# Not: The Negative Linguistics of the American Legal System

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*This article discusses how the language of American law is fundamentally based in the negative, creating a binary to the positive which may or may not definitively exist, and defining legality through the illegal, allowing the two warring sides to mediate one another in an attempt to create an effective system. For Americans, the Constitution, being the highest law of the land, dictates any resulting legislation. America, founded on revolutionary ideas as well as precedent, created this document within the stage of an ever-changing world with the realization that Americans are not virtuous people, and this is why the Articles of Confederation failed. Therefore, the legal system of the United States is based not in the positives of humanity, but rather the negatives, and this is what the language of the law represents. Holding to only laws created mallum prohibitum, and therefore bound by language, we can begin to look at the way that these laws exist first and foremost in the negative, and from this, investigate how linguistics plays a part in the way that the laws developed from the historical context to create a governing system.*

Without language, there can be no law. Language is, first and foremost, the binding element of legality. The resulting question then becomes what is the language of the law? How do we define legality and the resulting infractions of the law? For Americans, the legal system is founded on the Constitution. This document, being the highest law of the land, then dictates any resulting legislation. America, a country founded on revolutionary ideas as well as precedent, created this document within the stage of an ever-changing world. However, they also approached this foundational document with the realization that Americans are not virtuous people, and this is why the Articles of Confederation failed. Therefore, the legal system of the United States is based not in the positives of humanity, but rather the negatives, and this is what the language of the law represents. The language of American law is fundamentally based in the negative, creating a binary to the positive which may or may not definitively exist and defining legality through the illegal allowing the two warring sides to mediate one another in an attempt to create an effective system.

What is the law? This is a question which has always plagued civilized societies. Where does it gain its authority, and where does this authority stop? Legal philosophy is in itself an extensive field, but the major accepted philosophes are as follows: classical, positivism, constructivism, consequentialism, critical legal theory, practice theory, and new natural law theory[1]. For the purpose of clarity and historical significance, this paper will focus on classical legal theory, positivism, and constructivism with regard to the future development of consequentialism as these theories chronicle the transformation of the American perceptions of the legal system during the transitional period from a Confederation to the modern Democratic Republic. These legal theories, while somewhat outdated and occasionally discounted by modern philosophers, carry weight in a new historicist context with the understanding that they were the leading and primary thoughts influencing those who would come to write American law.

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[1] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 3-184.

Classical law refers to the writings of Aristotle, Cicero, Aquinas, Grotius, and Blackstone.[2] Under the teachings of Classical law, society is inherently concerned with justice and uses communication in order to convey understanding of ingrained moral understanding and truth.[3] This does not necessarily make the society itself moral, but rather their own reenactment of morality. Classical law associates the morality of a society and the world around them with their creation of laws to support or reject certain behaviors.[4] For someone who subscribes to the theory of natural law, "legal truths are relative in nature (and) recognition of their essential connection to…moral principles that are universal".[5]

Under classical law, that which is immoral is illegal and should therefore be punished, using the influence of the negative (that which is wrong) to act as a catalyst for the positive (that which is right). This moral objectivism creates a split in natural legal theory in that it can derive either from a place inherent to humanity, or it can be created by the society in which we live.[6] The latter is derived from theorist Thomas Aquinas who, in his work *Summa Theologica*, "Question 94" presents that "the order of the precepts of natural law is the order of our natural inclinations".[7] He argues that law and morality are fundamentally intertwined, and therefore cannot be separated. What is right is legal, and what is wrong is, therefore, illegal and expressed as prohibited. For example, if we look at the Ten Commandments of the Christian Bible, a text which set binding legal principles for many western civilizations, the phrase "You shall not murder"[8] is both a moral principle and an expressed legal prohibition on an immoral behavior.

These philosophical contexts gave way to Sir William Blackstone, an English legal theorist who focused on the application of classical legal theory to British common law. Best known for his work on property law and his *Commentaries on the Law of England*, Blackstone argues that the entire British system can be based on reason and morality as well as the "golden rule" of Christianity.[9] According to Blackstone's *Commentaries*, law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[10] Perhaps his most significant contribution in regards to his recognition of the linguistics of the laws themselves is his distinction between acts as either *malum prohibitum*, meaning that which is expressed as forbidden, and *malum in se*, crimes that are inherently wrong. In an offense malum

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[2] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 3.
[3] Ibid., 4.
[4] Kenneth Einar Himma, "Natural Law", Internet Encyclopedia of Philosophy, accessed 20 Mar. 2015, http://www.iep.utm.edu/natlaw/
[5] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 4.
[6] Kenneth Einar Himma, "Natural Law", Internet Encyclopedia of Philosophy, accessed 20 Mar. 2015, http://www.iep.utm.edu/natlaw/
[7] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 16.
[8] Exodus 20:13
[9] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 36-37.
[10] Ibid., 31.

prohibitum, the accused has committed a crime that was made criminal by the creation of law itself. Does this make crimes malum prohibitum inherently positivist in nature? These laws, often most applicable to white collar and commerce law, need not violate a societal or inherent morality, but rather a dictating statute.[11] Blackstone develops in his work the idea that these laws are different from one another and he comments on the fact that from here, laws exist only as expressed. Also in his *Commentaries*, he defines laws as generally understood in their most accepted meaning. They are to be taken, "not so much regarding the propriety of grammar"[12] but rather as their "general and popular use".[13] He goes on to acknowledge that there are times in which meaning cannot be discerned from use alone, at which point he presents that they should derive from context. For Blackstone, subject matter should be applied at the discretion of the legislator, and with no regard to consequence since it should hold no significance in the received sense of the law itself. Finally, he derives intent from the intent itself, applying a kind of new historicism to the legal text by evaluating the motives behind the creation of the law and whether or not said motives are currently applicable.[14] Published in a time coinciding with the founding of the Americas, Blackstone's text became a quintessential part of both British and American legal systems at the time as they struggled to define legality and to decide where did the basis of said legality lie.

The colonists coming to America were most familiar with the British system of common law. Rather than having a written constitution or set of defining legal documents, they used a set of tradition and precedent as a legal system. It has no codex, and simply operates in a rolling system with the most recent decisions being the most binding. In a common law court, the lawyers argue the case, the jury decides guilt or innocence. Then, it is the judge who holds the most power as it is his responsibility to hand down the verdict as well as the punishment and to write the brief that will define the case and add it to the ever-growing case law.[15] The problem colonists faced was that a system based on tradition needs tradition to function, and the Americas were quite literally a new world. As a result, many of the colonies wrote their own constitutions, forming a new tradition of civil law in the Americas.[16] Even in these tradition-based legal systems, the laws must be written once created. Otherwise, it would be impossible to enforce a penalty on a population that had been previously unaware of the consequence of their actions. It is only through a steady and fixed written legal system that a government can exist as that of law rather than of men.[17]

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[11] Gerald Hill and Kathleen Hill, "Malum Prohibitum", The People's Law Dictionary, accessed 15 Mar. 2015, http://dictionary.law.com/default.aspx?selected=1202

[12] William Blackstone, *Commentaries on the Laws of England I*, (The Project Gutenberg: 2009) Ebook, accessed 15 Mar. 2015. http://www.gutenberg.org/files/30802/30802-h/30802-h.html

[13] Ibid.

[14] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 35.

[15] "Common Law and Civil Law Traditions", School of Law Boalt Hall, UC Berkeley. Accessed 19 Mar. 2015. https://www.law.berkeley.edu/library/robbins/CommonLawCivilLaw Traditions.html

[16] Ibid.

[17] Morton J. Horwitz, *The Transformation of American Law 1780-1860* (New York: Oxford University Press, 1992) 12.

What is interesting, though, is that the Americas did not abandon common law entirely in favor of civil law, but rather formed a new conglomerate of both systems. This new approach to law would become a major player in following years as tensions between the colonies and Great Britain continued to rise.

As the colonies began to rebel against the British prior to the Revolution, they also began to rebel against the British system. They saw the Royal government as a tyrannical system under which their voices had been irrevocably repressed. This split represents the shift in America from negative liberties, that in which the government is prevented from interfering with rights, to positive liberties, that in which the rights of citizens are allowed and allotted based on the ability of such person to act.[18] Throughout the Revolutionary era, the American legal system was concerned primarily with the moral and equitable application of the law among a uniquely virtuous people. It was paramount to the entire Classical Republic system on which the founding fathers were attempting to base their new country that the citizens participating in government were "virtuous", meaning that when given the choice, they would always place the needs of the Republic above their own. After gaining their independence, these principles came into practice with the nation's first governing document, the Articles of Confederation. Under this system, citizens must be equal and independent in order to become participating members of a government, therefore excluding slaves, women, and the poor as they were all dependent upon others in order to make their livelihood.[19] The idea of Americans as virtuous people had been strongly supported during the Revolutionary War, especially in the learned leadership. During Valley Forge, George Washington was so convinced that the people would come to the aide of the soldiers for the good of the nation that he refused occupation and endured alongside his men the freezing cold and starvation of a Pennsylvania winter. He was once again proven wrong with the failure of the Articles of Confederation. The document was weak and many of its provisions, while successfully keeping the federal government weak, also managed to make it entirely ineffective. It was assumed that states would consider one another when provisions for unanimous voting and one vote per state, no matter the size or population were developed, and therefore allowing compromise and selflessness to overcome disagreements. This was not the case. Even once politicians realized this, correcting such provisions was exceedingly difficult for the same reasons that the document had been so unsuccessful. The document could not even be revised without excessive debate, and even then it could not be changed since any revision required a unanimous vote which the legislative body was unable to produce even once during its short span.[20] It had become clear that the Articles

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[18] Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of The United States*. 3rd ed. Vol. 1. (New York: Oxford UP, 2011) 54.
[19] Gordon S. Wood, "Classical Republicanism and the American Revolution," *Chicago-Kent Law Review* 66 no. 1 (1990): 23
[20] Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of The United States*. 3rd ed. Vol. 1. (New York: Oxford UP, 2011) 85-100

were a failure and the American people were not virtuous, and yet democracy still prevailed. How could this be? Americans were not virtuous and yet they were still free.[21]

We need only look as far as the Constitution itself to see these thoughts in action. The first ten amendments, often referred to as the Bill of Rights, act as a personal liberties buffer zone. The people wanted a government that not only did not challenge their personal liberties, but that protected them.[22] Proposed mainly by Anti-Federalist Patrick Henry, the people submitted a list of ten amendments that they saw as necessary to ensure freedom in democracy which would act to limit the government. While this all speaks to the people's inability to let go of the idea of positive rights, it becomes clear that, at least for those writing the new laws, positive rights had given way to a system of negative linguistics.[23] For example, take the first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…".[24] In this, perhaps the most beloved and heavily debated among the amendments, the words only assure a positive by creating a negative. It is the negative "shall not" is a defining element in that it has negative meaning and represents a "no" for the government, but it is a positive right for the American people. Throughout the first ten amendments, words like "shall not", "no", and "nor" appear in every single one,[25] and in every instance, they work much in the same way that they worked with the first amendment; they take a right to interfere away from the government and give a right of practice to the people.

Understanding the historical context allows us to understand what the writers meant, but to understand what the words themselves mean, we must delve deeper into the linguistics. Jacques Derrida, founder of the theory of deconstruction, focuses his study of meaning in the meaning conveyed by language itself.[26] Furthermore, for Derrida and deconstruction, language is not phonocentric, focused on language, but rather based in writing, as is law. Furthermore, the written word does not exist with meaning, but rather as a free-floating signifier to which we later attach meaning, knowing that our meaning will never be able to truly represent intent.[27] A floating signifier does not give meaning, but rather accepts it from some outside source, and is therefore constantly susceptible to multiple or different interpretations according to the nature of words themselves.[28] Language exists not alone as one single meaning, but as multiple meanings which

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[21] Gordon S. Wood, "Classical Republicanism and the American Revolution," *Chicago-Kent Law Review* 66 no. 1 (1990): 37
[22] Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of The United States*. 3rd ed. Vol. 1. (New York: Oxford UP, 2011) 136
[23] Ibid., 139.
[24] Terry L. Jordan, *The U. S. Constitution and Fascinating Facts About It*. 7th ed, (Naperville: Oak Hill, 2010) 45.
[25] Ibid., 45-47.
[26] Robert Dale Parker, *How to Interpret Literature: Critical Theory for Literary and Cultural Studies*, (New York: Oxford University Press, 2015) 91
[27] Ibid., 95.
[28] "Floating Signifier". Oxford University Press. Accessed 21 Mar. 2015. http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095824238

are then pitted against one another, and then derive meaning from their differences, their "differance" as Derrida puts it.[29]

These linguistic binaries play a major role in the idea that law exists in the negative because law cannot exist without a positive. There cannot only be an illegal, there must also be a legal. Through their differences, each proves the existence as well as the importance of the other. By wording law in the negative, we are also defining the positive and only then can the two work together to create law from only language, *mallum prohibitum*. When legality contains consistently only words like "shall not", that signifier brings meaning to a realm in which the reader is intended to interpret in the negative any words that follow. It is the job of those who read and interpret the law to bring tactical real-world meaning to arbitrary terms.

Holding to only laws created *mallum prohibitum*, and therefore bound by language, we can begin to look at the way that these laws exist first and foremost in the negative. It must be understood that the language of the law is not just English.[30] Already in this paper, Latin has been accepted alongside English as a term for a legal action and given meaning within that context. Sometimes it is the responsibility of the law to create words in order convey a more specific meaning. For example, the word "kidnapping" was created by colonists in the new world to identify those who forcibly took children or adults and forced them to work on plantations.[31] The point being that language in the law can be arbitrary. The free-floating signifier can apply meaning to words which may or may not exist in the common jargon. The problem with this arbitrary aspect of language is that it threatens the meaning of the law itself. Without some kind of dictionary definition of the terms being used, it becomes hard to recognize the law as concrete.[32] This is the balance that legality must constantly tread, especially when creating a law from nothing. It must hold a concrete meaning, that which cannot be challenged or changed, but it also must remain flexible enough so that the language can adapt to the needs of a culture. Basing law in the negative creates a solid fix on words like "no" while allowing an elastic fix on other words.

Modern property law is a conglomerate of the American legal system and history. Laws regarding property are *mallum prohibitum*, meaning that without their creation by law, we have no basis for them within morality. It is not natural law to own, but rather constructed law. This makes it a prime example for investigation in the way that the negative directly affects and defines the way that we understand property law as a whole. In the eighteenth century, right to property was seen as the right of man to hold absolute dominion. This meant that he not only had power over his land, but also the power over use of his neighbor's land if it interfered with his own dominion.[33] We see this logic carrying over into the American system in the third amendment to the Constitution which states that: "No soldier shall, in time of peace be quartered in any house,

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[29] Robert Dale Parker, *How to Interpret Literature: Critical Theory for Literary and Cultural Studies*, (New York: Oxford University Press, 2015) 91
[30] David Mellinkoff, *The Language of the Law*, (Boston: Little Brown and Co., 1969) 9.
[31] Ibid., 205.
[32] Ibid., 243.
[33] Morton J. Horwitz, *The Transformation of American Law 1780-1860* (New York: Oxford University Press, 1992) 31.

without the consent of the Owner…".[34] The fundamental idea being Blackstone's argument that an owner is to carry out his will over his land without any impeding threat from any outside authority. We see these concepts changing in the nineteenth century as it became evident that these two thoughts are inherently contradictory. For a man to hold absolute dominion over his land, he cannot prohibit the absolute dominion of his neighbor's land and vice versa, but in a land where landowners were scarce, a system of first come, first serve seemed to work best.[35] For Americans, especially early Americans still placing merit in Blackstone's theories, even lawful use of a neighbor's land becomes unlawful when the use of said land infringes on their own.[36] It was in their understanding of the loopholes in Blackstone's theory that Americans were able to form their own theory of property rights, which has become more fondly known as the "bundle of sticks". Revolutionary Americans saw property rights as not just one right given to one man with absolute dominion over all other men by the authority of his property, but rather as a group of rights which worked together to create the right to property itself.[37] This system of compromise worked two fold. On the one hand, there is the negative language which prevents one man's property from harming his neighbor's, but then on the other hand, there is the positive language which offers protection to said man from such harm in return.

It would be a disservice to talk about the language of the law and not address the legally binding contract. A contract is, for all intents and purposes, a legally binding agreement between two parties with mutual intent.[38] Dating back to the Code of Hammurabi and the Torah, contract law has been a quintessential part of the way we view law today.[39] However, it is safe to say that contract law as we recognize today emerged most strongly from the nineteenth century as both England and America began to form their legal systems in opposition to the traditional sense of equality, and instead began to view contract as an obligatory exchange.[40] Under this new system, contract law took on a more binding element, and entered both the public and private sectors as it became the foundational text for property, wills, market and goods transfer, and any other form of *mallum prohibitum* legal transference.[41] Contract law becomes a bit confusing in negative linguistics in that it does not inherently express prohibition. It is typically an agreement from one party to another establishing some criteria. However, the nature of contract law requires

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[34] Terry L. Jordan, *The U. S. Constitution and Fascinating Facts About It*. 7th ed, (Naperville: Oak Hill, 2010) 46.
[35] Morton J. Horwitz, *The Transformation of American Law 1780-1860* (New York: Oxford University Press, 1992) 32.
[36] Ibid., 74.
[37] Anna Di. Robilant, "Property: A Bundle of Sticks or a Tree?", *Vanderbilt Law Review*. Vanderbilt University. (Apr. 2013) 878.
[38] Morton J. Horwitz, *The Transformation of American Law 1780-1860* (New York: Oxford University Press, 1992) 161.
[39] Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of The United States*. 3rd ed. Vol. 1. (New York: Oxford UP, 2011) 190.
[40] Morton J. Horwitz, *The Transformation of American Law 1780-1860* (New York: Oxford University Press, 1992) 160.
[41] Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of The United States*. 3rd ed. Vol. 1. (New York: Oxford UP, 2011) 191.

consideration to substitution.[42] This means that in order to be enforceable by law, a contract must contain an if/then statement. In this statement, the negative linguistics is pitted against the positive without expressing either one outright. To violate the if is to receive the then, whether the two correlate as a reward or a punishment depends solely on the free floating signifiers that surround the irreplaceable caveat of the if/then.

Classical law and the *mallum prohibitum* of legal jargon developed from and alongside the legal system on which America is based. Without the realization that Americans are not virtuous, it would not follow to understand that the framework of liberty needed to be one which offered democracy under the understanding that it would need to appeal to a population that was inherently concerned with their own interests over that of the Republic. Throughout the years, this understanding has given way to new theories of legal philosophy unique to the American system which continued understanding not only of the law, but of the implications of the entirety of the legal system. Take, for example, positivism. The first major school of thought to emerge after Blackstone, positivism focused on the validity of law. Major texts written by H. L. A. Hart evaluate law as having a natural order or cause and whether or not objection to the law cancels the law itself. The negative linguistics throughout Hart's works are extremely prominent as he evaluates the establishment of law and therefore its creation.[43] Then, positivism gave way to constructivism as Ronald Dworkin questioned Hart's theories and added his own, defining the gray area of law as he questions hard cases against the reflective equilibrium. Hart takes into account that while the law can prohibit, it can never understand the circumstances of creation.[44] He, in a way, hints at Derrida's free-floating signifier as he separates the linguistics of the law itself, the signifier, from the real-world situation in which said law will apply, the sign. Finally, constructivism gave way to consequentialism in which Richard Posner questioned even our ability to construct the law in regard to the consequences that it will bring.[45] Legal theory continues throughout time, constantly changing, but it does not wipe the slate. Instead, it tends to add to or correct that which has already been established. It does not discount or end its affiliation with Blackstone's original thoughts and theories any more than it does the understanding of how democracy works in a real-world setting. It is interesting to see the way that these thoughts add to one another, consistently making one single conglomerate understanding of human nature.

"The end of law is not to abolish or restrain," said John Locke, "but to preserve and enlarge freedom. For in all the states created of beings capable of law, where there is no law, there is no freedom."[46] Whether these laws exist under the pretext of morality with the intent to help a society enforce morals upon its citizenship, or if they exist solely under the pretext of language, or even

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[42] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 191.
[43] Ibid., 41-42.
[44] Ibid., 65.
[45] Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases*. (New York: Oxford University Press, 1999) 65.
[46] John Locke, *Second Treatise of Government*, (The Project Gutenberg: 2010) Accessed 15 Mar. 2015, http://www.gutenberg.org/files/7370/7370-h/7370-h.htm

just the linguistics themselves, is up for debate. However, the implications of a direct parallel between Derrida's deconstructionist idea of the free floating signifier anchored by the negative and the nature of legal linguistics remains strikingly similar. In a nation where even positive rights are based in the negative, it brings to question the societal implications of a government founded on distrust of its people. One must ask how effective can a government hope to be if it spends time constantly focusing on the negative implications, rather than the positive possibilities. The Articles of Confederation took less than a decade to fail. How long will it take for the Constitution to meet this same fate if we do not find a way to mediate between the two? Legal philosophy is evolving. Is the law itself?