

1959

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Recommended Citation

Thomas F. Broden, *The Straw Man of Legal Positivism*, 34 Notre Dame Law. 530 (1959)..
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THE STRAW MAN OF LEGAL POSITIVISM

Thomas Broden, Jr.*

In 1951, a distinguished U.S. Court of Appeals Judge said:

John Austin, the patron saint of the modern positivists, began the law's descent to the Avernus of unfaith by proposing to distinguish morals from law. Some of the modern but less moderate pragmatists have continued it by proposing to divorce morals from law, while the down-right radicals among them, including the fellow travelers, preferring headlong descent, propose, as Nietzsche did, to abolish morals altogether.¹

Two years ago a respected political scientist wrote, recently jurisprudence has been befuddled by a school, lately fashionable in America, which, in the last resort, as Mr. Justice Holmes cynically pointed out, reduces the bases of law to the question, "who can kill whom?"²

In 1949 an editorial in the American Bar Association Journal opined that,

our difficulties have been increased by the fact that at this critical period many of our statesmen, judges, and particularly our law teachers, had abandoned natural law and had become champions of *positivism* or what some termed legal realism. . . . They maintain that the standards and ideals of natural law are matters for ethics and moral philosophies and have no place in the administration of the positive law.³

These quotations condemning a so-called school of jurisprudence generally known as legal positivism⁴ illustrate the typical view of many lawyers, philosophers, theologians and other thoughtful persons. According to this typical view legal positivism is a well developed philosophy of law the main tenets of which are that might makes right and that law and state sovereignty are absolute and not subject to independent moral evaluation.⁵

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1 Hutcheson, *The Natural Law & The Rights to Property*, 26 NOTRE DAME LAW. 640,651 (1951).

2 Catlin, *Political Theory*, 72 POL. SCI. Q. 1,21 (1957).

3 35 A.B.A.J. 42 (1949).

4 Sometimes referred to as analytical jurisprudence or legal realism.

5 Professor Bernard Schwartz has said, "With the goodness or the badness of laws, dogmatically declaimed Austin in a famous passage, jurisprudence 'has no immediate concern.'" Schwartz, *Administrative Procedure and Natural Law*, 28 NOTRE DAME LAW. 169,170 (1953).

Father Francis E. Lucey, S.J. has written that the analytical school "makes law stand on its own feet, absolutely divorces law and moral as to the formal element of a moral ought, makes the individual live and behave by privilege not right, deprives man of all innate dignity, and thus reduces him to the status of an animal." Lucey, *Natural Law and Legal Realism*, 30 GEO. L.J. 493, 496 (1942).

A leader of the American bar has written: "Law to Holmes as to the jurists of the Roman Empire and to Austin was the sovereign's command. . . . The fact that Holmes was a polished gentleman who did not go about like a storm trooper knocking people down and proclaiming the supremacy of the blond beast should not blind us to his legal philosophy that might makes right, that law is the command of the dominant social group." Palmer, *Hobbes, Holmes & Hitler*, 31 A.B.A.J. 569, 571 (1937). He continues: "for surely this is Hobbes & Leviathan come to life. . . . The doctrines of Hobbes, materialist, behaviorist, like Holmes were flagrantly contradictory to those

Needless to say this assumed jurisprudential view is roundly indicted, deplored and declaimed against with vigor and venom. We are warned that legal positivists are insidious termites threatening the very foundation of our law, order, freedom and way of life.

It is the burden of this article to demonstrate that these "insidious termites" of legal positivism are straw men, that is, figments of the imagination of the righteous attackers. That, as common sense would suggest, no thoughtful person adheres to a philosophy that might makes right and law is power alone, beyond moral limitation. Yet much energy — physical and mental — is constantly expended in an effort to destroy the assumed positivist dragon.

The most prominent persons in the positivist camp, according to the typical view, are Thomas Hobbes, a 17th century political writer in England; John Austin, English lawyer and the first lecturer in Jurisprudence at the University of London; Jeremy Bentham a late 18th and early 19th century English writer; Justice Oliver Wendell Holmes, Jr. of the U.S. Supreme Court; John Chipman Gray, a late 19th and early 20th century professor of law at Harvard; and Dr. Hans Kelsen, the most famous living exponent of legal positivism, who has been a professor of law in Austria and the U.S. There are lesser luminaries or villains (depending upon your point of view) in the positivist camp but an examination of the teachings of the leaders will suffice for our purposes. Since this article challenges the prevailing view of what these men said, it is necessary to quote their writings extensively. For this I apologize. However, since what they said and meant is the thing at issue, I see no other way to fairly discuss it.

JOHN AUSTIN

Although he chronologically follows Hobbes and Bentham, John Austin will first be studied because he is generally recognized as the dominant figure in legal positivism, or, as it is often called, "Austinian Positivism."

In 1826 the University of London was established and John Austin was chosen to teach Jurisprudence. The lectures he gave while teaching at the University of London formed the basis for this book on Jurisprudence. Austin's book is not concerned with the technical rules of law employed by practitioners. He directs his attention to more fundamental and philosophical legal principles. He does not confine himself to any single body of law.

ideas of Greek and Roman philosophy, of natural law and canon law, of Judaeo-Christian beliefs in the spiritual reality of man that reached their high fruition in the Declaration, the Constitution and the Bill of Rights. Hobbes was a champion of the totalitarian state. . . . Holmes was directly in the tradition of Hobbes." *id.* at 572.

Father John C. Ford's criticism of Justice Holmes juristic philosophy is well known. "The essence of law is physical force. Might makes legal right. The law is to be divorced from all morality. There is no such thing as a moral *ought*—it is a mere fiction. Ultimately there is only the physical necessity of behaving or being killed. There is no absolute truth. Man is a cosmic ganglion. His ideas probably have no more cosmic value than his bowels. He himself has no more cosmic significance than a baboon or a grain of sand. There is too much fuss about the sanctity of human life. To the state man is a means to be sacrificed if necessary in the interest of the state. The ultimate arbiter of all life is physical force. The ultimate *ratio decidendi* when men disagree is this, Holmes' words: 'We don't like it and shall kill you if we can.'" Ford, *The Fundamentals of Holmes' Juristic Philosophy*, 11 *FORDHAM L. REV.* 255, reprinted in *LEBUFFE & HAYES, THE AMERICAN PHILOSOPHY OF LAW*, 377-403 (1947).

Among others, his material deals with Roman, French and German as well as English Law. He emphasizes the need of precise terminology in the law and much of his book on Jurisprudence represents an effort to clarify the meaning of such concepts as positive law, natural law, positive morality, right, sovereign, sanction, obligation and duty.⁶

In discussing the concept of positive law, Austin makes clear that for him this term means the command of the sovereign. From this has been derived the popular notion of the "Austinian command theory of law" which has been widely criticized in the belief that it represents a might makes right position. There is no doubt that Austin defines positive law in terms of sovereign commands. He says, "Every positive law (or every law simply and strictly so-called) is set, directly or circuitously, by a sovereign individual or body to a member or members of the independent political society wherein its author is supreme."⁷ "Again, a law is a command which obliges a person or persons."⁸ Equally well known is Austin's proposition that positive law is different from morality.

For the confusion of them under a common name and the consequent tendency to confound Law and Morals, is one most prolific source of jargon, darkness and perplexity. By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and division which relate to law exclusively.⁹

From this it is inferred that Austin believes that law is not subject to moral evaluation. Finally it is charged that Austin believes in absolute governmental sovereignty. This charge is based upon his position that sovereignty is incapable of legal limitation.

Now it follows from the essential difference of a positive law, and from the nature of sovereignty and independent political society, that the powers of a monarch properly so called, or the power of a sovereign member in its collegiate and sovereign capacity, is incapable of *legal* limitation. (Austin's emphasis.)¹⁰

However, the truth of the matter is that Austin did not hold that might makes right, did not free law from moral evaluation and did not believe that governmental authority was beyond moral limitation.

A brief explanation of Austin's views demonstrates the utter falsity of the charges against him. Instead of ignoring or condemning the association of law and morality, Austin is vitally concerned with strengthening their relationship. No book on Jurisprudence devotes more time to the relationship of law and morality and points out more strenuously the fact that positive law should be judged by God's law and natural law. For example:

Strictly speaking, every law properly so called is a *positive* law. For it is *put* or set by its individual or collective author, or it exists by the *position* or institution of its individual or collective author.

⁶ AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 369 (Library of Ideas ed. 1954), hereinafter cited as AUSTIN, JURISPRUDENCE (Library of Ideas ed.)

⁷ AUSTIN, JURISPRUDENCE 330 (5th ed. 1885).

⁸ *Id.* at 96.

⁹ AUSTIN, JURISPRUDENCE 371 (Library of Ideas ed.).

¹⁰ AUSTIN, JURISPRUDENCE 263 (5th ed., 1885).

But, as opposed to the law of nature (meaning the law of God), human law of the first of those capital classes is styled by writers on jurisprudence '*positive law*'. This application of the expression '*positive law*' was manifestly made for the purpose of obviating confusion; confusion of human law of the first of these capital classes with that Divine law which is the measure or test of human.¹¹

In discussing Blackstone's statement that human laws are of no validity if contrary to the laws of God, Austin says:

Now he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. . . . Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because, if they do not, God will punish them. To this also I entirely assent. . . .¹²

Austin found similar confusion of what the law is with what the author thought the law ought to be in the writings of Paley, Grotius, Puffendorf and Ulpian.¹³ These are random samples of the theme which dominates Austin's consideration of the relationship of God's law and natural law and positive law.

There is no basis for the charges that Austin separated law and morality. Very simply, Austin merely made clear that God's law was one thing and that man's law was another. "The existence of law is one thing; its merit or demerits another."¹⁴ One of Austin's purposes was to clarify the distinction between the two concepts. He felt that a clearer understanding of the relevant terms would contribute to clarity of legal thinking.

If you read the disquisition in Blackstone on the nature of laws in general, or the fustian description of law in Hooker's Ecclesiastical Polity, you will find the same confusion of laws imperative and proper with laws which are merely such by a glaring perversion of the term. The cases of this confusion are, indeed, so numerous, that they would fill a considerable volume.¹⁵

In further discussion of Blackstone's statements that human laws are not valid if they conflict with God's laws, Austin says:

Now to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. . . . If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain. . . . What appears pernicious to one person may appear beneficial to another. . . . To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance . . . may be useful, for resistance grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all

11 *Id.* at 171.

12 *Id.* at 215.

13 *Id.* at 218.

14 *Id.* at 214.

15 *Id.* at 211-12.

laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.¹⁶

His purpose in separately identifying positive law, natural law, positive morality and Divine law was to clarify the meaning of the terms, not to weaken or destroy their interrelationship.

What has been said already indicates that there is no basis for the charge that Austin believed government should be beyond the limitations of morality.

Misconceptions about Austin's views may have arisen from the fact that Austin attributes to sovereignty the characteristic of power without legal restraint. But the key word here is *legal*. He makes perfectly clear that although the sovereign is not bound by legal restraint he is bound by moral limitations. Austin's meaning here is simply that, by definition, there exists in every independent political society an institution which has the authority to make final human decisions in governmental affairs. This authority Austin defines as sovereignty. There is certainly nothing unusual about this observation. For example, in our country, the Supreme Court of the United States has final authority to decide cases. There is no further legal remedy available to the parties. We may criticize the court's decision as unwise—even contrary to moral principle. But when judicial relief before the Court is exhausted, the legal order has run its course. In this situation, according to Austin, the court would be sovereign.

There is no justification, however, for inferring from this fact of lack of further legal restraint that sovereignty is, therefore, subject to no moral limitations. Nowhere does Austin say so. In fact, on the contrary. In footnote S, page 268 of the 1885 edition of his book on Jurisprudence, he anticipates and specifically answers this objection. In that footnote he expressly indicates that the positive law of the sovereign is subject to morality and the law of God.

Another variation of the charge against Austin in relation to sovereignty is that under Austinian positivism, the person has no rights except those given to him by the state and what the state gives it may take away. Further, that under this philosophy no natural rights are recognized. However, as has been indicated, when Austin attributes to the sovereign, power to change the law he is merely indicating the commonplace daily governmental occurrence. The examples he gives indicate that he means that the sovereign or monarch may, of course, make any changes in existing laws by amendment or repeal. However, his examples of what he considers to be unwise changes indicate his belief that the sovereign is subject to moral limitations. One hypothetical example he gives is of the British Parliament abolishing the established church. He says,

Assuming that the church establishment is commanded by the revealed law, the abolishment would be *irreligious*: or, assuming that the continuance of the establishment were commended by general utility, the abolition, as generally pernicious, would also amount to a *sin*. But no man, talking with a meaning, would call a parliamentary abolition of either or both of the churches an illegal act.¹⁷

¹⁶ *Id.* at 215-16.

¹⁷ *Id.* at 265.

But to say that the government is *legally* free does not mean that the government is free from positive morality or the laws of God. "For a government may be hindered by positive morality from abridging political liberty which it leaves or grants to its subject: and is bound by the *law of God*, as known through the principle of utility, not to load them with legal duties which general utility condemn."¹⁸ Thus Austin expressly indicates that the sovereign should not violate the moral law or the laws of God and, in addition to this, expressly indicates his belief that there are rights which individuals have from sources other than the positive law, to-wit: the laws of God or nature and from laws which are sanctioned morally.¹⁹

Clearly, if we are looking for proponents of what is popularly known as Austinian Positivism the last man to choose would be John Austin. As has already been indicated Austin emphasizes the precise meaning of legal terminology in the belief that precision will lead to improvement. He does not expressly indicate how more precise language will do this. It is possible, however, that Austin recognized the futility of relying upon automatic application of natural law principles and the law of God in governmental affairs. He may well have been concerned to point out the distinction so that it would be recognized that only through the thoughtful actions of men in legislatures and the courts will these lofty principles be infused in the positive laws.

THOMAS HOBBS

Let us now examine Thomas Hobbes. Whereas John Austin left no doubt of his rejection of the might makes right position, Thomas Hobbes is more ambiguous. Austin defends Hobbes against this charge,²⁰ and a fair reading of Hobbes supports Austin. It is true that some passages of Hobbes could lead one to believe that he freed law of moral evaluation. For example, Hobbes states that,

Civill law, Is to every Subject, those Rules, which the Common-wealth hath Comanded him, by Word, Writing or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the Rule.

. . . Lawes are the Rule of Just, and Unjust; nothing being reputed Unjust, that is not contrary to some law.²¹

In a similar vein he states that "before the names of Just and Unjust can take place, there must be some coercive Power to compell men equally to the performance of their covenants, . . . and such power there is none before the erection of a Common-wealth."²²

These statements obviously could be interpreted as a might makes right position.

Hobbes has also made statements from which some might infer that for him there is no limitation on the power of the sovereign.

. . . the sovereign is the sole legislator.

¹⁸ *Id.* at 274.

¹⁹ *Id.* at 343.

²⁰ *Id.* at 268.

²¹ HOBBS, *LEVIATHAN* 189 (Cambridge English Classics Ed. 1904.).

²² *Id.* at 97.

The Sovereign . . . is not subject to the Civill Lawes. For having power to make, and repeale Lawes, he may when he pleaseth free himself from that subjection. . . .²³

Seeing then that all Lawes, written, and unwritten, have their Authority, and force, from the Will of the Common-wealth. . . .²⁴

These statements obviously suggest unlimited power in the sovereign.

An oft-quoted passage from Hobbes has been implied to indicate the freedom of law from morality.

To the care of the Sovereign, belongeth the making of Good Lawes. But what is a good Law? By a Good law, I mean not a Just Law; for no Law can be Unjust. The Law is made by the Sovereign Power, and all that is done by such Power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust. It is in the Lawes of a Common-wealth, as in the Lawes of Gaming: whatsoever the Gamesters all agree on, is Injustice to none of them. A good Law is that, which is Needful, for the *Good of the People*, and with all *Perspicuous*.²⁵

Finally Hobbes makes observations on property rights which suggest that the state is the exclusive source of such rights. Hobbes states that property cannot exist in the absence of sovereign power and the commonwealth.

However, these statements out of context are not an accurate indication of Hobbes' thoughts. Hobbes was an ardent advocate of the law of nature and of natural rights. His position was that without government men actually lived in what he considered a war-like state of nature.²⁶ As a practical matter government is, therefore, necessary for peaceful life,²⁷ but rather than the sovereign being absolute he clearly states that the sovereign is subject to God's law and the laws of nature. "It is true, that Sovereigns are all subject to the Lawes of Nature; because such Lawes be Divine, and cannot by any man, or Common-wealth be abrogated."²⁸ It was the duty of the sovereign to put into effect the laws of nature for "the Office of the Sovereign, (be it a Monarch, or an Assembly) consisteth in the end, for which he was trusted with the Sovereign Power, namely the procuration of *the safety of the people*; to which he is obliged by the Law of Nature, and to render an account thereof to God, the Author of that Law and to none but Him."²⁹ ". . . For in this consisteth Equity; to which as being a Precept of the Law of Nature, a Sovereign is as much subject as any of the meanest of his People."³⁰

There can be no doubt that Hobbes considered government subject to God's law and the "Lawes of Nature."³¹ It was the moral duty of those exercising governmental power to act according to these higher laws but, being the final authority on human law, by definition, the government was not subject to *legal* controls. There is nothing startling about this doctrine. As we have said, in our government we fully recognize that once the Supreme

²³ *Id.* at 190.

²⁴ *Id.* at 192.

²⁵ *Id.* at 252.

²⁶ *Id.* at 81.

²⁷ *Id.* at 115.

²⁸ *Id.* at 235.

²⁹ *Id.* at 242.

³⁰ *Id.* at 250.

³¹ *Id.* at 231.

Court has finally spoken there is no further legal control of the particular dispute. Rightly or wrongly the positive legal processes have reached the end. We can assert our disagreement with what the Court has decided but there is no further legal remedy open to change the Court's decision. The Supreme Court's decisions condemning racial discrimination in public schools demonstrate this. To legally change these decisions would require a change in our basic governmental charter, the Constitution. To refuse to obey these decisions is clearly civil disobedience. Widespread and wholesale disobedience would signal the end of civilized community life.

This is what Hobbes is saying. It is his position that life under government is to be preferred to anarchy.³² When we look upon the international scene today his views seem hard to refute. Can anyone doubt that without government men live in a condition of hostility and war? Furthermore, he lived and wrote during the revolutionary 1640's and 1650's. It was a time of Civil War in England. It was a time of military coups and royal executions. It was a lawless time, a time of war. Hobbes did not glory in its violence and yearned for the peace and stability of lawful life.³³

His main purpose in writing was to present the advantages of lawful rather than lawless life. But he did not avoid the hard questions. Two of these are worth examining in some detail. Should men obey a law which is contrary to God's law? Should governmental authority be strengthened or weakened? Hobbes faced the first question but his answer is not clear. It will be remembered that Hobbes considered government bound by God's law and the natural law so that human laws should not conflict therewith. However it is not clear what Hobbes suggested in these instances when human law conflicted with God's law. In two places he says that since the Sovereign is created by the people, even when the Sovereign actions are contrary to the law of nature the people cannot be heard to complain "because they have authorised all his actions, and in bestowing the Sovereign Power, made them their own."³⁴

Yet in another place, clearly facing up to the question, Hobbes takes a somewhat different position.

The most frequent praetext of Sedition, and Civill Warre, in Christian Common-wealths hath a long time proceeded from a difficulty, not yet sufficiently resolved, of obeying at once, both God, and Man, then when their Commandments are one contrary to the other. It is manifest enough, that when a man receiveth two contrary Commands, and knows than one of them is Gods, he ought to obey that, and not the other, though it be the command even of his lawfull Sovereign (whether a Monarch, or a Sovereign Assembly,) or the command of his Father. The difficulty therefore consisteth in this; that men when they are commanded in the name of God, know not in divers Cases, whether the command be from God, or whether he that commandeth, doe but abuse Gods name for some private ends of his own.³⁵

³² *Id.* at 128.

³³ *Id.* at 146.

³⁴ *Id.* at 177, 234.

³⁵ *Id.* at 432.

Lest we hasten too readily to condemn Hobbes for leaving this question somewhat aloft, we should reflect that even today, 300 years later, we have not yet worked out the answer to the delicate problem of individual, conscientious disobedience to human law.

As to the second question Hobbes makes his position perfectly clear. Government to be effective must be strong. Although he condemns political abuses such as governmental favoritism of special interests³⁶ and the "cult of personality,"³⁷ he clearly considers the greatest evils to be those which weaken governmental power. He condemns military weakness;³⁸ civil disobedience on ground of conscience;³⁹ lack of legal immunity of government;⁴⁰ absolute private property (no taxing power)⁴¹ and the doctrine of the separation of powers.⁴² Hobbes opposed rebellion,⁴³ was anti-democratic, and favored the monarchy. He adopted these positions, however, not because of a philosophical commitment to the doctrine that might makes right or the Divine right of kings or absolute governmental power but because he thought the institution of the monarchy was the most practical way to bring about the good life under God's law, the law of nature. One may agree or disagree with these practical, prudential judgments of Hobbes, but there is no basis for implying from them that Hobbes placed the State and law beyond moral evaluation.⁴⁴

JEREMY BENTHAM

I think we should deal quite summarily with the next individual, Jeremy Bentham, a late 18th and early 19th century English writer on politics and morals. Bentham's entire life and works were so obviously given to the moral reform of English politics and law as to make further defense by me almost unnecessary. However, I shall point out two aspects of Bentham's thought that are particularly relevant to our discussion.

Like most who are called positivists, Bentham condemned the ambiguous use of moral and legal terminology because of the attendant confusion. He singled out the concept of natural rights as being a particularly confounding one.⁴⁵ Bentham reserved the word "rights" for that which was guaranteed by "real law." He used the words human inclinations when referring to what many called "natural rights." To use the same word for both of these concepts he said is confusing. There is no doubt that, for the sake of clarity, he distinguished positive law from God's law. But instead of being concerned about freeing positive law from the moral law, Bentham's writings were

³⁶ *Id.* at 241.

³⁷ *Ibid.*

³⁸ *Id.* at 232.

³⁹ *Id.* at 234.

⁴⁰ *Ibid.*

⁴¹ *Id.* at 235.

⁴² *Id.* at 236.

⁴³ *Ibid.*

⁴⁴ In his introduction to the Appleton-Century Philosophy Source-Book Edition of Hobbes' *De Cive*, or, THE CITIZEN (New York 1949) Professor Sterling P. Lamprecht describes the flood of confused and mistaken criticism that has engulfed and practically inundated what Hobbes really said and meant.

⁴⁵ BENTHAM, THE THEORY OF LEGISLATION 84 (Ogden ed. 1950).

largely directed to bringing about their closer relationship. This was to be done through the application to governmental problems of the moral principle of utility.

Bentham certainly did not favor absolute and unlimited governmental power. His writings were largely designed to and did inspire intelligent changes in the law. His book on the Principles of Legislation identified basic principles of desirable Civil and Penal Codes. There is no doubt he did not consider law its own justification. He said, "The general object which all laws have, in common, is to augment the total happiness of the community. . . ." ⁴⁶

While recognizing that laws ought to conform to his standard of moral evaluation, he condemned Blackstone's flat statement that we are bound to disobey all human laws which are contrary to the natural and divine law. ⁴⁷ Bentham considered such a statement sheer nonsense. He said, ". . . I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like." ⁴⁸ Bentham agreed that under certain circumstances civil disobedience was proper, nay, even a duty ⁴⁹ but only when the total circumstances were examined and greater good would result from such resistance. This is similar to the position taken by that well known legal positivist, St. Thomas Aquinas, who says that laws clearly contrary to God's law must not be obeyed but that in more doubtful cases they should be obeyed to avoid "scandal and disturbance." ⁵⁰

Clearly Bentham is not guilty of the popular charges leveled against legal positivism.

JUSTICE HOLMES

This brings us to one of the most fascinating and controversial men in American law, Justice Oliver Wendell Holmes, Jr. Son of a famous writer, a Civil War veteran, Justice of the highest Court of Massachusetts and of the Supreme Court of the United States, Holmes had a piercing mind and a captivating pen. Master of the cryptic comment, he has been widely quoted and vastly misunderstood. As with all great men, he defies labelling and pigeon-holing. But nevertheless he has been embraced by devotees of various philosophical positions and condemned for imputed affiliation with various, often conflicting, social and political ideologies.

He is often accused of membership in or affiliation with the positivist camp. He is accused of having a philosophy that might makes right, that law is unrelated to moral principles and that the state possesses unlimited power. ⁵¹ Statements relied upon to establish these allegations are as follows:

When the Germans in the late war disregarded what we called the rules of the game, I don't see there was anything to be said except: we don't like it and shall kill you if we can. So when it comes to the

⁴⁶ BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 170 (Oxford ed. 1907).

⁴⁷ BENTHAM, A FRAGMENT ON GOVERNMENT 213 (1951).

⁴⁸ *Id.* at 214.

⁴⁹ *Id.* at 215.

⁵⁰ SUMMA THEOL. I-II, Q. 96, Art. 4.

⁵¹ 31 A.B.A.J. 569 (1945); see note 5 *supra*.

development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way.⁵²

Law is "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."⁵³

You will find some text writers telling you [that the law] is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or whatnot, which may or may not coincide with the decisions. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁵⁴

These excerpts from Holmes' writings suggest a rather callous view of law as power alone. The first two statements, the first referring to the Germans in World War I and the second referring to the law as an aspect of public force are from letters to Dr. John C. H. Wu, a law professor from China who became a friend of Holmes while visiting in the United States.

The first of these is a not untypical example of Holmesian literary brutality. Many believe these portray the true Holmes. I doubt it. I think most were for literary effect. Later we shall see that these brutal statements are frequently inconsistent with other eloquent passages by Holmes on the relation of law to higher values, statements made on more serious occasions. While it is true one may be more candid in private correspondence than in public utterances, it is also true that one may be more careless.

Tracking down and clarifying statements of Holmes taken out of context is not an easy task. But it can be rewarding. For example in the letter to Wu, it is entirely possible that his apparently callous view about the basis of our motivation against the Germans in World War I was designed to shock Wu and thereby awaken him to the "facts of life." This possibility suggests itself because Holmes' statement was in response to a letter from Wu in which Wu had called attention to an edition of Stammler's book, *The Theory of Justice*, to which Wu had written an appendix.⁵⁵ Holmes did not like Stammler's book because it seemed to him "to elaborate the obvious in scholastic language" or maintain propositions that he did not believe.⁵⁶ With his typical disgust of meaningless general propositions in the law that ambiguously confused law and morals, Holmes let his literary dagger fly. The language is brutal but I think it is so primarily for effect.

The second statement is an oft-quoted definition by Holmes that law is "a statement of the circumstances in which the public forces will be brought to bear upon men through the courts." When read in context it is obviously intended to refer only to positive law and does not imply approval of unlimited governmental power. The statement was earlier made in the case of *American Banana Company v. United Fruit Company*.⁵⁷ In that case the

52 Letter to Dr. Wu, Shriver Collection 186-187 (1936).

53 Letter to Dr. Wu, Shriver Collection 157 (1936).

54 Holmes, *The Path of the Law* in COLLECTED LEGAL PAPERS 172 (1921).

55 Modern Legal Philosophy Series.

56 SHRIVER, JUSTICE OLIVER WENDELL HOLMES 186 (1936).

57 213 U.S. 347, 356 (1909).

plaintiff brought an action for treble damages under the Sherman Act based on the defendant's activity in monopolizing the fruit business in Central America. Holmes says that the Sherman Act like almost all statutes does not apply extra-territorially. It was in this context—purely an analysis of the purview of positive law — that Holmes made this statement. That he was using law in this limited sense is made clear by a letter he wrote to Dr. Wu on December 2, 1922, in which he pointed out that those who have objected to that definition of law "use the word *law* in some different sense from that in which I use it."⁵⁸

The third statement by Holmes defining law as prophecies of what the courts will do in fact is from a famous address dealing with the study of law in law schools. It was entitled "The Path of the Law."⁵⁹ In this lecture he makes perfectly clear that he thought much confusion in the study of law resulted from a failure to distinguish law and morals. Since this is an extremely important point I beg your indulgence of a rather long quotation.

The first things for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things.⁶⁰

And Holmes then went on to say:

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance. . . . But I do say that that distinction is of first importance for the object which we are here to consider, the right to study and mastery of the law as a business with well understood limits.⁶¹

This is hardly the shocking language of the letter to Dr. Wu.

Nor are the following statements of Holmes which were made on other occasions:

⁵⁸ Letter to Dr. Wu, Shriver Collection 158 (1936).

⁵⁹ Holmes, COLLECTED LEGAL PAPERS 167-202 (1921).

⁶⁰ Holmes, *The Path of the Law* in COLLECTED LEGAL PAPERS 169-170 (1921).

⁶¹ *Id.* at 170-171

If your subject is law, the roads are plain to anthropology, the science of man, to political economy, to the theory of legislation, ethics, and thus by several paths to your final view of life.⁶²

[Law is] A special branch of human knowledge, a branch, I may add, which is more immediately connected with all the highest interests of man than any other which deals with practical affairs.⁶³

A system of law at any time is the result of their present needs and present notions of what is wise and right on the one hand, and, on the other, of rules handed down from earlier states of society and embodying needs and notions which more or less have passed away.⁶⁴

While Holmes was interested in dispelling confusion because of ambiguous use of legal and moral terminology, he was well aware that value judgments played a vital part in development of the law.

"Behind the logical form [of a judicial decision] lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."⁶⁵ He added that the judges are not aware enough of this.⁶⁶ If they were they wouldn't be so confident about debatable judgments. He thought the moneyed classes, "who no longer hope to control the legislatures" now look to the courts to develop new constitutional theories to preserve 50 year old economic doctrines.⁶⁷ His dissent in *Lochner v. New York*⁶⁸ clearly indicates his disagreement with these new constitutional theories. The majority of the court held a minimum wage statute unconstitutional. But Holmes said:

the Fourteenth Amendment does not enact Herbert Spencer's Social Statics. . . . A Constitution is not intended to embody a particular economic theory whether of paternalism and the organic relationship of the citizen to the state or *laissez faire*. . . . Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the *traditions of our people* and our law. (Emphasis added.)⁶⁹

Whereas in legislation regulating economic affairs, Holmes was prone to sustain the legislature; in governmental action impinging on civil liberties Holmes was more definitely an activist judge. He led the way in more careful judicial scrutiny of our treatment of aliens.⁷⁰ He established the basic "clear and present danger" test for freedom of speech and the press⁷¹ and would have gone much further than others on the Court in invalidating state statutes in the field.⁷² He struck down state statutes designed to prevent

62 Holmes, *The Profession of the Law* in COLLECTED LEGAL PAPERS, 30 (1921).

63 *Ibid.*

64 Holmes, *The Bar As A Profession* in COLLECTED LEGAL PAPERS, 156 (1921).

65 Holmes, *The Path of the Law* in COLLECTED LEGAL PAPERS, 181 (1921).

66 *Id.* at 184.

67 *Ibid.*

68 198 U.S. 45-74, (1905).

69 *Lochner v. New York*, 198 U.S. 45, 75-76 (1905).

70 *Chin Yun v. U.S.*, 208 U.S. 8 (1908); *Gegio v. Uhl*, 239 U.S. 3 (1915).

71 *Schenck v. U.S.*, 249 U.S. 47 (1919).

72 *Gitlow v. N.Y.*, 268 U.S. 652 (1925).

negroes from voting.⁷³ He also set aside state trials which provided the form but not the substance of justice to negroes.⁷⁴

This is not to say that he always sustained civil liberties arguments. On the contrary he received criticism for upholding a state sterilization law,⁷⁵ for dissenting in a case striking down an Alabama statute imposing peonage⁷⁶ and for refusing to set aside the execution sentences of Sacco and Vanzetti.⁷⁷ But on balance he was more solicitous for civil liberties than other members of the Court and certainly did not evidence a might makes right philosophy in his judicial activity.

But Holmes was a skeptic. There is no doubt of this. He had what he called his own "can't helps."⁷⁸ These were propositions on which "my fellow man to a greater or less extent, (never wholly)" are in agreement. But he denied that "the ultimates of a little creature on this little earth are the least word of the unimaginable whole."⁷⁹ While rejecting man's ability to gain certitude, he recognized that one's attitude on these matters toward the universe was closely connected with one's evaluation of the wisdom and propriety of particular actions.⁸⁰

Holmes has been condemned for his skepticism by believers in natural law. This is understandable. The basic tenet of any natural law position is that there are some aspects of human nature which are fixed and immutable. Holmes denies this. Holmes has been praised for his skepticism by those who share his doubts. On this point I disagree with Holmes but do not agree with his detractors who say that one who has no fixed and immutable principles has a philosophy of law as dangerous as Hitler's. It is not true to say that a denial of man's ability to grasp immutable principles necessarily results in the adoption of a totalitarian or otherwise vicious philosophy of law. Principles that some philosophers believe will affect a person's actions are the kind of things that Holmes called "can't helps." If these are good then one has a good philosophy of law. If these are good, as a matter of fact, one has a better philosophy of law than one who proclaims the superiority of the Aryan race as a fixed, immutable principle of human nature.

It is evident that Holmes pointed out the distinction between morality and law. It is clear that he considered positive law to be the command of sovereign. There is grave doubt however, that he believed that might makes right, that morality had nothing to do with law and that the will of the state was beyond moral evaluation.

JOHN CHIPMAN GRAY

John Chipman Gray was a distinguished member of the faculty of the Harvard Law School around the turn of the century and author of a well

⁷³ *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁷⁴ *Moore v. Dempsey*, 261 U.S. 86 (1923).

⁷⁵ *Buck v. Bell*, 274 U.S. 200 (1927).

⁷⁶ *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

⁷⁷ *The Sacco-Vanzetti Case*, 5516-5517 (1929).

⁷⁸ Holmes, *Natural Law* in COLLECTED LEGAL PAPERS 311 (1921).

⁷⁹ *Id.* at 315.

⁸⁰ *Id.* at 314.

known book on jurisprudence, *The Nature and Sources of the Law*. As with many of the writers we have examined, he made clear that law was one thing and principles of morality another. Presumably for this reason he has been called positivistic. For Gray, "The Law of the State or of any organized body of men is composed of the rules which the courts, that is the judicial organs of the body, lay down for the determination of legal rights and duties."⁸¹

The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is. To fix this definitely in the Jurisprudence of the Common Law, is the feat that Austin accomplished. He may have been wrong in treating the Law of the State as being the command of the sovereign, but he was right in teaching that the rules for conduct laid down by the persons acting as judicial organs of the State, are the Law of the State, and that no rules not so laid down are the Law of the State.⁸²

A decision "is a Judicial Precedent, not because it ought to have been made, but because it has been made. The decision of a court may unite the character of a Judicial Precedent with the character of an expression of wise thought or of sound morals, but often these characters are separated."⁸³

From these quotations it might be inferred that Gray freed law from moral evaluation. But Gray made perfectly clear his belief to the contrary, that law should conform to principles of morality.

It may be well to be reminded, by the resemblance between names given to legal and moral relations that organized societies establish many legal duties with a moral purpose, and that they ought not to establish legal duties which are inconsistent with good morals; but it is not well to affirm, simply on similarity in name, that the essence of legal duties is a thing which they sometimes possess and sometimes do not.⁸⁴

In organized communities, political or other, the courts, in laying down rules for the decision of cases, are hemmed in and limited in many ways; the duty and responsibility of considering what rules they ought to apply is largely taken away from them, and there is imposed upon them, or they impose upon themselves, by reason of statutes, precedents, professional opinion or custom, lines of conduct to be followed without regard to their moral character; but where these limitations have not been imposed, then it is safe to say that in all civilized societies the courts are impliedly directed to decide in accordance with the precepts of morality.⁸⁵

He goes on to say that moral principles exert a great influence on the way courts interpret statutes and select precedents.⁸⁶ There is no doubt that for Gray moral principles, principles of ethics are a main source of Law.⁸⁷

81 GRAY, *THE NATURE AND SOURCES OF THE LAW* 84 (2nd ed. 1924).

82 *Id.* at 94-95.

83 *Id.* at 200.

84 *Id.* at 14.

85 *Id.* at 302-3.

86 *Id.* at 303.

87 *Id.* at 305, 309.

HANS KELSEN

Hans Kelsen is the most famous living exponent of legal positivism. His writings have been translated into French, Spanish, Portuguese, Italian, Czech, Polish, Serb, Hungarian, Greek, Bulgarian, Swedish, Japanese, Chinese and English. He is famous for his "pure Theory of Law." Many have been shocked by Kelsen's emphasis on the necessity of distilling all concepts of justice and morality out of law to achieve a pure theory. They contend that such a theory is better described as pure force rather than pure law. They point to the following statements of Kelsen:

[The pure theory of law] does not try to comprehend the law as an offspring of justice, as a human child of a divine parent. The pure theory of law insists upon a clear distinction between empirical law and transcendental justice by excluding the latter from its specific concerns. . . . Only by separating the theory of law from a philosophy of justice as well as from sociology is it possible to establish a specific science of law.⁸⁸

There can be no legal rights before there is law.⁸⁹

. . . it is the ideal of juridical positivism to preserve the theory of positive law from the influence of any political tendency, or which amounts to the same from any subjective judgment of value.⁹⁰

From these statements it is inferred that Kelsen's legal positivism is a philosophy of law recognizing no moral limitations, a philosophy that whatever rights we have are given us by the state and that moral principles should play no part in the development of legal rules.

But these inferences are a complete distortion of Kelsen's legal positivism. He has expressly answered all of these distortions as we shall see in a moment. First let us explain his pure theory of law so that his distillation of all extraneous elements — justice, politics, religion, ethics, morals — can be seen in its proper perspective.

Kelsen's pure theory of law is the format for the study of legal systems in what he conceives to be a strictly scientific manner. With Austin and Holmes, Kelsen condemns the sloppy use of moral terminology in the law. But he stresses another reason for a pure scientific study of law. Kelsen believes that "the splendid development of modern natural science may be attributed largely to its emancipation from political powers, and especially from the power of the Church."⁹¹ He strongly believes that until the social sciences are studied as the natural sciences, for their own independent principles, they will never be real sciences. It is for this reason primarily that Kelsen emphasizes the separation of all value judgments from a pure theory of law.

This approach can be compared to the purely scientific study of anatomy or psychology. The attempt is to plumb the depths of the reality as it is, not to prescribe how the human body or mind should function. So with the pure theory of law, the purpose is to examine all legal systems and discern basic

⁸⁸ KELSEN, *GENERAL THEORY OF LAW AND STATE* XV (1945).

⁸⁹ *Id.* at 79.

⁹⁰ KELSEN, *Natural Law Doctrine and Legal Positivism* in *GENERAL THEORY OF LAW AND STATE* 438 (1945).

⁹¹ KELSEN, *Science and Politics* in *WHAT IS JUSTICE?*, 357 (1957).

common features in each. For example, Kelsen observes that all societies from Ancient Babylon to the United States have employed "law." Any society which might develop and not use "law" as a social order would indeed be a vastly different kind of human society.⁹² In another place Kelsen also observes that men obey the law for a variety of motives — religious, social, moral fear of legal punishment. No scientific study has ever been done to indicate precisely why people obey the law.⁹³ He suggests that this would be extremely valuable information. It could be gained from an examination of laws or legal systems regardless of how morally bad or good they are. Kelsen anticipated that his position would be misunderstood. He said:

The tendency to identify law and justice is the tendency to justify a given social order. It is a political, not a scientific tendency. *In view of this tendency, the effort to deal with law and justice as two different problems falls under the suspicion of repudiating altogether the requirement that positive law should be just. This requirement is self-evident; but what it actually means is another question.* At any rate a pure theory of law in no way opposes the requirement for just law by declaring itself incompetent to answer the question whether a given law is just or not, and in what the essential element of justice consists. A pure theory of law — a science — cannot answer this question because this question cannot be answered scientifically at all. (Emphasis mine.)⁹⁴

Kelsen, like Holmes, is a skeptic; that is, he rejects the ability of man's reason to discern eternal and unchanging truths:

Thus, behind the question of Pilate, 'What is truth?' arises, out of the blood of Christ, another still more important question, the eternal question of mankind: What is Justice?

It seems that it is one of these questions to which the resigned wisdom applies that man cannot find a definitive answer, but can only try to improve the question.⁹⁵

But he has his own standards by which he evaluates the moral goodness or badness of positive law.

The question of justice, however, is the question of whether a positive legal order . . . is just, whether that which the lawmaker considers as an evil to society is indeed a behavior against which society should justly react, and whether the saction with which society actually reacts is appropriate.⁹⁶

There is no doubt that Kelsen's belief is that law is subject to moral evaluation. Not only is the law subject to moral evaluation but he expressly indicates that the state is subject to law.

The state as a legal person can be conceived of only as subjected to the law like all other persons; and a relationship between legal persons established by the law can be conceived of only as a legal obligation or a legal right one person has in relationship to another.⁹⁷

In fact, he picks up and hurls back at the adherents of natural law the very charges they make against legal positivism. He condemns absolutism

⁹² KELSEN, *GENERAL THEORY OF LAW AND STATE* 19-20 (1945).

⁹³ *Id.* at 24.

⁹⁴ *Id.* at 4.

⁹⁵ KELSEN, *WHAT IS JUSTICE?* 1 (1957).

⁹⁶ *Id.* at 14.

⁹⁷ KELSEN *Science and Politics* in *WHAT IS JUSTICE?* 371 (1957).

and totalitarianism but goes on to say that these evaluations have sprung more from adherents of natural law philosophers than philosophical skepticism.⁹⁸ He argues that the "Absolutist" philosophical principles of Plato, Aristotle, Aquinas, Dante, Leibniz and Hegel led these men to prefer undemocratic states. Whereas the relativist philosophical positions of Protagoras, Euripides, Democritus, Nicholaus Cusanus and John Locke led these men to support democracy.

Kelsen also attacks the tendency of natural law adherents to "legitimate the product of power by declaring positive law to be just. It is precisely this abuse of cognition which critical positivism wishes to avoid."⁹⁹ In other words, Kelsen attacks natural law philosophers on the grounds that they proclaim that whatever is, is right. This of course is a well-known criticism of legal positivism. Kelsen seeks to hoist natural law with its own petard.

This review of the philosophical positions of the luminaries of the jurisprudential school of legal positivism demonstrates the false nature of the popular charges against it. There is no group of legal philosophers dedicated to the proposition that might makes right and that law and the State should be freed from presumed limitations of morality. The only person likely to adhere to this absurd view is a non-thinking individual. We all have known immoral persons who conduct their private or business affairs in a manner that would suggest they have no morals and obey the law only because otherwise they might get caught and be punished — Holmes' "bad man." Likewise there are individuals who lead what Socrates called "the unexamined life" and who never think about questions such as the relation of law and morality. They act as if the letter of the law is its own justification. But neither of these are dignified by classification as well-thought-out schools of legal philosophy. No one has suggested they represent the legal positivism of Austin, Hobbes, Bentham, Holmes, Gray and Kelsen.

This review also makes clear the obviously falsity of equating legal positivism and totalitarianism. If we can agree that by totalitarianism we mean the suppression of the rights and freedom of individuals in a misguided desire to promote the welfare of the State, then it is obvious that these writers oppose it. Kelsen, who knows modern totalitarianism well, has eloquently condemned it and is clearly on record in favor of the protection of civil liberties. Justice Holmes' judicial decisions in support of civil liberties are well known. Austin and Hobbes were somewhat less enthusiastic about civil liberties. They were more concerned with the danger of anarchy. And considering the historical period in which Hobbes lived, this was not an unreasonable fear. However neither Austin, Hobbes nor any of these writers espoused doctrines or programs designed to promote Naziism, Fascism or Bolshevism.¹⁰⁰

⁹⁸ KELSEN, *Absolutism and Relativism* in *WHAT IS JUSTICE?* 198, 204-205 (1957).

⁹⁹ KELSEN, *GENERAL THEORY OF LAW AND STATE*, 441 (1945).

¹⁰⁰ An entirely different and more subtle question is the one raised by Radbruch's charge that the philosophy of legal positivism indirectly fostered Naziism in Germany. According to this it is not asserted that positivists do not oppose totalitarianism. However, it is said that by ignoring the "inner morality of law" and emphasizing the distinction between law and morals, positivists became a ready tool for exploitation by Naziism. Fuller, *Positivism and Fidelity to Law — A Reply to*

At this point an important observation is in order. We have been discussing some false charges against positivism. However, it is important now to state most emphatically that not all critics of positivism have made these erroneous accusations. More perspicacious critics of positivism such as Morris R. Cohen,¹⁰¹ Professor Lon Fuller,¹⁰² Professor Edgar Bodenheimer,¹⁰³ and F. Lyman Windolph,¹⁰⁴ in dealing with one or more of the so-called positivists, have pointed out the fact that positivists do consider law and the State subject to independent moral evaluation. These critics take positivism to task for much more subtle reasons. For example, Professor Lon Fuller criticises positivism because it emphasizes what he considers insignificant, i.e., that law and morality are different things,¹⁰⁵ and ignores what he considers most important, i.e., the inherent moral character of law. This more understanding criticism of legal positivism is not the straw man that I am dealing with in this article.

POSSIBLE REASONS FOR POPULAR MISCONCEPTION

The next question is obvious. Why does such a false picture of legal positivism exist? I have no definite answers but let us discuss a few possibilities. First, it is possible that in some instances an intellectual "rush to the summit" has taken place. That is, a reader has attempted to erect an entire philosophy on the basis of an author's single phrase or sentence while ignoring much else that the author has written. For example John Austin said law is the command of the sovereign. On the basis of this general proposition an entire superstructure of Austinian Positivism might be erected as follows.

1. Apparently any command of the sovereign is, to Austin, law.
2. Some sovereigns have issued very bad proclamations but according to Austin they would still be law.
3. From this it obviously follows that Austin makes no evaluation of goodness or badness of laws.
4. Therefore, according to Austin, law is freed from moral evaluation, the will of the sovereign is beyond limitation, might makes right.

As has been shown, a more complete reading of Austin would prevent this "rush to the summit" with its attendant errors.

It is possible that the same thing has taken place with Holmes' oft-quoted proposition that Law is the prediction of what the courts will do in fact. This has been torn out of context and developed and generalized into an entire legal philosophy far at variance with the context in which Holmes used the concept.

Professor Hart, 71 HARV. L. REV. 630, 657-661 (1958). Professor Hart had challenged Radbruch's thesis strenuously. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-621 (1958).

¹⁰¹ M. R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L.R. 237 (1927); COHEN & COHEN, *READING IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 403 (1953).

¹⁰² FULLER, *THE LAW IN QUEST OF ITSELF* 22 (1940).

¹⁰³ Bodenheimer, *Analytical Positivism, Legal Realism and the Future of Legal Method*, 44 VA. L. REV. 365, 367, (1958).

¹⁰⁴ WINDOLPH, *LEVIATHAN & NATURAL LAW*, vii-viii, 1951.

¹⁰⁵ Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 634 (1958).

Possibly the very title of one of Hobbes' books, "Leviathan," has served as the basis for another treacherous intellectual "rush to the summit." The term — taken from the Book of Job and meaning Mortal God — when applied to the State permits one's imagination to take flight and produce an horrendous picture of tyranny, slavery and oppression at the hands of an all-powerful, unlimited, autocratic, bureaucratic central government.

Kelsen warned us in advance that his separation of law and morals would be misunderstood and it has been. Certainly a tendency to hasty generalization may be one possible explanation for the popular misconception of legal positivism.

In the same vein is the second possibility, that is, the equating of legal positivism with philosophical positivism. Philosophical positivism or "sociological" positivism is generally recognized as a school of thought in opposition to the metaphysical abstractions of traditional philosophy. This positivism condemns inquiries which claim to go beyond the facts and things of immediate perception and experience. It emphasizes empirical rather than metaphysical data. Auguste Comte has generally been recognized as one of the leading exponents of this philosophy. In the popular mind it is pictured as somewhat anti-religious and amoral. By the application of the widely employed principle of "guilt by association" legal positivism may have inherited much of the popular prejudice associated with philosophical positivism. However, the relationship between the two is not a necessary one. Austin and Hobbes, believers in natural law, could never be considered philosophical positivists. Holmes and Kelsen, with their distrust of the power of human reason to capture immutable truth concerning human values, are closer to philosophical positivism. But from this it is obvious that a person may be a legal positivist regardless of his general philosophy. The latter is indifferent to legal positivism. This is clear if Austin — a believer in natural law — and Holmes — definitely not a believer in natural law — are put in the same camp.

A third possible explanation is one that suggests itself strongly to me. There is a feeling among many lawyers, philosophers and theologians that somehow the principles of right reason and good conscience can automatically become principles of government. I say *automatically* because this view disparages and distrusts the intervention of law-making by legislatures and, to a somewhat less extent, distrusts law-making by judges. Partisans of this view usually place great reliance on tradition and generally condemn change. It is through adherence to tradition and the status quo apparently that government automatically remains true to principles of right reason and good conscience.

In this view active government is a real menace. To the extent that it upsets existing expectations by changes, for example in the tax or racial segregation laws, it derogates from rights guaranteed by nature. And judges that refuse to invalidate such obvious injustices are conspirators in the erection of a modern "Leviathan."

Legal positivism is blamed for this in the belief that it dwells on the role of the human judge or legislator as the maker of positive law. The human

judge or legislator is no longer told, as in Blackstone, that his task is to find the law. The "petty politician" now is puffed up by being identified as a law maker. And not only a law maker but a Sovereign law maker. Nay, even more, a law maker not subject to the law. What an assault on our law, order and way of life this positivism is!

That the writings of the legal positivists do not justify these views is evident. It is clear there is no necessary relation between legal positivism and an active or passive government. Bentham leaned toward the former whereas Holmes was personally conservative.

A fourth possible explanation would clarify the position of some natural law critics. Some of their comments suggest that a necessary result of any legal system in which the principles of natural law are not superior to positive law is that might makes right, state sovereignty becomes absolute, law and morals are divorced and an individual has no natural rights. According to them the superiority of natural law over positive law means:

1. Positive law contrary to natural law is not law and, therefore, need not, must not, be obeyed.
2. Courts should invalidate any positive enactment which is contrary to natural law.

This they claim is the position of Aquinas and Blackstone and is presented as the orthodox and crucial test of a true and natural law position. Since Austin and Hobbes, the latter less definitely, reject these, they are not true natural lawyers. It is this natural law position that has been widely criticized for the past 100 years or more. Both Austin and Bentham demonstrated that the practical result of this view was anarchy. It would allow every citizen and individual judge to repudiate any enactment and decision he thought to be immoral. When one realizes the wide spectrum of moral beliefs that exist the unworkability of such a system is evident. For example, there are pacifists today who conscientiously believe any involvement in military preparedness is immoral. Should a pacifist judge have the power to declare the draft law, the Defense Production Act and all other legislation relative to military preparedness invalid on the grounds of immorality? Many believe the graduated income tax to be a form of theft and therefore immoral. Should citizens who so conscientiously believe be exempt from the obligation to pay such income taxes? Should a judge who so believes have the power to declare the income tax laws invalid? There are those who believe that the use of medicine is immoral. Should parents who so believe be allowed to let their children die because of inadequate medical care? Should a judge who so believes have the power to invalidate public health and other like legislation?

This is not to say that conscientiously held beliefs should be steam-rolled by the law. Not at all. On the contrary the problem of civil disobedience is a real one and is so recognized by our law. For example, our draft laws make exceptions for conscientious objectors. Some compulsory immunization laws make exceptions for parents who are opposed to them. Similarly, at Nuremberg the punishment of crimes against nature was a recognition that the law does not excuse some flagrant violations of the moral law done pursuant to superior authority. But this careful and selective way

of dealing with the problem is vastly different from an approach which flatly proclaims the right of individual citizens and judges to repudiate all laws they feel are contrary to natural law. To the extent that natural law is said to stand for this obviously untenable proposition, it has suffered irreparable, although I hope, not mortal harm. Although there are passages in Aquinas' *Treatise on Law*¹⁰⁶ which suggest that he took this broad position, it is difficult for me to believe that this is his true meaning. A more intelligent interpretation, it seems to me, is one that limits his general statements that human laws opposed to the divine and natural law are not to be obeyed in situations involving obviously vicious laws. This would be similar to the approach of the Nuremberg trials.

Conclusion

I think it is important to point out this popular misconception about legal positivism for two reasons. First, these prevalent views are fundamentally false. But the falsity is not only one of the misunderstanding of the views of individual persons. It is a falsity in the fundamental approach to jurisprudence. This article suggests the utter futility of categorizing or pigeon-holing writers as belonging to various "schools of jurisprudence." The traditional categorization of Hobbes and Austin as legal positivists makes no more sense than categorizing Aquinas and Blackstone as positivists. Both Aquinas and Blackstone distinguish natural law and positive law. Aquinas and Blackstone mean by "human law" the same thing Austin calls positive law.¹⁰⁷ But it might be objected that natural lawyers like Aquinas and Blackstone cannot rightly be categorized as legal positivists. If this is so then neither can Hobbes and Austin, both adherents of natural law. And if we cannot rightly categorize Austin as a legal positivist, we may as well abandon categorization. Of course, this is my point. Jurisprudential pigeon-holing by "schools" makes no sense and should be abandoned.

Certain categorization, of course, does make sense. In the area of general philosophy it is meaningful to lump together Holmes and Kelsen as Skeptics and to lump together Bentham and Austin as Utilitarians. But to suggest that this general philosophical approach has significant impact on their approach to particular legal questions or problems is a mistake. It is the legal questions and legal problems — not the "schools of jurisprudence" — which should be studied. And Austin as Austin, Kelsen as Kelsen and Holmes as Holmes, and so on, have some significant things to say about these legal questions and problems. But legal positivists as an amorphous group cannot even be intelligently herded together to give us the positivist approach or position on the important problems and questions.

For example, assuming *arguendo* the validity of lumping all these writers together in a "school" of jurisprudence called legal positivism, what is their position on the question of whether judges should be activist or passivist,

¹⁰⁶ SUMMA THEOL. I-II, Q. 90-97.

¹⁰⁷ SUMMA THEOL. I-II Q. 91, Art 3; BLACKSTONE'S COMMENTARIES, Sec. II. *The Nature of Laws in General*.

whether judges should or should not whole-heartedly accept their law-making role? I select this question because it has been said that a positivist judge is one who tends to be a passivist, would eschew law making, would seek to find rather than make law.¹⁰⁸ Yet, as Professor Morison of the University of Sidney has so recently indicated,¹⁰⁹ Austin not only recognized that judges make law but criticized them for not doing so more whole-heartedly.¹¹⁰ Holmes certainly recognized that judges make law.¹¹¹ Gray devoted a considerable part of his book, *The Nature and Sources of Law*,¹¹² to the destruction of the view that judges find rather than make law. Kelsen clearly recognizes that judges make law.¹¹³ The only conclusion that we can reach is that if, as we are told, some positivists believe that judges should not make law certainly all do not so hold.

Let us take another question. What is the so-called positivists' position regarding the role of the law in the protection of civil liberties? Whereas Austin was, to say the least, luke-warm in his concern for the legal protection of civil liberties,¹¹⁴ Holmes¹¹⁵ and Kelsen¹¹⁶ thought this one of the most important functions of the law. What is the positivists' approach to proposals having to do with world government? Austin¹¹⁷ and Kelsen¹¹⁸ thought the question worthy of serious consideration whereas Holmes was much more skeptical.¹¹⁹ Without belaboring the matter further, I think it can be said that it is difficult, if not impossible, to find any uniform, consistent approach to legal questions and problems that can be attributed to a so-called positivist "school." There is one possible exception. All of these writers agree on the proposition that positive law is one thing and moral law is another. But since everyone of intelligence, whether catalogued as a positivist or not, agrees with this, it hardly makes sense to erect an entire school of jurisprudence on this insignificant, non-distinguishing characteristic.

108 McWhinney, *English Legal Philosophy and Canadian Legal Philosophy*, 4 MCGILL L. J. 213 (1958).

109 Morison, *Some Myths about Positivism*, 68 YALE L.J. 212 (1958).

110 AUSTIN, JURISPRUDENCE 218-19 (5th ed. 1885).

111 So. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) and *supra* p. 540.

112 2nd ed. 219-240 (1924).

113 KELSEN, *Science and Politics in WHAT IS JUSTICE?* 367, (1957).

114 AUSTIN, JURISPRUDENCE 274 (1885 ed.).

115 *Supra* p. 542-43.

116 KELSEN, *WHAT IS JUSTICE?* 22-24 (1957).

117 AUSTIN, JURISPRUDENCE, 291 (1885 Ed.).

118 KELSEN, *GENERAL THEORY OF LAW AND STATE* 328-38 (1945).

119 THE POLLOCK-HOLMES LETTERS 36 (1942). In this letter to Pollock, Holmes expressed his skepticism over the value of the League of Nations. This letter has been greatly misunderstood. A few sentences from it have been torn from context and hurled back at Holmes. They are: "But I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force." But these passages are preceded by Holmes' revelation of his skepticism about the effectiveness of the League of Nations. They are also preceded by the statement "I loathe war". The sentences are a statement of what Holmes conceives to be "the facts of life". He was stating that on the international scene it appeared to him as if force was the *ultima ratio* and that the spirit of nationalism was such that peoples of one nation didn't seem to be particularly concerned about the sacredness of the lives of potential adversaries or enemies. The tone of the letter, however, is such as to suggest that Holmes wishes this were not so. In any event, there is no indication that Holmes gloried in the fact that "man at present is a predatory animal."

Second, there is a very practical reason for pointing out this popular misconception about legal positivism. I said that much energy is expended slaying the positivist dragon. Not only is valuable time being wasted, but more importantly, we are indulging in self-delusion. We are leading ourselves to believe that we really have grasped something important about law when we recognize the alleged errors of positivism. But the fact of the matter is that we really haven't learned anything because we have been misled from the paths of fruitful thought doing battle with a phantom enemy. The real questions of law are not so simple to answer as that supposedly posed by the straw man of positivism.

Every thoughtful person — including legal positivists — recognizes that law is related to morality. Furthermore, for the most part there is agreement on the basic human goals to strive for — realizing at all times we never shall finally achieve them. I personally believe them to be inherent in the nature of man. A list of such goals that appeals to me appears in Messner's *Social Ethics* as follows:

1. Self-preservation, including bodily integrity and social respect (personal honor);
2. Self-perfection physically and spiritually, including the development of one's faculties for the improvement of the conditions of one's life, and provision for one's economic welfare, including the necessary property or income to provide for the future;
3. The enlargement of one's experience, knowledge and receptivity of the values of beauty;
4. Self-propagation by mating and the rearing of offspring;
5. Benevolent interest in the spiritual and material well-being of one's fellow men as equal in their value as human persons;
6. Social fellowship to promote common utility, which consists in the establishment of peace and order, in facilitating the achievement of the material and cultural welfare of all, in the attainment of the knowledge and control of the forces of nature and society for these purposes;
7. The knowledge and worship of the Creator, and the ultimate fulfillment of one's self in union with Him.¹²⁰

The real, basic problems of the law concern the development of means to promote the realization of these goals to the extent that law can do so.¹²¹ Law has something to say about all of them but more to say about some than about others. From the very nature of the last having to do with religious worship, it is obvious that the main contribution the law can make is along the lines of the first amendment to the Constitution of the United States providing for freedom of religion. In the case of others a more active contribution can be made by law. To find and develop this contribution is a significant and important legal problem.

¹²⁰ MESSNER, *SOCIAL ETHICS* 21 (1949).

¹²¹ McDougal, *Fuller v. The American Legal Realists: An Intervention* 50 *YALE L.J.* 827, 836 (1941). "The basic problem to which we must all — author — critic, realist, fundamentalist, and reviewer — eventually get back is this: what is the most effective strategy, where can we best concentrate our energies for securing certain generally accepted social ends?"

This has been the historic role of law. By promoting the realization of these goals, law has made life for man more human and therefore more free. Of course law cannot solve all human problems — far from it. But it can and has made great contributions to human freedom as a rapid survey of American legal history will indicate. In the first place the Founding Fathers abandoned the weak, decentralized Articles of Confederation and established the stronger central government of the United States under the Constitution. This positive act in itself greatly contributed to the promotion of human freedom in the United States by encouraging industry and commerce. Early congressional customs and foreign trade regulations further encouraged economic health in the United States. The governmental decisions of Westward expansion, the construction of roads and other internal improvements, a benevolent public lands policy, all expanded the choices available to early Americans. Government subsidization and regulation of railroads and legal recognition of the special status for business corporations all aided in the 19th century industrial expansion.

Minimum wage and maximum hours legislation, safe labor conditions legislation, workmen's compensation programs, conservation programs, public health programs, regulations of banking, zoning and much of the New Deal Legislation. The list is endless how law has historically contributed to the promotion of human freedom.

No one suggests that all law has been wise, of course. In the early life of our nation, Congress made the great mistake of enacting the repressive Alien and Sedition laws. In the latter part of the 19th century state legislatures made great "give-aways" to the railroads. The unnecessary oppression imposed upon government employees by the Truman Loyalty Program is well-known. These are just a few of our legal blunders. These errors dramatize the nature of our real legal problem. It is to determine how law may make positive contributions to the promotion of human freedom.

Human freedom is the faculty by which man chooses his destiny both here and hereafter. But in the turbulence of anarchy or the straight-jacket of poverty and ignorance the choices of man are greatly limited. To the extent that law can and has promoted the realization of basic human goals, it has expanded these choices and thus promoted true human freedom. But this will not happen automatically. It will only happen if all who have to do with law recognize their creative role and the responsibilities imposed by the role. Inaction, rather than promoting freedom, is more likely to promote tyranny and anarchy. For example, the anarchy of present international life imposes vast limitations of choice on us all. International anarchy must be replaced by international law in the cause of human freedom.

In our own country the problem of racial discrimination is not one that will automatically solve itself as some apparently have thought. It will be solved only by work and thought and assistance in part, but in an important part, by law. When solved, the avenues of human choice open to persons of all races will be greater than at present.

The same is true of our national educational problem, our mental health problem, our physical health problem, the problems of poverty that are

still with us, the problem of delays in the judicial and administrative process, and the problems of mistakes in legislative and adjudicatory fact finding. Law on the national, state, and local levels can make a contribution to the solution of all these problems.

Then there are the more theoretical, but nonetheless real, problems of the law: the nature of political authority, the relation of political authority to law, the relation of the human person to his fellow men or, put another way, the rights and obligations of the individual relative to the community, the relationship of Church and State or religion and law, the nature of human knowledge, the relationship of human knowledge to political authority, the basis of political obedience, the purpose of human life and human society, the translation of legal theory into legal practice, and many others.

These practical and theoretical problems are the real, the difficult legal problems. Let us concentrate on them and not be diverted by fruitless battles with the straw man of legal positivism.