

## ARTICLE

# The Politics of Legal Theory Revisited\*

Dan Priel

## 1 Introduction

One of the things that divides legal positivists and their detractors is the question of whether legal positivism is related to a particular political view. The mainstream view among legal positivists is that their favoured legal theory is a description of what law is, and as such has no more political valence than the finding that water is H<sub>2</sub>O. One may be a proponent of an activist welfare state who wants greater legal regulation, or a libertarian minimalist, who thinks most law is illegitimate. Legal positivism, according to most of its proponents, is completely silent about all these questions. It only tells us what law is.

Against the background of many differences among legal positivists, this may be one of the few that most of them share, and remains one of the most enduring intellectual legacies of the leading lights of twentieth-century legal positivism, H.L.A. Hart and Hans Kelsen.<sup>1</sup> Their otherwise quite different accounts shared the view that properly understood legal philosophy should be morally and politically neutral. This idea that legal positivism, and general jurisprudence more generally, is a conceptual, politically neutral inquiry into the nature of law is implicit in the first edition of *The Concept of Law*. It is stated explicitly in the posthumous Postscript, where Hart says that his book pursued an account of law that is ‘general’ and ‘morally neutral’.<sup>2</sup> Hart used a similar characterisation to explain why he considered Jeremy Bentham to be the founder of legal positivism. As he put it: ‘the very centre, and I would say the sane and healthy centre, of the legal positivism of which Bentham may be regarded as the founder’, is the ‘insistence on a precise and so far as possible a morally neutral vocabulary for use in the discussion of law and politics’.<sup>3</sup>

Though emerging from a different intellectual tradition, the moral and political neutrality of legal positivism was also a central aspect of Kelsen’s thought. He argued that jurisprudence is to law as the natural sciences are to the physical world,

\* I thank two anonymous referees for this journal for their comments.

1 Even this consensus is not without its dissenters, as there are ‘normative’ legal positivists. See, e.g. Tom D. Campbell, *The Legal Theory of Ethical Positivism* (London: Routledge, 2016). It is notable that these legal positivists have looked back to Jeremy Bentham as their model and lamented the depoliticisation of his ideas in the twentieth century.

2 H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), 240.

3 H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 28.

Dan Priel

*and that for this reason* jurisprudence has no political valence whatsoever. Kelsen characterised his own work in jurisprudence as an ‘analytical description of positive law as a system of valid norms’, and as such ‘empirical’ because it describes positive law.<sup>4</sup> Kelsen believed that like any good science ‘[n]ormative jurisprudence describes law from an external point of view’, because it describes law’s ought statements and their relations aspiring to provide ‘a “wholly objective” view of law’.<sup>5</sup>

Many legal philosophers today, mostly legal positivists, continue to hold similar views.<sup>6</sup> In the aftermath of World War II, some critics of legal positivism argued that such views had political consequences, as they led judges who accepted them to follow immoral laws without question. Legal positivists responded that the charge was both philosophically and historically confused.<sup>7</sup> It is a mistake to confuse legal positivism as an account of what law is with what is sometimes known as ‘judicial positivism’, a theory of adjudication about the proper limits of the judicial role. Whatever are the merits of the latter view, it is unrelated to the former.

In later years, the attack on legal positivism became more direct. Now the charge was that legal positivism’s political neutrality was a cover. These critics argued that what was presented as a general, neutral, or scientific description of what law is in every time and place was (at best) a description of modern law in Western liberal democracies. As such, it attracted the ire, from both the right and the left, of critics of welfare-state liberalism.<sup>8</sup> This critique was similarly dismissed and largely ignored by legal positivists. Against such charges, legal positivists insisted that it is

- 4 Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge: Harvard University Press, 1945), 163.
- 5 Kelsen, *General Theory of Law and State*, 164, quoting Joseph W. Bingham: ‘What Is the Law?’, *Michigan Law Review* 11 (1912): 10. Kelsen’s use of the term ‘normative jurisprudence’ may confuse contemporary readers, as these days the term has almost the opposite meaning to the one given to it by Kelsen. For him, ‘normative jurisprudence’ was a science of norms, understood in opposition to sociological jurisprudence. It treated norms as foundational concepts that could not be reduced to any empirical facts.
- 6 See e.g., John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012), 275-276; Leslie Green, ‘Introduction’ to Hart, *The Concept of Law*, xlvii-xlviii; Andrei Marmor, *The Philosophy of Law* (Princeton: Princeton University Press, 2011), ch. 5; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed. (Oxford: Clarendon Press, 1994), 209; Julie Dickson, *Evaluation and Legal Theory* (Hart, 2001), 134-135.
- 7 H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 72-75, writing in response to Gustav Radbruch. There is extensive later literature on the topic, for example Walter Ott and Franziska Buob, ‘Did Legal Positivism Render German Jurists Defenceless During the Third Reich?’, *Social and Legal Studies* 2 (1993): 91.
- 8 Thus, for Hayek, Kelsen’s legal positivism was ‘the ideology of socialism’, an ideology seeking ‘complete control over the social order’. F.A. Hayek, *Law, Legislation, and Liberty: Volume 2 (The Mirage of Social Justice)* (London: Routledge & Kegan Paul, 1976), 48-56 (quote from 53). For critics of Hart’s theory from the left, his account was a ‘nostalgic mechanics of a late, (lost) Empire’. Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart, 2005), 159-161.

a misunderstanding of legal positivism, and perhaps even of philosophical inquiry, to think that legal positivism had any political commitments.<sup>9</sup>

This background explains how surprising Brian Leiter's contribution to the topic has been. Leiter is a full-throated defender of legal positivism, an idea that, he said, 'stands victorious as any research program in post-World War II philosophy'.<sup>10</sup> At the same time, in a short essay entitled 'The Radicalism of Legal Positivism', he has also argued that from its inception, legal positivism has had a political edge. Even more surprisingly, he associated legal positivism with radical left-wing politics.

The thesis is intriguing on multiple levels. First, this view is sharply at odds with most legal positivists' insistence of the political neutrality of their view. Coming from a prominent legal positivist, this alone makes it worthy of examination. Beyond the specifics of the thesis, it is at odds with the methodological presuppositions of mainstream legal philosophy, which insists that the philosophical study of law should not be confused with its context. Legal philosophy is standardly understood as the study of timeless, necessary truths about law. In the words of Andrei Marmor: 'A descriptive theory about the nature of law makes a claim to truth ... The intellectual and historical background of such a theory, whether moral, political, or other ... is the business of intellectual historians.'<sup>11</sup> On this view, to speak of the political orientation of legal positivists comes close to being a category mistake. Leiter's claim challenged this idea, for his claim was not just that leading legal positivists *happened to be* politically radical; he made the much stronger claim that leading legal positivists saw their political radicalism and their legal positivism as connected.

I welcome the contextualising assumed by Leiter's thesis. Like him, I am a naturalist. I see historicising jurisprudence as part of a naturalistic effort to add empirical reality to its study.<sup>12</sup> Jurisprudence is not (just) the battling of abstract propositions such as 'morality is (or, is not) a criterion of legal validity'. In my view, a naturalistic perspective recognises legal positivism has a history and a real-world historical reality, that it is an idea advanced by people within a particular social and political context.<sup>13</sup>

From a naturalistic perspective, there is another reason to find Leiter's thesis worthy of examination. I believe many naturalists are attracted to legal positivism

9 See Gardner, *Law as a Leap of Faith*, 23-24; Marmor, *The Philosophy of Law*, 118.

10 Brian Leiter, *Naturalizing Jurisprudence: Essays in American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), 2; see also Brian Leiter, 'Legal Positivism as a Realist Theory of Law', in *The Cambridge Companion to Legal Positivism*, ed. Torben Spaak and Patricia Mindus (Cambridge: Cambridge University Press, 2021), 79.

11 Marmor, *The Philosophy of Law*, 118.

12 Naturalism and history may not seem like friendly approaches. I explain in what way they can be in Dan Priel, 'Evidence-Based Jurisprudence: An Essay for Oxford', *Analisi e Diritto* (2019) no. 2: 101-103, 107-109.

13 I defend this view in Dan Priel, 'Analytic Jurisprudence in Time', in *Philosophy of Law as an Integral Part of Philosophy: Essays on the Jurisprudence of Gerald J Postema*, ed. Thomas Bustamante and Thiago Lopes Decat (Oxford: Hart, 2020), 213.

Dan Priel

almost by default. They have little sympathy for the metaphysical presuppositions associated with some natural law theories, and see legal positivism as the only real alternative. Despite similar doubts about natural law theory, I hold a less sanguine view about legal positivism. I consider twentieth-century legal positivism a failed intellectual enterprise, in large measure because it remains wedded to the anti-naturalistic, conceptual enterprise of its best-known exponents, Kelsen, Hart, and Joseph Raz. A large part of that enterprise, as I will attempt to show, was committed to *denying* any political orientation to legal positivism. The concluding section of this article outlines an alternative suggestion for thinking about legal positivism that rejects this brand of conceptual legal positivism without endorsing natural law theory.

To get ahead with examining the claim that legal positivism is politically radical we need to have some clarity on what is meant by ‘legal positivism’ as well as by ‘politically radical’. I will clarify the former in the course of this article, but I will broadly follow Leiter in seeing it as the view that law is fundamentally a matter of social fact. As for the latter term, it is sometimes taken to refer to any political view that stands outside of the mainstream. At other times it is taken to mean a sceptical view about very possibility of legitimate political authority. Leiter seems to use radical in both senses, but it is quite clear that when referring to the radicalism of legal positivism, he means outside of the political mainstream and on the left. For example, Leiter says that legal positivism may not have sufficed to counter the ‘reactionary developments in American law’ by which he includes the ‘right-wing ideology of “law and economics”’, but he still credits it with ‘lay[ing] the conceptual foundation for any radical critique of law in late capitalist societies’.<sup>14</sup> I will generally likewise limit my characterisation of radicalism to left-wing politics, except in one place where I consider the possible connection between natural law theory and scepticism of political authority, either from the left or from the right.

Leiter makes two distinct claims that need to be considered separately. One is the *historical* or, frankly, *empirical* claim that leading legal positivists were enemies of the status quo. Importantly, Leiter not only argues that legal positivism has unintended radical implications. Legal positivism, he said, ‘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’.<sup>15</sup> To say that legal positivism was ‘understood by its proponents’ to be a radical political theory is an empirical claim about certain individuals in the past. The second is the *philosophical* claim that at the heart of legal positivism is the radical idea that one should not trust authority. This claim may be true even if many legal positivists were not aware of the radical political implications of their views.

This article challenges both claims, but it purports to do more than that: I hope to use this article to examine more broadly the question of the relationship between competing theories of law and competing political views of law’s authority. In

14 Brian Leiter, ‘The Radicalism of Legal Positivism’, *National Lawyers’ Guild Review* 66 (2009): 171.

15 Leiter, ‘The Radicalism of Legal Positivism’: 165.

Section 2, I consider the historical claim and argue that one cannot find any consistent political radicalism in the writings of legal positivists; in fact, one often finds the opposite. Leiter provides us with some guidance to assist with the testing of his claim, as he names three prominent legal positivists as defenders of radical political causes. I argue that of the three named, two cannot be considered political radicals and in the case of the third no connection between his radical politics and his legal positivism can be established. I further argue that if historical examples may be used to show that legal positivism was understood by its proponents to be a radical view, then we should look at other legal positivists. Such an investigation does not reveal any consistent political pattern that matches Leiter's claims. After disposing of the historical question, the remainder of the article turns to the philosophical claim, by examining whether there is something radical about the *idea* of legal positivism. In Section 3, I focus on the idea that legal positivism is necessary for radical political action. In Section 4, I focus on the thought that central to legal positivism is the idea that law is a human creation, and as such, as something that should be treated with suspicion. In these sections, I show that many radical reformers in the past who accepted the fallibility of human law, marched under the banner of natural law. Seeking to explain this fact, I suggest that we better understand competing theories of law, not as conceptual claims, but as derived from competing political views about the authority of law.

## 2 The Unradical History of Legal Positivism

The most straightforward way of showing that legal positivism was understood by its proponents to be a radical claim is by providing evidence that they said so. That would not show their claim to be true, but it would show that they believed it to be true. Leiter does not do that. Instead, focusing on three figures associated with legal positivism (Jeremy Bentham, H.L.A. Hart, and Joseph Raz), Leiter argues that they all promoted radical political causes. The claim is unambiguously empirical and historical, pointing to specific facts about these thinkers as evidence of their political radicalism. To accept this claim requires showing not just that the legal positivists in question were political radicals, but also that they saw their political radicalism as connected to their legal positivism.

I believe the historical basis for Leiter's claims is shaky at best. To state my conclusion upfront, neither Hart nor Raz can plausibly be considered a political radical; Bentham's case is a bit different, as there is no discernible connection between his political radicalism and his (alleged) legal positivism. To substantiate these claims, I will consider in this section the views of Bentham and Hart, postponing for later (Section 4.2) the discussion of Raz's view. In addition to considering Leiter's own examples, I consider the views of other legal positivists. My reason is simple: if the political views of some legal positivists are evidence of the radicalism of legal positivism, then the views of other legal positivists can be used as evidence for refuting this claim. While not aiming for comprehensiveness,

Dan Priel

I show that a large number of prominent legal positivists were not political radicals, and certainly not left-wing radicals.

I start with Bentham, as he initially looks like a promising candidate for demonstrating positivism's radical credentials.<sup>16</sup> Bentham was the intellectual leader of a group that was known as 'the philosophic radicals', which pushed for many important political reforms in nineteenth-century Britain.<sup>17</sup> However, examining Bentham's case more closely complicates the picture. Bentham only became a radical long after concluding his main works in legal theory for which he is nowadays considered a legal positivist. Scholars have debated whether Bentham's turn to radicalism occurred around 1809 or around 1790.<sup>18</sup> Either way, it took place years after he completed the works in jurisprudence for which he is now considered a legal positivist. *A Fragment on Government* (published in 1776), *An Introduction to the Principles of Morals and Legislation* (completed in the late 1770s, printed in 1780 but published only in 1789), and *Of the Limits of the Penal Branch of Jurisprudence* (written in the late 1770s and never published in Bentham's lifetime) were all written at a time Bentham considered himself a Tory.<sup>19</sup> As though taking aim at Leiter's claim about questioning authority, Bentham summarised his politics at the time with these words: 'Under a government of Laws, what is the motto of a good citizen? *To obey punctually; to censure freely.*'<sup>20</sup>

Already then, Bentham was a severe critic of natural law ideas. Most of this critique had little to do with politics and much to do with Bentham's inability to account for natural law within his materialist metaphysical outlook. However, as part of his critique of natural law, Bentham argued that natural law ideas were dangerous for

- 16 Leiter echoes Ronald Dworkin here, who similarly drew a link between Bentham's radical politics and his legal positivism. See Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006), 180-181.
- 17 As always, the story is more complicated, both in terms of the elderly Bentham's impact on the Philosophic Radicals and the group's political impact. On the former question see James E. Crimmins, *Utilitarian Philosophy and Politics: Bentham's Later Years* (London: Continuum, 2011), ch. 7; William Thomas, *The Philosophic Radicals: Nine Studies in Theory and Practice, 1817-1841* (Oxford: Clarendon Press, 1979), ch. 1. Both Crimmins and Thomas discuss Bentham's uneasy relationship with the group, which came to prominence when Bentham was in his seventies. The second question, the influence of Bentham and 'Benthamism' on political reform, has been the subject of a protracted debate among historians of nineteenth-century Britain. For a survey see Stephen Conway, 'Bentham and the Nineteenth-Century Revolution in Government', in *Victorian Liberalism: Nineteenth Century Political Thought and Practice*, ed. Richard Bellamy (London: Routledge, 1990), 71. Some of those who minimised the radicals' influence argued that the reforms in question were not uniquely Benthamite in spirit as they originated with 'Evangelicals and Tories'. See David Roberts, 'Jeremy Bentham and the Victorian Administrative State', *Victorian Studies* 2 (1959): 198-199.
- 18 The former view is defended in J.R. Dinwiddy, 'Bentham's Transition to Political Radicalism, 1809-10', *Journal of the History of Ideas* 36 (1975): 683. For the latter view, see James E. Crimmins, 'Bentham's Political Radicalism Reexamined', *Journal of the History of Ideas* 55 (1995), 259.
- 19 See M.P. Mack, *Jeremy Bentham: An Odyssey of Ideas 1748-1792* (London: Heinemann, 1963), 13, 33; see J.H. Burns, 'Jeremy Bentham: From Radical Enlightenment to Philosophic Radicalism', *Bentham Newsletter* 8 (1994): 6-7.
- 20 Jeremy Bentham, *A Fragment on Government*, ed. Ross Harrison (Cambridge: Cambridge University Press, 1988), 10.



their ‘natural tendency ... to impel a man, by the force of his conscience, to rise up in arms against any law whatever that he happens not to like’.<sup>21</sup> In an unpublished manuscript written around the same time, Bentham was clearer: ‘No government can be so bad that a friend to mankind should be justified in advising revolt in order to substitute to it any other form of government.’<sup>22</sup> These are not the words of a political radical, and clearly do not urge us to distrust authority. They reflect what, as we shall see, is a common refrain of the perceived danger of political radicalism inherent in natural law theory.

There is difficulty also on the other side of the ledger. There is an emerging consensus among Bentham scholars that Bentham was not a legal positivist. Of course, Bentham never called himself a ‘legal positivist’, because the term ‘positivism’ was only coined (by Auguste Comte) after Bentham died. The real issue is whether he accepted ideas we *now* classify as ‘legal positivism’. This is not an easy question to answer, as it depends on what one means by the term. Hart’s view has been very influential in seeing Bentham as a founder of legal positivism, because he insisted on the separation of the analytic and normative study of law and was the first to give a morally neutral account of law.<sup>23</sup> While this view remains popular, Bentham scholars have more or less uniformly rejected it. Gerald Postema was the first to challenge the Hartian reading of Bentham, arguing that his legal philosophy was not morally neutral but closely related to his utilitarianism.<sup>24</sup> Postema’s view has since been followed by others who have consistently argued that Bentham’s jurisprudence cannot be separated from his utilitarianism.<sup>25</sup> Summarising the new consensus, Philip Schofield has recently stated that ‘to ascribe legal positivism to the historical Bentham is an anachronism’.<sup>26</sup>

Ironically, one might take this new view as a roundabout vindication of Leiter’s claim, especially as he ties Bentham’s radicalism to his utilitarianism: while Bentham does not fit the purely analytic, morally neutral legal positivism that dominates jurisprudence today, his case shows that a politically motivated version of legal positivism is possible. On this view, it is the sidelining of this understanding of legal positivism (including Hart’s misreading of Bentham as offering a neutral account) that shows how legal positivism lost its former radical edge. To say this, however, is to admit that legal positivism is not an inherently radical view: some of

21 Bentham, *A Fragment on Government*, 95-96.

22 Jeremy Bentham manuscripts, University College London, box clxx, 199, quoted in Emmanuelle de Champs, ‘Utility, Morality, and Reform: Bentham and Eighteenth-Century Continental Jurisprudence’, in *Bentham’s Theory of Law and Public Opinion*, ed. Xiaobo Zhai and Michael Quinn (Cambridge: Cambridge University Press, 2014), 201-202.

23 See Hart, *Essays on Bentham*, 28.

24 See Gerald J. Postema, *Bentham and the Common Law Tradition*, 2nd ed. (Oxford: Oxford University Press, 2019), 328-336.

25 See Philip Schofield, ‘Jeremy Bentham and HLA Hart’s “Utilitarian Tradition in Jurisprudence”’, *Jurisprudence* 1 (2010): 147; Xiaobo Zhai, ‘Bentham’s Natural Arrangement Versus Hart’s Morally Neutral Description’, *Revue d’études benthamiennes* 10 (2012): 1.

26 Philip Schofield, ‘Jeremy Bentham and the Origins of Legal Positivism’, in *The Cambridge Companion to Legal Positivism*, ed. Torben Spaak and Patricia Mindus (Cambridge: Cambridge University Press, 2021), 222-223.

Dan Priel

its proponents may have been politically radical and also tied their politics to their jurisprudence, but others, including the best-known exponent of legal positivism in the last century, were not.

Leiter says little on these issues. In fact, his ascription of political radicalism to Bentham is based on the radical equality of the utilitarian felicific calculus.<sup>27</sup> Even supposing this is a radical view – this is, after all, a view accepted by classical and neoclassical economists, as well as the champions of Chicago-style law-and-economics approach that Leiter deplores – it is not clear that how it is related to distrusting authority. The case of Bentham himself suggests otherwise, since, as mentioned, at the time of writing his early jurisprudential books Bentham was already a committed utilitarian but was concerned about the dangers of distrust of political authority.

All this undermines the claim that Bentham understood his views on law as grounded in radical politics. But suppose we accept that Bentham was a legal positivist, that he was a political radical, and that we see the two as connected. Even then, it is wrong to draw any general conclusions about legal positivism from the views of a single legal positivist. It is notable that completely absent from Leiter's claims about positivism's supposed radicalism are Thomas Hobbes and John Austin. In one sense, this is odd as they are regularly mentioned in historical accounts of the emergence of legal positivism. In another sense it is not, as neither was a political radical. Hobbes deserves mention in the history of liberalism for his arguments against the authority of kings by divine right, for his development of a contractualist political theory, and for his insistence that the sovereign should promote the welfare of his subjects, not merely protect their natural rights,<sup>28</sup> but Hobbes was a defender of unrestricted sovereign powers and the demand for complete obedience from its subjects, making him an unlikely candidate for the kind of political radicalism Leiter has in mind.

The same is true of Austin. In terms of setting the model for modern-day legal positivism, Austin is more significant than either Hobbes or Bentham.<sup>29</sup> For all the criticism later positivists piled on his work, it is with Austin's efforts to determine the province of jurisprudence that we see the beginnings of legal philosophy understood primarily as an analytical exercise seeking to identify what counts as law.<sup>30</sup> However, as far as politics go, Austin does not fit Leiter's bill at all. It is true

27 See Leiter, 'The Radicalism of Legal Positivism': 168.

28 On the latter, see Thomas Hobbes, *On the Citizen* ed. and trans. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1997 [1642]), 143-144.

29 See Hart, *The Concept of Law*, ch. 2-4. Even Kelsen, whose ideas draw on different intellectual sources, compared his work to Austin's, not Bentham's or Hobbes's. See Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', *Harvard Law Review* 55 (1941): 44.

30 See John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995 [1832]). On the extent to which contemporary legal positivism is Austinian see Dan Priel, 'H.L.A. Hart and the Invention of Legal Philosophy', *Problema* 5 (2011): 301; Gerald J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Cham: Springer, 2011), 31-32.



that the young Austin wrote in a letter to Bentham (incidentally, the only extant letter between them) that he was 'truly [Bentham's] disciple, and, as such, earnest for the improvement of human happiness'.<sup>31</sup> It is also true that the young Austin authored one essay urging radical reform. But this was apparently a passing phase in his early life, most traces of which disappeared later. As John Stuart Mill wrote in his autobiography, with age Austin 'acquired an indifference, bordering on contempt, for the progress of popular institutions' culminating with the 'modes of thinking of his later years ... [which] were much more Tory in their general character'.<sup>32</sup> It is hard to tell when exactly the transformation began, but it is not in doubt that by the end of his life Austin held extremely conservative views. Austin's few writings after the publication of *The Province* invariably took an unambiguously anti-reformist stance.<sup>33</sup> To the extent that Austin is remembered outside of jurisprudence, he appears as a minor figure in histories of intellectual life in nineteenth-century Britain, as a proponent of laissez-faire economics and an opponent of the expansion of the franchise.<sup>34</sup>

It appears that when Austin returned from his year in Germany in 1828 (i.e., before he delivered the lectures that would later be published as *The Province of Jurisprudence Determined*), his intellectual outlook had already changed. Even confining ourselves to the book on which Austin's reputation as an important legal positivist rests, it is hard to find in it any trace of political radicalism.<sup>35</sup> Leiter

- 31 See letter from John Austin to Jeremy Bentham (20 July 1819) in vol. 9 of *The Correspondence of Jeremy Bentham*, ed. Stephen Conway (Oxford: Clarendon Press, 1989), 337.
- 32 John Stuart Mill, *Autobiography*, ed. John M. Robson (London: Penguin, 1989 [1873]), 141.
- 33 These essays generated some interpretive dispute. Eira Ruben tied them to Austin's jurisprudential works, concluding that Austin's jurisprudence 'was designed to defend the stability of a particular economic system and protect the interests of the middle class'. Eira Ruben, 'John Austin's Political Pamphlets 1824-1859', in *Perspectives in Jurisprudence*, ed. Elspeth Attwooll (Glasgow: University of Glasgow Press, 1977), 20, 38. This view was challenged in W.L. Morison, *John Austin* (Stanford: Stanford University Press, 1982), 122-132 and Lotte Hamburger and Joseph Hamburger, *Troubled Lives: John and Sarah Austin* (Toronto: University of Toronto Press, 1985), 244-245, note 11. The Hamburgers argued that Austin's political views around the time he delivered his lectures defy easy classification (Hamburger and Hamburger, *Troubled Lives*, 51-52), but they are clear that already in his jurisprudence lectures Austin was expressing 'severe doubts about radicalism' (Hamburger and Hamburger, *Troubled Lives*, 40-44). Wilfrid E. Rumble, 'Did Austin Remain an Austinian?', in *The Legacy of John Austin's Jurisprudence*, ed. Michael Freeman and Patricia Mindus (Chan: Springer, 2013) 131, 144-148, argues (based on Austin's later writings) that despite his change in politics, Austin did not abandon his jurisprudential views. The discussion in the text below provides several illustrations that even in the *Province*, Austin was not a political radical.
- 34 See Christopher T. Harvie, *The Lights of Liberalism: University Liberals and the Challenge of Democracy 1860-86* (London: Allen Lane, 1976), 123; Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain 1850-1930* (Oxford: Clarendon Press, 1991), 260; Leonard Gomes, *Foreign Trade and the National Economy: Mercantilist and Classical Perspectives* (Basingstoke: Macmillan, 1987), 275-276.
- 35 See Michelle Chun, 'The Anti-Democratic Origins of Analytical Jurisprudence', *Jurisprudence* 12 (2021): 374-376. I think Chun goes too far when she argues that analytic jurisprudence all the way to Hart is anti-democratic, but I agree that it is not politically neutral and that some legal positivists' work – Hart's in particular – presupposed a rather elitist 'top-down' conception of government and democracy. See Dan Priel, 'Lon Fuller's Political Jurisprudence of Freedom', *Jerusalem Review of Legal Studies* 10 (2014): 42-43 and note 111.

Dan Priel

stressed the clear separation between law-as-it-is and law-as-it-ought-to-be as central to positivism's critical stance toward authority.<sup>36</sup> Austin gave this idea one of its most famous formulations – '[t]he existence of law is one thing; its merit or demerit is another'<sup>37</sup> – but he presented it as a warning *against* radicalism: try suggesting to a judge that there is some higher standard against which to evaluate the law, he said, and you will end up in the gallows.<sup>38</sup> Specifically, he challenged the claim that 'no human law which conflicts with the Divine law is obligatory or binding', a view Austin described as 'stark nonsense'.<sup>39</sup> He went on to argue that the view that 'all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to much wise and benign rule as to stupid an galling tyranny'.<sup>40</sup> This is not the view of someone who urges us to distrust political authority.

It is similarly difficult to find political radicalism when we look at some of the leading legal positivists from continental Europe, who were the first to use the term 'legal positivism' (or its translations before the term was imported into Anglophone jurisprudence around 1940). One example is Karl Bergbohm, sometimes considered the most important legal positivist in the German-speaking world before Hans Kelsen.<sup>41</sup> Bergbohm's rejection of natural law was so comprehensive that for him even Austin was not sufficiently positivistic. His views are captured in the following sentence: 'The weed of natural law, in whatever form and camouflage it would present itself, openly or shyly, has to be annihilated, without mercy, with root and branch.'<sup>42</sup> Less metaphorically, Bergbohm not only argued that all law is a matter of fact, but that it was possible to design a legal system that relied the judge of the need to resort to any non-legal considerations.<sup>43</sup>

Bergbohm was also a political conservative, whose

[r]adical positivism ... meant opposition to new ideas and social change, including the rejection of human rights as an element of international law taken as a vehicle for social change ... Bergbohm's mindset was conservative: what the law had to contain, it already contained ... Natural law was politics.

36 Leiter, 'The Radicalism of Legal Positivism': 166.

37 Austin, *The Province of Jurisprudence Determined*, 157.

38 Austin, *The Province of Jurisprudence Determined*, 158.

39 Austin, *The Province of Jurisprudence Determined*.

40 Austin, *The Province of Jurisprudence Determined*, 159.

41 See Lauri Mälksoo, 'The Science of International Law and the Concept of Politics: The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855-1985', *British Yearbook of International Law* 76 (2005): 420; Stanley L. Paulson, 'Statutory Positivism', *Legisprudence* 1 (2007): 7. Bergbohm is nowadays completely forgotten in the English-speaking world, though he was known to prominent Anglophone legal theorists of the past. See Lon L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1940), 31-32, 38-39; Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', *Harvard Law Review* 71 (1958): 638-639; H.L.A. Hart, 'Legal Positivism', in vol. 4 of *Encyclopedia of Philosophy* (New York: Macmillan, 1967), 420.

42 Mälksoo, 'Science of International Law and the Concept of Politics', 425, quoting Karl Bergbohm, *Jurisprudenz und Rechtsphilosophie* (Leipzig: Duncker & Humblot, 1892) vol. 1, 118.

43 See Edgar Bodenheimer, 'Law as a Bridge Between Is and Ought', *Ratio Juris* 1 (1988): 141.

Bergbohm's harsh rejection of natural law and his defence of positivism therefore constituted a reaction ... Ideally he would have had all politics expelled from the science of international law. Law was – or had to be – a defence, an asylum in the face of dangerous politics.<sup>44</sup>

It may be argued in response that Bergbohm's political views can be separated from his positivism. This was, in fact, Hart's view.<sup>45</sup> To accept this view, however, is to deny that legal positivists saw their jurisprudential views as connected to their political views. At the very least, it shows that Hart did not understand legal positivism to be tied to any political stance (let alone radical politics and distrust of political authority).

Kelsen is by far the most important continental European legal positivist of the twentieth century. His ideas have had a limited impact on English-language jurisprudence, which may explain why Leiter does not consider his work in relation to his thesis. But one cannot examine the claim that legal positivism is politically radical, and was understood by its leading proponent in this way, without considering him. I mentioned at the outset that Kelsen treated his work as a science, and insisted on the 'separation of legal science from politics'.<sup>46</sup> Kelsen was so dedicated to this neutralist, scientific stance that he considered it incompatible with becoming a member of a political party.<sup>47</sup> Kelsenians of later generations extended his ideas beyond general jurisprudence and argued that the study of substantive areas of law such as constitutional law can, and should, be politically neutral.<sup>48</sup> This should suffice for showing that Kelsen did not understand his legal positivism to be related to any political view, radical or otherwise.<sup>49</sup>

Kelsen's characterisation of legal positivism as scientific is central to early twentieth-century European legal positivism. Rather than radicalism, for at least some legal positivists, this meant tolerance (if not more) of fascism. Thus, in 1918,

44 Mälksoo, 'Science of International Law and the Concept of Politics', 435. Orrego argued (citing Bergbohm) that '[l]egal positivism arose, originally, to counter the notion that what the political authorities ordered might be disobeyed for "moral" reasons'. Cristóbal Orrego, 'H.L.A. Hart's Understanding of Classical Natural Law Theory', *Oxford Journal of Legal Studies* 24 (2004): 301; see also Kelsen, *General Theory of Law and State*, 417. This was also the view of French legal positivist Georges Ripert, whose views I discuss below.

45 Hart, 'Legal Positivism', 420.

46 Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992 [1934]), 3.

47 See Clemens Jabloner, 'Kelsen and His Circle: The Viennese Years', *European Journal of International Law* 9 (1998): 376.

48 See Alexander Somek, 'The Indelible Science of Law', *International Journal of Constitutional Law* 7 (2009): 426-427.

49 In saying this, I do not take a stand on whether Kelsen's work was jurisprudentially radical. An early argument for this view is in H. Lauterpacht, 'Kelsen's Pure Science of Law', in *Modern Theories of Law* (London: Oxford University Press, 1933), 105. Nor do I take a stand on the question whether, despite Kelsen's insistence on the political neutrality of his jurisprudence, it was not. In addition to Hayek, mentioned above, Nazi legal theorists also challenged Kelsen on this score. See Izhak England, 'Nazi Criticism Against the Normativist Theory of Hans Kelsen: Its Intellectual Basis and Post-Modern Tendencies', *Israel Law Review* 32 (1998): 227-229, 230.

Dan Priel

French law professor Georges Ripert published an essay entitled *Droit naturel et positivisme juridique*. Among his reasons for preferring the latter was his claim that it ‘demands respect for the juridical order merely because it exists’, leaving individuals with the choice whether to obey out of a sense of duty or of fear of punishment. He then added:

In one fell swoop the insoluble question of legitimate civil disobedience and legitimate resistance to authoritative orders disappears. It was the doctors of the [Catholic] Church, I believe, who created this theory ... They judge the temporal laws in relation to Christian doctrine. The higher authority of the spiritual law dictated directly by God ... allowed them to judge and criticize actions of the civil authority which called for, or tolerated, infractions of Christian law.<sup>50</sup>

Some two decades later, Ripert served briefly as minister of education in Vichy France, not quite the political position one would expect from a leftist radical. Upon his return to academia, while World War II was still being fought, he participated in the publication of a collection of essays on German law. He explained the publication by the need to study the law objectively: ‘The man of science has the right to ignore the practical consequences of his study.’<sup>51</sup> Again, many will argue that this conclusion is not entailed by legal positivism, but as we have seen, this characterisation of legal positivism as a purely, and properly, ‘scientific’ thesis has been central to how many proponents of legal positivism understood it. To dismiss such a view as unrepresentative of ‘real’ legal positivism risks turning the claim that legal positivism is radical into a tautology, one where only those deemed sufficiently radical also make the grade as proper legal positivists.

This, I believe, is the most significant reason to mention these forgotten figures. Though they are barely known today (at least in Anglophone jurisprudence), their views are relevant to the discussion of legal positivism in its present-day Anglo-American guise, because the separation between legal theory and normative inquiry remains central to contemporary legal positivism and its best-known

50 Georges Ripert, *Droit naturel et positivisme juridique* (Marseille: Barlatier, 1918), 38-39 (translated by the author). Like Bergbohm, Ripert was worried natural law theory allowed individuals to infuse their subjective moral views into the law. See Ripert, *Droit naturel et positivisme juridique*, 39. On Ripert’s political conservatism see Jean-Pierre Allinne, ‘Georges Ripert, un positiviste spiritualiste’, in vol. 2 of *Les facultés de droit de Province au XIXe siècle*, ed. Philippe Nélidoff (Toulouse: Presses de l’université Toulouse 1 Capitole, 2011) 221 at paras 27-33, online <https://books.openedition.org/putc/8864>; Frédéric Audren, ‘Georges Ripert (1880-1958)’, in *Great Christian Jurists in French History*, ed. Olivier Descamps and Rafael Domingo (Cambridge: Cambridge University Press, 2019), 372.

51 Georges Ripert, ‘Préface’ to *Études de droit allemand* (Paris: Librairie générale de droit et de jurisprudence, 1943), vi-vii, quoted in Danièle Lochak, ‘La doctrine sous Vichy ou les mésaventures du positivisme’, in *Les usages sociaux du droit*, ed. Danièle Lochak et al. (Paris: Presses universitaires de France, 1989), 252, 268. On Ripert’s government role in Vichy France see Lochak, ‘La doctrine sous Vichy ou les mésaventures du positivisme’, 253; Michael R. Marrus and Robert O. Paxton, *Vichy France and the Jews*, 2nd ed. (Stanford: Stanford University Press, 2019), 93-94. Yet another example of a positivist who, for a while, was (at least) receptive of Nazi Germany is Karl Olivecrona. See Torben Spaak, *Karl Olivecrona’s Legal Philosophy* (Cham: Springer, 2014), 24-28.

exponent. As mentioned at the outset, Hart described his own jurisprudential work as 'descriptive' and 'morally neutral'.<sup>52</sup> This view, that legal positivism is 'normatively inert',<sup>53</sup> remains a dominant feature of contemporary legal positivism, so much so that Leiter himself endorsed it at some point, because it does not pass judgment on law, but merely 'identifies some [of its] necessary features'.<sup>54</sup>

Such views strongly suggest that whatever Hart's political views were, he did not see them as in any way related to legal positivism. This implies that even if Hart had been a political radical, we would have good reason to doubt that he saw a connection between his jurisprudence and his politics. However, our task of examining potential connections between Hart's legal positivism and his radicalism is made simpler by the fact that, to put it simply, he was not a political radical. As depicted in his biography,<sup>55</sup> Hart was a left-leaning social democrat (a 'liberal' in the North American sense of the term), whose political views were well within the mainstream.<sup>56</sup> There is nothing in his written work or in his biography to mark out this bookish Oxford don as a political radical, in action or in ideas. It is hard to find anything in *The Concept of Law* that would get a (left-wing) radical's heart racing with excitement. In fact, those with such political leanings have often taken issue with the clearly positive terms in which Hart described the move from the pre-legal to the legal society and his rather Hobbesian fear of the looming disorder in the absence of political authority.<sup>57</sup>

In support of his contention that Hart was a political radical, Leiter claims that '[n]o public intellectual did more to bring about the decriminalization of homosexuality in Britain than Hart'.<sup>58</sup> Even if this were true, this has little to do with do with a general sentiment of distrust of political authority, and it is not clear how it is connected to Hart's legal positivism. But it is not true. Hart's natural inclinations kept him away from the limelight, and he rarely contributed to political debates of his day. Almost the only exception to this was his public support for the decriminalisation of homosexuality in Britain. Even here, his contributions to the debate were tiny and by historical measures insignificant. Hart's contribution consisted of a single radio recording for the BBC (later republished as a short essay in the BBC's magazine, *The Listener*), and one set of lectures, only partly dedicated

52 See Hart, *The Concept of Law*, 240.

53 Gardner, *Law as a Leap of Faith*, 24; Marmor, *The Philosophy of Law*, 109-110.

54 See Leiter, *Naturalizing Jurisprudence*, 164, quoting Gardner. At the same time, Leiter challenged scholars who argued that legal positivism is a 'politically sterile position'. Leiter, 'The Radicalism of Legal Positivism': 165. The only way I can see that these two views can be consistent is considered in Section 4.1 below.

55 See Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004).

56 See Tony Honoré, 'Herbert Lionel Adolphus Hart 1907-1992', *Proceedings of the British Academy* 84 (1994): 299. As Honoré puts it, Hart was a 'democratic socialist with liberal leanings, not a Marxist'.

57 See Hart, *The Concept of Law*, 94-97. For critical scholars' objections, see Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 202-203; Brendan Edgeworth, 'H L A Hart, Legal Positivism and Post-War British Labourism', *University of Western Australia Law Review* 19 (1989): 286-287.

58 Leiter, 'The Radicalism of Legal Positivism': 168.

Dan Priel

to this topic, delivered to a university audience in the United States and later published as a slim book by an academic press.<sup>59</sup> This hardly amounts to a major contribution that could do much to sway public opinion. No wonder that most historical accounts of law reform relating to homosexuality in twentieth-century Britain do not mention Hart at all.<sup>60</sup>

In addition to the paucity of Hart's interventions, it is also important to note their timing. This is relevant not just for the historical question of their impact but also for assessing his alleged political radicalism. Hart's first contribution to the debate, in 1959, appeared two years after the publication of the government report, known as the Wolfenden Report, that called for the decriminalisation of homosexual sex among consenting adults.<sup>61</sup> It is true that it took another decade for these recommendations to become law,<sup>62</sup> but by the time Hart publicly expressed his opinion on the matter his views were fairly mainstream. For example, in 1958, a year before Hart made his recording for the BBC, *The Times* published a letter in support of the recommendations in the Wolfenden Report signed by 33 public figures. The signatories included a former prime minister (Clement Attlee), several Oxbridge philosophers (A.J. Ayer, Isaiah Berlin, Bertrand Russell, John Wisdom), as well as other well-known academics and public intellectuals (Stephen Spender, A.J.P. Taylor, Barbara Wootton).<sup>63</sup> Hart was not among the signatories,<sup>64</sup> but as this letter shows, by the time he made his modest contributions to the debate, the views he expressed were widely held in his milieu. In fact, by then Hart's views were not even out of the step with the general population: a poll conducted shortly after the publication of the Wolfenden Report found that 38% of the population were in favour of its recommendations with respect to the decriminalisation of gay sex,

59 See H.L.A. Hart, 'Immorality and Treason', *The Listener* 62 (1959): 162, reprinted in *The Philosophy of Law*, ed. R.M. Dworkin (Oxford: Oxford University Press, 1977), 83. Hart's Harry Camp Lectures, delivered at Stanford University in 1961-1962, were published as H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963).

60 Lacey, *A Life of H.L.A. Hart*, 1-2, 221, claims the arguments in Hart's brief *Listener* essay 'became the cornerstone of a wide-ranging debate about the proper limits of state power'. But she provides no supporting evidence for the claim, and for reasons explained in the text, it seems unlikely. It is significant that most histories of the changing law and politics regarding homosexuality in Britain do not mention Hart at all. Hart is not mentioned in Stephen Jeffery-Poulter, *Peers, Queers, and Commons: The Struggle for Gay Law Reform from 1950 to the Present* (London: Routledge, 1991); Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, rev. ed. (London: Quartet, 1990); Patrick Higgins, *Heterosexual Dictatorship: Male Homosexuality in Postwar Britain* (London: Fourth Estate, 1996). Hart receives two cursory mentions in Antony Grey, *Quest for Justice: Towards Homosexual Emancipation* (London: Sinclair-Stevenson, 1992), 251, 274.

61 Home Office, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, Cmnd 247 (1957).

62 See Sexual Offences Act 1967 (E&W), section 1.

63 N.G. Annan et al., Letter to the Editor, 'Homosexual Acts: Call for Law Reform', *The Times*, 7 March 1958, 11.

64 Lacey notes that unlike some colleagues 'including Freddie Ayer', Hart did not publicly support the Homosexual Law Reform Campaign, which he regretted later in life. See Lacey, *A Life of H.L.A. Hart*, 221.



with 47% opposed.<sup>65</sup> Though still a minority view, speaking in support of a position defended by an official government report and held by about four in ten members of the British public (and by even higher percentages among British elites),<sup>66</sup> can hardly be the mark of a political radical.

### 3 The Unradical Idea of Legal Positivism

To summarise the argument so far: there is no clear evidence in support of the claim that the most prominent legal positivists were political radicals, and there is definitely no clear sense that they understood legal positivism to be a politically radical stance. On the contrary, many legal positivists have insisted that it was a politically neutral position, and some legal positivists were political conservatives. I spent some time establishing this point for a simple reason: Leiter made an empirical claim about how legal positivists understood their view, which he tried to support by citing evidence on the political attitudes of several legal positivists. The heart of the matter, however, lies with ideas, not personalities. Perhaps the more accurate way of understanding Leiter's claim is that while legal positivism is not in itself radical, it is *necessary* for radical political action. In that case, we could ignore the political views of legal positivists or their insistence that legal positivism is politically neutral and might still be able to show an important connection between legal positivism and political radicalism.

On occasion, this is what Leiter seems to argue. At one point, he says that legal positivism encourages 'clarity of thinking about law', an unromantic view of reality essential for radical political action. It does that, to quote again the concluding words of his essay, by 'lay[ing] the conceptual foundation for *any* radical critique of law in late capitalist societies'.<sup>67</sup> Thus on this view, even if legal positivists were not personally radical, they advanced (perhaps without fully realising it) a view necessary for radical politics.

The crucial question, then, is what precisely it is about legal positivism that could be seen as necessary for political radicalism. I will examine two possible understandings of this claim. The first is that legal positivism is an unvarnished truth about reality, which, in Leiter's words, provides the 'intellectual clarity about social reality [that] is indispensable for political action. One part of that social reality is law, and positivism remains the theory that supplies the requisite

65 See David Kynaston, *Modernity Britain: 1957-1962* (London: Bloomsbury, 2014), 71. A less rigorous poll found similar results across Britain, but also found that in the south of England, attitudes were roughly evenly divided. Most newspapers favoured decriminalisation. Kynaston, *Modernity Britain*, 70-71.

66 See Weeks, *Coming Out*, 168-71; Higgins, *Heterosexual Dictatorship*, 130. On the changing intellectual climate on the issue see Chris Waters, 'The Homosexual as a Social Being in Britain, 1945-1968', *Journal of British Studies* 51 (2012): 685.

67 Leiter, 'The Radicalism of Legal Positivism': 171 (emphasis added).

Dan Priel

clarity'.<sup>68</sup> The second argument is that though legal positivism may seem to be just a description of what the world is like, it encourages scepticism about political authority. This section and the next one deal with these two arguments, respectively.

Spelled out, the first argument appears to be this:

- (i) Clarity about reality is indispensable for political action.
- (ii) Legal positivism provides a clear and unvarnished (true) account of that reality.

Therefore, (iii) legal positivism is indispensable for political action.

This argument has the advantage that it seems to get around the apparent puzzle that legal positivism is both normatively inert and could be the basis for radical political action. Unfortunately, the argument itself is unsuccessful, because both its premises are suspect. With respect for the first, it is an unfortunate fact that people have often been mobilised to political action by delusional conspiracy theories. It is usually easier to get people to act by depicting a simplistic Manichean understanding reality, where unvarnished good is fighting irredeemable evil. By contrast, unromantic clarity about the complexity of reality and the difficulty of achieving change may lead one to despair and inaction. In short, truth is neither obviously necessary nor clearly sufficient for political action.

As for the other element in the argument, Leiter's view seems to be that the radicalism of legal positivism consists in highlighting some fundamental truths about law, which competing theories obscure. Without getting into the debate over whether legal positivism is true (and what exactly this means), that fact would make legal positivism no more politically radical than facts about economic inequality. It is true that a person living a complacent life may become radicalised and swayed into action upon learning the truth about economic inequality. But the *facts* themselves are not politically radical. Learning about the levels of economic inequality may move people to political action if they believe that such inequalities are unjust or immoral; they will leave them unmoved if accompanied by different views, for example about the natural inequality of humans, about how God prefers some people over others, how those who are poor deserve their situation because they are lazy, or a host of other familiar ideas long espoused by defenders of the economic status quo.<sup>69</sup> (Given what we know about confirmation bias, the latter seems more likely than the former.) If, as Leiter contends, legal positivism is a true account of what law is, then like other truths, it is not politically radical; it is simply a statement of what the world is like.

But perhaps, one might reply, truths about economic inequality extend beyond the scope of inequality and include also truths on how they came about. And knowing

68 Leiter, 'The Radicalism of Legal Positivism' (footnote omitted). This seems to be the mirror image of the view Leiter ascribes to Lon Fuller, namely that "positivism" had something to do with why judges in Nazi Germany did morally abhorrent things! Leiter, "The Radicalism of Legal Positivism": 165. Leiter criticises Fuller for this view; I think the opposite is no more compelling.

69 See Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Cambridge: Harvard University Press, 1991).

*these* truths is necessary for radical political action. One difficulty with this suggestion is that the causes of economic inequality are a contested matter, and that the evaluation of its causes may be influenced by political ideology. I am willing to ignore such complications here and assume for the sake of argument that such facts about inequality and its causes can be ascertained with certainty and that they are also necessary for (or more weakly, conducive to) radical action. For the analogy to work, i.e. for legal positivism to be similarly necessary for (conductive to) radical action, it must deliver the same kind of truths. But it is precisely the kind of truths that legal positivists disclaim. Legal positivists insist that it is not a claim about the development of law in one particular time or place, nor is it an account of the historical emergence of law, but a conceptual (classificatory, philosophical) claim about what law is, regardless of time, place, political system, or history.

It is difficult to see how this could be the basis for a radical critique of political authority, and not just because truths of this kind are not the kind that moves people to action. Understood as a conceptual claim, legal positivism is limited to identifying a *category*, not anything in the world. It is hard to see how such a truth will be conducive to radical action. Moreover, part of the normative neutrality of legal positivism is that its defenders argue that it says nothing about whether a society should be governed by law or something else, which implies that legal positivism has nothing to say on this question. In other words, even if we accept that legal positivism is true, in this guise it does not provide the *kind* of truths necessary for (radical) political action.

#### 4 Positivism and Distrust

In what may be just an elaboration of the previous argument, but which I will consider as a separate argument, Leiter has also contended that legal positivism is more than just a conceptual truth about what law is. Embedded in, or implied by, legal positivism is another truth, which leads to the politically radical conclusion: ‘Don’t trust authority!’<sup>70</sup> This idea, Leiter says, is the foundation of all radical political action.

Leiter never spells the precise argument leading to this conclusion. With the caveat that I am unsure what Leiter’s precise argument is, I present what seems to be its most plausible reconstruction:

- (1) The law is often presented as if (or, it is often believed that) what is legally required is also moral.
- (2) Such false beliefs encourage people to mindlessly submit to immoral or unjust laws.
- (3) Legal positivism provides a true account of law as a mere human creation, and as such as liable for moral failure.
- (4) In this way, legal positivism disabuses people of their false beliefs and contributes to a sceptical or questioning attitude toward political authority.

<sup>70</sup> Leiter, ‘The Radicalism of Legal Positivism’: 171.

Dan Priel

(5) A questioning attitude to political authority is necessary for radical political action.

(6) (From (3) to (5)): Legal positivism is necessary for (or, at least, conducive to) radical political action.

Much of this argument is empirical. For instance, it is an empirical, not a conceptual, claim that people tend to conflate the legal with the moral; it is likewise an empirical, not a conceptual, claim that legal positivism tends to disabuse people of such false ideas. This is something that, as a naturalist, Leiter must accept. But Leiter does not provide any empirical support for these claims. Is there any? I begin by presenting some challenging historical evidence. I then turn to a more theoretical discussion, which explains why natural lawyers, no less than legal positivists, can be sceptical of political authority.

#### 4.1 *History as Evidence*

From the safety of their armchair some legal philosophers have advanced the claim that natural law theory is a ‘quietist’ view, because it creates a certain mental association between what is legal and what is moral, thereby dampening potential criticism of the law.<sup>71</sup> Others have made the exact opposite claim, arguing that natural law’s close association of law with morality encourages people to constantly evaluate laws against moral standards. On this view, legal positivism, because it dissociates law from morality, encourages an unquestioning acceptance of the law just because it is the law. For them, it is natural law that encourages a more critical stance toward the law, and it is legal positivism that encourages quiet acceptance.<sup>72</sup>

As stated, neither claim is sufficiently specified to be testable, and in the absence of evidence, it is difficult to know which side has the better argument (some questions: Is belief in natural law the same as belief in objective morality? Does such a view require the further belief that this objective morality is a kind of law?). In addition, trying to reformulate the claims as testable hypotheses shows that the two hypotheses mentioned above hardly cover all possibilities. For example, it is possible that one claim may be true in one set of political or social circumstances while another will be true in others. It is also possible that the effect of ideas will be different for different people: for those with fixed and stable moral views, the association of law with morality may lead to greater questioning of the law. For those with more fluid or uncertain moral views, the same juxtaposition may lead to a tendency to see the legal as moral. Yet another possibility is that egalitarians and

71 See D. Neil MacCormick, ‘A Moralistic Case for an Amoral Law’, *Valparaiso University Law Review* 20 (1985): 1; Liam Murphy, ‘The Political Question of the Concept of Law’, in *Hart’s Postscript: Essays on the Postscript to The Concept of Law*, ed. Jules Coleman (Oxford: Oxford University Press, 2001), 371. I should add that Murphy now takes a view closer to the one advanced here. See Liam Murphy, ‘Better to See Law This Way’, *New York University Law Review* 83 (2008): 1088.

72 See A.G. Chloros, ‘What Is Natural Law?’, *Modern Law Review* 21 (1958): 611 (‘natural law has remained alive because it embodies the idea of improvement in legal institutions; indeed it is difficult to think critically of positive law without reference to ideal law’); see Friedrich Kessler, ‘Natural Law, Justice and Democracy – Some Reflections on Three Types of Thinking about Law and Justice’, *Tulane Law Review* 19 (1944): 53.

those who value hierarchy will react differently to the association of human law with some higher authority. It is also possible that these debates are so far removed from most people's lives that they have no practical impact whatsoever. What should be clear is that without supporting evidence there is no basis for accepting the claim that either legal positivism or natural law theory is quietist.

In the absence of empirical studies on these questions, we can turn to history, because history is, among other things, a repository of empirical evidence. This kind of evidence has obvious limitations, but whatever is available does not seem to favour Leiter's claim.

Recall that Leiter has argued that the clarity provided by legal positivism is 'indispensable' for radical political action. Against this specific claim, it is notable that there is a long history of associations between natural law (theory) and political radicalism. Natural law or natural rights were invoked by the English levellers,<sup>73</sup> by some American revolutionaries,<sup>74</sup> as well as the French.<sup>75</sup> Natural law was also relied on by slavery abolitionists,<sup>76</sup> by those who railed against the subjugation of women,<sup>77</sup> in the fight for the abolition of Jim Crow in the United States,<sup>78</sup> in challenges to apartheid in South Africa,<sup>79</sup> and by some proponents of liberation theology in Latin America.<sup>80</sup>

As is always the case when ideas are used in political debates or legal argumentation, references to natural law and natural rights found in them are not typically as rigorous as one finds them in philosophical discussion. Ideas are used and sometimes misused, they may be presented imprecisely, they are mixed and matched. Here, as elsewhere, it is not easy to gauge their causal impact on events

73 See Richard A. Gleissner, 'The Levellers and Natural Law: The Putney Debates of 1647', *Journal of British Studies* 21 (1980): 74.

74 See Dan Edelstein, *On the Spirit of Rights* (Chicago: University of Chicago Press, 2018), ch. 6; Staughton Lynd, *Intellectual Origins of American Radicalism* (New York: Pantheon, 1968), 25-37. The significance and meaning of invocations of natural law around the time of the American revolution remains a contested question among historians. It is notable that Lynd, whose account gave natural law ideas a prominent role, explicitly noted its contemporary significance: 'I am less interested in eighteenth-century radicalism than in twentieth-century radicalism ... The characteristic concepts of the existential radicalism of today have a long and honorable history'. Lynd, *Intellectual Origins of American Radicalism*, vii.

75 See Edelstein, *On the Spirit of Rights*, ch. 7.

76 See William Hosmer, *The Higher Law in Its Relation to Civil Government: With Particular Reference to Slavery and the Fugitive Slave Law* (Auburn: Derby & Miller, 1852); *Somerset v. Stewart*, (1772) 98 English Reports 499, 510 (K.B.). For commentary see Justin Buckley Dyer, *Natural Law and the Antislavery Constitutional Tradition* (New York: Cambridge University Press, 2012); Edelstein, *On the Spirit of Rights*, 83, 131-138.

77 See Rosemarie Zagari, 'The Rights of Man and Woman in Post-Revolutionary America', *William and Mary Quarterly* (3rd series) 55 (1998): 203; Edelstein, *On the Spirit of Rights*, 84.

78 See Martin Luther King, Jr., 'Letter from the Birmingham Jail', in *Why We Can't Wait* (New York: New American Library, 1963), 82-83.

79 See John Dugard, *Human Rights in the South African Legal Order* (Princeton: Princeton University Press, 1978), 393-402.

80 See Thomas L. Schubeck, 'The Reconstruction of Natural Law Reasoning: Liberation Theology as a Case Study', *Journal of Religious Ethics* 20 (1992): 149.

Dan Priel

in the world, but there can be no denying that people have made such arguments. It is notable that it is far more difficult to find radical social movements that marched under the banner of legal positivism.<sup>81</sup> Why is that? Walter Lippman suggested an answer: 'If there is no higher law, then there is no ground on which anyone can challenge the power of the strong to exploit the weak.'<sup>82</sup> While this formulation is probably too strong, it shows why many found the combination of natural law and political radicalism attractive. Notice that such a view may be true even if such a higher law does not exist. Perhaps it is a delusion that fosters radical action.

The perception that natural law may plant dangerous ideas in people's minds was also recognised by some authoritarian regimes. In nineteenth-century Russia, natural law was seen as a potential threat to the authority of the positive law of the state. One professor who taught a course on natural law 'with an emphasis on the liberty and equality of mankind' was removed from his teaching position. Eventually, the tsar issued a decree prohibiting the teaching of natural law altogether.<sup>83</sup> The fear of the radical potential of natural law was not limited to nineteenth-century Russia. Early in the twentieth century an anti-union American judge attributed to unions the dangerous idea that there exists law that has greater authority than positive law:

It would not be claimed for a moment that there has ever existed any authority in the defendant to ... issue its edicts against either the complainant or the non-union molders. The assumed right to thus dictate to others may be referred to an unfounded notion on the part of the part of this molders' union that it and its members are the exponents of some higher law than that which may be administered by courts.<sup>84</sup>

To be sure, natural law has also been invoked by defenders of other causes as well: slavery, the subordination of women, and laissez-faire economic policies have all been described as part of the natural order of the world. These days natural law is

81 A possible exception would be the Philosophic Radicals, although as discussed above, there are serious difficulties with this association. It has been suggested to me that the modern idea of the rule of law may be another example. Granting (controversially) that some aspect of the rule of law (specifically that all, including the sovereign, are subject to law) is politically radical, the connection to legal positivism is not obvious. Central to the thinking of Austin (and Hobbes) is the idea that a sovereign is someone who commands but is not subject to commands. Of course, other legal positivists criticised this idea, but this shows that the historical connection between the legal positivism and the rule of law is not strong.

82 Walter Lippmann, *The Good Society* (Boston: Little, Brown, 1937), 334. Lippmann acknowledged that Bentham's reformist attitude coincided with his denunciation of natural law. His response was that Bentham made his 'own impulses the highest authority'. Lippmann, *The Good Society*, 337; see Kessler, 'Natural Law, Justice and Democracy', 54. But this claim – in a way, an attempt show that Bentham was a kind of natural lawyer after all – is the mirror image of Leiter's, seeking to show that all radicalism requires some belief in natural law. This view is no more convincing than Leiter's.

83 See Richard S. Wortman, *The Development of a Russian Legal Consciousness* (Chicago: University of Chicago Press, 1976), 41, 45.

84 *Ohio Steel Co v. Local 218, Iron Molders' Union*, 110 Federal Reporter 698, 699 (C.C.N.D. Ohio, 1901).



far more frequently associated with political conservatism.<sup>85</sup> John Ladd explained this apparent oddity, noting that '[l]egal positivists are quick to point out that the practical effect of identifying law with a part of morals is either to nullify existing law in favour of an ideal law or to elevate all existing law to the status of what is moral'. Ladd added that the effect of this is turning the proponent of natural law into 'either a radical revolutionary or an unregenerate reactionary'.<sup>86</sup> These look like very different possibilities but they have something in common. They show that natural law has often been invoked in support of political causes that are outside the political mainstream from both the radical left and the radical right. Despite their differences, the examples seem to have one idea in common: Do not trust the dictates of authority.

#### 4.2 *Legal Positivism and Questioning Authority*

The extent to which we can draw general conclusions from specific historical events is one of the perennial questions of historiography. But even before we attempt at generalisation, anyone who thinks that legal positivism is indispensable for radical political action owes us an explanation on how to reconcile this claim with the fact that so many political radicals were drawn not to legal positivism but to natural law theory.

Nevertheless, I do not wish to rest my conclusions solely on these examples, so I turn now to the following question: is there a theoretical argument tying legal positivism to distrusting authority? I will consider two possibilities. One argument is that legal positivism teaches us that law is a human creation, and like other human creations, it can, and often does, go wrong.<sup>87</sup> Formulated somewhat differently, the argument seems to be this: law has an aura of authority, what Donald Regan called 'law's moral halo',<sup>88</sup> and legal positivism teaches us that halos are not real. Here, then, there seems to be an argument from legal positivism to a cautious, or even sceptical, attitude toward law. Though Leiter does not quite say so, I think one can reformulate his view as the claim that by insisting on a strong association between law and (non-human) justice or morality, natural law encourages the view that sees law as more than merely human, and as such, as meriting undeserved respect. This, in turn, leads to less questioning of legal and political authority. By insisting that law is nothing more than a human creation, legal positivism lays the groundwork for scepticism about law's edicts.

It is doubtful that natural lawyers have had difficulty realising human fallibility (for what it is worth, to the extent that natural law theory makes it into public debate

85 Although not uniformly. See Gary Chartier, *Economic Justice and Natural Law* (Cambridge: Cambridge University Press, 2009); Gary Chartier, *Flourishing Lives: Exploring Natural Law Liberalism* (Cambridge: Cambridge University Press, 2019).

86 John Ladd, 'Translator's Introduction' to Immanuel Kant, *Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, ed. and trans. John Ladd, 2nd ed. (Indianapolis: Hackett, 1999), xxxix.

87 See Leiter, 'The Radicalism of Legal Positivism': 166; see also Gardner, *Law as a Leap of Faith*, 52-53, although Gardner does not draw from this view the conclusion that legal positivism is politically radical.

88 See Donald H. Regan, 'Law's Halo', *Social Philosophy and Policy* 4:1 (1986): 15.

Dan Priel

these days, it is typically invoked in support of arguments about the perceived failures of human law). The idea of natural law itself can be seen as putting people on alert, as if saying, ‘the fact that something has been promulgated according to the right procedures within a particular legal system does not warrant thinking of it as law (or as law in the fullest sense), unless you are convinced that it passed an additional normative hurdle’. It clearly does not say that the fact that a law was properly promulgated according to the *legal* (human) standards of a particular legal system warrants an inference that it also passed whatever additional tests there may be for (full) legality. In other words, natural law can be seen as sending the message that looks can be deceiving: ‘Something that has the external appearance of law (because it was duly passed in Parliament, was printed in an official government publication), may turn out, when you examine it closely, to be a sham. You should always be alert to this possibility, because sham law looks like the real thing, but it is illegitimate.’

One *may* derive politically quietist conclusions from natural law theory if one holds the view that, for example, in a democratic political community, the judgment of the majority is good evidence (or even conclusive proof) for what is right.<sup>89</sup> Alternatively, a person might reach quietist conclusions if he or she believes that the edicts of the person who rules by divine right are evidence (or conclusive proof) for what is right. While some natural lawyers may have held such views, I do not see why a natural lawyer must embrace them, and the historical examples surveyed above show that many did not.

It is also true that authority does seem to come with a halo, but as shown by Stanley Milgram’s famous experimental studies on authority, unquestioning obedience to authority need not assume that the authority is anything but human, may come into existence within a few minutes, and it can be ‘generated’ with no hint that it derives from morality or higher law. But Milgram’s studies show more than that. In one of the less known permutations of his study, Milgram had two authorities in conflict, an experimental setting that yielded interesting results. Just as in the well-known experiment, subjects were told that they were participating in a study examining the effect of punishment on learning. They were then instructed to inflict what they thought were increasingly stronger electric shocks on the ‘learner’ (who was in fact an actor) in response to his mistakes. However, in this experiment, subjects were met by two experimenters, both presenting themselves as in charge of the learning study. At one point, the two experimenters began openly disagreeing with each other, with one of them urging an end to the experiment. The results were strikingly different from those of the original study. Of the twenty subjects tested in this setting, eighteen stopped precisely when the conflict between the

89 The stronger view seems to have been Rousseau’s. See Bernard Grofman and Scott L. Feld, ‘Rousseau’s General Will: A Condorcetian Perspective’, *American Political Science Review* 82 (1988): 567; B.M. Barry, ‘The Public Interest’, *Proceedings of the Aristotelian Society Supplement* 38 (1964): 12–13.

authorities erupted, and one stopped a single step later.<sup>90</sup> (One subject stopped before the disagreement.)

To be clear, it is not obvious that we can infer anything from a case of two conflicting human authorities to a case of a possible conflict between a human authority and a vague notion of natural law. I am therefore not claiming that this study proves that natural law theory instils a more critical attitude toward (legal) authorities. Nevertheless, this experiment suggests a possible mechanism by which natural law theory could lead to a sceptical attitude toward legal authority: simply positing another authority in addition to the authority of state law-making institutions may induce a more questioning attitude toward the latter. If true, this may explain why so many political radicals were attracted to natural law theory. (Note that by saying they were ‘attracted to’ I am not making the stronger, causal claim that it was a belief in natural law theory that drove them to their political radicalism. The causation may have worked in the opposite direction.)

Beyond this empirical evidence, I wish to make a more theoretical point. It is valuable to recognise the possibility of moral error in thinking about the relationship between legal theory and radicalism, but it calls for a more complete analysis. It is important to remember that it is not just lawmakers that can make mistakes, individuals can make them too. It is therefore the *relative likelihood* of moral error and the *likely implications* of moral error that matters for deciding how much to trust authority.

This point is pertinent to any discussion of Raz’s account of authority, which is Leiter’s most concrete attempt to show the connection between legal positivism and political radicalism. This looks like a promising path to such an argument, because Raz used his ideas of authority both as part of his legal philosophy (in his defence of ‘exclusive’ legal positivism) and as a foundation for his political philosophy (in his defence of the political liberalism).<sup>91</sup>

As the main contours of Raz’s account must be familiar to anyone reading this article, I will present them only in brief outline. The analytical core of Raz’s account is that a practical authority issues demands that replace the reasons that a person subject to the authority would act on but for the authority. The central normative point of Raz’s account – his ‘normal justification thesis’ – is that the standard way for justifying practical authority (although not necessarily the only one) is by showing that one complies better with reason by following the authority’s edicts than by acting on one’s own.<sup>92</sup> Raz further elaborated two concrete ways this may be the case: one is that the edicts of authority reflect its superior expertise. A law

90 See Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper & Row, 1974), 107.

91 The former is found in Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), ch. 3; the connection between Raz’s views on authority and his legal positivism is found in its most detailed form in *Ethics in the Public Domain*, ch. 10.

92 See Raz, *The Morality of Freedom*, ch. 3.

Dan Priel

that satisfies this condition is like a 'knowledgeable friend'.<sup>93</sup> Raz's other suggestion is that law may satisfy the conditions of the normal justification thesis when it provides a solution to a coordination problem. Determining which side of the road to drive on is not a matter of expertise, but the need to coordinate action may still provide reason to follow an authority's edict for everyone to drive on (say) the right.

Leiter offers a radical reading of Raz's view: 'Legal systems can sometimes meet this standard, for example, when they solve coordination problems that afflict any complex society ... But ... 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.'<sup>94</sup> It is true that Raz's view leaves open the possibility that political or legal authority is rarely, or never, justified. This conclusion, however, is not required by Raz's analysis and is quite clearly not Raz's own view.

When Raz first presented his ideas of authority, he explicitly presented them as a response to Robert Paul Wolff's defence of political anarchism. One of his stated aims was thus to show the *possibility* of legitimate political authority.<sup>95</sup> Of course, showing that legitimate political authority is possible is perfectly consistent with the view that only rarely do states (or legal systems) satisfy the conditions necessary for legitimate authority. But Raz's discussion of the justification of authority was more than a response to the political anarchist; it was a preliminary to a defence of the liberal, active welfare state as a guarantor of individual autonomy.<sup>96</sup> Leiter's reading that concludes that political authority is rarely justified focuses only on the coordination justification of authority and ignores Raz's alternative justification of practical authority in terms of expertise.

Central to this aspect of Raz's view is the epistemic asymmetry between the lawmakers and those they purport to govern. Raz gives the example of 'the world's greatest living expert on pharmaceuticals',<sup>97</sup> as someone that the law has no authority over because this individual has superior knowledge than the law when it comes to pharmacology. But such experts are extremely rare, and even the world's greatest expert on pharmaceuticals is no expert on workplace safety. Especially in this branch of Raz's argument, the question of whether one should follow authority is thus comparative: authority is justified so long as one does *better* than acting on one's judgment.

Rather than calling for radical distrust of authority, Raz's view could be seen as making it too easy to satisfy its requirements. The fact that someone else knows better than me how I should live may be a good reason for me to seek (and heed)

93 Raz, *Ethics in the Public Domain*, 348.

94 Leiter, 'The Radicalism of Legal Positivism', 169.

95 Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009), 25-26, discussing Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970).

96 See Raz, *The Morality of Freedom*.

97 Raz, *Ethics in the Public Domain*, 348.

their advice; it does not show they have legitimate authority over me. Since most people are not the world's greatest living expert on anything (despite the different impression one may get from social media), in the conditions of living in complex modern society, Raz's view could be read as legitimating almost all political authorities. Raz himself mentioned laws concerned with workplace safety, zoning, protection of the environment, preservation of scarce resources, taxation for financing public projects, and welfare provision as examples of laws justified based on expertise.<sup>98</sup> However imperfect these laws may be, one will often *better* comply with reason by following them than by acting on one's own. Raz's 'perfectionist' version of liberalism – his view that the state should not be neutral between conceptions of the good – shows that *he* did not draw radical conclusions from his own views on authority. He believed in both the potential and the obligation of the state to help people comply with reason. This does not sound like a politically radical view.<sup>99</sup>

Leiter may argue that while Raz's ideas of authority provide the basis for a sceptical attitude about authority, he was wrong to think that political authorities can be so easily justified. It is, of course, possible that Raz's views have radical implications he did not fully realise, or perhaps even rejected. To say this, however, is to concede that Raz himself was not a political radical and did not understand his legal positivism as somehow related to political radicalism. More significantly, beyond the question of Raz's intellectual biography, such a response concedes that Raz's views lead to scepticism about political authority only when accompanied by ideas that lie outside his account of authority and are even further removed from his legal positivism.

The extent to which we are likely to better comply with reason by following the edicts of a political authority because of its superior knowledge depends on many factors. Some of them are purely empirical: put simply, some governments are better than others. Beyond this, in the absence of clear evidence, the answer will depend on one's political outlook. For instance, part of libertarian political theorists' sceptical stance toward political authorities stems from their belief that individuals almost always know better than any authority what is right for them to do. A recent manifestation of this debate pertains to the extent to which we believe laws can serve as a means for overcoming individual folly and collective action problems. Based on psychological research on cognitive biases, many have argued for regulation as a possible cure. The sceptics' response was that there is no reason to think that the regulators, and thus the regulations they will promulgate, will be free from those same biases. Regulators are human too.

98 Raz, *Ethics in the Public Domain*, 348.

99 See Raz, *The Morality of Freedom*, ch. 5-6. Incidentally, Green criticised Raz for the 'structural conservatism' of his account and for his opposition to radical reform. See Leslie Green, 'Un-American Liberalism: Raz's "Morality of Freedom"', *University of Toronto Law Journal* 38 (1988): 330-331. I should note that recently Leiter has distanced himself from Raz's account of authority, considering it exceedingly moralistic. See Brian Leiter, 'Legal Positivism as a Realist Theory of Law', in *The Cambridge Companion to Legal Positivism*, ed. Torben Spaak and Patricia Mindus (Cambridge: Cambridge University Press, 2021), 79, 98.

Dan Priel

This is not the place to consider the different sides of this debate. I mention it only to point out that, as standardly understood, neither legal positivism nor natural law theory says much about these questions, which is why it is not easy to draw an unambiguous connection between either of them and a radical or sceptical stance toward political authority. Or, to make the same point differently, if one argues that this view still provides the foundation for a sceptical attitude about political authority, then, by the same token, it also provides the foundation for authoritarianism. The anti-authoritarian conclusion depends on coupling Raz's view of authority with scepticism about government's (or law's) ability to serve as a 'knowledgeable friend'. By contrast, when Raz's view is coupled with the belief that governments will typically do better than the individual, it can lead to a justification of many laws. After all, even an authoritarian regime may provide adequate food safety regulations.

## 5 How Legal Theory Is Political: A Sketch of an Alternative

When judged empirically, that is, against the views of those standardly considered legal positivists, and especially those who called themselves legal positivists, the suggestion that legal positivism is, and has always been, a politically radical view, is false. Some legal positivists were on the left, others on the right. Like the rest of society, it seems most hovered around the political centre, with the radicals among them few and far between. I have also shown that legal positivism is not necessary for political radicalism. In fact, as far as I can tell, more politically radical movements seem to have been associated with natural law theory. I have further argued that there is no compelling argument leading to the conclusion that all radical political action presupposes legal positivism.

This finding is what scientists call a 'negative result', and there is a well-known bias against them: to deny a connection between legal positivism and political radicalism is less interesting than showing one. Does it put us back with the standard view that sees legal positivism, and perhaps legal philosophy more generally, as descriptive and morally neutral? This view is intuitively appealing: law exists in places with very different political orders. Therefore, to merely describe law – which many think is what general jurisprudence purports to do – must give us an account that captures what law is independently of politics.

Despite the intuitive appeal of this idea, I think it is mistaken. Indeed, my belief that legal philosophy is not politically neutral is one reason to examine carefully Leiter's thesis. However, rejecting the association between legal positivism and political radicalism does not mean we must accept legal positivists' claims to their account's political neutrality. My suggestion is that this question should be approached differently. In this article, I will only offer a brief sketch of a suggestion that deserves to be explored more fully elsewhere. My starting point is one that legal positivism (and, frankly, everyone else) should welcome. Law is a human creation, shaped in the image of those who make it and use it. No one doubts that people living in different social and political environments produced laws with



different *contents*. Yet many legal philosophers, including many legal positivist, resist the idea that different social and political environments produced laws with different *concepts*. But the same considerations that support the former should also suggest there may be something to the latter.

Here is how: instead of thinking of different theories of law as competing accounts of legal validity, I suggest we think of competing theories of law as competing theories of law's authority. Authority is a political concept: different views of authority – what (if anything) makes it justified and under what conditions – are not politically neutral. Therefore, legal theories that presuppose competing ideas of authority are not going to be politically neutral either. To complete the argument, all that needs to be shown is that these differences are not just theoretical possibilities but that actual legal systems reflect these competing political ideas of authority. Such conclusions may not map neatly onto left-wing and right-wing politics, moderate or radical, but they suggest that the disagreements at the heart of jurisprudence are not purely conceptual. Since this is a large topic that deserves its own article, I offer some illustration of the kind of argument I have in mind.

I do not think it is difficult to show that Hobbes's views on law presupposes his normative views on authority. I mentioned earlier that Hart saw Bentham, not Hobbes, as the founder of legal positivism, precisely because he was the first to offer a 'morally neutral' account of law. But even Bentham disappointed Hart, because on occasion his 'utilitarianism gets in the way of his analytical vision'.<sup>100</sup> On this view, it was left for later legal positivists (like Austin and especially Hart) to continue the purification of analytical legal positivism from any political remnant. Thus we get a narrative of intellectual progress that starts with Hobbes and culminates in the purportedly morally neutral works of Hart, Kelsen, and Raz.

I think this was a turn for the worse. Legal positivism understood as a conceptual claim is a view that rests on assuming without warrant what things in the world count as law, which is part of what non-positivists dispute resulting in an account that assumes what it seeks to prove. But even if there is a way of salvaging legal positivism from this charge of circularity, here I want to suggest that a more productive way of thinking about legal positivism and its competitors is by seeing it as alternative views of what *in principle* can make law authoritative. Hobbes argued that law's authority derives from the fact that it was a sovereign's public act of will. He contrasted his view with that of the Aristotelian 'Schoolmen' who equated law's authority with natural reason and also with that of English common lawyers like Matthew Hale and Edward Coke who tied law's authority to the refined customs of artificial reason as developed by lawyers.

Hobbes's critique of these views was clearly political. Hobbes famously feared the chaos that would befall humanity in the absence of authority; he was almost as concerned with the risks of competing authorities. In his view, in different ways, the alternatives he challenged implied a divided authority: the former by grounding

100 Hart, *Essays on Bentham*, 162.

Dan Priel

authority in reason, whose demands were available for everyone; the latter, by holding that the authority of the common law is independent of the sovereign's, thereby implying that judges' power to shape law was separate from that of the sovereign.<sup>101</sup> Especially with respect to natural law theory, Hobbes's opposition is the one we encountered multiple times in this article, the fear that natural law theory encourages the questioning of authority.

Contemporary legal positivists would undoubtedly protest, correctly, that they are in no way committed to Hobbes's political (authoritarian) views; and many of them have in fact defended the possibility (and perhaps desirability) of institutions like the subjection of the sovereign to the rule of law, separation of powers, judicial review of legislation. The point remains that their qualifications still maintain the view that law's authority is grounded in the idea of law as an act of a sovereign: Hart stated that for 'the overwhelming majority of cases the formula "Whatever the Queen in Parliament enacts is law" is an adequate expression' for the rule of recognition of the UK.<sup>102</sup> With all the qualifications, Hart's picture is still one of law imposed by a sovereign on those subject to it; this is not a politically neutral vision of law.

Once we rethink these basic jurisprudential questions in these terms, we can see the old jurisprudential chestnut whether unjust law is law, in a new light. If law's authority derives from human will, then – given human fallibility – it is obvious that laws may be immoral while still retaining their authoritative power. But if we think of law's authority as derived from its correspondence to the demands of reason, we can see how laws that are deeply in conflict with those demands will be seen, at a minimum, as defective *laws*, and perhaps even as mere simulacra of laws.

These differences do not map neatly onto left-wing or right-wing politics, but they are not purely conceptual. What I mean by this is that competing political theories (about the basis of legitimate government) are not entirely neutral on what law is and imply different ideas (concepts, conceptions) of law. I believe a more complete discussion of these issues could go beyond this brief sketch and draw more concrete

101 Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 187, 227, 460-461.

102 Hart, *The Concept of Law*, 148. Hart also expresses Hobbesian sentiments about the chaos that would ensue the absence of political authority. See Hart, *The Concept of Law*, 197, 219. These remarks received surprisingly little attention.

connections between different conceptions of law and more familiar political positions, but this is not an issue I can take up here.<sup>103</sup>

103 Interestingly, Green, one of the contemporary defenders of the neutralist orthodoxy, presented a very different view in Leslie Green, 'The Political Content of Legal Theory', *Philosophy of the Social Sciences* 17 (1987): 1. Ehrenberg reports that Green stated in a seminar that he no longer accepts the views he had expressed in that essay. See Kenneth M. Ehrenberg, 'Law Is Not (Best Considered) an Essentially Contested Concept', *International Journal of Law in Context* 7 (2011): 211 note 4. As far as I know, Green did not explain where his former self made a mistake. Though I am not in full agreement with these essays, those interested in the ideas adumbrated here may profit from David Dyzenhaus, 'The Genealogy of Legal Positivism', *Oxford Journal of Legal Studies* 24 (2004): 39; Martin Stone, 'Legal Positivism as an Idea about Morality', *University of Toronto Law Journal* 61 (2011): 313.