

## LEGAL POSITIVISM vs. NATURAL LAW THEORY

There are two “natural law” theories about two different things: i) a natural law theory of *morality*, or what’s right and wrong, and ii) a natural law theory of *positive law*, or what’s legal and illegal. The two theories are independent of each other: it’s perfectly consistent to accept one but reject the other. Legal positivism claims that ii) is false. Legal positivism and the natural law theory of positive law are rival views about what is law and what is its relation to justice/morality.

### Natural Law Theory of Morality

i) Even things which are not man-made (e.g. plants, rocks, planets, and people) have purposes or functions, and the “good” for any thing is the realization of its purpose or function.

ii) The good for us human beings is happiness, the living of a flourishing life. Happiness or flourishing consists in the fulfillment of our distinctive nature, what we “by nature” do best. That involves the development and exercise of our capacities for rationality, abstract knowledge, deliberative choice, imagination, friendship, social cooperation based on a sense of justice, etc. The moral virtues (e.g. courage, justice, benevolence, temperance) are character traits that help us fulfill our true nature. The life of the heroin addict or of the carnal hedonist is not a good one, because it is inconsistent with our natural function.

iii) Natural law is the set of truths about morality and justice; they are rules that we must follow in order to lead a good or flourishing life. We can know what these principles are by means of unaided human reason. [The natural law theory of morality rejects ethical subjectivism (“right and wrong are all a matter of opinion”) and affirms ethical objectivism (“some moral opinions are more valid, reasonable, or likely to be true than others”)]. Immoral acts violate natural law. Hence, immoral behavior is “unnatural” (in the sense of “contrary to our function,” not “nowhere to be found in the natural world”), whereas virtuous behavior is “natural.” For example, lying is unnatural, Aquinas holds, because the function of speech is to communicate to others what is in our minds. When we use words to mislead others, we are using them contrary to their proper function.

### Natural Law Theory of Law

Legal systems have a *function*—to secure justice. Grossly unjust laws (e.g. “White people may own Black people as slaves,” “women may not own property or vote”) are not really laws at all, but a perversion of law or mere violence. As St. Augustine put it, *lex injustia non est lex*. Aquinas’s way of stating this point: positive law has as its purpose the common good of the community. Any positive law which conflicts/is inconsistent with either natural law or divine law is not really law at all. Hence, not only is there no moral obligation to obey it, but there is no legal obligation to obey it, either. Augustine, Aquinas, and Martin Luther King are supporters of this view.

Lon Fuller argued there is *some* necessary overlap between legality and justice, because it’s impossible to have a *legal system* without fidelity to the rule of law and *formal* justice. (Fuller would probably have cited Iraq under Saddam Hussein as a good example of a society that violated the rule of law so much that it really had no genuine *legal system* at

all). But Fuller does not go as far as Augustine or Aquinas, because he admits that a society can have a genuine legal system that satisfies the demands of formal justice (“like cases must be treated alike”) yet still have particular laws that are unjust. In such a society, judges are independent of the other branches of government and decide cases on their merits, the society honors the principles “no punishment without a crime” and “no crime without a pre-existing, public law,” the accused receives a fair trial with due process of law, etc. But still, some of the laws that are consistently and fairly enforced are unjust (e.g. “women may not own property or vote”).

Ronald Dworkin, whom we will talk about more later, defends a view of legal interpretation (by judges) that he claims is in the tradition of the natural law theory of positive law. Dworkin argues it is proper for Supreme Court justices to interpret the Constitution in light of the correct principles of justice that our country tries to honor.

Legal Positivism—

Whether a certain rule is a *law*, creating *legal* obligations to comply with it, all depends on its source. Valid laws are simply rules that come from certain people (kings, city councils, etc.), in accordance with certain procedures, that the society enforces. A rule can be a genuine, valid law even though it is grossly unjust. According to H.L.A. Hart, a contemporary legal positivist, the essence of legal positivism is the “**separation thesis.**”

**Separation thesis:** having a legal right to do x doesn’t entail having a moral right to do it, and vice versa; having a legal obligation to do something doesn’t entail having a moral right to do it, and vice versa; having a legal justification to do something doesn’t entail having a moral justification, and vice versa; etc.

In order to know what your legal rights are, you need to look at what laws your society has. In order to know what your moral rights are, you need to figure out what is the true morality. You might have legal rights that the true morality says you shouldn’t have (e.g. the right to own slaves), and your society might deny you legal rights that the true morality says you should have (e.g. the right to be free, to own one’s own body and labor power).

-- Some of the most influential defenders of legal positivism are the 19<sup>th</sup> century philosophers John Austin and Jeremy Bentham, and the 20<sup>th</sup> century legal philosopher H.L.A. Hart.

### **Some terminology from Aquinas and Austin**

Aquinas distinguishes four types of law—human, divine, eternal, and natural—as follows:

Human law—“an ordinance of reason for the common good promulgated by him who has the care of the community.”

Eternal law —God’s plan for all of creation.

Natural law—The part of eternal law that applies to human beings; it is God’s plan for us. Natural law can be discerned by unaided human reason, and it consists in the

correct moral principles. E.g. “it is never permissible intentionally to kill an innocent human being,” and “one must never intend what is evil, even as a means to achieving a good or avoiding a bad result” are natural laws, in Aquinas’s view.

Divine law—the part of eternal law that God reveals to us human beings *via* Scripture. If something is against natural law, then it’s against divine law too. But some things, primarily of a religious nature, are contrary to divine law but not natural law. For example, natural reason and natural law tell us that the God of traditional theism exists and should be venerated. But it is only through divine revelation that we can know that baptism, membership in the Christian church, etc. are necessary for our salvation.

Aquinas insists that human laws are genuine laws only if they do not contradict either natural or divine law.

Austin's definition of **law**: a "rule laid down for the guidance of an intelligent being by an intelligent being having power over him." There are two kinds of law: positive law (rules commanded by political superiors to their inferiors) and divine law (rules that God commands all human beings to follow). Law are commands, which Austin defines as an expression of a wish by someone who has the willingness and ability to enforce compliance. ("If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command.")

Unlike Aquinas, Austin does not distinguish divine and natural law. Austin assumes that God's commands to us are the true morality. Austin distinguishes divine law/the true morality from "positive morality," or the beliefs about what's right/wrong, just/unjust that are held by the majority of people in some society. The positive morality of our society is correct insofar as it coincides with divine law and incorrect insofar as it deviates from it. It's worth noting that Austin had an unorthodox view of the content of divine law. Austin believed that God commands us to be utility maximizers, making utilitarianism the true morality.

Positive laws are commanded by "political superiors." Austin calls these superiors the "sovereign," and he defines "sovereign" as the person or persons who are not in the habit of obeying anyone else, and whom everyone else is in the habit of obeying. Positive laws are general commands by people who themselves are not bound by them, and who can enforce obedience from everyone else. The idea that the "sovereign" is above the law is one that Austin shares with the 17<sup>th</sup> century political philosopher Thomas Hobbes.

Austin, then, defends two ideas:

- i) the command theory of law, and
- ii) the separation thesis. (See the 5 or 6 paragraphs in the textbook that start with the sentence "The existence of law is one thing; its merit or demerit is another.")

What is the logical relationship between i) and ii)? ii) follows from i); that is, if i) is true, then ii) must be also. But i) does not follow from ii). It's perfectly consistent to think that the separation thesis is true, but the command theory is false. That's precisely what H.L.A. Hart believes.

Some objections to Austin's command theory:

-- To have legal authority to make law, for Austin, is simply a matter of being able to impose one's will on everyone else. Now suppose that Dr. Evil invents shields/force fields that protect him from any attack, as well as horrible weapons that he can use against anyone he wants. Suppose he threatens to use his weapons on me unless I pee on the weeds in his front lawn. Do I have a *legal duty* to do this? Surely not. But Austin's command theory says that I do. As H.L.A. Hart puts the point, Austin's theory confuses being obligated with being obliged.

obliged = forced to do something.

obligated = there are rules which require that one do something.

If an armed robber demands "your money or your life," then you are obliged to hand over the money, but you have no obligation (of any sort) to hand it over.

-- Plenty of countries have laws, without having a "sovereign" in Austin's sense. In constitutional democracies, government has limited powers and is accountable to the people in elections. The President of the U.S., the Prime Minister of Great Britain, etc. are not "above the law," and thus, are not "sovereigns."

-- Hart: Austin's command theory of law may have some plausibility if one focuses on criminal law (where people who break the rules are subject to punishment), but it has much less if one considers other bodies of law, such as contract law or tort law. If I fail to fulfill the requirements for a valid will (e.g. I have it witnessed and signed by only one person, not the two required by law), the state doesn't punish me. It simply deems the will void and refuses to carry out whatever wishes I express in it about who inherits by estate.

-- Austin's command theory doesn't work for international law, because there is no international sovereign, that is, no entity with the power to force all countries to obey international law.