

COMMENTARY

In the first issue of the Cardozo Law Review, Professor Ernest Nagel, in "Reflections on 'The Nature of the Judicial Process,'" criticized Justice Cardozo's professed abandonment of the distinction between custom and law. Professor Anthony D'Amato, in "Judicial Legislation," argued that Cardozo's opinions belied his assertion of the necessity for judicial legislation, and adhered generally to the theory that cases should be decided in accordance with law as it is found, rather than made, by judges.

In this commentary, Professor D'Amato argues that Professor Nagel's assertion of a distinction between law and custom is inconsistent with the development of the common law, and that the assertion of judicial discretion to decide cases in accordance with custom provides an insufficient explanation of the anomaly. Professor Nagel rejoins that appellate courts have sufficient discretion to legislate; that this view is consistent with the history of the common law; and that there is no compelling reason for abandoning the distinction between custom and law.

PROFESSOR NAGEL'S REFLECTIONS ON CARDOZO

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In the first issue of the *Cardozo Law Review*, Professor Ernest Nagel concluded an essay with the following argument, which should not go unchallenged:

Cardozo's readiness to count as law customs and moralities that are *likely* to receive judicial backing at some future time, rejects a distinction which has been used with enormously clarifying effect by a long line of legal analysts, from Bentham, Austin, Holmes, and Gray, down to contemporary positivistic philosophers of law. There is no reason to believe that by abandoning the distinction between law and custom he has added to our understanding of the nature of law, and some reason for thinking that he has muddied it.¹

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¹ Nagel, *Reflections on "The Nature of the Judicial Process,"* 1 *CARDOZO L. REV.* 55, 61 (1979) (emphasis in original).

To say that there is "no reason" to abandon a distinction advocated by positivists is surely too strong.

To the positivist philosophers cited by Professor Nagel, morals and customs only become law when they are adopted by a court and made a part of the reason for reaching a decision in a case. This simple theory has the virtue of enabling one to be absolutely sure when a custom or a moral precept has become incorporated into the body of valid law. For example, Professor H.L.A. Hart has written an entire book devoted to distinguishing between rules that are mere rules of custom, courtesy, or morality, and rules that are part of the legal system entailing enforcement by the state.² To him, as to other positivists, a customary rule becomes a rule of law only when a judge adopts that rule as the basis for judicial decision—or, of course, when a legislature enacts that rule as a valid statute.

But, then, what do the positivists say about what a judge should do in the first case when a customary rule is argued by one side as the rule that should be used as the basis for reaching a decision? There are two logical possibilities for the positivist. First, the positivist could argue that in the initial case where a party is trying to persuade the judge to adopt a customary rule and make it a legal rule for deciding that case, the judge must reject the proposition on the simple ground that the judge may only apply rules of *law* and has no authority to apply rules that are not law (*i.e.*, rules of custom or morality). This approach appears consistent with the positivistic insistence, championed by Professor Nagel, that customs are one thing and laws another, and that the distinction between the two should not be abandoned. However, there is an obvious problem with this approach: it makes it impossible for rules of custom or morality ever to be adopted by courts. In short, the entire history and development of the common law would remain totally unaccounted for if positivists were to insist upon the clear implication of the theory that distinguishes between law and custom.³

Since positivists would not want to hold to the logical rigor of a theory that would force them to treat as inconsistent with that theory the origin and development of the common law, they have taken a second approach. They have argued that judges have "discretion" in the first case to adopt or not to adopt a customary rule and make it the *ratio decidendi* in a case. In this way, positivists "explain" how customary rules become legal rules.

² H.L.A. HART, *THE CONCEPT OF LAW* (1961).

³ A parallel difficulty obtains in dealing with custom as a source of international law. See A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 6-10 (1971).

I have put quotation marks around the word "explain" because the theory obviously explains nothing. The word "discretion" is like the term "black box" in the general theory of systems. When one does not know why an electromechanical device has a particular output, one may "explain" it by postulating a black box inside the device that accounts for the output. Similarly, to say that a judge decides on the basis of discretion, and nothing more, is to say nothing about how or why the judge decides a case.

Now, of course, positivist theory may in fact be teaching us that there cannot be any theory that explains judicial adoption of rules of custom or morality. Positivism certainly does not explain it, but perhaps no other theory can explain it either. Perhaps the best we can say is that it is a matter of unfettered judicial discretion. But at least if we reach this conclusion, we should conclude also that positivist theory on this point has added nothing to our understanding of the nature of law or the judicial process. If this is admitted, then we have flatly contradicted Professor Nagel's conclusion.

In such a state of affairs, it would seem prudent to look to any theory *other than* positivism to see if any light can be thrown upon the process of law creation in cases where the decision may be affected by rules of custom or morality cited by the parties. We might want to see, for example, what a judge, such as Cardozo, has to say about the process. We might investigate more sympathetically the various natural-law theories. These investigations would be lengthy and complex, and the resulting theory, unlike positivism, would not be simple. But neither would it be vacuous.

But even if we do not want to make these investigations, we might nevertheless realize that Professor Nagel's view is dominated by implicit definitions that he is assigning to the words he uses, with the result ultimately that he begs his own question. To use separate *words* for custom, morality and law is to invest something in their distinction. Yet reality does not come to us neatly packaged in such terms; rather, we invent those words as a poor approximation of reality. We should be aware that in inventing definitions for words, we may be forcing our own conclusions as implicit deductions from our own unstated premises. Thus, if we think that there is such a thing as a customary rule and a different thing known as a legal rule, we naturally can be swept along by positivist writers, such as Hart, who tell us at the outset that they will help us to throw light on "the" distinction between the two. On the other hand, perhaps in the real world there is no dividing line between customary rules and legal rules, so that judges who are presented with rules of custom in a case of first impression believe that they are obligated to decide the case according

to those rules of custom. But if that is what judges believe, then they are treating the customary rules as rules of law.

As students of the judicial process, we must look deeply into what judges believe they are doing and, to what may amount to the same thing, what litigants expect judges to do. At the same time, we must avoid the tyranny of words, for the words that we invest with meaning to explain judicial behavior might be wholly inappropriate to the reality of what judges do. Professor Nagel has shown in his other writings, particularly those on quantum electrodynamic theory, how words such as "wave" and "particle" cannot explain the basic constituents of matter.⁴ One wonders why he did not use similar caution in attempting to explain the basic constituents of law.

⁴ E. NAGEL, *THE STRUCTURE OF SCIENCE* 293-305 (1961). See E. NAGEL, *LOGIC WITHOUT METAPHYSICS* 324-26 (1956).