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LAW WITHOUT JUSTICE? — THE KELSEN AND HALL THEORIES COMPARED

In the midst of war, laws are silent, as the Romans, who were great warriors as well as great lawyers, warned us. War may be the ultimate sanction for law in at least one philosophy, but once war has been declared, soldiers take over, and lawyers, at least from the standpoint of the selective service rules, are "nonessential." Under Christian influence civilization attempted to develop laws of warfare, extending from the truce of God in the middle ages to the outlawing of poisonous gas in our day. Nevertheless, war remains inhuman in its brutality and its devastating effects on family life. In a sustained effort to supplement war with law, Christianity undertook to distinguish between just and unjust wars and inspired publicists to write learned treatises upon that point. Although many hundred years have passed since such a task was first undertaken, the results are still unsatisfactory. Even in our day more space in books on international law is accorded to war than to peace, with the possible implication that war is of greater importance. If the overemphasis on war even in international law texts be due to the fact that more of the total time of the world is spent on war than on peaceful pursuits, the exaggerated concern about war may be explained on that ground. But if modern man is as intelligent and as civilized as he is expected to be, then it would seem reasonable to suppose that in the course of history he would devote less attention to war which destroys him and his works and more thought to the essence of law with its function of protecting and preserving all he holds dear. A reconsideration of fundamental values and a resurgence of interest in law should then be anticipated as an aftermath of war.

The testimony of contemporary forums and printing presses indicates that most of our officials and many of our
journalists are calling out from the post-war wilderness that material progress is not enough and that spiritual factors are necessary if we are to preserve and improve the best features of our way of life. The prosecutions at Nuremberg, perhaps even more than the organization of the United Nations for the control of war, have probed deeply into our intellectual and spiritual resources without altogether satisfactory results. It is particularly in the field of the law that current self-criticism and public examination of conscience have brought disillusion. In a scientific and positivistic age, the unanimity with which practically every leader of the Anglo-American Bar has recently stressed the need for spiritual consideration,\(^1\) gives rise to the impression, and perhaps hope, that bottom has nearly been touched and that jurisprudence from now on may begin to look up.

American theorists appear to have been shocked more deeply by the Nazi subversion of legal forms than by the Soviet abolition of law, substantial as well as procedural. Convinced positivists themselves, for the most part, they believed that if only a legal rule considered desirable could be clearly and formally written out, every man could be coerced by the power of the state into compliance. They even proposed to outlaw war, less out of a concern for justice than as an intrument of national policy, by invoking "sanctions,"—by which they meant the application of force—against nations defined in their minds as "aggressors." Force all but usurped the place of reason in their philosophy of law, at the same time that states, at least abroad, were presuming in some respects to supplant God. When the German version of idealistic philosophy took shape in an absolute state which effected the prostitution of law by means of a dictatorship constitutionally achieved, the sophistry of the arguments about "legality" became obvious. Founded upon a more advanced philosophical system than the Soviets' gauche

\(^1\) Notably in addresses, American Bar Association meeting, Cleveland, September 22-26, 1947.
efforts at identifying law with property, the Nazi methods were much more subtle in their challenge to law than the Soviets' outright repudiation. When positivism was put on the defensive at the Nuremberg trials through the recognized need for an interpretation of such maxims as *ex post facto*, *nulla poena sine lege*, and *nullum crimen sine lege*, in a way which would further rather than impede the ends of justice, the positivists themselves had enough misgivings about their own doctrine to call for a reappraisal of their position, and a new interest in natural law has arisen in consequence. The law reviews, and especially the *American Bar Association Journal*, have begun to reflect this turn in jurisprudence by opening their pages to frank discussion of the cleavage in philosophical foundations manifest in contemporary legal thought. At the same time the Association of American Law Schools has gotten under way its project of supplying a second series of volumes containing source materials of great value for an adequate understanding of the prevailing theories. It is not inappropriate that the first volume of that series should contain the views of a leader of the positivists, a refugee from Vienna, now teaching in this country, who, in spite of his threatened persecution under the Nazi regime, maintains that legality depends not on justice but on legal form.

**The Kelsen Theory**

In accord with the modern philosophical emphasis on knowledge and on value, Professor Kelsen presents his "pure theory of law" as primarily concerned with cognition. He thinks of this theory as a "specific method of a science whose only purpose is the cognition of law, not its formation." He makes a "clear distinction between empirical law and

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4 University of California, Berkeley, Dept. of Political Science.
transcendental justice by excluding the latter from its specific concerns." In excluding justice from its concern, he declares that the "pure theory of law in no way opposes the requirement for just law"; it merely says that it is "incompetent to answer the question whether a given law is just or not" because "this question cannot be answered scientifically at all."

The cognition of law is established through "a specific social technique based on human experience" he says, but the experience he refers to, while founded upon reality, is "not the reality of nature which constitutes the object of natural science." Legal reality is rather manifested "in a phenomenon which is mostly designated as the positiveness of law" he declares, but he admits at the same time that "one of the most difficult tasks of a general theory of law is that of determining the specific reality of the subject and of showing the difference which exists between the legal and natural reality." Although the pure theory of law is scientific in its method, its subject matter differs from the subject matter of natural science in that "the principle according to which the science of law describes its object is normativity," whereas "the principle according to which natural science describes its object is causality," he explains. It differs also in its test of validity, for he says "the quest for the reason of the validity of a norm is not—like the quest for the cause of an effect—a regressus ad infinitum; it is terminated by a highest norm which is the last reason of validity within the normative system, whereas a last or first cause

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*The author's references in the footnotes following are to pages.

8 Ibid.
9 Ibid.
12 Ibid.
13 Ibid.
has no place within a system of natural reality.” Elsewhere he explains that the pure theory “seeks the basis of law—that is, the reason of its validity—not in a meta-juristic principle but in a juristic hypothesis—that is, a basic norm to be established by a logical analysis of actual juristic thinking.” From statements such as these it would appear that Professor Kelsen conceives of law as a phenomenon of human experience whose reality is found in positively stated norms derived from a basic norm which is understandable because it is a humanly conceived hypothesis.

A norm in the Kelsen system is something quite different from an is-statement about facts observable in nature. After acknowledging that the truth of a statement about reality is due to its correspondence with reality as confirmed by our experience he says that “a norm is not a statement about reality and is therefore incapable of being ‘true’ or ‘false’ in the sense determined above; a norm is either valid or non-valid.” In other words, for Professor Kelsen, “the reason for the validity of a norm is not, like the test of the truth of an ‘is’ statement, its conformity to reality”; on the contrary, “the reason for the validity of a norm,” he says, “is always a norm, not a fact.” What this distinction amounts to is a distinction between the “is” and the “ought” in law and the implications for legality that such a distinction suggests. One explanation Professor Kelsen gives puts it this way: “Only if law and natural reality, the system of legal norms and the actual behavior of men—the ‘ought’ and the ‘is’—are two different realms, may reality conform with or contradict law, can human behavior be characterized as legal or illegal.” Elsewhere he says that “the distinction between the ‘ought’ and the ‘is’ is fundamental for the descrip-

18 Ibid.
19 Ibid.
tion of law."²² In making such a distinction, Professor Kelsen separates validity from truth. "Whereas an 'is' statement is true because it agrees with the reality of sensuous experience," he explains, "an 'ought' statement is a valid norm only if it belongs to such a valid system of norms, if it can be derived from a basic norm presupposed as valid."²³

It is cognition still which underlies the distinction he makes between the "is" and the "ought", for he says that "the cognition of value, as distinguished from the cognition of reality, is not concerned with explanation, but with justification."²⁴ In this connection, not only is validity separated from truth, but values are separated from validity. "Positive law, as a norm," he declares, "is from its own imminent point of view an 'ought' and therefore a value, and confronts, in this guise, the reality of actual human conduct which it evaluates as lawful or unlawful."²⁵ In effect, the "is" statements in legal science, or in any science, are descriptive, while the "ought" statements are prescriptive.²⁶ It is the latter which constitute norms in the Kelsen system.²⁷

Another distinction Professor Kelsen makes is to be found in his differentiation of legal norms from the rules of law. The norms of law are enacted by the law-creating authorities and are prescriptive, while the rules of law are formulated by the science of law and are descriptive.²⁸ It is the task of the science of law, he says, to represent the law of a community in the form of statements which are in fact "hypothetical judgments attaching certain consequences to certain conditions."²⁹ To state that "if such and such conditions are fulfilled, then such and such a sanction will follow," is not a

²⁷ Ibid.
prediction for Kelsen as it was for Holmes, but a description; there is no implication of an event that may happen in the future but rather there is a sentence which has the character of a hypothetical judgment, and which is representative of the legal system as it exists. What the norm-creating authority means when it makes such a statement is that the sanction "ought" to be executed against the thief when the conditions of the sanction are fulfilled, he explains. There is something of the character of an impersonal command in such a statement, although it is not a command in the Austinian sense, derived from the "will" of the legislator. It is rather a norm, or an "ought" statement in the prescriptive sense, and, in the descriptive sense, a rule of law or an "is" statement insofar as it represents the norms which constitute the legal system of which it is a part.

Having differentiated legal norms from rules of law through comparing "ought" statements with "is" statements descriptive of an existent legal order, Professor Kelsen makes a further distinction with respect to legal rules in their applicability to human behavior. The latter he refers to as "efficacy" which he holds to be in a different realm from that of legality. "Efficacy of law," he says, "means that men actually behave as, according to legal norms, they ought to behave, that the norms are actually applied and obeyed," and he goes on to say that "efficacy is a quality of the actual behavior of men and not, as linguistic usage seems to suggest, of law itself." "Any attempt to represent the meaning of legal norms by rules describing the actual behavior of men—and thus to render the meaning of legal norms with-

30 Holmes, Coll. leg. papers, 167-173; quoted in Rooney, LAWLESSNESS, 120-122.
out recourse to the concept of ‘ought’—must fail,” he declares elsewhere. It is validity rather than efficacy which is a quality of law in the Kelsen system, for he says, “Law as a valid norm finds its expression in the statement that men ought to behave in a certain manner, thus in a statement which does not tell us anything about actual events.” The validity of the legal order is dependent upon its efficacy, however, although one must be careful not to be misled into identifying the two phenomena, law and natural reality, and thereby describing law in terms of “is” rather than “ought.” It is efficacy which belongs to the realm of reality, he explains, and it is often called the power of law. “If for efficacy we substitute power,” he continues, “then the problem of validity and efficacy is transformed into the more common problem of ‘right and might’... though law cannot exist without power, still law and power, right and might, are not the same; law is... a specific order or organization of power.”

It is the specific order or organization of power characteristic of law which distinguishes it from other social phenomena for Professor Kelsen. “If we ignore this specific element of law,” he declares, “if we do not conceive of law as a specific social technique, if we define law simply as order or organization, and not as a coercive order (or organization), then we lose the possibility of differentiating law from other social phenomena; then we identify law with society, and the sociology of law with general sociology.” He is careful to point out also that for him “the problem of coercion (constraint, sanction) is not the problem of securing the efficacy of rules, but the problem of the content of the rules.” In

other words, the essentially legal quality of a norm is the coercive element in its hypothetical judgment, not the efficacy of its application to human behavior. The latter pertains not to law but to justice, for he says, "Justice, in the sense of legality, is a quality which relates not to the content of a positive order, but to its application." This, in effect, proposes to us a legal system based upon coercion but separated from justice in the formulation of its norms.

The exclusion of justice from the content of legal norms in the Kelsen system gives rise to norms with any kind of content. Professor Kelsen says:

"Legal norms are not valid because they themselves or the basic norm have a content the binding force of which is self-evident. They are not valid because of their inherent appeal. Legal norms may have any kind of content. There is no kind of human behavior that, because of its nature, could not be made into a legal duty corresponding to a legal right. The validity of a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value. A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only. The basic norm of a legal order is the postulated ultimate rule according to which the norms of this order are established and annulled, receive and lose their validity." 46

Since the validity of the basic norm is itself unproved by reference to reality, an "ought" of positive law based upon it can only be hypothetical. But because a positive statement of law, as a norm, is from its own imminent point of view an "ought" and therefore a value, it confronting the reality of actual human conduct which it evaluates as lawful or unlawful. This evaluation is made, therefore, not on the basis of just content but on the basis of logical validity. "We are not interested here in the question of what specific

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norm lies as the basis of such and such a system of morality,” says Professor Kelsen; “it is essential only that the various norms of any such system are implicated by the basic norm, as the particular is implied by the general, and that, therefore, all the particular norms of such a system are obtainable by means of an intellectual operation, viz., by the inference from the general to the particular.”

The basic norm of a dynamic system is merely the fundamental rule according to which the norms of the system are to be created. It establishes a certain authority, which may in turn vest norm-creating power in some other authorities by delegation; since the norms of a dynamic system have to be created through acts of will by those individuals who have been authorized to create norms by some higher norm.

This matter of creation rather than derivation of the subordinate norms in the Kelsen system indicates the place volition takes with respect to cognition. One explanation supplied by the author puts it this way: “As one cannot know the empirical world from the transcendental logical principles, but merely by means of them, so positive law cannot be derived from the basic norm, but can merely be understood by means of it.” The basic norm, established not in accordance with an extra-legal ideal nor from observation of nature or the self-evident, but by a logical analysis of actual juristic thinking, is nothing more than a juristic hypothesis. Because the basic norm is established by a logical analysis of actual juristic thinking, it is held by Professor Kelsen to be a scientific hypothesis and therefore objective rather than subjective in character. Scientific activity may properly embrace both the cognition of reality, which is concerned with explanation, and the cognition of values, which is concerned with justification, he believes, but he feels that

science is unable, and therefore not entitled, to produce values or to offer value judgments. After comparing causality in natural science with normativity in legal science he distinguishes the objectivity of both sciences from what he considers to be the subjectivity of morals, justice, and similar "ideologies." He says explicitly that "statements asserting values of law are objective, statements asserting values of justice are subjective judgments of value." Elsewhere he declares that "judgments of justice cannot be tested objectively; therefore a science of law has no room for them." To put it another way, "justice is an ideal inaccessible to human cognition."

Neither the objectivity nor the scientific character of law in the Kelsen system preclude an espousal of relativism, however. On the contrary, the author discloses that the fundamental difference between his position and that of the natural law, which he rejects as unscientific, is to be found "in the difficult renunciation of an absolute, material justification, in this self-denying and self-imposed restriction to a merely hypothetical, formal foundation in the basic norm." Elsewhere he says, that the contrast between reality and norm ("is" and "ought") must be recognized as relative. Having pointed out that the reality of nature and natural science is not the subject-matter of the science of law, he finds legal reality manifested in the positiveness of law. And while he acknowledges that a certain amount of "social reality" may properly be considered in connection with the efficacy of law, he nevertheless postulates a legal

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67 Ibid.
"reality" which is artificial rather than natural in that it is created and annulled by acts of human beings. He says that "in relation to the law of nature, positive law appears as something artificial, i.e., as something made by an empirical human act of will which occurs in the realm of being, that is, in the sphere of actual events; it appears, thus, as a reality which is confronted by natural law as a value." Since he considers the natural law, which he rejects, to be an absolutistic system, he feels that "any attempt to push beyond the relative-hypothetical . . . to an absolutely valid fundamental norm justifying the validity of the positive law . . . means the invasion of natural-law theory into the scientific treatment of positive law."  

The Kelsen theory of law not only contradicts the principal tenets of natural law theory implicitly but it rejects most of them explicitly, and in detail. It is not necessary to review the differences between the two theories at this point. There only needs to be noted that since Professor Kelsen refers to Melancthon as a typical representative of natural-law doctrine who is "essentially rooted in the medieval Catholic theory of Thomas Aquinas" and that since he thinks of the natural law as absolutistic, his antagonist in the contest he insistently wages is as unrelated to truth and reality as the norms he discusses with such prolixity.  

In attempting to summarize some of the implications of the "pure theory of law," it must be kept in mind that although it claims to be scientific because of its emphasis on cognition, and although it acknowledges that cognition, being the rational element of our consciousness, has some interest in truth, nevertheless it excludes truth, empirically
tested, from its premises. Its cognition of law professes to be concerned only with the norm of law—the ought-statements—and their validity in the sense of authoritative derivation. It is unconcerned with the content of those norms and considers justice to be an ideal beyond the realm of cognition. For the student who tries to understand this theory, the obvious question arises that since norms are concepts and justice is an ideal for Professor Kelsen, and since both are detached from any connection with reality, what justification is there for concentrating on the former as worthy of scientific investigation and excluding the latter? Hitherto it had been assumed that the function of science is to explain reality. If the reality undertaken to be explained be arbitrarily limited to the positive phenomena of law, while other aspects of law, whether conceptual or substantial, which have equal claims to explanation, are either ignored or rejected, can the resulting theory be in any sense either scientific or adequate? To be sure, a zoologist may specialize on vertebrae, and exclude the rings around Saturn from his microscopic observations, justifiably, but it would be specious thinking to deny that the scientific method of observation, inference, and hypothesis pertained to one science and not to the other in their common explanatory functions for human knowledge. It is no less fallacious to separate the realm of legal norms from the realm of moral ideals on the ground that the latter type of concept is unknowable as contrasted with the former. The Kantian dichotomy of the pure reason and the practical, and the consequent distinction between the is and the ought, has, with the logical positivists, resulted in the confusion of the potentially existent with the conceivably possible, of the actual with the hypothetical. Professor Kelsen, who calls himself not a logical positivist but a critical positivist goes

78 Kelsen, *op. cit.*, 438.
further than his Vienna compatriots in transferring the manifestations of the practical reason into the concepts of the pure reason while leaving the concepts of the so-called pure reason out of account. Such a theory of law would appear to be neither dynamic nor vital, but on the contrary, sterile instead of pure.

The implications of the "pure theory of law" tend to confirm its inadequacy to account for legal reality. First of all, by taking justice out of the content of law and limiting its operation to the application of legal rules, Professor Kelsen removes the reason for law's existence. Although professing to describe law scientifically, he in fact ignores the essence of oughtness which the legal systems of the world have for centuries endeavored to make more explicit in their legal rules. Instead of the goal of justice as a criterion for the legality of legal rules, he would suggest the desirable. If by the desirable he thinks of objective good as the goal of human activity, his proposal would amount to a substitution of the good for the just, and would be unobjectionable on that ground. His notion of the desirable, however, appears to be subjectively determinable by those to whom power has been formally delegated. In such cases, the rationality of human beings gives rise to grievances if the legal rules imposed are not in fact reasonable in the justice of their demands. Justice is admittedly difficult to formulate in words and it may indeed have an aspect of unknowableness beyond the powers of human cognition, but it gives rise to unmistakable feelings interiorally when breached, which the law must take into account. The Kelsen proposal to exclude justice from considerations about law instead of undertaking to explain it is not convincingly scientific.

Another indication of the inadequacy of the Kelsen theory is found in the proposal to locate the reality of law in the positively stated rules. The consequence of this view is the exclusion of wrongs *mala in se* and the recognition only of those wrongs as contrary to law which are *mala prohibita*. 
Another consequence is the interpretation of the maxims, *nulla poena sine lege, nullum crimen sine lege*, as justification of positivism instead of the accepted usage which proscribes the lawgiver or judge from infringing arbitrarily upon the substantial rights of all men because of their inherent dignity as human beings. In the Kelsen view there are no wrongs other than those specified in positively and formally stated rules and no rights except those explicitly acknowledged by the state. Such an opinion is consistent with the denial that justice has any place in law. It seems strange coming from an Austrian professor who preferred exile under a legal system based on justice and natural rights to remaining in his native land under a Nazi government which was careful to observe constitutional forms in its substitution of expediency for equal justice under law.

The third point in the Kelsen theory which discloses its unsatisfactory premises is its explanation of the place of force in law. Professor Kelsen is careful to say that while law for him is an organization of power, it is not power alone. It is rather an ought-system which organized power will make effective. But since the ought-system he visualizes is unrelated to justice and human rights in themselves, the formulation of the ought or norm which the state will enforce is based upon the determination by those in power of what it would be desirable for those not in power to do. Those out of power merely participate by voting for those in power without other recourse than a possible testing of the validity of their authority under a hypothetically created basic norm. Ethics, education, manners, and similar social disciplines for directing conduct, having been left out of the pure theory of law as not essentially legal, Professor Kelsen considers the essence of law to be formally and authoritatively stated norms supported by organized state force at the demand of those in power. In reaching such a conclusion, Professor Kelsen ignores the data of experience as narrated in the political and legal history of the world, and his failure to in-
clude experience on the world scale as well as in his dismissal of an is-system based on actuality for an ought-system hypothetically determined, results in a theory of law, which, instead of supplying a scientific explanation of law, postulates a "legal" system which is quite the reverse of legal practice. It has been the experience of mankind that force in the control of the powerful has too often resulted in tyranny and that law is necessary to protect men against injustice. Fundamentally law is a rule, a guide, a system of regulating conduct in public matters which looks to force last, not first, in securing ultimate observance, and it is designed to be impartial in its application to ruler as well as to ruled. Were Professor Kelsen’s notion of law to prevail, not only justice and rights would be effectually excluded but the omnipresent threat of tyranny would be at hand to fill in the gaps that had been left. Professor Kelsen’s postulated system of ought-norms offers no guaranties of liberty comparable to the legal limitations traditionally incorporated in the law as known in America.

Professor Kelsen’s theory is not only monistic\(^79\) and nominalistic in its denial of the existence of substance but it is also unrealistic in confining itself to the conceptual and the hypothetical. The limitation of legal reality to its positiveness is a rather unsubstantial basis upon which to establish a legal system. Instead of seeking reality wherever it exists in nature, Professor Kelsen in effect gives up the quest. The result therefore cannot be scientific, since the exclusion of reality is not an explanation of it.

The Kelsen theory of law, being incompatible with the American system, would have little significance here were it not that its author has taken his place in American legal education not only with the publication of his theory in this country but also through his membership on the faculty of an important American university.\(^80\) Because he has found

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\(^79\) Kelsen, *op. cit.*, xvi.

\(^80\) University of California, Berkeley, Dept. of Political Science.
refuge and hospitality under a legal system quite different from that which he postulates or from that from which he fled, it is natural to ask whether the law he professes to teach in America is the American system which students here are expected to know or whether he will expound the theory whose formulation he has made his life work. In the latter case, the clash of ideas between the actual and the hypothetical could be a real challenge with the possible result of developing and strengthening an adequate philosophy of law commensurate with the American doctrine.

Unhappily, this country has up to the present produced few scholars of competence in the analysis of legal ideas—as distinguished from legal rules. It is all the more noteworthy, therefore, that there has currently appeared an indication that America may be beginning to approach maturity in the appraisal of legal principles. That the author of the most important book yet written setting forth and evaluating the premises of at least one branch of our law,81 is not only familiar with the Kelsen theories through being editor of the standard exposition in English of Professor Kelsen’s position,82 but is also the ablest antagonist of the Kelsen challenge, at least by implication, in behalf of American legal education, is of the greatest significance. No more important book has been published in contemporary jurisprudence than Professor Jerome Hall’s Principles of Criminal Law. It deserves careful study.

The Hall Theory

Professor Hall is as concerned about the cognition of law as Professor Kelsen is, perhaps in large part because of the Kelsen influence on current legal thinking. For Professor Hall, cognition has to do with understanding; it is more than

mere perception. Where perception gives rise to empirical knowledge through sense experience, cognition has to do with meaning which is reached through the highest intellectual processes. The knowledge of legal rules is distinguished from the perception of the facts to which they may be applied and cognition is ascribed to the former. Both types of knowledge are essential, however, to a knowledge of law. To put it in his own words, "Legal rules are generalizations; they are not sensed, but are understood in the process of cognition."\(^\text{83}\)

Cognition is distinguished in the Hall treatise from other types of knowledge, such as perception of facts, by ascribing to cognition the meaning of legal propositions.\(^\text{84}\) In adopting Whitehead's view that a fact "is a triumph of the abstract intellect,"\(^\text{85}\) Professor Hall declares that the knowledge of facts may include more than perception of "qualities or events occurring at certain places and times,"\(^\text{86}\) including the results of introspection\(^\text{87}\) and the understanding of very complex theories.\(^\text{88}\) Even the perception of facts is not simple since "it is precisely the fact that different relations are involved that produces differences in the phenomena, i.e., that gives different facts," he says.\(^\text{89}\) Furthermore, although facts are an essential constituent of legal knowledge, nevertheless they lack legal significance unless meaning is given to them by the rules of law.\(^\text{90}\) Law, Professor Hall would define, as a series or system of distinctive propositions\(^\text{91}\) and the cognition of law as the understanding of the meaning of these propositions.

Ignorance of law and mistake afford occasions for the elaboration of these views. Mistake about law he says may

\(^{83}\) Hall, \textit{op. cit.}, 344.
\(^{84}\) Hall, \textit{op. cit.}, 345.
\(^{87}\) \textit{Op. cit.}, 344.
\(^{90}\) \textit{Op. cit.}, 90; 346.
be due not only "to taking for real what is mere appearance" \textsuperscript{92} but also to the application of "a proposition to a situation which is not congruent with it." \textsuperscript{93} Ignorance of law may come as much from bias, due to ideas already in the mind as from inaccurate perception of facts.\textsuperscript{94} Knowledge of law therefore is something much more than perception of facts or mere logical demonstration for Professor Hall; it is "a judgment of experience which depends on subtle factors of cognition and cultural influence and upon other like judgments which are accepted as valid." \textsuperscript{95}

In the effort to grasp the nature of law and the purposes and limitations of legal control \textsuperscript{96} Professor Hall explains the relation of certain words to certain facts with particular reference to the criminal law, but his explanation, which covers a point about the positive statement of law which gives Professor Kelsen much concern, has broader scope than the criminal field alone. He says,

"... The rules of criminal law are about facts—just as are completely empirical generalizations. Thus criminal law theory is ultimately concerned with the relation of certain words to certain facts. The words comprise the rules; the facts are the things pointed out (denoted) by the words. Accordingly, if our purpose is to understand the meaning of the words, we must try to understand them in relation to the facts they denote. That relationship is the meaning of the rules. The relationship of the criminal law to fact does not exhaust the meaning of that branch of law. It is equally important to know the moral significance of the rules." \textsuperscript{97}

It is in the last sentence just quoted that the difference between the theories of Professors Kelsen and Hall is most clearly indicated. Where Professor Kelsen would confine the reality of law to its positive expression in words, Professor Hall would relate the words to the facts they denote in

\textsuperscript{92} Op. cit., 324.  
\textsuperscript{93} Op. cit., 325.  
\textsuperscript{94} Op. cit., 326.  
\textsuperscript{95} Op. cit., 114.  
\textsuperscript{96} Op. cit., 472.  
\textsuperscript{97} Op. cit., 16-17.
order to know both their meaning and their reality. Even more distinctive is the different treatment of morals in the two theories, for where Professor Kelsen would exclude morals as irrelevant to cognition of law, Professor Hall believes that the meaning of law cannot be understood apart from the moral significance of the legal rules. He amplifies his position on this point in many places throughout his book and thereby implicitly, if not explicitly, repudiates the essence of the Kelsen thesis. Still devoting his attention to the criminal law specifically, but expressing a view which must find support in any of the other branches of legal study in order to be consistently valid, he says it is "illusory to imagine it possible to construct valid criminal law theory while disregarding morality." The implications of this view constitute the distinctive contribution Professor Hall makes to modern legal thought.

Still concerned with cognition, Professor Hall says that a basic fallacy is implied in the argument and the prevalent holding "that understanding the 'nature' of an act is actually a separate process from knowing that it is right or wrong." In declaring a knowledge of moral principles is essential to law, he does not, however, confuse them. On the contrary he points out the essentially legal methods of controlling conduct as distinguished from ethics in his explanation of the necessity of external harm as a constituent element in legal wrong. He says,

"It is not so much that law is relational (that is also true of ethics) as it is that it is both relational and premised on injury to others' interests . . . A system of penal law in which persons who intended to commit harms but did not actually inflict any or persons who did right but were badly motivated were held punishable would, except as to the sanction, be wholly identified with ethics. Law is a more limited instrument and it is so limited because it implements not speculative decisions but reliable findings of fact, and because it does so by the imposition of severe penalties. Functioning thus, it is

not merely a theoretical construct but an actuality which is limited to the impact of a harm on social interests.\textsuperscript{100}

Professor Hall’s theory of law is fundamentally intellectualistic and this is indicated most clearly in his understanding of judgment in relation to moral conduct. In discussing the “right and wrong” test in mental illness he declares that the conclusions that emerge from his analysis are that “man exhibits his distinctive nature not only in the abstractions he creates and in the symbolic form he gives to them but also that the most characteristic of all his generalizations is the moral judgment.”\textsuperscript{101} Elsewhere, in discussing the relationship of moral culpability to the principle of \textit{mens rea} in the criminal law, he says that culpability is associated with “some of the most ancient ideas of western culture, and especially that view of human nature which regards man as a being endowed with reason and able within limits, to choose one of various possible courses of conduct; intelligence and will, together with the corollary of freedom of action, are the traditional connotations which have persisted, more or less challenged, throughout the entire history of civilized thought . . . they have been embodied in our criminal law at least since the 13th century.”\textsuperscript{102} To put it differently, “our criminal law,” he says, “rests precisely upon the same foundation as does our traditional ethics; human beings are ‘responsible’ for their volitional conduct.”\textsuperscript{103} The prevalent restriction of the word “act” to external behavior is unwarranted he feels, and indicates a misreading of the fundamental doctrine which distinguishes between law and ethics with respect to voluntary conduct.\textsuperscript{104} The essential question which must be answered in legal adjudication is whether the defendant is or is not responsible,\textsuperscript{105} in fact. If the term “act” is employed only to designate that “voluntary conduct” which constitutes

\textsuperscript{101} Op. cit., 499.
\textsuperscript{102} Op. cit., 165; see also 492.
\textsuperscript{103} Op. cit., 166.
\textsuperscript{104} Op. cit., 254.
\textsuperscript{105} Op. cit., 472.
a legally significant fact \textsuperscript{108} less confusion in the analysis of legal ideas would result as well as a clearer understanding of the moral foundations which are implied in the relation of the will to the intellect.\textsuperscript{107}

The intellectualism of the Hall theory is as different from the conceptualism of Kelsen in its notion of coercion as it is in the relation of actuality to conduct. Where Kelsen thinks of coercion as the distinctive characteristic of a legal system, unrelated to a moral order, Hall would restrict penal liability “to the voluntary commission of moral wrongs forbidden by penal law” \textsuperscript{108} in accordance with the theory of the case-law.\textsuperscript{109} In a cogent analysis of strict liability he holds the latter, when carrying punitive sanctions, to be indefensible either as tort law or as penal law.\textsuperscript{110} He objects also to the prevailing mode of thought which concentrates “almost exclusively but only formally on the sanction.”\textsuperscript{111} Sanction and harm, he thinks, must bear a rational relationship to each other, and if they do so, must contribute to each other’s significance.\textsuperscript{112} His theory of sanction touches upon many important points but it is admittedly incomplete in its analysis.\textsuperscript{113} It is particularly keen in its appraisal of the reformation and deterrence theories in comparison with the theory of just punishment.\textsuperscript{114} The latter does not lose sight of actuality in treating the convict as a human being but on the contrary informs him in a manner much more eloquent “than could ever be done by ‘hospitalizing’ him” \textsuperscript{115} through punishment following a careful appraisal of his misconduct, that he is a moral being.

\textsuperscript{106} Op. cit., 255.
\textsuperscript{107} On voluntary conduct involving the whole “self” including the intelligence, see p. 522.
\textsuperscript{112} Op. cit., 322.
\textsuperscript{113} Ibid.
\textsuperscript{115} Op. cit., 421.
In emphasizing the necessity of just punishment for an effective legal order, Professor Hall once again differs from Kelsen in his theory of the aims and ends of a legal system and of the function of coercion in attaining them. He says,

"The principal end is justice; and a corollary of that is that punishment ought to be proportioned to moral culpability. The criminal law also serves the objectives of deterrence and rehabilitation.

"In much of the criticism of theories of just punishment, the issues are incorrectly formulated by precluding, from the outset, the possible positive correlation of just punishment to the 'general good'. But if there is any sense in asking whether punishment is just or in speaking of innocence and guilt, then there can be no doubt either as to importance or as to priority in case of conflict. If punishment is unjust, it matters not how 'useful' it may be. As a matter of fact, it may be seriously questioned whether any 'ultimate good' can result from unjust punishment; even if it could, only omniscience could understand and condone it. In the common law of crimes, the primary question is not the utility of punishment but, instead, the justice of it." 118

Although Professor Hall believes justice pertains to the essence of law, his concept of law is not an "absolute," impossible of development, but is on the contrary as creative as Professor Kelsen claims his dynamic system to be. However, Professor Hall's notion of creativity is not an arbitrarily established system as Kelsen's is. It is rather based on the discovery of pre-existing law, that is on a law which pre-exists, but not with that specificity which is required for all subsequent adjudications.117 His theory embraces a law which can change as a result of judicial decisions which affect its creation, development, and meaning, but which pre-exists sufficiently to bar arbitrariness in its determinations.118 The opening paragraph of the book expresses succinctly this position with respect to criminal law. There Professor Hall says,

118 Ibid.
"Criminal law represents a sustained effort to preserve important social values from serious harm and to do so not arbitrarily but in accordance with rational methods directed toward the discovery of just ends." 119

The discovery of just ends here referred to is for Professor Hall an intellectual activity of the highest type and not at all a mechanical matching of pattern and rule. To make this clear he goes on to say:

"To those who build their view of law on passion, one need simply point not only to the sciences, to art and philosophy, as the irrefutable evidence of creative imagination, persevering thought and wise experiment, but also to mature legal systems and especially, considering the nature of the problems, to the criminal law." 120

The function of the judge in the creative process of developing the law, without resort to arbitrary methods is indicated further by Professor Hall in his discussion of strict interpretation of criminal statutes. He says that when the injunction is "strict" as against all other interpretations, the judge must definitely confine himself to the authoritatively established meaning of the words. 121 And here again Professor Hall is concerned with meaning with reference to the requisite knowledge of the law for he adds that "there is an important difference between the meaning derived from such rigorous adherence to plainly authorized meaning and that culminating from an inquiry which was not thus inhibited; when the latter approach enters into the realm of 'principle' it becomes policy-formation and legislation." 122 Whether the interpretation given to law by judges accords with rules of strict or of liberal construction, the meaning of law calls upon all the intellectual resources including "creative imagination, persevering thought and wise experiment" 123 which can be devoted to it, but the result of the cognitive process, in the Hall theory, is never purely conceptual as with Kel-

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120 Ibid.
sen, but is on the contrary concrete in its inseparability from justice as applicable to human beings.

Professor Hall calls this philosophy of his a theory of integration. He accepts, for the most part, Aristotle as the exponent of the most adequate theory of the integrating of the self so far known, and acknowledges the similarity of basic principles between Aristotle and St. Thomas Aquinas, at least insofar as they relate to the psychology of the self and similar essential elements of a legal philosophy. That his reliance is placed on Aristotle rather than on Aquinas is accounted for by his effort to treat law as it is known by human beings from manifestations observed in nature without resort to the supernatural. In accepting Aristotelean realism as the foundation for his theory of integration of the self, Professor Hall finds his justification in the fact that the theory of the common law as it has come down to us from Bracton is consonant with that of Aristotle in its basic principles and it cannot be fully understood apart from a full grounding in that system. That it has been able to withstand many challenges during the intervening centuries is due in large part to the soundness of those principles. For a person as conversant with current philosophies as Professor Hall, to be able to reject practically all except the Aristotelean foundation in his search for an accounting for the cosmos adequate to meet current needs, is high recommendation for the intellectual satisfaction to be found by contemporary thinkers in the Aristotelean system. The implication is not that a ready answer to all modern problems, many of which were unknown to Aristotle in the form in which they are presented today, is to be found ready at hand, there, but rather, that the basic principles of knowledge and conduct and right as expressed there give insights to the solution of modern problems superior to many of those proposed since. It is

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greatly to Professor Hall’s credit as a jurist that he has been fearless in pursuing the solutions for the most complex legal problems to their ultimate causes in philosophy as well as in the foundation of the common law system.

Like Mr. Justice Holmes, and perhaps due to his influence, Professor Hall recognizes the indispensability of a knowledge of Bracton in any competent interpretation of the common law. He is more astute, however, than Justice Holmes in his analysis of Bracton’s philosophical premises. Holmes was taken into the positivistic camp too early in life through his reading of Hobbes and his acquaintance with Mill, to understand Bracton completely. He did not live quite long enough to see the unhappy consequences of positivism which are to be found in the practice of Nazi Socialism. Professor Hall, on the other hand, not only has understood the significance of the Nazi and Soviet challenges to law from their results, but he has had the opportunity of profiting from Mr. Justice Holmes’ honest but regrettable mistakes and he has used that opportunity to good advantage. With Holmes he goes back to Bracton, but where Holmes read Bracton with positivistic preconceptions in mind, Hall reads Bracton in the light of the philosophia perennis which characterized the milieu in which the latter’s thought took shape. Professor Hall thereby goes a long way toward reestablishing the common law in its historical position of safeguarding liberty through law.

To a certain degree, however, Professor Hall falls short of restoring Bracton completely to the eminence he deserves among law-givers. Bracton is best known, perhaps, even among people who are not lawyers, for his declaration that “the king is under God and the law.” What he means

126 Bent, Silas, Justice Oliver Wendell Holmes, Garden City, N. Y., 1932, p. 77.
127 Hall, op. cit., 30, 54-57, 540, 569.
129 Bracton, Henry de, De Legibus et Consuetudinibus Angliae, f 5b; Twiss ed., I, 39; Rooney, op. cit., 63.
by that has often been expressed in technical language about legal limitations on royal or state power. If one interpret the term "legal limitations" to include limitations established by the natural law as well as those established by a humanly devised legal system like the common law, the implication is that at least some of these limitations come from God, the Author of nature as well as of the natural law, an inference which Bracton made explicit. If, however, in attempting to develop a purely intellectualist philosophy, one omits to account for the Author of nature, the result falls somewhat short of the Bracton theory. Professor Hall makes an able advocate for the recognition of the essential place of morality and justice in an adequate legal theory, and thereby to a large extent supplies the need for an accounting for the actuality which is called the natural law. For consistency's sake, however, he apparently feels that an intellectualist philosophy explanatory of nature should be concerned entirely with the natural to the exclusion of any reference to the supernatural. In replication to that viewpoint it need only be pointed out that Bracton was none the less—but rather the more—an exponent of an intellectualistic and realistic philosophy for his inclusion of God. It is submitted that in order to understand Bracton fully it is necessary to read him not only in the light of Aristotle but also in the light of St. Thomas Aquinas and the other leaders of the golden days of Scholasticism, of whom he was a contemporary.

An indication of the difference an understanding of the philosophy of St. Thomas Aquinas would make, in analyzing the foundations of the common law, occurs in the discussion of sanctions. On page 321 Professor Hall, in summarizing his commentary on sanctions says, "The differential essence of punishment is the deliberate infliction of suffering on the person of the offender because of a past moral wrong; by contrast, reparation does not imply suffering." A few sentences below he says, "By contrast, the criminal must submit
himself to punishment; it cannot be transferred—though the fine challenges at this point.” 130 Such statements as these disclose that Professor Hall has not gotten completely away from positivist influence in his thinking about law. To him punishment is infliction on a person by force. A comparison of this view with Bracton and with St. Thomas Aquinas is illuminating. Bracton thought of physical punishment in such terms as summary punishment, severe pain and torture, mutilation, exile, imprisonment, beating, and deposition from dignity. 131 On the surface this would seem to differ but little from the Hall notion, but when it is read in connection with what Aquinas wrote upon the same point, a different note is heard. St. Thomas said:

“Some who are not influenced by motives of virtue and prevented from committing sin, through fear of losing those things which they have more than those they obtain by sinning, else fear would be no restraint to sin. Consequently vengeance for sin should be taken by depriving a man of what he loves most. Now the things which man loves most are life, bodily safety, his own freedom, and external goods such as riches, his country, and his good name. Wherefore according to Augustine's reckoning (De Civ. Dei, XXI) Tully writes that the laws recognize eight kinds of punishment; namely, death, whereby man is deprived of life; stripes, retaliation, or the loss of eye for eye, whereby man forfeits his bodily safety; slavery, and imprisonment, whereby he is deprived of freedom; exile, whereby he is banished from his country; fines, whereby he is mulcted in his riches; ignominy, whereby he loses his good name.” 132

In the Thomistic theory, punishment is not infliction but deprivation of something desired. “Pain (poena, i.e., penalty) consists in the privation of something used by the will,” he says elsewhere. 133 If Bracton’s brief summary be read in the light of this ampler explanation of St. Thomas, running back to St. Augustine and to Cicero for evidence of

130 Hall, op. cit., 321.
131 Bracton, op. cit., f 104b; Twiss ed., II, 153; Rooney, op. cit., 66.
132 Thomas Aquinas, St., Summa Theol., (Domin. tr.) II II, q. 108, a. 3; quoted in Rooney, op. cit., 38.
133 Thomas Aquinas, St., op. cit., I, q. 48, a. 6; Rooney, op. cit., 39.
the meaning traditionally, it will be apparent that the positivistic preconception of punishment as the infliction of force with which Professor Hall interprets the common law theory is not quite accurate. Bracton was very much closer to Thomas Aquinas than to Thomas Hobbes, to Bentham, or to Holmes.

A third point of difference between Professor Hall's theory and the Scholastic, concerns the criterion of truth. Professor Hall relies upon consensus for his standard. For example, in discussing whether the holding of a lighted match to combustible materials in a dwelling-house is a criminal attempt or a state of preparation, he says that demonstration is impossible and an appeal can only be made to experience. If the person appealed to insists that criminal attempts do not represent substantial harms which are essentially like other crimes, "there is nothing further one can do in that direction except to enquire of other enlightened persons with a view to determining the consensus of such opinion on the matter." 134 In another place he distinguishes between "the enormous extent of presently accepted precedent" which should be thoroughly reconsidered 135 and "the least consensus regarding the instant problem" which "must certainly be that the entire structure of strict liability should be subjected to the most careful sociological investigation possible." 136 In discussing error or mistake in law he speaks of erroneous sensa (sense impression of facts) which are "for a time accepted as true," 137 this acceptance later being recognized as erroneous when "placed in a broader experience." With respect to truth he says: "there is the same appeal to experience, understanding and agreement which provides the ultimate test of 'truth' in any field." 138 And again he says that on the whole, the judicial practice,

134 Hall, op. cit., 115.
though overly cautious, "is essentially that of scientists themselves: a consensus of experts is the criterion of truth or of its recognition, if one prefers." To a large extent, of course, what Professor Hall means by consensus is close to what the Scholastic calls "common agreement." This is neither a counting of heads for determining "yeas" and "nays" nor a professional attitude of "experts" toward specific propositions. It is rather a recognition that healthy minds act through similar mental processes in arriving at a common goal of understanding. For the Scholastics formal agreement or mere consensus is not enough; substantial agreement founded on reality is essential. In other words truth is objective for the Scholastics to which men's minds must conform; subjective assent is insufficient. Professor Hall's position is in fact objective for the most part, but his use of the words consensus and acceptance leaves him open to misinterpretation on the part of the subjectivists, if indeed his own thought is entirely clear upon the point.

Although his criterion of truth suggests subjectivist influences, his notion of morality is quite definitely objective. Speaking of municipal regulations such as traffic lights, garbage disposal, and the installation of safety devices in factories, he agrees that such laws do not exist in the Sahara but he declares that in modern cities there is need of them. Although such laws are arbitrarily designated as conventions, the intentional or reckless omission of their observance he considers morally wrong. "So long as the public good requires any regulation, that regulation is not conventional," he says. In other words, he would reappraise the decisions of the courts which distinguish wrongs *mala prohibita* from *mala in se* through placing many petty offenses "outside the field of criminal phenomena on the ground that they are wrong merely by 'convention' and not by 'Nature'." In-

140 *Op. cit.*, 295
stead of the category of wrongs by convention, Professor Hall would reclassify such offenses by reference to "moral principles, public attitudes (mores) and other criteria that are legally significant."\(^{142}\) In other words, where Professor Kelsen would eliminate *mala in se* and consider all wrongs to be *mala prohibita*,\(^{143}\) Professor Hall would reverse the process and eliminate wrongs *mala prohibita* in favor of those designated *mala in se*. It is not necessary to agree with this specific proposal in order to recognize the objectivity of his concept of morality. It is obviously far removed from the criterion of agreement or consensus which he adopts for truth.

To the average lawyer or law student trained in our American law schools, it may seem exceedingly strange to evaluate a treatise on the principles of criminal law not on the cogency of its arguments against strict liability, nor for a reconsideration of the rules about intoxicated persons, nor about the distinction between intent and motive, but rather in terms of cognition, integration, positivism, subjectivism, and so on. Such terms are seldom encountered in prelegal or professional education. Briefs which mention them without observing all the forms in the local practice book win no cases. Yet the acknowledged leaders of the American Bar, men like Holmes and Cardozo and Pound, have delighted in injecting philosophical serums into their legal works. Must one achieve eminence in the profession, then, before one can afford the luxury of alluding to philosophy, or may one conclude, on the other hand, that leadership is attained at the bar on account of philosophical capacity? In either case, the paucity of leaders at the bar who are competent to appraise legal ideas and their significance is appalling. The price this nation is paying for that incompetence in leadership can result in the bankruptcy of its civilization. Government is needed to control and eliminate war. Law is the


\(^{143}\) Kelsen, *op. cit.*, 51-52.
foundation of government. But law based upon unsound philosophy can destroy itself. If the Nazi, Soviet challenge shocks us into an awareness of that fact, we shall have learned something very important, even at a great price.

It is to Professor Hall's great credit that as a professor in a leading law school he points out the need for philosophy in connection with understanding law. He not only says that "punishment cannot be understood or criticized apart from the philosophy thus implied," 144 but also, that "philosophy is an essential adjunct to an adequate criminology." 145 Of the doctrine of strict liability, he says, in introducing a discussion of the influence of positivism:

"The coincidence of strict liability with high industrialization, especially the mechanization consequent on the Industrial Revolution, has not escaped the attention of many writers, especially on torts. But the relation of this legal development to the broad current of philosophy and social theory that stimulated and accompanied it has been neglected. These ideological conditions deserve particular attention." 146

If such statements as these indicate that the tide has turned, that first class law schools will train and require students to analyze legal rules not only from the standpoint of economic functioning but also from that of philosophical implications, that the worth of man, intellectually, morally, and spiritually, and the incidence of law upon his development will be a respectable subject for legal argument—if these things are adumbrated by Professor Hall's book—American legal thought may be considered to have begun to approach maturity.

To the present commentator, the appearance of Professor Hall's treatise is especially gratifying in that it substantiates in many respects several of the theses proposed just ten years ago in a doctoral dissertation 147 which—as is said of Ben-

144 Hall, op. cit., 569.
tham's contribution—did not become "part of the professional literature of the criminal law." ¹⁴⁸ The turning back to Bracton for understanding of the foundations of the common law, the recognition that Aristotle and the Scholastics give a better insight than Hobbes and Hume and Bentham, the critical appraisal of Holmes' theory of the criminal law, the integration of morality and justice with law in contradiction to the positivists, the defense of the freedom of the will and of the necessity of the legal order, all these and more, which were incidental to the thesis that sound philosophy lies at the foundation of a satisfactory legal system, find support, if not in specific terms, at least by implication, in this book. There is more extensive analysis here of criminal law doctrines, there is an artistic concealment of the apparatus of scholarship, and there is an authority in the way legal rules are handled which adds much weight to the merits of the position taken. Of course, as indicated above, not everything in the book can be unqualifiedly accepted, such as the incomplete interpretation of Bracton, the positivistic influence on the theory of sanction, and the adoption of consensus as the criterion of truth, but there is so much that enriches American legal philosophy in directions which were hitherto ignored, that the book can be highly recommended. If it receives the hearing in the law schools which it deserves, there will still be hope for the cause of American legal education and eventually for competent leadership at the bar in America, and perhaps, in consequence, for the world.

Miriam Theresa Rooney

¹⁴⁸ Hall, op. cit., 7, note 15.