), Justice Holmes distinguishes between law and morality. Do Hobbes and Holmes mean the same thing by these distinctions? What place does equity/morality have in their thought?
8. Why does Justice Holmes say that the object of legal study is prediction? What, specifically, to students of law predict? What are the bases of their prediction? What is "positivist" about this understanding of the study of the law?

Part II. Connections to Other Thinkers

In order to understand the legal positivists, it is important to place them in their proper context. Spurred by the 20th-century notion of "positivism" championed by French philosopher Auguste Comte, legal positivists sought a way of understanding law that moved away from the traditional moral and metaphysical thought that had grounded previous legal theories. However, ancient ideas of positive law, as well as natural and customary law, play a role in the theories of legal positivism. As you look deeper into legal positivism, consider the following questions in light of the broader history of ideas.

1. In [Plato's Republic](#), the amoralist, Thrasymachus, contends that "justice is the advantage of the stronger"; i.e. that the only moral standards are those that the powerful impose on the weak. How similar is this to the legal positivists' view that law is whatever the authorities have enacted? When Holmes says that "truth is the majority vote of that nation that could lick all others," does he imply a position as radical as that of Thrasymachus?
2. [Aquinas](#), like most thinkers who believe in natural law, argues that a law that goes against the common good is no law at all. The goal of law, he believes, is to promote individual and social flourishing. Some legal positivists avoid talking about the common good, and others, such as Hobbes, argue that whatever laws the sovereign makes are laws for the common good. A critic of legal positivism such as [Finnis](#), on the other hand, argues that even legal positivists are implicitly motivated by concerns for the common good. Can the concept of the common good really have a place in legal positivists' thought? How might Bentham's utilitarianism or Holmes's [social Darwinism](#) influence their view of this question?
3. Aquinas consisely defines law as "an ordinance of reason, for the common good, by him who has the care of the community, and promulgated" ([Summ. Theol. I^{al} q90. A4. c.](#)). In his *Dialogue*, Hobbes proposes a definition of law as "the command of him that have the sovereign power, given to those that be his or their subjects, declaring plainly and

- publicly what every of them may do, and what they must forbear to do.” On the surface, at least, these definitions are very similar. But do Aquinas and Hobbes really agree? What might other legal positivists, such as Holmes or Bentham, think of these definitions?
4. In his 40th letter, Cato writes, “We do not expect philosophical virtue from [men]; but only that they follow virtue as their interest, and find it penal and dangerous to depart from it.” On the surface, Cato seems to say that law is not supposed to make men morally good, but merely to compel their obedience. This seems very similar to a legal positivist’s position. But at the same time, Cato frames the discussion of law in terms of “virtue.” Is Cato a virtue ethicist, like [Aristotle](#), or a positivist, like Holmes? Is it possible to combine these positions?
 5. Justice Holmes makes it very clear that he sees a strict distinction between law and morality, yet he also [writes](#), “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.” And at the conclusion of his speech in *The Path of the Law*, he tells his hearers that study of the law can enable them to hear “an echo of the infinite, [...] a hint of the universal law.” Compare these statements with Aquinas’s belief that human law is essentially eternal law refracted through human institutions. Are these statements of Holmes’s mere rhetorical flourishes, or are they compatible with his positivist understanding of law?
 6. The [Declaration of Independence](#), like much of the rhetoric surrounding the American Revolution, is very emphatic that governments derive their powers from the consent of the governed, and especially that there can be “no taxation without representation.” Hobbes, on the other hand, believes that the King cannot make an unjust law, and [argues](#) in his *Dialogue*, through his mouthpiece the Philosopher, that it is impossible to produce an “example of a King that ever raised any excessive sums.” Are these two positions simply diametrically opposed, or is there any way to reconcile them? In your opinion, what might Hobbes have concluded about the American Revolution? How could Hobbes respond to the argument that unbounded power leads to tyranny?
 7. Positivists argue that law is whatever the authorities declare it to be; utilitarians argue that law ought to promote the greatest pleasure of the greatest number. In Holmes and in Bentham, however, these two ideas seem to be combined. Are they really compatible? How could a positivist argue against an enacted law that fails to achieve maximum utility? On what grounds does a utilitarian think positive law is justified?

Part III. Critical Interpretations of Legal Positivism

With a basic understanding of legal positivism, let us examine the work of the legal positivists and their progenitors more critically. Are their arguments persuasive? Can we expand on their thought to determine what they would say about issues they did not directly address? How do the theories of the various legal positivists considered here differ? Use the questions below as your guide:

1. As explained in Murphy’s essay, some natural-law critics of legal positivism attempt to harmonize the insights of the legal positivists’ “source” thesis and “no necessary connection” thesis with principles drawn from natural law. How do they go about this? Is it a contradiction to argue that the natural law requires a degree of legal positivism? How might a legal positivist respond to this critique?
2. In Hobbes’s [Dialogue](#), the Lawyer defends the position that “reason is the soul of the law,” and that “nothing is law that is against reason.” The Philosopher is highly alarmed by this idea, arguing that if it is true, than anyone could claim their reason as an excuse to disobey the law. How far does the Philosopher’s argument go as a critique of natural law thinking? What is the proper relationship between positive, written statutes and the universal law of reason? Is there a solution to this problem?
3. Hobbes’s Philosopher [insists](#) that it is “not wisdom, but authority that makes a law,” and

that it is specifically the *King's* authority, rather than that of a Parliament of judges, that is the *anima legis*. Why does the Philosopher believe that the King's authority lies behind even laws that the King himself did not draft or formally approve? Is his doctrine, "what the sovereign permits, he commands," nothing more than a legal fiction? Is it a realistic way of understanding law?

4. Hobbes argues that the King cannot make an unjust law (and that if laws have unjust effects, it is only because they were misinterpreted or improperly applied). And on a more abstract level, all legal positivists seem to argue something similar. Legislative authorities, be they kings or congresses, cannot make unjust laws, because there is no higher standard of justice by which they could be judged. But almost anyone, considering past and present laws, would point out some laws that seem manifestly unjust, but were nevertheless enacted by a duly appointed authority. How might a legal positivist account for these cases? Would he really be compelled to admit that there was no such thing as an unjust law?
5. Justice Holmes [writes](#) that the law is a matter of predicting how "the whole power of the state will be put forth." The law's authority is based on the power that enforces it; without which, Holmes seems to suggest, the law would be of no concern. Is this argument – that it is the power of the state that makes law – different from a claim that "might makes right"? Why or why not? Is it an adequate account of the justification of law?
6. In cases where positive laws conflict with one another, adherents to natural law theory often claim to be able to resolve the conflict by appealing to a higher natural law, or to principles of justice and right that supersede written laws. How, on the other hand, can a legal positivist deal with a case of conflicting laws? If laws are justified simply by being enacted as laws, by what standard could a legal positivist prefer one enacted law to another? Is there a way around this problem?

Part IV. Contemporary Connections

The legal positivists have had a significant influence on contemporary considerations of legal thinking and practice in Western society. Therefore, let us now turn to some contemporary issues and see how the thought of legal positivists might be applied to them:

1. The principle of *stare decisis* is highly influential in American constitutional law. This principle, which translates as "to stand by decided cases," means that in general, courts ought to consider past decisions and interpretations of laws as binding on their future jurisprudence. This seems to agree with legal positivism's claim that enacted law, simply by virtue of having been enacted, is authoritative. Many of the most celebrated law cases in American history, however, have involved an overturning of this principle. In *Brown v. Board of Education*, for example, previous Supreme Court decisions endorsing school segregation were thrown out. Would a legal positivist judge have been obliged to uphold existing segregation laws? Or, contrariwise, does legal positivism allow judges, as officials authorized to overturn and reinterpret laws, to make any decisions they please? How might a legal positivist allow for some middle ground between these extremes?
2. In Hobbes's *Dialogue*, the Philosopher (representing legal positivism) argues that there are no reasons that could justify disobedience to the law. He argues thus because of a fear that, unless law is universally applied, everyone will find an excuse to disobey it. What might Hobbes's Philosopher think of American laws that include conscience clauses, such as those that exempt conscientious objectors from serving in wars, or exempt Catholic hospitals from requirements to perform abortions? These laws, after all, are themselves part of the positive law. Is the Philosopher right to worry that they undermine the authority of law?
3. "Originalism" is the idea that judges interpreting the [Constitution](#) (or other laws) are

obliged to do their best to discover and apply the original meaning of the law, independent of any external ideals or principles. In its emphasis on enacted law, this philosophy seems similar to legal positivism. And yet, “originalism” is sometimes associated with a conservative understanding that some kind of natural law is the foundation of all positive law. Is “originalism” one of those cases mentioned in Murphy’s essay, in which the natural law itself requires a degree of positivity in law? Can you think of reasons why a natural-law thinker and a legal positivist might both come down on either side of this question?

4. A major debate in our society at present is that over the definition of marriage. Customarily, marriage was understood to be between a man and a woman, and this custom was eventually enshrined in positive law. Today, however, many people argue that custom is not enough to justify a law (as did Hobbes and Holmes), and that marriage law ought to be changed to allow for homosexual unions. In your opinion, what influence should custom and tradition have on law? Do customs and traditions themselves require justification?

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