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Running Head: LEGAL POSITIVISM: THE LEADING LEGAL THEORY IN AMERICA

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by

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"Liberty is the prevention of control by others. This requires self-control and, therefore, religious and spiritual influences; education, knowledge, well-being." - Lord Acton

Introduction

The American Revolution emanated from a natural rights legal perspective. Since that time, there has been a shift in prevailing philosophies of law. The shift has been a dramatic departure from historical natural law theory to legal positivism, which is the current overarching structure within which modern American jurisprudence operates. Yet even so, there may be evidence of a post-modern push towards sociological law theory. The current legal positivist paradigm seems to be experiencing Kuhnian anomalies and the normal science of law is being challenged with sociological law, as this paper will attempt to demonstrate. Definitionally, positive law is understood to be "the expression of the will of the ruler(s)" and sociological law, simply put is understood to be "the expression of some 'localized' will of the people."[1]

Growth of Legal Positivism

Legal positivism began to take root in the American legal system after Natural Law fell into theoretical quicksand generated by Darwin's *On the Origin of Species* (1859). Darwin gave an alternative to the acceptability of the notion of God in intellectual communities. Charles William Eliot, president of Harvard University (1869-1909) embraced evolution and promoted science as "the key to truth in all fields of knowledge – history, philosophy, theology, politics and law" (Titus, p.3). Eliot appointed Christopher Columbus Langdell as the first dean of Harvard Law School. Langdell brought scientific method into the halls of Harvard Law. Langdell states in his

[1] Both definitions are ascertained from Dr. Robert Thetford, Faulkner University.

Cases and Contracts (1879) that "Law, considered as a science, consists of certain principles or doctrines… Each of these doctrines has arrived at its present state by slow degrees; in other words, a growth extending in many cases through centuries." (Titus, 1994, p. 4). So for Langdell and the lawyers being trained at Harvard, law became predicated upon evolutionary growth. U.S. Supreme Court Justice Oliver Wendell Holmes, although studying at Harvard Law a few years prior to Eliot and Langdell, nonetheless promoted legal positivism (http://www.answers.com/topic/legal-positivism). There is no need for a God in the fields of law. Man evolved, law evolved from man. Law without morality becomes about power, control and order, and not moral action, as emphasized by Justice Holmes "Between two groups of people who want to make inconsistent kinds of worlds, I see no remedy but force." (Quote DB, 2005). Under the influence and eventual guidance under Holmes as a Supreme Court Justice of the U.S., the paradigm of legal positivism became the reigning theory of law. Under this framework, law is necessarily separated from morality.

According to Christian legal theorist Rousas John Rushdooney, "…science today by-passes God and seeks to gain power without restraint and seeks knowledge as a tool of total power. Increasingly, science functions not under the law of God, but as the new law of creation, as the new source of law and power. The purposes of science can be summed up as prediction, planning, and control" (1971, p.55). Science as "source of law and power" means science has become god. Applying this goal of science to the field of law results in the end goal of law being that tool of power and control; Law is what judges say it is (Berkowitz, 2005). This, in the end, is congruous to Justice Holmes envisioning of force as the only solution to groups advocating different types of worlds.

Exemplary of this, is the easily seen fact that there is a stark departure from strict constitutional constructivism to interpretivism. Positivists care little for original intent of the founding fathers, because law and the U.S. Constitution is a living and evolving and society has changed so its meaning must as well. Arguably, this began taking shape with Abraham Lincoln's use of force to keep the Union together.[2] A strong case can be made, that when the states opted in to the union, they could opt out. Lincoln determined they would not be allowed to and used force to support his philosophical/legal position of centralization of power. Positive law sees authority emanating solely from the state who gives rights, not a Creator. The end result of positivism is statism. Again, Justice Holmes supports this separation of law and morality as evidenced by his statement "This is a court of law, young man, not a court of justice." (http://www.brainyquote.com/quotes/authors/o/oliver_wendell_holmes.html).

Judicial Examples of Legal Positivism

Two major features of legal positivism are to tend toward greater power being afforded the state over personal freedoms and elevation of personal freedom over accepted morality. Often this takes place through court systems ruling the legality or illegality of an action by the state or citizen. Often, there is departure from precedent and seemingly foundationless rulings. Examples might be seen in U.S. Supreme Court case *Lawrence v. Texas* 539 U.S. 558 (2003) where the court decides there is a fundamental Constitutional Right to engage in sodomy found in the Due Process Clause. Also, there is a fundamental right to an abortion created in *Roe v. Wade* 410 U.S. 113 (1973) where this right had never existed prior to that time unless granted by a state. Then through inaction, allows a state to rule that banning gay-marriage is unconstitutional in *Goodridge v. Massachusetts*

[2] See economist Thomas DiLorenzo's *The Great Centralizer: Abraham Lincoln and the War Between the States.* The Independent Review, v. III, n.2. Fall 1998.

Department of Health, (440 Mass. 1201, 802 NE2d 565 (Feb. 3, 2004)) when there is historical evidence that it could not have been considered so at any time preceding that decision in America.

In *Elk Grove Unified School District v. Newdow* (No. 02-1624 U.S. June 14, 2004) the Supreme Court rules that Newdow didn't have standing to bring the suit against the school district with regard to the "under God" clause in the pledge, hence getting out of having to deal with the issue (perhaps evidencing the struggle between positive and sociological leanings). In *Glassroth v. Moore* 347 F.3d 916 (2003), the 11th Circuit decided that a monument placed by an Alabama Supreme Court Judge which displayed the 10 Commandments was unconstitutional because it violated the First Amendment's Establishment Clause. Judge Moore argued that the monument was not a law, but "a decorative reminder of the moral foundation of American law." The U.S. Supreme Court in its silence speaks volumes. It can only be assumed to concur with the 11th Circuit's ruling that a monument placed on state property is a "law" for 1st Amendment purposes, which has no basis is reality, nor in American legal tradition, until the ruling mythically made it so.

Finally, Supreme Court Justice Antonin Scalia in his scathing March 1, 2005 dissent in *Roper v. Simmons* he finds that "The Court's reliance on the infrequency of executions, for under-18 murderers credits an argument that this Court considered and explicitly rejected in *Stanford*" [*Stanford v. Kentucky*, 492 U. S. 361, 370 (1989)](internal citations omitted). Scalia also illuminates the contradicting standards of the court in its determinations, citing that in *Hodgson v. Minnesota*, 497 U. S. 417 (1990) the American Psychological Association submitted evidence that juvenile (14-15) can make decisions similar to adults when contemplating aborting a child, but in this case argued that they can't be held responsible for a brutal murder because their faculties aren't developed. Conflicting standards and having rights evolve makes rule of law perhaps be more correctly called a rule of whim.

Cultural Examples of Legal Positivism

Hitler's Nazi party tried to use a positive legal defense at the Nuremburg trials by asserting that they were merely following orders. If there is no Creator, and the Nazi state passed a law that states that "Jews should be sent to Auschwitz and killed", and if law was merely the expressed will of the sovereign (and it was not overturned) then the law is valid, and therefore there was no action that Nazi's should have been tried under (Abadinsky, 2003, pp.9-10). The international community at Nuremburg clumsily fell back onto a Natural Law Theory while it suited their purposes.

Also exemplary of legal positivism's prevalence within America; the state has authorized itself to tax income (16th Amendment) and the rate at which taxation is done is up to the state; be it 50% of our income or the 99.5% rate on incomes over $100,000 proposed by President Roosevelt in 1941 (Roosevelt settled for a 90% cap) (Folsom, 2004, p.1). If law is what judges say it is, there is no positive basis to argue against tax rates of ninety-nine percent or more other than popularity (sociological law) or utility (rational law).

There is something inside most people that affirmatively tells them that a tax rate of ninety-nine percent and the actions of Hitler, Stalin, the Khmer Rouge, and other totalitarian government were immoral, regardless of what judges say. This issue was addressed December 10, 1948 with the adoption of the Universal Declaration of Human Rights. There is an attempt here to provide a baseline to follow. This is adopted as the international community's standard for human rights. The first three clauses are for the preamble state:

> Whereas recognition of the *inherent dignity* and of the *equal and inalienable rights of all members of the human family* is the foundation of freedom, justice and peace in the world; Whereas disregard and contempt for human rights

> have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which *human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people;* Whereas it is essential, *if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*… (Declaration of Human Rights, 1947) (emphasis added).

The Declaration sounds excellent, but what is important for this discussion is what is missing from the document *in toto;* a basis for the agreed upon dignity and worth. The foundation for this declaration *is* the United Nations. Contrast that with the Declaration of Independence and the U.S. Constitution that firmly plant the rights of its citizens in the identity and action of the Creator. Since the beginning of "international peacekeeping" with the United Nations Truce Supervision Organization or UNTSO (1948-present) which brought an end to the Arab-Israeli war (The Blue Helmets, 1996, p. 17-19), those holding to positivism seem to be futilely trying to disprove Justice Holmes aforementioned statement regarding the need to use force to hold competing worldviews in check; but this only verifies his statement.

Emergence of Sociological Law Paradigm

Recently, it appears that there is a competing paradigm that is either growing out of legal positivism in practice or outrightly confronting it. The Supreme Court of the U.S., with each ruling seems to take more of a sociological view of law. The more liberal Justices seem to have become

fond of citing "community standards" as reasons for their rulings.[3] These community standards are located in two distinct places, either the whole United States or the international community. Community standards are rarely being relegated to the states individually for a decision.

This now broadened standard seems to represent a new direction in dominant legal philosophy towards sociological law, or perhaps even a blending of the two concepts into a "legal socio-positivism." One of the defining features of this concept is stark departures from precedent and constitutions history. Supreme Court Justices are often overturning prior cases in the same court and declaring those decisions mistaken or incorrect or as in the recent case of *Roper v. Simmons* that the Constitution had changed. Justice Scalia elucidates the issue in his dissent, "… announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," of our national society." *Roper v. Simmons*; No. 03–633 (U.S. March 1, 2005).

Conclusion

[3] See *Lawrence v. Texas* 539 U.S. 558 (2003) – In overruling *Bowers v. Hardwick*, the court said that there was "*an emerging recognition* that liberty gave substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex ought to have been apparent when *Bowers* was decided" (emphasis added). See *Atkins v. Virginia* 536 U.S. 304 (2002) - stating that "a *national consensus*--with the consistency of the *direction of change* being more significant than the number of states--had developed against such executions, as evidenced by (a) the large number of states which had enacted prohibitions against such executions, (b) the absence of states reinstating the power to conduct such executions, and (c) the rarity of such executions even in states that allowed them" (emphasis added).
See *Roper v. Simmons* No. 03-633 (U.S. March 1, 2005) - affirming "the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual;" and "The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18.. The United States is *the only country in the world* that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain *fundamental rights by other nations and peoples* underscores the centrality of those same rights within our own heritage of freedom" (emphasis added, internal citations omitted).

In departing from precedent and hence historical interpretation, the Court has seized power and therefore can, and is, determining the moral, economic, and social direction that our country will take. This is not, nor was it ever in their power. The Bill of Rights initially only applied to the Federal Government (Siegel & Senna, 2004, p. 102). It was to protect citizens of the United States against federal usurpation of power, and not designed to protect Virginians, for example, from their elected officials. Through the Fourteenth Amendment to the Constitution (ratified in 1868), the Supreme Court, almost 100 years later applied the limits of power to the states as well (Gaines & Miller, 2005, p. 126). After bringing issues of states rights under its authority, the Supreme Court then proceeded under the leadership of Supreme Court Chief Justice Earl Warren to force the states to adhere to broader federal understanding of these rights. Now the current Supreme Court is using broader standards to interpret constitutionality.

The framers initial intent was to keep government small and localized (Hagelin, 2003, para 5). Local governments know the social attitudes and can be more responsive to constituencies better than state governments (DeMar, 2004, para. 8). State governments can respond better that the federal government. And the federal government can respond better than the international community can. The transfer of power has migrated in this direction, from the localities to the federal government, who is now looking to laws of other nations to interpret and create new laws and rights and then bind the state governments to new rights according to their design, based on their ideologies. The seat of so much power should never be limited to the whims of five justices. It will be interesting to see how the Supreme Court rules in the upcoming medical marijuana use case *Ashcroft v. Raich.* Will they assert states rights, or assert federal power? Under current interpretive methodology, our laws are whatever judges say they are, and there is no legitimate was

to rebel from that authority except via the ballot box. But it is this very ballot box that will be ushering in the next prominent legal theory, Sociological Law.

"Power tends to corrupt…" -Lord Acton

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