Legal Positivism: An Analysis

Jonathan Brett Chambers
Utah State University

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LEGAL POSITIVISM

by

Jonathan Brett Chambers

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Approved:

Thesis/Project Advisor
Dr. Charlie Huenemann

Departmental Honors Advisor
Dr. Charlie Huenemann

Director of Honors Program
Dr. Christie Fox

UTAH STATE UNIVERSITY
Logan, UT

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Introduction

Having taken some constitution and government courses during my undergraduate studies, I was comfortable with my understanding of justice and morality. An independent research seminar into the philosophy of law with Dr. Huenemann changed that. Taking Brian Leiter’s book *Naturalizing Jurisprudence* as our guide, we dived into the vast question of “what is the law?” This seemingly simple question has shaped western society in too many ways to account.

For instance, Legal Realists – one group that believes all rights “are the creations of government and the legal rules it lays down”¹ – dramatically changed labor laws in the early 20th century by changing the long-held belief that property rights were static. If their philosophy hadn’t become popular, would courts have continued to side with factory owners in post-industrial America? Consequently, if resulting labor laws such as the Norris-LaGuardia Act of 1932 hadn’t been enacted, what would our society look like today?

I began to understand that justice, morality, and the law are intricately tied, and how we understand any one of them will affect the others. More, I realized that legal philosophy is in constant motion, adapting to vogue ideas. Society, built upon the principle of law, likewise sways in harmony with legal philosophy.

The following is one perspective of what the law is. Though no theory is completely dominant today, Legal Positivism as formulated by H.L.A. Hart, has arguably had the greatest impact on legal philosophy since the 20th century.

Organization

This paper will explore Legal Positivism (hereafter referred to as Positivism), a theory that argues for the interpretation of law through social rules. Its implications concerning

¹ Altman, *Arguing About Law* pg. 97
morality and authority will be discussed, as will arguments of its detractors. An analysis of John Austin’s Command Theory, accredited as the first Positivist theory, will be given, as will contemporary forms of Positivism. Within contemporary Positivism there exist two opposing schools, each answering the role of morality within law in its own way. Both versions will be presented, with criticisms of both also included.

Following the outline of Positivism, the theory will be contrasted to Kant’s ideal of the law. Comparisons and differences in the two approaches will receive attention, leading to further understanding of Positivism. Lastly, Positivist trends within mainstream Mormonism will be discussed, of which it is hoped, will shed light on the theory’s practical side. The two concluding sections each include a brief explanation, so as to clarify their organization and for ease of reading.

The latter two essays were originally presented to research conferences at Utah State University (2010 LPSC Student Research Symposium) and the University of Utah (2010 Intermountain West Student Philosophy Conference). For inclusion into this paper, they’ve been edited and updated.
Jonathan Chambers, raised in Cache Valley, Utah, is a 2005 graduate of Mountain Crest High School. As a Presidential Scholar, Lillywhite recipient, and Research Fellow, he had the opportunity to study under various professors in the Philosophy department – the highlight of his undergraduate career. Former research projects were presented at the 2010 Intermountain West Student Philosophy Conference, University of Utah; 2010 HASS Colloquium, Utah State University; 2010 Research Day, Utah State University; and 2009 HASS Colloquium, Utah State University. While earning his B.A. in Philosophy and minor in Political Science, he spent the summer of 2010 living in La Rioja, Spain, learning Spanish.

He will graduate in Spring 2011, following which he will move to Ann Arbor, Michigan. There he will pursue his Juris Doctorate and find a career in public interest law.
Legal Positivism

What is Legal Positivism?

Principally arising as a refutation of Natural Law theory, Positivism is a theory of law that is based on social facts and not on moral claims. Positivism holds that law is based on social facts that have been posited, or assertions, from authoritative figures (heads of state, judges, legislators, etc), that qualify as law. These social facts, as will be investigated later in the Pedigree Thesis, are founded on social establishment, and not on morality.

While morality and law may share similarities, and are used synonymously at times, they are separate fields. “The positivist thesis does not say that law’s merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems exist.”

An example of the similarity between law and morality in legal systems today is their joint condemnation of murder. While Natural Law theory, the legal embodiment of morality, would denounce murder on moral grounds and incidentally on legal grounds, Positivism would condemn murder on legal grounds, with little or no regard for moral justification. Furthermore, while one version of Positivism-Inclusionary Positivism or soft positivism, might argue that a moral value has become a social fact and thus become legally valid, Exclusionary Positivism or hard positivism, would deny the influence of morality in the formation of law (except through abstract means, further detailed on pages 4-6). These two versions will later be discussed in greater length.

1 Stanford Encyclopedia – Legal Positivism
In Positivism’s view, the laws of Nazi Germany, some being morally unjust, were legally valid. Examples of this include the laws that deprived Jews of property and life. These laws were morally unfair; nevertheless, according to Positivism, were legally-legitimate.

In short, Positivism has two distinguishing characteristics:

1. Morality and law share no necessary connection. Though law shares certain features with morality, it does not depend upon morality for its justification. This is referred to as the Separability Thesis.

2. Law is a social invention. Various methods are employed in the determination of who or what qualifies as a social authority. These social facts establish what qualifies as law. This is referred to as the Pedigree Thesis.

**Separating Law & Morality**

The Separability Thesis, one arm of Positivism, argues for the separation of law and morality, as separate fields of inquiry. John Austin wrote, “the existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” What the law is, independent of morality, is one thing. What it *ought* to be, dependent upon morality, is another. No matter how “just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it.”

To illustrate the LP view, an excellent point made by Andrew Altman may be useful. “From the day they took power in Germany in 1933, the Nazis ruthlessly suppressed all political

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\(^2\) Stanford Encyclopedia – Legal Positivism

\(^3\) Stanford Encyclopedia – Legal Positivism
opposition... The Nazi regime enacted secret laws in order to persecute its enemies, applied laws retroactively to absolve of criminal responsibility Party members who used direct violence, and intimidated judges who would not twist and stretch the meaning of the laws to favor Nazi goals... During the time of Nazi rule, there were private citizens who sought to take advantage of the brutality and lawlessness of the regime... they [informed] the authorities of allegedly illegal acts performed by rivals or enemies against whom they had a personal grudge. [After the war] many Germans demanded the punishment of the informers.” Altman raises this situation and then questions whether the informers should have been charged for previously legal activity.

The question boils down to whether the Grudge Informers, as they became known, had violated the law. Legal Positivists take the position that they did not violate the law by informing on their neighbors. Though this position seems unpopular, it is disconcerting to many to strip a law’s validity based on political circumstances. If legality is dependent on morality, as Natural Law theory argues, then the actions of the United States in regulating and fostering the slave trade weren’t legal. However, few legal theorists today would go so far as to say they were illegal; morally despicable, yes, but illegal, no.

By taking the position that Grudge Informers were within the law, Legal Positivists aren’t necessarily committed to condoning the Grudge Informers. Rather, the position merely entails that punishment not be based on the illegality of their actions.

Within Legal Positivism, two juxtaposed schools of thought have arisen over this separation. One, referred to as Soft Positivism (Inclusionary Positivism), argues that law and morality do not necessarily share common ground. A similar yet different claim is made by

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4 Altman, *Arguing About Law* pg. 20
5 This topic receives further attention in the Pedigree Thesis section, but it can be strongly argued that governmental actions are legal by virtue of their source, thus further disputing the idea that laws should be view illegal because of political change.
Hard Positivism (Exclusionary Positivism), that morality necessarily is not configured into law. These two versions of interpreting the Separability thesis have led to different schools of thought concerning the proper role of morality in law.

Inclusionary Positivism

Inclusionary Positivism (IP), as put forth by H.L.A. Hart, consists in, “[the] simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.” In other words, in any given lawful society, it is not necessary that “laws reproduce...demands of morality,” though this has often been the case. Laws of a legal system may consist in, though not depend upon, morality in exercise and adjudication. For example, if a law uses morally based language, then that law doesn’t derive its basis from morality, only its function – specific to that law.

Interestingly, Hart acknowledges that the very existence of a legal system is based upon a teleologically based moral duty for society to survive. This is referred to as the “minimum content of Natural Law.” Survival of society, as an extended form of survival of the individual, is the only acceptable necessary connection between morality and law. Hart explains “to raise this or any other question concerning how men should live together, we must assume that their aim, generally speaking, is to live.” Morality, centrally concerned with “how men should live together” cannot make any other necessary claim on law other than the claim that it is man’s and society’s objective to survive. In order to achieve “minimum content”, social rules and obligations are required. These rules and obligations are what constitute a legal system. Further explanation of Hart’s rules will be discussed in pages 8-11 (Pedigree Thesis).

6 Hart, Concept of Law pp. 181-82
7 Hart, Concept of Law pg. 192
To clarify, IP accepts morality as a system outside of law that may be employed in the interpretation and implementation of laws. As said earlier, law doesn’t derive its basis from morality, only its specific function.

Certain doubts as to the consistency of Hartian IP are raised when closely examined. Citing David Hume, Hart says “Human nature cannot by any means subsist without the association of individuals; and that association never could have place were no regard paid to the laws of equity and justice.”

“Equity and justice,” implying moral qualities, are necessary to the continuation of society (i.e. “association of individuals”). To which of Hart’s claims should credence be given? Either “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality”, or “[society] never could have place without [equity or justice]”.

While Hart does acknowledge this irregularity by elucidating his concept of the “minimum content of natural law”, he does not totally reconcile this view with his claim that law should not “reproduce demands of morality.” It seems that Hart’s purpose in formulating his concept of the “minimum content of Natural Law” was to establish the definition of law as one partially and nominally defined by morality, and thereby independent from it in future analysis.

However, though morality’s role is initially minimal, it is nonetheless necessary in the identification of a legal system.

By analogy, consider the parallel claim “that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of” mathematics. While this claim seems tolerable at first glance, one must keep in mind Hart’s other claim that the purpose of law is to ensure the existence of society. Society is an organization of two or more individuals. Built into the notion of society is a mathematical principle of multiple individuals. Similarly, built into the notion of law is a moral principle of equity and justice. It does not adequately exempt morality from law

\[\text{Hart, Concept of Law pg. 191}\]
by presuming that if morality’s initial influence is inherent in defining law, then further moral impacts can be discarded.

Again, one must ask which of these contradictory claims is to be accepted.

Exclusionary Positivism

Joseph Raz, the principle advocate of Exclusionary Positivism (EP), denies any reliance of law upon morality. He argues for an interpretation of the law on strictly social grounds, excluding any moral claims as legally considerable. “Sources of law include both the circumstances of its promulgation and relevant interpretative materials, such as court cases involving its application."

A variety of reasons are given as to why morality and law should remain separate endeavors. When evaluating a judge’s decision, law would be greatly stigmatized if the general perception was that the judge’s decision was due to personal moral beliefs. The current common notion of law is one of objectivity and entwinement with morality. If that belief were to change, authority of the courts would diminish.

Furthermore, a system of law in which judges are tasked with determining the morality behind every law would encumber the judiciary. One can imagine a system in which judges must weigh each law against another. Figuratively speaking, the weight given to particular morals may be more substantial, depending on which judge receives the case. The law must be perceived as independent of moral constraints if society is to accept its influence.

Another argument for EP is that morality and law are independent fields. Morality is an outside value system which can but need not be used in the execution of law. An examination of the Eighth Amendment will prove fruitful in this regard. The Eighth Amendment specifies that

9 Kenneth Himma, IEP
“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The language used in the Eighth Amendment, typical of many laws, is value-laden. In other words, it requires a system outside of the law to determine how those laws are to be enacted. If the mechanism for determining value-laden laws was intra-legal, then a central tenet of EP would be violated. For this reason, the definition of value-laden laws must be assessed by an outside means. In this case, morality is the non-legal system required. The Online Stanford Encyclopedia offers another insightful analogy. The analogy is between mathematics used in the Income Tax and morality used in legal systems. The law, in directing a mathematical requirement, is not necessarily composed of mathematics. In similar manner, though the law may direct a moral requirement, morality is not a necessary component of law.

EP also explains how morality can become diffused into law. By considering moral claims when determining a case, through the method described before, a judge is creating new law and setting legal precedent. Because the case was decided by a legally-authoritative source—the judge—it becomes law. In future situations, when similar cases arise, the law has been determined. Thus, moral claims are disregarded and law can build upon itself, independent from moral claims. Once the judge decides, the law ceases to be questionable and progress is made.

In this way, the most that morality can affect law is to instruct authorities to employ extra-legal tools. However, these means do not supersede law.

One criticism of EP is that its differentiations between morality and law are merely semantic. If morality is within the law or outside the law, it is still necessary for the interpretation of certain laws. While law’s foundation may be bereft of morality, it nonetheless is essential in the implementation of law, and therefore is integral to law. Other extra-legal
systems supposedly similar to morality, such as mathematics, offer few services that law would consider essential. One can imagine a system in which algebra or geometry is forgone from law. While areas of the law would certainly be inhibited, such as taxation and construction law, society would continue to function to a degree. However, it is much more difficult to imagine a legal system in which moral input is entirely prohibited. Laws such as the Eighth Amendment prohibiting "cruel and unusual punishment" would become verbose and cumbersome as the legal system struggled to adequately define and prohibit divers vices.

Because of its emphasis on legal precedent and rejection of extra-legal sources, it becomes questionable on what grounds judges are rendering decisions.

The Roots of Law

The Pedigree Thesis, a central component of Positivism, holds that the legitimacy of law (legal validity) is founded on social facts. The recognition of these social facts is the subject of various Positivist theories. Perhaps the original Positivist theory – John Austin’s Command theory – is most demonstrative of the Pedigree Thesis.

Jeremy Bentham and John Austin, some of the first Positivists, articulated the idea that a legal system is one in which a sovereign issues commands and is obeyed without appeal to a higher authority. Always backed up by the threat of force/coercion, the sovereign’s commands are legally binding in his society. Austin’s view has been termed the Command Theory.

Command Theory had many discrepancies, and H.L.A. Hart was a leading critic in articulating many of those criticisms. Austin’s theory failed to account for governments with no discernable sovereign. Systems that would be excluded from their theory would include parliamentary and legislatively based governments. In such governments where power resides
with the population, lawmakers, though granted certain coercive powers, do not possess ultimate sovereign authority.

Constitutional governments also present difficulties to Austin's Command Theory. According to Austin, a sovereign has no legal restrictions placed upon him. Neither he nor another body may place limits on the coercive/legal power of the sovereign. In constitutional governments, this is obviously a problem.

In the United States for example, courts accept the restrictive powers of the Constitution as legally binding. The Supremacy Clause of Article VI of the Constitution states that the "Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." Austin, in answering this dilemma, provides a poor answer. Such Constitutional government's self-imposed restrictions are merely "positive morality".

Using the colorful analogy of a gunman, Hart criticized Austin's theory as being oversimplistic. In Hart's analogy a gunman commands a teller to give him the money in the bank. The analogy is meant to illustrate the difference between the obligations of the law and threats of an individual. According to Austin's Command Theory, the gunman's threats are equivalent to the threats of a sovereign and thus would qualify as law. Austin's theory fails to account for this discrepancy; in lawful societies, not just any individual with some power of coercion is able to issue lawful commands.

It should be noted, as P.M.S. Hacker appropriately did, that Hart's theory was to be a conglomeration of both Austin's Command Theory and Kelsen's Pure Theory of Law. While

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12 Kenneth Himma, IEP
13 Austin, John, Lectures on Jurisprudence and the Philosophy of Positive Law
14 So as not to dilute the focus of this paper, Kelsen's Pure Theory of Law will not be discussed herein. However, readers interested in Legal Positivism will find Kelsen's theory strikingly similar and worth evaluation.
Austin relied upon a “law-creating organ [i.e.] (the legal sovereign)”\textsuperscript{15} to define law, Kelsen’s analysis was based on a “law-creating norm (the basic norm).”\textsuperscript{16} Hart, partially rejecting and accepting both, establishes his theory as one sociologically based – norms or social customs – found in, but not necessarily created by, legal organs – courts.

For these reasons and more, Hart reformulated Positivism from the traditional Austinian version and argued for an interpretation of legal systems as rule-based. Hartian Positivism consists of primary, secondary, and further sub-labeled rules to categorize the legal system.

\textit{Hart’s Theory} \textsuperscript{17}

As can be seen in the diagram above, law is derived from social rules, or social facts. In this way, Hartian Positivism relies heavily upon social practices, customs, and traditions to determine law. Primary rules (referred to by Hart as rules of the first type) are designed to regulate the actions of individuals (coercion). While primary rules are necessary in the maintenance of a lawful society, a society must not subsist on them alone. Because law is based

\textsuperscript{15} P.M.S. Hacker, \textit{Law, Morality, and Society} pg. 22
\textsuperscript{16} P.M.S. Hacker, \textit{Law, Morality, and Society} pg. 22
\textsuperscript{17} Doc Stoe
on social facts, and social practices change and evolve, it must reflect social norms in any given lawful society. These changes are made through secondary rules. Secondary rules serve basic needs of the legal system. They recognize, change, and enact (adjudication) the law.

Kenneth Himma offers a smart summation of Hart’s three Secondary rules:

(1) the rule of recognition, which ‘specifies some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts’; (2) the rule of change, which enables a society to add, remove, and modify valid rules; and (3) the rule of adjudication, which provides a mechanism for determining whether a valid rule has been violated. On Hart’s view, then, every society with a full-blown legal system necessarily has a rule of recognition that articulates criteria for legal validity that include provisions for making, changing and adjudicating law. Law is, to use Hart’s famous phrase, “the union of primary and secondary rules.”

When “social structures” (society) consist exclusively of primary rules, they are primitive. Primitive structures are “pre-legal” and have “three main defects”. These defects, until corrected by secondary rules, perpetuate non-legal status. The first of these “defects” is uncertainty. Similar to our traditions of etiquette, there is no authoritative source to identify and clarify what the customs are. “Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative.”

18 Kenneth Himma, IEP
19 Hart, Concept of Law pg. 92
point is especially important for modern law. One need only imagine a society where no distinguishable standard existed for the determination of its member’s actions. If an action was questionable, who or what would determine the consequences to that action?

The second characteristic of primitive societies is the static nature of their rules. “There will be no means, in such a society, of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones.” When customs change, as is inevitable due to human nature, rules and obligations must reflect those changes. However, in primitive societies, there is no authoritative means to enact those changes. Similar to the aforementioned authority problem, static rules are ingrained and unchangeable except through long slow processes of psychological acceptance.

The third defect is inefficiency. Unable to unitedly punish violators, primitive societies lack special agencies existing to exert “social pressure involving physical effort or... use of force”

Rule of Recognition: Its Function

An effective summary of the Rule of Recognition was made by D.J. Galligan “[the Rule of Recognition] determines which officials have authority to make law, the limits of their authority, and, when disputes arise, who may resolve them. The second task... is to confer on specific rules their authority as laws... As a legal obligation, it is distinct from other kinds of obligation, such as one of a moral or religious nature, its consequences being that legal rules constitute reasons for officials to act in a certain way, and for their actions to be regarded as valid.”

20 Hart, Concept of Law pp. 92-93
21 Hart, Concept of Law pg. 93
22 Galligan, Law in Modern Society pg. 84
Brian Leiter, remarking on the Pedigree Thesis, explained the difference between custom and law by highlighting the Rule of Recognition. Without the Rule of Recognition he says, speeding on a highway and eating with one’s mouth open would be equivalent. The Rule of Recognition is crucial in differentiating the two. Furthermore, individuals intuitively understand the difference between a legislature’s regulation of a highway and an ordinary citizen’s regulation of a highway. Both might seek to enforce their will, but only one has the authority of law. The Rule of Recognition is the socially obligating force that identifies and separates law from other ‘norms.’

Hart’s Rule of Recognition is decidedly social in origin and nature. It arises out of practice and allows the legal system to have obligation. Without the Rule of Recognition, Hart’s system of primary and secondary rules would be insufficient in ‘recognizing’ what is law. Interestingly, as pointed out by the Internet Encyclopedia of Philosophy, the citizenry of a lawful society need not understand that the Rule of Recognition is the method by which its officials identify law. “The reality of the situation is that a great proportion of ordinary citizens – perhaps a majority – have no general conception of the legal structure or its criteria of validity.”

All that is needed for the Rule of Recognition to function is that officials accept their own behavior and practices as conforming to the law. In other words, if authorities accept that they are the authorities and that their practices/actions must fall in line to certain standards, the law, then by the very nature of the authorities being authorities, citizens will accept their practices/actions as law.

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23 Referred to by Leiter as the “Social Thesis”
24 Kenneth Himma, IEP
25 Hart, Concept of Law pg. 111
Indeterminacy in Positivism

Ronald Dworkin, foremost amongst modern critics of Positivism, levels an interesting dilemma. Within law, there exist certain cases where the law is silent. This is referred to as indeterminacy, when the law gives conflicting or no guidance to a particular situation. Indeterminacy can also arise from situations in which the law directs an outcome contrary to morality or ‘sits uneasily in our gut.’ Dworkin argues that IP offers no solution to indeterminate cases. Citing a New York appellate court case, Riggs v Palmer, Dworkin argues that IP cannot account for the court’s legal decision. An explanation of Riggs v Palmer is needed. In the words of dissenting judge John Gray “[Riggs], a lad of 16 years of age, being aware of the provisions in his grandfather’s will, which constituted him the residuary legatee of the testator’s estate, caused his death by poison, in 1882. For this crime he was tried, and was convicted of murder in the second degree... This action was brought by two of the children of the testator for the purpose of having those provisions of the will in the respondent’s favor canceled and annulled.”

In this case, the law was quite specific in its direction, namely, that the will was in effect and the ‘lad’ should receive his inheritance. As Dworkin pointed out “the court began its reasoning with this admission: ‘it is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.’”

Dworkin’s contention is that IP’s view of the law is too narrow and doesn’t properly account for how the court ruled. There being two alternatives in this case, an analysis will be

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27 Dworkin, Taking Rights Seriously pg. 23
28 Further reading of Riggs v Palmer reveals that moral justification was used in the majority’s opinion “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his
given of both with the difficulties arising for IP. If the law was executed as prescribed, the will
going into effect and the courts transferring property to Riggs, then broad social consensus
(felling that the law is unjust) might derail the validity of the law because the rule of recognition
would give conflicting guidance. The rule of recognition reflects what is acceptable to those
governed and the view of those in authority. If a law passed by authoritative figures is legal in
the authorities’ eyes yet invalid in those governed, then is the law still valid? Because the law
did not meet the validity requirement for social acceptance (being unjust), and IP unable to
provide an adequate explanation, is IP a coherent theory?

The other alternative, the one actually chosen by the court, also presents a problem for IP.
The fact that the court did consult extra-legal sources in its decision points to the narrow concept
of law employed by IP. Rightly argued, a theory of law is insufficient if its theories are
dramatically different in practice.

Hart answers Dworkin’s criticism by clarifying his theory of Positivism. His theory does
not, as Dworkin says, seek ‘ultra-guiding laws’, (stipulating the fact that indeterminacy is a
necessary component of legality,) but rather it tolerates indeterminacy in the law. Hart only
wonders to what degree indeterminacy is acceptable. “Even if laws could be framed that could
settle in advance all possible questions that could arise about their meaning, to adopt such laws
would often war with other aims which law should cherish. A margin of uncertainty should be
tolerated, and indeed welcomed in the case of many legal rules, so that an informed judicial
decision can be made when the composition of an unforeseen case is known and the issues at
stake in its decision can be identified and so rationally settled.”

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own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their
foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.”
– Riggs v Palmer – See http://www.cooter-ulen.com/cases.htm#Riggs%20v.%20Palmer
29 Hart, Concept of Law pg. 252
The "judicial decision" of which Hart speaks occurs when "existing law fails to dictate any decision as the correct one."\(^{30}\) Hart comments that the judge should "act as a conscientious legislator... by deciding according to his own beliefs and values."\(^{31}\)

Referring to Hart's conscientious legislators, Dworkin considers them to be judges engaged in unjust ex post facto law making. If a judge creates law where it is previously silent, and then that law is used in a manner to sanction an action that was previously unlawful (unlawful in that the law did not regard it), then these quasi legislatively-active judges are enacting law in an unacceptable fashion.

Hart defended his theory of legislatively-active judges from Dworkin by referring to the accusation of the unjustness of "ex post facto law making" as ungrounded. The unfairness of usual "ex post facto law making" was based on cases in which an action occurred under the former *clear-guiding* law, and was later changed "ex post facto". However, Hart rightly points out that it "seems quite irrelevant in hard cases since these are cases which the law has left incompletely regulated and where there is no known state of clear established law to justify expectations."\(^{32}\) In other words, with no "expectations" to satisfy, the law cannot be unjust when determined by the judge.

Until Hart's 1994 Postscript to Dworkin, Hartian Positivism was thought to exclude moral considerations. However, with Hart's recent reformulation, morality in law may be exercised in judicially indeterminate cases. If morality is an acceptable criterion for the interpretation of law, what of one of its central premises: "[that it is the] simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality"?\(^{33}\)

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\(^{30}\) Hart, *Concept of Law* pg. 273
\(^{31}\) Hart, *Concept of Law* pg. 273
\(^{32}\) Hart, *Concept of Law* pg. 276
\(^{33}\) Hart, *Concept of Law* pg. 192

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Specifically concerning the outcome of Riggs v Palmer, it seems that the law certainly acquiesced to the “demands of morality.” With Hart’s adaptations, one is left to wonder what IP offers as a legal theory.

Further, if Hart’s explanation is true, then how can judges be expected to rule on an area previously unregulated? If no expectation exists for a judge to violate, conversely, how can a judge pass a legitimate ruling based on... nothing. Something is clearly lacking from Hart’s explanation.

Kantian Legal Positivism:
An Oxymoron?

Introduction

Immanuel Kant is known as many things: theologian, metaphysicist genius, moral philosopher... but what about Legal Positivist? Jurisprudential theories have traditionally compared Kant’s legal philosophy to Natural Law theory, forming a delicate relationship between the two; however, is this comparison accurate? This section will argue that Kant’s analysis of law was fundamentally Legal Positivist in doctrine. First, Kant’s moral philosophy will be explained. After, Kantian ethics will be compared and contrasted with Legal Positivism. Finally, irreconcilable flaws in Kant’s reasoning will also discussed.

Kant’s Moral Philosophy

Underlying much of Kant’s writings on the nature of society and law is a Legal Positivist tone. This tone will be explored in three ways.

Rights
In his famous Categorical Imperative Kant states “act only according to that maxim whereby you can at the same time will that it should become a universal law.”\textsuperscript{34} Topically this would seem contrary to the Legal Positivist approach to rights. For a Kantian, in order for all actions to be moral, they must be hypothetically expandable to all persons. If an action would violate this principle, it would somehow violate an individual’s rights. In contrast, a Legal Positivist would employ sociological means to determine whether an action violated some degree of normalcy in a given society. Yet further inspection reveals Kant’s true purpose when put in the legal context.

“However well disposed and law-abiding men might be, it still lies a priori in the rational Idea of such a condition... that before a public lawful condition is established, individual men, peoples, and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it.”\textsuperscript{35} In a state of nature, Kant believed that all persons will ultimately do what they think is best. In this state of nature, persons would use empirical judgment, which is inherently subjective. Morality for Kant was something achieved through reason. In a state of nature, people would rely upon their personal judgment to determine what “seems right and good” to do. Because those judgments are based on empirical influences, they are ‘corrupt’ and inadequate for universal application. Thus, in order for morality to be possible, the state of nature must be left behind and persons must enter into a social compact, submitting to laws that can be universally applied. These laws, though perhaps not perfectly just, are preferable to an existence in which reason – and thus morality – is absent.\textsuperscript{36}

\textsuperscript{34} Hackett, *Grounding for the Metaphysics of Morals* pg. 30
\textsuperscript{36} For further discussion on the relationship between morality and government, see http://www.ehb.ufsc.br/ethic@@/et32art3.pdf  Cynthia Schossberger applies a similar principle, arguing that morality is inconceivable in the state of nature. Perhaps similar to incompatibilities arrived at by Kant, i.e. the ‘lying promise,’ the categorical imperative is impossible to universalize in the state of nature. For the moment an individual universalizes a maxim, then the concept of the state of nature has been left.
Necessity of Public Officials

Kant believed the state was necessary in order for rights and freedoms to exist. A rephrasing of Kant’s statement, keeping its original intent, could be: ‘[each individual] has [his or her] own right to do what seems right and good to it, [which leaves morality unattainable, until states come into being.]’ If every individual was to have freedom of will and rights, then some intercessory being would need to interact. Otherwise, as Kant hypothesized, freedom of the will would be hampered as some individuals violated others’ rights.

This intercessory being, taking the form of the state and the state’s executors, i.e. public servants/officials, would necessarily coerce certain individuals when those individuals violated the freedom of others. A state would be morally justified in pursuing this course of action if its doing so allowed for greater freedom of will.

Two hypothetical examples will be useful in demonstrating this – one involving an environment where public officials are absent, the other a modern society.

1. Treg is gathering apples for the coming winter. Upon finding a sufficient amount of apples, Treg puts the apples in a pile at the entrance to his cave and enters the cave to sleep. Geth is walking along when he discovers the food supply. Knowing these apples were gathered for the sustenance of another, Geth nonetheless decides to take the apples regardless of the consequences for Treg. Treg awakens awhile later, discovers that his stockpile is missing but is unable to gather anymore apples and starves as a result. According to Kant, Geth’s actions were immoral because he treated someone else as a means. His actions couldn’t be duplicated universally. Finally, and perhaps most wrongly, Geth deprived Treg of the freedom of choice, death severely limiting Treg’s choice-making abilities.
2. Greg is gathering enough money for the retirement years. Upon depositing a sufficient amount of money in the bank, Greg retires to Arizona to watch reruns of MASH and Matlock. Beth, an employee of the bank and an identity thief, is searching for helpless victims to take advantage of. Upon discovering Greg’s savings account, Beth decides to take the money regardless of the consequences for Greg. A while later Greg receives a notice from the bank of his insufficient funds. Greg becomes a Wal-Mart greeter to pay for his twilight activities and simultaneously informs the sheriff’s department of the theft. Upon investigation, Beth is caught and forced to return the money to Greg. Though the sheriff’s department coerced Beth into returning Greg’s resources, their actions were moral because they acted in a way that could be universally willed.

Thus, some manifestation of the state’s power to intervene is necessary.

Interestingly, in Kant’s view, an action can be moral, despite its superficial immorality – if it preserves the freedom of others. Yet this contradicts Kant’s reply to Swiss philosopher Benjamin Constant. Constant inquired of Kant as to whether it was morally justifiable to lie to protect someone from a murderer. Writing in his *On a Supposed Right to Tell Lies from Benevolent Motives*, Kant defended the application of his theory and verified that it was morally wrong to lie to a murderer even when the murderer’s immoral intent is known.

Kant’s views seem contradictory. On one hand he believes states are morally justified in their coercive powers, yet he also believes individuals can never lie, even to protect another. Perhaps for Kant, inaction by the state in even one instance is substantially more dangerous to universal freedom than occasional impairment of individual freedom. For example, imagine that Beth from the previous story had instead been framed, and the sheriff knows her innocence. After deliberation by the courts, she is to be executed in the public square. If the state
approached the sheriff inquiring her whereabouts, would he be morally allowed to lie on her behalf? If freedom is to exist for anyone, the state must exist. And for the state to continue, its orders/laws must be obeyed. The sheriff’s decision thus precipitates between denying freedom for one or denying freedom for all.

Although, of course, it would be wrong for the Kantian sheriff to consider the possible consequences of his actions, he would still have difficulty in making a decision if he considered the problem as choosing between lying and obeying the state. Both seem to have a first order moral obligation to be followed, but are mutually exclusive.

Kant endorses both possibilities thus producing confusion. He is both adamant that the state – through the will of the sovereign – was to have final say in all coercive decisions, and that it is never morally permissible to treat another as a means to an ends. This dilemma is murky water for Kant.

A further concern is whether Kant has violated his deontological ideology by producing legal views that are largely consequentialist. Despite these complexities, Kant shares the view with Legal Positivists that public officials are a necessary part of the law.

Will of the Sovereign

The third element in our focus is the concept of the sovereign. John Austin, one of the original fomenters of Legal Positivism, argued that law is nothing more than the commands of the sovereign. This sovereign, an ungoverned governor, is the original source of law. Though his laws create duties for the subjects of a state, he is the only individual upon whom no legal duty to observe the law exists. The definition of a sovereign can be simplified as: “one who
receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution.”

Kant’s thoughts on the topic are surprisingly similar to Austin’s. “Man’s equality as a subject might be formulated as follows. Each member of the commonwealth has rights of coercion in relation to all the others except in relation to the head of state. For he alone is not a member of the commonwealth, but its creator or preserver, and he alone is authorized to coerce others without being subject to any coercive law himself. But all who are subject to laws are the subjects of the state, and are thus subject to the right of coercion along with all other members of the commonwealth; the only exception is a single person (in either the physical or the moral sense of the word) the head of state, through whom alone the rightful coercion of all other members can be exercised. For if he too could be coerced, he would not be the head of state, and the hierarchy of subordination would ascend infinitely.”

Admittedly, modern Legal Positivists are apt to distinguish themselves from Austin’s problematic theory; nevertheless, Kantian and early Legal Positivist views of the command-origin of the law are nearly synonymous.

Kant’s statements present an interesting if not unenlightened picture: a sovereign who must issue commands that are universally applicable yet at the same time inapplicable to himself. A seeming contradiction, perhaps Kant was not able to fully elaborate his meaning.

An End to Conjectures

While many more factors would need to be considered before Kant was conclusively labeled a Legal Positivist, Kant’s political views do indicate such a legal positivist mentality.

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37 Stanford Encyclopedia – Austin, John
38 Immanuel Kant, Theory and Practice, Part 2 – See http://www.sussex.ac.uk/Users/sefd0/tx/tp2.htm
39 The principle difference between modern and early Legal Positivism being the 20th Century Legal Positivist emphasis of sociological means to define law.
Drawing upon the words of the philosopher himself, “In law a man is guilty when he violates the rights of others. In ethics he is guilty if he only thinks of doing so.” Kant, employing a form of the Separability thesis, saw morality and law as separate entities. Eerily Austinian in nature, Kant’s jurisprudential views are reservedly Positivist in theory. For these and other reasons, Kant’s reclassification as a Legal Positivist should receive further attention.

Legal Positivism: Anti-Religious Code or Religiously Tolerant

A Case Example Involving Mormonism

Introduction

“We believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law.” Written by the Mormon prophet Joseph Smith in the year 1842, only 12 years after the founding of the LDS church, the LDS faith has departed from traditional Christian understandings of law by adopting a view compatible with H.L.A. Hart’s legal positivism. This section will demonstrate why the Mormon approach to government and law is agreeable with Legal Positivism, focusing on Hart’s theory. In order to do this, explanations of Mormon doctrinal beliefs will be given with emphasis placed on scriptural and

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40 Attributed to Immanuel Kant
41 “The... law is one thing; its merit and demerit another.” John Austin, The Province of Jurisprudence Determined pg. 184
42 Smith, Joseph. Articles of Faith. Pg. 1
43 Numerous offshoots of Mormonism exist both within and outside the United States. For matters of simplicity and focus, the largest offshoot - The Church of Jesus Christ of Latter-day Saints (LDS) - will be evaluated in this article. Various names and terms apply to the LDS church; these will be used interchangeably and with slight distinction.
44 “Legal Positivism,” “Positivism,” and “Hart’s theory” are all used interchangeably in this article.
historical examples. H.L.A. Hart’s legal positivist theory will also be briefly introduced with key theses for compare and contrast shown.

**Mormon Doctrinal Beliefs**

As stated earlier, one of the 13 core articles of faith states that Mormons “believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law.” At the center of Mormon belief is the understanding that two categories of laws exist: heavenly laws and earthly laws. Not mutually exclusive nor completely compatible, heavenly laws and earthly laws serve different functions. While heavenly laws pertain to irrevocable commands given by deity, earthly laws pertain to the institutions and governments presiding over peoples and states.

**Pedigree Thesis & Mormonism**

“We believe that governments were instituted of God for the benefit of man; and that he holds men accountable for their acts in relation to them, both in making laws and administering them, for the good and safety of society... We believe that all governments necessarily require civil officers and magistrates to enforce the laws of the same; and that such as will administer the law in equity and justice should be sought for and upheld by the voice of the people if a republic, or the will of the sovereign.”

Mormonism, as a Christian-based faith, is interesting in that it leaves traditional dogma by accepting the validity of earthly law despite any moral qualifications. Its teachings include instructions to obey authorities of the law without recourse to moral value for validity. President Marion G. Romney of the First Presidency (the highest council of the Church) taught the importance of legal authority to the LDS Church, “Civil...

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42 Smith, Joseph. *Doctrine and Covenants* 134 pg.?
authority is of divine origin. It may be more or less adapted to the needs of man; more or less just and benevolent, but, even at its worst, it is better than anarchy.” 46 Past president of the LDS Church Joseph F. Smith echoed the same, citizens of the Church should “be subject to the powers that be,” 47 i.e., civil authorities.

Mormon conceptions of law stretch beyond the common belief in the separation of church and state. While many churches, including Mormonism, promote separation of religion and governmental bodies, the majority ascribe to the Natural Law Theory for an evaluation of law. A traditional Christian view might be “Laws are valid to the degree they conform with certain moral qualities.” Mormonism, however, grasps the relationship differently. The validity of law, as summed up clearly by President N. Eldon Tanner, sustains the legal positivist views that state authority grants legal validity. “There are many who question the constitutionality of certain acts passed by their respective governments, even though such laws have been established by the highest courts in the land as being constitutional, and they feel to defy and disobey the law. Abraham Lincoln once observed: ‘Bad laws, if they exist, should be repealed as soon as possible; still, while they continue in force, they should be religiously observed.’ This is the attitude of the Church in regard to law observance.” 48 So, though a law may be morally hideous, it is still legally valid.49

True to the Legal Positivist thesis, President Tanner’s words are similar to those of Hart’s. “What these [positivists] were, in the main, concerned to promote was clarity and honesty in the formulation of the theoretical and moral issues raised by the existence of particular laws which were morally iniquitous but were enacted in proper form, clear in meaning,

46 Marion G. Romney, The Rule of Law; Ensign pg. 2
47 Smith, Joseph. Doctrine and Covenants 58 pg. ?
48 N. Eldon Tanner, The Laws of God; Ensign pg. 82
49 Smith, Joseph. Doctrine and Covenants 58 pg. ?
and satisfied all the acknowledged criteria of validity of a system. Their view was that, in
thinking about such laws, both the theorist and the unfortunate official or private citizen who was
called on to apply or obey them, could only be confused by an invitation to refuse the title of
‘law’ or ‘valid’ to them. They thought that... we should say ‘This is law; but it is too iniquitous
to be applied or obeyed.’ Further Positivist comments solidify the relationship between
Mormonism and Legal Positivism. “Now, to say that human laws which conflict with the Divine
law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious
laws, and therefore those which are most opposed to the will of God, have been and continually
are enforced as laws by judicial tribunals.”

The Separation Thesis & Mormonism

Partly treated in the previous thesis, Mormonism compares to Positivism in its rejection
of the validity of law being morally based. Three specific examples will assist in understanding
this relationship. The first comes from the bedrock of Mormon belief, the Book of Mormon, in
which an example of Legal Positivism is to be found. Morianton, an ancient king of the
Jaredite people, was a wicked king who was peculiar in that he did “justice unto the people, but
not unto himself... [and was] cut off from the presence of the Lord.” This distinction is
important. While King Morianton was immoral, his rules and law were valid in the eyes of the
people. The interpretation of this verse may be, ‘Morian ton did good works for the people, but
evil for himself and in the eyes of God.’ This passage contains two significant correlations to

36 John Austin, The Province of Jurisprudence Determined pg. 184 – Credit to Brian Z. Tamanaha for bringing up
37 Ether 10:9-11: 9. And it came to pass after the space of many years, Morianton... did establish himself king over
all the land. 10. And after that he had established himself king he did ease the burden of the people, by which he
did gain favor in the eyes of the people, and they did anoint him to be their king. 11. And he did do justice unto the
people, but not unto himself because of his many whoredoms; wherefore he was cut off from the presence of the
Lord.
Legal Positivism. First, the people didn’t consider Morianton’s actions to be outside the domain of legal. Hart explains why. “Those rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and ... its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards.”52 This case exemplifies how Positivism is integral in Mormonism and how Hart’s Rule of Recognition functions.

The second significant detail is the implied relationship between God and legal entities, in this case, a relationship between morality and legal entities. The Book of Mormon remarks that Morianton was “anoint[ed]” by the people “to be their king.” While God, in this instance personifying morality, disapproved of Morianton, Morianton was still sovereign and his commands were nonetheless legitimate. This relationship is insightful of what Mormons believe. As a piece of Mormon theology King Morianton’s connection to morality helps form the way in which Mormons understand the law.

The second example draws upon Mormonism’s founder Joseph Smith. As will be seen, Smith’s example is indicative of modern Mormon perceptions of law. Elder Jack Goaslind explains an encounter of Smith while residing in Nauvoo. “As mayor of Nauvoo, Joseph was called upon to render judgment on Anthony, a black man who had ... been selling liquor in violation of the law ... Anthony implored Joseph for leniency, stating that he needed money to buy the freedom of his child held as a slave in a southern state. Joseph said, ‘I am sorry, Anthony, but the law must be observed, and we will have to impose a fine.’”53 One might attribute Smith’s attitude to racial currents of his day; however, Smith’s perception of the

52 Hart, Concept of Law pg. 116
53 Elder Jack Goaslind, BYU Devotional Joseph Smith’s Christlike Attributes 27 June 1995
validity of law changes in light of his personal abolitionist sentiments. Running for President in 1844, Smith’s platform included a complete ban on slavery by 1850 and freedom for existing slaves. The issue is further compounded by Smith’s obvious understanding of the moral implications of taking Anthony’s money. Imposing the fine would surely limit Anthony’s ability to free his son. To minimize the impact of the fine, Smith sold a horse to contribute money for the release of Anthony’s son.

Smith’s seemingly contrary individual and political actions are derived from his Legal Positivist understanding of the law. In the words of John Austin, “the existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” Smith knew the law prescribed punishment for Anthony: whether such a fine was moral or immoral was another matter.

A third and more modern example of Mormonism adapting a Legal Positivist view is the turn of the century fight over polygamy. While the two previous examples exhibited Mormonism as deferential to legal authority, the third involves conflict between heavenly law and earthly law. Openly “avow[ing]” plural marriage in 1852, the LDS Church’s stance commenced a series of legal attacks upon the LDS church. While a history of the struggle between the LDS church and U.S. government would be lengthy and beyond the present focus, one aspect of the conflict is pertinent. Despite dispute over the morality of mandated

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24 “My cogitations, like Daniel’s have for a long time troubled me, when I viewed the condition of men throughout the world, and more especially in this boasted realm, where the Declaration of Independence ‘holds these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness;’ but at the same time some two or three millions of people are held as slaves for life, because the spirit in them is covered with a darker skin than ours.” History of the Church, Vol.6, Ch.8, pp. 197-198
25 History of the Church, Vol. 6:205
27 Stanford Encyclopedia – Legal Positivism
28 Gary C. Bryner, Political Teachings

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monogamous marriage, Mormonism respected the claims of government and its entities as legally binding. In 1904 special hearings were held to determine whether Senator-elect Reed Smoot could take his seat. In the ensuing hearings, President of the Church Joseph F. Smith (grand-nephew of founder Joseph Smith), was called to testify concerning Mormonism’s compliance with mounting legal pressure to adopt monogamous marriage. When Senator Hoar asked whether church revelation trumped legal responsibility, Smith’s answer was that determination of the matter was for “[members to decide] whichever they pleased.”

Interestingly, Smith did not repudiate the legitimacy of the law. Traditional conceptions of religious authority are disposed to assess the law in its conformity to moral values. In other words, based on Natural Law theory’s perception of law, as passed down through western Christianity, many churches would see law as illegitimate when it conflicted with religious/moral dogma; Mormonism is distinct in this regard. Departing from the main stream, Smith and Mormonism embrace Hart’s Legal Positivist view that law is valid whether or not it embodies moral duties.

**Mormonism, Legal Positivism, and Immoral Laws**

Critics of Legal Positivism have at times misinterpreted the theory to endorse blind and immoral obedience of the law. However, proponents of Legal Positivism are apt to point out this is not the case. Mormonism provides a suitable model for recognizing the validity of law yet

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59 Name Unknown, *What Mormons Do When Laws Conflict*: New York Times 5 Mar. 1904: “Suppose you received a revelation commanding your people to do something which would conflict with the law of the land. Which would they have to obey?”-Sen. Hoar “Whichever they pleased, there is no compulsion... With me perhaps the revelation would be uppermost.”-Pres. Smith

60 “Their discomfort is sometimes the product of confusion. Lawyers often use ‘positivist’ abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. It is doubtful that anyone ever held this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists.” “The peculiar
rejecting it on moral grounds. In the years leading up to the prohibition of polygamous marriage, Church members frequently saw the United States Government’s law as valid but immoral and therefore unable to follow it. The reflection of an early church member gives insight into how rank-and-file Mormons perceived the law. Upon learning that federal troops were being sent to Utah to enforce monogamous marriage laws, Richard Ballantyne remarked that it “was a virtual declaration of war by a state against one of its own political subdivisions.”

Though the government was committing a foolish act against one of its own “subdivisions,” in Ballantyne’s eyes, the government/law was still valid.

Hart, commenting on the sometimes confrontation between law and morality, said “what surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.” “Moral scrutiny” is indeed familiar to Mormonism. When posed with the hypothetical situation of abandoning his children because of monogamous laws, Joseph F. Smith (then current president of the Church) replied to the heavenly law vs. earthly law conflict that “under the discipline that had been maintained for the last twenty years the people in the Mormon Church would obey the laws rather than any revelation which might be in conflict…but I should not like to be put into the position where I would be compelled to abandon my children. I could not do that.”

Though certain moral bounds could be crossed, others would not be. In determining which laws would be followed, it
is important to note that Smith explicitly cited moral evaluation in his answer. He didn’t question the validity of the law, but only its consequences.

**Conclusion – Mormonism and Positivism**

The ways in which Mormonism accepts Legal Positivism are many and varied. As seen in the preceding examples, Mormonism has developed its recognition of the validity of law regardless of moral underpinnings. This connection is unique considering the religious nature of Mormonism. As time progresses further research will reveal whether Mormonism retains its unique interpretation of law.

**Closing: Thoughts on Positivism**

To best understand Legal Positivism, one must remember how/why it was born. Natural Law theory had dominated western jurisprudence for centuries, with the result that little distinction was made between law and morality. The concept that “the existence of law is one thing; its merit and demerit another” was radical at the time and has remained the centrally defining theme of Legal Positivism.

Both Positivism’s theme and its limited role are often overlooked. Unfortunately, the theory has been misapplied both within and outside jurisprudence. Perhaps the most common charge is that Legal Positivism implies a fundamental submission to ‘legal yet morally wicked

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65 Austin’s doctrine, though intellectually bare in comparison to Hart’s, has remained the mainstay of Legal Positivism through to today.
behavior.' As Brian Bix points out, this is due to many individual’s belief that a legal theory should answer “important questions of law and practical reasoning.” However, as Bix advises “this complaint is not so much wrong as a misunderstanding. One should no more expect theories about the nature of law to guide behavior or answer difficult ethical questions than one should expect day-to-day guidance in life from theories of metaphysics.”

It was under the former charge that H.L.A. Hart endeavored to show that Legal Positivism was indifferent to Nazi Germany. Some critics argued that Positivism – at the time gaining influence in Germany – may have contributed to the horrendous acts of the Second World War. Perpetrators commonly claimed they were ‘following orders’ or ‘following the law;’ in this environment, without a true understanding of Positivism’s purpose, the theory seemed malicious.

To repeat Bix’s point, attributing immoral acts to Legal Positivism is equivalent to blaming the spread of AIDS on a medical theory that analyzes disease epidemics. Far from condoning, condemning, or applauding moral behavior, Positivism merely analyzes law; if anything, Positivism is simply indifferent to “important questions of law.”

Yet, as a final thought on the subject, Positivism’s role has been both practical and analytical – raising doubts that the theory does not influence “important questions of law,” as remarked by Brian Bix. By Hart’s own admission, Legal Positivism was instrumental in supporting the Wolfenden Committee’s recommendation that prostitution and homosexuality

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66 Brian Bix, *The Blackwell Guide to the Philosophy of Law and Legal Theory* pg. 32
67 “Much dissatisfaction has for long been felt in England with the criminal law relating to both prostitution and homosexuality, and in 1954 the committee well known as the Wolfenden Committee was appointed to consider the state of the law. This committee reported in September 1957 and recommended certain changes in the law on both topics.” H.L.A. Hart, *Law, Liberty, and Morality* pg. 13
be de-criminalized in England. Due to Hart’s effective reasoning, the committee eventually based its decision on the idea that “[morality is] not the law’s business.”

For its advancement of jurisprudence and the demarcating of law and morality, Legal Positivism will long hold a unique position in legal academia – and rightly so.

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Austin, John, Lectures on Jurisprudence and the Philosophy of Positive Law; St. Clair Shores, MI: Scholarly Press, 1977


