Philosophy of Law
An introduction

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Mark Tebbit

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2 Early positivism and legal realism

Although it is useful to classify most of the serious contributions to modern legal theory under the broad headings of legal positivism, natural law and legal realism, two important reservations should be noted. First, they have changed in various ways in response to legal and political events. Second, there is a lack of consensus on how even some of the leading theories should be classified. We can nevertheless paint the broad picture in terms of these three types of theory. This will be the purpose of the present chapter.

The rise of positivism: the philosophical background

As a distinctively modern school of legal thought, positivism was not established until well into the nineteenth century, primarily through the writings of Jeremy Bentham (1748–1832), the founder of modern utilitarianism. Legal positivism has evolved as a school of thought in its own right, but there is little doubt that it owed its origins, in substance as well as name, to positivist thinking as a whole, which grew out of the seventeenth-century revolution in philosophy and scientific method. Although 'positivism' as a general term is notoriously vague, it can be said to signify a body of doctrines associated with the belief that human knowledge is confined within the limits of what can be observed and recorded.

Positivism is rooted in the empiricist interpretation of the scientific revolution. On this view, what cleared the way for discovery and a deeper understanding of the world was a systematic concentration on appearances as they are given or 'posited' by our experience. This was taken to be the starting point for any claims aspiring to the status of genuine knowledge, and it was the basis of the empiricism of Bacon and Locke in the seventeenth century.

As a particularly rigorous form of empiricism, positivism was one of several directions that the new philosophy could have taken. Traces of it had always existed within the empiricist reaction to rationalistic interpretations of the world. In retrospect, many distinct features of positivism can be seen in ancient Greek and Roman philosophy, and more clearly in the medieval philosophy of William of Ockham. The spirit of positivism as exemplified

by these forerunners and by those of the early modern period is perhaps captured by Ockham's celebrated 'razor', a methodological principle according to which it is illegitimate, for the purposes of explanation, to appeal to entities not strictly required by the explanation. In all our investigations of the natural world, there must be a presumption against theories that postulate a complex of unseen entities when a more simple explanation is available. This was not merely a deliberate bias against the unobserved; simplicity and economy are themselves regarded as explanatory virtues. The positivist assumption is that the more simple and economic the explanation, the more likely it is to be true.

In the wake of the scientific revolution, the spirit of positivism was present to some extent in all the leading philosophers and scientists, even in those such as Descartes or Leibniz who seemed at the furthest remove from the empiricist interpretation. As a coherent philosophy, it took shape slowly under the long-term influence of scientific discovery and the eighteenth-century philosophy of rational enlightenment. While distinct elements of well-formed positivism can be detected as early as Hobbes's philosophy as a whole, and in Berkeley's philosophy of science, it was not until Hume's sceptical onslaught on the rationality of the principles assumed by modern science and philosophy that positivism became a real force in European philosophy.

What are the basics of the positivist approach in modern philosophy? The first feature, common to all versions, is the guiding principle that, in the search for knowledge and truth, the evidence of the senses is paramount. Second, the doctrine of phenomenalism, which first appeared in Berkeley, stipulates that we are not entitled to assume the existence of anything beyond the appearances. With sound scientific method, there should be no distinction between appearance and essential reality. Third, there is a strong tendency towards nominalism in most positivist philosophers. This rests on the principle that takes the referents of a general term to consist exclusively in concrete individual instances of that term. Underlying these three features, we always find – at least implicitly – the normative principle that, in the absence of empirical evidence to the contrary, the simplest explanation is to be preferred.

The overall purpose behind this positivist enterprise was the exclusion of every trace of speculative metaphysics from investigations of natural phenomena, the understanding of which depended on the discovery of natural causes that were in principle observable. What was resisted was reference to any underlying essence or principle that was in its nature unobservable. This much is perhaps an obvious implication of the main features of the positivist programme. What is probably less obvious is that the same programme also implied, from the outset, a radical change in attitude to questions of human value. If all reference to things other than concrete, observable particulars were to be eliminated from science, and science is the only form of knowledge, then moral and aesthetic judgements about such qualities as 'worthwhile', 'elegant', 'commendable', and so on

have also to be removed from the realm of knowledge and truth. One of the enduring positivist assumptions is that the objects of such value judgements are not given in experience in the sense that they are separable from the bare factual existence of particular things, and are therefore inaccessible to scientific investigation. The full impact of this exclusion of value by the scientific revolution as interpreted by positivism was not felt until it was spelt out in detail by Hume.

Hume's influence

The exact nature of the influence of David Hume (1711–76) on European philosophy has always been controversial, but there is a hard core that is undisputed. Our concern here is limited to the themes that are relevant to legal theory, in particular the rise of positivism and the eclipse of natural law. Hume's fundamental purpose in his philosophical writing was twofold: to challenge the traditional framework of moral philosophy in such a way that morality and law would be humanised by becoming more relative to human interests; and to undermine the overblown pretensions to knowledge of the rationalist philosophers of the Enlightenment. In carrying out this purpose, Hume inadvertently did much to establish the conceptual framework within which the transformation of every discipline into a rigorous science would be undertaken.

Hume stipulated two conditions for speaking good sense on any subject. The first – which is known as 'Hume's Fork' – is that all investigations should be confined to the reporting of experimental observation on the one hand ('matters of fact') and the rational elucidation of 'relations between ideas' (logical connections) on the other. The second condition is that such matters of fact should be understood in complete independence from any subjective evaluation of the factual subject matter (the much quoted 'separation of fact and value'). Reasoning that moves from matters of fact to matters of value results in confusion and nonsense. This is the philosophical source of the separation thesis in jurisprudence.

To these two claims, Hume added a third essential point concerning the nature of this reasoning. Contrary to the suppositions of his predecessors, Hume argued that the faculty of human reason is perfectly inert and morally neutral: 'It is not contrary to reason to prefer the destruction of the entire world to the scratching of one's little finger' (Hume 1972: 2.3.3, p. 157). The idea here is that reason has no bearing on human interests one way or the other. When this idea is applied to the first two conditions, the Humean implications for the human sciences become clear. If reason is morally neutral, the rational investigation of any kind of human behaviour or institution will make no reference beyond what is either empirically observable or logically demonstrable. The two cannot be combined. Second, the investigation will have nothing to reveal about the moral content of its subject matter. The moral worthiness of any human activity is not in itself

open to rational analysis. Approval or condemnation may be felt by a subjective moral sense, but this is no more than the projection of an inner feeling onto an external object. The implications of Hume's austere proposals, when drawn out, would transform the very idea of law.

Bentham's utilitarianism and his attack on the common law tradition

The beginning of the decline of natural law theory can be dated quite precisely from the time of Bentham's scathing attack on Blackstone's (1723–80) *Commentaries on the Laws of England*. With hindsight, this can be seen as the historical turning point, the successful launching of modern legal positivism. His attack on the common law tradition was based upon his utilitarian philosophy, according to which all actions and institutions (including legal systems and laws) are to be judged solely in terms of their utility. A specific law, for example, is good or bad to the extent that it produces on balance more happiness than unhappiness, which Bentham measured in terms of pleasure and the absence of pain. On this way of thinking, the role of reason changes. It cannot distinguish just from unjust dealings without reference to consequences in terms of human welfare. The role of reason is removed from its central place in natural law theory and reduced to that of rationally calculating the external consequences of actions and laws in terms of the aggregate good that will come out of them.

Bentham had many specific complaints about common law theory and its practice, which was closely tied to the traditional natural law theories. He regarded much of what happened in the English courts as 'dog-law': that is, as the practice of waiting for one's dog to do something wrong, then beating it. His low opinion of the doctrine and practice of judicial precedent was illustrated by his likening of the doctrine to a magic vessel from which red or white wine could be poured, according to taste. This 'double fountain effect', whereby the decisions of judges are seen as capricious selection of whichever precedent suits their prejudice, was regarded by Bentham as the inevitable outcome of a legal system that is not controlled by principles of utility.

Bentham's overriding passion for legal reform required the kind of clarification that would mercilessly expose the shortcomings, the corruption and obfuscation which he found in the common law as it existed at the turn of the nineteenth century. This clarity, Bentham believed, could only be achieved with a rigorous separation of law and morality. As we have seen, the exact meaning of this 'separation thesis' has become deeply controversial. What Bentham himself meant by it was reasonably clear. If the law was to be subjected to systematic criticism in the cause of reform, it was essential that its workings should first be described in accurate detail. This was a matter of dispassionate factual reporting of the nature and workings of law, which he termed 'expository' jurisprudence. What he found obstructing this project of clarification was the blurring of the boundary between legal reality and value judgement.

This was precisely what Bentham accused traditional legal writers of doing. Blackstone, as one of the most eminent of these writers, was singled out by Bentham as a prime example of one who clothed moral preaching in the language of law. When law is analysed in such a way that each law is represented as the embodiment of a Christian moral principle and a perfect expression of 'reason', the result is the kind of vagueness and indeterminacy that is inherently resistant to radical reform on the basis of the utility of the laws. When, by contrast, law is analysed according to Bentham's expository principles, the way is prepared for a clear-headed 'censorial' jurisprudence, subjecting the law to moral criticism, based on the principles of utility, principles that for Bentham were fundamental to legal reform.

Austin's positivism and command theory of law

A common mistake made by newcomers to jurisprudence is the assimilation of the command theory to legal positivism. In fact, while both are concerned with the elucidation of the nature of law, the positivist separation of fact and value does not necessarily result in a command theory. Furthermore, versions of the command theory were formulated over a hundred years earlier than the rise of positivism, in the early modern theories of political sovereignty put forward first by Jean Bodin (1530–96), and later by Thomas Hobbes (1588–1679). A second misconception is that the command theory as it was developed in the nineteenth century by the pioneers of legal positivism, Bentham and John Austin (1790–1859), was nothing more than an elaborate expression of a common-sense view of the essential nature of law. It was, and remains, a controversial attempt to capture the essence of law.

Austin was the first to give the command theory of law a comprehensive, typically modern treatment within the framework of a positivist rejection of natural law, based on systematic conceptual analysis. By comparison, Bentham's analysis of the command theory, upon which Austin built, had been no more than a primitive sketch. Whereas for Bentham, the elaboration of a systematic science of law was but one of his many projects for enlightening and reforming the outlook of the educated classes, for Austin it was a single-minded project aimed primarily at the legal profession. What he sought was a coherent theory that would lay the foundations for a comprehensive understanding of law as a discipline which would place it on an equal footing with the other nineteenth-century sciences.

The hard core of Austin's analysis consists in the drawing of strict demarcation lines to separate the authentic subject matter of legal science from that which should be regarded as irrelevant to such a science. What Austin aims at, by a process of eliminative classification, is the criterion by which the boundaries of positive law should be set, in order to identify what are strictly and properly speaking laws. To this effect, Austin surveyed the full range of what in common usage goes under the general term 'law'.

The first move here is to identify and eliminate those senses of law that are to be regarded as an improper or inappropriate use of the term. These fall under two headings, laws by analogy and laws by metaphor. What is distinctive is Austin's decisive rejection of grey areas of legality: a law is either a law properly speaking, or it is not. Widely accepted rules that are only vaguely or by analogy regarded as laws, such as the rules of a code of honour or of international law, have no part to play in the elucidation of the nature of law. These are laws, not as a matter of hard fact, but by virtue of mere opinion. Those which are laws only metaphorically speaking, by which he means the laws of animal or human instinct and the general laws of nature, are eliminated on the grounds that there is an absence of will to be incited or controlled. In the operation of such laws, there is a different kind of necessity at work, one that qualitatively differs from the compulsion involved in human legislation. What we are left with in the category of laws, properly speaking, are those which do control an active will, the laws of God and the laws of human decree, both of which have the character of being general commands.

Austin's second move, having eliminated improper uses of the term, is to narrow down further the subject matter by getting rid of usages that do not denote laws which are to be regarded, strictly speaking, as laws. Although it is proper to speak of the laws of God, they are not laws strictly speaking because they are general commands laying down the moral requirements of utility. Of the human commands that are properly speaking laws, the ones that do not strictly qualify are those that have neither legal authority nor legal backing; an order from master to servant or from parent to child does not count as law.

The outcome of Austin's analysis, then, is a definition of what is to count as proper and strict law. In its most literal meaning, law 'may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him' (Austin 1995: 18). At the heart of the law, we find the reality of the power held by some individuals over others. What completes Austin's analysis of law is his identification of the source of this legal power as the sovereign individual or body that takes no orders from any other source.

According to the theory of sovereignty at which Austin arrives, the laws that are properly and strictly speaking laws are those commands which are issued by a political superior to whom the majority of people in the society are in the habit of obedience, and which is enforced by a threatened sanction. In short, Austin's view of law is one of orders backed by threats. The three most important aspects of his concept of sovereignty are those that later excited the most criticism: it involves habitual obedience by the mass of society to a determinate sovereign individual or body, which itself is in no habit of obedience to any higher authority, its power being unlimited.

The significance of Austin's analysis of law is not obvious at a superficial reading. When the implications are absorbed, it can be seen how serious a

blow it dealt to the traditional natural law outlook. The neutralisation of the laws of God is not particularly important in this context. What is important is that the practical reality of law can be understood with greater clarity when its essential nature as a human command with a determinate source is abstracted from the idea of law as a natural force rooted in the community. It is generally agreed that this shift of emphasis, from the common law idea of the community as the source of law to the image of law as the imposition of power, caught the legal mood of the times. It was only at a much later stage in the development of positivism that the weaknesses in this account became fully apparent. Before we consider the criticisms, we need to turn to another important development at the end of the nineteenth century.

Pragmatism and legal realism

Legal realism was a movement of thought among lawyers and academics that originated in the US law schools in the 1890s. Although it was closer in spirit to positivism than to natural law, the new realist movement, which reached the height of its influence in the 1920s–1930s, offered a perspective that was reducible to neither tradition. It should be understood from the outset that there was no single outlook shared by all the realists, and that there was no conscious attempt to formulate a technically precise concept of law. What nevertheless informed most of their writings was a broad conception of legal theory and practice that scandalised existing legal opinion at the time. Despite the great variety of opinion among the realists, it is possible to identify the prominent themes that taken together represent a third point of view, a pragmatic conception of law that threatened to undermine the plausibility of orthodox legal positivism as much as the traditional natural law outlook.

Who were the realists?

The initiators of realism in law were Oliver Wendell Holmes Jr (1841–1935) and John Chipman Gray (1839–1915). As the name suggests, realism was guided by the perception that the legal theories and doctrines as they were taught did not reflect the reality of the law as it was practised in the courts. What Holmes – in his seminal article, 'The Path of the Law' (1897) – and Gray, in his influential lectures of 1908, were proposing was a radical revision of the basis of legal theory to bring it into line with the actual realities of the legal process. As dissatisfaction with orthodox theory grew over the following decades, numerous legal writers followed in this realist vein.

The two leading lights of the realist movement as a whole were Karl Llewellyn (1893–1962) and Jerome Frank (1889–1957). In 1931, a decade of turbulence in the legal profession culminated in a polemic between Llewellyn and an eminent critic of realism, Roscoe Pound (1870–1964). The stand taken by Llewellyn was fairly representative of the sceptical temper of the

movement as a whole. Jerome Frank represented the more radical wing of realism. *Law and the Modern Mind* (1930) was a frontal assault on what he saw as a systematic web of illusion and self-deception in the profession about the nature of law. Although many others are worthy of note, one in particular stands out. 'The Judgement Intuitive' (1929), written by a senior judge, Joseph Hutcheson, was an especially influential account of the realities of judicial reasoning. This was squarely within the realist movement, emphasising the widening gap between theory and practice.

Legal theory and judicial practice

One popular misconception is the belief that realists were hostile to legal theory, that they attempted to shift the focus of legal studies from theory to the practical realities of the courtroom and the history of case law. There is very little truth in this assumption. Even the most radical of the serious realists were interested, not in overthrowing theory, but in transforming it from a fixed body of dogmatic doctrines, rooted in tradition, into a more useful and dynamic approach to real legal problems in a time of rapid social and legal change in the USA.

The origin of this misconception was that the realist theory was indeed court-centred, and was more concerned with what the contemporary judges actually said and did than in what the textbooks told them they ought to say and do. What they were arguing here, however, was that the actual reasoning and practical justice handed down by real judges were the appropriate starting point for theory, rather than the *a priori* deduction of the meaning of law. This practical orientation in jurisprudence is analogous to the argument in the philosophy of science that theoretical speculation on the nature or spirit of the scientific enterprise should be grounded in the actual practice of working scientists.

The implications of the realist focus on actual legal cases went further than a reminder that theory should keep both feet on the ground. What it also implied, in different ways, was an understanding of the nature of law that was quite foreign to traditional ways of thinking. For John Chipman Gray, for instance, the decisions of judges and nothing else constitute the law. All else – the rules and principles of common law, the enacted statutes, the maxims of morality and equity, the dictates of custom, even the body of judicial precedent – is relegated to the status of *sources* of law, sources upon which the judges laying down the law can draw. For Gray, this was a strictly realistic assessment of the actual situation throughout legal history. Behind the rhetoric of a higher law, the will of the community or the command of the sovereign, what actually counts as law is the ruling of the judge, because this is what will be enforced. Gray's distinction between the nature and sources of law may seem arbitrary and implausible; it is difficult to accept the claim that a legal statute is not actually a part of the law until it has been tested in the courts. He did, however, make a persuasive case for his

contention that much of the confusion in legal thinking stems from its failure to observe the distinction between actual law and its sources.

An even more spartan conception of law was suggested by Holmes's famous maxim that 'the prophecies of what the judges will do in fact, and nothing more pretentious, are what I mean by the law' (Adams 1992: 92). If this is taken literally, it means that for all practical purposes the law on any given issue actually consists only in the best predictions that well-informed lawyers can make about the way in which a case will be decided. It does not even extend to the decisions themselves, which in turn become no more than the basis for future predictions.

Neither of these pronouncements became dogma for the subsequent realist movement, but the hard-headed, unpretentious approach to legal analysis that they embodied did become the guiding spirit of the realism expounded by Llewellyn, Frank and many others. Holmes and Gray were both motivated by a desire to deflate what they saw as a persistent idealisation of law, the inevitable consequence of removing it from its actual practice. Many years later, Llewellyn's realist programme made central the need to recognise the fluidity of law and society, and therefore the futility of trusting established theoretical doctrines and fixed-rule formations. In place of such reverence for the past, Llewellyn proposed a shift of emphasis to the actual effects of judicial decisions.

The attack on certainty

The main feature of legal realism that can be traced directly to the influence of philosophical pragmatism is its frontal assault on what Frank termed 'the basic myth of certainty and fixity' in the law (Frank 1949: ch. 1). The first principle of the pragmatism launched by C.S. Peirce (1839–1914) was the recognition as illusory 'the quest for certainty' bequeathed by the rationalist Descartes and the classical empiricists from the early modern period. According to the dominant strain of thinking in the late nineteenth century, natural science was a raging success story, a steadily expanding accumulation of fully established unrevisable truths. Even for those who were more reflective about the foundations of this supposedly unrevisable knowledge, certainty as an ideal was largely unquestioned. The main philosophical question was how to place the sciences on a sound footing, or how certainty was to be attained. The Peircean rejection of certainty as the guiding ideal of science, a rejection that was soon to be vindicated by the upheaval and crisis in the mainstream sciences, was echoed by the legal realists. From Holmes to Frank, the reaction against the pursuit of the ideal of law as a certain science, requiring systematic rigour that would leave no room for error or indeterminacy, was the central feature of American legal realism.

The pragmatist attempt to remove certainty from epistemology was anti-foundational. The range of issues this challenge raises is still nowhere near resolution, but the point to note here is that the denial of the need for

certain foundations allows knowledge to be provisional. Traditionally it has been held that the first condition of knowledge is that what is believed must be true. Without truth, there is no knowledge. If a belief turns out to be false, then what was thought to be known was not known at all. This seems self-evident. And what also seemed self-evident was that for knowledge to be knowledge, the possibility of error must be ruled out: hence the importance of the quest for certainty.

What Peirce and later pragmatists were arguing for was the initially counterintuitive claim that knowledge does not require the elimination of every possibility of error. What we 'know' now may later turn out to have been mistaken, but this does not mean that we do not know it now. For many philosophers such reflections lead straight into scepticism, the denial that any of our claims to knowledge are sound. For the pragmatists, and others influenced by them, it leads to a far-reaching revision of our understanding of the character of knowledge and, notoriously, a redefinition of truth. For Peirce, the true opinion is the one destined to be believed by an ideal community of future scientists. For William James, the true opinion is the one that it is to our best advantage to believe. Although neither of these pragmatic concepts of truth, which seem too radical a departure from conventional usage, have gathered much of a following, the pragmatist rejection of certainty is nevertheless widely endorsed by the entire movement of anti-foundationalism in epistemology.

The movement against certainty in legal theory runs along parallel lines. Legal absolutism in the 1890s was as unconvincing to radical thinkers as the uncritical scientific positivism of this period was to philosophers who saw the weakness of its foundations. Holmes regarded the almost universal belief that the law could be determined and applied with scientific precision as explicable only in terms of 'the longing for certainty and repose', a natural impulse found in every area of thought. All his writing was directed at breaking down this illusion and its damaging consequences. The illusion of certainty that he and subsequent realists assailed was the comforting official belief that 'the law' was a fully formed pre-existing reality, a coherent body of rules ready to be applied by judges trained and sufficiently skilled in syllogistic reason to deduce the correct answer to any legal problem with complete certainty. For Holmes, the law thus understood became an imaginary 'brooding omnipresence in the sky', a reified power that guaranteed a spurious certainty and determinacy. The hard reality of law was in truth inherently indeterminate and uncertain, a more gritty affair involving the unpredictable balance of principles, policies and unspoken assumptions.

Jerome Frank's attack on the basic myth of certainty was more polemical and uncompromising. In Frank's writing, it becomes forthright and explicit that legal certainty is as undesirable as it is unattainable. Its absence is no cause for regret, but the pretence that law can be made fixed and unwavering was so pervasive that it stifled any understanding of the real nature of law. What Frank and many of his contemporaries were struck by was not merely

the gap between theory and practice, but what he depicted as an astonishing self-deception at large in the interpretation of law as a fixed body of determinate rules, when it was plain for all to see that the opposite was the case, with rules adapted, changed and invented every day throughout the numerous jurisdictions of the USA. Although these were all rooted in common law, there was no denying that any particular decision was highly unpredictable.

Why was the belief in certainty so strong? Whereas, for Holmes, this contradiction required no more explanation than that the craving for certainty was a natural impulse, Frank sought the answer in Freudian psychoanalytic terms, in the unconscious yearning for the lost security of childhood, provided by the omniscient father figure. Frank believed that this almost universal creation of a chimerical certainty infected every aspect of legal theory in particular, because the law with its judges and judgements was peculiarly qualified to stand in for the father figure. Belief in 'the law' as a fundamental certainty fulfils a vital psychological need. The realist attack on this belief was inspired by the desire to uncover the reality of the workings of law that had been obscured by the myth of certainty.

The realist revolt against formalism

The pragmatist-inspired rejection of the ideal of certainty in law goes hand in hand with the hostility to the legal formalism that, in the perception of the leading realists, lay at the heart of modern legal analysis. 'Formalism' is a term with several distinct meanings and connotations in philosophy, mathematics and legal theory. What is relevant here is the realist interpretation of legal formalism as a tendency that has a damaging effect on both our understanding of law and the practical administration of justice.

Essentially, legal formalism is held to be a preoccupation with the outward forms of the law as it is written, at the expense of the inner content or substance of the law. This exaggerated emphasis on the formal was expressed by realists in a number of ways. The central point is that law is interpreted as a formally closed system, governed by strict rules of inference and demonstrative proof. This has two main implications: (1) as the narrowing down of legal reasoning to the form of the deductive syllogism, a formalistic approach is one that is guided by the belief that all legal problems can be resolved by framing them in syllogistic form, whereby major and minor premises yield a demonstrable conclusion; and (2) law is closed off to outside influences, so that its interpretation becomes a purely internal matter, to which other social factors are irrelevant.

The essential criticism is that the formalist approach makes the mistaken assumption that the law can be completely understood by studying and applying deductive formal logic. With syllogistic reason placed at the centre of law as a formally closed system, it becomes possible to resolve every problem in such a way that leaves no room for doubt. Holmes described this

as the 'fallacy of logical form', the error in which lay in the refusal to recognise the non-logical forces at work in the determination of the content and growth of the law. The structure of the legal syllogism is such that the truth of the conclusion does not depend to any degree on the substantial content of any of the premises.

What follows from this essential criticism is a general picture of the formalist approach as 'a mechanical jurisprudence', according to which all problems of interpretation can be definitively resolved by meticulous attention to logical detail. It is mechanical because a calculating machine could do it: one could feed the question in at one end, and wait for the answer at the other. The chief danger, as Holmes saw it, lay in the modelling of the system of law on mathematics, imagining that the whole system can be deduced from general axioms, so that a judicial mistake can be seen as 'not doing one's sums right'. What this obsession with certainty leads to is a strong tendency towards literalism, focusing on the letter at the expense of the spirit of the law. It leads to a tendency to follow rules for their own sake; the natural consequence of this is the elimination of equity in the assessment of individual cases. The peculiar features of each unique case are to be found in the substantiality of the concrete circumstances of the case, not in the formal rules that can be made to fit the case. A mechanical jurisprudence – so the realist argument runs – trains the legal mind to abstract from these circumstances, to find the applicable rule that will provide the correct answer.

What were the realists urging against or in place of this formal mechanisation of jurisprudence? What would a non-formal, unmechanised jurisprudence look like? For Holmes, 'the root and nerve of the whole proceeding' is the judgement – often inarticulate and unconscious – that lies behind the logical form. What he is referring to here is not the judicial pronouncement on a case, but the individual act of judgement that precedes it, the judgement of the relative worth of competing claims, a judgement that comes before its rationalisation in logical form. What Holmes was arguing was that the real factors influencing these prelogical judgements – in particular, matters of social policy – are nearly always camouflaged by syllogistic reason. Holmes's 'realism' consists in his advocacy of making conscious and explicit what was damagingly left half-conscious and concealed by the logical rationalisations surrounding these judgements. It was the nature of this judgement, then, and the influences forming it, which needed to be brought into the light as the basis of a realist jurisprudence.

Realists of the later phase of the movement broadened the scope of these 'real factors' enormously, and focused on the nature of this judgement. Jerome Frank's provocative itemisation of the types of conscious and unconscious personal preference and prejudice at work in the judicial proceedings, attempting to explode the myth of judicial impartiality and objectivity, was seen by traditionalists as an attack on the integrity of the profession. Behind this polemic, however, was a serious and sustained assault on formalism.

This was nowhere more visible than in the realists' scrutiny of the manner in which judges formed their judgements and arrived at their conclusions. Joseph Hutcheson's account of 'the judgement intuitive' literally reversed the established assumptions about this thought process. Hutcheson confronted the security of the legal formalist mind, and its systematic application of general rules to yield a certain result, with the real human mind of the judge, in which the prominence of the faculty of imagination allows the natural process of *backward* reasoning to be given full rein.

In sharp contrast to the formalist belief that judges move carefully forward from premises to conclusion, reaching their judgement through a painstaking rational process, Hutcheson paints a vivid picture of the judge assembling all the relevant data and 'brooding over chaos', waiting for 'the flash of understanding which makes the jump-spark connection between question and decision' (Adams 1992: 201). The phrase of Hutcheson's that was to become highly influential was the idea of 'the hunching out' of a solution. What he maintained was that the inspired hunch, the flash of understanding, lay at the very heart of the process of discovery, and that it was precisely the role of this hunch which was suppressed by formalistic reason. On this account, the judgement is reached first, the rationalisation follows; the public or official reasoning of the judge is an elaborate justification of the decision already reached by other means. It is essential to note that Hutcheson's analysis was not intended as an attack on the judiciary, of which he himself was an eminent member. This intuitive process of reaching judgements he regarded as the link between the 'great judges' – those with most insight into legal problems – and the great discovering scientists such as Kepler and Galileo. What he was criticising was the failure, under the influence of a formalistic training, to use the intellect in this way.

This aspect of the attack on formalism and mechanism in law was taken up with alacrity by Jerome Frank. Reinforcing Hutcheson's assessment of the nature of creative legal reasoning, he argued that it was more important for lawyers to catch the creative scientific spirit than to imitate scientific logic. He insisted that the judgement in a court of law was no different in principle from judgements in any other context; that what it essentially involved was the working backwards from a vaguely formed conclusion to find the premises to substantiate it, the search continuing until the right conclusion is found. Referring to this feature of judicial reason as 'conclusion-dominance', he maintained that what was clearly evident in the practice of a lawyer-advocate, who is openly partisan for a conclusion favouring his or her client, was less evident but equally operative in the case of the 'impartial' judge. The fault, for Frank, lies not in the backward reasoning of the judge, but in the concealment of this reality by the myth of certainty and the pretence that the conclusion is the outcome of formal reason. What he advocates is a shift in focus from the study of legal logic to the study of the explicit and unconscious factors – political, social, economic and personal – which have the real influence on the judge's selection of the conclusion.

Realism and rule-scepticism

The rule-scepticism to which numerous realists in the 1920s and 1930s subscribed has been misrepresented and distorted more than any other feature of legal realism. Treated by many as a fantasy that flies in the face of the facts about the doctrine of precedent, dismissed by others as an eccentric exaggeration of the idiosyncrasies of unconventional judges, the genuine insights of the realist rule-scepticism have more recently been acknowledged once again.

The initial reaction to rule-scepticism, though, was hardly surprising. The sceptical attitude to the status and role of legal rules in the judicial process was the most significant and potentially damaging of the realist criticisms of traditional formalism and mechanical jurisprudence. Rule-scepticism, emerging from the attack on legal certainty, threatened not only to bring down the entire edifice of legal theory, but also to undermine the credibility of the law as an institution, a basic premise of both theory and practice being the idea of law as a coherent set of authoritative rules governing human transactions. What we need to be clear about, then, is what exactly this scepticism amounted to. Did it really threaten to undermine the law? Or was it proposing a viable alternative to law as understood and practised?

What does it mean to be *sceptical* about legal rules? The first question concerns the ontological status of rules. In what sense, if any, can legal rules be said to exist? Such questions have caused much confusion, because if scepticism means the doubting of the very existence of the rules – an attitude attributed to the supposedly extreme realists and dubbed 'rule-nihilism' – we have to ask whether such a claim even makes sense. The contents of statute book and case law are nothing but rules; the question of whether they are ignored or selectively applied is another matter. To say, for example, that there are no rules on inheritance or the validity of contracts would be manifestly absurd. Moreover, as H.L.A. Hart later pointed out, the very existence of the court of law presupposes the existence of secondary rules conferring legitimacy on the court (Hart 1961: 133).

Rule-nihilism, then, is easy to refute; however, it is doubtful that any of the realists seriously took this attitude. Frank explicitly repudiated such literal nihilism, arguing that this was the product of the formalist critics' inability to see any other alternative to their own absolutism. With this false alternative, either rules operate without exception, or there are no rules at all. As we shall see, the realist exposure of the mythical status of legal rules does not entail this nihilism. The basic argument is not that rules do not exist, but that rules are not what they appear to be.

Curiously, there is a hint – but no more than a hint – of ontological nihilism in Llewellyn's famous distinction between the paper rules officially adhered to and the real rules followed by the courts. That is to say, Llewellyn's rule-scepticism did amount to the claim that the ostensible rules – as mere paper, mere words – have no real existence or force. Even this, however, does not lead to the absurdity of denying that there are any actual rules prohibiting theft, or governing contracts or inheritance.

The second question concerns the *role* of legal rules. Given their real existence, what part do they play in the administration of law? Does the activity of judges consist in the simple application of the relevant rules to the case in hand, or do the rules play a more subordinate role than this? In answering these questions, we need to draw a contrast between a minimum and a maximum rule-sceptic thesis.

The minimum thesis is that judges do in reality – irrespective of official doctrine – have at least some discretion in at least some areas of law, to make decisions without reference to pre-existing rules. In so doing, the judges themselves make new rules. Advocates of this thesis believe that complete codification and predictability are neither possible nor desirable. What is desirable in some areas of law is flexibility and adjustment to circumstance. This is minimal rule–scepticism in the sense that it is sceptical of complete codification, and it is a very limited critique of formalism.

The maximum thesis is that judges do in reality – irrespective of official doctrine – have full discretion, in every area of law, to make decisions without reference to pre-existing rules. In so doing, the judges are not making new rules; they are merely deciding one unique case. Advocates of this thesis believe that the existence of rules exercises virtually no practical constraint on judicial decisions. The elaborate legal doctrine of precedent, of the binding nature of authoritative judicial decisions, is a pretence that conceals the truth of free creativity. This is uninhibited rule-scepticism, which constitutes a complete rejection of formalism.

Two preliminary points about these theses should be noted. The first is that the minimum thesis is only minimally sceptical of the prominent role played by rules. Its supporters include not only proto-realists like John Chipman Gray, but also those who were at most on the periphery of the realist movement, such as Pound and Cardozo, and positivists in the mould of H.L.A. Hart. Essentially, what it involves is no more than a cautious rejection of the extremes of formalism and mechanical jurisprudence. This is what it means to allow that there exists and should exist a certain amount of judicial discretion. Second, the maximum thesis should not be confused – as it so very often has been – with ontological nihilism, the view that legal rules are a complete mirage. The rules are there for all to see; however, advocates of the maximum thesis regard them as little more than a front or façade, the purpose of which is to cover the tracks of judicial innovation. The versions of rule-scepticism promoted by most of the realists lay somewhere between these two positions. Between the minimum and the maximum thesis, then, we need to formulate a moderate rule-sceptic thesis.

According to the moderate thesis, the role of rules in every area of law is radically suspect. Sometimes the rules are fully operative; sometimes they are not. All decisions, although not haphazard, are inherently unpredictable. The theory and practice of applying general rules, of using these rules to reason to a conclusion, and in so doing following precedent, do have some force, but not as great as imagined by formalist theory. In reality, judges at

every level are able to select or disregard precedent to suit the conclusion already arrived at. On the moderate thesis, the idea that they are helplessly bound by the rules is indeed a myth.

It was in the spirit of this moderate thesis that Llewellyn drafted a list of what he regarded as the shared points of departure of twenty of the leading realists in the early 1930s. These included tendencies towards '*distrust* of traditional legal rules and concepts which purport to describe what courts or people are actually doing', and – crucially – towards 'distrust of the theory that traditional rule-formulations are THE operative factor in producing court decisions' (Twining 1973: 79–80). It was the limited extent and the uneven application of the rules that Llewellyn was highlighting. Rule-formulations were regarded as merely one operative factor among others, which may or may not be applied in any given instance. What he and others were resisting with this emphasis on distrust was the assumption that rules were necessarily, or by definition, the decisive factor influencing judicial decisions. The adoption of this moderate position, then, did not mean that all rules were to be regarded as bogus; what it meant was that a critical scepticism towards their actual authority should be maintained.

Frank acknowledged the realist direction of those who advocated the minimum thesis, but criticised their half-heartedness in this respect, arguing that they were still caught in the spell of the myth of certainty, and urging them to adopt a more thoroughgoing scepticism. His own position as a rule-sceptic was more ambiguous, seeming to oscillate between the moderate and the maximum thesis, between Llewellyn's critical scepticism and an outright denial of the efficacy of rules. Much of his writing is in the spirit of the latter, of uninhibited rule-scepticism, according to which rules are no more than aids for testing conclusions already reached, influences towards wise or unwise decisions, formal clothes in which to dress these decisions. In short, 'rules' of law are in truth guidelines rather than rules.

What is crucial here is Frank's understanding of the *status* of rules. He sees every rule as a formalised description of the past, as a useful abbreviated general description of the way previous courts have reacted and decided various cases. On his account, rules are not *established* by precedent, they are themselves merely compressed accounts of precedent in the abstract. They are informative of law, not constitutive of it. The determination of any actual concrete case adds another notch of authority to the traditional legal thinking on any given subject, but it is itself a part of the creative tradition. Every judge can either ignore this and fall against the tradition, thus reinforcing the formalist approach, or recognise it and contribute constructively to the continuing vitality of the tradition.

The pragmatics of justice

While it would certainly be an exaggeration to say that the realists were concerned entirely with the individualisation of justice, it is also true that

their guiding purpose in opposing the formalist approach was the development of a perspective that would assist, rather than hinder, the ability of judges to arrive at just solutions to difficult cases. Behind this purpose lay the conviction that the attempt to operate the law as a closed logical system had a stultifying effect on the very idea of legal justice.

The formalist approach to justice was traditionally justified by the need to discover and maintain rules and principles that could be applied impersonally, without fear or favour, on the basis of the principle of equality before the law, that 'like cases should be treated alike'. The subjection of all to the rule of law, and the reluctance to make any exceptions, were believed – not unreasonably – to be indispensable to the development of a just legal system. This was felt to express the inner meaning of justice, that the same rules be applied to everyone. In short, justice is best provided by a 'government of laws, not men'.

It was against this picture of formalised justice that the realist rule-scepticism reacted. The realists had a pragmatic attitude to justice in as far as they regarded this picture as an unattainable idealisation of law. In the real life of the law, there is no certainty, no guarantee that the legal process will deliver just solutions to every problem. This absence of certainty is due, not primarily to the human fallibility of judges and juries, but to the fact that any real legal system will always contain indeterminacies. What the realists were trying to expose and dissolve was the illusion that a sophisticated modern legal system, perfectly formalised and idealised, is the perfect vehicle for legal justice.

What Frank saw in this was the elimination of the human factor, specifically the marginalisation of the spirit of equity. If justice is to be real, it has to be individualised to the circumstances of each concrete case. As we saw earlier, the idea of equity as the necessary correction to justice administered too literally originates in Aristotle. Frank argued that the tradition emanating from Aristotle's account of equity distorts it by removing it from the ambit of law, by representing it as an unfortunate necessity disrupting the regular procedure of law, in the interests of a wider sense of justice than is allowed by law. Frank's challenge to this interpretation, which has been very influential, reverses its assumptions. The spirit of equity, he argues, is not an expedient to be wheeled in for the odd occasion, it is inseparable from the rest of what we call law. Furthermore, as the superior aspect of justice, it is found at the very heart of the law (which, for Frank, it should be remembered, is what actually happens in its main arena, the courts) because 'as against Aristotle and Pound it would be wiser to go to the other extreme and to say that the law is at its best when the judges are wisely and consciously exercising their discretion, their power to individualise cases' (Frank 1949: 141).

With the abandonment of the quest for certainty, the problem of the objectivity of justice also diminishes. Hutcheson's model judge, the realist waiting for the flash of inspiration and 'hunching out' solutions intuitively, rather than applying the deductive syllogism, has 'a roving commission to

find the just solution' (Adams 1992: 203). In contrast to the lawyers, who are partisan for their clients, the judge is partisan for justice. This is what Hutcheson argues against those who see the model judge as the one who dispassionately applies the rules to find the correct decision. The justice of the pragmatic decision is relative to the moral judgement of a real individual, who depends primarily on understanding and experience, using formal reason only to check and reinforce the decision. The justice rendered by the strict application of pre-existing rules is an abstract justice that makes no real contact with the interests of the competing parties in the legal dispute.

A final point about the pragmatic nature of justice concerns the opening up of the deliberations of the judge to outside influence. The idea that the intrusion of non-logical, extra-legal considerations of social policy should be made explicit and legitimate, for the sake of the continuing vitality of the law and its interaction with a changing society, was first made forcefully by Holmes. This idea has influenced the whole of modern jurisprudence, not just the legal realists. Its general character is essentially forward-looking. For the realists it meant an instrumentalist focus on probable outcomes of legal rulings, rather than a retrospectivist reverence for past decisions. What they were advocating was a future-directed honesty about the social objectives of the judiciary, reflecting contemporary views of morality and justice in a changing world.

Conclusion

The crucial feature in the history of the idea of law between Aristotle and the early twentieth century was the transition from the concept of law as an embodiment of justice to the distinctly modern idea of law as morally neutral fact. This was a transition from a philosophy for which the role of natural reason was central, to a positivist philosophy of law as descriptive science, for which the dictates of reason were quite incidental to the subject matter of this science. The eternal ideals of the higher law were giving way to an understanding of law as human-made expressions of entirely earthly powers.

It is easy to see why the hard-headed factual approach of Bentham and Austin rang true in an age of scientific materialism. Austin's concept of law as a structure of commands appealed to the nineteenth-century scholars and lawyers who were looking for the truth behind the idealised rhetoric of natural justice. From a secular point of view, natural law looked increasingly like a relic from more spiritual societies. Many of the features of this positivism were adapted and developed by the early American realists. Holmes especially – with his 'cynical acid' stripping the legal reality down to its bare mechanisms – did much to impress the spirit of positivism upon American legal theory. At the same time, however, there was an anti-formalist strain in realism from Holmes to Frank, which worked against positivism and created the space for a distinctive and new approach to law that was freed from the grip of both the traditional theories.

Study questions

General question: Were the early positivists successful in exposing the weaknesses of natural law theory and common law thinking?

Further study questions: What were the essential features of Austin's legal positivism? Explain Hume's influence on the separation thesis. How might one defend natural law theory against positivism? To what extent was the new legal realist movement merely an American version of legal positivism? Explain and critically examine the realist revolt against legal formalism. Which version of rule-scepticism, if any, do you find the most convincing? How might one defend natural law theory against legal realism? All things considered, how realistic was American legal realism?

Suggestions for further reading

On Hume and positivism in philosophy generally, see Kolakowski (1968). For Hume and the fact–value separation, you should read Hume (1972: 3.1.1). A good concise commentary on Hume is found in Woolhouse (1988: ch. 8). On Bentham's legal positivism, the main text is Bentham (1970). For commentaries, read Hart's essay in Summers (1971) or Hart (1982) and (1983: ch. 2). Dinwiddy (1989: ch. 4) and Postema (1986) are also useful. Austin's primary text is Austin (1995). There are useful commentaries in Harris (1997: ch. 3) and Riddall (1991: ch. 2). For a more advanced comment on Bentham and Austin, see Cotterell (1989: ch. 3).

Full studies of American legal realism include Rumble (1968) and Twining (1973). The essential primary source to read is Holmes (1897). Other important sources are Gray (1921), Frank (1949) and Llewellyn (1930). Novick (1989) is an interesting biography of Holmes. Important commentaries include Golding and Edmundson (2005: ch. 3), Friedmann (1944: ch. 25), Dias (1985: ch. 21) and Cotterell (1989: ch. 7). Hart (1961: 132–44) is a significant analysis of rule-scepticism. For a useful collection of American pragmatist writings, see Thayer (1982).