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Review of The Philosophy of Positive Law: Foundations of Jurisprudence

Howard J. Bromberg

University of Michigan Law School, hbromber@umich.edu

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MURPHY, James Bernard. *The Philosophy of Positive Law: Foundations of Jurisprudence*. New Haven and London: Yale University Press. 2005. xiii + 240 pp. Cloth, \$40.00—This meticulously researched book addresses a central question of analytical and philosophical jurisprudence: What is positive law? Throughout his analysis, James Bernard Murphy, author of *The Moral Economy of Labor: Aristotelian Themes in Economic Theory* (New Haven: Yale University Press, 1993), contrasts positive law with the other two kinds of law that constitute the triad of legal concepts—natural law and customary law. Although they are treated at length in this work, Murphy states in the preface that he intends to write a companion volume on natural law and customary law, “thus completing the foundation of philosophical jurisprudence” (p. x). It is an ambitious project, but Murphy is up to the task. Murphy displays a vast knowledge of analytical jurisprudence, of the history, sociology, and anthropology of law, as well as of linguistics (study of language is the fundamental analytical tool employed by Murphy). *The Philosophy of Positive Law* is a searching examination of the concept of positive law—apparently the first such book length study—in the works of four seminal legal philosophers, Plato, St. Thomas Aquinas, Thomas Hobbes, and John Austin (along with “eminent” and contemporary scholars thereof), allowing Murphy to draw magisterial conclusions about the jurisprudence of positive law.

In the introduction, Murphy accepts the definition of positive law as “the law that human courts enforce” (p. 2). Positive law is thus distinguished from “legal positivism,” which is succinctly defined as the claim that “law can be identified and distinguished from other norms by a set of empirical criteria and that the content of law has no necessary connection to moral truth” (p. 22). Yet the perennial question remains: “What distinguishes law enforced by courts from all the other kinds of law, which are not so enforced?” (p. 1). Chapter 1 seeks the roots of an answer in a philosophical debate over language among the ancient Greeks. In Plato’s *Cratylus*, Socrates asserts against Cratylus that a law-giver names things as natural images of what they are; and against

Hermogenes, Socrates asserts that names do not thereby emerge by nature but from social agreement. In this debate over social convention and natural necessity, we can trace the origins of the philosophical definition of positive law, as law that “finds its source in some authoritative enactment (in contrast to custom) or that . . . lacks intrinsic force (in contrast to natural law)” (p. 18).

Through this prism, St. Thomas Aquinas is significantly identified in Chapter 2 as the “first major theorist of positive law” (p. 55) because of his paradigm of law as an authoritative imposition by a legislator. Aquinas recognizes both divine positive law and human positive law, which derive binding force from a complex interplay of morally necessary content and the sovereignty of the promulgator. As to divine law, Aquinas distinguishes the parts of the Mosaic law which possess generic moral force and hence are immutable, with those that have merely legal force and are applicable only to Israel. Likewise, enacted human laws acquire moral force from both a rational connection to a principle of morality and from the rational requirement to obey the law-giver. In Chapter 3, Murphy finds that Hobbes’s account of positive law, although linguistically rich, is not able to achieve a clear distinction between law which is positive because it is imposed and law which is positive because determinate and not vague or uncertain in content. Many of the same ambiguities pervade John Austin’s jurisprudence of positive law. In chapter four, Austin is shown to have been greatly concerned with questions of moral truth and divine law, in the pattern of Aquinas and Hobbes, rather than the utilitarian jurisprudence of the Benthamites to which he is usually linked. In his conclusion, Murphy suggests that much of the confusion over the discourse of legal positivity stems from a misplaced emphasis on statutory law as the supreme, and perhaps the only, form of positive law. The insights of contemporary legal anthropologists, historians, sociologists, and philosophers indicate that norm-applying institutions—courts—are a more important source of positive law than legislatures. This conclusion would seem to indicate that the search of analytical philosophers such as Hans Kelsen and H. L. A. Hart for a single enacted norm that underlies a legal system is misplaced.

The Philosophy of Positive Law reviews with great erudition the contribution of leading legal thinkers to concepts of positive law, while clarifying the pervasive confusion over the descriptive claim that law is positive because it has been duly enacted and the normative claim that law is positive because it lacks intrinsic connection to moral principles. This analysis allows for a persuasive and even striking rethinking of historical jurisprudence: for example, recognizing Aquinas not only for his natural law philosophy but for presenting “a full-blown ideology of legal positivism” (p. 57) and Hobbes and Austin for their overlooked efforts to connect divine and moral law with positive law.—Howard Bromberg, *Ave Maria School of Law*.