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# HAYEK'S TREATMENT OF LEGAL POSITIVISM

BY DANIEL NIENTIEDT

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# Hayek's Treatment of Legal Positivism<sup>1</sup>

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**Abstract:** Friedrich Hayek devoted the later part of his career to investigating the legal rules required for the existence of a free society. The subject of this paper is Hayek's treatment of legal positivism, which he thought was the most important intellectual movement responsible for the decline of liberal institutions in Europe in the early 20th century. As shown in the paper, Hayek's critique consists of two separate arguments: that legal positivism destroys the rule of law and that it amounts to constructivism. The first claim rests on the assumption that "true" laws comply with the rule of law principle, although the meaning of the adjective true is ambiguous. The second claim holds only for a particular variant of legal positivism. In addition to discussing these issues, the paper provides an assessment of Hayek's own evolutionary theory of law, which was intended as an alternative to both legal positivism and natural law theory.

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## 1. Introduction

Friedrich Hayek is well-known for identifying and warning against ideas that pose a potential threat to individual freedom, such as Soviet-style economic planning (Hayek [1944] 2007) or the “scientific” approach to solving normative problems (Hayek 1952).<sup>2</sup> One of the more curious threats to freedom identified by Hayek is a branch of legal philosophy called legal positivism. In contrast to the ideas mentioned above, legal positivism has lost nothing of its importance since Hayek criticized it (Leiter 2013). Indeed, only few people<sup>3</sup> seem to share his concerns regarding the doctrine.

Legal positivism is a theory about what constitutes law. Its main contention is that whether a law is “valid” – whether it has the status of law<sup>4</sup> – depends on the manner of its creation rather than the merits of its content. Legal positivism is usually contrasted with natural law theory, which maintains that in order to be valid, a law needs to satisfy certain moral criteria (Hart 2012, 185–86).<sup>5</sup> While there are different strands of legal positivism, the foremost target of Hayek’s criticism was Hans Kelsen, his teacher at the University of Vienna and the author of the pure theory of law.

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<sup>2</sup> For an overview of Hayek’s work see Caldwell 2004.

<sup>3</sup> Another prominent critic of legal positivism is Ronald Dworkin (e.g., Dworkin 1967).

<sup>4</sup> A valid law is a law, while an invalid law is not. Validity refers to the fact that a law has the normative consequences it purports to have (Raz 1977).

<sup>5</sup> Here, the term natural law theory refers to the normative evaluation of laws. It may also refer to the laws of nature, i.e., positive claims about regularities in the natural world. On this distinction see Nientiedt 2019.

In *The Constitution of Liberty*, Hayek describes legal positivism as the most important intellectual movement responsible for the decline of liberal institutions in Europe in the early 20th century (Hayek [1960] 2011, 342–58). In his view, Kelsen’s work in particular “signaled the definite eclipse of all traditions of limited government” (347) and even prepared the ground for the emergence of dictatorships:

The antilibertarian forces had learned too well the positivist doctrine that the state must not be bound by law. In Hitler Germany and in Fascist Italy, as well as in Russia, it came to be believed that under the rule of law the state was “unfree” ... and that ... it must be released from the fetters of abstract rules.<sup>6</sup> (350)

A similar assessment can be found in the second volume of *Law, Legislation and Liberty* (Hayek 1976), where Hayek refers to legal positivism as “an ideology born out of the desire to achieve complete control over the social order” (53).

Hayek’s opposition to legal positivism developed over time. When studying in Vienna in the early 1920s, he was “greatly impressed” by Kelsen and thought that “the logic of [legal positivism] has a certain beauty” (Hayek 1983, 276). Hayek went on to receive his first PhD in law, with Kelsen being one of the examiners (White 2015, x fn 3). There is no mention of legal

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<sup>6</sup> Hayek’s account coincides with a popular narrative among German legal scholars. In the aftermath of the Third Reich, Gustav Radbruch famously turned against legal positivism, proclaiming that “positivism, with its principle that ‘a law is a law’, has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal” (Radbruch [1946] 2006, 6). Hayek was aware of Radbruch’s argument and repeatedly referred to it.

positivism in *The Road to Serfdom*, published in 1944.<sup>7</sup> However, in the same year, Hayek penned a review of John Hallowell's *The Decline of Liberalism as an Ideology*. This review marks the beginning of Hayek's engagement with the subject.

Hallowell (1943) identifies legal positivism as the dominant reason for the decline of German liberalism at the end of the 19th century. Hayek's review of the book was not particularly positive, calling the central thesis "a just and significant if not original observation" (Hayek 1944, 159). Still, he adopted Hallowell's argument in later years. Hayek continued to allude to Hallowell's work, referring to it as "a good account" (Hayek [1970] 1978, 17 fn 23) and "an important American book" (Hayek 1978, 1).

Hayek's first substantial discussion of legal positivism is contained in a series of lectures delivered to the National Bank of Egypt in Cairo (Hayek 1955). He expanded his argument in the aforementioned *The Constitution of Liberty* and *Law, Legislation and Liberty*. In addition to these well-known sources, the present paper draws on an unpublished 39 page manuscript entitled "The Destruction of Classical Liberalism by Legal Positivism" (Hayek 1978). It is based on two lectures which Hayek apparently gave at Hillsdale College in Michigan.<sup>8</sup>

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<sup>7</sup> In the preface to the 1976 edition, Hayek indicates that he wasn't fully aware of Kelsen's writings at the time (Hayek [1944] 2007, 55).

<sup>8</sup> The author would like to thank Jeremy Shearmur for pointing him to the manuscript and the estate of F. A. Hayek for permission to quote from it.

While Hayek's criticism of legal positivism has often been noted (e.g., Gray 1981; Caldwell 2008; Lewis and Lewin 2015), only few authors have examined his arguments in detail. Norman Barry (1979) comments on Hayek's unusual treatment of the subject when discussing his theory of law. Richard Posner (2003) argues that by attacking Kelsen, Hayek simply wanted to defend a particular version of natural law thinking. Niclas Berggren (2006) uses the example of property rights to show that Hayek's notion of an antagonism between legal positivism and a liberal order based on the rule of law is ultimately unconvincing.

The aim of this paper is to analyze Hayek's interpretation of legal positivism, place it in the context of his work and compare it to the relevant literature from law and (constitutional) economics. As explained in *Law, Legislation and Liberty*, Hayek viewed his own evolutionary theory of law as a kind of third way between natural law theory and legal positivism. Thus, a final objective of the paper is to inquire into whether he succeeded in providing an alternative to these established concepts.

## **2. Natural Law, Legal Positivism, and Hayek**

Any theory of law needs to address the question of what defines law. There are two broad answers to this problem: Natural law theory and legal positivism. Following from the tradition established by Thomas Aquinas, natural law theory relies on two assertions. First, that there exist

general moral principles that can be discovered by human reason, and second, that individual laws must conform to these principles in order to be valid (Hart 2012, 156).<sup>9</sup>

Legal positivism, on the other hand, claims that the existence of a law is distinct from its moral quality. The observation that a law is recognized as authoritative in society does not tell us anything about the merits of its content (and vice versa). As described by H. L. A. Hart, legal positivism maintains that a law is valid if it was created in accordance with some socially accepted criteria (100–10). Both legal positivism and natural law theory make conceptual claims about the nature of law. For this reason, they cannot be compared directly to more descriptive theories of judicial reasoning, such as legal realism (Leiter 2001).

It was emphasized by Bruce Caldwell (2009) that Hayek explicitly rejected the natural law approach.<sup>10</sup> While he acknowledged that older forms of liberalism used natural law arguments to challenge the status quo (e.g., the inalienable rights of man), he objected to the view of law as “an unalterable fact of nature” (Hayek 1979, 174 fn 62). Hayek’s position on natural law could be taken to mean that he thought of himself as a legal positivist. As seen in the introduction, this was definitely not the case.

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<sup>9</sup> If a law does not conform to these principles, it does not have the status of law. This is expressed by the phrase *Lex iniusta non est lex* – an unjust law is no law at all (see Finnis 2011, 351–66).

<sup>10</sup> This distinguishes Hayek from other members of the Austrian School who embraced natural law thinking (e.g., Rothbard [1982] 1998).



What did Hayek understand by legal positivism? In the Cairo lectures, the doctrine is described as follows:

[Legal positivism] knows no principles beyond the positive laws, it has no criteria to judge whether a law is good or bad. It is solely concerned with what the law is and whether according to it a particular action is legal or not. (Hayek 1955, 27)

The above description focuses on the fact that legal positivism does not provide criteria for the moral evaluation of laws. It coincides with Kelsen's persuasion that legal positivism, as a science, "enquires into actual and possible law, not into 'right' law" (Kelsen [1934] 1992, 18). This attitude is particularly characteristic for Kelsen's own variant of legal positivism.

However, starting with *The Constitution of Liberty*, Hayek defined legal positivism along the lines of an earlier theory, namely the English command theory of law.<sup>11</sup> Its most famous exponents were Jeremy Bentham and John Austin. At the heart of the command theory is the "sovereign will" model.<sup>12</sup> It states that proper laws are simply the commands of a sovereign.<sup>13</sup> In this way, the command theory differentiates man-made law from other things that could be considered law, such as God's commands (Austin 1832, 1–30).

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<sup>11</sup> While it is unclear what prompted Hayek's decision, it was not based on Hallowell's 1943 book (where the English school does not play a role).

<sup>12</sup> This expression taken from Barry 1979.

<sup>13</sup> In *The Constitution of Liberty*, Hayek says that for legal positivism, "law by definition consists exclusively of deliberate commands of a human will" and a law is that which states "that whatever a certain authority [does] should be legal" (Hayek [1960] 2011, 346).

In *Law, Legislation and Liberty*, Hayek argued that the sovereign will model remains fundamental to modern forms of legal positivism:

It is from Bentham that John Austin derived his conception of “all law being laid down by an intelligent being” and that “there can be no law without a legislative act”. This central contention of positivism is equally characteristic of its most highly developed modern form, the version of Hans Kelsen. (Hayek 1976, 45)

Contrary to Hayek’s characterization, there are marked differences between Kelsen and the earlier positivists. From Kelsen’s point of view, what all laws have in common is that they were created in a legal manner. Their validity derives not from the command of a sovereign, but from other norms and, ultimately, a presupposed basic norm. Consequently, Kelsen objected to Austin’s notion of laws as commands (Kelsen 1945, 30–37).

Still, the “definition of law as the product of the will of the legislator” (Hayek 1976, 48) became the starting point for Hayek’s critique of legal positivism. His criticism consists of two separate charges: that legal positivism destroys the rule of law; and that it amounts to what Hayek calls “rationalist constructivism”.

### **3. Legal Positivism and the Rule of Law**

The concept of the rule of law is of central importance in Hayek’s work. While it appears in *The Road to Serfdom*, the concept plays a much more prominent role in his writings starting in the 1950s. Jeremy Shearmur (1997) posits that focusing on the rule of law allowed Hayek to better

identify what he regarded as the legitimate activity of the state and to distinguish his liberalism from that of John Maynard Keynes.

For Hayek, the rule of law is essentially the same as the German *Rechtsstaat* conception, which he traces back to Immanuel Kant (Hayek 1955, 18–20). At its most basic, this conception says that the actions of government should be bound by certain rules. These rules limit the coercive powers of the state and create a free, private sphere of action for each individual. In this sense, the rule of law is seen as the precondition for the freedom of the person (Hayek [1944] 2007, 112–13).<sup>14</sup>

An early comprehensive description of the rule of law can be found in the Cairo lectures. Here, Hayek offers a historical account of the emergence of the concept of the rule of law, its changing meaning, and its importance in different legal systems. For example, he claims that in Germany, the *Rechtsstaat* idea was gradually abandoned in the late 19th and early 20th century as the result of the emergence of welfare statism, historicism and legal positivism (Hayek 1955, 25–27).

In Hayek's legal theory, the rule of law is a normative criterion for good law. It is a “meta-legal principle” (32) that is not itself a law, but rather a description of what good law looks like. Hayek names three characteristics that a legal system must fulfill in order to conform to the rule of law, namely that the laws be general, equal and certain (34). This means that laws should not

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<sup>14</sup> As pointed out by Ronald Hamowy (1961), the rule of law should not be seen as a sufficient condition for individual freedom because some tyrannical laws meet Hayek's criteria for the rule of law.

discriminate in favor of or against certain persons or groups, that they should apply equally to all, and that individuals should be able to predict whether a law affects them.

Hayek suggests that the concept of the rule of law is closely connected to the distinction between two different kinds of law. In *The Constitution of Liberty*, he distinguishes between “law in the substantive or material sense” and “law in the merely formal sense” (Hayek [1960] 2011, 312–15). All decisions laid down by the legislature are called laws, but only few of them have the character of general rules of conduct. Hayek maintains that only the latter deserve to be called laws in the material sense or “true laws” (315).

In essence, Hayek argues that true laws can be identified by the merits of their content. This can be seen particularly clearly in a passage where true laws are described as being characterized by the attributes of generality, certainty and equality (315–17).<sup>15</sup> Thus, true laws conform to the criteria established by the principle of the rule of law. Hayek (1978) adds a fourth attribute of true laws, namely that they aim at securing the formation of a spontaneous order of actions (12–13).

Where does the distinction between law in the material sense and law in the merely formal sense come from? When Hayek connects the rule of law to a specific conception of what is meant by

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<sup>15</sup> Some scholars argue that these attributes pertain to the form of the law rather than its content. For the purpose of the present discussion, this distinction is relatively unimportant: “The validity of legal norms cannot depend on their merits even if their merit does not lie in their content but lies rather in their form, eg in the extent of their compliance with rule-of-law standards” (Gardner 2012, 31).

law, he points to two texts by Carl Schmitt (1926; [1928] 2008).<sup>16</sup> Schmitt differentiates law in the sense of the *Rechtsstaat* conception from a “political concept of law”:

For the *Rechtsstaat* understanding, the law is essentially a norm. It is, specifically a norm with certain qualities, a legal (an appropriate, reasonable) rule of a *general* character. Law in the sense of the political concept of law is concrete *will* and *command* and an act of sovereignty. (187)

In Hayek’s view, legal positivism destroys the rule of law by claiming that law does not have a specific content. He correctly notes that from the positivist point of view, the question of whether something is law is distinct from the question of whether it conforms to the principle of the rule of law. Hayek interprets this to mean that the legislator “has a completely free hand” (Hayek 1976, 48) in determining the content of the law:

The insistence that the word “law” must always be used and interpreted in the sense given to it by the legal positivists, and especially that the difference between the functions of the two kinds of rules actually laid down by legislatures are irrelevant for legal science, has thus a definite purpose. It is to remove all limitations on the power of the legislator that would result from the assumption that he is entitled to make law only in a sense which substantively limits the content of what he can make into law. (52–53)

By saying that true laws have a specific content, Hayek could be making a natural law argument. Indeed, Posner (2003) depicts Hayek as a representative of a “free market” version of natural law

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<sup>16</sup> In the Cairo lectures, Hayek attributes this distinction to Albert Hänel (1888). However, Schmitt expresses Hayek’s contention much more clearly.

thinking. As shown by Posner, Hayek often equates law with the rule of law, which could be taken to mean that only true laws have the status of law (281–83).

Consider, for example, Kelsen's contention that "from the point of view of the science of law, the law (*Recht*) under the Nazi-government was law (*Recht*). We may regret it but we cannot deny that it was law" (Kelsen, quoted in Hayek 1976, 56). Hayek objects to this view. He asserts that Kelsen's use of the term law in this passage deprives it of its original meaning of referring to general abstract rules (53–56). Thus, Hayek does not seem to distinguish between actual laws – the laws of Nazi Germany – and the normative principle of the rule of law. As explained by Posner, "it is not paying a compliment to Nazi Germany ... to say they had law, but it is a justified condemnation of them that they did not have the rule of law" (Posner 2003, 281).<sup>17</sup>

Posner is correct in pointing out that Hayek often does not distinguish between law and the rule of law. However, there is also an argument to be made against the notion that Hayek should be seen as a natural lawyer. The problem is the ambiguity of what is meant by law in the material sense or true law. In contrast to the representatives of natural law theory, Hayek never states that laws that violate his normative principle – i.e., not true laws – do not have the status of law.

#### **4. Legal Positivism and Constructivism**

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<sup>17</sup> On a related note, Hayek also criticizes Kelsen's use of the term *Rechtsstaat*. This seems to be based on a misunderstanding. According to Hayek, Kelsen uses the term to denote a state of law, thus claiming that "the rule of law prevails of necessity in every state" (Hayek 1976, 50 fn 56). While Kelsen uses the term in this sense, he is clearly aware of the double meaning and differentiates the "formal" term *Rechtsstaat* (a state of law) from its "material" meaning (the rule of law – Kelsen 1925, 91).

The second major criticism leveled by Hayek against legal positivism is that it amounts to what he calls constructivism. Indeed, Hayek claims that he only became aware of the errors of legal positivism in this particular context:

[Interviewer]: When did you first come to have the now-critical view of Kelsen that you hold?

HAYEK: Oh, certainly only when I was working on these problems ten years after my study in England. It was probably when I was working on these things on the history of ideas, particularly [Auguste] Comte and the Saint-Simonians, when I learned to see what I now call the constructivistic approach. It was in Comte and the early sociology that I found it most clearly expressed, and I began to trace the development from Cartesian rationalism to positivism. Well, it was a very slow and gradual process which let me see it clearly; so that's why I can't say exactly when it began. But by the time I did this book on the "counterrevolution of science," I had a fairly clear conception of it.<sup>18</sup> (Hayek 1983, 276–77)

What does Hayek mean by the "constructivistic approach" and "Cartesian rationalism"? He credits René Descartes with starting an intellectual movement that places a particular emphasis

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<sup>18</sup> *The Counter-Revolution of Science* was published in 1952. For the most part, the book is concerned with criticizing logical positivism, not legal positivism. Hayek points to legal positivism only once: "I believe that quite a good case could be made out that [Comte and Hegel] are among the main sources of the modern tradition of legal positivism. It is, after all, only another manifestation of the same general attitude that refuses to admit anything as relevant which cannot be recognized as the expression of conscious reason" (Hayek 1952, 202).

on human reason – a movement which Hayek refers to as (rationalist) constructivism. The term constructivism takes on a number of different meanings in his work (Diamond 1980). In the context of the present paper, it needs to be understood first and foremost as an epistemological method, i.e., the notion that “reason [is] defined as logical deduction from explicit premises” and that “rational action [is] only such action as was determined entirely by known and demonstrable truth” (Hayek 1973, 10).

The connection between constructivism and legal positivism is first made in *The Constitution of Liberty*, where Hayek says that legal positivism stems from “a false rationalism that conceives of an autonomous and self-determining reason and overlooks the fact that all rational thought moves within a non-rational framework of beliefs and institutions” (Hayek [1960] 2011, 269).

In the following, Hayek expands on the idea that legal positivism falls into the trap of constructivism (Hayek [1970] 1978; 1976; 1978). The argument proceeds from the notion that legal positivism conceives of law as being necessarily the product of the will of the legislator. Hayek points out that this contention is simply false because it does not account for other types of law that are not the result of any conscious law-creating act. Most importantly, Hayek shows that the sovereign will model does not account for customary law and judicial legislation:

The legislator may instruct the courts to maintain the common law and have little idea what the content of that law is. He may instruct the courts to enforce customary rules, native law, or the observation of good faith or equity – all instances where the content of the law that is to be enforced is certainly not created by the legislator. (Hayek 1976, 46)



This objection must be read in the broader context of the development of Hayek's legal theory. In his later work, he refers to laws that are general and abstract as *nomos*, while legislation aimed at achieving particular ends is called *thesis*. The two kinds of law develop in different ways: *nomos* is said to be the outcome of spontaneous growth, while *thesis* is deliberately set (Hayek 1973, 94–144).<sup>19</sup> According to Hayek, a notable example of *nomos* is the English common law, which was created by judges in a case by case manner (124).

Both *nomos* and *thesis* are legitimately called law (126–28). Although the distinction between them is similar to Hayek's earlier distinction between law in the material sense and law in the merely formal sense, it should be noted that *nomos* refers to general abstract rules which also have developed in an evolutionary manner. The later Hayek seems to suggest that common law systems are more likely to produce a liberal social order than codified systems of law.<sup>20</sup>

Hayek's reference to customary law and judicial legislation constitutes a valid criticism of the claim that law is the product of the will of the legislator. Indeed, this is one of the main arguments Kelsen and Hart brought against Austin (Kelsen 1945, 34–37; Hart 1958, 600–15). It remains unclear whether Hayek was aware that his position mirrored that of two leading

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<sup>19</sup> When applied to the organization of society as a whole, these two principles are referred to as *cosmos* (spontaneous order) and *taxis* (planned order). See Hayek 1973, 35–54.

<sup>20</sup> This idea may have been prompted by the work of Bruno Leoni. For a discussion see Shearmur 1996, 87–101. An apparent counterexample is given by Hayek 1973, 89.

representatives of legal positivism.<sup>21</sup> Of course, Hayek was of the persuasion that he was attacking legal positivism as such, not just the command theory of law.

## **5. Is There a Third Way Between Natural Law and Legal Positivism?**

As we have seen, Hayek was critical of both natural law theory and legal positivism. His charge against the former is that it regards law as a fact of nature. His criticism of the latter consists of two separate arguments: that legal positivism destroys the rule of law and that it amounts to constructivism. Given that Hayek rejected both concepts, the question arises whether he was able to provide an alternative to them.

Hayek's attempt to solving this problem is the evolutionary theory of law, as developed in the first two volumes of *Law, Legislation and Liberty* (Hayek 1973; 1976). In the view of its author, this theory does not fall into the long-established categories of natural law theory and legal positivism (60) because it differs from both in important respects. Most notably, Hayek's approach offers a new interpretation of what constitutes valid law.

According to Hayek, valid law is consistent with a pre-existing system of rules (48–60). The idea is that there exist rules which are in fact observed in society. These rules have emerged over a long time and their content is independent of the will of any person. Hayek believes that the

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<sup>21</sup> Notably, Hayek treats Hart as if he were not a legal positivist. He speaks approvingly of Hart's notion of a "minimum content of natural law" (Hayek [1970] 1978, 21 fn 25) and says that Hart's work "in most regards appears to me one of the most effective criticisms of legal positivism" (Hayek 1976, 56).

legislator needs to take these rules into account when creating new law. Indeed, he thinks that the pre-existing system of rules determines what should be the law (51).

In order to assess whether a law is consistent with the prevailing system of rules, Hayek introduces the “test of universalization” (38–42). The test simply asks whether a law could be universally applied. Hayek contends that this question will be answered in the affirmative if and only if the law does not conflict with an existing rule.<sup>22</sup>

The test of universalization is a negative test, meaning that it only enables us to determine which laws are not valid. It lets us “eliminate rules which prove to be unjust, because they are not universalizable within the system of other rules whose validity is not questioned” (54). Hayek compares the negative character of the test of universalization to Karl Popper’s method of falsification, which allows for the identification of statements that have no claim to scientific truth (43; Hayek 1978, 15).

Hayek’s definition of legal validity is not without problems. When speaking of pre-existing rules, he acknowledges that some rules that are in fact observed in society may not (yet) have the force of law. Thus, an important feature of Hayek’s definition is that a rule can be valid according to the criterion of universalizability without in fact being the law. The opposite is also

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<sup>22</sup> This is expressed particularly clearly in Hayek (1978): “Universalizability in this connection means that we can will that the rule which we want to test should be universally applied. And the obstacle which may make it impossible to will this can only be that the endeavour to apply the rule generally or universally will lead to conflict with some other rule which we wish to maintain” (13–14).

true. Hayek gives the example of a judge whose decision contradicts the existing system of rules: “The judge may make a false decision which, though it may become valid (acquire ‘the force of law’), will remain nevertheless in a meaningful sense contrary to the law” (Hayek 1976, 50–51).

As observed by Barry (1979), Hayek’s definition of validity produces a paradox. It allows for a rule to be valid and invalid at the same time. If a rule can have the force of law and not be valid – as in the example of the judge – how are we to know which rules are actually valid? Barry concludes that “it cannot be said that this [theory] provides the kind of certainty and predictability that Hayek wants” (99). It was seen earlier that the same ambiguity is produced by the notion of true laws. While Hayek maintains that true laws conform to the rule of law criteria, he does not say that laws that do not meet these criteria are not valid.

A comparison may be drawn between Hayek’s evolutionary theory of law and the so-called historical school of jurisprudence (Ratnapala 1993; Zywicki 2014).<sup>23</sup> In the 19th century, this school emerged as a challenge to both natural law theory and legal positivism. Its main representatives were Friedrich Carl von Savigny and Henry Sumner Maine. The historical jurists claimed that valid law is that which exists as part of the “common consciousness” or *Volksgeist* of a people (Savigny [1814] 1831, 28).

If one were to speculate on the reason why Hayek thought that both natural law theory and legal positivism missed important characteristics of law, it was likely because he read Savigny. Savigny is not mentioned in *The Road to Serfdom*, but appears in *The Constitution of Liberty* and

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<sup>23</sup> The author would like to thank Todd Zywicki for pointing this out to him.

*Law, Legislation and Liberty*. What Hayek takes from Savigny is not so much the notion of a common consciousness, but rather the idea of pre-existing law that can be discovered (e.g., Hayek 1973, 72–74). He may have adopted Savigny’s description of 19th century legal positivism along with it.<sup>24</sup>

## 6. Conclusion

Hayek devoted the later part of his career to investigating the legal rules required for the existence of a free society. The subject of this paper is Hayek’s treatment of legal positivism, which he thought was the most important intellectual movement responsible for the decline of liberal institutions in Europe in the early 20th century. As shown in the paper, Hayek’s critique consists of two separate arguments: that legal positivism destroys the rule of law and that it amounts to constructivism.

Regarding the first point, Hayek maintains that legal positivism obscures the distinction between laws in the material sense – also called true laws – and laws in the merely formal sense. True laws are identified by the fact that they conform to the principle of the rule of law. Contrary to the reading advanced by Posner, the present paper argues that Hayek’s distinction does not amount to a natural law argument. The reason is that he never says that laws in the merely formal sense (i.e., not true laws) do not have the status of law. It remains unclear whether there exists a conflict between Hayek’s position and legal positivism.

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<sup>24</sup> “According to [legal positivism], all law, in its concrete form, is founded upon the express enactments of the supreme power” (Savigny [1814] 1831, 22–23).

Regarding the second point, Hayek describes legal positivism as a form of constructivism because it falsely assumes that all law is the result of a conscious law-creating act. He refutes this conjecture by pointing to the importance of customary law and judicial legislation. As shown here, this strand of Hayek's critique is directed at an older variant of legal positivism which identifies law with the commands of a sovereign. Hayek's observations on the evolutionary nature of law are compatible with 20th century legal positivism. In fact, his criticism of the sovereign will model mirrors that of Kelsen and Hart.

Much of Hayek's opposition to legal positivism seems to be informed by the concern that the doctrine may provide a justification for bad law, and in particular that it may weaken the argument in favor of the rule of law. However, legal positivism confines itself to the rather limited task of determining what makes law valid. When it comes to answering the question of legal validity, neither the notion of true laws nor the test of universalization – introduced as part of the evolutionary theory of law – is particularly helpful. In this sense, Hayek's attack on legal positivism does little to support his case for liberal institutions.

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