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# REVIEW ESSAY

## POSITIVISM, FORMALISM, REALISM

LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE. By Anthony Sebok.\* New York: Cambridge University Press, 1998. Pp. 327. \$59.95.

*Reviewed by Brian Leiter\*\**

*In Legal Positivism in American Jurisprudence, Anthony Sebok traces the historical and philosophical relationship between legal positivism and the dominant schools of American jurisprudence: Formalism, Realism, Legal Process, and Fundamental Rights. Sebok argues that formalism followed from the central tenets of Classical Positivism, and that both schools of thought were discredited—through misunderstandings—during the Realist period. Positivism’s essential tenets were reasserted by Legal Process scholars, though soon thereafter misappropriated by politically conservative theorists. In the concluding chapters of the book, Sebok argues that the recent theory known as “Soft” Positivism or “Incorporationism” holds out the possibility of redeeming the liberal political credentials of positivism.*

*In this Review Essay, Professor Leiter questions Sebok’s jurisprudential analysis. In Part I, Leiter sets forth the central tenets of positivism, formalism, and realism. In Part II, he critiques each step in Sebok’s jurisprudential argument. He shows that formalism has no conceptual connection with positivism, while realism is essentially predicated on a positivist conception of law. Moreover, Leiter finds that Legal Process has far greater affinities with Ronald Dworkin’s jurisprudence than with positivism. Finally, Soft Positivism cannot redeem positivism’s liberal credentials because positivism does not entail any political commitments in adjudication. Leiter concludes by questioning Sebok’s acceptance of the correctness of Soft Positivism as a theory of law.*

### INTRODUCTION

Anthony Sebok’s book tells the following striking story about the reception of legal positivism in American legal thought over the last hundred years. Although the term “positivism” did not figure significantly in academic discourse until the second quarter of this century (p. 32), “Classical Positivism” (the doctrine of Austin and Bentham) was the tar-

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This Review Essay is dedicated to the memory of my cherished and devoted friend, Milton Handler (1903–1998).

get of various writers from the late nineteenth century onwards under labels such as “formalism” and “analytic jurisprudence” (pp. 41–47).<sup>1</sup> Indeed, Sebok claims, “[f]ormalism [rightly understood] . . . was a form of positivism” (p. 108). The Legal Realists of the 1920s and later, for example, were opponents of positivism, even though they didn’t attack it under that name (pp. 3, 114). The anti-Realist reaction after World War II, reflected in the rise of the Legal Process school, was in fact predicated on an acceptance of the basic tenets of Classical Positivism (pp. 128, 159). Unfortunately, this revival of the insights of legal positivism was “hijacked” through the conservative appropriation of Legal Process by constitutional scholars like Alexander Bickel and Robert Bork (pp. 187–95).<sup>2</sup> The result was that positivism was henceforth unfairly viewed as an inherently conservative position (p. 179). Recent “Inclusive” or “Soft” versions of legal positivism, however, demonstrate why positivism is not an inherently conservative doctrine, and how positivists can accord due respect to the (constrained) role of moral considerations in adjudication (p. 316).

Sebok tells his story well and with copious documentation. In its historical dimensions, the book is often highly illuminating. Sebok does, indeed, show how the label “positivist” “has become a pejorative in modern American legal circles” (p. 2). He reveals the rather frightful misunderstandings of positivism that a host of twentieth-century thinkers—from Morris Cohen to Lon Fuller—latched onto and then ascribed (wrongly) to legal positivists like Austin, Bentham, and Hart (pp. 20, 39). At the same time, Sebok saves “formalists” like Langdell and Beale from some of the worst caricatures they suffered at the hands of their many critics (pp. 83–104). On all these counts, his historical research is thorough and his interpretive points are convincing.

But ultimately Sebok’s book turns on a jurisprudential argument, and here he is less successful. Indeed, Sebok introduces new confusions about and misunderstandings of positivism to replace those he so ably disposes of in earlier chapters. In particular, I will argue, against Sebok, that (1) positivism, as a theory of law, has no conceptual connection with formalism; (2) Legal Realism was tacitly committed to positivism as a theory of law; (3) Legal Process was *not* predicated on an essentially positivis-

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1. Although much of Sebok’s discussion until late in the book concerns “Classical Positivism,” it is worth noting that of the three theses Sebok attributes to Classical Positivism, only one (what Sebok calls the “command theory of law” (p. 31)) is rejected by contemporary positivists. Since the book’s ambitions are ultimately jurisprudential, rather than historical, I confine most of my attention to positivism, *simpliciter*, and bracket questions about the accuracy of Sebok’s historical account. Where something significant turns on a difference between Classical and contemporary positivism, I note that point either in the text or in the footnotes.

2. The vehicle for this transformation was Herbert Wechsler’s seminal essay—see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). Because the conservatives were “skeptical about the objective existence of moral concepts,” they took the demand for neutral principles to require that all constitutional interpretation be grounded in original intent (p. 188).

tic theory of law; and (4) positivism is not inherently “conservative” or “liberal”—though its proponents have generally been motivated by reformist and radical political goals—and thus, as a consequence, Soft Positivism does *not* redeem the (liberal) political credentials of positivism.

I proceed as follows. In the spirit of Sebok’s welcome project of trying to introduce greater clarity and consistency to our use of theoretical labels, I begin by setting out what I take to be the core theoretical commitments of “Positivism,” “Formalism,” and “Realism” (confining largely to the footnotes discussion of where I think Sebok goes wrong in his own presentation of these schools and movements). I then turn to the four points enumerated above, to illustrate in some detail where Sebok’s superficially attractive narrative fails as jurisprudential argument.

### I. THREE *ISMS*

#### A. *Positivism*

Positivism is a *theory of law*, i.e., about the *nature of law*. Such a theory aims to explain certain familiar features of societies in which law exists, and it proposes to do so by analyzing the “concept” of law. Conceptual analysis, of course, is not a mere exercise in lexicography.<sup>3</sup> As H.L.A. Hart observed: “[T]he suggestion that inquiries into the meanings of words merely throw light on words is false.”<sup>4</sup> Rather, Hart endorsed J.L. Austin’s view that “a sharpened awareness of words . . . sharpen[s] our perception of the phenomena.”<sup>5</sup> Thus, although Hart employs the *method* of conceptual analysis, he calls his project one of “descriptive sociology.”<sup>6</sup> As Joseph Raz puts it: “[W]e do not want to be slaves of words. Our aim is to understand society and its institutions.”<sup>7</sup> Conceptual analysis is simply the primary tool that the Hartian Positivist employs to this end.<sup>8</sup>

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3. Though it seems more than a little misleading to say, as Leslie Green does in his otherwise illuminating review, that Hart’s “book is not an exercise in linguistic philosophy.” Leslie Green, *The Concept of Law Revisited*, 94 Mich. L. Rev. 1687, 1688 n.1 (1996).

4. H.L.A. Hart, *The Concept of Law*, at v (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

5. *Id.* at 14.

6. *Id.* at v.

7. Joseph Raz, *Legal Positivism and the Sources of Law*, in *The Authority of Law* 37, 41 (1979) [hereinafter *Raz, Legal Positivism*]. For more on this theme, see Raz’s contribution to the recent symposium on Hart’s Postscript: *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 *Legal Theory* 249, 254–58 (1998).

8. Thus, Sebok is plainly mistaken when he writes that positivism “grounds the definition of law on the analytical separability of law and morality” (p. 7). This is misleading on two scores. First, positivists are not interested in defining law. They want to understand the concept of law, and while the word “law” and how it is used has evidentiary value as to the content of the concept, the positivist enterprise does not involve definition.

Second, Sebok’s formulation makes it sound as though the Separability Thesis, see *infra* text accompanying note 11, is sufficient for positivism, whereas it is equally central to

Which features of the concept of law require explanation for the positivist? Two are particularly important. First, *legal* norms are typically demarcated from other norms in society: One violates a *legal* norm by going faster than 65 m.p.h. on most highways, while one violates a norm of *etiquette* by talking with one's mouth full at the table. A theory of law tries to articulate the *criteria of legality*, i.e., the criteria a norm must satisfy in order to count as a *legal* norm as distinct from some other type. Second, *legal* norms play a distinctive role in the practical reasoning of citizens, i.e., reasoning about what one *ought* to do. If I say, for example, "Don't go faster than 65 m.p.h. on the highway," that may give you reasons for listening to me, depending, for instance, on whether you think I am a good driver, knowledgeable about the roads, or sensitive to your schedule. But when the legislature issues the same prescription—"Don't go faster than 65 m.p.h. on the highway"—that adds certain reasons for action that were not present when I articulated the same norm. Thus, a satisfactory theory of law ought to explain this special *normativity* of law as well.<sup>9</sup>

Positivist theories of law are distinguished by their commitment to the following two broad theses:<sup>10</sup>

**SOCIAL THESIS:** What counts as law in any particular society is fundamentally a matter of social fact.<sup>11</sup>

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positivism (as contemporaries like Jules Coleman and Gerald Postema have emphasized) that what counts as law be a matter of social fact or convention.

9. I will not discuss the positivist account of the "normativity" of law, which bears less directly on the argument here. For discussion, see Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A Companion to the Philosophy of Law and Legal Theory* 241, 244–49 (Dennis Patterson ed., 1996).

10. I borrow from my own contribution to the Postscript symposium. See Brian Leiter, *Realism, Hard Positivism, and Conceptual Analysis*, 4 *Legal Theory* 533, 534–35 (1998) [hereinafter *Leiter, Realism*]. This characterization differs slightly from the one presented in Coleman & Leiter, *supra* note 9, at 241, which now seems to me unduly narrow. The labels in the text were coined in Jules L. Coleman, *Negative and Positive Positivism*, reprinted in Ronald Dworkin and *Contemporary Jurisprudence* 28, 28–29 (Marshall Cohen ed., 1983) [hereinafter *Coleman, Negative and Positive*], and Raz, *Legal Positivism*, *supra* note 7, at 37, though both authors use them in a more narrow sense than that presented in *Leiter, Realism*, *supra*, at 534–35, and *Coleman & Leiter*, *supra* note 9, at 241.

11. In a discussion of the "Classical Positivism" of Austin and Bentham, Sebok distinguishes between two theoretical commitments: "the command theory of law"—that law was an expression of human will" (p. 31)—and "the 'sources thesis'—that every valid legal norm was promulgated by the legal system's sovereign, and that the norm's authority could be traced to that sovereign" (pp. 31–32). I do not want to enter here into a debate of merely historical interest about whether or not Sebok has rightly represented the views of Austin and Bentham. What is worth noting is that, as a conceptual matter, the Social Thesis, as defined in the text, is broad enough to cover Austinian Positivism, as captured by both Sebok's "command theory" and "sources thesis," as well as capturing all contemporary forms of positivism that repudiate the command theory.

SEPARABILITY THESIS: What the law *is* and what the law *ought to be* are separate questions.<sup>12</sup>

Positivists, of course, differ among themselves about the correct interpretation of these two theses. The most important recent debate concerns whether the Social Thesis should be interpreted as stating merely the *existence-conditions* for a Rule of Recognition (the rule that sets out a society's criteria of legality) or whether the Social Thesis also states a constraint on the *content* of the test for legal validity that any Rule of Recognition can set out. If the Social Thesis merely states the existence-conditions, then a Rule of Recognition is simply whatever Rule is constituted by the social facts about how officials actually decide disputes; as a result, such a Rule can incorporate tests of legal validity that make reference to moral and other substantive criteria of legality if these are the criteria officials actually employ to decide disputes. If, however, the Social Thesis also states a constraint on the content of the Rule of Recognition, then the criteria of legality a Rule of Recognition sets out must themselves *consist* in social facts, e.g., facts about pedigree or source. The former "Inclusive" or "Soft" Positivism has been defended by a

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12. Once again, in his treatment of Classical Positivism, Sebok formulates the Separability Thesis as follows: "[T]here is no necessary connection between law and morals" (p. 30). Sebok here adopts the formulation of his teacher, Jules Coleman, who also characterized the Separability Thesis with a modal operator ("necessary"). See Coleman, *Negative and Positive*, supra note 10, at 29. By contrast, in his classic paper, *Positivism and the Separation of Law and Morals*, 71 *Harv L. Rev.* 593 (1958), Hart does not use the modal formulation, employing instead something much closer to my formulation, above, of the Separability Thesis: "Bentham and Austin . . . constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be." *Id.* at 594. (In Chapter VIII of *The Concept of Law*, Hart does analyze the claim of "a necessary connection" between law and morality, and in the Postscript, he explicitly adopts Coleman's modal formulation. See Hart, supra note 4, at 156, 268.) The reason to prefer my own and Hart's early formulation over the modal formulation is that the modal formulation appears to make the Thesis trivial and uninteresting, as Coleman himself concedes, see Coleman, *Negative and Positive*, supra note 10, at 28. For the claim that there is no necessary connection between law and morals is true if there exists—or it is conceivable that there exists—one legal system that does not employ morality as a criterion of legal validity. Even Dworkin can acknowledge this. See Ronald Dworkin, *Law's Empire* 124–27, 431 n.4 (1986). The modal formulation also rules out a stronger separability doctrine (the one, in fact, favored by Hard Positivists), according to which truth as a moral principle can never be a criterion of legality. I think it is a desideratum in a characterization of the Separability Thesis that it allow for this possible reading as well as the modal formulation. The formulation of the Thesis presented in the text meets this criterion.

(Scott Shapiro suggests to me that "there is no necessary connection between law and morality" can be interpreted to mean either that "it is not the case that there is a necessary connection between law and morality" (Soft Positivism) or "it is necessary that there is no connection between law and morality" (Hard Positivism). To the untutored ear, I am inclined to think that only the former is suggested by the modal formulation, but if I am wrong, then there is no reason to prefer the modal characterization of the Separability Thesis over Hart's more generic "separate questions" formulation.)

number of writers<sup>13</sup>—including, importantly, Hart himself in the recently published Postscript to the second edition of *The Concept of Law*.<sup>14</sup> It is rejected by Joseph Raz<sup>15</sup> in favor of “Hard” Positivism and, in effect, by Ronald Dworkin, who thinks that Soft Positivism is not a positivistic view at all.<sup>16</sup>

The centerpiece of Hartian Positivism is the idea that in any society in which *law* exists there must exist a certain complex social fact (per the Social Thesis) constituting a Rule of Recognition that determines the criteria any norm must satisfy to count as a *legal* norm. Such a Rule of Recognition is just a particular instance of a more general phenomenon that Hart calls a “social rule.”<sup>17</sup> A social rule exists in a society when we find patterns of convergent behavior in accord with the rule and we find that participants in the convergent practice view the rule as a standard of conduct, to which they appeal both to justify their own conformity to the rule and to criticize those who deviate from the rule. With respect to a Rule of Recognition, we are interested in the patterns of convergent behavior evinced by relevant officials: e.g., how do judges decide questions about what the binding legal standards are? In the United States, for example, we find that arguments such as “This statute is invalid because it conflicts with the First Amendment,” or “This will is enforceable having been duly enacted in accord with the applicable state statute,” accurately state criteria of legality, while the argument, “This statute is void because

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13. Jules Coleman (on whose work Sebok relies heavily in the final chapter of his book) was not the first defender of Soft Positivism, but he has been its most systematic and innovative proponent in recent years. See Coleman, *Negative and Positive*, supra note 10; see also Jules L. Coleman, *Authority and Reason*, in *The Autonomy of Law* 287 (R. George ed., 1996) [hereinafter Coleman, *Authority and Reason*]; Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *Analyzing Law: New Essays in Legal Theory* 257 (Brian Bix ed., 1998) [hereinafter Coleman, *Second Thoughts*]; Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 *Legal Theory* 381 (1998) [hereinafter Coleman, *Incorporationism*]. Oddly, early on in the book, Sebok attributes to Coleman the argument that

legal positivism may be seen as a “semantic” theory of law, as a theory about the truthfulness of the argument that the rule of recognition identifies authoritative legal statements. He argued that positivism should not be seen as an “epistemic” theory of law—that is, as restricting or determining the content of the rule of recognition (p. 19).

This misstatement of the argument of Coleman’s well-known paper *Negative and Positive Positivism*, see supra note 10, makes it sound like a meta-jurisprudential paper about the status of legal theories, rather than an argument about the status of the Rule of Recognition. Coleman’s claim is that the primary function of the Rule of Recognition is semantic, i.e., setting out the truth-conditions for propositions of the form “The law on this point is X in this society,” rather than epistemic, i.e., enabling citizens to know what the law is.

14. See Hart, supra note 4, at 250–54. For further discussion of Inclusive or Soft Positivism, see generally Coleman & Leiter, supra note 9; W.J. Waluchow, *Inclusive Legal Positivism* (1994).

15. See especially Joseph Raz, *Authority, Law and Morality*, 68 *Monist* 295 (1985).

16. See Dworkin, supra note 12, at 127.

17. See Hart, supra note 4, at 55–56.

it is inconsistent with the principles set out in Book IV of Plato's *Republic*," does not. What we learn, in other words, by examining official practice is that the Rule of Recognition for our legal system identifies the federal Constitution and state statutes as valid sources of law (among many others), while it accords no such significance to Plato's *Republic*.<sup>18</sup> The positivist answer, then, to the conceptual question, "What is law?" is in essence: "Whatever satisfies the criteria of a society's Rule of Recognition," where the Rule of Recognition is a social rule as described above.

### B. Formalism

Whereas positivism is a *theory of law*, formalism is a *theory of adjudication*, a theory about how judges *actually do* decide cases and/or a theory about how they *ought to* decide them.<sup>19</sup> "Formalism" is, like "positivism," frequently used as an epithet, and thus inspires unflattering, and sometimes colorful, characterizations. The literature, moreover, is replete with differing statements of the doctrine, for example:

Formalism holds that "legal reasoning should [and thus can] determine all specific actions required by the law based only on objective facts, unambiguous rules, and logic."<sup>20</sup>

"Formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened."<sup>21</sup>

Formalism is "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."<sup>22</sup>

A non-jurisprudential writer paints an even more colorful portrait:

18. Of course, a Rule of Recognition for a complex legal system like the American one must be correspondingly complex. For example: "A rule is a valid rule of law in the United States if it has been duly enacted by a federal or state legislature and it is not inconsistent with the federal Constitution and if (for a state law) it is also not inconsistent with federal law or the state constitution; or if it figures in the holding of a court, and it has not been overruled by a higher court, or (in the case of non-constitutional issues) if it has not been overruled by a subsequent legislative enactment." Even this is far from complete. For example, in the modern administrative state, administrative agencies are also sources of binding legal norms.

19. Sebok's usage is slippery on this point. He refers to "formalism as a theory of law" (p. 48), which is harmless enough if all that is meant is that formalism is a theory of adjudication, adjudication being one part of "the law" in popular parlance. But this familiar way of talking leads Sebok into jurisprudential confusions, as will be discussed, *infra*, at Part II.

20. Steven J. Burton, *An Introduction to Law and Legal Reasoning* 3 (2d ed. 1995).

21. William Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621, 646 (1990).

22. Roberto Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 563, 564 (1983).

Pure formalists view the judicial system as if it were a giant syllogism machine, with a determinate, externally-mandated legal rule supplying the major premise, and objectively “true” pre-existing facts providing the minor premise. The judge’s job is to act as a highly skilled mechanic with significant responsibility for identifying the “right” externally-mandated rule, but with little legitimate discretion over the choice of the rule. The juror’s job is to do the best she can to discover the “true” facts and to feed them into the machine. The conclusion takes care of itself as a matter of logic.<sup>23</sup>

Beneath all the rhetoric, is there a coherent and (remotely) plausible position here?

Drawing on some of the literature already cited, as well as other familiar pieces in the “pantheon” of (or about) formalist jurisprudence,<sup>24</sup> we can usefully (and, I believe, accurately) describe “formalism” (used hereafter as a term of art) as committed to three theses. We can characterize the three theses most effectively by first introducing some special terminology.<sup>25</sup>

Let us call “the class of legal reasons” the class of reasons that may be legitimately offered in support of a legal conclusion, and that is such that, when it supports the conclusion, the conclusion is *required* “as a matter of law.” The class of legal reasons then will include not only (a) the valid sources of law (e.g., statutes, precedents, etc.), but also (b) the interpretive principles through which such sources yield legal rules, as well as (c) the principles of reasoning (e.g., deductive, analogical) by which legal rules and facts are made to yield legal conclusions. Let us say that the law is “rationally determinate” if the class of legal reasons *justifies* one and only one outcome to a legal dispute. Finally, let us say that judging is “mechanical” insofar as judges, in reaching conclusions about legal disputes, have no discretion. Judges exercise “discretion” if they either (a) reach conclusions about legal disputes by reasoning in ways not sanctioned by the class of legal reasons; or (b) render judgments not justified by the class of legal reasons.

Given these definitions, we may characterize formalism as the descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is *autonomous*, since the class of *legal*

23. Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. Rev. 419, 421 (1992).

24. See, e.g., Thomas Grey, *Langdell’s Orthodoxy*, 45 U. Pitt. L. Rev. 1 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); Frederick Schauer, *Formalism*, 97 Yale L.J. 509 (1988). I’m less confident the discussion in the text does any justice to the more philosophically ambitious type of formalism defended by Ernest Weinrib. See, e.g., Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949 (1988).

25. For more on this terminology, see Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory 481 (1995).

reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.<sup>26</sup>

This characterization is sufficiently broad to allow for competing interpretations of the central theses, interpretations that would reflect genuine differences among formalists. The “vulgar formalist” of popular imagination—who may have no real-world instantiation—believes that judicial decisionmaking is strictly syllogistic in the manner described so colorfully in the long passage quoted above.<sup>27</sup> He thus accepts the rational determinacy of law, the mechanical nature of judging, and the autonomy of legal reasoning. Vulgar formalism, though, is implausible because of its austere picture of the conceptual apparatus of “legal reasoning.” A sophisticated formalist like Ronald Dworkin, who has a rich theory of legal reasoning, still remains within the formalist camp because he sees the law as rationally determinate and he denies that judges have strong discretion (i.e., he denies that their decisions are not bound by authoritative legal standards). Some have thought that Dworkin denies the “autonomy” of legal reasoning,<sup>28</sup> but this accusation is patently question-begging: Dworkin’s claim is precisely that the moral considerations that ultimately fix a party’s legal rights are themselves part of the law. Dworkin simply has a richer picture of the class of legal reasons than other formalists—indeed, too rich for some formalists. Justice Scalia, for example, thinks that for judging to be genuinely mechanical (per the formalist’s ideal), the interpretive principles that are part of the class of

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26. In his discussion of the Realist critique of formalism, Sebok correctly emphasizes the formalist idea of the “autonomy” of law (or, more precisely, legal reasoning), though without being ideally clear about what kind of autonomy is at issue (e.g., causal, conceptual, rhetorical, etc.). Thus, he describes the thesis about the “autonomy of law” variously as follows: “law as an autonomous social practice (completely divorced from either morality or social science)” (p. 79); “any credible theory of law had to reject the idea that law was autonomous from either moral theory or the social sciences” (p. 80) (emphasis omitted); “formalists thought that legal reasoning was autonomous from moral or social concerns” (p. 82). These are actually three different kinds of claims: one about law as “social practice”; one about theories of law; and one about legal reasoning. I take it that what is really distinctive to formalism is closest to the latter: a commitment to the idea of the (conceptual) autonomy of legal reasoning, in the sense specified in the text above—namely, that the class of legal reasons justifies a unique outcome, and that judges, in reasoning their way to that outcome, have no discretion. Thus, even Sebok’s third formulation—which he dubs the “autonomy thesis” (p. 82)—is too broad, for moral and social concerns can figure in legal reasoning consistent with the autonomy of legal reasoning if those concerns are part of the class of legal reasons.

Sebok goes on to ascribe the “autonomy thesis” to “classical positivism” (p. 83). Putting aside the historical question of what Austin and Bentham would have thought, it is surely worth noting that the leading positivist of the twentieth century, H.L.A. Hart, does not appear to be committed to the autonomy of legal reasoning, given that he recognizes and welcomes the role of strong discretion in adjudication.

27. See *supra* text accompanying note 23; see also Neuborne, *supra* note 23, at 420–21.

28. See, e.g., Dennis Patterson, *Law and Truth* 77–78 (1996).

legal reasons must be austere simple, lest discretion sneak into adjudication under the guise of "interpretation."<sup>29</sup>

### C. Realism

It is a commonplace—so oft-repeated that it now has the status of dogma—that Legal Realism cannot be "defined," that the movement is too disparate in its concerns to be characterized coherently.<sup>30</sup> If one actually reads the Realists, however—as opposed to reading *about them*—the opposite turns out to be the case. For those writers who are, by any account, major figures in Legal Realism<sup>31</sup>—e.g., Karl Llewellyn, Jerome Frank, Max Radin, Underhill Moore, Hessel Yntema, Felix Cohen, Herman Oliphant, Leon Green, Joseph Hutcheson—all shared an interest in understanding judicial decisionmaking<sup>32</sup> and, in particular, shared certain substantive views about how adjudication *really* works. This has long been clear to lawyers whose work is actually informed by Realism. As one leading First Amendment scholar writes: "The sine qua non of legal realism was the belief that doctrine obscured more than it explained about why a court decided as it did. *Thereafter*, legal realists split into a variety of approaches to the law."<sup>33</sup>

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29. See generally Antonin Scalia, *A Matter of Interpretation* (1997). For a devastating critique of Scalia's explicit and implicit assumptions about meaning, see David Sosa, *The Unintentional Fallacy*, 86 Cal. L. Rev. 919 (1998).

30. For one recent version of this skepticism, see Neil Duxbury, *Patterns of American Jurisprudence* 65 (1995). Even Sebok sounds a similar theme (pp. 77–78). At the same time, Sebok also endorses the familiar claim that "[a]ntiformalism in law is at the foundation of legal realism" (p. 75). Realists were certainly antiformalists, but this way of describing Realism obscures the fact that Realists shared a positive view about what goes on in adjudication.

31. Getting a clear picture of Realism has been complicated in recent years by the "reinvention" of Realism by the Critical Legal Studies writers. The Crits typically treat as central to Realism the critique of the public-private distinction found in Realist contemporaries like the economist Robert Hale and the philosopher Morris Cohen. But Hale was, in fact, viewed as a marginal figure by his Realist contemporaries (and, indeed, had nothing to say about their central concern, adjudication), while Cohen was actually best known as a critic of Realism. For discussion of the CLS misreading of Realism, see Brian Leiter, *Is There an 'American' Jurisprudence?*, 17 Oxford J. Legal Stud. 367, 374 (1997); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Texas L. Rev. 267, 271–74 (1997) [hereinafter Leiter, *Rethinking Legal Realism*]. For examples of the CLS reinvention of Realism, see generally Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151, 1219–59 (1985); J. William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465 (1988); Morton J. Horwitz, *The Transformation of American Law: 1870–1960* (1992). The introductory essays and editorial selections in *American Legal Realism* (W.W. Fisher et al. eds., 1993) also reflect an essentially CLS vision of Realism.

32. A point that was equally a commonplace among an earlier generation of commentators. See, e.g., Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* 541 (1953) ("The leading realists centered upon the judicial process.").

33. L.A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 Const. Comm. 267, 271 (1989) (emphasis added).

More precisely, the Realists all embraced the following *descriptive* thesis about adjudication:<sup>34</sup> In deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons (the latter figuring primarily as ways of providing post-hoc rationales for decisions reached on other grounds).<sup>35</sup> Where the Realists differed was over *how* judges respond to the facts of a case. A minority of Realists—like Frank and Hutcheson—thought that idiosyncrasies of the judge's personality determined the decision (though neither held, as popular lore would have it, that "what the judge ate for breakfast" determined the outcome). As a result, predicting how courts will decide cases is impossible for this "Idiosyncrasy Wing" of Legal Realism.

The majority of Realists—sensibly recognizing that lawyers can and do predict judicial outcomes all the time—took a different view. Judicial decisions, this "Sociological Wing" of Legal Realism argued, fall into discernible patterns (making prediction possible), though the patterns are not those one would expect from examining the existing legal rules. Rather, the decisions fall into patterns correlated with the underlying factual scenarios of the disputes at issue: It is the judicial response to the "situation type"—i.e., the distinctive factual pattern—that determines the outcome of the case.<sup>36</sup>

Herman Oliphant offers a useful illustration of the point.<sup>37</sup> Oliphant examined a series of conflicting court decisions on the validity of contractual promises not to compete, cases that were utterly inexplicable by reference to the then-existing rules of contract law. Why, then, did the courts uphold some promises but not others? Oliphant finds the solution in the underlying "situation types" of the cases: In cases involving a promise by a seller of a business not to compete with the buyer, the promises were upheld; in cases involving a promise by an employee not to compete with his employer, the promises were generally not enforced. In each case, prevailing, but informal, "commercial norms" favored these differing outcomes. But instead of saying explicitly that what they were

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34. For a detailed defense of this interpretation, see Leiter, *Rethinking Legal Realism*, supra note 31; see also Brian Leiter, *Legal Realism, in A Companion to the Philosophy of Law and Legal Theory* 261, 261–80 (Dennis Patterson ed., 1996) [hereinafter *Leiter, Legal Realism*].

35. See, e.g., Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 75 (1928) (judges respond primarily "to the stimulus of the facts in the concrete cases before them rather than to the stimulus of over-general and outworn abstractions in opinions and treatises"). For further documentation and discussion, see Leiter, *Legal Realism*, supra note 34, at 270 *passim*.

36. This wing of Realism is "sociological" insofar as it takes the best explanation for why judicial decisions fall into these patterns to be that various "social" forces are at work determining the direction of judicial decision in a regular way. As Felix Cohen put it, "[a] truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as . . . even more importantly . . . a product of social determinants." Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 843 (1935).

37. See Oliphant, supra note 35, at 159–60.

doing was enforcing the norms of the prevailing “commercial” culture, the courts instead invoked general rules of contract law—rules that did nothing to explain the actual decisions.<sup>38</sup>

This Realist insight—that in the private law especially, what courts really do is enforce the prevailing, uncodified norms as they would apply to the underlying factual situation—is reflected in the teaching materials that Realists prepared. For the Realists, there was, for example, no law of torts, *per se*, but rather numerous laws of torts specific to differing situation-types. Thus, the Realist casebook was not organized by doctrinal categories—e.g., negligence, intentional torts, etc.—but rather by “situation types”: e.g., “surgical operations,” “keeping of animals,” “traffic and transportation,” etc.<sup>39</sup> So, too, the law of remedies was to be understood not in terms of the general legal remedies available, but, rather, in terms of the *types* of injury-situations for which remedies might be sought.<sup>40</sup>

Realists like Oliphant—who were, to repeat, the vast majority—thought that the task of legal theory was to identify and describe—not justify—the patterns of decision; the social sciences were the tool for carrying out this non-normative task. While the Realists looked to behaviorist psychology and sociology, it is easy to understand contemporary law-and-economics (at least in its descriptive or “positive” aspects) as pursuing the same task by relying on economic explanations for the patterns of decision.<sup>41</sup>

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38. Interestingly, the Restatement of Contracts Second has actually incorporated Oliphant’s distinction, now restating the rules in a more fact-specific way. See Restatement (Second) of Contracts § 188 cmts. f, g (1981). (I am grateful to Mark Gergen for pointing this fact out to me.)

But Oliphant’s point hardly belongs only to the past. A seminal study by the leading scholar of the law of remedies recently demonstrated that in 1,400 cases involving the “irreparable injury rule”—the rule that says courts won’t prevent harm, when money damages will compensate:

Courts do prevent harm when they can. Judicial opinions recite the rule constantly, but they do not apply it . . . . When courts reject plaintiff’s choice of remedy, there is always some other reason, and that reason has nothing to do with the irreparable injury rule. We can identify the real reasons for decision, and use those reasons to explain old cases and decide new cases.

Douglas Laycock, *The Death of the Irreparable Injury Rule* vii (1991). Like the Realists, Laycock also attributes the existing pattern of decisions to “[a]n intuitive sense of justice [that] has led judges to produce sensible results.” *Id.* at ix. For a similar argument regarding the law of federal courts, see Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 *Emory L.J.* 89, 89–90 (1998).

39. See, e.g., Leon Green, *The Judicial Process in Tort Cases* (1931).

40. See, e.g., Charles Alan Wright, *Cases on Remedies* (1955).

41. This ambition was clearest in the early work of Richard Posner. See, e.g., Richard A. Posner, *Economic Analysis of Law* 6 (1st ed. 1973); see also William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 *Ga. L. Rev.* 851, 851 (1981).

## II. A JURISPRUDENTIAL CRITIQUE OF SEBOK

A. *Why Positivism Is Not Formalism*

Sebok notes that Legal Realists, and even their critics, accepted Morris Cohen's wholly fanciful definition of positivism as "the fiction that the law is a complete and closed system, and that judges and juries [sic] are mere automata to record its will."<sup>42</sup> Now while this would do rather well as a rough account of formalism (as we have seen), it has nothing to do with the tradition that runs from Austin and Bentham in the nineteenth century to Hart and Raz in the twentieth. The point can be put simply: Positivism is a *theory of law*, while formalism is a *theory of adjudication*. If positivism is one's theory of law, nothing substantial follows about one's theory of adjudication. Indeed, it is perhaps the most notable failing of positivism as one of the great traditions in jurisprudence that it has so little to say about adjudication. In the seminal work of the tradition, Hart's *The Concept of Law*, some "observations" about adjudication—they hardly amount to a "theory"—figure only as an afterthought to the critique of Realism in Chapter VII.<sup>43</sup> There, we learn that Hart is, in effect, a "formalist" about easy cases (those cases in which the facts of the case fall squarely within the core meaning of the key word(s) in the applicable legal rule), but a "realist" (of sorts) about hard cases (those cases in which the facts fall within the penumbra of the meaning of the key word(s) in the applicable legal rule). In these latter cases, Hart thinks it the duty of judges to exercise discretion, that the existence of cases calling for discretion is an inevitable result of any complex legal system, and that the opportunity for individualized decisionmaking in the form of judicial discretion is a welcome, not objectionable, feature of a legal system.<sup>44</sup> Formalists like Dworkin and Scalia are, of course, committed to denying all of these latter claims made by the century's leading positivist. This, by itself, should give us pause before following Sebok in his identification of positivism and formalism.

What bears emphasizing, though, is that the two central commitments of positivism—to the Social Thesis and the Separability Thesis—entail no theoretically substantial claims about the nature of adjudication. A formalist about adjudication *might* be a positivist, but he could just as well be a natural lawyer. A positivist about the nature of law might think Realism gives the correct description of appellate adjudication. The two doctrines—positivism and formalism—exist in separate conceptual universes.

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42. Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 *Colum. L. Rev.* 237, 238 (1927) (quoted in Sebok at p. 41). Sebok slightly misquotes the original, which has "jurists," not "juries."

43. Hart, in fact, "confess[es]" in the Postscript "that I said far too little in my book about the topic of adjudication and legal reasoning . . ." Hart, *supra* note 4, at 259.

44. See *id.* at 135–36, 138.

Sebok misses all this. Throughout the book, he makes claims such as the following:

[A] useful way to redefine formalism would be to see it as a subspecies of positivism and hence consistent with the commitments of Austin and Bentham. (P. 3.)

[T]he basic elements of legal positivism . . . could be found hidden within those late-nineteenth-century theories of law associated with the idea that law is a complete and closed system. (P. 41.)

[W]hat historians today call “legal formalism” is basically a version of legal positivism . . . . (P. 42.)

Pound was right to equate formalism with classical positivism . . . . (Pp. 46–47.)

Beale, as a formalist, was also a positivist. (P. 103.)

American formalism was an heir to English classical positivism. This lineage has been obscured by the antiformalist critique, which manufactured a set of charges that misrepresented *formalism's* positivist core. (P. 104 (emphasis added).)

Formalism was not a theory of transcendental law. It was a form of positivism. (P. 108.)

Sebok does acknowledge that there were differences between positivism and *what was sometimes called* “formalism,” but he chalks these up to the unwarranted attribution of preposterous views to formalists like Beale and Langdell, who were said to believe things like “legal rules exist *a priori*; that is, their existence is a matter of objective fact unaffected by contingent historical events” (p. 75). Once we see that “formalists did not really embrace some of the more bizarre views” attributed to them, we see that it is correct “to equate formalism with classical positivism” (pp. 46–47). Sebok does a great service, to be sure, in demonstrating that Beale and Langdell did not hold these eccentric views (pp. 83–104), but he is wrong to think that this saves Pound’s equation of formalism and positivism. What is deeply misleading is the suggestion that one should think there is *any* conceptual connection between positivism as a theory of law and formalism as a theory of adjudication.

The following passages suggest how Sebok got misled:

[F]ormalism and classical positivism were committed to retaining a central role for logic in legal reasoning for the same reasons. The command theory and the sources thesis required that valid legal principles (however identified) generate legal conclusions; otherwise, legal results could not be traced back to the sovereigns that commanded them. (P. 107.)

The formalists . . . believed in classical positivism’s sources thesis to a fault: They believed that if every legal rule had a source, then there was a legal rule for every case. This is clearly wrong, but it is not wrong for the reasons proffered by the antiformal-

ists. The main motivation for their error was to preserve the core positivist idea that the law constrains judges . . . (P. 110.)

The central confusion is found in the nonsequitur from the first passage: The interpretation of the Social Thesis according to which every legal norm must have a social source is a theoretical position that is *silent* on legal reasoning. All it says is that norms that lack a social source (e.g., being commanded by the sovereign) are not legal norms. There is no “core positivist idea that the law constrains judges,” for positivism is not a theory about what judges do, but about the concept of law, and, in particular, the relationship between legal norms and moral norms.

But perhaps this refutation is too quick. One might try to salvage Sebok’s point as follows.<sup>45</sup> A Rule of Recognition is a social rule meaning that, at a minimum, it is constituted by social facts about how officials (i.e., judges) decide questions about what the law is. What this means is that there can *not* be too great a gap between what the law is in a particular society and how judges decide cases, for the very idea of “what the law is” is (for positivism) conceptually dependent on the actual practice of officials (including judges) in deciding “what the law is.” Thus, there *is* a conceptual link between positivism and a theory of judicial decisionmaking, and, in particular, positivism entails the formalist idea that judges decide cases in a way that is rationally determinate as a matter of law *and* that does not involve the exercise of discretion.

This possible rejoinder on behalf of Sebok is, itself, too quick. Notice, to start, that it is compatible with the Rule of Recognition being a social rule that, say, appellate judges always exercise discretion in deciding cases (and thus fail to realize the formalist ideal). For appellate judges are only a subset of the universe of judicial officials who might manifest their acceptance of the Rule of Recognition from an internal point of view (i.e., appealing to the same criteria of legal validity when answering questions about “what the law is”) and in doing so might accept from an internal point of view the Rule of Recognition that describes their behavior. In that event, there would be a social rule constituting a Rule of Recognition even though some officials, namely appellate judges, always exercise discretion.

There are different ways, too, in which the law may fail to realize the formalist’s ideal of rational determinacy. The class of legal reasons is *indeterminate* if it justifies *any* outcome on a given question. The class of legal reasons is *underdeterminate* if it justifies more than one but not simply any outcome on a given question. Any plausible thesis about the inde-

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45. Something along these lines is hinted at in Sebok’s discussion of Legal Process, where he makes the following remark: “Unless a legal rule can, at some level, constrain the preferences of the law applier, there is no point in talking about the rule of recognition, because legal rules appear and disappear with each new judgment by a legal actor” (p. 4). My formulation of the argument in the text is much indebted to Scott Shapiro, who first called these issues to my attention in connection with other work of mine on the relationship between Legal Realism and Positivism.

terminacy of law is, strictly speaking, a thesis about the *underdeterminacy* of law.<sup>46</sup> Now the class of legal reasons in a particular legal system is constituted, at least in part, by that system's Rule of Recognition. If the class of legal reasons is underdeterminate, that means that it still constrains the decisions of officials who are exercising discretion—for officials have discretion, recall, simply when the class of legal reasons fails to justify a *unique* outcome. Thus, even our appellate judges who, by hypothesis, always exercise discretion still may be guided by the Rule of Recognition, just like the other officials of the legal system. But saying this is still compatible with denying the formalist idea that they lack discretion, for the Rule of Recognition (and the class of legal reasons it helps define) still *underdetermines* any particular decision. Formalism can be false, and the Rule of Recognition can still be a social rule. The real conceptual link, in short, is not between positivism and formalism, but between positivism as a theory of law and the idea that judicial behavior (including, *perhaps*, the behavior of appellate judges) is constrained in some measure (even if not fully determined) by the criteria of legal validity set out in the society's Rule of Recognition. But formalism demands more than mere constraint, as we have seen already.

#### B. *Why Legal Realists Are (Tacit) Legal Positivists*

In a well-known earlier paper, incorporated into the present book, Sebok wrote that “[l]egal realism and legal positivism were, in fact, deeply antagonistic theories.”<sup>47</sup> The same theme is, as already suggested, central to the present volume. Thus, for example, Sebok writes early on that

[A] useful way to redefine formalism would be to see it as a sub-species of positivism and hence consistent with the commitments of Austin and Bentham. By extension, therefore, the rise of legal realism in the early twentieth century was in no small part an attack on some of the basic elements of legal positivism. (P. 3.)

Moreover, he claims later in the book that “legal positivism was the object of realism’s attack in the 1920s and 1930s” (p. 114).

Now Sebok is no doubt correct that the Realists *thought* they were opposed to positivism. But this is because the Realists, like most writers at the time, either had no idea what positivism meant or associated the term with figures who, themselves, conflated positivism and formalism. This is clear enough from material Sebok quotes. Thus, Hessel Yntema wrote that “the typical interest of a genuine legal positivist is in logic and form,” in contrast to the interest of the Realists.<sup>48</sup> Realists were, indeed, opposed to formalism, but once we sever the conceptual link between posi-

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46. See Leiter, *Legal Indeterminacy*, supra note 25, at 481–82 & n.1.

47. Anthony J. Sebok, *Misunderstanding Positivism*, 93 Mich. L. Rev. 2054, 2094 (1995).

48. Hessel E. Yntema, *Jurisprudence on Parade*, 39 Mich. L. Rev. 1154, 1164 (1941) (quoted in Sebok at p. 21). Yntema is responding to an equally ridiculous characterization

tivism and formalism, there is no reason to assume that the Realists were opposed to positivism as well.

In fact, the Realists *had* to be legal positivists, albeit tacit ones. For the Realist arguments for the indeterminacy of law—like *all* arguments for legal indeterminacy<sup>49</sup>—in fact depend upon a theory of law, an account of the *concept* of law. Remember that to say that the law is indeterminate is to say that the class of legal reasons fails to justify a unique outcome. To know whether that claim is true, however, we must have some account of the class of legal reasons, i.e., the reasons that may properly justify a conclusion “as a matter of law.” So, for example, in our legal system, we know that appeals to a statutory provision or a valid precedent are parts of the class of legal reasons, while appeal to the authority of Plato’s *Republic* is not. Any argument for indeterminacy, then, presupposes some view about the *boundaries* of the class of legal reasons. When Oliphant argues, for example, that the promise-not-to-compete cases are decided not by reference to law, but by reference to uncodified norms prevalent in the commercial culture in which the disputes arose, this only shows that the law is indeterminate on the assumption that the normative reasons the courts are actually relying upon are not themselves *legal* reasons. So, too, when Holmes chalks up judicial decisions not to legal reasoning but to “a concealed, halfconscious battle on the [background] question of legislative policy,”<sup>50</sup> he is plainly presupposing that these policy concerns are not themselves *legal* reasons. The famous Realist arguments for indeterminacy—which focus on the conflicting, but equally legitimate, ways lawyers have of interpreting statutes and precedents<sup>51</sup>—only show that the law is indeterminate on the assumption either (1) that statutes and precedents largely exhaust the authoritative sources of law or (2) that any additional authoritative norms not derived from these sources conflict. It is the former assumption that seems to motivate the Realist arguments. Thus, Llewellyn says that judges take rules “in the main from authoritative sources (which in the case of law are largely statutes and the decisions of the courts).”<sup>52</sup>

What concept of law is being presupposed here in these arguments for legal indeterminacy, a concept in which statutes and precedent are part of the law, but uncodified norms and policy arguments are not? It is certainly not Ronald Dworkin’s theory, let alone any more robust natural law alternative. Rather, the Realists are presupposing something like the (“Hard”) positivist idea of a Rule of Recognition whose criteria of legality

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of positivism by Lon Fuller, who made a veritable career out of misunderstanding the positions he thought he was attacking. See the relevant remarks quoted in Sebok at p. 20.

49. On this point, see Leiter, *Legal Indeterminacy*, *supra* note 25, at 492.

50. O.W. Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457, 467 (1897).

51. The classic discussions are K.N. Llewellyn, *The Bramble Bush* 72–75 (1930) [hereinafter, *Llewellyn, Bramble Bush*]; Max Radin, *Statutory Interpretation*, 43 *Harv. L. Rev.* 863 (1930); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *Vand. L. Rev.* 395 (1950).

52. Llewellyn, *Bramble Bush*, *supra* note 51, at 21.

are exclusively those of pedigree: A rule (or canon of construction) is part of the law by virtue of having a source in a legislative enactment or a prior court decision.<sup>53</sup>

### C. *Why the "Jurisprudence" of Legal Process Is Not Positivism*

Sebok claims that "[w]riters working within the legal process tradition did . . . operate with a background theory of law that was a version of legal positivism, although this background theory was not, at the time, called as such" (p. 113). Chapter 4 of Sebok's book presents an admirably sympathetic and fair-minded reconstruction of the central themes of Legal Process; indeed, it is such a useful introduction to Legal Process that one can only regret that the chapter is marred by the mistaken hypothesis that Legal Process was committed to legal positivism. In fact, Chapters 4, 5, and 6 can stand on their own as an excellent survey of Legal Process, its influence on theories of constitutional interpretation, and the post-Process reaction in constitutional theory of the 1960s and 1970s. Because, however, the central thesis of Chapter 4—that Legal Process represented a revival of the key elements of positivism—is mistaken, the fundamental narrative of the book collapses at this point.

Sebok locates the core idea of the Legal Process theory of adjudication in its call for "reasoned elaboration" of judicial decisions:

[A] judgment accompanied by a reasoned justification—whatever its political outcome—was better than a judgment alone even if it reflected the "right" result.

. . . .

Thus, reasoned elaboration was a theory of adjudication in which reason served three functions: It controlled political willfulness, it provided the public with principles around which action could be planned, and it helped increase the likelihood of the right outcome. It is clear that the realists would have denied each of these propositions. (Pp. 126–27.)

Sebok is surely correct that the Realists would have denied these central claims of Legal Process, but it also bears noting that Legal Process amounts to little more than a denial of Realism's contrary claims: There is nothing in the corpus of Legal Process that would count as a principled response to the Realists' skeptical attack on the idea of a "method" of legal reasoning that would constrain judicial decisions. Legal Process merely reaffirms what the Realists had argued against twenty years earlier.

But why think the commitment to "reasoned elaboration" betrays a commitment to positivism? Here Sebok's argument is strained. He says, for example, that the "principle of institutional settlement" endorsed by Hart and Sacks—according to which "a decision which is the due result

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53. One difference is that most positivists recognize customary practices as sources of valid law, whereas it is not clear what the Realists think about this. For a more substantial argument for this conclusion, see Brian Leiter, *Legal Realism and Legal Positivism Reconsidered* (forthcoming 2000) (manuscript on file with the *Columbia Law Review*).

of duly established procedures [should] be accepted whether it is right or wrong”<sup>54</sup>—shows that they “recognized that there is no necessary connection between law and morality and therefore embraced a central tenet of legal positivism, the separability thesis” (p. 130). But the principle of institutional settlement shows nothing of the kind. Most obviously, the principle is not even being advanced as a claim about the concept of law at all; indeed, on its face, it is a claim about when the decision of a court should be “accepted” or obeyed—a question of *moral* obligation, not the positivist’s question about *legal* obligation. Hart and Sacks endorse, in this regard, a procedural requirement for the *legitimacy* of law, but this sheds no light on whether they think morality is or is not a criterion of legality.<sup>55</sup> Somewhat later, Sebok claims that Hart and Sacks believe that “law performs a coordination function” that “is consistent with recent theories of legal positivism” (p. 134). That a view about the purpose of law is merely *consistent* with positivism is, however, far too weak to establish that the view of law at issue is based on positivist premises.

If the affirmative reasons for ascribing positivism to Legal Process are thin,<sup>56</sup> the explicit evidence counting against such an ascription is strong. Indeed, the giveaway should be the fact that, as Sebok notes, Hart and Sacks relied on Lon Fuller’s work “to set out the essential features of adjudication” (p. 144). Sebok continues: “They cited to Fuller so frequently, and used his terminology so naturally, that there is good reason to believe that Hart and Sacks self-consciously adopted his view of adjudication” (pp. 144–45). Now since Sebok is well aware that Fuller is “the single most important critic of legal positivism in postwar America” (p. 160),<sup>57</sup> the question is why the concession that Legal Process embraces Fuller’s view of adjudication doesn’t vitiate the claim that Legal Process is predicated on positivism?

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54. P. 130 (quoting Henry M. Hart, Jr. & Albert M. Saks, *The Legal Process: Basic Problems in the Making and Application of Law* 109 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

55. One might object, though, as follows: If Hart and Sacks really believed that morality were a criterion of legality, then they would have no need of a procedural criterion for the legitimacy of law. This inference is warranted, however, only on the assumption that every court decision correctly applied the criteria of legality. Given the implausibility of this latter assumption, there might still be need for a non-substance-based account of legitimacy even for theorists who believe morality is a criterion of legality.

56. Sebok’s attempt to demonstrate the positivist foundations of Legal Process is long, and all of it is, in my judgment, as implausible as the examples discussed in the text above. Thus, for example, Sebok also says that “Hart and Sacks’s claim that law required the application of practical reasoning in order to identify norms and to determine the scope of authority granted by the law maker was essentially the same as the sources thesis” (p. 159). The Sources Thesis, however, says that legal norms must have a social source. It says nothing about practical reasoning or the proper methods for interpreting sources. By the logic of Sebok’s position, any theory of adjudication that was concerned “to determine the scope of authority granted by the law maker” would be equivalent to the Sources Thesis.

57. This overstates, in my view, Fuller’s importance, since so many of his criticisms were based on confusions about positivism.

Sebok dodges this natural objection by arguing that Hart and Sacks did not, in fact, accept Fuller's "internal morality of law" (pp. 158–76), i.e., his notion that to constitute law, any set of norms must adhere to certain essentially procedural norms, which constitute a minimal moral content of any legal system.<sup>58</sup> We needn't consider whether Sebok is right on this point, for it actually misses the real worry: not that Hart and Sacks embraced Fuller's notion of the "internal morality of law," but that they embraced a picture of adjudication, and hence of what legal rights courts should enforce, that was, like Fuller's, incompatible with positivism. The real worry, in short, is that the Legal Process theory of adjudication as "reasoned elaboration" involves an essentially anti-positivist view of law, because it makes morality a criterion of legality by its emphasis on "purposive" interpretation.

"Reasoned elaboration," according to Hart and Sacks, requires judges to make decisions that are *consistent* and that reflect the *purpose* of the laws they are asked to interpret: "[E]very statute and every doctrine of unwritten law developed by the decisional procedure has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or agree exactly how it should be phrased."<sup>59</sup> According to Sebok, "consistency and purpose . . . were essential features of a legal system" (p. 138) for Legal Process. Thus, it follows that "[t]here are norms embedded in the law for judges to discover" (p. 181), where that discovery is effected by looking to the underlying purpose of the law while, all the time, making the present decision consistent with those that preceded it.

In identifying the jurisprudential view with which this picture of adjudication most clearly resonates, it would seem bizarre to single out positivism. For the conception of "law as integrity" of Ronald Dworkin—positivism's arch-opponent—echoes Legal Process note for note.<sup>60</sup> According to Dworkin, "propositions of law are true if they figure in or follow from the principles . . . that provide the best constructive interpretation of the community's legal practice."<sup>61</sup> A "constructive interpretation," in turn, is one that "impose[s] purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."<sup>62</sup> A party's legal rights, in short, are those that *cohere* (are consistent) with the best interpretation of the purposes of the law. This is just the Legal Process theory of adjudication rendered in the more precise vocabulary of analytic jurisprudence.

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58. Sebok aptly summarizes Fuller's views, as well as H.L.A. Hart's response, at pp. 160–68.

59. Hart & Sacks, *supra* note 54, at 148 (quoted in Sebok at p. 138).

60. The resonances go beyond those suggested in the text. For example, Hart and Sacks draw a distinction between principles and policies similar to the one Dworkin drew in his early work. On this, and related points, see Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 *Ariz. L. Rev.* 413 (1987).

61. Dworkin, *supra* note 12, at 225.

62. *Id.* at 52.

Now it is surely possible that Hart and Sacks would dissent from Dworkin's idea that the *best* interpretation of the law is one that shows its coherent purpose to be "best" from the standpoint of political morality.<sup>63</sup> But all this brings out is that the Legal Process writers were not explicit, or even self-conscious, about how their views intersected with the debates that animate analytic jurisprudence. If one is forced to choose, then it is tempting to conclude that Sebok has it exactly backwards: Legal Process writers are not *sotto voce* positivists, but proto-Dworkinians.<sup>64</sup> Indeed, since Sebok concedes that Hart and Sacks are Fullerians about adjudication (even if they repudiate the idea of the "internal morality of law"), and since he also acknowledges that "Dworkin's critique [of positivism] . . . picked up where Fuller had left off" (p. 268), he should hardly find this conclusion surprising.

#### D. *Soft Positivism and Politics*

Sebok's failure to make the case that Legal Process is a form of legal positivism does have the unfortunate effect of ruining the narrative structure of the book. Sebok can be perfectly correct that Legal Process was co-opted by conservative thinkers, and that the "fundamental rights" school of constitutional law constituted a flawed response to this hijacking (Sebok's Chapter 6), but none of this has anything to do with legal positivism. Nonetheless, Sebok presents the development of "Soft" or "Inclusive" Positivism as a "much more powerful response to the fundamental rights approach" (p. 267),<sup>65</sup> in particular, with respect to the latter's attempt to provide an alternative to the conservative reading of Legal Process. But Soft Positivism is nothing of the kind; indeed, the whole suggestion that a theory of law has certain *necessary* political overtones—while certainly a fashionable accusation in the confused discussions of jurisprudence that populate the law reviews<sup>66</sup>—reflects a misunderstanding of the philosophical issues at stake.

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63. On Dworkin's view in this regard, and some of the problems it faces, see Brian Leiter, *Objectivity, Morality, and Adjudication*, in *Objectivity in Law and Morals* (Brian Leiter ed., forthcoming 1999) (manuscript on file with the *Columbia Law Review*).

64. To put the point less anachronistically, the Legal Process writers are self-conscious Fullerians, and as such could not be positivists. Dworkin, in turn, gives the most sophisticated realization of the alternative to positivism at which Fuller gestures. See the quote from Sebok that follows in the text.

65. The "fundamental rights approach," according to Sebok, floundered over the problem of the "insatiability" of moral reasoning: "Conscientious decision makers applying a moral value must test and revise each and every step of their practical reasoning against the theory of morality they believe is true" (p. 301).

66. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 *Minn. L. Rev.* 265, 276 n.38 (1978); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L.J.* 1, 60 (1984).

Recall that Soft Positivism<sup>67</sup> interprets the Separability Thesis as stating a modal existential generalization of the following form: It is (conceptually) *possible* that there exists *at least one* Rule of Recognition, hence one legal system, in which morality is not a criterion of legal validity. Thus, Soft Positivists can allow that *all* existing legal systems employ moral criteria of legality; all that Soft Positivism demands is that it is *conceivable* that a legal system might not make morality a criterion of legality. Thus, Soft Positivism makes the Separability Thesis trivial.

Soft Positivism, in turn, interprets the Social Thesis as stating only the existence-conditions for a society's Rule of Recognition, but as remaining silent on the content of that Rule (i.e., the criteria of legality that the Rule sets out). This follows from the fact that the Rule of Recognition is a social rule, one whose existence is constituted by the actual practice of officials in deciding disputes. Thus, insofar as officials decide questions about "what the law is" by reference to moral criteria, morality is a criterion of legality.<sup>68</sup>

Now why think such a doctrine would have *any* particular political consequences—why think, in other words, that it will help discredit the idea that "positivism is a theory of law for judicial conservatives" (p. xii)? Notice that Soft Positivism, as a doctrine about the nature of law, is *silent* on the content of morality. But surely the political implications of Soft Positivism depend on the content of the moral criteria of legality. Absent a substantive philosophical thesis about the demands of morality, any Soft Positivist theory is politically inert.

This should not be surprising. Positivism, as we saw above,<sup>69</sup> is a theory that aims to explain certain familiar features of law—law's special normativity, the idea that law is different from morality—rather than to answer substantive questions of political theory. It is true, of course, that as a matter of historical fact *all* the leading positivists were political radicals (for their times) or liberal reformers: These writers found positivism attractive, in part, precisely because it separated the question of what the

67. The same view recurs under different labels. I follow H.L.A. Hart's usage here, but note that the same basic doctrine has also been dubbed "Inclusive Positivism" and "Incorporationism." Some worry that "soft" has a pejorative connotation, see, e.g., Coleman, *Second Thoughts*, supra note 13, at 260, but the same can be said for "Exclusive" positivism. "Incorporationism" has the double disadvantage of (a) obscuring the connection with positivism, and (b) admitting of no obvious label for the contrasting doctrine (other than the inelegant and uninformative "nonincorporationism," which is the label Sebok uses (p. 277)).

68. The Soft Positivist interpretation of the Separability Thesis is first set out in Coleman, *Negative and Positive*, supra note 10, though Hart eventually adopts Coleman's formulation in the Postscript, see supra note 14 and accompanying text. By contrast, the Soft Positivist interpretation of the Social Thesis is to be found not only in Coleman, *Negative and Positive*, supra note 10, but also in David Lyons, *Principles, Positivism and Legal Theory*, 87 *Yale L.J.* 415 (1977) (reviewing Ronald Dworkin, *Taking Rights Seriously* (1997)), and in Philip Soper, *Legal Theory and the Obligation of a Judge: the Hart/Dworkin Dispute*, 75 *Mich. L. Rev.* 473 (1977).

69. See Part I, supra.

law is from what it ought to be, and thus did not permit the existing legal status quo to benefit, *a priori*, from a moral halo. Positivism, in short, creates the conceptual space in which the law may be judged a moral and political abomination. But positivism *itself* is silent on this question of political morality.

Sometimes Sebok is admirably clear on this point. He says early on, for example, that "it is a mistake to think that legal positivism . . . offers reliable shelter to any political camp" (p. 7). But that being the case, it seems misleading to then present Soft Positivism as redeeming positivism from a "conservative" reputation. It can do no such thing.<sup>70</sup>

#### E. The "Triumph" of Soft Positivism?

One final worry about Sebok's last chapter bears noting here. Much of the argument of this chapter depends on a rather facile confidence about the correctness of Soft Positivism. Sebok usefully canvasses the debate between Hard Positivists like Raz and Soft Positivists like Coleman (pp. 277–80, 287–94), but he is too quick to conclude that Soft Positivist arguments prevail. Indeed, it is jarring to read that "Coleman proved" (p. 294) some particular Soft Positivist thesis. Outside of its formal branches, almost nothing is *ever* "proved" in philosophy!<sup>71</sup> In fact, important new arguments against Soft Positivism (including, particularly, Coleman's version) have been proposed recently.<sup>72</sup> Moreover the state of the debate is more fluid than Sebok allows, and there is an equally good interpretation of the recent literature suggesting that Hard Positivism, as defended by Raz, now prevails.<sup>73</sup> It would be extremely unfortunate if readers came away from the concluding chapter of this book thinking that these issues had been decisively resolved in favor of Soft Positivism—though Sebok's rendering, I fear, gives exactly that impression. Let me offer just one example of where the issues are more contested than Sebok allows.

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70. Sebok's precise worry about the "fundamental rights" approach concerns what he calls the "insatiability" of moral reasoning. See *supra* note 65. Sebok suggests that Soft Positivism can solve this problem because "[t]he rule of recognition itself determines how the moral concept [that is part of the law] is to be elaborated," and thus successfully "cabin[s]" its application (p. 317). The Rule of Recognition does this by also validating the applicable rules of interpretation that govern moral concepts. Nothing in this line of argument is peculiar to Soft Positivism, as the theory committed to the particular interpretations of the Social and Separability Theses discussed *supra*, text accompanying notes 67–68. Indeed, Hard Positivists do not deny a role for morality in adjudication; they only deny that moral reasons are legal reasons.

71. I can think of only one exception in philosophy of the past forty years. I think everyone agrees that Gettier "proved" that the analysis of "knowledge" as "justified true belief" does not work. See Edmund N. Gettier III, *Is Justified True Belief Knowledge?*, 23 *Analysis* 121 (1963). But even this was a case of proving a negative, rather than proving a positive philosophical thesis.

72. See, e.g., Scott J. Shapiro, *The Difference that Rules Make*, in *Analyzing Law: New Essays in Legal Theory* 33 (Brian Bix ed., 1998).

73. For such an interpretation, see Leiter, *Realism*, *supra* note 10.

The central argument for Hard Positivism's view that the Rule of Recognition can *only* employ pedigree or source-based criteria of legality (as opposed to content-based or moral criteria) is Joseph Raz's argument from authority.<sup>74</sup> According to this argument, it is essential to law's functioning that it be able, in principle, to issue authoritative directives—even if it fails to do so in actuality. Raz claims that only source-based criteria of legal validity are compatible with the possibility of law possessing authority. According to Raz, a legal system can only claim authority if it is possible to identify its directives without reference to the underlying ("dependent") reasons for those directives. This is a "prerequisite" for authority because what distinguishes a (practical) authority in the first place is that its directives preempt consideration of the underlying reasons (including, e.g., moral reasons) for what we ought to do, and in so doing actually make it more likely that we will do what we really ought to do. But Soft Positivism makes the identification of law depend on the very reasons that authoritative directives are supposed to preempt, and thus makes it impossible for law to fulfill its function of providing authoritative guidance.

Soft Positivists have a number of noteworthy rejoinders to Raz's argument from authority. First, Soft Positivists might contest whether identifying laws by reference to moral considerations necessarily requires taking into account the dependent reasons on which those laws are based. "The set of all moral reasons," W.J. Waluchow notes, may "not [be] identical with the set of dependent reasons under dispute . . ."<sup>75</sup> Even if this were right, however, it wouldn't prove enough. For Soft Positivism is not a theory compatible with the law's authority if there exists *any* case in which the dependent reasons are the same as the moral reasons which are required to identify what the law is; that there remain some cases where these reasons "may" be different is irrelevant. Moreover, if moral reasons are always overriding in practical reasoning—a view accepted, in fact, by most moral theorists<sup>76</sup>—then moral reasons will *always* be among the dependent reasons for any authoritative directive. Therefore, if identifying that directive requires recourse to moral reasons, the preconditions for authority will fail to obtain. Sebok fails to note these serious difficulties with the Soft Positivist rejoinder to Raz.

Second, and more interestingly, Jules Coleman has recently argued that Soft Positivism is compatible with the law's claim to authority because the Rule of Recognition is not the rule by which ordinary people (those subject to the law's authority) *identify* what the law is.<sup>77</sup> Recasting his ear-

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74. For a full articulation, see Raz, *supra* note 15, at 297–316.

75. Waluchow, *supra* note 14, at 139. Sebok discusses Coleman's version of the same objection at p. 291.

76. Philippa Foot and Bernard Williams come to mind as exceptions. See the discussion in Brian Leiter, *Nietzsche and the Morality Critics*, 107 *Ethics* 250, 258–60 (1997).

77. See Coleman, *Authority and Reason*, *supra* note 13, at 307–08; see also Coleman, *Incorporationism*, *supra* note 13, at 419–21.

lier, well-known distinction between the “semantic” and “epistemic” senses of the Rule of Recognition<sup>78</sup> in terms of “validation” versus “identification” functions, Coleman argues as follows:

For there to be law there must be a validation rule—one that is as broad as [Soft Positivism] allows. For law to be authoritative, however, there must be an identification rule—one that may not be so broad. There is a problem for [Soft Positivism] only if those two rules must be identical. They need not be, however, and often they are not. The [thesis that all legal norms must have a social source] . . . imposes a constraint [only] on whatever rule ordinary citizens employ to identify the law that binds them. Since most ordinary citizens are able to determine the law that binds them, whereas few, if any, are able to formulate or state the prevailing rule of recognition, it is unlikely that the rule of identification [i.e., the *epistemic* guise of the rule of recognition] is the [*semantic*] rule of recognition.<sup>79</sup>

Coleman’s argument calls attention to an important point: The *in-principle* authority of law is only impugned if the rule that ordinary people use to *identify* the law requires recourse to dependent reasons.<sup>80</sup> That would be so if the Soft Positivist’s Rule of Recognition fulfilled an epistemic function not only for legal officials but for ordinary people. But Coleman wants to deny this.<sup>81</sup>

The denial, as Coleman admits, depends (at least in part) on certain *empirical* claims.<sup>82</sup> The two central ones are: (1) most ordinary people can identify valid law, and (2) most ordinary people cannot formulate or apply the applicable Rule of Recognition. Is it likely that either claim is true?

Notice that it suffices to rebut Coleman’s defense of Soft Positivism if we can show simply that *sometimes* the Rule of Recognition and the ordinary person’s “rule of identification” do, in fact, converge. For then we will have shown that Soft Positivism is incompatible with the (in-principle) authority of law. There is good reason to think we can meet this modest evidentiary demand, since Coleman’s central empirical claims appear to get matters exactly backwards.

“As a general matter,” says Coleman, “ordinary citizens tend to know what the law is on most matters, whereas few, if any, of them could formulate, even in a rough way, the relevant rule of recognition.”<sup>83</sup> In fact,

78. For discussion of this distinction, and Sebok’s misreading of it, see *supra* note 13.

79. Coleman, *Authority and Reason*, *supra* note 13, at 308.

80. What about the authority of law vis-à-vis officials, for whom the Rule of Recognition still fulfills an epistemic function even on Coleman’s account? Coleman does not address this point.

81. In my view, it is a serious enough problem for Coleman’s position that it concedes that the Rule of Recognition fulfills an epistemic function for legal officials. I focus in the text, though, on his claim about ordinary citizens.

82. See Coleman, *Authority and Reason*, *supra* note 13, at 319 n.17.

83. *Id.* at 307.

beyond the most obvious features of the criminal law (e.g., the prohibitions on murder, bank robberies, and rape), traffic regulations, and a few other areas that impinge regularly on their lives (e.g., building codes for homeowners, the basics of commercial law for businesspeople, and the like), most citizens know relatively little about what the law is. This is why they turn to lawyers when they need a will, or are cheated by a repairman, or are pursued by the IRS, or feel they have been wronged by a retailer. By contrast, what most citizens surely do know is that any law enacted by the Texas legislature constitutes valid law in Texas; that a decision of the U.S. Supreme Court determines "the law of the land" (as the common phrase goes); and that the United States Constitution is the "supreme" law of the country. In short, although most citizens of Texas are utterly ignorant of 99% of the laws of Texas, the vast majority surely know that a rule enacted by the legislature is binding law. What ordinary people are far more likely to know, in other words, is precisely some version of the Rule of Recognition, *not* the actual laws.

Indeed, it is because most citizens have a rough understanding of the Rule of Recognition that they frequently are able to *learn* what the particular laws are. When they hear a report on television or read a newspaper article reporting that "The legislature passed the following new rules in the last session," or "The Supreme Court struck down the following laws this term," it is only because they appreciate the relevant contours of the Rule of Recognition that they know that these events bear directly on questions of legality and illegality. In cases like this, the Rule of Recognition (even inchoately and incompletely understood) plays an epistemic role for ordinary citizens. That it does so in these cases will suffice, however, for Raz's Authority argument: If the Rule of Recognition incorporated moral criteria, then the identification of law in these cases would require recourse to dependent reasons, and thus the law could not be authoritative. Once again, Sebok rehearses Coleman's counter-argument to Raz's authority argument (p. 292),<sup>84</sup> without considering the difficulties (just noted) that afflict Coleman's position.<sup>85</sup>

#### CONCLUSION

If I am right in the criticisms developed in the previous sections, then Sebok's provocative narrative about legal positivism is seriously flawed. Yet the flaws are instructive, and the immense erudition and re-

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84. Sebok also accepts rather uncritically Coleman's claim that the Rule of Recognition is primarily a semantic rule or a rule of validation (pp. 300, 312-13). As its very name would suggest, however, the Rule of Recognition is, for Hart, centrally an epistemic rule ("recognition" is an epistemic capacity, after all). As Hart himself says: "It is of course true that an important function of the rule of recognition is to promote the certainty with which the law may be ascertained." Hart, *supra* note 4, at 251.

85. Coleman, of course, responds to some of these objections as well. See especially Coleman, *Incorporationism*, *supra* note 13, at 413-20, for Coleman's most recent thoughts on this question.

search that this book reflects will still be of value to all serious students of jurisprudence. In his perhaps hyperbolic dust-jacket blurb for the book, Jeremy Waldron says,

Anthony Sebok has achieved the impossible. He has given us a detailed account of mid-century American legal thought—particularly the Legal Process School—and he has brought its details and difficulties into relation with the traditional categories of analytical jurisprudence. Few have even tried this; but Sebok's book is uniquely valuable because of the flair and philosophical rigor with which he has succeeded.

It is surely right that "few have . . . tried" to consider Legal Process from the standpoint of analytical jurisprudence, but the difficulties Sebok confronts in doing so suggest why few have made the attempt. Still, Sebok's sympathetic account of Legal Process is of great value, and the difficulties attendant upon his attribution of positivism to Hart and Sacks constitute an invitation to other scholars to see whether jurisprudential sense can be made of the foundations of Legal Process. More importantly, by exposing so clearly how positivism has been misrepresented, Sebok demands of academic lawyers a higher degree of care in their discussion of jurisprudential matters. And if so able a commentator as Sebok has, himself, also misrepresented positivism in certain other respects, that only indicates how difficult are the questions about the philosophical foundations of law that he considers.



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