Legal Positivism in American Jurisprudence

This book is both a work of intellectual history and a contribution to legal philosophy. It represents a serious and philosophically sophisticated guide to modern American legal theory, demonstrating that legal positivism has been a misunderstood and underappreciated perspective throughout most of twentieth-century American legal thought.

Having traced the roots of positivism through the first half of the twentieth century, Anthony J. Sebok argues that it was “hijacked” during the Warren Court by conservative legal scholars who were moral skeptics, and this created the impression that positivism is necessarily hostile to moral principles in the law. The author rejects the view that one must adopt some version of natural law theory in order to recognize moral principles in the law. On the contrary, once one corrects for the mistakes of formalism and postwar legal process, one is left with a theory of legal positivism that takes moral principles seriously while avoiding the pitfalls of natural law.

The broad scope of this book ensures that it will be read by philosophers of law, historians of law, historians of American intellectual life, and those in political science concerned with public law and administration.

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Legal Positivism in American Jurisprudence

ANTHONY J. SEBOK
To my parents
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This book draws its inspiration from three great teachers. The first, Joseph Raz, introduced me to legal positivism and helped me to see its rigorous virtues. The second, Walter Murphy, challenged my commitment to legal positivism by teaching me that the U.S. Constitution is based upon moral concepts that are difficult if not impossible to capture in the language of law. The third, Jules Coleman, helped me to reconcile my interests in legal positivism and the U.S. Constitution by insisting that positivists can take moral language seriously. Even though I disagree with each of my former teachers at one point or another in this book, it was through their example and encouragement that I gradually built my argument. This book reflects the influence that each has had upon me. Like a point discovered through triangulation, I have found my own true position by carefully measuring my distance from all three of them.

As with many first books, this work is a map of my graduate education. The path formed across the years reveals that at each turn I was irresistibly pulled back to the same questions. From the start of my training in political theory at Oxford I have been fascinated by the ambiguous status of law in liberal democracy. Given that liberalism presupposes disagreement among sincere participants in the common practice of government, how was a liberal to view the role of the judge? No less than anyone else, the judge knows, in advance, that there is a good chance that he or she will sincerely disagree with some of the practical judgments of those empowered to make the law. Yet the judge knows too that liberalism requires the rule of law, which forbids anyone to change the law after it has been duly made, except as the law itself requires. What then was the responsibility of the judge who wanted to be faithful to justice? What honor or nobility could there be in a job in which one was required
not only to watch, but to help, the state to do what one knows is wrong? And yet, I felt strongly that law is an extraordinary and rich form of practical reasoning, and that the power of law came from the fact that it asks the judge to efface him- or herself. To adjudicate is to promote justice by being an instrument of the law. Sometimes the law’s normative universe matches the judge’s own picture of justice; many times it does not. Sometimes the law asks the judge to fill in gaps where the law itself is silent on a question that sounds in justice. Regardless of which of these moments the judge finds him- or herself, in each of them he or she is being asked to suppress a part of his or her own judgment about justice itself in order to perform a job crucial to the success of liberal democracy.

As I learned more about legal positivism, I became convinced that it could explain how legal reasoning helps judges perform the difficult job that has been asked of them by liberal democracies like the United States and England. But even as I grew more convinced of the value of positivism to modern liberal thought, I became increasingly aware of the view, held by many who study the U.S. Constitution, that positivism supports a peculiar view of legal reasoning associated with the theories of original intent and “judicial restraint.” Much of my time studying public law at Princeton and legal theory at Yale Law School was dedicated to challenging the assumption that positivism is a theory of law for judicial conservatives. I am very grateful to all of my teachers at both these schools for tolerating my almost obsessive interest in questioning the “conservative positivist” paradigm.

The one thing for which my graduate studies did not prepare me, and for which my teachers should feel no responsibility, is the amount of historical research I ultimately had to do to write this book. Shortly after I decided to write about the importance of legal positivism to modern American law, I realized that the burden fell on me to prove that the conventional picture of positivism held by lawyers and political scientists was a mistake. The best way to prove that the views to which scholars had heretofore attached the label “positivism” were in fact inimical to positivism was to show how the misimpression had been created. My research therefore took me back to Fuller’s conflation of realism and positivism in the middle of the twentieth century, which then took me back to the realists’ own attack on analytic jurisprudence. By the time I had done my “preparatory” research for my dissertation, I had discovered that English positivism had come to the United States through the
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doctrine we now call formalism; that it was the focus of much of the
realists’s jurisprudential criticism; and that positivism reemerged,
changed and much improved, in the writings of the legal process
school.

This story of the evolution of American positivism startled me
and seemed important. I realized that it was a story that had never
been told, partly because the sources did not directly address them-
selves to the question of positivism. It is for these reasons that I de-
cided to lead the reader through the same process of discovery that
I experienced when I first worked through the materials. I apolo-
gize in advance for the unusual structure of my historical argu-
ment. Not only am I not a professional historian, and therefore un-
trained in the difficult task of writing intellectual history, but the
subject matter itself forced me to adopt an awkward expository
style. Because much of what we know about nineteenth-century
formalism is based upon what its critics have said about it, and it is
my contention that those critics have misunderstood formalism’s
positivist core, I have had to reconstruct the history of positivism by
first telling the story of its misrepresentation. The most difficult part
of this project, and the part that may confound legal historians the
most, is the relative absence of any positivists actually speaking for
themselves until the history reaches the middle of the twentieth
century. The reason for this is simple: Given the lack of materials
available to me, I found it useful first to build a picture based on
what formalism’s critics believed they were attacking, and only then
to ask whether, and to what extent, the legal theory at the heart of
that picture looked anything like positivism. To conclude that the
formalists were not positivists because they did not say they were
positivists would be to mistake silence for absence. Nonetheless, I
recognize that my method may strike some as less rigorous than
what one might expect of a legal historian: I plead guilty to that
charge. This is the work of a legal theorist who found that he could
not do legal theory without doing legal history.

Parts of my argument have been published in articles in the
Michigan Law Review and the Southern California Law Review. I have
significantly revised my ideas since these articles were published,
and the process of working with the editors of these journals has
helped me refine and improve my arguments. I am grateful to the
editors of these journals for allowing me to publish with them and
for their careful and thoughtful criticisms. I am also grateful for their
permission to use sections from my original articles in this book.
Acknowledgments

Many people have supported and aided me through the course of this project. I was lucky to receive a lot of advice over the past ten years. I probably made a great mistake by not following the advice of others more carefully. But even when I did not follow their suggestions, I was always grateful for the patience and time of the following friends, teachers, and colleagues. Many thanks to Bruce Ackerman, Larry Alexander, Akhil Amar, Mark Brandon, Hon. Guido Calabresi, David Carlson, Randall Costa, Michael Dorf, David Dorsey, Neil Duxbury, David Dyzenhaus, Chris Eisgruber, Julie Faber, Judy Faiser, Jim Fanto, Stephen Feldman, Owen Fiss, Jim Fleming, Robert George, Amy Gutmann, Les Green, Abner Greene, Tom Grey, Randy Hahn, Cheryl Hall, Gil Harmon, Susan Herman, Dean Tony Kronman, Bailey Kuikin, Arthur Jacobson, Marianne Lado, Sheldon Leader, Brian Leiter, Tim Lytton, Gary Minda, Wayne Moore, William Reynolds, Michel Rosenfeld, Alan Ryan, Larry Sager, Fred Schauer, Amos Shapiro, Scott Shapiro, Paul Shupack, Brian Tamanaha, Ruti Teitel, Paul Vogt, Spencer Weber Waller, Dean Harry Wellington, G. Edward White, Steven Winter, and Ben Zipursky. I would like to thank the two deans who supported my research at Brooklyn Law School, Hon. David Trager and Dean Joan Wexler. Sara Robbins, the head librarian of Brooklyn Law School, made this project much less painful than it could have been by making it easy for me to use our library’s resources. I have been lucky to have the help of an extraordinary group of research assistants: Peter Bucklin (BLS ’95), Margaret Foley (BLS ’99), Tom Uhl (BLS ’96), and David Gordon. Finally I would like to thank two people who have been engaged in conversation with me about legal theory ever since we met in graduate school: John Goldberg and Eldon Soifer. Each has confirmed for me the simple truth that the greatest reward of philosophy is friendship.