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## Natural Law Ambiguities

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## NATURAL LAW AMBIGUITIES

*Robin West\**

I share with Fred Schauer the relatively unpopular belief that the positivist insistence that we keep separate the legal "is" from the legal "ought" is a logical prerequisite to meaningful legal criticism, and therefore, in the constitutional context, is a logical prerequisite to meaningful criticism of the Constitution.<sup>1</sup> As Schauer argues, despite the modern inclination to associate positivism with conservatism, the positivist "separation thesis," properly understood, facilitates legal criticism and legal reform, not reactionary acquiescence. If we want to improve law, we must resist the urge to see it through the proverbial rose-colored glasses; we must be clear that a norm's legality implies nothing about its morality. To reverse the classical natural lawyer's formulation of the issue,<sup>2</sup> if we wish to make our laws just, we must first see that many of our laws are unjust, and if we are to understand that simple truth, we must understand that the *legality* of those norms implies nothing about their justice.

Surely the lessons of positivism are more compelling, not less compelling, in the constitutional context where the capacity for self-delusion is so great, given the moralistic content and peculiar history of the Constitution, and where the stakes are highest: the consequences of merging constitutional fact with constitutional virtue are that we preclude even the logical possibility of fundamental criticism of our most foundational legal document. As I have argued at some length elsewhere,<sup>3</sup> by merging in our own minds and in the public mind "constitutional morality" and critical morality, we have closed the door to meaningful criticism of the Constitution. The positivist's classic and even enlightened insistence on the "separation" of law and morality, if it would free up criticism of constitutional norms, could bring a welcome breath of fresh air.

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1. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 806-07 (1993).
2. The classical natural lawyer would argue that an unjust law is not a law.
3. Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1993).

What Fred Schauer has not done in his article, perhaps because it simply wasn't part of his project, is to provide any account of why so many people are inclined to think otherwise. For as he forthrightly notes—but doesn't explain—it is widely believed at least in contemporary legal-academic circles that legal positivism, far from being the jurisprudential grounding of enlightened legal criticism as insisted by its nineteenth-century proponents, is instead the handmaiden of a reactionary, “Borkian,” noncritical, and even anticritical acquiescence in the legal status quo and is therefore the enemy of both criticism and reform. Today, “legal positivism” is widely taken to imply not just a conservative stance against legal change, but much worse: a refusal even to engage the issue, a denial of the coherence of legal criticism, and a denial of the relevance, in some sense, of legal reform. Given the historical grounding of positivism in an insistence on the need for legal criticism and legal reform, this modern belief about the reactionary consequences of legal positivism is strikingly peculiar: how did black become white? Where did this belief, so widely shared yet so wildly at odds with both the clear history and the apparent logic of legal positivism, come from?

One possible answer, or at least the possibility that I want to explore very briefly in this commentary, is that the *modern* association of positivism with undue acquiescence in unjust norms—and particularly with undue *judicial* acquiescence in unjust norms—is rooted, not so much (or not any longer) in the classic and inconclusive debate on the point between Hart and Fuller,<sup>4</sup> but rather in Robert Cover's powerful indictment of the “legal positivism” of the pre-civil war abolitionist judges in *Justice Accused*.<sup>5</sup> Those judges—judges who expressed in their nonjudicial lives deep and sincere opposition to slavery—generally espoused a positivist understanding of the nature of law and of legal obligation. Cover argued that because of that commitment, when they were faced with the need to decide Fugitive Slave Act cases and therefore with a possible conflict between their moral and legal obligations, they tended to self-censor their abolitionist moral convictions so as not to compromise their felt “positivist” duty to apply the “positive” law. The point is easily generalizable beyond the example of the abolitionist judges: positivism, at least when combined with a strong duty of fidelity to law, serves to censor conscience. It is that Coverian argument, I

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4. See LON FULLER, *THE MORALITY OF LAW* (1964); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958).

5. ROBERT COVER, *JUSTICE ACCUSED* (1975).

think, and not Dworkin's argument against the Hartian rule of recognition<sup>6</sup> or Fuller's claims on behalf of the internal morality of law,<sup>7</sup> that, at least for my generation, has turned the tide against positivism. Whatever may have been the claims of the historical positivists, or even the apparent logic of positivism, if it facilitated judicial acquiescence in the most abominable, ignoble moment in American legal history, there is something very deeply wrong with it.

In these comments I want to supplement Fred Schauer's discussion and general defense of positivism with a brief response, in a sense, to Cover's quite chilling indictment. I will ultimately argue that whatever the (limited) force of Cover's indictment of the positivism of the abolitionist judges, that argument has no force against the positivism of the *nonjudge* constitutional critic. The critic, unlike the judge, is interested in competing theories of the relationship between law and morality, not as a guide to legal *interpretation*, but rather as a guide to clear-headed legal criticism. The constitutional critic, almost by definition, will rarely if ever be a judge. For such a critic, contrary to contemporary opinion and for the reasons stressed by the classical positivists, positivism does indeed facilitate the kind of constitutional criticism that natural law thinking obscures.

Let me begin by noting a central but neglected *ambiguity* in both the natural law and the positivist formulations of the relationship between law and morality. The natural lawyer, as Schauer claims,<sup>8</sup> is committed to the proposition that for a norm to be a true "Law" it must comply with some minimal moral conditions. An unjust law, to use Augustine's and Aquinas's negative formulation, is no law at all.<sup>9</sup> Now in a logical or linguistic sense, the claim that "an unjust law is not a law" can have two sharply different meanings with radically different political implications. First, what might be meant by the phrase is that a sovereign's command (or whatever is a "law" in the positivist sense) that fails to comply with the requirements of justice is not "Law," and that as a consequence, not only does the citizen have no moral duty to obey it, but a judge has no duty to apply it—it truly is not a law. Whatever the sovereign commands that is grossly unjust is not "Law," and it is only "Law," not "a sovereign's command," that

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6. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45 (1977).

7. FULLER, *supra* note 4, at 95-118.

8. Schauer, *supra* note 1, at 798.

9. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* 1014 (Christian Classics 1948) (1911) (2d art., objection 4).

imposes duties of obedience on citizens and duties of fidelity on judges. I will call this (very familiar) understanding of the natural lawyer's definitional claim the "critical interpretation."

The natural lawyer's claim that an "unjust law is not a law" might also be meant and understood, however, in a very different way—and, historically, has often been meant in a very different way. The claim might mean that whatever the sovereign commands—or whatever is a law in the positivist sense—is *therefore* just. The sovereign, in other words, establishes the content of justice as well as the content of legality; put somewhat differently, the sovereign by his decrees establishes our moral as well as our legal obligations. The sovereign is a sort of moral as well as legal "Humpty Dumpty"<sup>10</sup>: since he has power whatever he decrees is law, but furthermore, by virtue of it being law, whatever is decreed also defines justice. The *source* of the sovereign's moral as opposed to purely legal authority may be his monarchical status—by virtue of the crown and throne he has direct access to the wisdom of divine authority—or, perhaps, simply his benevolence and virtue, as is widely believed about our "constitutional framers." But whatever the source, the identity of legality and morality attendant to this understanding of the natural lawyer's claim has dramatically conservative consequences. Criticism of existing law on moral grounds is precluded by the legality—and therefore the justice—of the norm under consideration. I will call this quite different understanding of the natural lawyer's claim the "reactionary interpretation," for the obvious reason that the natural lawyer's claim, understood in this second way, is the natural jurisprudential outlook of the extreme political reactionary, not the Kingian civil disobedient or the "natural rights" motivated revolutionary.

As Bentham argued long ago,<sup>11</sup> the "natural law" tradition wavers between these two interpretations: the insistence that only good law is law can serve the ends of either the anarchist or the royalist, the critic or the reactionary. What he surely didn't notice, however, is that "legal

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10. I refer to the Humpty Dumpty of Lewis Carroll's *Through the Looking Glass* who had the power to dictate linguistic usage. LEWIS CARROLL, *Through the Looking Glass*, in ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 274 (Penguin Books 1968) (1962) ("When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less.'").

11. See 1 JEREMY BENTHAM, *A Fragment on Government*, in THE WORKS OF JEREMY BENTHAM 221 (John Bowring ed., 1962) (1838); 2 JEREMY BENTHAM, *Anarchical Fallacies*, in THE WORKS OF JEREMY BENTHAM, *supra*, at 489; 5 JEREMY BENTHAM, *A Commentary on Mr. Humphreys' Real Property Code*, in THE WORKS OF JEREMY BENTHAM, *supra*, at 387.

positivism" contains a parallel (or mirror image) ambiguity. The positivist's insistence on the separation of law and morality might be understood in the enlightenment tradition of asserting the existence of a set of universal moral truths about the nature of justice that ought to be employed as the criteria against which the particular "posited" commands of particular sovereigns are to be judged. Understood in this way (essentially, as H.L.A. Hart presents it) the positivist's separation thesis well serves the ends of sensible legal criticism and legal reform. Alternatively, however, the positivist's insistence on the separation of law and morality might be understood not as an insistence on the separateness of two domains, but as an emphatic denial of the existence of the moral domain. Law and morality should be kept separate simply because the first actually exists and the latter does not. If the positivist separation thesis is understood in this second way, then the positivist view of law is indeed the philosophical underpinnings of a profoundly reactionary conception of legal obligation. Legality, on this view, simply exhausts our normative options and hence our normative universe. There is no alternative normative scheme—divine, Kantian, utilitarian, principled, or contextual—to which a citizen might turn. One does what the law commands and that's more or less the end of it.

Again the question arises, to which understanding of the relationship of law and morality—legal positivist or natural law—should the legal critic, and particularly the constitutional critic, be drawn? It is simply not the case, as both Schauer and Cover seem to believe, that the logical differences between natural law and positivism offer an answer. It is not the case, in other words, that positivism simply *is* the jurisprudential grounding for criticism and reform while natural law simply *is* the jurisprudential grounding for a more acquiescent posture and that anyone who thinks otherwise is simply confused about basic definitions. Rather, the legal critic has a "jurisprudential choice" (as does the legal reactionary). A positivist legal critic can urge, in the Benthamic and Hartian tradition, that a recognized law is unjust and therefore ought to be criticized and changed. A critical natural lawyer who agrees that the "law" is unjust might put the point differently: the law's injustice precludes it from being "Law." The legal reactionary seeking to fend off criticism of law will have the same option. He might argue, within the positivist framework, that "law is law" and that there simply is no coherent or knowable independent "moral standard" against which the law can be judged. Alternatively, he might argue, within the natural law tradition, that the law's legality is sufficient to

demonstrate its justice: if the law is a law, then it must be just. Natural law and legal positivism seem to have no logical connection with either a reactionary or critical attitude toward law.

The logic of the two philosophies *does* seem to matter, however, if we look at the issue *from the situated perspective of the deciding, interpreting judge*. It was by insisting on this shift in perspective that Cover managed in his powerful book to shift the weight of history, so to speak, against positivism. The judge who is critical of a law—the abolitionist pre-civil war judge or the anti-apartheid South African judge—and who is and considers himself to be under an absolute or near absolute obligation to “interpret and apply” the “law” faithfully, will indeed be served very differently by legal positivism and natural law as guiding jurisprudential philosophies.

The positivist judge who is and feels duty bound to obey the law, who is faced with what he considers to be an immoral law, and who insists on the positivist “separation” of law and morality, is faced with a stark choice: either breach one’s judicial duty of fidelity to law or cease being a judge and thereby avoid doing something evil, or abide by one’s duty of fidelity to law and do something positively evil. From the perspective of even the highly moral judge who is (or feels himself to be) under an obligation to apply the law, the reactionary interpretation of the positivist claim is virtually inevitable—not because such a judge denies the existence of moral norms, as posited above, but rather because, given his duty of fidelity to law, those norms, if in conflict with legal norms, must yield. Whatever may be the case for the citizen critic, the judge cannot simply abstractly criticize the immoral law; he must also apply it. Although it facilitates criticism of law, then, by the outside critic, it facilitates only a crisis of conscience for the faithful “inside” judge.

By contrast, the natural law judge who is and feels duty bound to apply the “law,” and who is faced with the same immoral law, has another choice: the natural law judge can declare the immoral decree not truly a law—if it is evil it is not a law—and therefore not something the judge is obligated by role to apply. From a natural lawyer’s perspective, the judge’s duty of fidelity to law obviously does not extend to evil laws. Such laws are not truly “Law.”

The positivist judge who is critical of the bad law and who has the courage to do so will no doubt try to interpret the law narrowly to avoid the bad result. In an extreme case, and if he is courageous, he might refuse to apply it on moral grounds and thereby breach his duty

of fidelity. But by doing so the judge has become himself "lawless": he has forsaken the rhetorical advantages, so to speak, of legalism. He can do the right thing, but only by partaking in an act of judicial disobedience, and any judge who views his obligation of fidelity to law as paramount or absolute simply will not engage in such an act. Natural law, by contrast, provides the morally critical judge a means of doing the right thing from the bench, with the power and prestige of law, legalism and the Rule of Law still clearly on his side. The moral judge who is a legal positivist, then, will be somewhat more disabled comparatively from using his legal power to further morally compelling ends. When viewed from the perspective of the morally sensitive judge under an obligation of fidelity to law, positivism, far from facilitating the criticism and reform envisioned by Hart, seems indeed to promote judicial acquiescence in unjust norms—thus, Cover's "indictment" of positivism.

There are, however, two important limitations on this indictment, which Cover himself seemed to understand, but which have unfortunately dropped out of modern restatements of his position. First, as discussed above, natural law, no less than positivism, is an ambiguous doctrine. The judge who embraces a natural law perspective *may* do so in order to facilitate moral outcomes in the face of immoral law. But even such a high-minded judge runs at least one risk of moral failure that is peculiarly encouraged by the same natural law philosophy that facilitates the moral decision: the natural law equation of law and morality may permit him to argue against the legality of the immoral law (and hence refuse to apply it), but it alternatively may encourage him to view the existing law as moral by virtue of its legality, and hence quite effectively silence his own moral voice. And even high-minded, morally righteous judges are, virtually by definition, strongly identified with the legal establishment: they must be committed to a considerable degree to the legal system of which they are a part or they could not be judges. The critical version of the natural law formulation presents a moral opportunity to do a noble, courageous, and moral act in the name of "Law," but the reactionary version of the natural law formulation presents an invitation to see in existing law a morality that is not there—to do the legal act in the name of a false "morality." Natural law may well facilitate judicial courage by cloaking the moral act with the luster of legalism, but it can also facilitate judicial bad faith and inauthenticity. There certainly is *at least* as much danger that a morally critical judge committed to natural law will slip into the acquies-



cent posture of the reactionary—if an unjust law is not a law, then all laws that are law must be just—as that a morally enlightened positivist judge will succumb to the felt imperative of his duty of fidelity to law.

In other words, *precisely the same critique that Cover leveled against positivism*—and against the positivist abolitionist judge who failed to act on the basis of his moral beliefs—can be made with equal force against the hypothetical abolitionist judge who is a committed natural lawyer: that judge might be led by the force of the logic of natural law to eventual acquiescence, just as his positivist brother might be led by the force of positivism to complicity in injustice. It may well be that the nineteenth-century abolitionist judges were seduced by positivism toward acquiescence in the evil legal system of their time. But it is not clear they would have done any differently had they been natural lawyers. The *argument* the hypothetical natural law judge would have made would indeed have been different: the positivist judge acquiesces because his role-derived duty of fidelity to law and the separation thesis that law is in no way constrained by morality leave him no obvious logical choice. The natural law judge acquiesces because *his* role-derived duty of fidelity to law and his natural law-defined insistence that, in effect, “laws are just by virtue of being laws,” legitimate acquiescence. Although the arguments by which they reach their decision are different, the outcome is the same. Again, I do *not* argue *against* Cover’s claim that the logic of positivism combined with a duty of fidelity to law led the abolitionist judges to a posture of acquiescence: I think it may well have. I do argue, though, that the quite different logic of natural law combined with the same felt duty of fidelity to law may well have led to the same outcome, albeit by a very different route. If so, then it seems sensible to conclude that the abolitionist judges’ acquiescence in the unjust regime was ultimately a function of their fidelity to the legal profession—itsself a function of their inclination to preserve order and their loyalty to the state—and the relatively self-evident fact that these dispositions in some sense weighed more heavily on their conscience than their abolitionist sentiments, and not a function of their jurisprudential theory. Jurisprudence provided only the form of the argument. Had there been a different ruling jurisprudence there would have been a different argument, but if all else were held constant, there almost undoubtedly would have been the same outcome.

The second limitation on Cover’s indictment of mid-nineteenth-century positivism is that it is an indictment not of legal positivism per

se, but of positivism *as an interpretive strategy* for sitting judges who are and feel themselves to be bound by duty to interpret and apply the law faithfully. From the morally sensitive judicial perspective, the Coverian argument against legal positivism does indeed seem compelling: the judge obligated to interpret and apply the law who is committed to the "separation thesis" that law is not constrained by morality will be less likely to use the "interpretive play" that the looseness of law provides to push it in a morally salutary direction than the natural law judge who also feels obligated to obey the "law," but who views the "law" to be applied as necessarily constrained by the demands of justice. And again, let me stress, this indictment of positivism may well succeed even if it is the case, which I think it is, that natural law carries its own quite different risk of facilitating an undue acquiescence in unjust regimes. *But* this is an indictment of positivism as an interpretive strategy employed by judges who are and feel themselves to be under an obligation to interpret and apply the law faithfully. It is simply irrelevant to the legal critic—particularly the constitutional critic—who neither is nor feels himself to be under any such obligation.

The difference is of great importance in the constitutional context. For it is very unlikely that a true constitutional critic—one who has serious doubts about the wisdom or morality of the United States Constitution—will be a judge. Put negatively, it is very unlikely that a modern judge will have serious moral criticisms of or even reservations about the United States Constitution. In contrast, the nonjudge constitutional critic is under no duty to interpret and apply the law faithfully. He may or may not be under a citizen's obligation to *obey* the law, but he is under no duty whatsoever to refrain from the critical disposition and acts of reform seemingly barred by the judge's duty to interpret and apply faithfully existing law. The nonjudge critic is not faced with the quandary of being required by duty to apply an immoral law and hence do an immoral act and, more importantly, is not faced with the liberatory possibility, seemingly opened up by natural law and foreclosed by positivism, that a morally acceptable interpretation of the apparently immoral law is required not just by an extralegal moral duty, but by judicial duty as well, at least when "law" is properly understood. The moral sitting judge of course will want to push the bad law in a morally better direction by employing his interpretive talents and powers, and it may be that natural law facilitates such a strategy better than does positivism. The citizen critic, however, has neither the power nor the obligation to do so: the citizen critic is not in a position to

improve the law by interpreting it one way rather than another. Rather, he wants, and should want, to achieve a clear-headed understanding of its evil in all its undisguised brutality, so as to clarify the need for changing it. Whatever force there may be in Cover's indictment of the positivism of the sitting judge, it carries no weight with respect to the nonjudge legal critic and, accordingly, no weight with respect to the constitutional critic, who almost by definition will not be a judge.

For the nonjudge legal critic—interested in competing jurisprudential theories about the relationship between law and morality not in order to provide an interpretive strategy for improving bad laws, but rather to provide a basis for criticism—the comparative and entirely pragmatic virtues of the positivist formulation of that relationship and the risks of the natural lawyer's opposite formula—risks and virtues stressed by the classical positivists—appear to be incontrovertible. Particularly in the constitutional context, it is indeed imperative that we remain clear on the simple positive facts: that the Constitution was posited by people, not ordained by a supernatural deity, that it was and is an intensely political document, and that it was and is the culmination of a struggle for power between competing factions. That it is, in other words, an entirely ordinary legal document. All that is peculiar about it is how inclined we are to forget that fact. The scheme of government it mandates may well serve individuals and communities or it may ill serve them; its particular mandates may be foolish or wise. Whether the Fourteenth Amendment, the First Amendment, or some particular judicial gloss is or isn't a part of the Constitution says nothing about whether or not the Fourteenth or First Amendment, or a judicial decision, is good or bad. The constitutional critic, under no obligation to apply or interpret the document faithfully, gains nothing from the anti-positivist insistence that the Constitution somehow constitutes our "public morality" as well as our foundational law. What he loses is the capacity to engage in meaningful constitutional criticism; what he loses is the ability to countenance the possibility that the Constitution spells out a scheme of rights, liabilities, duties, and obligations that disserve rather than promote our individual and collective well-being. There is no obvious value in that massive self-censoring of the critical voice.

That legal positivism is a *necessary* condition of constitutional criticism does not imply, of course, that it is a sufficient condition; indeed I think that it is not. As the critical legal scholars have insisted for almost two decades now, meaningful criticism of the Constitution must

rest on a willingness to criticize not only the law itself, but also the community's widely shared moral beliefs that tend to "legitimate" it—the beliefs, in other words, that are in some sense produced by the Constitution and in some sense constitutive of it. How to accomplish that part of the task—how to develop a critical stance toward our shared morality as well as our shared positive law—is far too difficult a question to answer here. But it is worth insisting, as Fred Schauer has done in his essay, that legal positivism, although not the complete answer, is indeed the necessary first step. We will not achieve a critical stance toward our Constitution—and we therefore will not achieve a mature stance regarding it—until we rid ourselves of the two centuries-long delusion of its essential and everlasting virtue.