

Chapter 1

Why Study Legal Positivism?

1.1. LEGAL POSITIVISM'S CHECKERED PAST

The past forty years have not been kind to legal positivism. Ever since H.L.A. Hart's famous debate with Lon Fuller over the charge that German legal positivists were partly responsible for the rise of Adolf Hitler, positivism has often been the target of frequent attacks by American lawyers.¹ Its critics have tried, at various times, to connect positivism with a diverse and jointly inconsistent group of theories, such as legal formalism,² legal realism,³ and originalism.⁴ Furthermore, since the 1960s, legal positivism has been associated almost entirely with politically conservative forces in the United States, especially with an approach to constitutional interpretation known during the 1970s as "judicial restraint."⁵ Given the

¹ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 595 (1958) (citing Gustav Radbruch, *Die Erneuerung der Rechts*, 2 *Die Wandlung* 8 [Germany 1947]; Gustav Radbruch, *Gesetzliches Unrecht and Ubergesetzliches Recht*, 1 *Sddeutsche Juristen-Zeitung* 105 [Germany 1946]); Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630 (1958); and see Wolfgang Friedmann, *Legal Theory* 416 (3d ed. 1953) (Austin's positivist theory of sovereignty "enabled the rising national State [sic] to assert its authority undisturbed by juristic doubts").

² See Duncan Kennedy, *Legal Formality*, 2 *J. Legal Stud.* 351, 362 n19 (1972); William Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *Harv. L. Rev.* 513 (1974).

³ See, for example, Lon Fuller, *The Law in Quest of Itself* 47 (1960); John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 *U. Pa. L. Rev.* 833 (1931); Charles Miltner, *Law and Morals*, 10 *Notre Dame Lawyer* 1 (1934); Hermann Kantorowicz, *Some Rationalism About Realism*, 43 *Yale L. J.* 1240 (1934); Rufus Harris, *Idealism Emergent in Jurisprudence*, 10 *Tul. L. Rev.* 169 (1936); Philip Mechem, *The Jurisprudence of Despair*, 21 *Iowa L. Rev.* 669 (1936).

⁴ See Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 *Chicago-Kent L. Rev.* 1001, 1009 (1990); James Wilson, *Contrasts of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, and Winter*, 40 *U. Miami L. Rev.* 1171, 1172 (1986).

⁵ See, for example, Ronald Dworkin, *Taking Rights Seriously* 131–2 (1977). Positivism's conservative reputation in America is especially ironic, given that Jeremy

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various contexts in which the term *positivist* has been used, it is clear that in recent years it has become a pejorative in modern American legal circles.⁶

The first task of this book is to set out a historical account of the transformation of legal positivism in American jurisprudence. The method is somewhat inductive: The argument begins with the observation that, although scholars today treat legal positivism as a major – if not the major – jurisprudence in the United States, no such theory was discussed by name in legal literature before the late 1920s. The first half of this book argues that although legal positivism did not properly emerge as a major theory of law in America until Fuller’s attack in 1940, positivism had been playing a major role in shaping American jurisprudence since the late nineteenth century. The fact that the term *legal positivism* was rarely used before 1940, and probably never used before 1927, does not mean that the theoretical content of legal positivism was not abroad before that date. I will show that legal positivism played its part in jurisprudential debate under other names – *noms de guerre*, so to speak. In fact, two other historical schools of jurisprudence present themselves as the “aliases” that concealed prewar positivism’s influence: formalism and “analytic jurisprudence.” The former has a credible claim to a family resemblance with positivism because by the 1930s many of the critics of formalism were using the expression *positivism* interchangeably with *formalism*. Analytic jurisprudence has a credible claim because the authors to whom Fuller (and later Dworkin) refer when discussing positivism are Thomas Hobbes,

Bentham and H.L.A. Hart, positivism’s chief spokespersons in England in the nineteenth and twentieth centuries, were also outspoken liberal reformers of the law. See, for example, H.L.A. Hart, *Law, Liberty and Morality* (1963) (responding to the *Report of the Committee on Homosexual Offenses and Prostitution*, Cmd. no. 247 [1957] [“The Wolfenden Report”] and Lord Devlin’s criticisms thereof); Hart, *Positivism and the Separation of Law and Morals* at 594–6 (Bentham was one of “the most earnest thinkers in England about legal and social problems and [among] the architects of great reforms”).

⁶ See Frederick Schauer, *Positivism as Pariah*, in *The Autonomy of Law: Essays in Legal Positivism* (Robert George, ed., 1996); Frederick Schauer, *Constitutional Positivism*, 25 *Conn. L. Rev.* 797, 798 (1993) (positivism “until recently” viewed as “simultaneously irrelevant and pernicious”); Robert Summers, *Legal Philosophy Today – An Introduction*, in *Essays in Legal Philosophy* 16 (Robert Summers, ed., 1970) (the use of the term *positivism* “is now radically ambiguous and dominantly pejorative”); see also James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 *U. Pa. L. Rev.* 383 (1987); William Eskridge, *Metaprocedure*, 98 *Yale L. J.* 945, 964 (1989).

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John Austin, and Jeremy Bentham. In the nineteenth and early twentieth centuries, these theorists were generally seen as the founders of analytic jurisprudence.

It would be convenient and reasonable to conclude that both pre-1940 schools of thought – formalism and analytic jurisprudence – were compatible facets of the same concatenation of theoretical commitments. In fact, I suggest that a useful way to redefine formalism would be to see it as a subspecies of positivism and hence consistent with the commitments of Austin and Bentham. By extension, therefore, the rise of legal realism in the early twentieth century was in no small part an attack on some of the basic elements of legal positivism. The points of conflict between legal realism and formalism are quite familiar to the student of jurisprudence. What is less familiar, and what Chapter 2 sets out to illustrate, is a similar set of contrasts between Austin and Bentham and the realists.

Classical legal positivism was developed in England by Austin and Bentham and brought to the United States through the writings of Langdell and Beale, who were influenced by the English positivists. In Chapter 3 I argue that Langdell and Beale were interpreted by the realists as having erected a much more complex rule of recognition than Austin's. According to the realists, the formalists defined law as a deductive science of rules. The rule of recognition that follows from this definition, I argue, forces onto the formalist a picture of law with all of the vices of natural law and none of its virtues: Law is seen as a set of requirements whose validity exists independent of the will of any legal actor or sovereign, or correspondence with practical moral reasoning. Thus, by 1930, American legal positivism, as portrayed by the realists in the form of formalism, had taken on a shape quite different from that of its English original. If formalism were committed to supernatural principles of law that existed independent of human authority, it would have been at loggerheads with the "sources thesis" of classical legal positivism. In fact, the realists had attributed to formalism a theory of law that resembled Blackstonian natural law. American formalism may have been guilty of many sins, but natural law is not one of them. By picturing the formalist as committed to pure deduction, the realists created a "straw man" that aided their more general program of arguing for rule and fact skepticism in law. Had they attacked the sort of rules Austin's sovereign might command, they would have had a more difficult time than they had proving that legal rules are not instantiations of perfectly coherent, internally con-

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sistent rules that were not written but simply “there,” in the nature of things.⁷

In Chapter 4 I argue that those associated with the form of positivism called formalism attempted to mount a counterattack against realism. If they had given the impression that they believed that law was a system of deductive rules, they conceded, then this view was properly criticized by realism. But, they continued, realism’s solution – skepticism about whether rules can constrain at all – was itself an extreme view. So, they argued, law can still be defined as a system of rules, but only as a system of rules that channel discretion. Otherwise, these opponents of realism argued, we are left with no reliable mechanism by which the sovereign can control future behavior. If the law is mostly indeterminate, its usefulness to society disappears. This counterargument to realism was the foundation of the legal process school, and later Herbert Wechsler’s theory of neutral principles. Its logic is simple: Unless a legal rule can, at some level, constrain the preferences of the law applier, there is no point in talking about the rule of recognition, because legal rules appear and disappear with each new judgment by a legal actor.

In Chapter 5 I explain why legal process did not flourish after it appeared as an alternative to realism. I draw attention to the fact that, while on the one hand the legal process school represented a healthy repudiation of whatever formalist tendencies had been attributed to positivism, on the other hand, contingent historical reasons led the legal process school to saddle itself with a variety of other liabilities. Some members of the legal process school, after correctly identifying the role of rules in defining law, next adopted a theory of adjudication that produced interpretations of the rules of federal jurisdiction and constitutional civil rights that, in retrospect, have proven to be incorrect. I argue that there are two distinct movements within the legal process school: The first, defined by Hart and Sacks, laid the foundation for the kind of positivism I think is defensible and is not an obvious ally of political conser-

⁷ To its credit, Critical Legal Studies has taken on the harder task of trying to show that rules uttered by human sovereigns (such as legislatures and agencies) are fundamentally incoherent and cannot live up to the standard of the liberal rule of law that such regimes set for themselves. See, for example, Kennedy, *Legal Formality*, at 351.

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vatism; the second, defined by Wechsler, Bickel, and Bork, came later and twisted Hart and Sacks's theory of law into a conservative theory of adjudication. The later legal process scholars' criticisms of the Warren Court's interpretation of the Constitution were based on a misconception about the degree to which the legal norms of the Constitution could identify moral concepts and command judges to apply them. Wechsler, especially, made the mistake of believing that for legal rules to constrain judges, the rules had to be as value-neutral as possible. In fact, I argue that the later legal process scholars relied on a controversial form of moral skepticism. They assumed that legal norms cannot command judges to enforce moral principles because it is unclear whether moral principles have any cognizable existence. Not even Austinian positivism required such a crabbed interpretation of legal norms.

I conclude Chapter 5 by arguing that it was not a coincidence that the political consequence of the later legal process scholars' "narrow" interpretation of constitutional norms was to buttress the conservative movement that formed in reaction to the Warren Court's perceived activism in the areas of civil rights and the right to privacy. The later legal process scholars' misapplication of Hart and Sacks to the Warren Court was informed, I argue, by a rejection of the Court's liberal, reformist politics as well as by a sincere attempt to develop the jurisprudence of legal process. Although it is difficult to prove, I suggest that part of what drove the later legal process scholars to develop their theory of rules as they did was that their final model produced political results of which they approved. By the end of the 1960s, positivism had taken on a new image in American jurisprudence. It was now a theory that championed the idea that law was a system of authoritative rules *and* that championed a particular method to determine the content of those rules. In fact, as I show, Justice William H. Rehnquist and Judge Robert H. Bork's theory of adjudication is based on a peculiar mixture of original intent and moral skepticism. The fact that the opponents of the Warren Court were positivists was, in the eyes of the Warren Court's defenders, conflated with the fact that these same opponents were using a particular theory of adjudication to attack the Court. I argue that when the liberal response to the legal process school began, liberals mistakenly assumed that in order to rebut the later legal process scholars' theory of adjudication, one had to do away with the fundamental tenets of legal positivism as well. I ar-

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gue that the liberal critics picked exactly the wrong aspect of legal process to reject. The liberal critics built into their alternative theory of fundamental rights the assumption that legal norms cannot fully or completely specify moral principles for law applicers to enforce. Unlike the later legal process scholars with whom they shared this assumption, however, most of the liberals were not moral skeptics. The liberal legal theory that resulted from the rejection of the legal process school insisted that all law (especially constitutions) have moral content; if they could not find that content in the law, they would find it in “unwritten law.” Thus, in their rush to avoid the moral skepticism of Wechsler, Bork, and Bickel, the liberal critics rejected an essential positivist tenet, the separation of law and morality, and ultimately, I argue, embraced a version of natural law (what I call in Chapter 6 *epistemic natural law*).

In Chapter 6 I consider the various methods by which a fundamental rights theorist might evade the charge that he or she is an epistemic natural lawyer; all of them fail, I argue, because of the insatiable nature of moral reasoning. Because moral reasoning is unlike other forms of practical reasoning, it cannot be cabined by any other form of practical reasoning. Thus, sophisticated attempts to show that positive law can authorize the application of moral reasoning collapse into the simpler forms of epistemic natural law that these more sophisticated versions were designed to cure. I conclude the chapter by arguing that the fundamental rights school’s adoption of an approach as problematic as epistemic natural law was unnecessary.

In Chapter 7 I review attempts by recent legal positivists to explain how a legal system can fully and adequately describe moral principles for application by law applicers without collapsing into natural law. I compare Jules Coleman’s arguments for “incorporationist” positivism with Joseph Raz’s and Frederick Schauer’s arguments for “nonincorporationist” positivism. Incorporationism says that moral principles may be part of a positivist rule of recognition. I argue that when the rule of recognition is viewed as a device through which the power to interpret is constrained, positivism can explain how morality can be both incorporated and cabined by law. I conclude by suggesting that incorporationism – modified according to my suggestions – looks like the form of positivism that legal process would have become had it not been “hijacked” by skeptical conservatives in the 1960s.

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1.2. SYMPATHY FOR THE DEVIL: LEGAL POSITIVISM AND CREON

It is a peculiarly American belief that positivism is somehow inherently conservative.⁸ In this book I argue that it is a mistake to think that legal positivism, which grounds the definition of law on the analytical separability of law and morality, offers reliable shelter to any political camp. This book began as a study of the American myth that legal positivism is inherently conservative. In its final form, this book not only tells the story of a jurisprudential myth but also defends legal positivism by demonstrating that positivism has played a positive role in the development of modern American jurisprudence. Furthermore, I argue that although the essential tenets of positivism have often been endorsed throughout the past century by lawyers with primarily conservative agendas, positivism's association with conservatism was the result of historical contingency, and not theoretical necessity.

One of the enduring examples of legal positivism's alleged conservatism is Creon the tyrant in the play *Antigone*. In Sophocles' tragedy, *Antigone*, the daughter of Oedipus, is condemned to die by Creon, who has just become king, because she disobeyed a law that forbade the burial of her brother, Polynices. Creon had made the burial of Polynices a capital offense because Polynices betrayed Thebes. Antigone openly disobeyed the law because her religious beliefs obliged her to bury her brother, regardless of the Theban law. Despite the fact that Antigone is his own niece, that his son is engaged to marry her, and that the people of Thebes beg for her life, Creon insists on enforcing the law. By the time Creon relents, Antigone and Creon's son have committed suicide, with Creon's wife soon to follow. The play ends with Creon's acknowledging his mistake and regretting his inflexibility.

Antigone clearly celebrates a certain vision of civil disobedience, and in the modern era it has come to symbolize the struggle between justice and authority. In Jean Anouilh's 1944 Paris production, Antigone was identified with the French resistance, and in Bertolt Brecht's 1948 production, Creon was clearly identified with Hitler.⁹ Among American legal scholars, the conflict between

⁸ Hart, *Positivism and the Separation of Law and Morals*, at 594–5.

⁹ Bernard Knox, *Introduction*, in *Sophocles, The Three Theban Plays* 36 (Robert Fagles, trans., 1982).

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Antigone and Creon has also taken on a certain character. Creon has come to be seen as a symbol of legal positivism, and the awful consequences of his legal reasoning have been held up as proof of legal positivism's inherent bias toward injustice.¹⁰ Robert Cover, by calling Antigone an "archetype for civil disobedience," clearly suggested that Creon was an archetype too, but he added that Creon was a disappointingly "one-dimensional" symbol for legal positivism.¹¹ Cover noted that because Creon both made and applied the law of Thebes, his legal role was not like that of a judge in a modern legal system.¹² According to Cover, Creon did not visibly wrestle with his conscience in the play because Creon *qua* legislator wanted the same thing that Creon *qua* judge wanted. Cover suggested that Melville's Captain Vere from *Billy Budd* was a better symbol of positivism because Melville explicitly described Vere's process of self-rationalization, through which he convinced himself and the other members of the courtmartial that they were obliged by their uniforms to sentence to death a man they believed to be "innocent before God" yet guilty in the eyes of the law.¹³ Cover thought that because he had only one role, that of adjudicator, Vere experienced a form of "cognitive dissonance" between his desire for justice and the state's desire for injustice that Creon, in his unidimensional state, escaped.¹⁴

According to Martha Nussbaum, Creon's unidimensionality is a vital element of *Antigone*. Nussbaum offered a Hegelian interpretation, arguing that Sophocles constructed Antigone and Creon as complementary opposites, each representing a portion of practical reasoning.¹⁵ Neither Antigone nor Creon is just because each "is somehow defective in vision . . . [and] has omitted recognitions, denied claims, called situations by names that are not their most rele-

¹⁰ See, for example, Richard Posner, *The Problems of Jurisprudence* 400 (1990) (Agamemnon and Creon were the first legal positivists); David Luban, *Legal Storytelling: Difference Made Legal: The Court and Dr. King*, 87 *Mich. L. Rev.* 2152, 2160 (1989) (comparing the racist court that convicted Martin Luther King to Creon); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 *N.Y.U. L. Rev.* 145, 200 (1985) (contrasting Antigone's "tragic" natural law with Creon's positivism).

¹¹ Robert Cover, *Justice Accused* 1 (1975).

¹² *Ibid.*, at 2.

¹³ *Ibid.*, at 2 (quoting Herman Melville, *Billy Budd* [Hayford & Sealts, eds., 1962]).

¹⁴ Cover, *Justice Accused*, at 6–7. Cover specifically adopted Vere as a symbol of the dilemma that northern antebellum judges faced in the fugitive slave cases.

¹⁵ Martha C. Nussbaum, *The Fragility of Goodness* 52 (1986).

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vant or truest names."¹⁶ Nussbaum's choice of metaphor suggests that, like Oedipus, Antigone and Creon are *tragic* heroes because they are blind in one way and yet insightful in another.¹⁷

Nussbaum's picture of Creon, which presents his character as carefully and deliberately drawn by Sophocles, conflicts with Cover's picture, which presents Creon as a crudely drawn afterthought compared with Antigone. I will argue that Nussbaum is right and that the value of positivism is that it can explain to us why Creon is a better judge than Vere. I will argue that Creon's unidimensionality makes sense only in the context of the fact that he acts as both law maker and law applier. As I will show, Creon is a tyrant not because he was a bad judge but because he was a bad king. This simple distinction lies at the center of my modest defense of positivism. As we will see, most critics of positivism do not object to how positivist judges perform their judicial duties; what they object to is that positivist judges refuse also to take on the duties of the sovereign, or when they do take on the sovereign role, it turns out that what may have made them good judges has little to do with whether they are good at making law.

Creon performs a number of adjudicative acts and a number of sovereign acts in the course of *Antigone*. As the play opens, he adjudicates the question of whether Thebes will allow Polynices, the

¹⁶ Nussbaum, *The Fragility of Goodness*, at 52. Nussbaum nonetheless believed that Antigone makes the better decision, but she emphatically denied that the fact that Antigone's choice is just necessarily implies that Antigone is just. Nussbaum, *The Fragility of Goodness*, at 52 n7.

¹⁷ In *Oedipus at Colonus*, Creon, who is attempting to force Oedipus to return to Thebes against his will, taunts Oedipus by reminding him of his parricide and incest. Oedipus acknowledges his sin and points out the difference between him and Creon: "One thing I do know: *you* [Creon] know what you do." Sophocles, *Oedipus at Colonus* 126 (line 1132) (David Grene, trans., 1991). Oedipus' characterization is correct. Throughout all three plays of the Oedipus Cycle, Creon's unjust acts are rarely the result of factual error or misapprehension (unlike Oedipus'). In *Oedipus Rex*, Creon counsels Oedipus to be more deliberative in his decision making. See, for example, Sophocles, *Oedipus the King* 189 (line 607) (Robert Fagles, trans., 1982) ("Hear me out, then judge me on the facts"). In fact, when Oedipus unjustly accuses Creon of treason and condemns him to death, Creon says to him:

If you detect that I . . .
 have plotted anything, arrest me,
 execute me. Not on the strength of one vote,
 two in this case, mine as well as yours.
But don't convict me on sheer unverified surmise.

Sophocles, *Oedipus the King* 193 (line 684) (Robert Fagles, trans., 1982) (emphasis added). When Creon unjustly condemns Antigone to death, the only thing about Creon's practical reasoning that is not flawed is his fact finding: Everything he accused Antigone of was true and based on either her words or witnesses.

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traitor, to be buried. Although he adjudicates this question in his capacity as king of Thebes, he is not making the law in this matter; rather, he is interpreting a relatively rich body of “customary” public law that governed such questions. As Nussbaum noted, in the Greek city-state, although “corpses of enemies may be returned to their kin for honorable burial, traitors are not given this much consideration.”¹⁸ That is why Hegel argued that Creon was not in the wrong, because he in fact represented the “moral force” of the city’s public law.¹⁹ Nussbaum concluded that “Creon is within custom and justified . . . insofar as he shows dishonor to the corpse and forbids it burial in or near the city.”²⁰

Nussbaum noted that Creon was obliged, as Polynices’ uncle, to bury him. Therefore, an audience in ancient Greece would have expected Creon to be caught between two powerful and equally valid demands. The audience would have expected Antigone to have experienced exactly the same tension but to have resolved it in the opposite way from the way Creon did. And yet neither Creon nor

¹⁸ Nussbaum, *The Fragility of Goodness*, at 55. It must be stressed that Polynices was a traitor to Thebes, not just a leader in a civil war. Polynices, who had shared the kingship with his brother Eteocles after Oedipus gave up the crown, was expelled from the city by Eteocles. Polynices had every reason to feel wronged by his brother, especially because he was the elder of the two. But Polynices’ next step was utterly unwarranted. He went to Argos, married into the royal family, and raised an army to take Thebes on behalf of Argos. See Sophocles, *Oedipus at Colonus* (lines 415–20). Polynices boasts that his captain Capaneus has vowed to “burn the city of Thebes into the ground.” Sophocles, *Oedipus at Colonus* 138 (line 1508) (David Grene, trans., 1991).

¹⁹ See Bernard Knox, *Introduction*, in Sophocles, *The Three Theban Plays* 41 (Robert Fagles, trans., 1982) (quoting Hegel); and see A. C. Bradley, *Hegel’s Theory of Tragedy*, in *Hegel on Tragedy* 367 (A. and H. Paolucci, eds., 1975).

²⁰ Nussbaum, *The Fragility of Goodness*, at 55 n14. Nussbaum raised a complication about the law of the burial of traitors. Nussbaum noted that although customary law forbade the burial of Polynices “in or near the city,” the law would not have required that Creon forbid the burial of Polynices *anywhere else*. *Ibid.*, at 55 n14. Nussbaum cited sources that “Athenian traitors, though forbidden burial in Attic territory, were frequently buried by their kin in Megara.” *Ibid.*, at 55 n14 (citing G. Perrotta, *Sofocle* [1935]). Creon’s proclamation forbade any citizen of Thebes from burying or mourning Polynices. If Creon intended to control what Thebans did outside Thebes or felt in their own hearts, then this application of customary law would have been both historically incorrect and practically absurd. But as Nussbaum pointed out, these outer limits of Creon’s ruling were not tested by Antigone: She attempted to provide Polynices with a public burial (with full honors) where he fell, right by the city. *Ibid.*, at 55 n14. To the extent that the purpose or point of Creon’s ruling was to deny Polynices “honor” in Thebes (see *Antigone*, lines 222–8), then Creon’s ruling was consistent with the customary law cited by Nussbaum, and Antigone’s intent – to honor Polynices – was clearly in violation of customary law.