

**RADICAL RE-ADMISSION: MORAL AND  
METAPHYSICAL IMPLICATIONS OF THE  
'IS'/'OUGHT' DISTINCTION THROUGH THE  
LENS OF DRUZIN'S EXPANDED SIGNALLING  
MODEL OF NORMS**

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[T]he *actual* theory of law developed by positivist philosophers like Bentham, Hart, and Raz, ... is, and was, understood by its proponents, to be a *radical* theory of law, one unfriendly to the *status quo* and anyone, judge or citizen, who thinks obedience to the law is paramount.

– Brian Leiter<sup>1</sup>

I INTRODUCTION

The core concept of legal positivism has been expressed by Brian Leiter as a normative command that has come into effect by way of a particular form of human action.<sup>2</sup> This definition assists in distinguishing legal positivism from the schools of thought invoking universal or religious truths but does little to reveal the role ethics and metaphysics does or

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<sup>1</sup> Brian Leiter, 'The Radicalism of Legal Positivism' (2009) 66 *National Lawyers Guild Review* 165, 165 (emphasis in original).

<sup>2</sup> Ibid.

does not play in a positivistic legal system. By examining positivism through the lens of a Law and Economics perspective, in particular the use of an Expanded Signalling Model of Norms (ESM)<sup>3</sup>, it is possible to evidence that, by separating ‘is’ from ‘ought’, positivism actually encourages engagement with ethical and metaphysical dialogues.

The finer details of positivism vary depending on the source – ranging from the Sophist view of law as of accidents of convention<sup>4</sup> or Thrasymachus’ ‘advantage of the stronger’<sup>5</sup> dating back to ancient Greece, through to the *Leviathan* of Thomas Hobbes and beyond. For the purposes of this discussion, H. L. A. Hart’s variant will be considered. Hart considered that previous positivist explanations for the source of law were too narrow, at times equating it to little more than ‘orders backed by threats’<sup>6</sup>. He believed that laws represented social norms that had been elevated by way of social recognition of the power of the enacting body to create such laws. So called ‘weak acceptance’ or recognition is sufficient – the basis for recognition need not be universal, only the recognition itself.<sup>7</sup> (It is worth noting that Hart recognized that whilst a group may present acceptance of a conduct there is no reason to conclude their moral values or reasoning are the same).<sup>8</sup> The effect of this rule of recognition is that there is no fundamental content of law, only that which

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<sup>3</sup> See Bryan Druzin, ‘Law, Selfishness, and Signals: An Expansion of Posner’s Signalling Theory of Social Norms’ (2011) 24(1) *Canadian Journal of Law and Jurisprudence* 5.

<sup>4</sup> J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 2007) 14.

<sup>5</sup> Plato, *The Republic* (B Jowett trans, KayeDreams Novel Art, 2009) 54 [first published 360 BC].

<sup>6</sup> H L A Hart, *The Concept of Law* (Clarendon Press, Oxford, 1994) 20.

<sup>7</sup> *Ibid* 160.

<sup>8</sup> *Ibid* 198-9.

is ‘posited’. To use the words of Austin – ‘The existence of law is one thing; its merit or demerit is another...’<sup>9</sup>

If law is governed by social norms, an understanding of the mechanics of social norms will assist in the understanding of the mechanics of law under a positivist approach. Bryan Druzin presents a comprehensive, multidisciplinary theory of social norms,<sup>10</sup> expanding on Posner’s signalling theory of norms.<sup>11</sup> Posner’s theory posits that social norms are effectively tools to signal ‘discount rates’ of individuals, discount rates being indicative of whether an individual is a worthwhile long-term co-operative partner.<sup>12</sup> Normative behaviour, having an inherent transaction cost, is but a tool to show the willingness to make a sacrifice in the present for future benefit, thus representing a person who is a ‘good investment’.<sup>13</sup> Posner acknowledges that this model relies entirely on the assumption of rational choice.<sup>14</sup>

## II DRUZIN’S EXPANDED SIGNALING MODEL OF NORMS

The main difficulty is that a rational choice model does not accurately describe human behaviour,<sup>15</sup> as is evidenced from numerous behavioural experiments.<sup>16</sup> This has led some commentators to speculate that norms

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<sup>9</sup> John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, first published 1832, 1995 ed) 157.

<sup>10</sup> Druzin, above n 3.

<sup>11</sup> Eric A Posner, *Law and Social Norms* (Harvard University Press, 2000).

<sup>12</sup> *Ibid* 24-5.

<sup>13</sup> Posner, above n 11, 6.

<sup>14</sup> *Ibid* 46.

<sup>15</sup> John Scott, ‘Rational Choice Theory’ in G Browning, A Halcli and F Webster (eds), *Understanding Contemporary Society: Theories of the Present* (Sage Publications, London, 2000) 133.

<sup>16</sup> See, eg, Bryan Druzin, ‘Law Without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order within Commercial Systems’ (2010) 41 *Georgetown Journal of International Law* 1; Robert Axelrod & William D Hamilton, ‘The Evolution of Cooperation’ (1981) 211 *Science* 1390, 1392; Ernst Fehr, Urs Fischbacher & Simon Gächter, ‘Strong Reciprocity, Human

are no more than arbitrary preferences that happen to be shared.<sup>17</sup> The key difference with Druzin's model is that it does not rely on the traditional rational choice model, instead suggesting that internalisation of norms is an adapted evolutionary behaviour such that

evolution has generated an instinctual proficiency in working with norms as signals in whatever form they take – a proficiency that invariably manifests in an emotional context.<sup>18</sup>

By internalising the process of identifying normative signals a person is more likely to have an advantage in identifying suitable economic partners, which in turn increases the likelihood of success and survival.<sup>19</sup> A comparison to this internalisation process can be drawn to the human body internalising 'hunger' in order to ensure sufficient caloric intake rather than relying on the individual's reasoning to ensure that said needs are met.<sup>20</sup> Once internalised, the emotive response is instinctual and thus not reliant on whether, in a given circumstance, the signal in question is beneficial to send or receive.<sup>21</sup> It is not a novel idea that emotions are evolutionary traits;<sup>22</sup> however it is important to note that emotions are, of themselves, not normative beliefs. Druzin's theory does present a novel idea though; the idea that normative beliefs are simply internalisations of discount rate signals. If this concept is transported to Hart's theory of legal positivism we are given the position that both law and morals are governed by (internalised) discount rate signals which are the result of

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Cooperation, and the Enforcement of Social Norms, (2002) 13 *Human Nature* 1; W Guth et al., 'An Experimental Analysis of Ultimatum Bargaining' (1982) 3 *Journal of Economic Behavior and Organization* 367.

<sup>17</sup> Scott, above n 15.

<sup>18</sup> Druzin, above n 3, 15 (emphasis in original).

<sup>19</sup> Ibid.

<sup>20</sup> Druzin, above n 3, 16.

<sup>21</sup> Ibid.

<sup>22</sup> See, eg, François Nielsen, 'Sociobiology and Sociology' (1994) 20 *Annual Review of Sociology* 267, 277.

evolutionary adaptation. Equally, it stands that the rule of recognition is itself a discount rate signal. Consequently – the law is effectively a means of demonstrating one’s suitability as a long term economic partner.

### III SIMILARITIES AND DIFFERENCES

It is prudent to raise a distinction at this point between this conceptuality and legal utilitarianism, such as that those proposed by Epicurus<sup>23</sup> or Bentham.<sup>24</sup> Utilitarianism is the theory that the law should be made to create maximum social benefit, whereas this theory purports that the law is a result of people seeking to demonstrate their willingness to engage in behaviour that will result in maximum benefit for both themselves and the group. (If you will, the distinction is one of what the law ‘is’ versus what the law ‘ought to be’.)

Similarly, it should be noted at this point that, despite sharing an apparently ‘natural’ basis with natural law concepts, Druzin’s theory embraces the variation in normative values between various segments of societies, given that signals are somewhat idiosyncratic in their creation and the effectiveness of individual signals relies on their value within a given grouping of people.<sup>25</sup> It is similarly stated that norms may still arise due to their ‘inherent survival value, or as solutions to coordinated dilemmas’, thus implying that if a particular group is facing a pressing disadvantage a norm may develop, which will subsequently be internalised, in effect resulting in a moral stance.<sup>26</sup> This can be evidenced by analysing the following position put forward by Robert Nozick: If, in a jurisdiction such as the modern United States, slavery is considered a

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<sup>23</sup> See generally Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexus Butterworths, 2013), 56.

<sup>24</sup> Ibid 65.

<sup>25</sup> Druzin, above n 3, 20.

<sup>26</sup> Druzin, above n 3, 8.

violation of fundamental human rights and cannot be made into law, is taxation not, by requiring a person to surrender a portion of the gains of their labour, equivalent to forcing a person to work without recompense for a portion of their working week equivalent to the rate of taxation experienced and therefore in violation of the aforementioned fundamental right?<sup>27</sup> However, even should one agree with such a premise, it is unlikely one would argue that various tax assessment acts are not, in fact, valid law, more likely viewing the concept an artefact of sophistry.<sup>28</sup> There is a co-existence of a normative value against all slavery (which is a direct contrast to the historical acceptance of slavery) with normative value of the acceptance of taxation, which logically stems from its perceived public utility, both of which have been internalised, both of which existing under a normative value of law. The Expanded Signalling Model of Norms can explain this seeming contradiction by simple reference to the discount rate inherent in these internalised signals. Slavery, much like committing murder or cannibalism, signals a rather high discount rate as it is an indicator that economic partnerships with the sender carry elevated risks. ‘After all, what is a greater indication of disinterest in long-term cooperation than killing and eating the other person?’<sup>29</sup> Taxation, on the other hand, indicates an interest in future cooperation and thus is a signal of a low discount rate.

#### IV EFFECT OF ESM ON POSITIVISM

This capacity for changing and conflicting norms can be paralleled to Leiter’s description of the positivism of Hart and the like as ‘a *radical*

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<sup>27</sup> Robert Nozick, *Anarchy, State and Utopia* (Oxford, 1974) 169-72.

<sup>28</sup> D N MacCormick, ‘Law, Morality and Positivism’ (1981) 1 *Legal Studies* 131, 131.

<sup>29</sup> Druzin, above n 3, 30; Cf Leo Strauss, *Natural Right and History* (Chicago University Press, 1965) 3.

theory of law, one unfriendly to the *status quo* and anyone, judge or citizen, who thinks obedience to the law is paramount.’<sup>30</sup> If norms can contradict, then it follows that simply because a person believes in the rule of recognition and the norm that is ‘law’, that person does not need to normatively adopt the content of any given law within the system. If an individual disagrees with a given law they can 1) choose to obey the law and continue to recognize the source of law, 2) choose to *disobey* the law but still continue to recognize the source of law, or 3) choose to no longer personally recognize the source of law. There is no element of positivism that prevents any of these options. If sufficient people chose option 3, the rule of recognition fails and the entire system of law ceases to exist. Essentially, positivism is concerned with what the law ‘is’ (including whether or not there is in fact a valid system of law), not whether it ‘ought’ to be followed.

It is this ‘is’ versus ‘ought’ distinction that challenges the allegation that positivism promotes the expulsion of ethics and metaphysics from the law. Positivism is a technique for describing what law is, compared to what it ought to be, but it does not attempt to fix the law as invariable or ‘right’. E.S.M seeks to explain the mechanics behind social norms, including morals, but in the same way that positivism does not seek to assign value to law, E.S.M. does not attempt to engage with metaphysical considerations such as what norms would exist in an ideal society.

## V CONCLUSION

MacCormick has said ‘The problem is not that viciously oppressive laws do not exist, but that they do.’<sup>31</sup> By acknowledging such a possibility, the

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<sup>30</sup> Leiter, above n 1, 165 (emphasis in original).

<sup>31</sup> MacCormick, above n 28, 131.

very nature of positivism, as examined through the perspective of the Expanded Signalling Model of Norms, invites the participants of a system to engage with and evaluate laws, on both a morally and metaphysical basis. After all – you can't plot a course to a destination without knowing where you are starting from.