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ON BEING A POSITIVIST:
A REPLY TO PROFESSOR VAUGHAN

PETER W. HOGG*

I. INTRODUCTION

In a recent article in this journal, I mentioned that I did not believe in natural rights, and I added: "If that makes me a positivist, so be it." Although that was my one reference to legal positivism, Professor Vaughan has published an article asserting that various evil results are entailed by "Hogg's positivism" and demanding that I justify my position. In this article, I attempt to reply.

II. IS LEGAL POSITIVISM MORALLY REPUGNANT?

Let me respond first to the suggestions that legal positivism "fails those who are oppressed," "favours oppression over freedom," and "reduces our outrage over apartheid to silence." Professor Vaughan portrays natural law, as expounded by Blackstone, as a

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2 Ibid. at 89.


4 Ibid. at 402 & 403.

progressive force, and legal positivism, as expounded by Bentham, as a reinforcement of the unjust status quo. This will come as a surprise to those who remember Bentham's reforming zeal — he may have been the most influential law reformer in British history — and the fact is that Professor Vaughan's portrayal is quite misleading.

The theory of legal positivism holds that law consists exclusively of "positive" law, meaning law that has been made by the law-making institutions of the state. Legal positivism denies the existence of a "natural law" that emanates from some source other than the law-making institutions of the state. But legal positivism does not involve a denial of the existence of moral principles, universal or particular. All that legal positivism insists upon is that there is a distinction between law and morality. That distinction cannot be complete, because it is obvious that the laws of a society are profoundly influenced by and reinforced by moral values. But, for a legal positivist, there is no certainty that moral values will be faithfully reflected in positive law. In other words, the legal positivist accepts that there can be laws that are morally wrong or unjust. It does not follow, as Professor Vaughan suggests, that legal positivism "fails those who are oppressed," etc. On the contrary, by insisting upon a distinction between law and morality, the positivist is free to employ moral values in order to criticize unjust laws, to refuse to obey them, and — if need be — to suffer and die for principles of justice. It is not the case that all those courageous people who have resisted the forces of tyranny are believers in natural law.

Blackstone gave this account of natural law in his Commentaries:

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all of their force, and all their authority, mediatly or immediately, from this original.  


This postulates a body of natural law that is universal and immutable, not varying from place to place or from time to time. Its rules are superior to the rules of the positive law and, to the extent that the rules of the positive law conflict with the natural law, the superior force of the natural law nullifies the rules of the positive law.

The natural lawyer's belief that positive law owes its validity to natural law enables the natural lawyer to claim that an unjust law is not a law at all. It is the strength of that claim that appeals to Professor Vaughan. However, natural law theory can be — and often has been — used to silence criticism of the positive law. The corollary of the assertion that positive laws that are contrary to the natural law are invalid is the assertion (made expressly in the passage from Blackstone quoted above) that those positive laws that are valid are consistent with the natural law.

How did the laws of England in 1765 (when Blackstone wrote) measure up against the natural law? According to Blackstone:

The idea or practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject.  

One might be inclined to dismiss this statement of the perfection of the laws of England as a rhetorical flourish, but that would be a mistake. In the four volumes of the Commentaries, which constitute an account of the whole of the laws of England in 1765, Blackstone found not one instance of a positive law in conflict with the natural law. This is what infuriated Bentham, who described Blackstone as "everything-as-it-should-be-Blackstone." He saw Blackstone as an enemy of reform, an apologist for the established order, using the theory of natural law to ward off the criticisms of the law that were made by reformers like Bentham. One must acknowledge, I think, that Bentham had a point.

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8 Ibid. at 122-23.
9 He gave only the hypothetical example of a law that permitted murder, which he said would be in conflict with the natural law. See Ibid. at 43.
Blackstone's claim that all valid law was consistent with the natural law did serve as a powerful reinforcement of the status quo.

II. DOES NATURAL LAW EXIST?

Let me turn now to the justification for my lack of belief in natural law.

Natural law, if not handed down directly from God, must be derived from reason. The reason must derive from the facts of human nature (hence natural law) or at least from other aspects of the human condition. However, if this form of reasoning is portrayed as logically required, it falls into the well-known fallacy, originally pointed out by Hume in 1739,10 of deriving an "ought" from an "is." A fact cannot demonstrate the truth of a normative proposition. Consider, for example, two facts: animals rear their young and human beings are animals. These facts do not establish that human beings ought to rear their young. To draw normative inferences from nature confuses fact and value. The only answer that a natural lawyer could give to this objection would be to point out that forms of reasoning less rigorous than logical deduction can still have persuasive force.11 That is true, but it severely weakens the claim that a body of natural law can be inferred by reason from nature.

A second reason for scepticism about natural law is that there is no evidence of its existence. If a positive law that conflicts with natural law is a nullity, one would expect to find some instances of nullification. But there are no such instances. No court in Canada (or anywhere else that I am aware of) has ever held that a rule of statute law or common law was invalid on the ground that it conflicted with natural law. This difficulty has led modern natural lawyers to shift their ground and claim only that a conflict with natural law removes or diminishes the moral obligation to obey the


11 This is the answer offered by J. Finnis, Natural Law and Natural Rights (New York: Oxford University Press, 1980) at, for example, 34 and 219.
unjust law. However, this robs natural law of its character as law because an appeal to moral principles as a justification for disobeying an unjust law is available to everyone, not just those who believe in natural law. Civil disobedience has never been the exclusive preserve of natural lawyers.

A third difficulty with natural law is that there is no agreement among natural lawyers as to what the rules of natural law are. It turns out that the "reason" of any given natural lawyer produces rules that look suspiciously like the moral precepts of a particular time and place and that appear inappropriate in another time and place. Consider, for example, the natural-law rights espoused by Blackstone: "the right of personal security, the right of personal liberty, and the right of private property." It will be noticed that this list does not include the equality of the sexes. Of course, in 1765, women were subject to many legal disabilities including, in the case of married women, the incapacity to hold property.

Nor does Blackstone's list include the right to vote or any other democratic right. Professor Vaughan, concerned to argue that "Blackstone's principles are more immediately conducive to democracy than are Hogg's," says that the right to vote is an "easy and indeed necessary extension of Blackstone's statement." But this is incorrect because it would have required Blackstone to nullify the restrictions on the franchise that existed in England in 1765. At that time, all women and most men (those that did not satisfy the property qualification) had no right to vote. It will be recalled that England had to wait another half century for the Reform Bill of 1832, which was enacted over the ferocious opposition of the Tory party (to which Blackstone belonged), and which, although it made important reforms to the franchise, still did not remove the

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12 Ibid. at 290.
13 Blackstone, supra, note 7 at 125.
14 Vaughan, supra, note 3 at 402.
15 Ibid at 401.
16 An Act to Amend the Representation of the People in England and Wales is cited as The Reform Bill of England, (U.K.), 1832, 2 & 3 Will. 4, c. 45.
disabilities on women and propertyless men. Professor Vaughan's depiction of Blackstone as a champion of democracy only illustrates how different Professor Vaughan's 1991 values are from Blackstone's 1765 values.

As for the rights that Blackstone does include, even the rights to personal security and personal liberty would require considerable qualification today if we were concerned with sustaining the mass of social and economic regulation that routinely interferes with individual liberty. But the right to private property seems particularly hard to accept. It would mean that socialist states are founded on a breach of natural law. It would require major exceptions to accommodate our own laws respecting income tax, matrimonial property, zoning, pollution, health and safety, expropriation, and the minimum wage — to name only the most obvious of the modern state's inroads into private property rights. Once again, one can appreciate Bentham's objection that Blackstone's natural law was a mask that concealed a profoundly conservative political programme.

Enough has been said, I think, to support the conclusion that Blackstone did not succeed in deriving universal, immutable natural rights. What he succeeded in doing was listing values that seemed important to a person of his time, place, and class. This brings me back to the thesis with which I started. The fact is that there is no generally agreed-upon list of "natural" rights; there is no agreement on the source of those rights; there is no agreement on the reasoning process by which such rights might be derived; and there is no agreement on how such rights could be enforced, although there probably is agreement that such rights never have been enforced. That is why I do not believe in natural rights.

IV. DOES IT MATTER?

Does it matter whether natural rights exist or not? Bentham thought the issue was very important because he saw natural rights as the enemy of any programme of radical reform. I think this particular concern has disappeared. Today, an attempt to gain an advantage in political debate by an appeal to natural rights would
be greeted with such scepticism that it could safely be treated as a harmless rhetorical flourish.

However, I think Professor Vaughan raises a different concern. He would like our judges to be better educated in natural law and to apply it in their decisions. In my view, this would pose a serious threat to democratic government because it would authorize judges to give legal force to values that had never been approved by any democratic process. Professor Vaughan invites a return to the *Lochner*\(^\text{17}\) era in the United States. Between 1905 and 1937, a majority of the Supreme Court of the United States, sharing Blackstone’s belief in the sanctity of private liberty and private property, struck down many state laws that attempted to regulate wages, hours of work, prices, and anti-union activity. Oliver Wendell Holmes, sharing Bentham’s legal positivism, wrote dissenting opinions in these cases, accusing the majority of using the language of rights to mask a laissez-faire economic theory.\(^\text{18}\) Only after President Roosevelt had proposed his court-packing plan did the Court swing over to Holmes’s position and overrule the decisions.\(^\text{19}\)

The *Canadian Charter of Rights and Freedoms\(^\text{20}\)* does not contain a right of private property. In my view, a judge who believes with Blackstone in a natural-law right of private property should not implement this belief, but should apply the positive law, which is the *Charter* as written. The *Charter* does contain rights to vote and to equal protection. In my view, a judge who believes with Blackstone that such rights are not natural-law rights should not ignore or minimize or refuse to enforce those rights, but should apply the *Charter* as written. I emphatically disagree with Professor Vaughan that our judges should take their direction from their conceptions of natural rights. They should take their direction from the *Charter*.

\(^{17}\) *Lochner* v. New York (1905), 198 U.S. 45.

\(^{18}\) Ibid. at 76.

\(^{19}\) *West Coast Hotel* v. Parish (1937), 300 U.S. 379.
