EARLY POSITIVISM AND LEGAL REALISM pdf

1: Legal Positivism - Philosophy - Oxford Bibliographies

Legal positivism is a school of thought of analytical jurisprudence, largely developed by eighteenth- and nineteenth-century legal thinkers such as Jeremy Bentham and John Austin.

Bring fact-checked results to the top of your browser search. The 19th century Jeremy Bentham â€" is one of the great philosophers of law in the Western tradition, but his legacy is unusual and is in fact still developing. He remains one of the most analytically rigorous and insightful philosophers ever to write about the nature of law, but much of his writing was, upon his death, unpublishedâ€"and indeed unread until the midth century. A much-simplified version of his philosophy of law was presented by the English jurist John Austin â€" , which in turn helped set the agenda for important work in the 20th century. The first, and earliest, theme was a relentless and comprehensive critique of common-law theory and, indeed, an attack on the very idea of the common law itself. His initial target with this line of thought was Blackstone, who in his Commentaries on the Laws of England â€"69 tried to systematize and reduce the long history of English common law to an elegant set of basic principles. Beginning in his first work, A Fragment on Government , Bentham excoriated Blackstone and other common-law theorists for conflating the questions of what the law is and what it ought to be. This mistake, he claimed, had the effect of stifling reform of the law to adequately deal with the rapidly changing social and economic conditions of the late 18th century. Bentham held, with Hobbes, that unless the language of the law and the methods used to interpret it were accessible and useful to the ordinary citizens to whom it applied, law would remain ineffectual as a guide to their behaviour. Bentham went farther and argued that a system in which judges allegedly developed legal doctrine on a case-by-case basis was also not capable of guiding the conduct of persons to whom it applied and therefore did not qualify as law. And like Hobbes, Bentham used the concept of sovereignty to explain the unity of a legal system as well as the criteria of legal validity for that system that is, the criteria in virtue of which any particular norm or rule was deemed part of the law. A given rule is a law of a given system if, and only if, it bears the right relation origination or adoption to an exercise of sovereign legislative power. The power of the sovereign was in turn explained by reference to the habit of or disposition to obedience of the people of a community to laws issuing from this source. In that regard, Bentham was a forerunner of the idea, developed significantly in the late 20th century, that law rests on complex social conventions that include the actions, mutual expectations, and beliefs of a sufficient part of the community. John Austin Austin was a relatively unknown figure during his tenure as the first professor of jurisprudence at University College London in â€" After his death, however, two of his works, The Province of Jurisprudence Determined and Lectures on Jurisprudence 4th ed. Law, said Austin, is the command of the sovereign backed by threat of sanction. Commands are necessarily general prescriptions that signify a desire of the commanding sovereign that an action be done or not done. Like Bentham, Austin characterized the sovereign as a person or group of persons who are habitually obeyed by the bulk of a political community but who do not habitually obey anyone else. The consequence of this view, however, is that at least the threat of sanction is necessary to motivate people to obey. Philosophy of law from the early 20th century The 20th century was very much the century of legal positivism: Hart â€"92 , both developed influential versions of a positivist theory of the nature of law. Defenders of antipositivist views, such as the American constitutional lawyer Ronald Dworkin â€" and the Australian Thomist John Finnis, developed their views by way of response, in particular to Hart. Hans Kelsen Kelsen, a fierce opponent of natural-law theories, identified the central problem of the philosophy of law as how to explain the normative force of lawâ€"i. But what gives those rules their authority? Perhaps it is the constitution , the foundational document of a legal system, which establishes a legislature entitled to enact procedural and substantive rules governing court decisions and specifies who can exercise the power of a judge and under what circumstances. But then what gives the constitution the right to do that? An infinite regress now looms if one posits some further authority-granting source. A fatal problem with transcendental arguments, however, is that they are vulnerable to objections based on denying the reality of what the theory purports to explain: Austin â€"60 and Ludwig Wittgenstein â€" , framed his theory as an attempt to understand the ordinary concept of lawâ€"the concept

familiar to any citizen of an advanced modern legal system. Hart criticized the command theories of law associated with John Austin and Bentham because of their failure to make sense of all those familiar instances of laws that confer legal powers on individuals rather than commanding them to abstain from particular conduct on pain of punishment. A criminal prohibition on murder may be a command backed by a threat of sanction, but a law authorizing an individual to make a valid will disposing of his property after his death is not. Power-conferring rules are central features of legal systems, and command theories, Hart contended, cannot explain them. The problem, Hart thought, went farther. The problem, according to Hart, is that one typically thinks of law as, at least sometimes, imposing obligations to act or not to act in certain ways. If law is essentially about threats, however, then talk of having an obligation makes no sense: Hart, in short, agreed with Kelsen that the law claims a kind of authority, a right to tell people what they ought or ought not to do, not simply what they must or must not do on pain of penalty. But a rule of recognition is not a Grundnorm, a transcendental presupposition of legal thought. Constitution is a source of legal authority in the U. To be sure, Hart agreed with Kelsen that laws may be morally unjustified, but, unlike Kelsen, he thought that the existence of law is, fundamentally, dependent on nothing more than the conventional practices of judges. If judges in the United States were to stop treating the Constitution as a criterion of legal validity, then it would cease to be such. But what is authority? The reason, according to Raz, is that if what the law tells someone to do is not intelligible independent of the moral and other reasons on which it is based, then the law cannot possibly perform a service for its subjects. In that respect, Raz recast themes from the command tradition of the early modern period, in particular the idea that law is a system of norms that play a special role in the practical reasoning of its subjects and, with Hobbes and Bentham, that the contents of those norms must be identifiable without recourse to controversial moral argument. Ronald Dworkin Although legal positivism thus triumphed in the 20th century, it was not without critics. Ronald Dworkin, for example, argued that moral reasoning is essential for resolving difficult constitutional questions. Raz, as noted above, rejected the latter possibility: Hart recognized that officials might treat the rule of recognition as obligatory for many different kinds of reasons, and he also recognized that they might be wrong to do so. In his later work Dworkin expanded on the idea that moral considerations figure in determining what the law is. John Finnis John Finnis took a more-ambitious philosophical tack against positivism than Dworkin did. The central cases of law, according to Finnis, are those in which there exists a genuine moral obligation to obey the law. Hart agreed that the philosophy of law should focus on central cases, but he also believed, contrary to Finnis, that the central cases could be identified without regard to their moral quality. By all appearances, the Nazis had a legal system, one that authorized the confiscation of life, property, and liberty on the basis of religion and ethnicity. By contrast, Hart and other legal positivists, in the spirit of Hobbes and Bentham, sought to separate the question of whether the Nazis had lawâ€”it certainly looks as though they did, in almost all respectsâ€”from the question of whether their laws were just they were not and whether the morally grotesque character of the actions of Nazi officials should warrant punishment, even though the actions were lawful. Realism As the legal-positivist position, whether Kelsenian or Hartian, became the dominant view among philosophers of law in the 20th century, there developed alongside it an influential but very different approach to thinking about law, now usually described as legal realism. The two most-important figures in this regard were the Dane Alf Ross â€” and the American Karl Llewellyn â€” , though they were very different theorists. Ross was a systematic philosopher who taught in a law faculty, Llewellyn a philosophical novice but an extremely accomplished and influential lawyer and professor. Both kinds of realism, Scandinavian and American, were skeptical of the idea that written laws really explain the behaviour of judges, and both depended upon a naturalistic worldview in which reality was presumed to be as the sciences described it. Alf Ross For Ross, the latter, naturalistic assumption was explicit: Because the empirical sciences do not explain natural phenomena in terms of normsâ€”they make no reference to obligations, duties, rights, or justice, for exampleâ€”naturalists like Ross concluded that such norms do not really exist. As a law professor, however, Ross certainly did not want to extend this conclusion to laws and legal systems themselves. Smith has a contractual obligation to pay Mr. Smith should pay Mr. Smith owes money to Mr. Jones is not trying to predict his own behaviour , Ross was not interested in the ordinary concept of law. By means of such interpretations, Ross hoped to explain the

phenomenon of law in a world naturalistically conceived. Those themes received their most-extensive development in the work of Llewellyn, who had been influenced by the lateth and early 20th-century German free-law movement, a protorealist school of jurisprudence. According to Llewellyn, in most cases that reach the appellate level of review where they are heard by an appeals court , the law is generally indeterminate in the sense that the authoritative legal sources such as statutes, precedents, and constitutions do not justify a unique decision. Indeterminacy, according to Llewellyn, arises primarily because of the existence of conflicting but equally legitimate canons of interpretation for these sources, so the very same legal source could be read in at least two different ways. For example, Llewellyn demonstrated that U. Regarding such cases, the question posed by the realists was: Why did the judge reach the conclusion he did, given that law and principles of legal reasoning did not require him to do so? According to Llewellyn, a judge almost always has the latitude to characterize a decision in an earlier case in either a highly fact-specific way, so as to distinguish it from the present case, or in a way that abstracts from the specific facts of the earlier case, so as to make it binding in the present case. Thus, according to Llewellyn, judges are never really constrained by precedent. Like most American realists, however, Llewellyn nonetheless believed that judicial decisions fall into predictable patterns though not, of course, the patterns one would predict just by looking at the existing rules of law. Focusing primarily on disputes in business law , Llewellyn argued that what judges really do in such cases is attempt to enforce the uncodified but prevailing norms of the commercial culture in which the dispute arose. Llewellyn noted that the rule seems to have been rather harshly applied in these cases, since either the buyer may not have known of other defects at the time of rejection or the seller could not have cured the defects anyway. A careful study of the underlying facts, however, revealed that in each case in which the rule seemed to have been harshly applied, what had really happened was that the market had gone sour, and the buyer was seeking to escape the contract. Thus, the commercial normâ€”buyers ought to honour their commitments even under changed market conditionsâ€”was enforced by the courts through a seemingly harsh application of an unrelated rule concerning rejection. By calling attention to the role of nonlegal factors in judicial decision making , Llewellyn and the realists initiated an interdisciplinary turn in American legal education and made clear the need for lawyers to draw on the social sciences in understanding the development of law and what judges do. Much contemporary political science literature on law and the courts takes its inspiration from realism by seeking to explain decisions not by reference to legal reasons which are assumed to be indeterminate but by reference to facts about the politics, background, and ideology of judges.

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2: Legal Positivism (Stanford Encyclopedia of Philosophy)

As nouns the difference between positivism and realism is that positivism is (philosophy) a doctrine that states that the only authentic knowledge is scientific knowledge, and that such knowledge can only come from positive affirmation of theories through strict scientific method, refusing every form of metaphysics while realism is.

Auguste Comte Auguste Comte â€" first described the epistemological perspective of positivism in The Course in Positive Philosophy , a series of texts published between and The first three volumes of the Course dealt chiefly with the physical sciences already in existence mathematics , astronomy , physics , chemistry , biology , whereas the latter two emphasized the inevitable coming of social science. Observing the circular dependence of theory and observation in science, and classifying the sciences in this way, Comte may be regarded as the first philosopher of science in the modern sense of the term. His View of Positivism therefore set out to define the empirical goals of sociological method. This Comte accomplished by taking as the criterion of the position of each the degree of what he called "positivity," which is simply the degree to which the phenomena can be exactly determined. This, as may be readily seen, is also a measure of their relative complexity, since the exactness of a science is in inverse proportion to its complexity. The degree of exactness or positivity is, moreover, that to which it can be subjected to mathematical demonstration, and therefore mathematics, which is not itself a concrete science, is the general gauge by which the position of every science is to be determined. Generalizing thus, Comte found that there were five great groups of phenomena of equal classificatory value but of successively decreasing positivity. To these he gave the names astronomy, physics, chemistry, biology, and sociology. Ward , The Outlines of Sociology , [29] Comte offered an account of social evolution , proposing that society undergoes three phases in its quest for the truth according to a general " law of three stages ". Comte intended to develop a secular-scientific ideology in the wake of European secularisation. God, Comte says, had reigned supreme over human existence pre- Enlightenment. It dealt with the restrictions put in place by the religious organization at the time and the total acceptance of any "fact" adduced for society to believe. This second phase states that the universal rights of humanity are most important. The central idea is that humanity is invested with certain rights that must be respected. In this phase, democracies and dictators rose and fell in attempts to maintain the innate rights of humanity. The central idea of this phase is that individual rights are more important than the rule of any one person. The third principle is most important in the positive stage. Neither the second nor the third phase can be reached without the completion and understanding of the preceding stage. All stages must be completed in progress. Sociology would "lead to the historical consideration of every science" because "the history of one science, including pure political history, would make no sense unless it was attached to the study of the general progress of all of humanity". The irony of this series of phases is that though Comte attempted to prove that human development has to go through these three stages, it seems that the positivist stage is far from becoming a realization. This is due to two truths: The positivist phase requires having a complete understanding of the universe and world around us and requires that society should never know if it is in this positivist phase. Anthony Giddens argues that since humanity constantly uses science to discover and research new things, humanity never progresses beyond the second metaphysical phase. As an approach to the philosophy of history , positivism was appropriated by historians such as Hippolyte Taine. Debates continue to rage as to how much Comte appropriated from the work of his mentor, Saint-Simon. For close associate John Stuart Mill , it was possible to distinguish between a "good Comte" the author of the Course in Positive Philosophy and a "bad Comte" the author of the secular-religious system. Magnin filled this role from to , when he resigned. What has been called our positivism is but a consequence of this rationalism. By carefully examining suicide statistics in different police districts, he attempted to demonstrate that Catholic communities have a lower suicide rate than Protestants, something he attributed to social as opposed to individual or psychological causes. He developed the notion of objective sui generis " social facts " to delineate a unique empirical object for the science of sociology to study. Durkheim described sociology as the "science of institutions , their genesis and their functioning". His lifework was fundamental in the establishment of practical social research as we know it

todayâ€”techniques which continue beyond sociology and form the methodological basis of other social sciences , such as political science , as well of market research and other fields. Antipositivism and Critical theory At the turn of the 20th century, the first wave of German sociologists formally introduced methodological antipositivism, proposing that research should concentrate on human cultural norms , values , symbols , and social processes viewed from a subjective perspective. Weber regarded sociology as the study of social action , using critical analysis and verstehen techniques. Positivism may be espoused by " technocrats " who believe in the inevitability of social progress through science and technology. Contemporary positivism[edit] In the original Comtean usage, the term "positivism" roughly meant the use of scientific methods to uncover the laws according to which both physical and human events occur, while "sociology" was the overarching science that would synthesize all such knowledge for the betterment of society. Neither of these terms is used any longer in this sense. The extent of antipositivist criticism has also become broad, with many philosophies broadly rejecting the scientifically based social epistemology and other ones only seeking to amend it to reflect 20th century developments in the philosophy of science. However, positivism understood as the use of scientific methods for studying society remains the dominant approach to both the research and the theory construction in contemporary sociology, especially in the United States. Public sociology â€”especially as described by Michael Burawoy â€”argues that sociologists should use empirical evidence to display the problems of society so they might be changed. If a public sociologists assumes a multi-lineal interpretation of social change, public sociology will fail to affect social change for three reasons:

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3: Positivism - Wikipedia

Natural law, legal realism, and legal positivism are three ways of thinking about the origins of law and its sources (or lack thereof) of legitimacy.

What You will learn? You will get the answer to What is the theory of natural law? What is the legal theory? What is a legal theory in jurisprudence? Jurisprudence means studying legal philosophy. It includes theories of law and different schools of law. Here we will discuss 3 different theories of law. A theory may be a general account or explanation of things, ideas, truths and realities through explanation and description. It is a separate entity from material things rather it falls into the world of thought. Generally theory claims to express and find the truth. Theory explains itself through words, numbers or any other symbolic expression. It is also known as jurisprudence. Legal Theory and Jurisprudence Jurisprudence is a set of different theories and their explanation. The main difference between legal theory and jurisprudence their being narrow and wide. Jurisprudence includes a number of theories on different aspects of law from what law is to, penalties, punishments, state, tools of law and medical jurisprudence. On the other hand legal theory means a single theory defining a single legal issue. Legal Theories and Schools of law For each legal theory, some followers, supporters and opponents are present. These supporters and followers combine to form a school of thought in law. Legal theories are the basis of these schools of law. As these theories provide a particular view on any legal issue or question and this point of view further establishes different Schools of law. Its origins are found in Greece Philosophy. Leading philosophers who support theory are Heraclitus, Socrates, Plato, and Aristotle. Naturalism or natural law theory divides laws into 2 kinds: No one should steal. Natural Law has different names. Some of these names are law of reason, eternal law, rational law, and principles of natural justice. Positivism gives the concept of sovereign who can make law. Laws have no relation with morality, reason or justice to gain validity. The followers of this theory include Austin, Bentham and H. Positive Law Theory rules given by sovereign are laws irrespective of any other ground. Realism or Realist Theory of Law: If studied in detail, we come to know that realists say the decision of a judge is the law. Because he is the sovereign to interpret the law. The doctrine of precedent has a very significant place in realist theory. One of the leading supporter of Realism is Oliver Wendell Holmes. Comparison of Legal Theories I have done the comparison of the theories by differentiating them in their characteristics then with their stranding in the judicial system.

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4: Legal positivism - Wikipedia

Legal Realism and Legal Positivism in the US academy and the elements of the New Legal Realism, including examples of New Legal Realist approaches to international law.

Comtean positivism was more overtly religious than any school of natural law theory. Legal positivism has also been confused with the ancient idea of positive law. Hart , and Joseph Raz Nor is it the case that twentieth-century legal positivism directly stems from traditional theories of positive law: The leading legal positivists of our day, such as Hart and Raz, almost never speak of positive law while a major theorist of positive law today, John Finnis, is no legal positivist. Still, we distinguish in order to unite, and there is an important relation between traditional theories of positive law and modern versions of legal positivism. The theory of positive law cannot be understood except by contrast with two other kinds of law. In contrast to natural law, however, positive law is defined variously as morally indifferent, morally arbitrary, or morally adventitious. So in one sense, to claim that law is positive is to make a descriptive claim about its source: Yet in another sense, to claim that law is positive is to make a normative claim about its content: It is often difficult to distinguish properties that often co-exist: So it is understandable, then, to associate what is positive in content with what is positive in source. Nonetheless, our two senses of positive law are logically independent, even if they are often found together. Natural-law norms can be deliberately imposed by sovereign authority, as in parts of the Decalogue, the American Bill of Rights, and the West German Federal Constitution. Although these norms have intrinsic and universal moral force quite apart from these historical enactments, the fact that they were solemnly adopted by legislative authority provides citizens of those polities additional moral reasons for respecting them. These laws, then, are natural in content but positive in source. Conversely, many of the rules of customary or common law lack intrinsic moral force: The two most distinctive theses of contemporary legal positivism both stem from the traditional accounts of the two senses of positive law: In contrast to custom, positive law is imposed by deliberate imposition. Obviously, the claim that law has its source in deliberate sovereign imposition applies better to some kinds of law than to other kinds: When Hobbes argues that all civil law is positive, he means that all civil law is imposed by the sovereign. What about customary or common law? John Austin similarly argued that common law reflects a kind of indirect legislation: Later legal positivists, however, have become embarrassed by these crudely Procrustean methods of forcing all kinds of law into a legislative mold. Hart effectively refuted the argument that whatever the sovereign permits, he commands. Nonetheless, Hart also attempted an explanatory reductionism of law by tracing all legal norms to a unique rule of recognition whereby the whole legal system, from the orders of a police officer to the statutes of Parliament, forms a top-down chain of command. So the claim that all law is somehow posited by deliberate acts of legal officials continues to fail to make sense of the role of custom as a largely independent source of law. In contrast to natural law, positive law is morally arbitrary or indifferent. Some exclusive legal positivists argue that legal validity necessarily excludes appeals to moral truth while other inclusive positivists argue that some legal systems in particular, the American permit appeals to moral truth in the finding of law Waluchow: Lon Fuller argued against the legal positivists that law necessarily embodies some procedural principles that are moral in content: Ronald Dworkin argued against the legal positivists by asserting that law includes general principles that can be indentified and deployed only by means of moral argument by judges. Critics say that what many legal positivists fail to note is that there are several sound natural-law reasons for the positivity of law. To coordinate complex human activities, law must descend into concrete particularity: So natural law shows us why it is morally necessary for law to be largely morally indifferent in content. Similarly, many legal positivists, such as Raz, argue that we must be able to identify legal norms without recourse to moral argument, because the point of a legal system is to provide a framework for social interaction in contexts precisely where there is no agreement about moral principles. Here again, we can see that there are good moral reasons for insisting on objective criteria for identifying valid legal norms, if we hope to sustain a legal order that can be respected by citizens of widely divergent moral views. In short, say natural law theorists, over a wide range of legal norms and institutions,

the requirements for valid law identified by legal positivists are not only compatible with, but also find their deepest justification in, natural law theory Finnis Scientific positivists since Ernst Mach have often asserted that the aim of science is not description or even explanation but prediction. For example, Milton Friedman famously argued that positivism in economic science means that economics seeks to predict behavior, not to describe or explain it. The Province of Jurisprudence Determined. Cambridge University Press, Of Laws in General. Natural Law and Natural Rights. Essays in Positive Economics. University of Chicago Press. The Morality of Law. The Concept of Law. General Theory of Law and State. Russell and Russell, In Defense of Legal Positivism: The Philosophy of Positive Law. Richard Tur and William Twining.

EARLY POSITIVISM AND LEGAL REALISM pdf

5: Legal Positivism | Natural Law, Natural Rights, and American Constitutionalism

Naturalism Vs Legal Positivism Vs Legal Realism: Theories of Law Here we are going to discuss what is legal theory? What does the terms Natural law,positivism or positive law theory, Realism or Realist law theory mean. what is the difference between jurisprudence and legal theories.

Home - Choosing a Lawyer - Legal Formalism vs. In my experience, judges rarely rule based upon particular relationships or preferences for particular legal counsel or parties. Judges, although human, strive on a regular basis to be unbiased toward individual litigants or criminal defendants. More aptly, it seeks to make the bold statement that judges are indeed human. Judges are in fact human, and are shaped by experiences they have had in early development all the way to adulthood. They have particular values and political beliefs. They have certain ways of doing things that are peculiar to his or her particular court. Andâ€”this one is the most counter-intuitive of them all: The training and experiences an individual lawyer goes through in preparation to become a judicial officer seeks to remove him or herself from that human condition, and to make him or her into an objective thinker. This simply means that most people use the right side of their brains to make decisions. These people are typically emotional, creative, and interested in people rather than legal issues. They often view hearings and trials as human dramas rather than about abstract issues. Cognitive thinkers, on the other hand, are thought to reason with the left side of their brains. This thinker is more interested in abstract issues than people, enjoys waiting and not deciding until all of the evidence is received, and uses inductive reasoning to reach an eventual logical decision. For obvious reasons, most judges tend to be more cognitive thinkers; again, however, this is a matter of degree. Each judge has a varying mix of both types of thought pattern, and can be influenced by a variety of factors when making a decision based on who he or she is. So what does all of this mean? Well, this philosophical fight has been waged over many centuries. Legal formalism, above all, seeks to enforce what the law actually says, rather than what it could or should say. It is a theory that the law is a set of rules and principles independent of other political and social institutions. Legal realists see the legal world as a means to promote justice and the protection of human rights. Legal realists often believe that judges should develop and update law incrementally because they, as the closest branch in touch with economic, social, and technological realities, should and can adapt the law accordingly to meet those needs. They often believe judges should have broad discretion and decide matters on an individual basis, because legislatures are infamous for being slow or innate to act to such pressures for change. In my experience as a relatively young lawyer, I have been frustrated at times that it seems that most trial court judges more closely resemble legal realists than legal formalists. I sincerely believe this to be true, but it may not be judges simply preferring one judicial philosophy over the other. Rather, I think it arises out of practical needs that are present in the courtrooms of today. It is rarely the case that the law completely favors one side over the other. There is usually a legal argument to be made on both sides of any given issue. The law will generally lean one way, however, and I have found that the legal strength of a case is less important than the given facts of the case. In my experience with local judges, the facts often determine the outcome of cases rather than the law; that is, I have had many situations and cases where the law is stacked on my side to one degree or another, and my client still received an unfavorable result. Conversely, I found myself scratching my head at results where I had a disadvantage according to the law, but where I achieved a victory for my client based upon favorable facts. I believe this is because most trial court judges are legal realists. I believe that trial court judges are more often legal realists for a variety of reasons. First and foremost, I believe that their overburdened court dockets force this into local courtrooms. Judges are often put into situations where they must act quickly to move through the vast number of cases in their respective courts. It is much easier and efficient for judges to dispose of cases quickly, by doing what they feel is the best outcome for the parties before the court, without regard to complex legal concepts. They have a general understanding of the many bodies of law, and have a working knowledge of the basic concepts which guides their day-to-day decision making. They are not interested in being published in the Yale Law Review for their ingenious thoughts or opinion on an original issue. They simply want to get through the day, and be able to sleep with the decisions

they rendered from the bench. Appellate court judges, on the other hand, tend to focus on the more abstract legal principles. This is because first, they have never met the litigants. Second, they are not under the same pressure that trial court judges are to act quickly to clear a docket. Third, the decisions they render are often cited by future cases as precedent to guide them in application of the law, so thorough legal reasoning is necessary to prevent injustice in future decisions. For these reasons, I believe I have experienced a greater success in appellate courts where the law favors my side, rather than the facts. Law schools across the country explain this distinction, but not as it applies to local courtrooms. As the lawyer becomes more seasoned, however, the lawyer learns that making the human arguments at the trial court level is often more productive than wielding the expertise he or she gained in law school. Simply knowing this can be a powerful tool in persuading judges in getting more favorable results for your clients.

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6: Legal Formalism vs. Legal Realism: The Law and the Human Condition - SFT Lawyers

Keywords: Legal Realism, Legal Positivism, Hart, jurisprudence, legal theory Oxford Scholarship Online requires a subscription or purchase to access the full text of books within the service. Public users can however freely search the site and view the abstracts and keywords for each book and chapter.

Development and Influence Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought see Finnis The modern doctrine, however, owes little to these forbears. Its most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law. The most important architects of this revised positivism are the Austrian jurist Hans Kelsen and the two dominating figures in the analytic philosophy of law, H. Hart and Joseph Raz among whom there are clear lines of influence, but also important contrasts. Although they disagree on many other points, these writers all acknowledge that law is essentially a matter of social fact. Their discomfort is sometimes the product of confusion. 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. Among the philosophically literate another, more intelligible, misunderstanding may interfere. Legal positivism is here sometimes associated with the homonymic but independent doctrines of logical positivism the meaning of a sentence is its mode of verification or sociological positivism social phenomena can be studied only through the methods of natural science. While there are historical connections, and also commonalities of temper, among these ideas, they are essentially different. The view that the existence of law depends on social facts does not rest on a particular semantic thesis, and it is compatible with a range of theories about how one investigates social facts, including non-naturalistic accounts. To say that the existence of law depends on facts and not on its merits is a thesis about the relation among laws, facts, and merits, and not otherwise a thesis about the individual relata. The only influential positivist moral theories are the views that moral norms are valid only if they have a source in divine commands or in social conventions. Such theists and relativists apply to morality the constraints that legal positivists think hold for law. The Existence and Sources of Law Every human society has some form of social order, some way of marking and encouraging approved behavior, deterring disapproved behavior, and resolving disputes. What then is distinctive of societies with legal systems and, within those societies, of their law? Before exploring some positivist answers, it bears emphasizing that these are not the only questions worth asking. While an understanding of the nature of law requires an account of what makes law distinctive, it also requires an understanding of what it has in common with other forms of social control. Some Marxists are positivists about the nature of law while insisting that its distinguishing characteristics matter less than its role in replicating and facilitating other forms of domination. Though other Marxists disagree: They think that the specific nature of law casts little light on their primary concerns. But one can hardly know that in advance; it depends on what the nature of law actually is. According to Bentham and Austin, law is a phenomenon of large societies with a sovereign: It has two other distinctive features. The theory is monistic: The imperativalist acknowledges that ultimate legislative power may be self-limiting, or limited externally by what public opinion will tolerate, and also that legal systems contain provisions that are not imperatives for example, permissions, definitions, and so on. But they regard these as part of the non-legal material that is necessary for, and part of, every legal system. Austin is a bit more liberal on this point. The theory is also reductivist, for it maintains that the normative language used in describing and stating the law -- talk of authority, rights, obligations, and so on -- can all be analyzed without remainder in non-normative terms,

ultimately as concatenations of statements about power and obedience. Imperatival theories are now without influence in legal philosophy but see Ladenson and Morison. What survives of their outlook is the idea that legal theory must ultimately be rooted in some account of the political system, an insight that came to be shared by all major positivists save Kelsen. It is clear that in complex societies there may be no one who has all the attributes of sovereignty, for ultimate authority may be divided among organs and may itself be limited by law. Obedience is a normative concept. To distinguish it from coincidental compliance we need something like the idea of subjects being oriented to, or guided by, the commands. Explicating this will carry us far from the power-based notions with which classical positivism hoped to work. Treating all laws as commands conceals important differences in their social functions, in the ways they operate in practical reasoning, and in the sort of justifications to which they are liable. For instance, laws conferring the power to marry command nothing; they do not obligate people to marry, or even to marry according to the prescribed formalities. Nor is reductivism any more plausible here: Moreover, we take the existence of legal obligations to be a reason for imposing sanctions, not merely a consequence of it. On his view, law is characterized by a basic form and basic norm. On this view, law is an indirect system of guidance: Thus, what we ordinarily regard as the legal duty not to steal is for Kelsen merely a logical correlate of the primary norm which stipulates a sanction for stealing , p. The objections to imperatival monism apply also to this more sophisticated version: The courts are not indifferent between, on the one hand, people not stealing and, on the other, stealing and suffering the sanctions. But in one respect the conditional sanction theory is in worse shape than is imperativalism, for it has no principled way to fix on the delict as the duty-defining condition of the sanction -- that is but one of a large number of relevant antecedent conditions, including the legal capacity of the offender, the jurisdiction of the judge, the constitutionality of the offense, and so forth. Which among all these is the content of a legal duty? Might does not make right -- not even legal right -- so the philosophy of law must explain the fact that law is taken to impose obligations on its subjects. Moreover, law is a normative system: For the imperativalists, the unity of a legal system consists in the fact that all its laws are commanded by one sovereign. For Kelsen, it consists in the fact that they are all links in one chain of authority. For example, a by-law is legally valid because it is created by a corporation lawfully exercising the powers conferred on it by the legislature, which confers those powers in a manner provided by the constitution, which was itself created in a way provided by an earlier constitution. But what about the very first constitution, historically speaking? Nor can it be a social fact, for Kelsen maintains that the reason for the validity of a norm must always be another norm -- no ought from is. It follows, then, that a legal system must consist of norms all the way down. It bottoms in a hypothetical, transcendental norm that is the condition of the intelligibility of any and all other norms as binding. There are many difficulties with this, not least of which is the fact that if we are willing to tolerate the basic norm as a solution it is not clear why we thought there was a problem in the first place. One cannot say both that the basic norm is the norm presupposing which validates all inferior norms and also that an inferior norm is part of the legal system only if it is connected by a chain of validity to the basic norm. We need a way into the circle. Moreover, it draws the boundaries of legal systems incorrectly. The Canadian Constitution of was lawfully created by an Act of the U. Parliament, and on that basis Canadian law and English law should be parts of a single legal system, rooted in one basic norm: If law cannot ultimately be grounded in force, or in law, or in a presupposed norm, on what does its authority rest? The most influential solution is now H. For Hart, the authority of law is social. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced. Law ultimately rests on custom: It exists only because it is practiced by officials, and it is not only the recognition rule or rules that best explains their practice, it is rule to which they actually appeal in arguments about what standards they are bound to apply. Thus for Hart too the legal system is norms all the way down, but at its root is a social norm that has the kind of normative force that customs have. Law is normally a technical enterprise, characterized by a division of labour. And this division of labour is not a normatively neutral fact about law; it is politically charged, for it sets up the possibility of law becoming remote from the life of a society, a hazard to which Hart is acutely alert , p. Although Hart introduces the rule of recognition through a speculative anthropology of how it might emerge in response to certain deficiencies in a customary social order, he is not committed to the

view that law is a cultural achievement. The objection embraces the error it seeks to avoid. It imperialistically assumes that it is always a bad thing to lack law, and then makes a dazzling inference from ought to is: If one thinks that law is a many splendored thing, one will be tempted by a very wide concept of law, for it would seem improper to charge others with missing out. Positivism simply releases the harness. Law is a distinctive form of political order, not a moral achievement, and whether it is necessary or even useful depends entirely on its content and context. Societies without law may be perfectly adapted to their environments, missing nothing. A positivist account of the existence and content of law, along any of the above lines, offers a theory of the validity of law in one of the two main senses of that term see Harris, pp. Kelsen says that validity is the specific mode of existence of a norm. An invalid marriage is not a special kind of marriage having the property of invalidity; it is not a marriage at all. In this sense a valid law is one that is systemically valid in the jurisdiction -- it is part of the legal system. This is the question that positivists answer by reference to social sources. It is distinct from the idea of validity as moral propriety, i. For the positivist, this depends on its merits. One indication that these senses differ is that one may know that a society has a legal system, and know what its laws are, without having any idea whether they are morally justified. For example, one may know that the law of ancient Athens included the punishment of ostracism without knowing whether it was justified, because one does not know enough about its effects, about the social context, and so forth. No legal positivist argues that the systemic validity of law establishes its moral validity, i. Even Hobbes, to whom this view is sometimes ascribed, required that law actually be able to keep the peace, failing which we owe it nothing. Bentham and Austin, as utilitarians, hold that such questions always turn on the consequences and both acknowledge that disobedience is therefore sometimes fully justified. Hart thinks that there is only a prima facie duty to obey, grounded in and thus limited by fairness -- so there is no obligation to unfair or pointless laws Hart The peculiar accusation that positivists believe the law is always to be obeyed is without foundation. Moral Principles and the Boundaries of Law The most influential criticisms of legal positivism all flow, in one way or another, from the suspicion that it fails to give morality its due. A theory that insists on the facticity of law seems to contribute little to our understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralized. It is a curious fact about anti-positivist theories that, while they all insist on the moral nature of law, without exception they take its moral nature to be something good.

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that legal positivism and legal realism are conflicting positions; this view was backed by a simple argument: positivism was identified with Langdellian formalism, and if there is one view the legal realists were undisputedly united in its "negation," it is formalism.

The theory has enjoyed a large number of adherents since it was first articulated by Jeremy Bentham in the 18th century and has undergone considerable modification and development since then. General Overviews The two most important statements of positivism in the 20th century are Hart originally published and Kelsen first published in Hart was influenced by earlier British positivists like Austin and Bentham, as well as the later Wittgenstein, but his has proven to be the most influential text on positivism in the English-speaking world. The second edition Hart includes a posthumously published postscript in which Hart addresses primarily the criticisms of Ronald Dworkin, a response which has itself spawned a considerable literature. Green gives a thorough and up-to-date overview of the various competing positivist theories and contains a short but reliable bibliography for further reading. Leiter and Shapiro give useful summaries of the dialectic between positivists and their critics over the past three decades. Gardner takes a different tack by illuminating the nature of positivism by distinguishing it from other views which are often mistakenly identified as central to positivism. Extensive and wide-ranging discussion distinguishing legal positivism from many other views with which it is often confused. An important article, though most useful to those with a basic knowledge of the scholarly literature. Edited by Edward N. Also a brief discussion of the broader methodological problem of the role of evaluation in constructing theories of law, an issue which has moved to the forefront of debate among positivists and legal theorists more generally. A good introduction for undergraduates, graduate students, and scholars alike. The Concept of Law. Pure Theory of Law. Translated by Max Knight. University of California Press, With Hart , one of the major statements of legal positivism in the 20th century. Kelsen is difficult, but he is essential reading for graduate students and scholars. The Methodology Problem in Jurisprudence. Usefully compared with Shapiro Oxford University Press, Stanford University Press, A Short Guide for the Perplexed. Edited by Arthur Ripstein, 22â€” Cambridge University Press, See also Criticisms of Positivism. Users without a subscription are not able to see the full content on this page. Please subscribe or login. How to Subscribe Oxford Bibliographies Online is available by subscription and perpetual access to institutions. For more information or to contact an Oxford Sales Representative click here.

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8: What is the Difference between Naturalism, Positivism and Realism ?

In contrast, "legal realism" is the concept that the law, as a maleable and pliable body of guidelines, should be enforced creatively and liberally in order that the law serves good public policy and social interests.

Natural law is the idea that laws or at least many laws exist naturally. They are not dependent on the actions Natural law, legal realism, and legal positivism are three ways of thinking about the origins of law and its sources or lack thereof of legitimacy. They are not dependent on the actions of any particular government. Because of this, these laws are universal, applying to all human beings. For example, a natural law theorist might say that all human beings have the right to life, liberty, and property regardless of whether the government under which they live recognizes these rights. This idea has its roots in classical times, but it is perhaps most commonly connected with Enlightenment thinkers such as John Locke. It is most commonly connected with Europe beginning in the mids. During the Enlightenment, thinkers were looking for ideas about law that did not rely on the dubious idea that God had given power to a certain family. This helped lead them to the idea of natural law. Legal positivism and legal realism are reactions against the idea of natural law. They both hold that law is a social construct. In other words, they both hold that laws come about because a given society or the people in power in a given society wants those laws. In other words, laws reflect the ideas and prejudices of a given society. They do not reflect some universal truth. Legal positivists hold that law exists as a set of formal rules set out by governments. By contrast, legal realists hold that law is more malleable and depends on changing ideas among the people. Both of these ideas are most closely connected with the early 20th century. The main figure in legal positivism was H. Hart while the most prominent legal realist was Oliver Wendell Holmes, Jr. Both of these theories arose out of a certain degree of jadedness. Natural law theory implies that laws come from a universal sense of morality. Legal realists and positivists were more inclined to be cynical and to say that laws come about because people want them to exist.

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