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Band 270

Post Positivism

By
Eric Engle



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Preface

Post-Positivism presents a unique theory of law. The work argues:

- (1) That positive law and natural law are complementary, not competing views.
- (2) That normative inference (is-to-ought) can be a logically valid form of reasoning.

This book thus presents resolutions to the two leading questions of contemporary legal theory.

This book also provides a dialectical synthesis of competing ontological, epistemological and axiological theories. Breaking both from Catholic natural law neo-Platonic idealism and from international relations theory realism (nominalism), the work argues for a monist (not dualist), materialist (not idealist), cognitivist (not relativist) and holist (not atomist) view. Thus, the work combines the best aspects of Catholic neo-Platonism (moral cognitivism, holism) and nominalism (materialism) to present a powerful scientific theory of law, which sees positive law and natural law as complementary (some laws are natural, such as the prohibition of murder, others are positive such as parking regulations). Finally, the work argues that logic must be understood as consisting of practical reasoning and theoretical rationality, and that a binary logic of “either true or false, only” is inadequate to explain legal phenomenon and that binary logic generates paradoxes, which can be avoided in multivariate logics.

Chapter 1 presents a comprehensive theory of law founded on correct ontological, epistemological and axiological bases and proposes that monism, materialism, and holism will have greater explanatory and predictive power than dualist, atomist and realist theory have had. The theory described, though focused on IR, is applicable to domestic law as well.

Western thought has long been predicated on either ontological materialism (matter determines mind) or ontological idealism (eidetic realism: mind determines matter). Usually, the materialist view is also monist (reality is fundamentally unitary); whereas the idealist view is generally presented as dualist (reality is fundamentally binary). This ontological choice between monist materialism or dualist eidetic realism generally has entailed either an atomistic epistemology (one can only comprehend reality by decomposing it into discrete real elements) or an epistemological holism (to under-

stand reality we must examine it as a whole). These epistemological and ontological choices also have usually entailed in turn either an axiology of moral scepticism and thus relativism (morals as intellectual constructs have no material existence) or of cognitivism (morals as expressions of the intellect are real entities), respectively.

In fact, these usual associations are not inevitable: Other choices are possible. The greater part of the Manichean conflict endemic in western thought is due to an erroneous linkage of ontology and axiology. Axiological dualism (good versus evil, us versus them) and ontological materialism (only the material world exists, so go make money) have been supposed, wrongly, as somehow necessarily consequent from each other. Materialist ontology can in fact be associated with an epistemology based not on atomism, the dominant western paradigm, but instead on holism. Likewise, axiology can be based not on relativism but on moral cognitivism, grounded not on eidetic realism but rather on materialism.

This work thus presents two ruptures from western thought. First, it describes a monistic materialist reality, which is understood *not* analytically but synthetically. Second, it describes moral choice not in relativist terms but as a fact of the material world. Rejection of eidetic dualism does not entail moral relativism. Adhesion to a materialist viewpoint does not entail atomism. These two key ruptures are the basis of a unique and far-reaching theoretical basis for legal analysis presented here.

Chapter 2 presents Aristotle's theory of justice in painstaking detail in order to understand the roots and extent of social conflict in western thought. Aristotle was the greatest scientist in western history. He established the scientific paradigm and the instruments thereof (materialism and logic). His work covered all the basic sciences: Astronomy, Botany, Logic, Mathematics, Meteorology, Philosophy, Psychology, Political Science, Rhetoric, Zoology. Aristotle's conception of justice pervades the law and heavily influences the Anglo-Saxon court system to this very day. Yet, Aristotle was racist, sexist and homophobic. He thought slavery was natural and good and that a woman's place was in the home. Because Aristotle is so influential these flaws have distorted western thought ever since. Purged of racism, sexism, and homophobia through exposure, Aristotle's concept of justice is then used throughout the rest of this work as the measure of the rectitude of law.

Chapter 3 addresses moral theory. Antiquity identified moral values, but selected the wrong values. Late modernity rejected the idea of moral values entirely, arguing instead for a subjective relativization of value choices. This chapter argues that moral values are cognizable in materialist terms and defines morality in materialist terms. Morality is that, which tends to

encourage survival of the human species. This chapter traces out the battle over the cognizability of truth and morality by examining the quarrel of universals among the scholastics and concludes that quarrel was the result of an erroneous binary epistemology that was incapable of coping with uncertainty. The erroneous epistemology of antiquity is explained by insights from contemporary logic. The breakdown of classical moral values during early modernity was inevitably possible due to the scholastics' erroneous belief that all values must be either true or false, only. It merely required historical circumstances in the form of two global wars and global communication to be actuated. Yet, the late modern subjectivist relativist view is also wrong. Understanding how we know what morals are allows us to better see that we can infer from normative statements by recasting them as conditionals. To date, relativism has won the quarrel of universals but as an alternative materialist cognitivist epistemology emerges I predict that situation will change.

Chapter 4 addresses logical aspects of moral reasoning and the relation of moral inferencing to the debates concerning natural law and positivism. Two false dichotomies: "no ought from is" and "either natural law or positivism" impair current legal thought. This chapter exposes those dichotomies and explains why they are not in fact accurate using Professor Duncan Kennedy's work as a foil for the exposition.

Chapter 5 looks to the influence of natural law theory on the theory of the state. Following the scholastics' reworking of Aristotelian logic, Western thought then reiterated natural law through Hobbes and generated a social contract theory used by Hobbes, Rousseau, and Locke. The social contract and the state of nature are accepted as legitimating myths in the liberal democracies. However, these myths do not correspond to reality. In contrast, a theory of natural law (*lex naturalis*, the law of the jungle, the law of the strongest) combined with *ius naturale* (natural justice – right reason in accord with the law of nature) is internally consistent and externally verifiable and thus an adequate description of reality. A certain theory of natural law is a consistent and complete axiomatic system – with more than purely formal value. Yet, natural law theories were rejected by late modernity in favour of pure positivism and voluntarism – with disastrous consequences. Natural law arguments are the basis of the individual rights underlying the social contract model of liberal democracy, and so the rejection of natural law should entail the rejection of social contract theory, yet did not.

So, contemporary theorists such as Dworkin, Rawls and Nozick struggle to this very day with the concept of the social contract and state of nature, without however consciously developing or deploying any tenable theory of natural law and are thus doomed to irrelevance and failure because both the

social contract and the state of nature as explanations of the origin of the state are myths and have no basis in history. A reconceptualisation of the foundations of the state requires recognition of the validity of natural law and the rectitude of the Aristotelian view that the state is inevitable, and a natural phenomenon. The social contract is no answer to the problems of state formation or legitimation. Liberal democracies would more consistently and coherently legitimate themselves by reference to laws founded not on a mythical social contract but rather on accurate reflections of the facts of human nature.

Chapter 6 looks at state legitimation – and the justification of judicial power – in light of the economic collapse of the 1930s, bringing into focus the theories of legal realism. Legal interpretation in the United States radically changed between 1930 and 1950. However, the new legal realist methods developed and used, which at first seemed to indicate a new legal order, in fact only preserved the old order, protecting it from fundamental change. Thus, the same problem, war resulting from economic cyclicality re-occurred in Vietnam sparking the critical legal studies (CLS) movement. Most recently, the wars in Southwest Asia and the Horn of Africa indicate that the ideas of the legal realists and critical theorists are not moribund. New legal movements will arise out of these wars, too. Contemporary scholars and students will almost certainly look back at the errors and victories of their elders. This chapter presents a retrospective of past legal discourse intended to help contemporary scholars situate their ideas contextually as part of a recurring struggle.

Chapter 7 continues to look at legal history to extend forward the analysis of Chapter 5 from the era of the Second World War to the 1980s and to see how that experience influences our view of moral theory. It argues that progressives took up the idea of moral relativism, hoping thereby to criticize the failed conservative morality. However, that doomed the left to irrelevancy and economism. By the 1980s, the Left became trapped and immobilized by the erroneous belief that normative inferencing be impossible. That erroneous belief paralyzes any moral critique and transforms all arguments into economic ones. This chapter suggests the way out is to recognize axiology on objective foundations and to situate political struggles in historical materialist terms.

Economic analyses of law triumphed from the failure of CLS to do more than merely disrupt hegemony. Chapter 8 looks at the now clearly ascendant economic analyses of law. Economic analyses of law predominate in the United States because they can claim to be objective and scientific and thus they are verifiable and can serve as the basis of predictions and reproducible experiments. However, though economism preserves some scientific

city in law despite (erroneous) moral relativism, several of the claims of economic analysis of law go too far and are entirely unrealistic. This explains why economic analysis of law has not been taken up outside of the U.S. to the extent it has in the U.S. This chapter points out the unrealistic presumptions within law and economics theory (homo economicus and efficient markets, mostly) and the unrealistic claims of law and economics (that the law is and should be a mirror of the economy). Economic analysis of law cannot and should not serve as a general basis of legal decision-making. However, as a special theory, applicable as a method for determining certain issues, economic methods can well inform legal decision, helping judges to shape justice correctly. This chapter exposes the competing schools within law and economics and presents a defensible version of economic methodology applied within legal discourse.

Natural law and moral inferencing were wrongly rejected by the left and led to sterile positivism. Chapter 9 examines the leading 20th century positivist, Hans Kelsen, in hopes of finding some guide or vision of the future. Unfortunately Kelsen's thought is sterile if not outright bankrupt. Kelsen's views are founded upon an epistemology, which is both objectivist, regarding the existence of truths, and subjectivist, regarding normative positions. This epistemological bifurcation leads to a variety of contradictions in Kelsen's positions, and explains his reversals regarding the possibility of normative inference, the real or metaphorical existence of a fundamental norm, and constructivism. Aside from these contradictions, this 'split' explains certain terminological ambiguities: Kelsen confounds conditionals (statements in the form of 'if then') with imperatives under one term, 'norm'. This ambiguity is only partially resolved through the distinction between "legal norm" and "legal statement", for the distinction between legal norm and legal statement is a distinction between the domain of legal science and of law. The confusion of a command (an imperative statement) and a conditional (a statement in the form of if then) remains, for the distinction between legal statement and statement of legal science refers to another thing entirely: the epistemological distinction between two different domains of study, and not to the epistemological distinction between two different intentional entities. Reversals on constructivism, normative inference, and the real or metaphorical character of the fundamental norm reveal that Kelsen's theory suffers from a fundamental conceptual flaw in the definition of his basic unit of analysis. The result is a theory that is not merely devoid of prescriptive utility (no normative content) but also is internally incoherent.

Chapter 10 continues the examination of legal history, extending forward from the 1980s to the present. Legal Realism, Critical Legal Studies, Post Modernism, and Marxism are all intertwined, somehow. This chapter

sees Marxist currents as the common thread throughout U.S. left legal theory. Marxism as an ideology never took off in the U.S. outside of law schools. However, there, Marxism seems to have overtly or covertly informed these three legal theories resulting in what, in Marxist terms, are revisionist, deviationist and sub-reformist lines. Examining legal realism, CLS and PoMo from the perspective of Marxism reveals extrapolations from some portions of Marxism into legal theory. This chapter concludes that legal realism did not “follow through” on its radical origins, that CLS stayed “radical” but never took state power and that PoMo is too open textured to be at all useful as a tool to fight against oppression or exploitation.

Chapter 11 presents a comprehensive and critical review of the work of the most influential contemporary American legal theorist, Duncan Kennedy. Currently, we are living through an era of post-positivist reintegration. The chapter draws on sources from European legal theory to present a comprehensive defence and critique of Professor Kennedy’s positions. Kennedy has had more influence than he thinks, but could become more influential were his work resituated through certain presuppositional moves. These moves are presented in outline form in this work.

Chapter 12 deepens the examination of the relations of language, logic, law and science started in Chapter 9. It argues that the study of law can and should be scientific and that the scientific basis of legal study is logic. This chapter particularly argues that the usual binary logic (‘either true or false, only’) is inadequate to explain all relations and generates enthymemes and paradoxes of material implication. This chapter argues for an understanding of logic as consisting of two branches – theoretical logic and practical reasoning, which can be studied either philosophically (Aristotle) or mathematically (Boole). The gist of this chapter is that materialism allows a scientific basis for the study of law, and that logic permits its formalization to reach the conclusion that law is not an autonomous or unscientific discipline. Law can be determinate and legal science is not autonomous because knowledge is grounded in material facts.

Chapter 13 presents a critique of Ronald Dworkin’s theory of rights discourse. The critique of rights discourse is then extended in chapter fourteen to show how Dworkin’s theory could be readily reworked to become a powerful basis for fundamental legal reform. Dworkin’s basic assumptions, that positivism and natural law are antithetical, and that “rights” and “policies” are fundamentally different, are flawed. The flaw arises from a misapprehension of the complimentary character of positive and natural law and a resulting misconceptualisation of the relationship between laws (conditional statements) and teleology (goals and policies). However, these flaws

can be readily remedied as shown in the final chapter to transform his theory into a force for real legal reform.

Chapter 14 then applies the theory and method to a concrete contemporary issue: the international human right to food. The right to food is at least a hortatory right, but is probably also a programmatic goal: as such, it can be used as a guide to the interpretation and application of other positive rights. This chapter argues that the right to food does itself have positivity, that it creates an obligation on the state to create the framework conditions as well as the provision of basic alimentation to all. However, even if the right to food were not a positive substantive right to at least minimal nutrition this chapter shows how it can be given effect at least as a hortatory norm and programmatic goal.

The work concludes that moral theories of law are positive when posited in materialist terms. It presumes as postulates an anthrocentric worldview, which aims to secure Aristotle's goal of the good life for all. Normative inferencing is possible as a variety of practical reasoning (phronesis) built on an ontological monist holism, an epistemological materialism, and an axiological cognitivism, a unique combination of concepts, which are often, wrongly, cast as incompatible.

Thank you for reading.

Eric Engle

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Chapter 1

Method: Ontology, Epistemology, Axiology

A. Introduction

In this chapter I present the method which will be applied throughout this book, by examining basic presumptions about life and law. The subject of theory is our basic assumptions. Theory examines and questions global assumptions of systems, which in turn enables us to work changes on that system. Legal theory is thus one key to systemic change. When a system becomes dysfunctional and collapses, the facts force people to reconsider their theories. Competing worldviews such as fundamentalism versus globalization struggle over economic outcomes and conflicting basic assumptions. If one is to understand and influence the interactions of entire systems, such as the Soviet system and U.S. capitalism or Islamic fundamentalism and Christian fundamentalism, then theory is necessary.

One reason that there is confusion in theory is epistemic. Although true consequences always follow from true premises, true consequences sometimes seem to follow from false premises.¹ We can have right answers for wrong reasons² which is my view of why errors persist in thought. Eventually however reality catches up to our beliefs.³ If our beliefs and reality do not correspond,⁴ we and those we love suffer.

These facts, and natural human curiosity, justify theoretical inquiry. Theory questions assumptions to explain dysfunction.⁵ If one is to understand,

¹ Karen K. Koehler, Michael D. Freeman, *Don't Fall for Defense Fallacies*, 36-NOV Trial 88 (2000); 2 Litigating Minor Impact Soft Tissue Cases § 12:24 (2005).

² Kenyon Bunch, *If Racial Desegregation, Then Same-Sex Marriage? Originalism and the Supreme Court's Fourteenth Amendment*, 28 Harv. J.L. & Pub. Pol'y 781, 840–841 (2005).

³ Francis J. Mootz III, *Nietzschean Critique and Philosophical Hermeneutics*, 24 Cardozo L. Rev. 967, 1036 (2003).

⁴ Ronald J. Krotoszynski, jr., *The New Legal Process: Games People Play and the Quest For Legitimate Judicial Decision Making* 77 Wash. U. L.Q. 993, 996 n. 11 (1999).

⁵ "Critical Race Theory scholars question the traditional assumptions of both liberals and conservatives with respect to the goals and means of traditional civil rights reforms." Harvey Gee, *Some Thoughts and Truths about Immigration Myths: The*

let alone influence, the interactions of entire systems then theory is necessary.

It is thus essential to start from correct first principles,⁶ yet, we must be open to the idea that what we think is correct is not. Sceptical⁷ certitude is a nice way to summarize what I think is the correct attitude towards our basic assumptions. We should do our best to be certain what we believe and why and constantly search for reasons we might nonetheless be wrong, for errors in our ideas.

Even with the right attitude – probing scepticism, which seeks to make sure what we believe really is so – we can still be confused about basic questions. This is because everything in life can ultimately be related to everything else if we just get creative.⁸ Of course, that leads to magical thinking.⁹ Where do individuals and groups draw lines?

I present here a theoretical methodology that I believe cuts through the confusion and uncertainty so prevalent in theorization. We start with a problematique. A problematique is a question set. By following the problematique, by answering the questions, we get to answers, at least for ourselves. But, if our answers are good enough, we can hope that others might see things as we do. This is not postmodernism with its tepid view of truth as subjective or intersubjective nor is it the idea that values are merely a question of taste. Rather it is liberalism, the understanding that my values, if correct, are by that very reason persuasive, that I respect myself and that I respect you and so rather than force my ideas on you I present them. They

“*Huddled Masses Myth: Immigration and Civil Rights* 39 Val. U. L. Rev. 939, 940 (2005); “An important contribution of feminist moral theory has been to question the firmly embedded assumption” Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents* 14 Cornell J.L. & Pub. Pol’y 251, 273 n. 82 (2005).

⁶ See, e.g. Rene DesCartes, *Meditations on First Philosophy*. While I am not Cartesian (he is dualist, I am monist), DesCartes radical scepticism, questioning basic presumptions to be certain they are true, is methodologically sound.

⁷ Scepticism in western theory can be traced back at least to William of Occam (Ockham’s razor: “*Essentia non sunt multiplicanda praeter necessitatem.*” – do not multiply entities beyond what is necessary to explain, author’s translation). See: *The Cambridge Companion to Ockham* ch. 5 (1999); DesCartes too was a sceptic. Louise Harmon, *Wild Dreamers: Meditations on the Admissibility of Dream Talk*, 79 Wash. L. Rev. 575, 634–635 (2004).

⁸ Donald T. Bogan, *ERISA: State Regulation of Insured Plans After Davila*, 38 J. Marshall L. Rev. 693, 704 n. 40 (2005).

⁹ “[M]agical thinking is a uniquely childlike inability to approach situations with an adult decision-making process. The child’s wishes become his/her reality.” Donna Sheen, *Professional Responsibilities Toward Children in Trouble With The Law*, 5 Wyo. L. Rev. 483, 490 n. 38 (2005).

are I think true, and you are welcome to disagree and correct me, I appreciate that in fact since that is the nature of science, to synthesize the most accurate view from incomplete and inaccurate views.

The problematique I present is: What is the nature of being? (Ontology)¹⁰ What is truth? (Epistemology)¹¹ What are our fundamental values (axiology)?¹² I think answers to these three questions determine more or less where we stand when it comes to law.¹³ I did not invent this problematique,¹⁴ but the answers I present are mine. I think 1) your answers to these questions will drive your practice of law. If you believe that life is a fundamental value then you will oppose the state killing, just for example. If you think “the truth is out there” you will take a philosophical view of the law. I cannot answer these questions for you. I can ask you these questions and I can show you my answers. I do think that these questions are related. Therefore, I ask those questions in the order I think is correct. If we know the nature of existence (ontology) then we can determine when something is true, false, unknown, or unknowable (epistemology). If we have a correct science of truth (epistemology) then we can determine whether a correct science of values (axiology) is possible and what it is.

¹⁰ “Ontology is the science of being, ‘the study of what is.’” Scott DeVito, *The Ontology of Copyright Infringement: Puzzles, Parts, and Pieces*, 35 Conn. L. Rev. 817 (2003). In computer science the word has a particularized meaning of a certain domain: “An ontology is a shared and common understanding of some domain that can be communicated across people and computers.” Thomas F. McInerney, *Implications of High Performance Production and Work Practices for Theory of the Firm and Corporate Governance*, 2004 Colum. Bus. L. Rev. 135, 176 (2004).

¹¹ Epistemology is the science of truth; it is “the branch of knowledge concerned with how knowledge is derived.” Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DePaul L. Rev. 1077, p. 1102 n. 110 (2005).

¹² “‘Axiology’ is derived from the Greek, *axios* meaning ‘worthy’ and *logos* meaning ‘science.’ As a general philosophical theory, it involves a study of ‘goodness, or value, in the widest sense of these terms. Its significance lies (1) in the considerable expansion that it has given to the meaning of the term value and (2) in the unification it has provided for the study of a variety of questions – economic, moral, aesthetic, and even logical – that had often been considered in relative isolation’.” Robert F. Blomquist, *Rethinking The Citizen As Prosecutor Model Of Environmental Enforcement Under The Clean Water Act: Some Overlooked Problems Of Outcome-Independent Values*, 22 Ga. L. Rev. 337, p. 406 n. 204 (1988).

¹³ Ontology could be described as “the science of being” of *ousia*: The object of ontology is to determine what is. Epistemology is the science of knowledge, that is the theory of how we know that, which we know. Epistemology is by nature recursive. Axiology is the science of moral choice, of fundamental values.

¹⁴ I wish to thank Prof. Christophe Grzegorzczak of the University of Paris X for presenting this problématique.