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The Radicalism of Legal Positivism

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"Legal positivism," a theory about the nature of law developed over the last two hundred years by, among others, Jeremy Bentham, Hans Kelsen, H.L.A. Hart, and Joseph Raz, is often caricatured by its jurisprudential opponents, as well as by lawyers and legal scholars not immediately interested in jurisprudential inquiry. "Positivist" too often functions now as an "epithet" in legal discourse, equated (wrongly) with "formalism," the view that judges must apply the law "as written," regardless of the consequences. Lon Fuller (late of Harvard Law School), whose spectacular confusions may have poisoned the minds of a whole generation of law students, even went so far as to suggest that "positivism" had something to do with why judges in Nazi Germany did morally abhorrent things![1] Ronald Dworkin, often viewed as a 'liberal' legal philosopher,[2] has made a career out of scandalous mischaracterizations of the positivist theory of law.[3] Writers associated with "Critical Legal Studies"—to whom I'll return below—contributed to the sense that "positivism" was a politically sterile position.

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[1] *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals* 4 Harv. L. Rev., 71, 593-629 (Feb., 1958) and Lon Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 Harv. L.Rev. 630–672.

[2] By American standards, he is certainly a liberal, but by more cosmopolitan standards, he is plainly an apologist for welfare-state capitalism.

[3] For detailed discussion, see my "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," reprinted in my *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007). For a shorter and more polemical account, with citations to many of those who have tried to correct Dworkin's misrepresentations, see my *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 Rutgers L.J. 165 (2006).

I should like to revisit in this short essay the *actual* theory of law developed by positivist philosophers like Bentham, Hart, and Raz, and to make clear why it is, and was, understood by its proponents, to be a *radical* theory of law, one unfriendly to the *status quo* and anyone, judge or citizen, who thinks obedience to the law is paramount. To be clear, the leading theorists of legal positivism thought the theory gave the *correct* account of the nature of law as a social institution; they did not endorse it because of the political conclusions it entailed, and which they supported. Yet these theorists realized that the correct account of the nature of law had radical implications for conventional wisdom about law. We would do well to recapture their wisdom today.

Positivist theories of law, if we may put their core idea quite simply, treat law as a human *posit*: some normative command—"Don't rob banks" or "Don't go faster than 55 miles per hour"—is a law (or *legally valid*, as I will sometimes say) because of actions taken by human beings. Laws are not God's commands, they are not handed down from 'on high': they come into being through certain kinds of human actions. Human beings, of course, do and say lots of things; not all of them create "laws." But, by the same token, there is no reason to think that because human beings have said or done things that do create laws that what they have done is good, or sensible, or fair, or just, or ought to command our obedience, or even our allegiance. What the law is in our society is one thing; what it morally ought to be, whether we ought to obey it or endorse it, is wholly another. We would do well not to confuse the two, says the positivist; we would do well, for example, not to think that because the U.S. Supreme Court says the law is X, that we have any moral obligation to comply with X or to celebrate it or defer to it. Or, as Bentham was concerned to argue, we should never confuse the fact that certain rules were duly enacted by Parliament and so constituted "law" with the question whether these laws were any good, whether they made most people better off, whether they should be respected or, instead, ridiculed and repealed.

That is the simple way of putting the core thought underlying Legal Positivism. But let us now state it a bit more formally. Law is, in Hart's famous formulation, "the union of primary and secondary rules." Primary rules are the rules that tell citizens what they can and cannot do, but a legal system requires more: for it also requires rules by which we can change the rules, adjudicate disputes about the rules, and, most importantly, figure out what the rules of *our* legal system actually are. The rule discharging this latter function Hart dubs "the Rule of Recognition": it is the rule that specifies the criteria of legal validity, the criteria all other rules must satisfy to count as rules of the legal system. Of course, if the "rule of recognition" is just another rule, like all the others, then the question can naturally arise: how do we know *this rule of recognition* is the rule of our legal system? An infinite regress looms.

But the Rule of Recognition, according to Hart, is a special kind of rule, what he calls a "social rule." A "social rule" is Hart's label for a social practice that has two distinguishing characteristics. A "social rule" exists when: first, there is a convergent practice of behavior among a group of people; and second, those engaged in the behavior *believe* themselves to be *obligated* to engage in that behavior (in Hart's terminology, those engaged in the behavior take an "internal point of view" towards what they are doing). The first criterion—convergent practice of behavior—is characteristic of lots of mindless group behavior: all the children choose chocolate at the ice cream parlor; all the worker ants serve the queen ant. No one thinks the children have an *obligation* to choose chocolate, it just happens that they are in the habit of doing so. And the worker ants certainly do not think they *must* protect the queen ant; they just do what they do!

The Rule of Recognition is different. To be sure, it involves a convergent practice of behavior: judges in the U.S., for example, treat the fact that Congress enacted a piece of legislation (and the President signed it) as *obligating* them to decide issues that come before them in accord with the rules in that legislation. So judges *converge* on "norms enacted by Congress" as a criterion of legal validity.

But judges are not like the kids who habitually choose chocolate or the worker ants serving their queen. Judges do not just "mindlessly" happen to treat Congressional enactments as legally binding; rather they believe that they have an *obligation* to treat such enactments as binding. That is the second crucial component for the existence of a social rule in Hart's sense. The Rule of Recognition is a social rule, which means that for a Rule of Recognition to exist there must be *both* a convergent practice among officials (especially judges) of applying certain criteria of legal validity in deciding which norms are law, but also that the officials adopt an "internal point of view" towards this practice, that is, they believe they have an *obligation* to do this.

So now we have a much richer account of the sense in which law is a product of human actions: a norm is legally valid in some society when it satisfies the criteria of legal validity in that society's Rule of Recognition, and a Rule of Recognition exists in virtue of a complex sociological and psychological fact, namely, that certain officials of the system apply those criteria and *believe* they *ought* to apply them. Notice that the positivist theory of law does *not* claim that they are *correct* to believe that they ought to apply those criteria; the theory claims only that *when law exists* in some society, we find a social rule that is the Rule of Recognition.[4] This leaves open the possibility—*importantly so*—that the officials of the system are *mistaken* in thinking they *ought* to apply the criteria of legal validity they actually apply. That, of course, is what any positivist would have said about judges in Nazi Germany or in the "Jim Crow" American South or in Pinochet's Chile: to the extent they took themselves to have an obligation to apply rules enforcing the second-class status (or worse) of Jews or African-Americans or socialists, they had made a moral mistake. The valid laws of their system were morally reprehensible, and warranted disobedience, not enforcement. But whether Alabama had a legal system in 1950 is a

[4] Confusion on this point accounts for most of the "natural law" criticisms of positivism, from Dworkin through John Finnis.

separate question from whether it was a *good* legal system: no significant legal positivist I can think of would have answered the second question in the affirmative.

Jeremy Bentham was a radical who thought British moral thinking of the early 19th-century was a travesty of trivialities and self-serving nonsense, almost willfully ignoring the plain fact that the majority of people were not well-off or happy. He proposed replacing "morality" (which was preoccupied with many topics we would now denominate matters of etiquette) with utilitarianism, which would ask whether or not some rule or action actually maximized happiness. His was a radically egalitarian doctrine: each person counted once in the utilitarian calculus, and not more than once. The happiness of lords and bankers counted for no more than the happiness of paupers and cobblers. Bentham thought it important to separate the question, "Is this rule part of the law?" from "Does this rule maximize utility?" precisely because he thought the laws of England were largely indefensible and required radical overhaul in accordance with utilitarian principles. Bentham's radicalism extended, famously, beyond the grave: in order to disabuse his superstitious fellow citizens of their fears about dead bodies, he declared in his will that his body should be preserved and put on display, the "Autoicon" that exists (in somewhat modified form) to this day.

Neither Hart nor Raz is quite the notorious enemy of the status quo that Bentham was, but both share with Bentham the progressive impulse and the desire to demystify "law" so that no one thinks the judgment, "This is the law" settles the question, "Is this what ought to be done?" No public intellectual did more to bring about the decriminalization of homosexuality in Britain than Hart,[5] for example, and Raz, a native of Israel, has been a staunch critic of the mistreatment of the Palestinians and other human

[5] H.L.A. Hart, *Law, Liberty and Morality* (1963) at 9, 13-14, 25, 45. Available at: http://books.google.com.

rights abuses by Israel. But the real radicalism of Raz's view becomes clear only in the technical details of his legal and political philosophy.[6]

All law claims the right to tell citizens what it is they must do. Even the worst legal systems, and the stupidest laws, present themselves as *authoritative* and *binding*. If you are stopped by the police for speeding, and protest, "But the speed limit is unreasonably low here," the response by the officer of the law will no doubt be abrupt: "Save your breath, you broke the law." Law, as Raz put it, claims "authority," it claims the right to tell its subjects what they *must* do: it does not invite them into a dialogue about whether the reasons underlying the law are good or sound or sensible, it purports to say, *this is what must be done, end of the discussion*.

That may be a characteristic feature of laws and legal systems, but that does not, of course, mean any particular legal system is justified in making that claim to authority. According to Raz's influential account, a claim of authority by the law is *only* justified when what the law commands its subjects to do is close enough to what they *really, morally speaking, ought to do* and, left to their own devices, the subjects would have done worse. Raz calls it the "Service Conception" of authority, and its core idea is simple: a claim of authority is morally justified when the authority actually performs a service for its subjects, helping them *really* act better than they would without the benefit of the authority's intervention.

Think, for a moment, of a parent who tells her child, "You must wear your raincoat today." The child replies, "Why? It's not raining," even as the first drops fall and the clouds darken. The parent has a *justified* claim of authority over the child precisely because the child will come closer to what Raz calls "right reason"—doing what the child really ought to do (namely, wear a raincoat)—than he would

[6] *See generally,* Joseph Raz, *The Morality of Freedom* (1986).

without the parent's intervention. We can all, I think, agree that parents, in situations like this, have justified claims of authority over their children. But Raz's suggestion is that a legal system only has a justified claim of authority over its subjects when it satisfies the same stringent standard.

Legal systems can sometimes meet this standard, for example, when they solve coordination problems that afflict any complex society. Should we drive on the left or the right? Surely it is a matter of moral indifference! The Brits may drive on the left, but they are not for that reason *immoral* drivers! What matters is that we all do the same thing, that is, that we coordinate our behavior. The law is uniquely situated to effect that outcome: by telling its subjects to all drive on the right (or the left, as the case may be), it can exercise a justified claim of authority over its subjects on the Razian view. Sometimes it can also do so when the law brings to bear technical expertise not available to the ordinary citizen.

But the key point is that, on the Razian view, it almost certainly turns out that most laws, and most legal systems, do *not* have justified claims of authority over their citizens. Take the legal system in the plutocratic United States: its laws—from its tax system, to its laws regulating business—consistently enrich a tiny minority (1-2% of the population) at the expense of the well-being of the vast majority.[7] To be sure, the U.S. legal system claims authority over its subjects, but is it justified in doing so? The Razian answer is almost certainly in the negative, unless we suppose that the vast majority would be complicit in their subjugation.[8] If that is right, then even though the U.S. legal system claims *authority* over its subjects, that claim is probably not morally defensible.

[7] See, Huffington Post, *Income Inequality: Top 400 U.S. Earners See Income Rise 476% In Last 15 Years*, available at: http://www.huffingtonpost.com/2010/03/05/income-inequality-top-400_n_487878.html. In the same time, median family income increased only 13.2%.

[8] One must admit the possibility, of course, that the U.S. population has had its cognitive and empathetic capacities so damaged by thirty years of reactionary propaganda that, left to its own reasoning, it might well do

The Marxist legal theorist Evgeny Pashukanis (later murdered by Stalin), in his classic 1929 work on *The General Theory of Law and Marxism*,[9] cautioned that it is a mistake to think a Marxist theory of law "should simply throw overboard the basic abstractions which give expression to the fundamental essence of the legal form";[10] rather it "must start with an analysis of the legal form in its most abstract and pure shape and then work towards the historically concrete".[11] When we understand law and its claimed authority in the manner of Hart and Raz, we immediately open up the possibility that the concrete instantiations of laws and legal systems are unjust and have no claim on our allegiance or obedience. The possibility of radical critique of law, as Pashukanis understood, turns on our ability to identify its essential characteristics precisely so we can then subject its concrete instantiations to skeptical assessment.

There has, alas, never been a serious school of Marxist criticism of legal institutions in American law schools. The closest we have come in the reactionary political culture of the United States over the last thirty years was the "Critical Legal Studies" movement (hereafter CLS) associated with such minor and philosophical insubstantial theorists as Duncan Kennedy and Roberto Unger of the Harvard Law School. From the standpoint of a Pashukanis, or any Marxian theory of law and society, the rise of CLS in the 1970s and 1980s—coinciding, as it did, with the rise of the free-market ideology of the "law and economics" movement—is fraught with ironies. For with some exceptions,[12] CLS simply revived a

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worse. That, of course, was the nightmare scenario imagined by the Frankfurt School a half-century ago, but we may still hope that most people would, e.g., recognize the moral importance of taxing the estates of the wealthy.

[9] Trans. by Barbara Einhorn (Worcester: Pluto Publishing, 1989).

[10] *Id*. at 49.

[11] *Id*. at 95.

[12] Closer to the spirit of Marx are the critiques of the American legal system in CLS-associated writers like Richard Abel and Karl Klare, who emphasize the extent to which the explicit ideals of the law (e.g., in torts and labor law) fall far short of the reality of the practice. See their contribution to David Kairys (ed.), *The Politics of Law: A*

strategy of left-wing critique that dates back to the Left Young Hegelians of the 1830's in Germany. Seizing upon the Hegelian notion that ideas are the engine of historical change, the Left Hegelians sought to effect change by demonstrating that the prevailing conservative ideas were inherently contradictory and thus unstable. To resolve these contradictions, it would be necessary to change our ideas, and thus change the world.

This strand of Hegelianism was a dead issue by the 1850's--in part because of Schopenhauer's devastating anti-Hegelian polemics, in part because of Marx's criticisms (about which more below), and in part because of the more general "materialistic" and "positivistic" turn in German intellectual life associated with Feuerbach and the so-called "German Materialists."[13] It was not revived until 1922 when Georg Lukács re-introduced Left Hegelian themes into the Marxist tradition of social critique in *History and Class Consciousness*, especially in the central chapter on "The Antinomies of Bourgeois Thought." CLS, however, acquires the style of argument not directly from Lukács--though he was a favorite figure in the footnotes of CLS articles--but from CLS "founding father" Roberto Unger, whose 1975 book *Knowledge and Politics* quite obviously recapitulates the central arguments and themes of *History and Class Consciousness*.

The irony, of which most CLS writers seem little aware, is that CLS should have revived precisely the tradition in left-wing thought that Marx had so viciously lampooned 150 years earlier![14] Indeed,

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Progressive Critique, pp. 445 et seq, pp 539 et seq. respectively (1st. Edn. 1982) available at: http://books.google.com.

[13] See Frederick Gregory, *Scientific Materialism in 19th-Century Germany* (Dordrecht: D. Reidel, 1977).

[14] See esp. the attack on Left Hegelians like Bruno Bauer in Marx and Engels's *The German Ideology: Part I*, reprinted in R.C. Tucker (ed.), *The Marx-Engels Reader*, 2nd ed. (New York: Norton, 1978).

with certain obvious emendations, we find Marx and Engels articulating the kind of critique that accounts for why CLS is now moribund:

> Since [the Crits] consider conceptions, thoughts, ideas, in fact all the products of consciousness...as the real chains of men...it is evident that [the Crits] have to fight only against these illusions of the consciousness. Since, according to their fantasy, the relationships of men, all their doings, their chains and their limitations are products of their consciousness, [the Crits] logically put to men the moral postulate of exchanging their present consciousness for human, critical or egoistic consciousness, and thus of removing their limitations. This demand to change consciousness amounts to a demand to interpret reality in another way, i.e., to recognize it by means of another interpretation....They forget, however, that to these phrases [constituting the old interpretation] they are only opposing other phrases, and that they are in no way combating the real existing world when they are merely combating the phrases of this world.

Showing the right-wing professors that their ideas are incoherent and demanding that they change their ideas is politically irrelevant for Marx: it is, of course, "contradictions" in the material circumstances of life that are the real engine of historical change. What CLS did was to revive precisely this discredited strand of critical theory--the critique of ideas or "consciousness"--in the legal domain. That the right-wing ideology of “law and economics” triumphed in American law schools at the very same time as CLS mounted its critique is surely rather good evidence that this strategy of critique is no more relevant now than it was in 1840.

Unfortunately, the flirtation with CLS’s revival of Left Hegelianism disabled an entire generation of legal theorists who might have benefitted from the clarity of thinking about law characteristic of legal positivism. To be sure, we should not imagine that a generation of clear-eyed legal positivists would have defeated the many reactionary developments in American law over the last thirty years. The

material circumstances in which we live continue to dictate the major legal and political developments. But as Marx also understood, there come historical moments when intellectual clarity about social reality is indispensable for political action.[15] One part of that social reality is law, and positivism remains the theory that supplies the requisite clarity. Much more is needed, of course, than a realistic picture of the nature of law, but that hardly alters the fact that positivism lays the conceptual foundation for any radical critique of law in late capitalist societies.

[15] See the discussion of Marx in my "The Heremenutics of Suspicion: Recovering Marx, Nietzsche,a nd Freud," in *The Future for Philosophy*, ed. B. Leiter (Oxford: Clarendon Press, 2004).