Retrieving Positivism: Law as Bibliolatry

Frederick C. DeCoste

University of Alberta

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Jurisprudence Commons, and the Public Law and Legal Theory Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
Frederick C. DeCoste* Retrieving Positivism: Law as Bibliolatry

I. Introduction

Legal positivism is a curious phenomenon in both its theoretical and sociological parts.¹ It is curious as theory because its very existence, as theory, is often questioned,² and because, even when its existence is

¹Frederick C. DeCoste, Assistant Professor, Faculty of Law, University of Alberta, Edmonton. I am indebted to Hans Mohr and Brian Slattery of Osgoode Hall and to my colleague Richard Bauman for reading with critical intelligence earlier drafts of this article.

²And legal positivism — like any theory — is indeed a phenomenon of both parts because, as theory, positivism is a belief which not only orients practice but which is constitutive of the very possibility of practice. See for instance: Teubner, “After Legal Instrumentalism?” in Dilemmas of Law in the Welfare State (1985, G. Teubner, ed.) 299, 301 (arguing that “legal theory...forms part of the legal system and thus orients practice”); N. E. Simmonds, The Decline of Juridical Reason: Doctrine and Theory in Legal Order (1984) 29-30 (arguing that “in examining the nature of legal science, we are studying an actual social phenomenon” because “social reality consists, not of brute data...but of actions and practices that can be apprehended only by reference to some rationale, some meaning attached to the relevant behaviour”); and R. Dworkin, Law’s Empire (1986) 90 (submitting that “no firm line divides jurisprudence from adjudication or any other aspect of legal practice”) [Hereinafter, Empire]. These assertions with respect to the meaning of theory anticipate the more fundamental question — which is beyond the purview of this essay — of the meaning of praxis and of the relationship between theory, praxis and polity. For an illuminating discussion of these questions in the context of political theory, see: W.N. Sullivan, Reconstructing Public Philosophy (1986), esp. Ch. 2 and 3.

²See: N. MacCormick, Legal Reasoning and Legal Theory (1978) 240:

“Among the most pointless questions which could be asked is whether [there is an] essence of positivism; there is no such thing as an essence of positivism. The term positivism serves only to characterize an approach to or a programme for legal theory held by some theorist or theorists. There is a range of possible uses of the term from which all one can do is stipulatively select that which characterizes the approach one wishes to defend — or attack.” J. Raz, The Authority of Law: Essays on Law and Morality (1979) 37: “The perennial and inexhaustible nature of the controversy concerning the positivist analysis of the law is due in no small measure to the elusive meaning of ‘positivism’ in legal philosophy. True, it is well established that legal positivism is essentially independent (even though not historically unrelated) both of the positivism of nineteenth-century philosophy and of the logical positivism of the present century. But the great variation between different positivist theories of law and the large variety of philosophical motivations permeating the work of the non-positivists indicate the difficulty, perhaps the impossibility, of identifying legal positivism at its source — in a fundamental positivist philosophical outlook.” And R. S. Summers, Essays in Legal Philosophy (1968) 16 (arguing that “it would be best in legal philosophy to drop the term ‘positivist’, for it is now radically ambiguous and dominantly pejorative.”). For summaries of different meanings of positivism, see: K. Olivcrona, Law as Fact (1971) 50-62; Hart, “Positivism and the Separation of Law and Morals” (1958), 71 Harv. L. Rev. 595, 601-602; and Summers, “The New Analytical Jurists” (1966), 41 N.Y.U. L. Rev. 861, 889.
admitted, the nature of the theory,\textsuperscript{3} and who does and does not qualify as an adherent,\textsuperscript{4} most often remains in dispute. It is curious sociologically because rare is the legal theoretician who forthrightly endorses positivism: positivists, it would appear, are as scarce as the formalists among whom they used to be numbered.\textsuperscript{5}

In this essay, I attempt to construct a model of the positivist “version” of law which shows this reticence to be both unwarranted and — for

\textsuperscript{3} See for instance: Coleman, “Negative and Positive Positivism” (1982), 11 \textit{J. Leg. Stud.} 139 (arguing that in the final analysis, there are three separate varieties of positivism); and Fiss, “The Varieties of Positivism” (1981), 90 \textit{Yale L. J.} 1007 (arguing that legal positivism is “one variant of ethical positivism” which “insist[s] on the distinction between ‘ought’ and ‘is’” and that a commitment to legal positivism does not involve a commitment to cognitive or logical positivism).


\textsuperscript{6} I use the term “version” in the same fashion as does Nelson Goodman: see, N. Goodman, \textit{Ways of Worldmaking} (1978) and \textit{Languages of Art: An Approach to a Theory of Symbols} (1968), hereinafter referred to respectively as \textit{Ways} and \textit{Languages}. Goodman’s founding proposition is twofold: that the meaning of the world is the world and that there are as many worlds as there are meanings. (\textit{Ways}, 3) For Goodman, therefore, “reality is relative” (\textit{ibid.}, 20) and there are “multiple actual worlds” (\textit{ibid.}, 2). Versions and visions are ways of creating those worlds by giving meaning to the world. They are ways of world making: “each participant[s] in the formation and characterization of the world”; (\textit{Languages}, 40) and “our universe consists of these ways, rather than of a world or of worlds.” (\textit{Ways}, 3)

Yet, according to Goodman, they are different ways. A version is a \textit{description} of the world as something and, therefore, has “truth-value” (\textit{ibid.}) A vision, on the other hand, is a \textit{depiction}. Instead of propounding a world descriptively, it proposes a world representationally; and instead of possessing truth-value, it possesses rightness. Rightness is a matter of “ultimate acceptability” (\textit{ibid.}, 139); and acceptability is “primarily a matter of fit” (\textit{ibid.}, 138) [In the end, Goodman appears to abandon truth entirely: he instead translates the truth of versions to correctness and then subsumes both correctness and rightness under fit. (See: \textit{Ways}, 138; and \textit{Languages}, 264-265) That is, “a statement is true and . . . a representation is right, for a world it fits” (\textit{Ways}, 132). But this does not at all detract from the utility of his founding distinction between versions and visions as different ways of world making because to describe and to represent a world remain different even if the tests for each reduces to acceptability. In any
reasons with which I conclude — tragically counterproductive. Preliminary to undertaking that task, however, and by way of structuring the argument which follows, I must first clear the ground of two fundamental difficulties which this curious state of theoretic affairs presents to the critic.

The difficulties are these. On the one hand, because positivism is apparently so evanescent, one’s criticisms may appear to be frivolous: simply, why bother criticizing that which does not exist or that to which none subscribe. Much more ominously, however, one’s criticism may appear dishonest. For if the existence and nature of positivism is indeed so contestable and so elusive, any version which the critic offers as an object of critical inquiry may itself be criticized as a product of the critic’s event, his ultimately equalling truth and rightness with fit is unsurprising since both truth and rightness are relative to a world each creates.] Under the view taken here, positivism is a version of law both because it conceives itself as a description of legal phenomena and because it proclaims and defends its description as true.

This characterization is fundamental to any critical assessment of positivism (a project beyond the purposes of the present essay) because it establishes the meaning of truth for such an assessment. For if positivism is indeed a version and if, following Goodman, truth is relative (because there is no world which is “undescribed, undepicted, unperceived”: ibid, 4), its “truth cannot be defined or tested by agreement with the world” (ibid., 17). Nor, for the same reason, is it possible to compare it with other, different versions: because they are different, versions are incommensurable (ibid., 4-6). Rather, a version — including the positivist version of law — can only be “taken to be true when it offends no unyielding beliefs and none of its own precepts” (ibid., 17). Goodman includes among unyielding beliefs “long-lived reflections of laws of logic, short-lived reflections of recent observations and other convictions and prejudices ingrained with varying degrees of firmness” (ibid., 17); and among precepts, “choices among alternative frames of reference, weightings and derivational bases.” (ibid.) Truth, therefore, is not only relative, it is flexible: “far from being a solemn and severe master,” it is “a docile and obedient servant.” (ibid., 18)

In consequence, in testing the “truth-value” of positivism as a version, one would need to inquire whether it offends ‘any unyielding beliefs” or “any of its own precepts.” If, therefore, we were to inquire whether the positivist version is demonstrable on its own terms, we could propose that we are testing it on both bases — the former because it is a “long-lived reflection” of logic that propositions be in some sense (and not, note, in a logical positivist sense) verifiable; and the former because, as we shall see, choice of a particular frame of reference is critical to the positivist project.

7. My purpose, I should make abundantly clear, is to establish a foundation — indeed an object — for subsequent criticism. Charles Taylor claims that epistemic projects (which, in this essay, I will claim positivism is clearly one: see infra, parts II and III) have moral consequences which implicate certain positions in moral, political and social theory. See: Taylor, “Overcoming Epistemology” in After Philosophy: End or Transformation? (1987), K. Baynaes et al, eds.) 464-488. Elsewhere, I will take Taylor’s suggestion as a point of departure to argue that positivism implicates a politics of estrangement between rulers and the ruled (I begin this undertaking in “Radical Discourse in Legal Theory: Hart and Dworkin,” forthcoming, (1990), 21 Ottawa L. Rev.); elsewhere too I will inquire (see: supra, note 6 and infra, note 108 and accompanying text) whether we can, as a legal theoretical matter, avoid this form of polity. (see: “Desire and the Word: Interpreting Law as Interpretation”, forthcoming).
manipulative manufacture: the critic, it will be said, has created a "straw-person" for the sole purpose of an easy display of critical vivisection.\textsuperscript{8}

The first objection — that of frivolity — is, I think, easily set aside. If the existence of positivism can be seriously\textsuperscript{9} contested, it is because the legal academy is so enthralled a captive of the positivist programme. Positivism’s alleged translucence is, in this sense, itself manufactured: positivism does not appear to us because we so much “belong”\textsuperscript{10} to it. And because we do belong, we are forgetful — we have amnesia — about our ever having assented.\textsuperscript{11} I shall attempt to cure this forgetfulness by rendering distinct the “positivist enterprise”\textsuperscript{12} and by persuading that that rendition makes sense.

The second objection is much more troublesome. How, after all, does one convince of veracity in construction when the end in final view is

\textsuperscript{8} This counter-criticism is usually accusatory in form and tone: the critic's criticism, it is said, is without force and effect because she has criticized a "strawman", a caricature of a real position to which none would or does subscribe. "Strawman-ism" has become a popular idiom in recent jurisprudential debate, especially to those defending mainstream versions of law against the work of critical legal scholars. See, for instance: Ewald, “Unger's Philosophy: A Critical Legal Study” (1988), 97 Yale L. J. 665, 754, 691 and 702 (arguing that the version of liberalism which Unger criticizes is a "straw-person" because "it is dubious that [it was] ever held by anybody at all" and attributing Unger’s mistake to his being "in control neither of the literature he cites, nor of his own arguments"); Langille, “Revolution Without Foundation: The Grammar of Scepticism and Law” (1988), 33 McGill L. J. 451, 486 (submitting that “the legal theorists under attack as ‘mainstream’ or ‘liberal’ all hold more sophisticated theories about legal reasoning, the requirements of legal certainty or determinacy and the ideal of the rule of law than those ascribed to them”); Stick, “Can Nihilism Be Pragmatic?” (1986), 100 Harv. L. Rev. 332 (commenting that “many observers have noted that strong critics in assembling the target of 'liberal' law for destruction engage in the exercise of constructing a ‘straw-man’ ”); Krygier, “Critical Legal Studies and Social Theory — A Response to Alan Hunt” (1987), 7 Oxf. J. Leg. Stud. 26, 28 (arguing that in critical characterizations of liberalism, “the arguments of individuals are rarely analyzed singly or at length but are briefly and abstractly characterized and dissolved into the one, antinomy — ridded portrait” and that the “claims attributed to them... are at times the opposite of what [they] believed”); and Finnis, “On the Critical Legal Studies Movement” (1985), 30 Am. J. Juris. 21, 42 (arguing that Unger “distorts our human situation as that situation is understood in the social theory of Aristotle and... Aquinas”).

More hopeful responses to critical scholarship, especially Unger’s, have, of course, also been offered. See: “Unger Symposium” (1987), 81 Nw. U. L. Rev. 589-951; and Rorty, “Unger, Castoriadis and the Romance of a National Future” (1988), 82 Nw. U. L. Rev. 335, 351 (arguing, among other things, that Unger’s work “has a better chance than most to be linked, in the history books, with some... world-transforming event.”).

\textsuperscript{9} I do not mean to imply — nor do I believe — that such a contest can ever be intelligible; I mean only to say that the disputants can take seriously the contest only because they have forgotten that the contest makes no sense.

\textsuperscript{10} See: Simmonds, supra, note 1, 29.

\textsuperscript{11} I borrow this metaphor from Fraser, “Legal Amnesia: Modernism versus the Republican Tradition in American Legal Thought” (1984), 60 Telos 15. On the nature of our assent, see: infra, notes 99, 105 and 106 and accompanying text.

\textsuperscript{12} See: Boyle, supra, note 5, 390.
denunciatory deconstruction? The very project appears an exercise in self-interest and self-fulfilment. One could rejoin, of course, that this is always the case — that "re-presentation" of the critical object is a necessary condition for any critical practice. Indeed, one could even go the extra epistemetic mile to proclaim that criticism is prejudice because prejudice is the only form of virtue available to us.

None of this, however, solves the critical problem in this instance. Because the positivist oeuvre is itself the object of critical contest or judgement, the critic is faced with a problem critically prior to the issue of the possibility of fidelity to (or the need for prejudice towards) the oeuvre once it is found. Simply, there is here no one text or group of texts which, without more, constitutes the critical object. Just the contrary: the construction of the oeuvre is, in this case, itself, the necessary first step in the critical project. And it is this necessity which is problematic. The literature — which I will allege is positivist — does not offer a homogeneous view in all its parts. But not only that: the parts not only conceive of themselves as being distinct, they also generally conceive of themselves as being in opposition.

Now one could — and quite successfully, I think — propose that while the literature admittedly fails to present "a unified system", it nonetheless is unified as "a family of ideas" that shares a "deep structure"; the oeuvre would then be constructed by disclosing "this hidden framework of ideas." But such circuitous sophistication is not, I think, at all necessary here simply because, in this instance, the critical object is much more directly accessible. A direct construction is possible because

15. See: Fish, "Demonstration versus Persuasion: Two Models of Critical Activity", ibid. 30 arguing that "prejudicial and perspectival perception is all there is, and the question is from which of equally interested perspectives will the text be constituted". I will elsewhere indicate (see: "Desire and the Word: Interpreting Law as Interpretation", forthcoming) that Fish's is a position which I endorse fully but not completely: that is, while I accept his historicist premises and his critical argument, I dissent from his ontic conclusions.
16. That is, none thinks itself the successor of another; and each thinks itself as transformatively displacing the other. I am here thinking in particular of the self-conceptions of Hart and Dworkin. In Concept (supra, note 5, at 76, 95 & 151), Hart proclaims his work not only distinct from Austin's (Province, supra, note 5), but as constituting an entirely new beginning, "a fresh start", in which alone "the heart of a legal system" — its very "essence" — is discernible. So too Dworkin in Taking Rights Seriously (1977), 22 & 45: his is not an amendment of Hart; it is, instead, "a general attack" which seeks to "shake ... loose" from prior theory so that "a model truer to the complexity and sophistication" of law may be built (Hereinafter, TRS).
17. This, of course, was Unger's strategy in constructing his version of liberalism. See: R. M. Unger, Knowledge and Politics (1975) 8.
the literature both shares a common "programme"\(^{18}\) and implicates common results. The programme to which I refer, consists of a version of law which defines a peculiarly epistemic project for legal theory and practice.\(^{19}\) By results, I mean the moral consequences which that project implicates. Together this project and these consequences, I argue, both constitute the positivist oeuvre and qualify literature for membership in that oeuvre: together, that is, they are its only unity.\(^{20}\)

In this essay, I make the first of these arguments.\(^{21}\) I will proceed as follows. First, I will provide a general description of the version of law in terms of which alone the positivist project makes sense. Second, I shall attempt to draw from that description a fuller account of the positivist project and, more particularly, of the sorts of claims which positivism must make in order either to make intelligible or to justify its version of law. I will then conclude with some remarks concerning the significance to legal theory and practice of the legal academy's continuing seduction by the currency of positivism.

II. *Describing Positivism*

[T]he business of the court [is] neither more nor less than that of declaring the meaning of a law in respect of a contingent occurrence.

— Michael Oakeshott\(^{22}\)

---

19. This could be put another way: because the literature shares a project — i.e., a version both of a problem and of what can possibly qualify as a solution — and because that problem and that method are only intelligible given certain premises about law, the literature is to that extent operating from a common version of law. However stated — whether, that is, the version implicates the project or the project, the version — the point is simple enough: the literature only makes sense and, more to the point, can only be made to make sense, in terms of an interdependence between a defined project and a defining framework.

This method of construction is not, I hasten to add, mine alone. Helmut Dubiel, for instance, deploys a similar approach in construing the oeuvre of the Frankfurt School: the texts there at issue, he claims, are, despite their very real differences, part of the same oeuvre because each is "a historically varying answer to an identical, invariant framework of 'points of inquiry' " which together constitute "an orienting frame of reference". See: H. Dubiel, *Theory and Politics: Studies in the Development of Critical Theory* (1985, B. Gregg, trans.) 7-10. So too here: positivist texts are positivist because they share "an orienting frame of reference" which is composed of and defined by a "structure of points of inquiry".

20. I think this construction is self-contained and self-standing. There is, however, a caveat: since this construction violates the self-understanding of much of the literature, whether it, in the last analysis, avoids the charge of manufacture and manipulation can only be assessed in terms of its persuasiveness, which, with Fish, (see: *supra*, note 14), I believe the only demonstration possible.

[L]egal practice is an exercise in interpretation.

— Ronald Dworkin

I claim that for positivists, law is bibliolatry. I mean by this simply that they view legal practice as largely a practice of interpreting authoritative texts. Now this view of law is not at all uncommon; indeed, it may even be said to be hegemonic. My view that this is the positivist view may, however, appear irregular if only because many who subscribe to a textualist view of legal practice do not view themselves as positivists. I must, therefore, make a case for their inclusion; and this I will do by arguing that the textualist view is only intelligible in terms of a background framework which itself is indisputably positivist. After so doing, I will explore the deep structure of that framework; I undertake this task because the deep structure that stands behind the positivist framework permeates the whole of the positivist project and is, in large measure, responsible for its ultimate theoretic fragility.

23. See: Dworkin, "Law as Interpretation" in The Politics of Interpretation (1982, W. J. T. Mitchell, ed.) 249. See also: Empire supra, note 1, 14 ("law [is] an argumentative social practice"); 87, 410 ("law is an interpretive concept"). Dworkin's view is neither new nor peculiar to legal theorists (it, of course, is held by other legal theorists: see, for instance, R. N. Moles, Definition and Rule in Legal Theory: A Reassessment of H. L. A. Hart and the Positivist Tradition (1987) 259 — "the existence of a legal rule is essentially constructive and interpretative"). Hobbes, for instance, thought the legal enterprise implicated an interpretive project: "All Laws, written, and unwritten, have need of Interpretation..." [See: Leviathan (1968, C. B. MacPherson, ed.) 322] And it is common practice among literary theorists to invoke law as the paradigmatic interpretive project. See for instance: Hirsch, "Meaning and Significance Re-interpreted" (1985), 11 Crit. Inq. 202, 219 (submitting that "law ought to be a paradigm for the serious practice of interpretation"); and Gadamer, Truth and Method, supra, note 5, 292 (arguing that "legal hermeneutics is able to point out what the real procedure of the human sciences is").

24. A caution: this view does not imply anything with respect to how the text is defined. See: infra, Part II.

25. The whole of legal education, for instance, can be aptly conceived as literacy training. Law students are taught which sort of texts comprise the legal oeuvre and how texts of that sort ought be interpreted and all this so that they may later "join the practice of law with that furniture in place and with a shared understanding" of what law can and cannot be. See: Empire, supra, note 1, 91; and infra, note 99. Other, less careerist, interpretations of the quality of the literacy are, of course, available. For a feminist interpretation, see: "Symposium: Women in Legal Education —Pedagogy, Law, Theory and Practice" (1988), 38 J. Leg. Ed., 1.

26. Ronald Dworkin is the archetypical instance: see, TRS, supra, note 16, 16-45; and Empire, supra, note 1, 33-35, 37-43.

27. At this stage, I will argue only that the views of theorists such as Dworkin can only make sense in terms of a paradigm which is, by any account, positivist. Elsewhere (see: "Desire and the Word: Interpreting Law as Interpretation", forthcoming; and supra, note 7) I make a detailed case with respect to their positivism; this I shall do by analyzing Dworkin's work in terms of the dimensions identified in this essay as definitive of positivism. I choose Dworkin for this analysis for purely tactical reasons: for if Dworkin is, on this account, a positivist, other lesser lights who disclaim positivism using his work are also positivists.
1. **Surface Taxonomy**

First then: what is required in order to make sense of the proposition that law is an interpretive activity? Well the proposition at least requires that there be something to be interpreted — that there be an *interpretandum* which constitutes the object of interpretive activity. And if there is to be an *interpretandum*, there must also be a text; and for there to be a text, there must be an epistolary inscription of some sort or other. These requirements follow, I think, as a matter of course for any bibliocentric activity.\(^{28}\) The positivist version of law as bibliolatry differs, however, in its understanding of the significance of “the inscriptive text”.\(^{29}\) For not only is the text authoritative (and this, positivism shares with all bibliolatry), it is authoritative for a peculiar reason — it is authoritative because it is viewed as having been posited.

For the positivist, the positum is the *interpretandum* and the text is, therefore, postutional and not merely — or, in some instances, at all — propositional. That is, the text is a claim\(^{30}\) and not merely a proposal or commendation. It is just this appraisal of textual significance that, I now propose, is the core of positivism. For from it arises, necessarily, the taxonomy that is constitutive of the positivist version of law.

To declare both that the text is a claim and that it is authoritative for just that reason is to construe and structure the relationship between the text and the interpreter in terms of rule-making and rule-following. Simply: the text has authoritative significance for the interpreter because — and only because — it is a positum, a claim-to-be-followed; and it can only have such significance if there is a positor. Together these propositions require and constitute a cleavage between rule-making and rule-following. And that cleavage is the positivist taxonomy: for law, for the positivist, consists precisely of this bicameral division of law-labour. The rule-maker is the positor of texts which are authoritative because they have been posited; and the rule-follower is the interpreter of the text whose interpretations consist in following the claim which is the text.\(^{31}\)

---


29. Ibid, 824.

30. But for the theoretic associations that such a description might connote (see: supra, *Province*, note 5), the text could just as easily and appropriately be said to be a demand. I use the term “claim” to avoid such connotations because the text as claim does not, without a political theoretical more, imply anything with respect to the political character of the positor.

31. For this reason — and as we shall discuss more fully below: see: infra, Part II — all positivism is “textual positivism” (see: Hutchinson, “Part of An Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)” (1985), 60 N.Y.U. L. Rev. 850, 862); the turn to the text, and to interpretation, are its very fabric and each is, for that reason, inevitable (see: Kennedy, “The Turn to Interpretation” (1985), 58 S. Cal. L. Rev., 251).
Now a number of objections may be raised regarding this construal of positivism. First, it may be declared self-contradicting inasmuch as it arises from the assertion that law is an interpretive activity and yet concludes by identifying two foci of law activity, one of which — rule-making — is not at all interpretive. I intend to deal with this objection in a different context elsewhere. Suffice it to say here that positivism, in a very real, if paradoxic, sense, degrades rule-making activity by viewing rule-interpreting as the paradigmatic instance of law-activity.

My version of positivism may also perhaps be criticized as eccentric. Certainly, positivism is generally characterized in terms of the separation of law and morals: the legal positivist, it is said, is one who maintains that law and morals are separate. It is, of course, a weak defence to this charge that others also construe positivism in a fashion roughly similar to my own. I will, instead, offer a positive defence in

32. See: supra, note 7, "Desire and the Word: Interpreting Law as Interpretation", forthcoming. And this is to pass on the most obvious rejoinder, i.e., that rule-making too is interpretive. I pursue this argument neither here nor elsewhere because, in my view, it hides more that it discloses.

33. See for instance: J. Raz, Practical Reason and Norms (1975) 129-31 (arguing that "law applying" rather than "law-creating" is central to the understanding of law); Dworkin, TRS, supra, note 16, chp. 4, esp. 82-86, 113-115 (distinguishing between the political obligation of legislatures and courts in terms policy and principle, reserving for courts the practice of principle and characterizing legislatures as preference counters); and Dworkin A Matter of Principle (1985) 71 (describing courts as "an institution that calls some issues from the battleground of power politics to the forum of principle").

Dworkin offers a more sophisticated version of legislative obligation in Empire (supra, note 1). While in TRS he was tentative in suggesting that "there is perhaps some limit to the arbitrariness of the distinctions the legislature may make" (TRS, supra, note 16, 114), he now holds "lawmakers" to "a legislative principle" of political integrity according to which they are "to try to make the total set of laws morally coherent" (Empire, supra, note 1, 176). Yet the fundamentals remain the same: his "main concern" remains "with the adjudicative principle" of integrity (ibid, 176); and judges remain "in a very different position from legislators" because they "must make their common-law decisions on grounds of principle, not policy" (ibid., 244).

34. Which is to say, not invariably: see, Simmonds, supra, note 1, 22 (arguing that positivism is "the claim that all laws emanate from authoritative sources in the sense that they have been deliberately laid down or accepted"); and, at least in part, Raz, supra, note 2, 38 (defining positivism as "the view that the law is posited, is made law by the activities of human beings").

35. This view has its origin in Austin's famous epigram — "The existence of law is one thing; its merit or demerit is another" (see: Province, supra, note 5, 184); and more recently in Hart's redaction of Austin (see: Concept, supra, note 5, esp. Ch. IX.). This version has generally been endorsed by positivist friend and foe alike. See, for instance: Olivecrona, supra, note 2; S. I. Shuman, Legal Positivism: Its Scope and Limitation (1963) 11-40; M. J. Detmold, The Unity of Law and Morals: A Refutation of Legal Positivism (1984) 21-23; J. Murphy and J. Coleman, The Philosophy of Law (1984) 29; P. Soper, A Theory of Law (1984) 101-102; and D. Beyleveld and R. Brownsword, Law As A Moral Judgement (1986) 1-4. By implication at least, Dworkin too appears to share this view: see, TRS, supra, note 16, 17, 60f; and Empire, supra, note 1, 96-98.

36. For instance: Simmonds supra, note 70; and (in part) Raz, supra, note 2.
two parts. I will argue first that the normal version of positivism confuses consequences for cause; I will then argue that this confusion arises from confusing legal with logical positivism.

The first line of defence arises from a claim that is coeval to the division between rule-making and rule-following. The claim is this: that rule-making and rule-following are different because it is possible to follow rules and that it is possible to follow rules because rules are, in some fashion or another, knowable. To this extent, at least, the positivist project is epistemic: that is, an epistemic demonstration is a necessary condition for the project's success because the project can only possibly be sustained if knowledge is possible.

Now, as we shall later discover, such a demonstration is itself only possible in terms of a very specific "construal of knowledge". For now I wish only to contend that the law/morality division is positivism's reduction of that construal. The division, that is, constitutes a particular kind of epistemic claim — that what is "out-there" (the rules) is knowable because the knowing subject (the rule-follower) is, and can be, socially and historically disengaged. This characterization sheds new light on and provides theoretic substance to the traditional statement: a positivist is indeed one who thinks law and morality are separate because he thinks it possible to know law without moral appraisal or engagement; and he thinks it important to be able to so know because he works within and wishes to maintain the founding division between rule-making and rule-following. Viewed in this fashion, the law/morality split is an epistemic consequence of the positivist framework: while it is necessary to sustain the framework, it does not itself constitute the framework.

37. We will consider this claim more fully later: see infra, Part II.
38. I define the positivist project in detail infra, Part III.
39. But, as well shall see, it is not a sufficient condition: see, infra, Part III.
40. See, infra, Part III.
41. See: Taylor, supra, note 7, 479. I shall later appropriate Taylor's argument that this construal implicates a representational view of knowledge (i.e., that knowing is "a certain relation holding between what is 'out-there' and certain inner states"; ibid, 467) and a socially and historically eviscerated view of the knowing subject (ibid, 466, 471): see, infra, Part III. Elsewhere (see, supra, note 7), I shall argue with Taylor that together these implications comprise "a moral ideal" (ibid, 470) which, has moral and spiritual consequences" (ibid, 473) which, in turn, inform and require certain versions of moral, social and political theory (ibid, 472, 4800).
42. Nor, viewed in this fashion, does the law/morality split require the legal positivist to be a logical positivist: see infra, note 51 and accompanying text. A note on pronouns. I believe that the work of feminist theoreticians — along with the work of liberation theologians — to be the site most likely to produce a vocabulary which will provide a moral space for both the criticism of the present and for the articulation of a grammar of a human future. And because I so believe, I deploy female pronoun designations whenever, throughout this essay, I speak from the perspective of those who are the objects of those who share the construction of the
The second defence arises from a particular use to which the law/morality distinction is often put. I refer to its usage as shorthand for distinguishing between legal positivism and natural law theory. What distinguishes legal positivism from natural law, it is said, is that the one and not the other denies a necessary connection between law and morality. Now, notwithstanding that some legal positivists have taken time to deny a connection between legal and logical positivism, this usage can lead to the conflation of legal and logical positivism — legal positivism can become equated with a law/morality split defined along logical positivist lines. And when this is done, the split becomes the misunderstood whole and heart of legal positivism.

I use the term logical positivism to refer to that brand of twentieth century epistemology best represented by A.J. Ayer's *Language, Truth and Logic* and according to which “the meaning of any statement is shown by the way in which it could be verified.” This proposition, which became known as the Verification Principle, sought to establish a “general criterion of significance” which would condemn to cognitive present. When, however, I speak for those who are now empowered moral agents, I shall use masculine pronouns.

My point in so doing is not a demographic one: the fact that most of those who have moral responsibility in and for the construction of the present are male, does not, without more, carry theoretic significance. (Accord: J. Grimshaw, *Philosophy and Feminist Thinking* (1986) 36, arguing that the dominance of males in philosophy does not alone “establish the ‘maleness’ of philosophy in any real important sense.”) And my point arises just from that: that viewed theoretically the sexual demographics of empowerment are significant because those demographics have resulted in the exclusion of women from the vocabulary and grammar of power (ibid., 370). The voice in much mainstream literature can, in consequence, be viewed a male voice — the voice, that is, of those who are enabled moral agents in history. Some feminists have subjected legal theory to precisely this analysis. See for instance: Hanen, “Feminism, Objectivity and Legal Truth” in *Feminist Perspectives: Philosophical Essays on Method and Morals* (1988, L. Code, et al, eds.) 29 (analyzing Dworkin along these lines); Stubbs, “Feminism and Legal Positivism” (1986), 3 *Aust. J. Law & Soc'y* 63 (arguing that “the conceptual framework of legal positivism ... has very effectively constrained the development of a feminist critique of law”); Mossman, “Feminism and Legal Method: The Difference It Makes” (1986), 3 *Aust. J. Law & Soc'y* 30 (arguing that “feminism has a power to transform the perspective of legal method”); and Spivak, “The Politics of Interpretation” in G.C. Spivak, *In Other Worlds: Essays in Cultural Politics* (1988) 118, 130 (arguing that Dworkin’s discussion of law as interpretation is “narrow and gender-specific, rather than unusual”).

43. See, for instance: Murphy and Coleman, *supra*, note 35, 13 and 22; and Beyleveld and Brownword, *supra*, note 35, 2.

44. See most notably: Hart, “Positivism and the Separation of Law and Morals”, *supra*, note 2, 624-629. Others, of course, have sought to establish just such a connection: see, for instance — Shuman, *supra*, note 5 (arguing not only that a legal positivist is one who maintains that law and morals are separate, but also that a legal positivist must maintain a certain — quite nearly logical positivist — view with respect to the nature of morals).


and linguistic insignificance any statement — including, notably, the whole of moral statements — not empirically verifiable. Now one can be a legal positivist without being a logical positivist — one can, that is, claim a separation between law and morals without subscribing to the logical positivist test of sense. The converse, however, is not true: if one is a logical positivist, one would necessarily have to be a legal positivist otherwise one simply could not speak of law.

The logic of these positions is easily confused and especially so, when the law/morality distinction is deployed to distinguish legal positivism from natural law. This is so because natural law theory is most appropriately conceived as the very antithesis of logical positivism: that is, natural law is fundamentally the claim that moral statements are meaningful because they are accessible and verifiable through the practice of practical reasoning. And when the logic is confused — when, that is, legal positivism becomes equated with a logical positivist epistemology — the law and morality distinction ceases to be an epigrammatic usage and becomes instead the whole of a re-defined legal positivism.

Finally my version may be condemned as incomplete for failing to account for case law. This criticism would probably take the form of a counterclaim — that decisional law cannot be analyzed as “a body of

---

48. See: Soper, supra, note 35, 159 and 160; and Beyeveld and Brownsword, supra, note 35, 4-7; and Fiss, supra, note 3, 1016.

49. If law is, from the knower’s perspective, comprised of moral statements — if, that is, the knower cannot know without moral engagement — then the logical positivist must necessarily stand mute because law would be for him meaningless and nonsensical.

50. Finnis’ is the best recent statement of this view. See: J. Finnis, Natural Law and Natural Rights (1980) 18, 103, 280. One might add that, properly conceived, the natural law view neither implicates nor requires the assertion that immoral laws are not laws: ibid. 25f.

51. None of this is to deny, however, that logical and legal positivism do share other less central characteristics. Chief among these, I think, is the value of neutrality of facts. Both positivisms view facts as independent from the concepts used to describe or express them. In the case of legal positivism, this gives rise to the epistemic proposal of the disengaged subject to whom law-facts are neutrally available in the interpretive act. But similarity along these lines ought not be surprising since “the founding principles of any positive science”, legal or other, include “value-neutrality”. See: Z. Bauman, Legislators and Interpreters: Modernity, Post-Modernity and Intellectuals (1987) 174. See also the discussion in Beyeveld and Brownsword, supra, note 35, 4-7.

Nor, of course, is value-neutrality the only dimension they share. I elsewhere argue (see: supra, note 7) that legal positivism constitutes an ethos which implicates moral consequences which themselves implicate — or, at least, tend to associate with — certain moral, social and political theories. The moral theory which is associated is, at least, a sceptical one — that people neither have, nor possibly can, come to a shared understanding of the good. And in the moral sense, then, legal positivism differs from logical positivism only in degree — while the one is sceptical about knowledge of the good, the other declares that such knowledge is impossible.

52. Or, at least, that decisional law which is not directly a commentary on a statutory text.
deCoste: Retrieving Positivism

posited rules". 3 Now one could easily avoid this charge simply be pointing to any number of positivists who hold just the opposite position. MacCormick, for instance, opines that any differences in "the process of reasoning from or with precedent . . . from that of reasoning from or with statutes" are "at most differences of degree, not of kind"; 54 and no less a positivist than Hart conceives of precedent as a device, co-equal with legislation, for the communication of rules. 55 We are not, however, confined to invoking authority; a more positive defence is available.

For we can intelligibly argue that our version indeed accounts for decisional law both because, for the positivist, decisional law can only be intelligibly conceived in terms of the framework we have attributed to, and think constitutive of, positivism and because decisional law shares the same epistemic project which emerges from that framework. 56 First a question: what does the legal actor conceive himself as doing when he undertakes case law research? Clearly — if he is a positivist — he, at least, thinks himself as looking to the past; and, in this sense, case research is really an archaeological activity 57 in which the artifact of value is decisional. But if that, to what purpose — why does the legal actor look to the past? Again clearly: he looks to the past for guidance to the present. And the guidance he seeks is rule guidance. The whole point of decisional archaeology, as conceived by positivism, is precedential; and precedentialism is a variety of rule following. One looks to the legal past to find authoritative textual reason for constraining the present. Past judgements legislate the present; and they are, in consequence, no different from any other positum.

But not only that: because the legal past is textual to the same complete degree precedentially as legislatively, decisional archaeology shares with legislative commentary the same epistemic project. Like the legislative

53. See: Simmonds, supra, note 1, 106.
54. See: MacCormick, supra, note 2, 214.
55. See: Concept, supra, note 5, 121f. One could add Dworkin, the protestant positivist, to this list: see, Empire, supra, note 1, 99 (where he unceremoniously identifies legislation and precedent as constitutive of legal practice) and 410 (where he describes the law as the practice of "judges [deciding] what the law is by interpreting the practice of other judges deciding what the law is").
56. This is not to say, however, that I accept the positivist construal of decisional law or, for that matter, to deny that that construal cannot be criticized on any number of bases. For an argument against the positivist version of case law, see: Simmonds, supra, note 1, Chp. 8, 106-118.
57. Since adopting this metaphor — I thought originally, if derivatively [see: M. Foucault, The Archaeology of Knowledge (1972), A. M. Sheridan, trans.] — I have just recently, discovered that it is not mine alone. See: Halpern, "Judicious Discretion: Miranda and Legal Change" (1988), 2 Yale J. of Criticism 51, 55 (describing the judicial decision as "an exercise in archaeology, a search for sources that consistently grants explanatory privilege and legitimating authority to origins").
commentator, the decisional archaeologist too must always proclaim, and seek to demonstrate, his own fungibility: he is a rule-follower, he must say, because he is not a rule-maker; and he is not a rule-maker, he must show, because he discovers the rules out-there-in-the-(decisional) text.\textsuperscript{58} All of which is to say that the practices of both depend upon their establishing a secure "epistemological footing";\textsuperscript{59} and that, in turn, is merely to say that each is part and parcel of the positivist project.

2. Deep Structure

So far we have seen that the positive version of law as interpretive activity arises from, and only makes sense in terms of, a dichotomous view of law activity. On the one hand, there are rule makers — legislators — who posit claims which are at once rules and authoritative by the very act of positing. On the other hand, there are rule followers — all other legal actors — who follow rules because they are posited and who can follow rules because they are knowable. This taxonomy, in turn, arises from, and only makes sense in terms of, another deeper division. This latter division — which I henceforth term the deep structure of positivism — comprises a taxonomy which seeks to describe not merely the divisions of law activity, but the whole of human activity. It is critical that we understand this deep structure not only because the positivist enterprise cannot adequately be understood without it, but also because the enterprise's theoretic fate, in the final analysis, rests with this structure.

Of what — we may properly inquire — does the act of legislating consist? As defined by positivism, to legislate is to fabricate: it is an activity of causing something to come into being. We have already indentified that which is made as a rule. But we may now be able to see that in the positivist world, cause and effect are one. The rule itself is the act of fabrication: law is that which is made, that which is posited. Through seeking to understand this positing activity more clearly, we can, I think, disclose one dimension of the deep structure of positivism.

To posit is to assert; and to posit is, therefore, at once an act of will and of power and of commitment. It is an act of will because to posit is to act: it is a willing — an exercise of volition. But not only that: an exercise of

\textsuperscript{58} Dworkin has put this as successfully as anyone: it is "judge's duty, even in hard cases", he says, "to discover what the rights of the parties are, not to invent new rights retrospectively". See: \textit{TRS}, supra, note 16, 81. And note that my description of the positivist's proclamation could be put another way — that interpretations are discoveries because they are not fungible and they are not fungible because interpreters are fungible. I should add that we will shortly discover (infra, Part III) that textual discovery requires that both the text and the interpreter be constant and that it is through his fungibility that the interpreter is constant. See: \textit{infra} note 92 and accompanying text.

\textsuperscript{59} I borrow this phrase from Quine: see W. Quine, \textit{From a Logical Point of View} (1953) 44.
will implicates power (which consists of the capacity to be will-full) and desire (which consists in the willing-ness to exercise capacity). The rule-making portion of the positivist framework is, in its entirety, an expression of this antecedent version of the qualities of human action. I say antecedent in the very real sense that positivism's version of rule-making is only intelligible in terms of a prior understanding of this sort of the structure of human action; and I caution that this is completely the case because, true to positivism's self-understanding, law-making as the willing exercise of empowered will, is not only a manufacturing activity, it is the manufacture itself.

Rule-following too has an antecedent structure. Where, however, the deep structure of rule-making consists of a version of the meaning and qualities of human action, the deep structure of rule-following is a version of the meaning and qualities of human reason. We have already found that the division between rule-making and rule-following is only defensible and only intelligible in terms of an epistemic demonstration which I have termed the positivist project. If we now reflect further on the nature of that project, we will discern a version of human reason which alone provides the vocabulary in terms of which the project is possible.

To follow a rule is, before all else, to know the rule; and to know a rule which is communicated textually is to interpret. We can now perhaps re-fashion the positivist division as a division between willing (rule-making) and knowing (rule-following). In order to maintain this division, a particular kind of interpretive knowing is required. Simply: knowing must exclude willing. The positivist project is, most fundamentally, a programme to effect that exclusion through the adoption and deployment of an epistemological idiom which not only permits the exclusion, but ineluctably requires it.

I have already alluded to this idiom. It is a vocabulary of estrangement between the knower and the world (in this case the textual world) and between the knower and his biography. Knowing is separate from willing in such a view of the circumstances of human knowing because, in such a view, both the knowable and the knower are constant. The text is an already-made object out-there-in-the-world; the interpreter is constant because all interpreters are one and the same qua interpreters.

60. Existentially, of course, the order would be somewhat changed: power is primary because it is the sine qua non of both willing and willingness; and willingness precedes willing because it is always occasions and pre-conditions willing.
61. See: supra, note 58 and accompanying text. And we will, of course, refer to it in much greater detail again: see, infra, Parts II.
This view of the circumstances of human knowing is, ultimately, an ontological claim; and that claim, in turn, is, in the final analysis, a version of human knowing. Because meaning awaits us in the world, knowing is discovery; and because the knower can transcend his biography, discovery is methodologically the exercise of constraint. The knower discovers because he can and does exclude his desires and aspirations for the world. Knowing, in this sense, is an act of ontic resignation: it exists where — and only where — the knower recognizes and acts upon his incapacity as a knower, to influence the world. It is this resignation that is the deep structure of the positivist version of rule-following as knowing.

I am proposing, then, that the positivist edifice is constructed from specific conceptual materials and that its architecture is a particular, dichotomous version of the possibilities of human activity. I have identified that version as the claim that willing and knowing are constitutive of human activity and that willing and knowing are separate and distinct. According to this claim, all human activities are either acts of willing or acts of knowing: no human act is both simultaneously. This, however, does not exhaust our analysis of deep structure because the primary opposition of willing to knowing intricates a number of other equally "binary oppositions" to which the major opposition is "indissolubly linked."

Consider first willing: if willing is the exercise of an empowered and desiring volition, how else must willing be construed? Clearly, it must, at least, be construed as involving choice, otherwise the dimension of empowerment makes no sense. Simply willing cannot both be empowered and unfree. But if willing, therefore, necessarily implicates free will, it also, in consequence, implicates a number of other dimensions which are minimally constitutive of free will. The first of these is arbitrariness. For a will to be free, it must be completely free: there can be no prior constraint. A will is constrained if it is compelled in any direction by a force other than itself. But to say that a will is not so compelled is to say that the will is entirely self-directed — that it is purely


63. I borrow this term from Taylor, supra, note 7, 469.
a subject and never an object. This subjectivity is the second condition of free willing and from it arise two further dimensions.

Those dimensions are creativeness and form; and while they are conceptually distinct, they are, existentially, one and the same. The exercise of subjectivity is creative because it is a making or a fabrication. It is this because subjectivity, by definition, is not constrained and because, in consequence, the exercise itself is that which is made. This notion is often designated by use of the term value: the exercise of subjectivity is a value exercise because there is nothing that compels the exercise. The point under either guise remains, however, the same: exercise of subjectivity is creative, or is a value exercise, because there is no constraint.

Yet to declare that the exercise of subjectivity is a making and that — because it is, by definition, unconstrained — that which is made is the exercise itself, is also to declare that the exercise is purely a form. It is to say, that is, that method and product are one — that what affords subjectivity being is its form.

We have identified, then, a number of dimensions additional to the primary deep structure of one part of the positivist framework. Willing, we have found, intricates, and is constituted by, choice, arbitrariness (i.e., absence of constraint), subjectivity, creativeness (i.e., value) and form. It should be noted again, however, that our inquiry has been confined to identifying implications which are uncontroversial because logically requisite; that our construction is, in consequence, minimalist; and that more controversial and more constructions are possible.64

Knowing, too, implicates, and is constituted by, a number of additional dimensions. In terms of our minimalist project, these dimensions are antipodal to the dimensions we have identified as constitutive of willing, namely: determinism, constraint, objectivity, fact and content. Knowing is determined because it is constrained, and it is constrained because, unlike willing, knowing is not arbitrary. Knowing, instead, is directed and confined to the object of knowing which exists independent from, outside of and prior to the knower. Knowing is other-directed and is defined by that direction: it seeks the object by being objective. Unlike willing, it is, therefore, not at all comprised of or equal to its form; just the contrary, it is constituted by the other-ness which it discerns.

64. A feminist deconstruction of willing and knowing has been offered. According to this view, willing is feminine because subjective and volitional and knowing male because objective and cognitive. See: Ryan, supra, note 62, 121; Vickers, “Memoirs of and Ontological Exile: The Methodological Rebellions of Feminist Research” in Feminism in Canada: From Pressure to Politics (1982) 27, 30; and Grimshaw, supra, note 42, 36-74.
We can catalogue our construction of the deep structure of positivism in the following fashion:

<table>
<thead>
<tr>
<th>RULE-MAKING</th>
<th>RULE-FOLLOWING</th>
</tr>
</thead>
<tbody>
<tr>
<td>WILLING</td>
<td>KNOWING</td>
</tr>
<tr>
<td>Choice</td>
<td>Determined</td>
</tr>
<tr>
<td>Arbitrary</td>
<td>Constraint</td>
</tr>
<tr>
<td>Subjective</td>
<td>Objective</td>
</tr>
<tr>
<td>Value</td>
<td>Fact</td>
</tr>
<tr>
<td>Form</td>
<td>Content</td>
</tr>
</tbody>
</table>

This catalogue should be read sequentially. The surface dichotomy between rule-making and rule-following requires — because it is otherwise unintelligible — a deeper structural dichotomy between willing and knowing. And this structure in turn requires — because it is constituted by — the additional structural dimensions of choice/determinism, arbitrariness/constraint, subjective/objective, value/fact, and form/content.

Our catalogue can be described in either of two fashions depending upon whether one stresses the dichotomy as a whole or the knowing activity on one side. If the former, the structure may be aptly termed either Kantian, because it emphasizes the “conviction” that discovery is different from creation,65 or Humian, because it articulates a distinction between fact (is) and value (ought). If, instead, the knowing side alone is our focus, then Cartesian is apt because, according to both Descartes and this structure, knowing is a relation between the mind (the cogito) and the mind’s object (the res cogito). Whichever description is used, the lesson from their availability is that positivism is a localized deposit of a larger, pan-locational tradition in the history of ideas. This instruction is useful because it can cause us to mine the deposit further and more widely.

III. Theoretical Requirements

I wish to argue that the framework and structural buttresses which I have just briefly described necessarily found a number of “very deep needs within positivist legal theory”66 and that the positivist enterprise can only be sustained if those needs are completely satisfied. The needs to which I refer are of two categories — one category concerns the rightness of the positive enterprise and the other the validity of the positivist project. Both

65. See: Rorty, supra, note 62.
66. See: Simmonds, supra, note 1, 100.
concern the relation between law-making and law-following; yet they are different needs because the need for rightness arises from, and in terms of, the deep structure of willing, while the need for validity arises from, and in terms of, the deep structure of knowing.

More precisely put, the needs are these: positivism needs to demonstrate that the division between law-making and law-following ought and can be sustained. In this section, I shall attempt to articulate fully each of these needs. We will find that positivism translates its needs into an idiom of moral and epistemic claims.

1. The Moral Claim

It is not then for judges and lawyers as such to pass a judgment of superior wisdom upon the decisions of the political nation. Their proper role is wise and faithful application of the law as it issues from those political decisions. They need to have criteria for what counts as law, but, in interpreting and applying whatever counts as law by these criteria, they are not themselves to be bothered with issues of political theory in the grand manner. . . . [T]he law, once made, is binding law which the courts just have to apply.

— Neil MacCormick

[E]ven when no settled rule disposes of the case . . . it remains the judge’s duty . . . to discover what the rights of the parties are . . .

— Ronald Dworkin

Positivism asserts that law-making and law-following are categorically different activities. This assertion defines what I earlier referred to as the positivist project — the search for a conclusive demonstration of the cleavage between making and following. Let us now suppose that the search were successful and that positivism, in consequence, were able to sustain the division epistemologically. Would that demonstration alone suffice to defend the division? The answer to this question, I think, is quite obviously no.

The epistemic demonstration is necessary, but it is not, without more, sufficient because positivism must assert not only that rule-following is possible, but also that it is proper. That is, its claim is not merely methodological; it is also necessarily moral. This is so because the possibility of following is not equivalent to the propriety of following.

68. See: *TRS, supra*, note 16, 81.
69. Simply, “can” says nothing about and, certainly, does not imply “ought”. The converse is somewhat different: while “ought” does not imply “can”, it is clearly says something about “can”, if “can” is otherwise possible.
There must, therefore, be an additional demonstration — of why following, even if possible, ought to constitute practice.

Logically at least, this second demonstration ought comprise a theory of restraint. This theory differs from the theory of constraint which positivism’s epistemic claim engenders in the following very direct fashion: instead of seeking to prove — as does the theory of constraint — that interpreters are constrainable, the theory of restraint will seek to convince that interpreters ought restrain themselves so as to permit — to let — themselves be constrained.

This moral claim has a mixed and unsure status in positivist theory. Indeed, it has generally been conceived less as a claim and more as a context in which to articulate issues subsequent and subsidiary to the epistemic demonstration.

2. The Epistemic Claim

[L]aw is not a matter of personal or partisan politics.

— Ronald Dworkin

[T]he primary role of jurisprudence is to provide a legal epistemology, a theory of legal knowledge.

— Neil MacCormick

[T]he desire for a theory of knowledge is a desire for constraint — a desire to find “foundations” to which one might cling, frameworks beyond which one must not stray, objects which impose themselves, representations which cannot be gainsaid.

— Richard Rorty

I earlier proposed that the positivist framework necessarily implicates a project which is epistemic in nature. This is so, I argued, because rule-following is only possible if rules are, in some way or another, knowable.

70. And with which I deal immediately following.

71. I am here referring to the deployment of the whole question of fidelity to law as a context in which to deal with the moral limits of legal epistemology, particularly as regards, what Dworkin calls, “wicked legal systems”. See: Empire, supra, note 1, 105-109, 202-204; and TRS, supra, note 16, 327. I elsewhere argue (see: supra, note 7) that this state of affairs is not at all accidental; it, rather, resonates complex value sentiments and theoretic interdependencies from deep within positivist theory.


75. See: supra, Part I.
The assertion "can follow" is equivalent to and requires the assertion "can know"; and knowledge is, therefore, a necessary condition for the practice of rule-following.\textsuperscript{76} I now want to explore the project's foundations in greater depth and finer detail in order to disclose more fully both its meaning and its ambitions.

The positivist research for an epistemology — and, indeed, the division between rule-making and rule-following itself — only arises because of an antecedent assertion which is ontological in nature.\textsuperscript{77} The assertion is this: that there is, out-there, a legal world comprised of distinctively legal objects which are properly the stuff of legal cognition. It is only because there is such a world that the "epistemological goal"\textsuperscript{78} is at all possible: one can only frame that end-in-view if one asserts (or assumes) that there is something, of some sort or another, to be known, in some way or another.\textsuperscript{79}

Now, we have already found that for the positivist, what is out-there is, minimally and paradigmatically,\textsuperscript{80} the rule-bearing text. We can, therefore, perhaps refashion the more general assertion: what is out-there is an \textit{interpretandum} and that "thing to be interpreted" is the object of legal cognition.\textsuperscript{81} I now want to argue that this assertion determines both the nature of and the truth conditions for the positivist project. Before undertaking that argument, however, I want first to associate the assertion with what may be termed the source thesis.

The term "source thesis" was coined by Joseph Raz\textsuperscript{82} and it is thought in many quarters as definitive of positivism.\textsuperscript{83} Whether or not that is the case with respect to Raz's definition is not at issue here; nor, for that

\textsuperscript{76} But it is not — I say again — a sufficient condition.
\textsuperscript{77} The assertion may not, however, be a conscious one; and, in that event, the prior ontic understanding is really an assumption.
\textsuperscript{78} See: Soper, supra, note 35, 7.
\textsuperscript{79} By reason of this qualification, the positivist assertion is not necessarily essentialist (see: J. N. Shklar, Legalism (1964) 32-35) and, indeed, modern positivists say that it is not (see: Raz, supra, note 2, 37; and Soper, supra, note 35, 7). Even, however, if the end-in-view is description (as in Hart — see, Concept, supra, note 5, v; and in Dworkin — see, TRS, supra, note 16, 90: his rights thesis, says Dworkin, "presents not some novel information about what judges do, but a new way of describing what we all know they do . . ."), that changes neither the ontic typology nor the methodological requirement because description requires both that there be something out-there to describe and that it be accessible methodologically.
\textsuperscript{80} But this implies and requires nothing with respect to how the text is defined. Dworkin, for instance, defines the text as including not only institutional history, but institutional morality as well.
\textsuperscript{81} This phrase is Dworkin's: see, Empire, supra, note 1, 79.
\textsuperscript{82} See, supra, note 1, 47.
matter, is his definition. I wish instead briefly to offer a general description of the thesis and then to argue that a source thesis of this general variety is, indeed, definitive of positivism, not — as is generally understood — as a premise, but as a consequence.

An occupation with the sources of law is not Raz’s alone — indeed, every positivist appears to deploy a thesis of some kind or another concerning the sources of law. Whence, we may ask, this belief in sources; and is it a necessary incident of positivism? I take the view that the source belief is a corollary to positivism’s founding ontological assertion and that it is, therefore, a necessary consequence of the positivist programme.

Positivists must subscribe to a source thesis of some sort. This is so because positivists declare both that law is out-there and that law is posited. That is, if law is indeed out-there and if law is not — because it is posited — a natural phenomenon, then it must have a source. Versions of positivism can be said to differ in terms of their definitions of source. The difference, for instance between a Dworkin and a Hart is that the one, and not the other, includes institutional morality, and not merely institutional history, in his interpretandum; and that difference is directly a function of their different versions of the sources of law. In any case, we can now say that positivist ontology necessarily implicates the source thesis and that a source thesis, however defined, is, in the result, a necessary consequential incident of positivism.

This excursus permits us to take the next step in our exploration of the positivist project. I want now to argue that the possibility for, and the nature of, positivism’s epistemic goal arises only in terms of the prior ontological assertion we have just been discussing. I will make the following argument: that the source thesis — the claim that what is out-there is identifiable by source — defines a further requirement which can only be met in terms of a two part methodology which I shall designate the autonomy thesis.

84. For a good critical review of Raz’s thesis, see: Perry, Ibid.
85. Hart’s rule of recognition (see: Concept, supra, note 5, 92 and 97-107) is, for instance, clearly a thesis with respect to the sources of law; so too is Dworkin’s rights thesis and the Herculean methodology which arises from it (see: TRS, supra, note 16, 871). What the different varieties of the thesis share, I think, is this: they believe that “legal rules can be identified by their source” (see: SImmonds, supra, note 1, 99). And they differ, in terms how they define source. Compare, for instance, Raz (“the sources of a law are those facts by virtue of which it is valid and which identify its content”: see, supra, note 1, 47-48) and Hart (a “rule of recognition is . . . used for the identification of primary rules of obligation”: see, Concept, supra, note 5, 97): each views source as a means of identifying what is and is not law although they differ in their views about what the source is.
86. And I elsewhere argue (see supra, note 7) that it is truly and completely a belief — that positivism in effect “espouses a myth of origins”: see, Halpern supra, note 57, 53.
The source thesis, however defined in the particular, asserts that "what law is and is not is a matter of social fact". We have already discovered that the social fact in question is an interpretandum (again, as however defined) deposited by a legal positor (yet again, as however defined). Now in what sense does it make sense to say that an interpretandum is a fact? Clearly it makes sense historically: the interpretandum is a fact at least in the sense that, from the interpreter's perspective, it exists now and is, therefore, of and from the past. But that sense is both obvious and theoretically incomplete. It also makes sense — and, ultimately, can only be made to make sense theoretically — if the interpretandum has a correct meaning. For an interpretandum to be a fact, other than in an historic sense, its meaning must be factual; and for its meaning to be factual, its meaning must be a truth-matter. Otherwise the source thesis is self-contradicting: it would be declaring both that we can identify what the law is as a historic matter, but that we cannot identify what it means as an interpretive matter.

We are now in a position to inquire under what conditions of interpretation, meaning may be factual in this sense. We can inquire, that is, what must be true for meaning to be a matter of truth. The positivist is driven to a two part reply to this inquiry. He must assert firstly, that the text — the what(ever) is out-there — in some fashion and to some appreciable degree constrains the interpreter; and, secondly, he must claim that the interpreter is, by nature, constrainable. He must make these claims because constraint is a threshold condition for textual truth. If there be no constraint, meaning cannot be a truth matter. For if it is not possible to confine meaning, it is not at all possible to speak of discernment among meanings; and truth and validity require just such talk because truth and validity constitute — they are — discernments. Only if the universe of meaning is somehow limitable, does it make sense to speak of truth and validity because only then can meanings be unequal.

87. See: Raz, supra, note 71, 37. I am, of course, aware that some positivists, including most notably Dworkin (see: Empire, supra, note 1, 429 n3), deny just this. I elsewhere seek to convince (see supra, note 7) that their denials are shallow inasmuch as what they are ultimately disagreeing with is not that law has sources, but what those sources are. It is, in any case, clear that theorists such as Dworkin think meaning a truth matter (see: ibid, 77, 88, 110, 262 and 265) and that they, in consequence, arrive at the same position that the source thesis would otherwise destine them. If a Dworkin were then to rejoin that destination does not require the cartography of the source thesis, we would then be disagreeing only about road maps and not about geography.

88. For this reason: because, for the positivist, law is, at a minimum, a textual phenomenon, identification is a two stage process — the positivist must identify both what the law is and what the law means. The historic is necessary to, but it is not sufficient for, identification because while it can tell the positivist what the law is, it cannot tell him what the law means.
The positivist's first claim is a formalist one. By formalism, I mean simply the assertion that the text constrains the interpreter's choice of meaning. The methodology of the constriction is variously construed; but all positivist constructions share an understanding of the meaning of formalism. Formalism does not contend that the interpreter is without choice; it contends, rather, that only certain choices are proper. Constraint is, therefore, evaluative and not prohibitive. The claim is not that many meanings are not possible; it is, rather, that only some meanings are proper. Indeed, it is only because texts are so fecund that constraint becomes at issue; if texts were not fecund and if, in consequence, many meanings were not possible, texts would constrain in a prohibitive sense and a theory of constraint would be both unnecessary and frivolous.

This version of constraint imposes a specific theoretic onus on positivism: for the enterprise to succeed, a theory of how texts constrain must be constructed. Such a theory will consist of a definition of valid meaning, which usually takes the form of defining what constitutes the text. Given the premise of fecundity and the objective of propriety, this

89. Discussion of formalism has a long and very confused history in the legal academy (see, for instance: R. Moore, Legal Norms and Legal Science: A Critical Study of Kelsen's Pure Theory (1978) 18-19 — "'Formalism' is a term that has established currency both in jurisprudence and in philosophy. In both arenas, the term has acquired ambiguous reference through unsystematic and uncritical employment.").

For a summative analysis and bibliography of the legal academic discussion, see: Schauer, "Formalism" (1988), 97 Yale L. J. 509, esp. with respect to bibliography, 510 N1. See also the discussion in Shklar, supra, note 79, 33-39.

For a recent discussion which seeks to contrast formalism (conceived as the "immanent moral rationality" of "legal phenomena" which separates law from politics) with "the thinner formalism of positivism" (which according to the author, "contrasts the formal principle of legal validity with the material content of law and thus makes the notion of law as such indifferent to the law's content"), see: Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988), 97 Yale L. J. 949, 954, 964, 954n14. Under the view taken here, Weinrib's attempt to salvage the "law's autonomy" (ibid., 95) — through I think its hellenization — is fundamentally an attempt to salvage a very positivist version of law. For law remains for him constituted (ibid., 1005) by the cleavage between law-making (the political) and law interpreting (the judicial); judicial work is conceived by him (ibid., 956) as "essentially cognitive" — "more ... the discovery than ... the making of law"; the objects of judicial cognition continue to be (ibid., 957) "the doctrines, institutions and decisions of positive law"; and truth (ibid., 972: which, like Dworkin, he defines as coherence) remains the fundamental criterion of valid cognition. Likewise, under the view taken here, Weinrib confuses formalism with objectivity — which is to say, with the second of positivism's claims (see: infra, note 91 and accompanying text); for if the view taken here is correct, it is the objective and not the formalist claim which asserts that there is a "legal mode of intelligibility that goes beyond the physical, the positive, the historical or the sociological" (ibid., 958; see also 973).

90. See for instance: Empire, supra, note 1, 67 ("He [the interpreter] also needs convictions about how far the justification he proposes at the interpretive stage must fit the standing features of the practice to count as an interpretation of it rather than the invention of something new").
is not at all surprising: in this view which meanings are proper, properly depends upon how the text is defined because by defining the text one is at once defining the ambit of validity.

We have seen, however, that formalism is not the only claim to which the positivist is wedded. His ontic assumption requires him to assert not only that texts constrain but also that interpreters are constrainable. This is so because a theory of constraint is, by itself, an incomplete and, indeed, an empty demonstration: only if the interpreter is, in some sense or another, prey to the text, does it matter that texts constrain. I shall designate the claim that interpreters are the prey of texts, objectivist. In consequence, as used here, objectivity neither can nor does refer to either interpretive methodology or to the quality of the interpretive product, both of which matters are, instead, properly the substance of the formalist claim. Rather, as used here, objectivity refers to the relationship of the interpreter to his biography and, more specifically, to the proposition that the interpreter can transcend and stand apart from his particular situation. This version of objectivity is required by the very object and nuance of positivist inquiry. If interpretations can only be differentiated if texts constrain, it only matters that texts constrain if interpreters are constrainable. But what does it mean to say interpreters are constrainable? It, at least, must mean that he is available and accessible to the text's instruction with respect to interpretive choice — that, as I put it earlier, he can be prey to its lesson. But, if that is the case, we can inquire what would make him inaccessible. The answer, clearly, is his particularity. If a text can only constrain if it is constant — and it becomes constant through definition of what constitutes the text —

91. Though much used, the term "objectivity" is most times deployed in an unspecified and, in consequence, terribly unclear fashion. A splendid example of this is Christie's, "Objectivity in the Law" (1969), 78 Yale L.J. 1311 which throughout fails to define precisely what objectivity is; a recent attempt to be much more definitive is Schlag, supra, note 62, esp. 942-944. For a discussion — which I do not to pursue here — of the meanings of objectivism, see: Fiskin, "Liberal Thought and the Problem of Justification" in Nomos XXVIII: Justification (1986, J. R. Pennock and J. W. Chapman, eds.), 207, 208-214; J. S. Fiskin, Beyond Subjective Morality: Ethical Reasoning and Political Philosophy (1984) 10-13, 17; and Morality and Objectivity (1985, T. Honderich, ed.).

I take the legal academy's law and interpretation literature (see: infra, note 102) as using the term in two, related fashions. The first use is methodological: that there exists a methodology for discerning what is really out-there. The second is evaluative: that there exists a standard for assessing the truth or falsity of the products of interpretation. They are related because the standard in the second sense generally consists of a statement of the methodology in the first sense. These uses, in my view, confuse objectivity with formalism. What is more important, however, is that they confuse as primary what are really effects and applications of a more fundamental use. As will become apparent, the fundamental use to which I refer is "the transcendence of self". See: T. Nagel, Mortal Questions (1979) 209. See also, his The View From Nowhere (1986) 17.
equally, an interpreter can only be constrained by the text if he too is constant. The interpreter must be everywhere, and every time, the same because otherwise the project of constraint is not at all possible. An unvarying text cannot constrain a varying interpreter because if the interpreter varies, the possibility of choice is not only fecund, it is infinite. The constraining text would, in a sense, be without a target, and interpretive choice would be affected in diverse and unpredictable and, in the result, project-defeating ways. And note: one cannot avoid this requirement by permitting the text itself to vary simply because a varying text cannot constrain. Constancy is a complete requirement: texts can only constrain if their instruction is constant over time and interpreters are only constrainable if they are uniformly prey to that instruction.

In this light, the interpreter is every bit as much an object for the text as is the text an object for him: each is, in a sense, out-there for the other. And for there to be validity discernment among interpretations, not only the text, but the interpreter too must be constant. As with the text, the interpreter can only be constant if he is limitable. Since particularity is the antithesis of limitability, it is the interpreter's particularity that is the object of limitation. The proper interpreter is this limited interpreter. He is the fungible interpreter to which I earlier referred — fungible because he is everywhere and every time the same. He transcends his, and every other, time: he is a transtemporal and transsocial subject, alien to every place and time, and at home only in his unchanging accessibility to the text. And so a second theoretic onus: positivism must show how the autobiographic interpreter "counts for nothing" in "the epiphany of the law" by showing interpretation to be an autarkic enterprise in no need of the biographic stuff of situation.

Together these theoretic requirements constitute what I wish to call the autonomy thesis. It is a thesis in two parts, the first being that the text is autonomous from the interpreter and the second, that the interpreter is autonomous from his biography. We should notice again that the first part arises because of positivism's formalism, and not because of its objectivism, and that it does not, in consequence, commit positivists to any one definition of the text. Just the opposite is the case with the second part: because the autonomy at issue here arises from the claim of

92. See for instance: Rosen, "The Limits of Interpretation" in Literature and the Question of Philosophy (1987, A. J. Cascardi, ed.) 213, 215 ("If there is no human nature that remains constant within historical change, and so that defines the perspectives of individual readers . . . , then reading is impossible").
94. This has long — if not unanimously — been understood. See: Michaels, "Against Formalism: The Autonomous Text in Legal and Literary Theory", (1979) 1 Poetics Today 23.
objectivity, positivists are committed to a very specific definition of the interpreter as transcendental subject.

Two final notes before I offer some concluding remarks. The autonomy thesis arises, I have argued, from — and only because of — the founding ontic assertion that there is out-there something that can serve as the object of legal cognition. I now want to suggest that not only is the epistemic thesis ontological in origin, it is also ontological in effect. That is, the founding assertion not only makes possible the epistemic project, it defines its success in ontological terms. For the effect of showing that the text constrains and that the interpreter is constrainable is to assert that there is a natural ontology in which humans forever find themselves. According to this view, human existence is, at least in its knowing part, constituted by the interaction of transcending subjects with eternal texts.95

I have not so far mentioned another matter which since the American realists has often been thought to be the central claim and soft underbelly of positivism.96 I refer, of course, to the claim to determinacy in law application. My delay has been intentional. For, in my view, this claim is merely another — and not so illuminating — expression of positivism’s epistemic project and of its autonomy thesis. This is so because to say that law-applying is possible is to say that law-following is possible; and if that be the case, then it is also to implicate all the same theoretic requirements. The trouble with this usage, however, is that it conceals more than it reveals in that regard. Realism stands in witness to this: it is a record of obsession with objectivity which misses entirely the antecedent assertions in terms of which alone objectivity is either a contention or contentious.

IV. Conclusion

You must not let yourself be seduced by the terminology in common currency.

— Wittgenstein97

Positivism is the common currency of legal theory, practice and education.98 It provides the vocabulary and grammar in which current

95. This applies equally to scientific knowledge: for the positivist, science is distinctive not because it exhibits an ontic typology different from interpretation, but because its text is different. See Dworkin’s comments in this regard in Empire, supra, note 1; 49-53.
98. By common, I mean dominant; and I do not, therefore, mean to imply, nor do I believe, that there are no exceptions to dominant discourse. Precisely, however, because we perceive these discourses as exceptions, we experience them as marginal, which is to say, as both ineffective and unendorsed. See: infra, note 103 and accompanying text.
forms of inquiry are articulated and undertaken — the problems we perceive and the practices we pursue are positivist in origin and in yield. I have taken the view that all of this is so by insinuation because our assent has been neither given nor requested. On the contrary, positivism is for us seduction and we are beguiled by it.  

I began by proposing that the evanescence of positivism expresses our enchantment. We can only take seriously questions concerning the nature and, indeed, the very existence of positivism, because positivism so pervades our perspective. It is the weave of our understanding of the world-in-law, of our conceptions of the points of inquiry and of the universe of solutions, which can possibly be legal. Our seduction is complete because we have, in this fashion, come to belong to positivism.

In this essay, I have sought to establish a foundation for curing this possession. My project has been to make positivism appear as theory by defining its project and proposals as theory. Success in this is fundamental to a cure because we can come, I believe, critically to assess our situation only through distance and because distance is fundamental to definition. But none of this is to say why a cure is at all desirable; indeed, to declare that a cure is required is, without more, to assume a pathology. I wish, therefore, to conclude this essay with some brief comments about both the present pathology of legal theory and the threshold requirements for any future theory.

The malady, I believe, is simply this: enchantment has led to enchainment. We are captivated by the positivist version and have, in consequence, become incapable of speaking of or to alternative theoretic...
futures in law. Instead of articulating new vocabularies, our common practice is to defend — and to defend again — the grammar of the present. And because this is our practice, alternative vocabularies which do emerge become marginalized and trivialized. They are perceived as (and perhaps even conceive themselves as) thoughts more visionary than versionary, projects less productive than poetic, paradigms which are in conception and reception without practitioners. Concealment, in this fashion, both invites and produces containment. Because the theoretic substance and structure of present theory and practice has, through our inattention, become covered by that practice, we experience the present form of practice as incontestable and other

102. This is perhaps no better demonstrated than in current law and interpretation scholarship which, in very short order, has come to occupy very nearly the whole of our theoretic vocabulary. Rather than using its discovery (concerning which, see: “Law and Literature: A Symposium” (1982), 60 Tex. L. Rev. 373-586; and “Symposium on Interpretation” (1985), 58 S. Calif. L. Rev. 1-713) of the philosophy of interpretation as an occasion for theory development, the legal academy has, instead, deployed hermeneutics as a novel strategy for shoring the buttresses of the positivist present. The style is new but the project and proposals remain the same. Law as interpretation is, in consequence, merely a fashionable addendum to the past; and its discovery that positivism is fundamentally a proposal about interpretation has lost whatever critical bite it might otherwise have had.


104. For a discussion of the distinction between visions and versions, see: supra, note 6.

105. This is not to say our inattention is accidental; it may, in fact, be manufactured: for discussion, see, supra, notes 25 & 99.
forms as unthinkable. Theoretical discourse thereby becomes contained by and the willing captive of the present.

The project foundational to any future theory is to give us cause to disentangle ourselves from the positivist present. Remembering\textsuperscript{106} is the first step in such a project. We must come to recognize the positivist foundations of our present projects and discourse by coming to see that they arise from, and are only intelligible in terms of, those foundations. The present essay is a contribution to the revival of memory in this sense.

But retrieval alone is not sufficient. We must then come to terms intellectually with the positivism we have recovered. This, I think, raises two further requirements. First we must become sensitive to positivism as a moral and political vision;\textsuperscript{107} and this we can only do by uncovering the moral, social and political predicates and proposals which inhere in its literature. Second, we must inquire whether such a vision of polity is defensible. By defensible, I do not mean morally desirable or descriptively accurate. The inquiry, rather, is theoretical: we must ask whether this vision presents a choice which we must later address on moral grounds because it arises from a version of law which is itself defensible.\textsuperscript{108}

Each of the stages in this project can be pursued without our normative engagement in alternative proposals. But — and this is the crux — the converse is not the case. Unless we become sensitive to our present practices in these fashions, no new sensibility is possible. Until, that is, we address the structure and significance of our situation, our theory will continue to be a resignation to the present and an abdication of the future.

\textsuperscript{106} If our inability to see positivism is manufactured (see: supra, notes 105, 99 and 25), then remembering will in large measure become a practice of consciousness-raising.

\textsuperscript{107} For a discussion of the relationship between positivism as a epistemic project and moral, political and social theory, see: supra, note 7.

\textsuperscript{108} I propose to pursue both these tasks elsewhere: see, supra, note 7.