

LEGAL POSITIVISM THEORY

TO BE OR NOT TO BE?

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WHAT IS LEGAL POSITIVISM?

LEGAL POSITIVISM IS A SCHOOL OF THOUGHT OF ANALYTICAL JURISPRUDENCE, LARGELY DEVELOPED BY EIGHTEENTH- AND NINETEENTH-CENTURY LEGAL THINKERS SUCH AS JEREMY BENTHAM AND JOHN AUSTIN. WHILE BENTHAM AND AUSTIN DEVELOPED LEGAL POSITIVIST THEORY, EMPIRICISM SET THE THEORETICAL FOUNDATIONS FOR SUCH DEVELOPMENTS TO OCCUR. THE MOST PROMINENT LEGAL POSITIVIST WRITING IN ENGLISH HAS BEEN H. L. A. HART, WHO IN 1958 FOUND COMMON USAGES OF "POSITIVISM".

MAIN IDEAS

**laws are
commands
of human
beings**

**there is no
necessary
connection
between
law and
morals—th
at is,
between
law as it is
and as it
ought to be**

**analysis (or
study of the
meaning) of
legal concepts
is worthwhile
and is to be
distinguished
from history or
sociology of
law, as well as
from criticism
or appraisal of
law, for
example with
regard to its
moral value or
to its social
aims or
functions**

**a legal
system is a
closed,
logical
system in
which correct
decisions can
be deduced
from
predetermine
d legal rules
without
reference to
social
consideration
s**

**moral
judgments,
unlike
statements of
fact, cannot
be
established or
defended by
rational
argument,
evidence, or
proof
("noncognitiv
ism" in
ethics)**

LITTLE ABOUT THE HISTORY

LEGAL POSITIVISM IS THE THESIS THAT THE EXISTENCE AND CONTENT OF LAW DEPENDS ON SOCIAL FACTS AND NOT ON ITS MERITS. THE ENGLISH JURIST JOHN AUSTIN (1790-1859) FORMULATED IT THUS: "THE EXISTENCE OF LAW IS ONE THING; ITS MERIT AND DEMERIT ANOTHER. WHETHER IT BE OR BE NOT IS ONE ENQUIRY; WHETHER IT BE OR BE NOT CONFORMABLE TO AN ASSUMED STANDARD, IS A DIFFERENT ENQUIRY." (1832, P. 157) THE POSITIVIST THESIS DOES NOT SAY THAT LAW'S MERITS ARE UNINTELLIGIBLE, UNIMPORTANT, OR PERIPHERAL TO THE PHILOSOPHY OF LAW. IT SAYS THAT THEY DO NOT DETERMINE WHETHER LAWS OR LEGAL SYSTEMS EXIST.



HISTORY

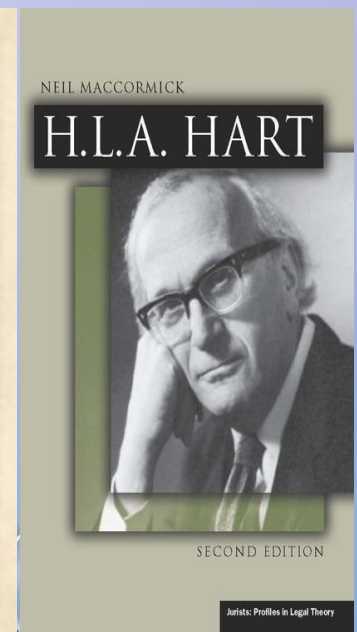
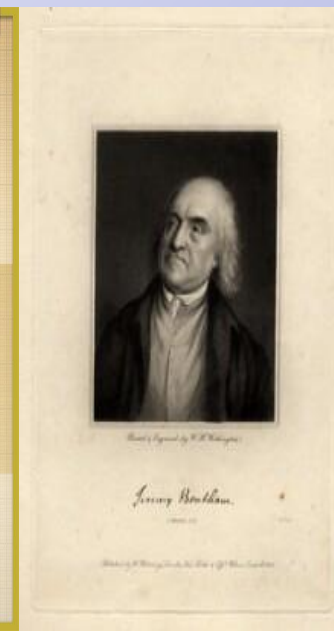
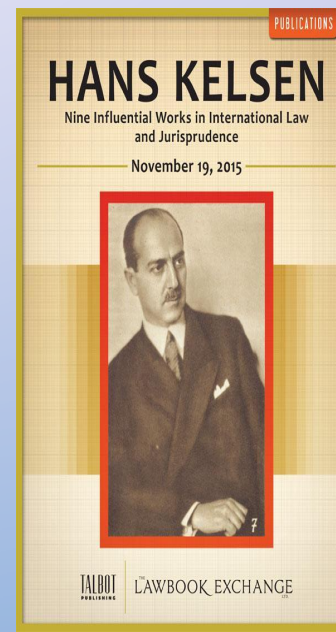
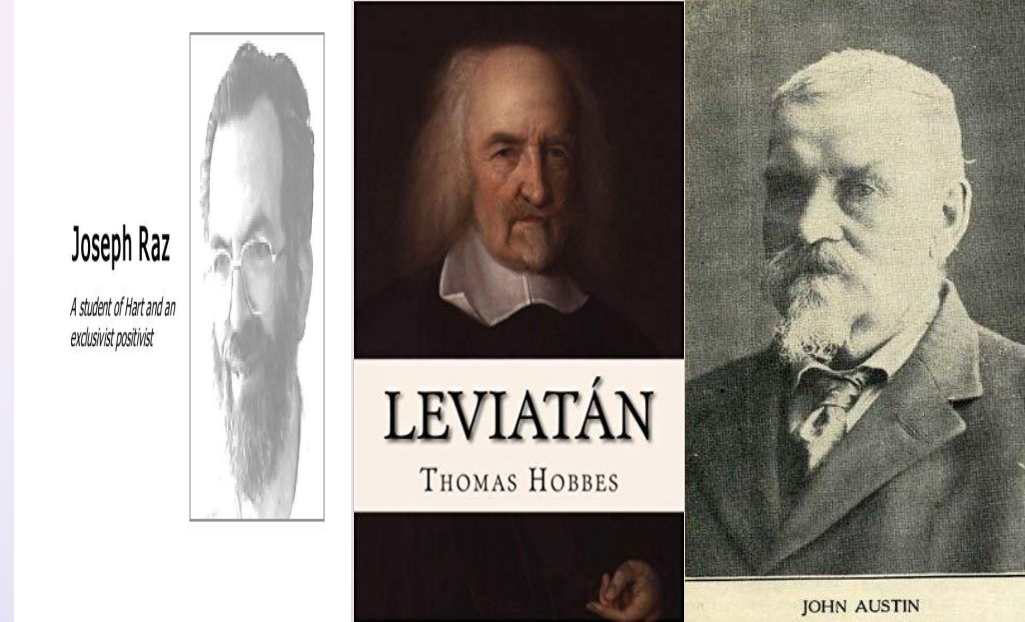
THOUGHTS OF SCHOLARS



ACCORDING TO BENTHAM AND AUSTIN, LAW IS A PHENOMENON OF LARGE SOCIETIES WITH A SOVEREIGN: A DETERMINATE PERSON OR GROUP WHO HAVE SUPREME AND ABSOLUTE *DE FACTO* POWER -- THEY ARE OBEYED BY ALL OR MOST OTHERS BUT DO NOT THEMSELVES SIMILARLY OBEY ANYONE ELSE. THE LAWS IN THAT SOCIETY ARE A SUBSET OF THE SOVEREIGN'S COMMANDS: GENERAL ORDERS THAT APPLY TO CLASSES OF ACTIONS AND PEOPLE AND THAT ARE BACKED UP BY THREAT OF FORCE OR "SANCTION." THIS IMPERATIVAL THEORY IS POSITIVIST, FOR IT IDENTIFIES THE EXISTENCE OF LEGAL SYSTEMS WITH PATTERNS OF COMMAND AND OBEDIENCE THAT CAN BE ASCERTAINED WITHOUT CONSIDERING WHETHER THE SOVEREIGN HAS A MORAL RIGHT TO RULE OR WHETHER HIS COMMANDS ARE MERITORIOUS. IT HAS TWO OTHER DISTINCTIVE FEATURES.

FAMOUS SCHOLARS

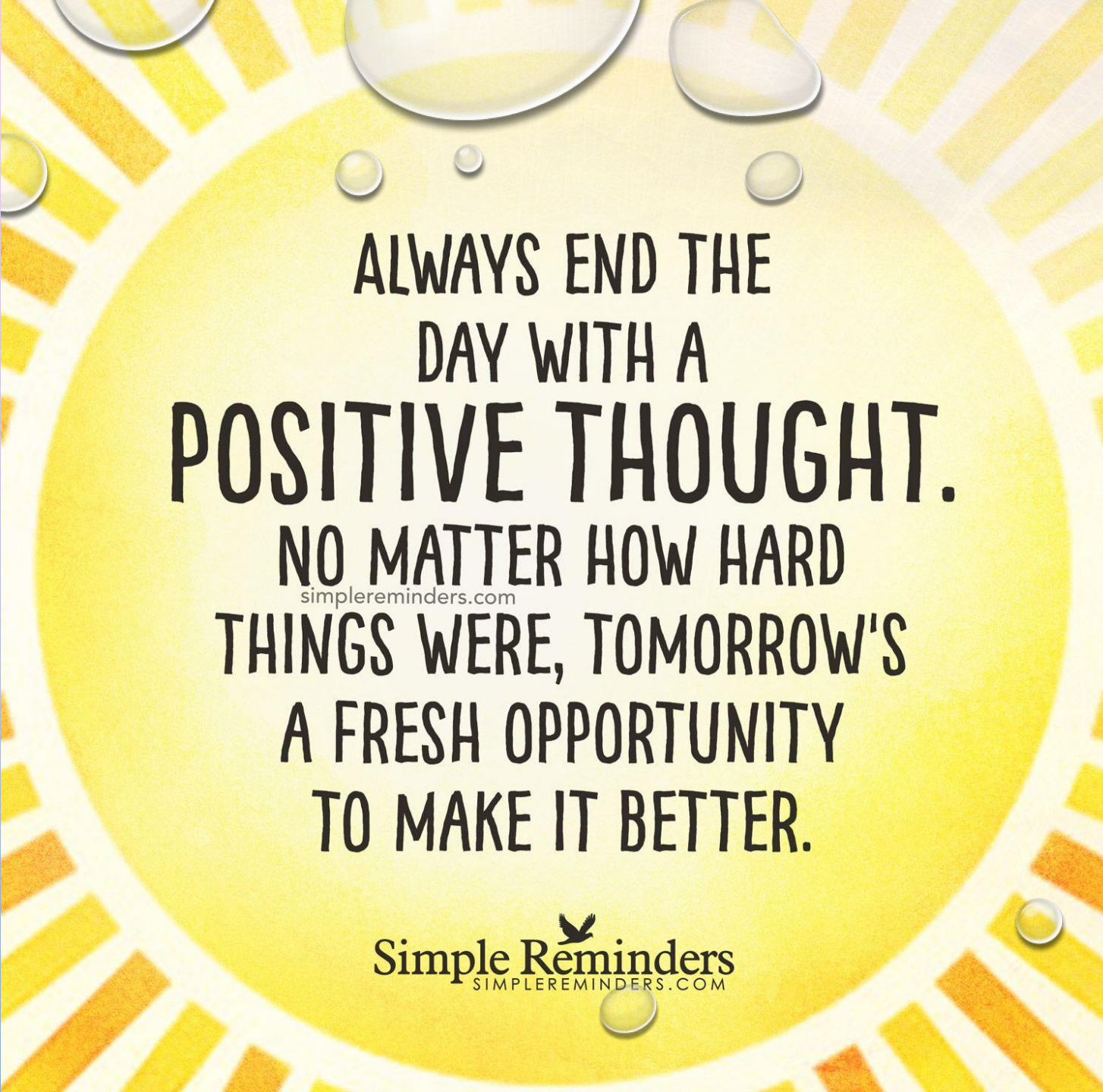
- **THOMAS HOBBS**
- **JEREMY BENTHAM**
- **JOHN AUSTIN'S**
- **HANS KELSEN**
- **H. L. A. HART**
- **JOSEPH RAZ**



IN CONCLUSION



LEGAL POSITIVISM IS A PHILOSOPHY OF LAW THAT EMPHASIZES THE CONVENTIONAL NATURE OF LAW—THAT IT IS SOCIALLY CONSTRUCTED. ACCORDING TO LEGAL POSITIVISM, LAW IS SYNONYMOUS WITH POSITIVE NORMS, THAT IS, NORMS MADE BY THE LEGISLATOR OR CONSIDERED AS COMMON LAW OR CASE LAW. FORMAL CRITERIA OF LAW'S ORIGIN, LAW ENFORCEMENT AND LEGAL EFFECTIVENESS ARE ALL SUFFICIENT FOR SOCIAL NORMS TO BE CONSIDERED LAW. LEGAL POSITIVISM DOES NOT BASE LAW ON DIVINE COMMANDMENTS, REASON, OR HUMAN RIGHTS. AS AN HISTORICAL MATTER, POSITIVISM AROSE IN OPPOSITION TO CLASSICAL NATURAL LAW THEORY, ACCORDING TO WHICH THERE ARE NECESSARY MORAL CONSTRAINTS ON THE CONTENT OF LAW.



ALWAYS END THE
DAY WITH A
POSITIVE THOUGHT.
NO MATTER HOW HARD
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THINGS WERE, TOMORROW'S
A FRESH OPPORTUNITY
TO MAKE IT BETTER.

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THE END