

Positivism, Realism, and Sources of Law

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1. The essentials of legal positivism

We should not make too much of party labels in philosophy, including ‘legal positivism’. Jeremy Bentham and John Austin were energetic partisans, but the party that energized them was philosophical radicalism, not legal positivism.¹ Nor did H.L.A. Hart write *The Concept of Law* to show loyalty to the positivist tradition in English legal thought; he sought to explain the nature of law, and along the way appropriated ideas from others, including natural lawyers and legal realists. Perhaps Hans Kelsen wrote *in order to* produce a positivist philosophy, that is, with the aim of disciplining theoretical reflection on law by strictures he considered methodologically positivist or, as he put it, ‘scientific’—but even Kelsen modified those as his thought developed. And today, influential advocates of legal positivism often adopt that label somewhat diffidently and with qualifications: Jules Coleman, Julie Dickson, John Gardner, Matthew Kramer, Brian Leiter, Andrei Marmor, Joseph Raz, Frederick Schauer, Wil Waluchow and others would probably describe their own theories as ‘positivist, but...’ Their hesitations reflect a

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¹ See Halevy 1934. Austin grew more conservative in later years.

natural reluctance to associate a sound theory of law with the distracting, misleading, and even mistaken doctrines that have adhered to it over the years. Thus, it is hard to find contemporary positivists who still hold that law is the command of a sovereign, that law is the product of explicit or tacit legislation, that there is a sharp distinction between applying and creating law, or that there are no necessary connections between law and morality—all claims once associated with legal positivism.² But one doctrine remains essential: Any theory of law that a *positivist* would be willing to call ‘positivist’ endorses a version of the following claim: *all law is positive law*.³

Of course, nearly everyone agrees that *some* law is positive, meaning that its existence and content is fixed by considerations of social fact, including facts about what people actually believe, want, intend, and decide, whether individually or in concert.⁴ What is distinctive of legal positivism is the claim that this is true *of all law*. Law is positive if and only if it is created by human thought and action: by actual, datable events such as people deliberating, deciding, ordering, accepting, tolerating, conforming, or obeying. As this (incomplete) list shows, not all positive law is created by acts performed with the intention of creating law, so positive law need not be legislated. And, if an artefact is

² See Gardner 2001; Green 2008.

³ I ignore the pejorative use of ‘positivist’ once current in American law schools: a mélange of doctrines no serious philosopher ever endorsed, including the idea that law is always clear, that ‘plain meaning’ is the only proper approach to interpretation, that judges never make law, and that, however foolish or unjust, the law is to be obeyed and applied. For discussion, see Schauer 1999.

⁴ The most prominent exception is Ronald Dworkin, who comes close to suggesting that there is *no* fully positive law, and that anything worth counting as a legal system, and anything worth acknowledging as a law, must satisfy a demanding moral condition: Dworkin 1986. Similarly, Greenberg 2014. In contrast, neo-Thomist natural lawyers typically affirm the existence of ordinary positive law: Finnis 2011; Murphy 2006.

something that is made intentionally, law need not be an artefact either. It can be an *objet trouvé* that someone puts to a fresh, legal, use. Law can also be made unintentionally: a custom may emerge by invisible hand mechanisms yet satisfy the prevailing criteria for legal validity in that legal system; a ruling can be made solely to settle a particular dispute, but have the upshot of changing the law for many future cases; a piece of judicial reasoning can silently introduce, *en route* to its conclusion, a presupposition that is later treated as legally binding. And so on.

Such positive events produce the ‘sources’ of law in a legal system: the constitutions, treaties, statutes, decisions, and customary practices on which lawyers rely in argument and by which judges are bound in their rulings. Another familiar way of epitomizing legal positivism is thus to say it is the view that *all law has sources*, where a source can be identified in a content-independent way, apart from its merits.⁵ Moreover, many sources involve norms of a general character, rules created under the authority of, or using, other rules. Hence, a third familiar way of characterizing positivism is to say that *law is a system of social rules*.

These three characterizations differ in nuance, but here I will use them interchangeably. My interest here is not in defending a particular version of legal positivism but in exploring the relationships between positivism (in its essentials) and its

⁵ Some hold that all law is *ultimately* source based (but may include non-ultimate, non-source-based materials); others hold that all law is *wholly* source based. This is the distinction between ‘inclusive’ and ‘exclusive’ legal positivism: Waluchow1994. I do not examine that debate here. My own view conforms to an exclusive interpretation of the idea that all law is positive. For discussion see Raz 1979, chap 3, and Green 2018.

closest cousin in the evolution of jurisprudential thought: legal realism. Brian Leiter says that legal realists also believe that all law is positive law, and at one point Hart riskily describes his own theory as a kind of ‘descriptive sociology’ of law.⁶ Yet some realists have thought, or said, that they disagree with legal positivism, and textbooks in jurisprudence still include set-piece debates between positivism and realism. How can this be, if realists accept the essentials of legal positivism? I will try to answer that question. Like Leiter’s, my conclusion is conciliatory, for I too think the differences have been exaggerated. But I offer a different explanation of how the misunderstandings arose.

2. Upshots of the essentials

Legal positivism has been doubted on many grounds, often rooted in what are taken to be inevitable but unacceptable upshots of the essential positivist thesis. Here are four such claims, each accompanied by a brief remark suggesting how positivists address it. There then follows a fifth upshot of the positivist thesis. I will explain why that one is no mistake, then turn to consider its bearing on the relationship between positivism and realism. Mainly, I have in mind American legal realism—not only the historical variety, but also the casual, untheorized, ‘realism’ or ‘functionalism’ that circulates in many

⁶ Leiter 2007; Leiter 2019 (this volume); Hart 2012: v.

substantive subjects in law schools. Where I need a specific version of legal positivism, I will enlist work by H.L.A. Hart, somewhat inflected by my own views.

First, four familiar objections. (The fictive quotations are to be read in a *reductio* tone of voice:)

- (1) 'If law were wholly positive, law could have no real value, since mere facts cannot entail values.' *But:* It is wrong to suppose that whatever value law has must follow—and follow as an entailment—solely from true propositions about law's nature.
- (2) 'Law is a purposive activity, so law cannot solely be a matter of fact.' *But:* It is wrong to suppose that a historical, factual activity cannot be identified partly by the purposes for which it is undertaken. An election, for example, is a purposive activity.
- (3) 'If law were positive, legal systems could not be identified by their contribution to human goods.' *But:* Institutions and artifacts may have constitutive aims to promote wellbeing. Nothing is a sewage system that is not oriented to promoting public health, yet the existence (and content!) of a sewage system is a matter of plain empirical fact.
- (4) 'If law were positive, there would be no guarantee that there is always a *prima facie* moral duty to obey it'. *But:* There is no reason to believe in such a duty, as

opposed to, say, a duty to give due weight to the requirements of an effective and potentially beneficial institution.

The quoted propositions in (1) to (4) reflect familiar errors about the essential thesis of positivism. The telegraphic replies could be, and have been, endorsed by both legal positivists and legal realists. But now consider this upshot:

- (5) 'If law were positive, then the law would be incomplete and, on some matters, there would be no conclusive law.' No *buts* about it: this does indeed follow and is true.

There are three related reasons why the consequent in (5) follows from the essential positivist thesis, together with some other true propositions:

(A) The sources of law are finite. The UK constitution contains all the powers needed to create an infinite number of statutes. But most of those have not *been* created, including many which there is an overwhelming moral reason to create. Law provides for, and regulates, the creation of law 'dynamically,' as Kelsen put it: by being used. Hence, if an existing set of legal norms would justify, or even logically entail, further norms, those further norms are not law unless someone endorses, or presupposes, or otherwise uses that justification.

(B) All legal sources are somewhat indeterminate, owing to the related phenomena of ambiguity, vagueness, and the fact that there is always more than one permissible way of applying a legal norm, even a mandatory norm.⁷

(C) There are unresolved conflicts among laws. An action that is permissible according to one rule may be impermissible according to another. Legal systems do have positive, conflict-resolving rules; but the list of conflict-resolving rules is finite (see A), those rules are themselves indeterminate (see B), and they may in any case never get applied, since a conflict may go unnoticed or not be worth resolving.

Hence, positive law is incomplete, and some legal disputes lack a single right answer in law. Some writers think that is a powerful objection to legal positivism.⁸ But legal realists do not think so, at least not if they have mastered the distinction between legal positivism and so-called formalism. Like positivists, legal realists understand that the rule of law cannot be fully realized, not least because it has multiple desiderata that may conflict *inter se*. The law should be stable, but it should also be clear; so intolerably vague provisions can be cured only by introducing instability in the law, that is, by changing it. In any event, a society completely ruled by law is not an attractive ideal. It is better to leave judges some discretion to accommodate the equities in a particular case,

⁷ 'The higher norm cannot bind in every direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act.' Kelsen 1967: 349.

⁸ Most insistently, Dworkin 1977. See, in reply, Raz 1979, chap. 4.

and as a prophylactic against formalistic fantasies of fixing the law for the future, in ignorance of what sort of laws we shall need. Here, positivism and realism are at one.

3. Indeterminacy and realism

Positivism as I understand it contributes to a conceptual explanation of law. By that I mean it aims to deepen our understanding of law by examining *what counts as what*; it has only a secondary interest in counting up instances of the various *whats*. How then could there be any conflict between positivism and a theory that acknowledges that all law is source-based, but adds that decisions of the courts cannot generally be explained by positive law, though they can be explained by extra-legal considerations, including the court's sense of what would be fair in a case, what common sense or efficiency requires, or what suits their judicial style or temperament? The essential positivist thesis is a claim about *how law is determined*, not a claim about *how much of a judicial decision is determined by law*. On the latter issue, Kelsen says, 'There *must always be* more or less room for discretion'; and Hart insists that, in every legal system, 'a *large and important field* is left open for the discretion of courts and other officials'⁹ Positivists are not indeterminacy-minimizers. Indeed, as the discussion of upshot (5) shows, the incompleteness of law is intimately connected with its nature as a social institution.

⁹ Kelsen 1967: 349; Hart 2012: 136. Emphases added.

One source of friction, if not disagreement, between realists and positivists arises this way: Positivists hold that law is wholly constituted by social facts, but a realist might ask, *what use is it* to know fact-constituted law if it gets little traction in court? However, there is such a thing as useless knowledge. Perhaps some realists share Dworkin's view that the only sensible career ambition for jurisprudence is to become a kind of high-brow *amicus curiae*. Felix Cohen wrote, 'Fundamentally there are only two significant questions in the field of law. One is, 'How do courts actually decide cases of a given kind?' The other is, 'How ought they to decide cases of a given kind?' Unless a legal 'problem' can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.'¹⁰ Yet Cohen misses something. Whenever we have two meaningful questions, we perforce have a third: What is the relationship between the first two questions?

According to one view, Cohen's questions are independent. There are psychological and sociological questions about the causes of judicial decisions and there are normative questions—moral or legal—about how such decisions ought to be made. These inquiries do not compete and may not converse. This tolerant view takes no sides in general jurisprudence. It is held by H.L.A. Hart,¹¹ but also by Ronald Dworkin, who

¹⁰ Cohen 1935: 824.

¹¹ Hart 1983: 'Problems of Legal Philosophy'.

not only acknowledges the legitimacy of legal sociology but says it is entitled to its very own concept of law—the ‘sociological concept of law.’¹²

Competing with the independence view are two imperialistic ones: for Kelsen, normative questions take conceptual priority over factual ones; for realists the reverse is true. Kelsen holds that intelligible inquiry into the causes of judicial decisions *presupposes* a normative (but not moral) theory of adjudication. Legal and political entities are norm-constituted, and while we can and should aim for a descriptive theory of a normative object, the theory must preserve the character of the object it explains. A legal system is a system of norms directing judges how they *ought* to decide cases, not a set of predictions about how they *will in fact* decide, so the former is the proper object of jurisprudence. Admittedly, Kelsen thinks sociological jurisprudence and legal positivism cannot come entirely unstuck. He holds that a legal system exists only if it is broadly effective—only if most of its rules are obeyed or applied, most of the time. He also holds that a particular legal rule, if never applied, is liable to be extinguished by the doctrine of desuetude or by the customary practices of the courts. So, he concludes, ‘The norms which normative jurisprudence regards as valid are norms that are ordinarily obeyed or applied’ and ‘the results of a sociology of positive law cannot essentially differ from those of normative jurisprudence.’¹³ That is over-optimistic. System-wide efficacy does not guarantee the

¹² Dworkin, 2008: 2-3; but contrast his more Kelsenian view in Dworkin 1986: 12-13, relying on the idea that law is *necessarily* an argumentative (normative) practice.

¹³ Kelsen 1949: 170, 174.

efficacy of individual norms, and desuetude is merely a possible rule in positive law. There are valid laws ‘on the books’ that have long been ignored, or gone unused, or even honoured in the breach. (In fact, this weak link between current conformity and continuing validity is one of the things that gives legal systems an edge over many kinds of customary social order.)

A second imperialistic view, attributable to some realists, among others, is that social science should *replace* normative jurisprudence, because the norms found in legal doctrine either do not exist or are causally inefficacious in court. We understand the nature of law—to the extent that law has a determinate nature—the same way we study the nature of political parties, electoral systems, or markets: only by *a posteriori*, empirical analysis. When the data do not match the norms held out as valid law, the norms that are efficacious in court are the ones that determine the province of jurisprudence.

Brian Leiter once defended a related view, both on its merits and as an interpretation of the leading ideas of the American legal realists, whom he regarded as presaging a kind of ‘naturalized jurisprudence,’ a jurisprudence fit to keep company with the successful empirical sciences.¹⁴ The positivists may have been substantively correct about the nature of law, but they were wrong methodologically: it was just a lucky guess. No armchair analysis of the concept of law can show that law is wholly based on sources.

¹⁴ Leiter 2007: especially the essays ‘Rethinking Legal Realism: Toward a Naturalized Jurisprudence’; ‘Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis’; and ‘Legal Realism and Legal Positivism Reconsidered’. Leiter’s view changed as he lost confidence in the (current) sciences of judicial decision-making. See especially Leiter 2007: 188-193.

An empirical study of judicial decision-making may reveal that *something like* positive sources figure in the working assumptions about, or operational definition of, law as used by lawyers and sociologists. But that definition is revisable. If doctrinal rules have a place in a theory of law, it must be in virtue of their predictive efficacy somewhere in legal systems.

4. Legal realism and positivism

Thus, on any account, positivists and realists agree about much: that law is constituted by social facts, that judges have and exercise significant powers to make law, and that law is morally fallible and so is to be approached in a realistic spirit in the everyday sense of that term: with attention to facts and without romanticism or mystification. So, what is there left to disagree about? It proves surprisingly hard to say.

H.L.A. Hart thinks the Scandinavian realists advocate reductivist theories of rules, and he thinks the American realists lack an adequate account of the rule-constituted institutions of courts and judges that preoccupy them. (He lays the same charge at the door of the imperativists, especially Austin.) In both cases, there is a failure to pay attention to the nature and variety of rules in law. These objections are second nature to contemporary positivists, many of whom first met the realists not *in habitat* but in Chapter VII of *The Concept of Law*. Returning to the sources, Leiter argues that we have been misled: the most important realists hold views that are either compatible with Hart's

positivism or, to the extent of any incompatibility, superior. In particular, the realists are not the ‘rule sceptics’ that Hart made notorious. They do not deny the *possibility* of legal rules; they do not offer a predictive *analysis* of the concept of a rule—those are forms of conceptual rule scepticism and the realists eschew conceptual analysis altogether. They are committed only to empirical rule scepticism: owing to indeterminacy, the decisions of appellate courts cannot be predicted on the basis of (positive) law but they *can* be predicted by extra-legal considerations, for instance, by ‘judges’ responses to the underlying facts of the cases,’ including their beliefs about what would be fair, given those facts.¹⁵ While philosophers like Hart or Kelsen were cogitating, Leiter thinks they should have been counting.

Unfortunately, Hart uses the term ‘rule scepticism’ in several ways. It covers those who deny that practical rules even exist, and instead hold that they are theoretical ‘prophecies of what the courts will do in fact.’¹⁶ He also uses it to cover writers who think that those who have final authority to decide also have unfettered authority to decide. And, most generally, he uses it for all who deny ‘that for the most part decisions ... are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would

¹⁵ Leiter, 2011: 297.

¹⁶ Holmes 1920: 173.

generally be acknowledged.¹⁷ These sceptics are different, but Hart thinks they are all befuddled by a failure to understand *what it would be* for conduct to be rule-guided. Rules can be loose or crisp, they can have exceptions or be defeasible, they can appear *ex ante* in decision-making or *ex post actu*, appealed to in defense when conduct is challenged, but so long as they are shared standards of belief or conduct effectively ‘accepted’ as appropriate from the ‘internal point of view’, they are rules, they have practical functions, and they constitute both laws and legal institutions.

In his reading of the American legal realists, Leiter argues that they have no stake in any of this. ‘Conceptual’ claims about the nature of law, or rules, just leave them cold. Could all the loose talk, in Holmes, in Cohen, or in Llewellyn about ‘definitions’ or ‘ideas’ of law or rules merely be jurisprudential *obiter dicta*? Leiter writes:

[Theirs] is not a claim about the concept of law but, rather, a claim about how it is useful to think about law for attorneys who must advise clients what to do. (...) [F]rom the practical perspective of the franchisee, what one wants to know about the law is what, in fact, the courts will do when confronted with the franchisee’s grievance. That is all the law that matters to the client. And that is all, I take it, the Realists wanted to emphasize.¹⁸

¹⁷ Hart 2012: 137.

¹⁸ Leiter 2007: 292.

Well, some of them *seem* to emphasize more. Beginning with Holmes, it becomes almost an article of realist faith that there are ‘really’ no primary obligations in tort or contract, but only remedial obligations to pay damages if so ordered by a court. Yet a client—even Holmes’s ‘bad man’—may think he has a stake in his reputation for fidelity. He may even care more about what people outside courtrooms think than he cares about the likelihood of being ordered to pay damages. Cohen writes that legal realism is ‘a theory of the nature of legal roles, legal concepts, and legal questions. Its essence is the definition of law as a function of judicial decisions.’¹⁹ Yet Cohen insists that, ‘Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls. Their acts are ‘judicial’ only within a system which provides for appeals, rehearings, impeachments, and legislation.’²⁰ To say that judges’ acts are judicial only within a system of effective norms is to say no more than what Kelsen says in section 2 of *Pure Theory*. If these sort of comments do not actually assert conceptual claims, they do presuppose them.

Of course, the realists are not coming to any of their theoretical conclusions by analysis of ordinary language (nor, in truth, is Hart).²¹ And sorting through the realists’

¹⁹ Cohen 1935: 842. On whom see Leiter 2007: 291.

²⁰ Cohen 1935: 843.

²¹ ‘The idea that what demands understanding about law is the concept of law as manifest in ordinary language would have struck [the realists] as ridiculous.’ Leiter 2007: 291. On Hart and ordinary language, see my ‘Introduction’ to Hart 2012.

opinions—bearing in mind that most of them had no philosophical interests or insight—is a task that calls for an intellectual historian, and a patient one at that. Here, I hazard only two claims:

First, as Leiter agrees, insofar as the realists assert no claims about the concept of law, or the concept of a rule, they have no dispute with the essential thesis of positivism. And as I have stressed, positivists are not indeterminacy-minimizers, certainly not with respect to decisions of appellate courts: the indeterminacy of law follows from positivism's essential thesis.

Second, if realists are nonetheless committed to claims about the concept of rules or law, then the fact that they do not assert them as such does not immunize them from conceptual mistakes. Conceptual error is a strict liability offence—though it may be an offence of small consequence. If someone complains to his doctor that 'my arthritis has moved into my thigh,' what he says is not, as Cohen might have put it, 'nonsense.' It is grammatical and intelligible English. It may even be diagnostically useful. ('He's feeling the sort of pain in his thigh that his arthritis causes in his knee, therefore...') All the same, it *is* a mistake, and a mistake about the concept of arthritis. Of course, the patient has some command of 'arthritis' ('it causes an ache and not an itch;' 'it is felt in the limbs but not the ears,' etc.) He is getting by, as we all do, with a partial grasp of concepts prevalent in his society. In a similar way, if lawyers say that there are no such things as legal rules, but only decisions of courts made by people called judges, they too demonstrate a partial

grasp of a concept: they see that law stands in internal relations to positive activities of the courts. Moreover, just as the patient's mistake about arthritis may not matter for clinical purposes, conceptual mistakes about law may not matter for advocacy.

I do not think Hart considers the typical rule sceptic to be committed to absurd denials that any rules exist. He takes the realists' most extravagant statements to be 'great exaggerations of some truths about law unduly neglected....'²² The neglected truth is that source-based law is always somewhat indeterminate and, in the most complex and most studied cases, often quite indeterminate. The exaggeration lies in thinking that this is the *ordinary* run of things in an operational legal system, where people use legal rules to find their way through a roundabout, to enter tenancies, to buy cars, to make wills, or to get married, often going nowhere near a lawyer, never mind a courtroom.²³ Even in the appellate courts, Llewellyn's idea that 'there is *always* more than one available correct answer, the court *always* has to select'²⁴ neglects the fact that on some points (for example, whether the court has jurisdiction) the law may be as determinate as law ever is. And Llewellyn's claim that 'there are two opposing canons [of interpretation] on almost every point' does not show them to be in equipoise.²⁵ It is a reminder that advocates have lots of tools work with; but it is not grounds for a sceptical conclusion. Among our contemporary, garden-variety, 'law-school' realists—especially those teaching American

²² Hart 2012: 2.

²³ As Leiter notes (This volume): Leiter denies that any realist except Jerome Frank made this error.

²⁴ Llewellyn 1935: 396. Emphases added.

²⁵ Llewellyn 1935: 401.

constitutional law—the idea that there is no rule of recognition because courts disagree about the sources of law to an extent inconsistent with the *correct* criteria for the existence of a rule still gets traction.²⁶ That too rests on a notion of what those criteria are. Unless we are happy with bare stipulations in these disputes, when we wrestle with questions of the form ‘What counts as X?’ or ‘What are the criteria for Y?’ we engage conceptual problems.

Like Kelsen, Hart considers law to be a norm-constituted object; but one that is tractable to descriptive analysis.²⁷ His arguments against the various characters he labels ‘rule sceptics’ are cogent, but compact. His influential points about the role of legal reasons in legal arguments, about finality versus the infallibility of decisions, and about how we detect social rules require expansion and, at points, correction.²⁸ They do not reach a hard-bitten sceptic who thinks our entrenched notions of rules, reasons, and judicial mistakes involve explicable errors. Nor are they alert to Goodman- or Kripke-type anxieties about rules in general. But perhaps Hart does not need more for his purposes, since he mainly wants to show that the errors on which predictivism (etc.) rest are so gross that we should not treat them as literal proposals for a new jurisprudence but as vivid reminders of important, but modest, truths about positive law.

²⁶ Dworkin 1986: 10.

²⁷ As my granny put it, ‘It disnae tak a fat cowherd tae drive fat kine.’

²⁸ For one correction, see Green 1999.

Any realist who is any kind of rule sceptic faces the challenge of keeping his scepticism under control. A dose is needed in respect of the reasoning of appellate courts; but not so much that it makes it dissolve the existence of those institutions, and not so much that it makes ordinary law—law-in-action, law-on-the-ground—unintelligible. Legal institutions, courts, officers, and decisions are rule-constituted things. Holmes argued that it might be of value if every word of moral significance were purged from jurisprudence, but he was never tempted by the thought that we should also eliminate all reference to institutional facts about courts, judges, or decisions. That is no doubt why Hart says that the only serious form of scepticism *acknowledges* that social rules exist, that they are *indispensable* to understanding law, including both courts and their decisions, and maybe even accepts that statements of rules have non-assertoric, dynamic, functions.²⁹ The sceptic Hart criticizes *accepts* all that but goes on to deny that such rules ever *bind* judges to a unique decision. His main target is the idea that, whatever psychological states judges find themselves in, whatever their pretence, *however* predictable their decisions, it is always false to suppose that they are bound by their own practices to decide cases as they do: ‘There is nothing which courts treat as standards of correct judicial behaviour, and so nothing in that behaviour which manifests the internal point of view characteristic of the acceptance of rules.’³⁰ Did American realists of the

²⁹ Hart 2012: 138.

³⁰ *Ibid.*

early generation think this, or is Hart projecting backwards his own concerns? I am not sure; but some such view became sufficiently influential, not only among untheoretical 'law-school realists' but also among the short-lived Critical Legal Studies 'movement', that it still worth considering how it should be addressed.

5. Permissive Sources of Law

How could someone understand the boundary between law and non-law (such as custom, convention, or instinct) if they were to deny that the law controls decisions in the higher courts, where these boundaries are produced, usually indirectly, by the application of law?

Leiter notices the resonance between the realist argument from indeterminacy and the positivist view about the boundaries of law. Herman Oliphant's idea that the American promise-not-to-compete cases were decided by accepted norms of business practice *rather than by legal norms*, and Holmes's idea that broad policy considerations *rather than legal norms* determine outcomes both depend on a distinction between such norms on the one hand and American law on the other.³¹ So they accept that law has boundaries, and that its boundaries are determined—to the extent that they are—by social rather than moral or metaphysical considerations. Holmes calls law a 'business

³¹ Leiter 2011: 292-93.

with well understood limits, a body of dogma enclosed within definite lines.’³² Max Radin calms the anxious by reminding them of the common culture of legal thought: ‘We need not fear arbitrariness. Our Cokes and Mansfields and Eldons derive their physical and spiritual nourishment from the same sources that we do.’³³ What should we make of this?

Possibly, the realists *presupposed* something like a positivist view of law without working out whether that could be made consistent with sceptical views about rules and appellate decisions. Or maybe the realists were happy to compartmentalize, to be casual positivists in their court pleadings and hard-bitten sceptics in their graduation addresses. But I think there is another possibility.

I have stressed that the essential doctrine of legal positivism is that all law is positive. On Hart’s version, the sources of law are ultimately determined by customary social rules that identify them as valid grounds for judicial decision. But there is a complication here:

[W]hen it is said that a statute is a source of law, the word ‘source’ refers not to mere historical or causal influences but to one of the criteria of legal validity accepted in the legal system in question. Enactment as a statute by a competent legislature is

³² Holmes 1920: 171.

³³ Radin 1925: 362.

the *reason* why a given statutory rule is a valid law and not merely the *cause* of its existence.’³⁴

The claim is that enactment is both part of the causal history of a statutory rule *and also something else*, namely, one of the criteria identified as a source of law in that system. Since the ultimate recognition rules in every legal system, even ones with a ‘written’ constitution, are but customary practices of (at least) the courts and other officials, there can be no clear demarcation between an event playing a causal role in the creation of a statute and it being accepted as a criterion of statutory validity. What starts off just *being done* can end up becoming ‘*the done thing*’. Customary norms emerge higgledy-piggledy out of common practice, not as products of prescription or planning. *Ex post facto*—when a customary norm is well entrenched—courts and others may look back on earlier bits of history as precursors to or even aspects of its contemporary acceptance, but that is as much of a fiction as when we say *Donoghue v. Stevenson* was the ‘beginning’ of our negligence standard. (It became its beginning only later, after other courts reacted to it.) That means there will be gray areas in which something may, or may not, be a source; or may be a source-to-be; or, I will now suggest, a source of a permissive kind.

In explaining the idea of a source of law, Hart remarks that in addition to the familiar binding sources of enactments, decisions, and customs, a court may also draw on the decision of a foreign court, institutional writers, Roman jurists, and even, in some

³⁴ Hart 2012: 294.

jurisdictions, academics. ‘The legal system does not *require* him to use these sources, but it is accepted as perfectly proper that he should do so. They are therefore more than merely historical or causal influences since such writings are recognized as ‘good reasons’ for decisions.’³⁵ Yet the very same courts might never think it appropriate to cite Rawls’s *Theory of Justice*, or (thank God) *Leviticus*. Common practice makes the difference.

How then should we characterize ‘good reasons’ for decisions whose normative force turns on practice, but which have not crystallized into binding law? Judges sometimes cite treatises or law dictionaries just for a pithy statement of the law, believing the statement is, on independent grounds, correct. They also sometimes cite academic arguments they find convincing on their merits, taking them not as authoritative but as persuasive only. Sometimes, however, the fact that things are generally ‘recognized as good reasons’ set them apart by this very recognition. For example, it is a matter of positive practice that Scots courts may cite the seventeenth- and eighteenth-century writers, Stair and Erskine. Unlike the way an English lawyer might cite Blackstone, however, the Scots allow their institutional writers some actual, if weak, authority. The very fact that *Erskine declares N* is some reason for holding that *N* is part of Scots law—though a subordinate reason, and one that cannot resist the contrary authority of, say, statute or case law. Still, Erskine can be used to resist common sense or certain customs or a persuasive argument from a law journal. It may be no legal error to omit Erskine

³⁵ Hart 2012: 294, note to 101.

where he could be relevant, yet it may strengthen a case to cite him. (Scots lawyers are canny; they never waste sources.) Something similar holds, in many legal systems, of the judgments of foreign courts.

On Hart's account, whether a norm is mandatory or binding is a matter of degree.³⁶ Hence, the distinction between what is binding on the courts and what is not is also a matter of degree—just as we would expect in an area of customary obligations. In addition to sources they are strictly bound to apply, there are sources that courts are by their own customs expressly permitted to apply: practice-based 'good reasons' for decision that are given greater force than they would have just on their merits and in the absence of the practice.

A 'permissive source' of law is not, of course, a bare permission. Being permitted to φ is not normally any sort of reason to φ (though it may be a reason for others not to interfere). Moreover, absent a source, courts are permitted to act on any sound reasons relevant to a dispute. It is not as if we live in a world in which judges have no grounds to decide anything until law steps in and provides some. The function of sources in law is often to block appeals to what would otherwise be good reasons for decision.³⁷ We should normally transfer wealth from the rich to the poor—though not when the law of negligence steps in to require a poor negligent driver to compensate a rich one he has

³⁶ Hart 2011: 82-91.

³⁷ Raz 2009: 190ff.

injured, thereby blocking reasons of beneficence or charity. So, a permissive source of law differs both from a mere permission and also from something that is just on its merits a good reason for decision, for example, a consideration of justice, utility, or humanity. Permissive sources get their merit-independent force from the fact that they are recognised and applied as reasons for decision in the practice of the courts, even though they fall short of binding authority.

I therefore conjecture that part of the realists' objection to positivism is that they consider many sources to be permissive—not only Llewellyn's canons of interpretation that hunt in contrasting pairs, but also case law and even some statutes, 'judicially construed'. They acknowledge the core of rules that constitute legal institutions and elementary procedures; that is how they can freely speak of the boundaries of law and legal institutions all the while thinking that the law does little to constrain judges in hard cases. But in addition to the familiar positivist claims about the finitude, indeterminacy, and conflicting character of sources, the realist also supposes that many sources have little more than the weak authority of something like a doctrine of foreign law, or the views of a writer like Erskine or Stair.

On this sort of view, legal doctrine is a limited menu of socially-based considerations that courts are entitled to apply, that are recognized as appropriate to apply, that are distinct from things like ordinary commercial customs and social conventions, but which have weak authority that is often overborne by considerations of

policy, justice, the equities of the case, etc. Legal reasoning is, just as the positivists hold, source-based, but the control of those sources over judicial decisions is more limited than most people think. Luckily, law can contribute to social life outside the drama of the court-room, and thus outside those cases in which any judicial intervention is called for. That sounds, to me, like the position realists defend.

If this is correct, then there is an empirical and a conceptual dispute between positivists and realists. Hart addresses the empirical point the only way one can: with a plea to look. He does not think that the realists mean to restrict their claim to the American appeals courts only—that would drain a lot of blood from their theory. For a realist should think it an open question to what extent the trial courts follow the high court: the output, not just the input, of appellate cases is legal rules. Hart thinks that, free of the *a priori* blinders of reductionism, anyone can see the uncontroversial application of rules at some points in the appeal courts, at many points in the trial courts, but, most important, in the myriad ways that law guides daily conduct without the supervision of courts at all. '[B]oth the framework within which ... [judicial decisions] take place and their chief end-product is one of general rules. These are rules the application of which individuals can see for themselves in case after case, without further recourse to official direction or discretion.'³⁸ This plea is not, I admit, an argument. But neither is it *ipse dixit*. If someone fails to spot the pigeons and then boldly declares there are none about, it may

³⁸ Hart 2012: 136.

be enough to say, ‘Just look; over there! Pigeons everywhere!’ People sometimes miss fairly determinate legal rules because they are looking in the wrong places, and sometimes because they are wrong about what a fairly determinate legal rule looks like.

To this, Hart adds two arguments for believing there are mandatory legal norms that bind the courts. First, even if judges do not *experience* any special psychological states like ‘feelings of compulsion’ they may nonetheless *have* an obligation to decide in a certain way.³⁹ This point may be addressed to the crude behaviourism of Alf Ross or Axel Hägerström’s reductionism, or maybe eliminativism, about legal entities.

The second argument is that most judicial decisions are either (a) ‘reached by genuine effort to conform to rules consciously taken as guiding standards’ or (b) reached ‘intuitively’—without conscious effort to conform—but nonetheless ‘justified by rules that judges are disposed to observe and whose relevance to the case at hand would be generally acknowledged.’⁴⁰ Point (a) reiterates the plea to look. Point (b) is a claim about the criteria for the existence of social rules. It is a mistake to think one uses a rule only if there is a *very high* degree of consensus about what the rule requires over a *wide* range of possible application, if one is *conscious* of it as a rule, and if one uses it in making an *effort* to conform. This overemphasizes the degree to which rule-following is articulate and conscious *ex ante*. It leaves too little room for our familiar experience of the inarticulate,

³⁹ ‘What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified...’ Hart 2012: 57.

⁴⁰ Hart 2012: 141.

unconscious, and instinctive following of rules that are mostly internalized, for example, when we know how to speak our native language, or how to dress for an occasion, or when we know that a certain legal argument ‘just won’t fly’. Rule-following is also often displayed *ex post actu*, when rules are produced in justifications, used in communicating past decisions to others, or used to explain what was decided or to defend it against criticism, actual or anticipated. To downplay all this is to make a mistake about the concept of a rule, a mistake that can infect one’s theory of law.

6. The Displacement of jurisprudence?

Law is an anthropocentric, mind-constituted, thing, and one way to understand such things is to get clearer about their conceptual structure. Realists (and their descendants) sometimes use ordinary doctrinal argumentation to show a case for one position, then pile on more of the same to show there is also a decent case for a contrary position. This is what we expect: if there were no case *at all* one on side, what would the parties be doing in court? Just for a moment, however, think of this as two arguments—each perhaps assigned to a different clerk. Before we get to adjudicating between *P* and *not-P*, we can inspect each limb of the argument—the case for *P*, and the case for *not-P*, temporarily isolated from each other. Before we get to the weighing of arguments and authorities, we want to be sure that each line follows within its artificially constrained limits. It may be policy, personality, or preference that tilts the final choice *as between P*

and *not-P*; but why doubt that ordinary legal reasoning takes us part of the way *to P*? How should that (partial) argument be understood, if not as positivism explains it: reasoning with and from positive rules? And, when finally pushed to decide—to ‘draw the line’—why doubt that some sort of (non-legal) considerations may be rationally adequate to give a preference for *P* over *not-P*? Llewellyn seems content with that. He contends only for a ‘temporary divorce of Is and Ought for the purposes of study’⁴¹ And Cohen writes: ‘When we recognize that legal rules are simply formulae describing uniformities of judicial decision... then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values.’⁴² Neither of them thinks the ‘serious business’ of judicial decision is insulated from reasoned (if sometimes non-legal) argument.

How far could Cohen’s ‘formulae describing uniformities of judicial decision’ replace the doctrinal aspects of legal argument? It depends, I suppose, on what we expect from a replacement. Compare proposals for a naturalized account of knowledge. Reflecting on the failure of foundationalist epistemologies, Quine writes, ‘If all we can hope for is a reconstruction that links science to experience in explicit ways short of translation, then it would seem more sensible to settle for psychology.’⁴³ ‘Seeming sensible’ is not an entailment relation or even a very compelling reason. That *E* fails is

⁴¹ Llewellyn 1931: 1236.

⁴² Cohen 1935: 487.

⁴³ Quine 1969: 78.

no reason for thinking that *P* will succeed, and certainly no reason for thinking that *P* will succeed *at what E was aiming for*. Perhaps Quine's observation shows that knowledge defies reasoned inquiry of any kind, and that if you want to study *something* naturalistically, you will have to settle for the sociology or psychology of belief. In a Quinean spirit, Leiter writes, 'if no normative account of the relation [between legal reasons and judicial decision] is possible, then the only theoretically fruitful account is the descriptive/explanatory account given by the relevant science of that domain.'⁴⁴ This sounds more like a reason for studying a *different* domain, one tractable to the methods that 'naturalism' approves. And Kelsen makes the same sort of move: he decides he wants to study law 'positivistically', drafts desiderata for such a programme, then gives no further thought to aspects of legal life that are not tractable given his methods.

In any event, why should the psychology of judicial decisions be worth pursuing only on the condition of the *failure* of doctrinal argument to shed light on questions that psychology is not asking? If Carnap's foundationalism had succeeded, we could still have pursued an independent science studying the extent to which people endorse or follow the principles it constructed. If Bayesianism is the best foundation for decision theory, we can still study how far, and why, people deviate from its prescriptions. Likewise, where law yields determinate answers, we can still ask why some judges and not others are willing to rule as the law requires. Maybe we will discover that some judges

⁴⁴ Leiter 2007: 293.

misunderstand the law, or misapply it, or even break it? That would hardly come as a surprise. There are judges and courts who make little effort to apply settled law when it is at variance with the wishes of their patrons; there are many more whose wishful thinking makes the variance invisible to them.

Kelsen writes,

To replace this [normative legal] science by legal sociology is impossible, because the latter is concerned with an entirely different problem. As long as religion exists, there must be a dogmatic theology that cannot be replaced by religious psychology or religious sociology; in precisely the same manner there will be a normative science of law as long as there is law.⁴⁵

This analogy is strained. Some religions did not evolve hand-in-glove with European rationalism, and so were not shaped by its characteristic modes of rationalization through doctrine. Still, Kelsen is on the mark in thinking that a psychology or sociology of those religions would not deepen our understanding of their meaning for their adherents and would involve changing the subject of inquiry. Are we then tempted to object: But don't some people study astrology with great sophistication and energy, and doesn't that give meaning to their lives? Yes: but in that case, there is no evidence that astrology can do *what it purports to do*, i.e. predict the future, determine human compatibilities, and so on. Astrology fails at the very thing it promises, and its promises are part of its meaning for

⁴⁵ Kelsen 1967: 89.

its practitioners. In contrast, a normative theory of adjudication does not *purport* to predict how judges will decide cases; it purports to explain how they *ought* to decide cases. To the extent that ‘ought implies can’, it will be interested in the sciences of human decision-making. But none of that undermines the relative autonomy of jurisprudence as a subject.

7. Conclusion

The essential thesis of positivism is that all law is positive law — all law has sources; all legal systems are systems of source-based rules. Other legal philosophers doubt that, on various (incompatible) grounds. But, as far as I can tell, most legal realists do not doubt it and, in any case, should not doubt it. Their distinctions between traditional legal materials and considerations of policy or judicial psychology suggest that they presuppose that law rests on sources. They may doubt that the sources generally determine judicial decisions, at least in the appellate courts, but more exaggerated assertions of the indeterminacy risk sawing off the branches they sit on—their comfortable, and mostly unexplained, ontology of courts and decisions. Maybe, as Hart holds, they are exaggerating to foreground a phenomenon they consider underappreciated. Maybe, as Leiter holds, the realists are suggesting we replace, within limits, an unsuccessful method with a more useful one. (There is no denying that if one really could predict judicial decisions, there would be good money in it.) Maybe—and this is

the conjecture I have been exploring here—they think important cases often turn on sources that are not binding but are instead permissive. Or maybe there is something in all three explanations: they are partly compatible and, as elsewhere in jurisprudence, the truth may be shared among them. But there is no doubt that legal positivism and legal realism have much in common, and not only in temperament. Let us not make them seem more foreign to each other than they really are.

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