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On Being a Positivist: Does it Really Matter?

ON BEING A POSITIVIST: DOES IT REALLY MATTER?°

FREDERICK VAUGHAN*

I. INTRODUCTION

In a recent volume of the *Osgoode Hall Law Journal*,¹ Professor Peter Hogg, writing on the *Canadian Charter of Rights and Freedoms*² and American theories of interpretation, stated:

I should make clear an underlying assumption of the article that will render some of the discussion unsatisfying to some readers. I do not believe in "natural rights." If that makes me a positivist, so be it. I do not know how to identify natural rights, from whence they derive their authority, or what the legal effect of their breach could be. I do not trust any judge to reach conclusions on these matters. My scepticism is reinforced by the widely differing accounts of rights that are given by legal philosophers such as Dworkin, Rawls, Nozick, and Finnis, who do believe in natural rights. To me rights are creatures of law.³

This statement, to which I would like to offer the following response, is typical of the kinds of new and important issues lawyers and law professors have been forced to consider directly since the *Charter* came into force in 1982. I would like to demonstrate that the issues are profoundly important and cannot be dismissed as Professor Hogg has done. But, before proceeding to address the substantive issues raised in Hogg's disclaimer, I would like to reflect upon the statement itself.

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¹ P.W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 *Osgoode Hall L.J.* 87.

² Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

³ Hogg, *supra*, note 1 at 89.

The first thing that emerges from Hogg's statement is the lack of clarity as to what constitutes a natural right. In a footnote to the central statement, Hogg says: "All I mean by 'natural rights' are rights derived from sources other than positive law."⁴ But that definition is inadequate. The source of natural rights is hinted at in the very term itself: nature. The voluminous literature on rights (going well beyond Rawls, Dworkin, and Nozick⁵) clearly identifies two fundamental sources of law: nature and convention (law). Rights are derived from nature (whatever that may mean for the moment) or by convention, that is, by human (individual or collective, i.e. legislative) fiat. As Gary Glenn has written:

All rights, supposing there are such, either exist *a priori* or else on the basis of some argument. That basis may be a "subjective" reality (convention) or else an "objective" reality (nature). If rights are based on nothing more than convention, whether this means custom, ordinary law, or a more permanent constitution, the only issue regarding assertion of a particular right is whether one has the *power* to get agreement to recognize it. Here reason is restricted to ends determined by desire and is unable to argue an intrinsic claim to a right since there are no such claims. If, however, rights are founded on an objective reality, reason can still determine that the denial of a particular claim to a right is contrary to objective right.⁶

Hogg clearly does not subscribe to Blackstone's natural law based teaching. By implication, he sides with Blackstone's great critic Jeremy Bentham whose *Fragment on Government*⁷ is a scathing assault on Blackstone. It becomes necessary, therefore, for us to explore the Blackstone-Bentham controversy before proceeding further because, by implication, we are being invited by Hogg to side with him and Bentham against Blackstone (and John Locke, Blackstone's mentor). In the *Commentaries*, Blackstone wrote that:

⁴ *Ibid.* n. 8.

⁵ J. Rawls, *A Theory of Justice* (Mass.: Belknap Press of Harvard University Press, 1978); R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978); R. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1975).

⁶ G.D. Glenn, "Abortion and Inalienable Rights in Classical Liberalism" (1975) 20 Am. J. Jur. 62 [emphasis added].

⁷ J. Bentham, *A Fragment on Government* (New York: Cambridge University Press, 1988)[hereinafter *Fragment*]; and J. Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner, 1948).

The rights of persons considered in their natural capacities are ... of two sorts, absolute and relative. Absolute which are such as appertain and belong to particular men, merely as individuals or single persons: relative which are incident to them as members of society, and standing in various relations to each other.⁸

And a little later, he goes on to say that

the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature ... Hence, it follows, that the first and primary end of human laws is to maintain and regulate those absolute rights of individuals ... And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute which in themselves are few and single.⁹

As to the rights of the people of England, Blackstone claims that "these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property."¹⁰ And in an attempt to specify further the right of personal security, Blackstone states that "personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."¹¹

Thus, Blackstone does not have Hogg's difficulty of identifying natural rights. Nor does he have Hogg's problem of enforcing them. For Blackstone, the civil or state (positive) laws must be conducive to the ends specified by nature: "uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." These uninterrupted enjoyments cover the full range of what we would now call civil rights. Granted, they are not spelled out as, for example, the right to vote, the right to be presumed innocent until proven guilty, etc. However, they are easy and necessary extensions of Blackstone's statement as, indeed, the common law tradition had done until Bentham's axe was levelled at the roots.

Blackstone would find it an easy matter to support the people of Eastern Europe and South Africa in their struggle for

⁸ Sir W. Blackstone, *Commentaries on the Laws of England*, vols 1-4, 5th ed. (Oxford: Clarendon Press, 1765) at 123.

⁹ *Ibid.* at 124-25.

¹⁰ *Ibid.* at 129.

¹¹ *Ibid.*

freedom against the oppressive positive regimes under which they have lived for almost half a century. For Blackstone, people — by nature — enjoy "absolute rights ... such as would belong to their persons merely in a state of nature, and which *every* man is entitled to enjoy, whether out of society or in it."¹²

Hogg, by contrast, would appear to say that the aspirations of the people of Eastern Europe or South Africa are not grounded in nature, but in the will of the legislatures of those countries, that is, in convention. That means that Blackstone's principles are more immediately conducive to democracy than are Hogg's, for the people of Eastern Europe and South Africa are appealing over the heads of their governments (and legislatures) to a higher or more fundamental right: the natural right of all men and women to be free. Thomas Paine articulated this doctrine most forcefully in the late eighteenth century in his *Rights of Man*.¹³ It is no coincidence that Paine was a founding member of the first anti-slavery society in the United States or that he, as secretary to the Pennsylvania Assembly, wrote the preamble for the first anti-slavery resolution. Nor is it surprising to learn that Bentham was employed by the proponents of slavery.¹⁴ It is difficult to see how Hogg's principles would be very helpful to oppressed peoples. If, indeed, there is no claim to rights beyond the legislative power, then there is no right to revolution. By Hogg's principles, oppressed people would have to be patient, and try to persuade the sovereign legislative body to confer greater rights and liberties, but there would clearly be no claim as of right for such peoples.

Somehow Hogg's positivism fails those who are oppressed when they need help the most. But this is the essential weakness of positivism: it favours oppression over freedom, except in those regimes that have the good fortune to be liberal. Yet, regimes that have the good fortune to be liberal have no grounds for that good fortune other than the good fortune itself. Those nations and peoples who live in Western liberal regimes can afford the luxury

¹² *Ibid.* at 123 [emphasis added].

¹³ T. Paine, *Rights of Man* (New York: Willey, 1942).

¹⁴ See P. Palmer, "Benthamism in England and America" (1941) 35 *Am. Pol. Sci. Rev.* 39.

of positivism; those who live under oppressive governments cannot. Indeed, those of us who share the good luck of living under liberal regimes are at the mercy of those who rob us of our good fortune and impose an oppressive regime. We would not be able to appeal to nature in our efforts to throw off tyranny, all we would be able to appeal to is our former condition of freedom. But that former condition could never, in Hogg's view, be claimed as a *right*.

As well, Hogg's positivism reduces our outrage over apartheid in South Africa to silence. The oppressive laws of South Africa are sound laws: formal legislative enactments of the legislature of South Africa. Those of us who believe that they are unjust laws base that claim in human nature. This gives us the authority to transcend the legal space of our own liberal democratic regime and denounce the apartheid laws of South Africa as unjust. They are unjust because they offend the natural right to liberty that Blackstone asserted earlier and that Paine propagated in the *Rights of Man*. The Blackstone-Paine thesis advocates universal nature: that all men ought, by nature, to be free. Granted, the assertion of universal natural rights does not prove their existence. But the universal or near universal outrage that greets the oppressive policing tactics of apartheid points simply to the existence in men and women of a ground that is universal and natural.

Jeremy Bentham, Hogg's implicit mentor, claims that natural rights teaching is a "dangerous doctrine" because it provides the foundation for oppressed peoples. Bentham says: "I see no remedy but that the natural tendency of such doctrine is to impel a man by force of conscience to rise up in arms against any law whatever he happens not to like."¹⁵ With scorn, he says he will leave it to Blackstone to demonstrate how any sort of government could survive with such a doctrine available to citizens. As for natural rights, Bentham brushes them aside impatiently as "nonsense upon stilts."¹⁶

My impression is that Hogg is clearly in the mainstream of contemporary legal thinking; the law schools of this country are overwhelmingly positivistic. Bentham's positivism reigns in our law

¹⁵ *Fragment, supra*, note 7 at 149.

¹⁶ J. Bentham, *The Works of Jeremy Bentham*, 1st ed. by J. Bowring (New York: Russell & Russell, 1962) at 11 and 501.

schools with the force of iron clad ideology. It is almost never seriously challenged openly; it forms the implicit and explicit foundations for most discussions of rights. Unless positivism is understood properly as a dangerous form of relativism, it will have the effect of working great evil. The *Charter* has, for the first time, formally forced this issue to the fore in Canadian legal studies. And lawyers and law professors, unschooled in the tradition of political philosophy, suddenly find themselves out of their depth. Their response to the new pressures tends to be panic or a simplistic and superficial impatience. We all deserve better.

II. NATURAL LAW REVISITED

At the heart of the issue of natural rights is the question or problem of natural law. It is necessary, therefore, to revisit this long-repudiated (in legal circles) subject.¹⁷ The first thing to clear up is the confusion that arises out of the use of the expression "natural law tradition." There is no single natural law tradition. The doctrine emerged out of the classical (Plato and Aristotle) teaching of natural right (natural justice). It is imperative to note, however, that Plato and Aristotle did not have a natural "law" teaching. There is no teaching anywhere in Plato or Aristotle that obliges people to obey the dictates of natural justice under the threat of penalty (which is what all law does). For the ancient political philosophers, the primary question was: Is there some right that is natural, that flows from nature, or is all right (i.e., the foundation of *all* law) one of convention, that is, of custom or human origin?

The easy solution (Hogg's following Bentham) is to assert, in the face of a wide variety of competing and conflicting claims, that there is no one conception of justice rooted in nature because we see all around us a variety of such conceptions. Plato and Aristotle did not throw in the towel in the face of such obvious facts. Rather, they set about to examine the issue in all its particulars. We

¹⁷ For a good recent overview of Thomistic natural law, see E.A. Goerner, "On Thomistic Natural Right" (1979) 7 *Pol. Theory* 101.

have the result of that process in Plato's *Republic*¹⁸ and Aristotle's *Nicomachean Ethics*;¹⁹ books which are no longer read in the law schools having been driven out by Bentham's disciples. But this advent does not make the cogency of Plato and Aristotle's arguments any less compelling. It merely makes those arguments inaccessible to our law students.

This institutional "value judgment" has acquired, over the years, the support of rigid orthodoxy. Our law students deserve better. These books are difficult books which cannot be approached by impatient hostility. They require a certain kind of openness which is not always available due to the hostile attitude so deeply inculcated by Bentham. If one cannot read both of these books, one should read Aristotle's *Ethics*²⁰ and ponder carefully what he says. It is an invitation to converse with a very wise man who spent many years contemplating the issues, unlike his detractors who spend almost no time contemplating the issues and less time reading him. My point is: No law professor or teacher has any right to teach against the concept of natural right (and natural law) without first demonstrating that he or she is qualified to teach. *The prerequisite to teach in this matter is a sound knowledge of Aristotle's Nicomachean Ethics.*

Natural law, as we have come to understand it, emerged out of the writings of the Stoics who took their bearings from Aristotle. Even in those writings, natural law first referred to the laws of physical nature; those "laws" by which nature ruled the physical world. The Stoics taught that humans participated in an analogous order; that human beings could discover the law governing human conduct and in so doing attain the fullness of human perfection by nature.²¹ Under the Stoics, natural law became synonymous with right reason: the grounds for subduing the passions. One of the principles of the Stoic natural law teachings was the natural

¹⁸ Plato, *The Republic*, trans. B. Jowett (New York: The Modern Library, 1941).

¹⁹ Aristotle, *Nicomachean Ethics*, trans. Hippocrates G. Apostle (Grinnell, Iowa: Peripatetic Press, 1984).

²⁰ Aristotle, *Ethics* (London: Faber, 1973).

²¹ See Cicero, *De natura deorum; Academica*, trans. H. Rackham (Cambridge: Harvard University Press, 1933) c. I at 40.

inclination for people to love their fellow humans, not merely fellow citizens. The prevailing and almost universal abhorrence for apartheid would appear to be a contemporary manifestation of that Stoic principle. Implicit in the Stoic natural law teaching is the concept of divine sanction. No law is a law without sanctions.²²

It is easy to see how this understanding of natural law could be gathered under the umbrella of Christian orthodoxy. This is exactly what Aquinas did.²³ For Aquinas, it was a simple matter to bring the vague Stoic providence within the dictates of revealed theology.²⁴ The God of Christianity became the dispenser of sanctions (in the next world principally), and the Ten Commandments became understood as divine positive law or explicit accounts of what natural law contained. This highly charged, Christianized version of natural law drew its inspiration from the Stoics and hence the ancient Socratic sources. There are fundamental differences, however. Both Plato and Aristotle would have great difficulty with the Christian overlay provided by Aquinas. However, the fundamental grounding in *nature* would nonetheless be appealing to them. But Thomas is clearly not Aristotle.

III. MODERN NATURAL LAW

The Thomistic or Scholastic natural law teaching dominated Western civilization until the sixteenth century, that is, until Thomas Hobbes (1588–1679) and John Locke (1632–1704) arrived on the scene. Hobbes and Locke rejected completely the Scholastic–Aristotelian foundations of natural law (except the language). They erected, in its stead, a *new natural law* that was founded on a new natural right. Hence, in place of Aristotle's conception of natural right (or natural justice), Hobbes founded a new natural law on the foundations of the new natural right of self-preservation.

²² See Cicero, *De re publica; De legibus*, trans. C.W. Keyes (Cambridge: Harvard University Press, 1959) c. II at 15-17 and c. III at 33-34.

²³ See Saint Thomas Aquinas, *Summa theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Bros., 1947) c. Ia-IIae at 90-104.

²⁴ For a critical account of this matter from the Aristotelian perspective, see H.V. Jaffa, *Thomism and Aristotelianism* (Chicago: University of Chicago Press, 1964).

This new modern natural law shared nothing but the name with the old natural law. The new natural right of self-preservation (meaning *comfortable* self-preservation, not mere existence) was the basis for the new modern order of "possessive individualism" or modern capitalism. It rejected the theological aspects so essential to medieval or Scholastic natural law; it returned to the purely rational domain and posited the existence of a new natural law on the foundations of a new natural philosophy. The Biblical foundations of the old natural law were replaced by a rational account of man's first condition by nature – the state of nature.

Access to this account of man's truly first condition was not by way of the Scriptures, but by the human mind reasoning back upon human experience. Many of our contemporaries today, unschooled in the history of political philosophy, confuse the new natural law with the old and tend to talk of a single natural law tradition. They do not appear to understand that the old and the new natural law teachings have as much in common as a horse chestnut and a chestnut horse. The modern philosophers, Hobbes and Locke, transformed natural law from private law norms into public law norms. Hobbes's doctrine of sovereignty was meant to establish, on a firmer footing, the supreme state power or authority.²⁵ Locke's teaching culminated in the defiant doctrine of "no taxation without representation."²⁶ Under the impulse of the new natural law, the rallying cry became "the rights of man." The old Scholastic natural law teaching attempted to teach people their duties. The new modern natural law liberated people both from the church as well as from a nature understood as restraining (i.e., it "liberated" them from duties). The new natural law, founded in the right to self-preservation, liberated the new modern person and encouraged him or her to be creative, to conquer nature in the interest of, as Bacon put it, "relieving man's estate" on this earth.²⁷

²⁵ See T. Hobbes, *Leviathan*, ed. by M. Oakshott (Oxford: Beza Blackwell, 1962).

²⁶ See J. Locke, *Two Treatises of Government* (New York: Hafner, 1947) and see also J. Locke's *Essays on the Law of Nature*, 1st ed. by W. von Leyden (Oxford: Clarendon Press, 1958).

²⁷ F. Bacon, *The New Organon* (New York: Liberal Arts Press, 1960).

The new natural law eventually solved the old antimony between nature and convention by demonstrating that, by nature, man is conventional. Therefore, by nature, human beings are not restricted by any God-given moral code. Rather, they are the makers or creators of their own standards or norms. This line of thinking culminated in Nietzsche for whom there are no standards by nature: if nothing is prohibited, everything is permitted.²⁸ Man, aided by Bentham, becomes, not only the measure of all things, but the new *God*, the new creator of his own standards. Justice, in short, becomes whatever men say it is. In so doing, we come full cycle and undo or undermine the ancient classical conception of natural right or natural justice. In the words of Faust, "Whirl has become king, having driven out Zeus."²⁹

All this leads to nihilism, and the triumph of modern nihilism rests secure only if the premises or foundations of the modern thought remain unchallenged. They have remained unchallenged thanks to the forceful sophistry of Jeremy Bentham and his followers. What is required is a reopening of the great debate that took place in the seventeenth century between the ancients and the moderns. For, unless we rescue contemporary legal thought from the clutches of modern positivism, we are doomed to remain unthinking followers of another man's thinking. In the first place, we must become aware of how the modern mind has become closed to real alternatives and, in the second place, we must set about to do something about it.

IV. CONCLUSION

It should be clear by this point how the question posed in the title is to be answered. It makes a great deal of difference whether one is a positivist or not. It makes more than a difference for Canadians since the adoption of the *Charter* for, unless we can justify those rights in more than the caprice of the passing moment,

²⁸ For a good brief account of Nietzsche on this point, see L.P. Thiele, "The Agony of Politics: The Nietzschean Roots of Foucault's 'Thought'" (1990) 84 *Am. Pol. Sci. Rev.* 907.

²⁹ J.W. von Goethe, *Faust*, trans. by J. Anster (London: Routledge, 1883).

we are like the blind leading the blind. Above all, it is imperative for succeeding generations of lawyers to know where we are coming from and where we are going since they will become the judges whose duty it will be to clarify the future course of direction. At the present time, I can sympathize with Peter Hogg when he says: "I do not trust any judge to reach conclusions on these matters."³⁰ Our judges are the products of our positivistic law schools. How can we expect more from them than we have a right to expect? The current generation of students in our law schools should, however, demand more because much more will be demanded of them. The *Charter* has, in short, issued a call to revolution no less urgent than the cry to end, as of right, apartheid in South Africa or the cry for democracy, as of right, in Eastern Europe.

I am fully aware that this response requires more elaborate support. But my objective here is a precisely limited one: to open up a debate that is crucial to our lives, not only as Canadians, but as human beings. And so, it makes a great deal of difference when Canada's leading constitutional scholar publicly announces his positivism. We ought to take it seriously, but, above all, we ought to demand a justification in reason because the implications and consequences are profoundly important.

³⁰ Hogg, *supra*, note 1 at 89.

