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Natural Law and the Liberal (Libertarian) Society

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Introduction

Many prominent libertarian theorists have augmented their moral and economic criticism of the actions of governments with the claim that these actions constitute crimes.[1] In particular, Rothbard is famously attributed with the view that government is merely "a gang of thieves writ large".[2] Certainly, if some private citizen did the same actions that government agents regularly perform, these he rightly be considered a criminal.[3] If a private citizen attempted to impose taxation on another, this would be regarded as theft. If he undertook a policy of drug prohibition, in the absence of some existing government policy backing him up, this would involve acts of assault and robbery. If he attempted to

1 For example, see Rothbard, M.N. (2006) *For a New Liberty: The Libertarian Manifesto*. The Ludwig von Mises Institute: Auburn, pp. 55-86; Rothbard, M.N. (2002) *The Ethics of Liberty*. New York University Press: New York, pp. 161-174; Hoppe, H.H. (1989) *A Theory of Socialism and Capitalism*. The Ludwig von Mises Institute: Auburn, pp. 127-144; Rand, A. (1967) *Capitalism: The Unknown Ideal*. Signet: New York.

2 Interestingly, this specific statement does not actually appear in any of Rothbard's published writings, though the statement is commonly attributed to him. Certainly the sentiment pervades his works. The closest statement to the attributed one is found in Rothbard (2002) where he observed that"...if the bulk of the public were *really* convinced of the illegitimacy of the State, if it were convinced that the State is nothing more nor less than a bandit gang writ large, then the State would soon collapse to take on no more status or breadth of existence than another Mafia gang." In any case, the view that the state is "a gang of thieves" is commonly attributed to Rothbard and it is clear from his writings that he held such a view.

3 This was one of the central points made by the classical economist Frederick Bastiat in his works on the law (see Bastiat, F. (1850/2007) The Law. The Ludwig von Mises Institute: Auburn.)

draft others into his employment for some purpose, military or otherwise, this would be regarded as an act of kidnapping and enslavement. If he undertook a policy of business regulation on a local business, this would involve acts of trespass against property.

In order to sustain the view that these private actions are crimes, but equivalent government actions are not, one must have some good reason to exempt government agents from the laws of conduct applying to private citizens. Libertarians have rejected this view, and held instead that all people, including government agents, are subject to the same moral injunctions concerning the use of force. It stands to reason that, if judged by the nature of the actions themselves, rather than the identity of the actor taking these actions, government actions which initiate force against others should be regarded not only as bad policy, but as acts of crime, in the sense of acts that they are acts that are *malum in se* (i.e., acts that are wrong or evil in themselves). This view is at odds with the more commonly accepted view of crimes as acts that are *malum prohibitum*, (i.e., acts that are regarded to be unlawful only because they are prohibited by government command).[4] The latter exempts government agents from its ambit in many cases, by referring directly to the commands of government institution on whose behalf they are acting (We will talk later about the semantic issue of how one should properly define "crime". All we need to accept for now is that the acts we are talking about are things that would be regarded as crimes if done by an actor who is not a government agent).

This seems a fairly straightforward argument, and yet this claim often arouses scepticism and bewilderment from members of the public, who regard law as being something that is made by the government, and hence, is incapable of being opposed to its actions, except in cases involving government agents overstepping their government-proscribed authority. Though common now, things were not always this way. Legal theorist Stephen Kinsella notes that "…previously, law was thought of as a body of true principles ripe for discovery by judges, not as whatever the legislator decreed. Nowadays, however, legislation has become such a ubiquitous way of making law that "the very idea that the law might not be identical with legislation seems odd both to students of law and to laymen."[5] And, one might add, to many libertarians."[6]

In light of this common perception of law and crime, the Rothbardian claim that government is a criminal institution might be regarded by many as being mere hyperbole. Indeed, if one accepts that laws are merely the decrees of legislators, and crimes are actions which

4 On this distinction see Note (1930) The distinction between "mala prohibita" and "mala in se" in criminal law. *Columbia Law Review* 30(1), pp. 74-86. The distinction between these offences at common law is set out in *State v Horton* (1905) 139 NC 588; 51 SE 945. In that case, Hoke J held at 946 that "[c]riminal offenses can be broken down into two general categories *malum in se* and *malum prohibitum*. The distinction between *malum in se* and *malum prohibitum* offenses is best characterized as follows: a *malum in se* offense is "naturally evil as adjudged by the sense of a civilized community," whereas a *malum prohibitum* offense is wrong only because a statute makes it so."

5 Leoni, B. (1961) *Freedom and the Law (Expanded 3rd Edition)*. Liberty Fund: Indianapolis, p. 6 (note 2).

6 Kinsella, S.N. (1995) Legislation and the discovery of law in a free society. *Journal of Libertarian Studies* 11(2), p. 136.

violate these decrees, then this statement cannot possibly be correct. Yet the contention that government is a criminal agency is clearly meant literally, and hence, must be grounded in some view of law and crime that differs from the account that it now dominant.

I. The Goal Of This Paper

In order to assess this claim, and issues associated with it, the present article examines the subject of *jurisprudence*, which is the theory and philosophy of the nature of law. The purpose of jurisprudence is to analyse the nature of law and figure out what we mean when we say that some rule in society is a law, or that some person has committed a crime or a non-criminal breach of law (e.g., a tort or breach of contract). This issue is clearly important to libertarian theory, since the claim that government is a criminal institution must be backed by some jurisprudential analysis of the nature of "law" and "crime". (In short, if libertarians want to make this claim, they need to define their terms and support their usage of these terms.) Such an analysis provides the underlying philosophical rationale for claims that the actions of governments are crimes and that these governments may properly be regarded as an organised criminal enterprises.

Our purpose here is twofold. One is to examine some conceptions of the nature of law and the semantic issue of which meaning of the terms "law" and "crime" is the most sensible in the context of an examination of the actions of government agents. Another is to see why this semantic issue matters in the advocacy of libertarian ideas.

A cautionary word is appropriate here: Since this paper is concerned in large part with the proper meaning of the words "law" and "crime", in the context of a particular problem, some readers will be tempted to dismiss the issue entirely: "Why, it's all just pointless semantics!" Well, yes, it is semantics, but semantics are not pointless — they are important in coherently grounding an argument and elucidating the nature of a claim. If libertarians are to claim that governments are criminal enterprises then it is important that this claim be clearly understood (especially given that it is contrary to the dominant view in our society).

In fact, in the advocacy of libertarian ideas, semantic concessions to one's opponents can harm one's case a great deal. One major semantic concession that occurs in the advocacy of libertarian ideas is to accept the prevailing discourse of government actions as a matter of "public policy". When one makes an argument related to the actions of government it is common to hear the argument described in terms of competing conceptions of proper "public policy" (e.g., libertarians favour a free-market policy and statists favour an interventionist policy). A libertarian who wants deregulation of the health system might argue in favour of this "public policy" and his opponent who wants state regulation would argue instead for a contrary "public policy". But clearly, if governments are mere criminal agencies, and their actions are crimes, then this must be regarded as a hopeless euphemism.

When libertarians accept this description of their ideas, they have made a major concession

in argument, and lost a powerful explanation of the reasons for their views. Moreover, they are being less-than-candid about what it is they advocate. If government is indeed a "gang of thieves" as some prominent libertarians claim, then their thievery ought to be described candidly, as criminal in nature, not euphemistically, as "public policy". The latter term neutralises the implicit but powerful normative judgement that underlies an assertion of acts that are *malum in se*, and inoculates the discussion against the recognition that government agents are committing such acts. By accepting the euphemism of "public policy" and framing their views in this way, libertarians unwittingly hide their true motivation and thesis: that what they want is for governments to stop committing crimes.

This is by no means the only semantic concession commonly made by libertarians, but it is the most important and the most harmful. Though an analysis of jurisprudential theories and semantics may sound like a task that is far removed from the issues in political philosophy that are usually discussed by libertarians, it is my contention that this issue is actually very important in understanding libertarian theory and proper framing its ideas.

II. A Motivating Example For Our Analysis

Let us start off by discussing a simple example which calls for an analysis of jurisprudence. Suppose you are walking alone at night in some city streets, and you take a wrong turn down a dark alley. You are confronted by a mugger with a gun, who demands your wallet and other valuables. You would have no problem in concluding that this man is a criminal, and that his actions are a crime.

But wait! Suppose that the mugger tries to characterise his actions as being consistent with a "policy" of wallet-relief, and your actions as being consistent with a competing "policy" of wallet-retention. Since his policy of wallet-relief affects the public, he reasons that it can properly be described as a "public policy".[7] Is it still a crime? Why of course not! As you can see, it is clearly just a policy disagreement! You prefer that he not take your wallet, but he prefers that he does, and of course, reasonable people can disagree on matters of public policy can't they?

What do you think of this characterisation? Is it accurate to call this a policy disagreement? Or is this merely a euphemism to whitewash an obvious crime? Why does this even make a difference?

Probably you have concluded that no, this is not an accurate characterisation of the situation, and yes, the notion that this is a "public policy" issue is indeed serving to euphemise a

7 This does not mean that the mugger would not accept the legitimacy of property rights and laws against robbery in other cases. He would probably accept such rights and laws in cases where he is not the perpetrator of the act, and would probably feel entitled to avoid being robbed himself. As Adam Smith pointed out, "[i]f there is any society among robbers and murderers, they must at least, according to the trite observation, abstain from robbing and murdering one another." (see Smith, A. [1757] (1982) *The Theory of Moral Sentiments*. Liberty Fund: Indianapolis, II.II.3.)

crime. You would not accept the proposition that you and the mugger are engaged in a policy disagreement and you would not allow the mugger to describe his actions in this way without some retort against this. (A retort made later, in the safety of the courtroom.) You would realise that if the mugger is able to convince people that his taking of your wallet stems from a "policy disagreement" then he has *already* succeeded in a major sematic change that serves to immunise him against the proper moral condemnation that is called for. You could still argue over his "policy" and convince others that it is a bad idea, perhaps even an unjust one. But nevertheless, he has now succeeded in setting the terms of the debate in a way that views his crimes as a mere political disagreement. The situation is no longer recognised as a debate between a criminal and his victim, but rather, a debate between people with different views on "public policy". The mugger has managed to avoid the issue of law and crime, which means he has succeeded in whitewashing his own crimes with euphemism.

At root in this kind of situation is a jurisprudential and semantic view about what constitutes a law, and what constitutes a crime. When you judge that this man with a policy of wallet-relief is actually a criminal, and his implementation of his "policy" is a crime, that is because you believe that the action of robbery is against "the law". You have a theory of law which underlies this judgement (even if only implicit) and a semantic view of why the appellation of "law" properly describes the principle involved.

III. Jurisprudence: Why Is Armed Robbery A Crime?

Recall that our ultimate purpose in this paper is to determine whether or not it is proper for libertarians to regard a government as a criminal enterprise (e.g., as "a gang of thieves"). In order to assess this, we will begin with an examination of jurisprudential theories of law applied to the motivating example of the mugger in an alley. *Why* is it proper to describe the mugger's action as a crime? What makes it so? Why do we say that he is a criminal? What about murder? Why is it proper to describe this as a crime? What about assault, rape, battery, arson? Why are those crimes? These might all seem like silly questions to many people, but they are at the heart of competing theories of jurisprudence, which tell us the nature of law.

Here's one possible reason you might give for why the mugger's actions are a crime: his robbery is a crime because it says so right here in this statute. Parliament has gone through the process of enacting this statute on criminal laws, and it has a section on armed robbery right here, and look: it says that it's not allowed.[8] So the mugger here is a criminal because he has defied the commands of the parliament who developed criminal law statutes, or the judiciary who developed the common law that preceded them.

8 Even before such statutes were enacted, with a little research, you could find judgements from judges telling you that this was already considered to be a crime under common or civil law, depending on what country you are in.

If you were a policeman or a prosecutor, this is exactly what you would rely on when the mugger in our example is apprehended and appears before a judge. You would refer back to a statute or common law doctrine, and this would be taken as an appropriate embodiment of law. If you were dissatisfied with this explanation, you might go a bit deeper than this. You might say: armed robbery is a crime because that statute book we mentioned, which prohibits it, is a valid expression of the "will of the people," as determined through the acts of their duly-elected parliamentary representatives. So the mugger here is a criminal because he defied laws that are determined indirectly by the will of the people.

IV. The Positivist Theory Of Law

The explanation we have just given, perhaps with some further nuance added, is popular with many legal theorists and political philosophers. It is a theory of jurisprudence called **legal positivism**. This theory asserts that law is solely a *social construct* — that the content and force of law comes not from any objective or natural source, but from facts about society and human social conventions. The first explanation above took the force of law to be derived directly from the commands of parliament, whereas the second took the force of law to be derived indirectly through the aggregated wills of the members of society which elect the parliament (presuming that such an aggregation can properly exist). Though one of these explanations appeals more directly to the theory of democracy, both are expressions of the view that the force of law comes from the fact that some group of people have adopted some convention or custom pertaining to the subject matter of the law. In short, both explanations view law as a social construct.

The legal theorist John Austin gave a more specific formulation of the positivist view, which seeks to explain exactly which group is the source of law and why. He explained the theory of legal positivism as a view of law based on the commands of the "sovereign". The identity of the sovereign differs from place to place and time to time, depending on the nature of the society, but it is always some authority whose commands are habitually obeyed by most people in the society which it rules over.[9] If such a person or body of people exist in society, then Austin argued that *this* is the source of law.

Austin argued that, when a society has some sovereign institution that enforces its commands by coercive sanctions (including sanctions that merely nullify the ability to enforce contracts, etc.), then those commands amount to laws.[10] In describing law, and

9 Legal theorist Roger Cotterrell notes that Austin's sovereign-based theory is best understood by reference to an office or institution of sovereignty, rather than by reference to a particular person who acts as ruler at a given time (see Cotterrell, R.B.M. (2003) *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy (second edition)*. LexisNexis: London, p. 63). This conception of Austin's theory avoids problems that would arise due to the elevation of a new person as ruler, since such a person could not yet be "habitually obeyed". In such cases, Cotterrell argues that the *institution* of the sovereign is still habitually obeyed, even if the new person exercising the power of that institution has only just taken office.

10 Austin, J. (1998) *The Province of Jurisprudence Determined and The Uses of the Studies of Jurisprudence*. Hackett Publishing Company: Indianapolis.

violations of the law, Austin is describing acts by reference to the commands of the rulers of society. In modern representative democracies, the government would be an institution whose commands are habitually obeyed, and therefore it would constitute a sovereign under the positivist view, with its commands being understood to be laws.

The positivist conception of law has been developed further by other jurists, notably by Herbert Hart, who took issue with some of the specifics of Austin's formulation, and sought to improve on it. Hart pointed out that not all commands of agents of a sovereign body have legal force. To have legal force, and be habitually obeyed, a command from agents of a sovereign institution must usually comport to some "rules of recognition" which shows the rule to have been formulated by the institution, and supported by the social pressure it exerts, as opposed to being merely the will of some agent of the sovereign, acting outside his authority.[11] Hart's view of the "rules of recognition" allows one to distinguish between commands of officials of the sovereign body that have legal force, and commands that have no legal force.

In modern representative democracies, the rules of recognition require commands of the sovereign to pass through legislative and judicial procedures before they are accepted as valid laws. For example, proposed laws must pass through houses of parliament by vote, and may be required to be signed off by the Head of State. The commands of officials who work for the sovereign body will generally only be habitually obeyed if people are satisfied that these commands are processed through this mechanism.[12] (Constitutions may exist, but these too are interpreted and administered by the ruling sovereign.) Commands are often challenged if they are thought to be procedurally defective, and this serves to differentiate between valid executions of power by an official *on behalf of the sovereign institution*, and invalid uses of personal power which are not made on behalf of the sovereign institution.[13] Hence, the rules of recognition serve to demark the actions of the sovereign *institution*, from the actions of its particular *agents*.

One school of legal positivists, known as the "legal realists"[14] take a slightly different view,

11 Hart, H.L.A. (1994) *The Concept of Law (second edition)*. Oxford University Press: Oxford, p. 94.

12 Hart also argues that coercion alone cannot enforce habitual obedience, and is a flimsy basis for power —that the power of the sovereign must usually rest on some voluntarily acquiescence to its authority. Commands that do not comport to the rules of recognition are more likely to be challenged and disobeyed by the people in society. This point was also examined in depth by the French jurist Étienne de la Boétie. (see de la Boétie, E. (2008) *The Politics of Obedience: The Discourse of Voluntary Servitude*. Ludwig von Mises Institute: Auburn. Available at http://mises.org/rothbard/boetie.pdf).

13 The requirements of the "rules of recognition" exist to allow the sovereign institution to limit the powers of its officials and agents to act in their personal capacity, so that not all commands issued by these agents amount to laws. They do not constrain the institution, since this institution creates or administers the rules of recognition.

14 On the assertion that legal realists are a species of legal positivist, see Leiter, B. (2001) Legal realism and legal positivism reconsidered. *Ethics* 111(2), pp. 278-301. Though legal realism is sometimes presented as opposing legal positivism, it is actually opposed only to particular positivist theories such as the Austin-Hart theory. Clearly the legal realist theory explains law as a social construction and so it is a species of positivist theory, by the accepted definition of this term.

arguing that the actions of the specific enforcement agents who implement the commands of the sovereign are the determinative factor in what constitutes law, rather than the abstract commands of the institution. Legal realists are critical of the claim that legal decisions are determined by the higher-level commands of the sovereign, such as pieces of legislation. They believe that these commands are indeterminate and that, in practice, they may be merely *post hoc* rationalisations for decisions that are determined, in large part, by extralegal considerations such as the prejudices of judges and other enforcers.[15] The theory of legal realism holds that the command theory of law in legal positivism is unrealistic, and that law is best described as *the actions of the enforcers* of the sovereign, rather than the commands themselves. Under this view, "law" is whatever judges or other enforcement officials actually do.[16] [17]

Other legal positivists have also given subtly different explanations of the command-based theory, or disagreed with the requirements posited for sovereignty, or disagreed as to the type of commands that are obeyed. Nevertheless, the overriding thesis of legal positivism has remained the same: that "laws" are commands issued by a powerful group within society to enforce their will. In essence, the positivist view amounts to the claim that *laws are the commands of the powerful* —specifically, those commands that can properly be regarded as being done on behalf of the most powerful and habitually obeyed institution in society.

At this point it is important to emphasise that we do not reject this view as an adequate descriptions of the government legal system or as an accurate description of what is often characterised as "positive law". We will consider later whether this description serves well for the goal of our analysis, and it is at that point that we will consider the competing claims of different theories of law.

In any case, if we take a positivist view of law as correct, then we can come up with an explanation for why the mugger in our example is a criminal. We can point to the fact that the government is habitually obeyed by most of the people in its jurisdiction and it has issued commands against armed robbery (or at least, against armed robbery by

15 Similar insights are made in Hasnas, J. (1995) The myth of the rule of law. *Wisconsin Law Review* 14, 199. (Also published in Stringham, E.P. (ed.) (2007) *Anarchy and the Law*. Transaction Publishers: New Brunswick, pp. 163-192.)

16 Holmes J argued for a clear distinction between laws and morals, saying that "[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. … When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law" (see Holmes (1897) The path of law. *Harvard Law Review* 10, p. 457).

17 Leiter (ibid) argues that legal realism can be regarded as a descriptive theory of the process of adjudication, rather than a theory of law. Under this view, legal realism is not a theory of law, but rather, it assumes the correctness of the positivist theory and then makes claims about the adjudication process under the law. This view is contrary to the claims put forward by some legal realists (e.g., Cardozo), who have most certainly claimed it as a theory of what constitutes law. Actually, many observations about adjudication processes made by the realists are quite insightful, and it is only its use within legal positivism that we take issue with here.

others). Moreover, we can point out that the government imposes sanctions for violating these commands. These commands have been processed through legislative procedures comporting with rules of recognition that are habitually obeyed by the officials of the government, and recognised by society at large. The actions of the mugger are contrary to these commands, and he is therefore committing a crime under the positivist account. He is a criminal because his actions violate the commands contained in government statutes. In short, he has acted contrary to the commands of the powerful. (A legal realist might take things a bit further, and say that the mugger is a criminal because the judge in his case said that he is, presuming he was convicted. In either case, the mugger is regarded as a criminal based on commands or rulings of the agents of the sovereign.)

Under the positivist view, actions are judged as crimes by virtue of being prohibited by the sovereign. If this view of law is applied to the assessment of government actions, then clearly it is not correct to describe government actions as crimes and the libertarian claim that government is "a gang of thieves" cannot be sustained. Agents of government may commit crimes against positive law if they step outside the bounds of their government-proscribed authority, but the *institution* of government cannot be regarded as criminal in nature in this positive law sense.

V. The Interpretive Theory Of Law

An alleged alternative to the positivist theory was put forward by the legal theorist Ronald Dworkin, who argued that the meaning of law is determined by a constructive interpretation of the institutional history of a legal system; in particular, that law is the set of principles that best explain and justify what the institutions of the legal system have done in the past.[18] Dworkin described this as the view of "law as integrity," meaning that the principles that constitute law must integrate and describe the actual historical practices of the legal system under consideration.

Although Dworkin's theory is offered as an alternative to the positivist account, it is actually a positive theory itself, insofar as it still posits law as being socially constructed.[19] The most limiting aspect of the interpretive theory, for our present purposes, is that the meaning of law is defined in terms of the practices of institutions of an existing "legal system," which presumes that one already accepts these institutions as valid expositors of law. Since one begins with the supposition of a recognised "legal system" under the interpretive approach, the historical practices of institutions within this system are taken as being determinative of the meaning of law. This approach does not consider whether or not this system is actually applying law; instead it seeks to interpret what this system is doing, and takes this result to be law. (Though we will deal with this issue in detail later, it is important to

18 See Dworkin, R. (1998) *Law's Empire*. Hart Publishing: Oxford.

19 Though Dworkin allows objective theories to be used to explain and justify the legal system, these are only descriptive of law insofar as they rationalise the actual actions of people in society. Hence, law is a social construct which is found inductively from social acts.

understand at this point that the interpretive theory makes no claim about the justness of the legal system in question. Its purpose is merely to establish how the system operates.)

Dworkin left no doubt that when he talked of the "legal system" he was referring to the legal enforcement institutions of the sovereign —i.e., the government legislature and judiciary. It is possible to combine the interpretive view with the positivist account of the sovereign, to obtain an argument in favour of this choice, and if this is done, then we see that the thesis of interpretive theory is that "law" is another name for *the best ex post facto rationalisation of the historical actions of the powerful* — specifically, the principles which best rationalise the past actions of the most powerful and habitually obeyed institution in society.

Now, the term "rationalisation" may be in issue here. It connotes the idea that the principles established to integrate and describe past actions operate as an excuse or justification for these past actions. We do not mean this in the normative sense of rationalising the justice of these acts, and the interpretive theory does not make this claim. However, the interpretive theory does rationalise the *legality* of past actions in the legal system, if these are in question. It can properly be described as a *legal* rationalisation of these past actions. Again, since the purpose of the doctrine is to describe an already accepted "legal system" the fact that it provides a legal rationalisation for past practices in that system is somewhat tautological —the majority of actions in the system must be seen to be legal by virtue of the fact that the system as a whole is pre-emptively accepted as being a "legal system".

If we were to take an interpretive view of law, then we could come up with an explanation for why the mugger in our example is a criminal. We would analyse all possible rationalising principles for the past actions of the government courts and legislature, and once we found the best rationalisation for their past actions, we would regard this set of principles as being "the law". Since this would need to be consistent with past practice (to the maximum extent possible) and since the government has imprisoned private muggers in the past, in accordance with its statutory commands, this set of principles would therefore hold that the mugger is doing something that is against the law. (If it did not then it would be difficult to see how it could be rationalised with the past imprisonment of muggers, and therefore difficult to see how it could be regarded as the best explanatory theory.) In short, the mugger is a criminal because he is acting contrary to the best rationalisation we can think of for the past actions of the government courts, who have previously applied statutes to imprison muggers.

VI. Summary Of The Positivist Theories Of Law

We are now in a position where we can state, in their baldest and most basic form, the three leading positivistic accounts of law. If we understand "the powerful" to refer to the sovereign body under the positivist account (i.e., the body whose commands are habitually obeyed) then the three leading theories of jurisprudence existing today can be stated as follows:

Positivist Theories of Law

Legal positivism (Austin-Hart): Laws are the commands of the powerful.

Legal realism (Cardozo): Laws are the enforcement actions of the powerful.

Interpretive positivism (Dworkin): Laws are the principles that are the best ex post facto rationalisations for the past actions of the powerful.

As applied to a society in which there is an established government (i.e., a monopoly enforcer of disputes, capable of taxation and determination of outcomes in disputes occurring within its jurisdiction) this institution would be regarded as the sovereign under positive law. The reason for this is that such an agency would command habitual obedience. This means that law in the positivist sense refers to the commands of governments in the context of our present society where these entities exist.

Applied to a libertarian private-law society with no government (i.e., a state of private-law anarchism) things are more complicated. In such a society there would be competing private agencies providing resolution and enforcement services in disputes. Each of these agencies would probably command habitual obedience in some small sphere of its own operations, but the monolithic adherence to the commands of a single agency would be absent. Nevertheless, since such a structure would require some co-operation and agreement between competing agencies, and since each agency would operate with a view to enforcing libertarian rules of social conduct, it is likely that they would collectively enforce adherence to roughly the same set of principles, subject to minor differences in interpretation. One could perhaps make an argument that the libertarian political philosophy and its consequential legal principles would then constitute a single system of positive law, with the arbitration and enforcement agencies being regarded collectively as a sovereign in this context. This matter is beyond the scope of the present paper and we remain agnostic on this point here.

Again we stress that our goal is to answer the question of whether or not a government can be regarded as a criminal institution. We do not dispute the fact that the commands described by positive law exist, and that the concept is useful in many contexts. In particular, we do not deny that there are such things as commands issued by bodies that command a great deal of power in society and are habitually obeyed, and that these are conventionally referred to as "laws" by people. Nor do we deny that there are principles

which might be used to try to rationalise the actions of institutions in the "legal system," to explain in general principles how it operates. We recognise that such bodies exist, that their commands are real, and that there are often serious sanctions for disobeying them. Our concern is whether or not the positivist theory can provide insight into the question at issue.

VII. Legal Positivism And Unjust Laws

So far we have considered a simple example of armed robbery by a private mugger. This is an action which is clearly immoral, and is also recognised as a crime by the ruling sovereign power. The act of the mugger is contrary to the commands of the sovereign, and a good rationalisation for the actions of the sovereign would include a prohibition on such conduct. We have therefore considered a situation in which the positivist and interpretive conceptions of law accord nicely with our conception of what is and is not moral conduct. In such a context a person may be satisfied with these accounts of law and criminality, since they both accord well with our moral intuitions about what is a crime. In short, in this case, positive law accords nicely with our conception of moral conduct.

We now turn our attention to the possibility of *unjust* positive laws. Rather than our present example involving a legally prohibited robbery in our present society, suppose we now consider the situation of a person living as a slave in a society where slavery is habitually accepted as a valid positive law, and enforced by the ruling sovereign of the day. We needn't be too specific here as to the particular society we are talking about; it suffices to note that there have been many societies in the past where the ruling sovereign power has commanded that certain people may be kept as slaves, and has granted their purported owners the prerogatives of ownership over them. In such societies the sovereign body has almost always prohibited slaves from defying their owners or attempting to escape their captivity and has granted slave-owners the legal prerogative to execute their slaves.

Suppose then, that a slave in such a society attempts to escape from their slave-master, in defiance of the commands of the sovereign body in that society —a body which is habitually obeyed, and meets the criteria for a legal sovereign under the positivist view. In the course of the escape attempt, the slave is captured by the slave-master, and executed by him, as a warning to other slaves who might also contemplate escape. In other words, the slave-master has intentionally killed the slave; something which we would now regard as an act of murder if it were done by one private citizen to another.

So who is the criminal here? Well, according to the positivist viewpoint, it is the slave who is the criminal here; the slave-master is not. It is the slave who has violated the commands of the sovereign, which are regarded as having the status of law under the positivist account. The killing here is done in accordance with the recognised property rules commanded by the sovereign, and the slave-master is in fact a *victim of crime* under the positivist account —his interests have been harmed by the criminal act of the slave, who unlawfully attempted to escape, and thus deprived the slave-master of his legal property.

Similarly, according to the interpretive positivist account, we must search for the principles which best rationalise the actions of the legal system. In this case, that system allows the slave-master to kill his slave without any sanction, and it assists with the capture and enslavement of the slave while he is still alive. Hence, it is clear that the rationalising principles must recognise the legality of slavery and must again conclude that the slave is the criminal, and the slave-master is the victim of crime.

Now, in fairness to positivists (of all varieties), this does *not* mean that they countenance acts of unjust killing and enslavement, or condemn the slave's attempt to escape. In the present case a positivist may decide that the slave is morally right to try to escape, but that it is nonetheless against the law to do so, and the law in this case is unjust. He may also decide that the slave-master is morally wrong to capture and execute the slave, notwithstanding that he is legally permitted to do so. The positivist may regard slavery as an abomination and may have contempt for the actions of the slave-master.

This means that it is open to a positivist to describe the actions of government agents as being lawful while disagreeing with these actions. It is open to the positivist to regard these actions as unjust. However, it is not open to the positivist to regard government as acting criminally itself. The positivist cannot say that the government is "a gang of thieves," since any such talk would be contradictory under the positivist account; the government does not act contrary to its own commands.[20]

VIII. The Separation Of Morality And Law Under Legal Positivism

Though positivists are not in the habit of describing slave-owners of fugitive slaves as victims of crime, they are nonetheless aware of the divergence between criminality and morality that emerges under their account of law. Hart uses a positivist account of law when he accepts the legal validity of slavery in societies where this was the dominant social norm.[21] In fact, positivists hold that there is no "inherent or necessary connection" between morality and the validity of laws, meaning that the morality or immorality of an action does not have any direct bearing on its lawfulness.

There can still be an indirect connection between morality and positive law. In his interpretivist view of law, Dworkin saw that people working within the legal system hold moral beliefs, and these beliefs affect their practices in that system.[22] Hence, since moral principles affect the institutions of the legal system, he argued that moral principles play

20 In fact, even if the government as an institution did act contrary to its own commands, it could be argued that its actions would yield implicit commands in favour of its own actions. We do not pursue this line of thought here, since it is beyond the scope of our present analysis.

21 Ibid, Hart (1994), pp. 201.

22 This is not to say that other positivists would disagree. Nevertheless, the epistemological connection between law and morality under positivism arises most clearly under the interpretive approach, since this approach seeks rationalising principles for the actions of the sovereign, and these rationalising principles may be the moral beliefs of the agents of the sovereign.

a part in the set of principles derived from a constructive interpretation. But even here, the connection between law and morality in the interpretive theory exists only through the beliefs of the people in institutions of the legal system; it does not exist in any direct objective sense —in other words, the morality of an action has no direct effect on its lawfulness. Since moral principles can only affect the law through the beliefs and actions of practitioners within the institutions of the legal system, this account of the connection is epistemological; there is still no direct connection between moral truth and the content of law.[23]

Legal positivists need not agree with the content of those rules that they recognise as laws, and they may believe that it is morally right to disobey valid laws in some instances, but they nonetheless argue that the *validity* of laws is a social matter, determined solely by social conventions, and with no inherent or necessary connection to morality. Hence, they cannot regard the government as acting criminally even in cases where its agents undertake actions that would be regarded as crimes if done by private citizens.

The legal positivist account of law and crime must conclude that any people who are the victims of reprehensible actions of the powerful and attempt to defend themselves through defiance of these commands, or lack of compliance with enforcement actions, are *themselves* criminals, even if the law in question is unjust and their actions are good. In such cases the sovereign is an evil but lawful authority and its victims are good criminals. To the present author, this seems to be a rather topsy-turvy way of looking at things, and it is proper that we examine the semantic claim made in the positivist account.

IX. Semantics: Why Are Positive Laws Called 'Laws' At All?

We start our semantic consideration with a simple question: Why do the positivists use the terms "law" and "legal system" at all? The positive definitions of these terms refer directly to commands, or actions taken in furtherance of these commands (or for legal realists, to actions that appear to be taken with a view to enforcing commands, but may actually be motivated by other considerations). So why do positivists not simply refer to positive laws as "commands" and refer to the resulting system of these commands as a "command system"? This would encapsulate the concept described by positive law more directly and it would also have the beneficial effect of severing any unwitting connotation of moral legitimacy. So why don't we see positivists undertaking a movement towards this language?

If the positivists genuinely wished to separate their description of sovereign commands from any connotation of justice, they could easily develop their theory in these terms,

23 Echoing the work of Dworkin, legal theorist David Carlson has argued that standard positivism cannot successfully separate morality and law as it purports to, and must admit is as an epistemological connection, since it must rely on a moral principle of fidelity to the spirit of the law in order to function without collapsing into legal realism (see Carlson, D.G. (2010) *The collapse of positivist jurisprudence into legal realism after Dworkin*. Cardozo Legal Studies Research Paper No. 289. http://ssrn.com/abstract=1557354).

and indeed, there would be no reason not to do this.[24] Indeed, by encouraging members of the public to refer to positive laws as "commands," they would affect a change toward language that is more accurate and less confusing under their own theory, since people do not imagine that the term "command" has any connotation of moral legitimacy. The fact that positivists do not do this suggests that something else must be going on.

Observe also that "law" under the legal positivist account lacks all the properties of what we call law in any other context. In the context of the physical sciences we refer to the laws of physics, the laws of chemistry and so on. In the context of the social sciences we refer to the laws of economics, the law of supply and demand, Gresham's law and so on. In each case we are referring to some immutable principles derived objectively from nature. By referring to positive laws as "laws" rather than "commands" we are surely adopting a linguistic usage that is at odds with our normal practice in other contexts. In doing so, we invite conceptual confusion, and yet this is precisely what the positivists complain about. So again, why do they adopt this term at all?

All of this can be explained by the fact that legal positivists are, in practice, almost always statist in their political views. An important part of their concern in jurisprudential work is to provide a legal justification for government power and action. The real purpose and effect of legal positivism is to act as an impediment to rational criticism of government, by creating the conceptual impediment of "law," imbued unconsciously with moral authority through its usage in referring to immutable rules in other areas of description, but divorced in definition from actual morality. Positivists take advantage of the fact that ordinary people view "law" and "criminality" as being terms which are inherently imbued with moral authority. They ride on these terms while simultaneously denying any normative assertion. This allows them to provide an implicit normative defence to government actions while denying that they are doing any such thing.

There is a major divergence between the legal positivist conception of "law" and the general meaning of this term in every other context in which it is applied. For instance, when we examine the laws of physics we understand that these are determined *by nature* and that it is the physicist's job to *discover* these laws, not invent them. We understand that a physics paper or textbook is an exposition of an expert opinion on the content of a natural law; it has no authority in its own right to determine what these laws are. We understand that the physicist's exposition of the laws of physics may be correct or incorrect, and the ultimate authority for this is nature itself. We do not believe that the laws of physics are created by the theories of physicists or their published works, and we therefore understand that the proper focus of attention in an examination of the laws of physics is on the arguments for or against different conceptions of nature. In short, the goal of physics is not to undertake a textual analysis of physics textbooks.

24 One might argue that this would mean that it is no longer a theory of jurisprudence, since it would no longer answer the question "What is law?" Positivists could then merely assert that "law" is a useless word which causes confusion, and that the proper term for the concept which they refer to is "commands". This would still constitute an answer to the jurisprudential question, albeit one which denies the premise.

This also applies in every other scientific endeavour in which we refer to laws. Whether we are talking of the laws of physics, the laws of economics, the law of reveal preference, or any other law of nature, we always refer to something that is *determined by nature* and *discovered by man*. In each case the term "law" imports the imprimatur of nature, and refers to a fixed, immutable principle.

We have already noted that, until the dominance of the positivist viewpoint in legal theory, this was also the way that the common law was viewed. Indeed, one of the major benefits of the notion of common law, and the sparing use of command-based statute, was the fact that it allowed for the discovery of principles of conduct based on reason rather than decree. Writing in the late-nineteenth century, prior to codification of the positive laws of New York, lawyer James Carter made the following argument against the proposed codification:

'At present, when any doubt arises in any particular case as to what the true rule of the unwritten [common] law is, it is at once assumed that the rule most in accordance with justice and sound policy is the one which must be declared to be the law. The search is for that rule. The appeal is squarely made to the highest considerations of morality and justice. These are the rallying points of the struggle. The contention is ennobling and beneficial to the advocates, to the judges, to the parties, to the auditors, and so indirectly to the whole community. The decision then made records another step in the advance of human reason towards that perfection after which it forever aspires. But when the law is conceded to be written down in a statute, and the only question is what the statute means, a contention unspeakably inferior is substituted. The dispute is about *words*. The question of what is right or wrong, just or unjust, is irrelevant and out of place. The only question is what has been written. What a wretched exchange for the manly encounter upon the elevated plane of principle!'[25]

Since this time, common law has been largely replaced by statute, and the positivist notion of laws as commands has become more firmly entrenched. The semantic notion of sovereign commands as "law" has led to a situation in which "law" refers almost exclusively to the statutory commands of legislators, and the proper approach to establishing their content is to undertake textual analysis, rather than moral reasoning. This has established a system that is unlike any other system of law recognised in wider scientific endeavours. One particular characteristic of this conception of law is that a person's actions are judged as lawful or unlawful, criminal or non-criminal, depending not only on the nature of the action, but on the person's relationship to the sovereign. This allows different actions for different people, and particularly for the agents of the sovereign.

This already counts as a major strike against the positivist conception of law. This doctrine creates a concept that is a "package deal," purportedly referring in a purely descriptive sense to the commands of the sovereign, but choosing language which unnecessarily

25 Carter, J. (1884) *Proposed Codification of our Common Law* (a paper prepared at the request of the committee of the bar association of the city of New York). Evening Post Printing Office: New York, pp. 85-86.

imports the imprimatur of an immutable principle of nature, taken from its application in other contexts. Legal positivism holds that power alone creates law, and hence, there is no means to criticise the legality of action but for criticism on the grounds of lack of power. The power of governments to command habitual obedience to their commands allows these commands and consequent actions to be viewed as "law" without regard to whether there is any rational or moral basis for those actions. No matter how arbitrary, irrational, immoral and unjustifiable the actions of government may be, by the mere fact that it is an institution which is habitually obeyed it is able to apply the appellation of "law" to these actions, and thereby boast that it is acting lawfully (and those who refuse to follow its commands are acting unlawfully). This allows the defenders of the state to conflate law and morality, by simultaneously using the notion of "law" as an expression of moral authority, while at the same time being careful not to let this intrude on the definition (As a caveat, I will freely concede that there are many honest positivists who genuinely wish to avoid conflation between the identification of sovereign commands and moral principles. For these people, I ask again, why not just call your positive laws "commands" and thereby avoid the confusion altogether?).

X. The Natural Theory Of Law

Analogy to the wider application of the term "law" to immutable principles of nature suggests a possible application to the social system as well. Just as there are natural principles of physics which are fixed principles amenable to the discovery of man, there are also natural principles of morality pertaining to the proper use of force. This gives us another account of law called the theory of **natural law**.

The theory of natural law holds that there is a body of proper social principles pertaining to the use of force — this body of law is not merely a social convention, but rather, consists of fixed moral principles that are derived objectively from the nature of man (hence the term "natural"). Since man's nature is fixed, these principles are immutable and universally valid for all times and places and all societies.[26]

The theory of natural law is a consequence of the view that objective ethical principles can be established from the nature of man. If ethics is itself merely a social convention, with no objective basis, then natural laws cannot properly be established. However, if objective ethical principles can be justified, then it stands to reason that some of these principles would pertain to the proper uses of force. If a person accepts this view, then they are a believer in the substance of natural law, whether or not they choose to describe it by that name (we will discuss this semantic issue later). Hence, natural law is a very wide concept, which can be said to apply in any theory of ethics that purports to be grounded in objective

26 Patterson, E.W. (1953) *Jurisprudence: Men and Ideas of the Law*. Foundation Press: Brooklyn, p. 333. Note that natural law theory has sometimes been used to refer to the claim that positive law cannot be properly understood without reference to natural laws. When we refer here to the theory of natural law, we merely mean the theory that such laws can be established (this is sometimes referred to as natural moral law theory).

principles derived from a natural source (e.g. the nature of man). Natural laws are merely the objective ethical principles applying to the use of force.

Under the libertarian account of natural law, the principles of law are derived from the account of private property homesteading and the non-aggression principle which underlie the libertarian theory. Roughly speaking, the libertarian view mimics the standard view people have of the moral principles governing interactions between private citizens: they should not kill, assault, rape, steal or commit other kinds of violence. What is unique to libertarian theory is that it applies these principles to *all* people, including those people who act as agents of the government. Under the libertarian view, the agents of government must also obey these principles, and hence, they cannot continue to act as a government, under the standard defining criteria for such.[27]

The justification for the libertarian theory is grounded in various different arguments, each of which is derived solely from facts about the nature of man and his actions. The libertarian theory is grounded in the homesteading rules of property (including self-ownership) and the non-aggression principle which follows as a corollary from this. Murray Rothbard argues in favour of the theory of natural law on the basis of rational first-appropriation rules.[28] Hans Hoppe argues in favour of the non-aggression principle on the basis of an axiomatic argument involving argumentation, establishing the principle as an "argumentation ethic".[29] Ayn Rand argues in favour of the non-aggression principle on the basis of an analysis of man's means of survival and the proper beneficiary of actions under a moral theory of egoism.[30] (Rand refers to the resulting set of principles as "objective law" rather than "natural law," though what she has in mind is identical to what we call natural law.) Other theorists have argued in favour of the non-aggression principle on the basis of other arguments.

(Questions over the proper basis of these moral rules are common; in particular, the question repeatedly arises as to whether these rules are deontological or consequentialist. The proper approach here is the to recognise that all moral rules arising from an examination of nature must be justified on the grounds of their consequences in reality, but the consequentialist calculation involved in their justification does not form a part of the moral rule. The reason for this is that moral rules must provide operational guidance, and appeals to consequences do not provide an adequate basis for this. Hence, an objective moral theory must put forward rules of conduct that stand on their own and not refer to consequences, even though they are derived from an examination of their consequences.[31])

27 The standard definition of a government is as a territorial monopolist of the use of violence, or alternatively, as a territorial monopolist of the functions of decision-making in conflicts (including conflicts involving itself). As has been established many times by various libertarian theorists, neither function can be reconciled with the libertarian view of natural law.

28 Rothbard, M.N. (1998) *The Ethics of Liberty*. New Your University Press: New York, pp. 29-62.

29 Hoppe, H.H. (1989) A Theory of Socialism and Capitalism. Kluwer Academic Publishers: Boston.

30 Peikoff, L. (1991) *Objectivism: The Philosophy of Ayn Rand*. Meridian: New York, pp. 187-324.

31 For a detailed account of this argument, see Smith, T. (1995) *Moral Rights and Political Freedom*. Rowman and Littlefield Publishers Inc: London, pp. 85-100.

All of the arguments in favour of the libertarian view of natural law make reference to facts about the nature of man or his actions, and use these facts to establish moral principles pertaining to the use of force, which is the subject matter of law. Thus, all of these arguments can properly be regarded —if correct— as establishing a natural conception of law. There has often been confusion on this issue, owing mostly to the failure to recognise the actual meaning of what natural law is.[32] It is not something *super*-natural, nor is it something imbued into the physical material of nature. The theory of natural law asserts nothing more than the fact that objective moral principles pertaining to the use of force exist, and these can be derived from facts about the nature of man or his actions. Unfortunately, most people are so imbued with the positivist account of law that they find the very idea of "nature" being used in law or ethics to be somewhat dubious.[33]

(Incidentally, some objections to the idea of natural law seem to be based on an objection to doctrines that assert that there is some kind of God-made law. It is nonsensical to call such a viewpoint "natural" law since it is clearly an assertion of a super-natural source. A proper conception of natural law would exclude such theistic doctrines, and hence, the mysticism inherent in these theistic doctrines is no argument against the natural law position, properly construed. Other objections refer to specific formulations of natural law that are indeed false. It is important to stress that we argue here in favour of the validity of the *concept* of natural law, and the correctness of the libertarian view of its *content*. Hence, any argument against the content of some other doctrine of alleged natural law is of no consequence to us.)

If we take the natural theory of law, based on the libertarian view of its content, then we can come up with an explanation for why the mugger in our example is a criminal. Criminality here means the violation of law, and in the context of an acceptance of natural law, this is the proper standard for adherence. To establish the criminality of the mugger we would use information about the nature of man to establish objectively that it is morally wrong for a person to rob another of their property using a threat of violence. This would establish the right to property, and we would see that the mugger is violating this right. He is a criminal because he is acting contrary to the dictates of natural law. He is a criminal regardless of whether or not there are commands against robbery in the society he is in. He is a criminal regardless of whether he is caught and punished for his crimes and regardless of the actions of the enforcement agents of the sovereign.

32 For example, in arguing in favour of the argumentation ethic of non-aggression, philosopher Gary Madison says that "...the various values defended by liberalism are not arbitrary, a matter of mere personal preference, nor do they derive from some natural law. ...they are values that are implicitly recognized and affirmed by everyone by the very fact of their engaging in communicative reason." But actually, the very conclusions he establishes —namely, an objectively true statement of liberalism, grounded in an aspect of man's nature (that he engages in argumentation)— *is* a statement of natural law. (See Madison, G.B. (1986) The Logic of Liberty. Greenwood Press: New York, p. 266.

33 Ibid, Rothbard (1998), pp. 9-10.

XI. Semantics: Which Has A Better Claim To The Title Of 'Law'?

Those who posit the correctness of the natural law theory do not deny that there are *also* such things as commands issued by bodies that command a great deal of power in society and are habitually obeyed. Nor do they deny that there are principles which might be used to try to rationalise the actions of institutions in this system. They recognise that such bodies exist, that their commands are real, and that there are often serious sanctions for disobeying them. It is most accurate to refer to these commands simply as "commands" since this term is well-understood, and does not have any normative import. However, due to the presently common usage of the word "law" to describe such commands (an effect of positivist doctrine) it is an adequate concession to present language use to describe these commands as "positive laws". (Of course, it would still be preferable to move towards calling these "commands", so as to be clearer on their nature.) This term describes a body of rules telling you what you must do in a society to avoid running afoul of the authorities.

However, to the natural law theorist, such commands do not have an exclusive claim to being called laws — in fact, their claim to being called laws is far weaker than for natural law. Positive law is dissimilar from all other forms of principle described as laws in nature, whereas natural law conforms nicely with these other forms of principle. Just as in physics or chemistry, it is possible to discover a natural law which is derived objectively from the nature of man, and this law has a proper claim to the title of law in the same way that the laws of physics have a proper claim to the title of law. Such laws are immutable principles that are not dependent on time or place and are applicable to any society.

To the natural law theorist, the mugger in our example is a criminal, under the natural law conception of the term, because he has engaged in an act which is objectively criminal in nature, since it uses force in violation of the rights of another. He is a criminal regardless of whether or not there exist statutes or legal judgements condemning his actions and regardless of the views of the "sovereign" or society in general. His criminality is **not** a social construction; it is a consequence of the fact that armed robbery is an objectively indefensible use of force; it is contrary to a proper objective view of morality, as derived from facts about the nature of man. Similarly, to the natural law theorist, there is no divergence in criminality and morality in the institution of slavery. The slave-master in our previous example is the criminal; the killed slave is the victim of crime, even though they are not recognised as such by the "positive law" of their time.

But isn't this all just a matter of semantics? Why should we prefer to apply the descriptor "law" to one of these concepts rather than the other? For this, we can let Hart do the talking:

'Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage. For what really is at stake is the comparative merit of a wider [positivist] and a narrower [natural] concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which

it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both'.[34]

To assist our theoretical enquiries we need to consider the *purpose* of talking about 'law'. If the purpose is merely to describe the commands and enforcement actions of the institutions of government, then clearly the positivist conception is the more useful, though it could still most accurately be referred to as a command system. In this context, the positivist theory gives a concept that directly tells us what we can and cannot do if we wish to avoid sanctions being imposed on us, and what we may expect from the enforcers of the sovereign body. In such a case we do not want a natural law theorist, we want an actual lawyer who knows about the case law and statutes of the government, and the past actions of the courts and other enforcement agents.

For this reason, most people are in the habit of regarding positive law as the exclusive body of rules that should be described as law. Indeed, the legal positivists argue that objective rules of morality should not be referred to as 'law' since this would only create confusion.[35] But is it really more confusing? Let's see.

Our purpose here is to answer the question of whether or not the government can properly be described as a criminal institution. The positivist rules this out by persuasive definition: any action done by people acting in the government apparatus, in accordance with rules of recognition of its own determination, must *ipso facto* be regarded as lawful, regardless of the nature of the action.

So which advances and clarifies our moral deliberations in this context? A theory which grounds law and crime in objective facts derived from nature, just as with references to laws in every other scientific endeavour, or a theory which grounds law and crime in the pronouncements of the powerful? A theory that applies equally to all people, or a theory that defines law and crime by reference to the whims and actions of the powerful? Which is really more confusing? A theory which allows for the possibility that people may be criminals or not, depending on their *actions*, or a theory that rules out the possibility that certain parties may act as criminals, merely by their *identity* as powerful people? To even ask these questions is to see that legal positivism does *not* clarify these matters in the context of such an evaluation, but rather, confuses them.

XII. Conclusion

At root in the libertarian theory is the judgment that aggression is objectively morally wrong —that it is a violation of rights. Since this conclusion is derived from facts about the nature of man, it can properly be regarded as a theory of natural law. Those who violate this law are criminals, regardless of who they are, or what position they hold in society.

34 Ibid, Hart (1994), p. 209.
35 Ibid, Hart (1994), pp. 207-208.

If libertarian theory is correct, then it follows that governments are criminal institutions. Their agents and enablers are engaged in crimes, and should properly be regarded as criminals, no different in principle, to a mugger in an alley.

As a result of this theory, libertarians have one simple demand: they ask that people obey the law (i.e., natural law). They ask them not to kill, steal, assault, rape, and so on. Though this is sometimes presented in more abstract terms (using political concepts such as free-market capitalism, anarcho-capitalism, non-interventionism, etc.) the entire theory of libertarianism is merely an elaboration of this one simple mandate.

Libertarians can make use of the concept of "positive law" just as well as anyone else, and they should regard this concept as a valid description of a useful thing in its proper context. (Each of the above theories of positive law has some merit in describing some aspect of the institutions of government enforcement systems. Nevertheless, there is no good reason that they should not be called by the more accurate term as "commands".) However, their belief in objective moral principles pertaining to the use of force means that they should regard natural law as having the stronger and more permanent claim to the title "law". Concession on this issue to legal positivism allows governments to whitewash their crimes under the euphemism of "public policy" and thereby command more respect and legitimacy than their actions deserve.

We began with an examination of a mugger in an alley, and the fanciful notion that he might try to describe his crime as a "public policy disagreement". When you read that, you may have thought: Surely no-one would ever make such a preposterous claim! And I would never be fool enough to fall for it if they did!

Wouldn't you? Are you sure you haven't already?

Actually, this happens almost every time libertarians talk about their preference for free-market policies in some context, and contrast these with interventionist or socialist policies that they don't like. In such discussions, it is common for libertarians to couch an argument in the language of a "free-market policy" or an "anti-interventionist policy" or a "liberal policy". But what does this mean? All it means is that the libertarian opposes some form of government intervention which involves the initiation of force against someone. In short, they oppose some act of robbery, assault or other trespass, and the preferred "policy" is that the government should not commit this crime.

When arguments of this kind occur, with no attempt to cut through higher level abstractions to show their roots in the concept of law and crime, libertarians have already given up most of the argument by conceding an important conceptual and semantic issue. These are not disagreements about "public policy". They are appeals to refrain from committing crimes.