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One Hundred Years of Legal Philosophy

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ONE HUNDRED YEARS OF LEGAL PHILOSOPHY

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There is a sense in which twentieth century legal philosophy began on January 8, 1897. On that day, Oliver Wendell Holmes, then a justice of the Supreme Judicial Court of Massachusetts, spoke at a ceremony dedicating the new hall of the Boston University School of Law. In his remarks, which were published that spring in the *Harvard Law Review* under the title *The Path of the Law*,[1] Holmes proposed to debunk the jurisprudence of the past and to propose a new course for modern jurists and legal scholars. Holmes' themes—the question of law's objectivity and the relationship between law and morality—have preoccupied legal philosophy in the century that was then dawning and is now drawing to a close. They have figured centrally in the work of our honoree, Kent Greenawalt. My mission is to survey the treatment of these themes by some other influential twentieth century British and American legal philosophers and jurists and to make some observations about where we find ourselves a hundred years or so after publication of *The Path of the Law.*

Let us look first, though, at Holmes's own treatments of his themes. The opening sentence of his lecture invited his audience—lawyers, law professors, and law students—to consider what it is we study when we study law. We are not, he said, studying a "mystery," but rather, "a well known profession."[2] People are willing to pay lawyers to advise and represent them because "in societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees."[3] Now, this is a fearsome power. So, "[p]eople will want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out

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1 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 458 (1897).

2 *Id.* at 457.

3 *Id.*

when this danger is to be feared."[4] The object of the study of law, therefore, "is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."[5]

This was the thesis of *The Path of the Law.* It was intended, I believe, as a provocation. And so, Holmes formulated it in provocative ways:

> [A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court.. . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. . . .[6]

Of course, the power of provocation is enhanced to the extent one obscures one's intention to provoke. And so Holmes claimed merely to be proposing a "business-like understanding of the matter."[7] And such an understanding, he insisted, requires us strictly to avoid confusing moral and legal notions. This is difficult, Holmes suggested, because the very language of law—a language of "rights," "duties," "obligations," "malice," "intent," etc.—lays a "trap" for the unwary. "For my own part," he declared in another famously provocative sentence, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."[8]

Holmes' implicit denial of law's objectivity is not unconnected to his insistence on the strict separation of moral and legal notions. "One of the many evil effects of the confusion between legal and moral ideas," he stated, "is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward."[9] A corrective, according to Holmes, was to adopt the viewpoint of a "bad man" when trying to understand the law as such:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which

4 *Id.*
5 *Id.*
6 *Id.* at 458–62.
7 *Id.* at 459.
8 *Id.* at 464.
9 *Id.* at 458.

> [legal] knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[10]

And what exactly is being corrected by adopting the bad man's point of view?

> 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 what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact.[11]

"I am," Holmes declared, "much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[12]

Still for all his skepticism—legal and moral—Holmes denied that his was "the language of cynicism":[13]

> 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 our 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.[14]

Going still further, Holmes claimed to "venerate the law, and especially our system of law, as one of the vastest products of the human mind."[15] It was not, he assured his readers, disrespect for the law that prompted him to "criticize it so freely,"[16] but rather a devotion to it that expresses itself in a desire for its improvement.[17]

Holmes' aim was merely, he said, to expose some common fallacies about what constitutes the law. For example, some people—Holmes doesn't tell us who they are—hold that "the only force at work in the development of the law is logic."[18] This erroneous way of thinking is, Holmes advised his audience, "entirely natural" for law-

10 *Id.* at 359.
11 *Id.* at 460–61.
12 *Id.* at 461.
13 *Id.* at 459.
14 *Id.*
15 *Id.* at 473.
16 *Id.*
17 *See id.* at 474.
18 *Id.* at 465.

yers, given their training in logic with its "processes" of analogy, discrimination, and deduction, but it is erroneous nevertheless. Moreover, "the logical method and form flatter that longing for certainty and for repose which is in every human mind."[19] "But," Holmes went on to say—without, it should be added, the slightest hesitation or expression of doubt—

> certainty generally is an illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an articulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.[20]

Now, this is getting interesting. The man who would later utter, in another connection, that famous aphorism that "the life of the law has not been logic, it has been experience," has already told his audience in this lecture that law is a matter of prediction, of prophecies of what courts will do in fact. And he has expressed great skepticism about the role of logic in guiding the decisionmaking of judges whose rulings, one way or the other, will constitute the law. So, how are those decisions to be rationally guided? What is "the law" from the perspective, not of the "bad man" but of the "good judge," who facing a disputed question of law will not be comforted by the assurance that "the law" is a prediction of how he will in fact resolve the case? In fact, what he wishes to do is to resolve the case according to the law. That, he supposes, is his job. He wants to rule on the matter favorably to the litigant whose cause is supported by the superior *legal* argument. But what constitutes *legal* argument? What are the sources of law upon which legal reasoning operates?

Of course, one candidate for inclusion in the list of legal sources is history. And according to Holmes, "The rational study of law is still to a large extent the study of history."[21] Is this good or bad? "History must," Holmes says, "be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know."[22] But then comes the punch line: "It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules."[23]

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19 *Id.* at 466.

20 *Id.*

21 *Id.* at 469.

22 *Id.*

23 *Id.*

So, history is not a source in the sense that the legal rules uncovered (and whose meaning is clarified) by historical inquiry are authorities that guide the reasoning of the conscientious judge. On the contrary, such study has its value in exposing such rules to "an enlightened skepticism" regarding their value. But then, by appeal to what standards are such judgments of value to be made? And—most critically—are these standards internal to the law or external? Does the judge discover the proper standards in the legal materials—the statutes, the cases, the learned treatises—or bring them to those materials? If the latter, then what is the discipline from which he derives them?

These are questions that will be central to the theoretical reflections of jurists and legal scholars for a hundred years. They will be answered one way by Jerome Frank and his fellow "legal realists" in the first half of the twentieth century, and precisely the opposite way by Ronald Dworkin and his followers in the second half. H.L.A. Hart—the most influential of the English-speaking legal philosophers of our century—will refer to the realists' answer as the "nightmare" that law does not exist, and to Dworkin's answer as the "noble dream" that law as such provides a "right answer"—a single uniquely correct resolution—to every dispute which makes its way into the courtroom.[24]

Holmes's own answer was tantalizingly ambiguous. In *The Path of the Law*, he said at one point, "I think . . . the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage."[25] At another point he made this remarkable statement:

> I look forward to a time when the part played by history in the explanation of [legal] dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics.[26]

Three-quarters of a century later, Richard Posner, Frank Easterbrook, Richard Epstein, Guido Calebresi, and other theorists and practitioners of the "economic analysis of law" would take this last piece of advice quite literally. Their books, law review articles, and—in the cases

24 *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 123–24 (H.L.A. Hart ed., 1983).

25 Holmes, *supra* note 1, at 467.

26 *Id.* at 474.

of Posner, Easterbrook, and, most recently, Calebresi—judicial opinions would subject legal rules and social policies to cost-benefit tests and other forms of economic analysis to assess their instrumental rationality and thus, in some cases, their legal validity. What these scholars and jurists do fits pretty well with Holmes' desire for lawyers and judges to "consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price."[27] But one must ask, would Holmes really approve their doing it?

Although Holmes was, in his politics, "a moderate, liberal reformer,"[28] he was resolutely determined, as a judge, not to "legislate from the bench." Indeed, during a period of unprecedented "judicial activism," he became the symbol of opposition to the judicial usurpation of legislative authority under the guise of interpreting the Constitution. As a Justice of the Supreme Court of the United States, he drew as sharp a line as any jurist of his time between "law" and "politics"—even when the politics in question concerned political economy. In what is perhaps his most celebrated dissent, Holmes castigated the majority in the 1905 case of *Lochner v. New York*,[29] which invalidated a state law setting maximum working hours for employees in bakeries on the ground that such a regulation violated the "freedom of contract" that was held to be implicit in the Due Process Clause of the Fourteenth Amendment. Holmes argued that this so-called "substantive due process" doctrine was an invention designed to authorize what was, in fact, the illegitimate judicial imposition of a theory of economic efficiency and the morality of economic relations on the people of the states and the nation.[30] His claim was not that there was anything defective in that theory; on the contrary, its "social darwinist" dimensions held considerable appeal to him. Rather, it was that judges had no business substituting their judgments of efficiency and value for those of the people's elected representatives in Congress and the state legislatures. They, he said, should be able to go to hell in their own way!

It is not that any of this is flatly inconsistent with what Holmes said in *The Path of the Law*. Indeed, at one point in that lecture he seems to suggest that training in economics and a due weighing of considerations of social advantage will have the salutary effect of encouraging judicial restraint. "I cannot but believe," he declared,

27 *Id.* at 476.

28 J.W. HARRIS, LEGAL PHILOSOPHIES 94 (1980).

29 198 U.S. 45 (1905).

30 *See id.*

> that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.[31]

But plainly Holmes, as a judge—and, above all, as a dissenting judge—is supposing that the law is something more than merely a prophecy of what the courts will in fact decide. As a dissenter, he holds that the courts have decided the case incorrectly. Of course, he does not deny that their rulings—even where incorrect—have the binding force of law, at least until they are reversed by higher courts of appeal; but he does suppose that the judges in the majority "got the law wrong." So, apparently, judges resolving disputes should be guided, in some significant sense, by law. And this presupposes the reality of law, and indeed, the *preexistence* of law, as something more than a "prophec[y] of what courts will do in fact."[32]

So we must press the question: To what standards of legal correctness should the judge look in reasoning to the resolution of a case? Are the standards internal to the legal materials and discoverable, by some method, in them? Or are they external? Do judges "find" the law? Or do they, necessarily, "create" it? Can lawyers predict or "prophesy" what a good and conscientious judge will do by figuring out what he should do in light of the legal materials which should control his reasoning? If that is all Holmes means by "prediction" and "prophecy," then his debunking exercise is, for all its provocative language, far less skeptical than it appeared.

Drawing their inspiration from Holmes, however, there soon emerged a group of legal scholars who were prepared, for awhile at least, to expose the idea of law to truly radical skepticism. The legal realist movement, which reached the peak of its influence in the 1930s and '40s, advanced the debunking project well beyond the point at which Holmes had left things in *The Path of the Law.* Felix Cohen, Karl Llewellyn, Jerome Frank, and others pressed to an extreme the idea of jurisprudence as an essentially "predictive" enterprise. "Law," according to Llewellyn, was what "*officials do about disputes.*"[33] In accounting for their decisions, he insisted, it could only rarely be true to say that they are guided by rules. The trouble is not—or not just—that judges and other officials are willful, and thus willing to lay aside the clear command of legal rules in order to do as

31 Holmes, *supra* note 1, at 468.

32 Holmes, *supra* note 1, at 462.

33 KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 12 (1951).

they please. It is that legal rules are necessarily vague and susceptible of competing reasonable interpretations and applications. Even the problem of selecting which rule to apply to a given set of facts can only rarely be solved by looking to a clear rule of selection. The result is a measure of indeterminacy that makes nonsense of the idea of legal objectivity. The key to understanding the phenomenon of law—accounting for what judges and other officials do or predicting what they will do about disputes—is not the analysis of legal rules. It must be something else. True, judges and other officials cite the rules in justifying their decisions. But if we are to be realistic about what is going on, according to Llewellyn, we must recognize that this is the mere legal rationalization of decisions reached on other grounds.

Frank's realism was, if anything, still more extreme in its denial of legal objectivity. Going beyond Llewellyn's "rule-skepticism," Frank declared himself to be a "fact-skeptic" as well.[34] Thus he denied law's objectivity even in the rare cases in which a clear rule was clearly applicable. Since rules must be applied to facts in order to generate a legal outcome, everything depends on findings of fact in trial courts and other fact-finding tribunals. And facts are, in most cases, virtually as indeterminate as legal rules. In statements that seem eerily, well . . . realistic, in the aftermath of the O.J. Simpson trial, Frank argued that our perceptions of facts are deeply influenced by conscious and subconscious beliefs, attitudes, and prejudices that vary among groups and individuals. So the key to understanding law—understood in legal realist terms—is understanding people's beliefs, attitudes, and prejudices, and why they hold them. Since law is a sort of epiphenomenon of human psychology, legal scholarship should be directed to scientific (e.g., psychological) and social scientific studies of human motivation. To be realistic, it should abandon the idea that law preexists and is available to guide legal decisions.

The legal realists' insistence on the indeterminacy of law would, in our own time, be reasserted by advocates of "critical legal studies," though this time in the service of a "new left" political agenda and with nothing like the realists' faith in the objectivity and explanatory power of the natural and social sciences. The realists themselves were, like Holmes, political progressives—moderate liberals—eager to bring instrumental rationality to bear to solve social problems. Many were New Dealers. A few became judges, and those who did were, like Holmes, far less radical in practice than their theoretical views would have led one to predict. Although appeals to the alleged findings of social science became an increasingly common feature of judicial

34 *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1930).

opinions as the twentieth century wore on, realists who became judges rarely cited their own subjective views or prejudices or psychological predilections as grounds for their decisions. Rather, they cited legal rules as the ultimate reasons for their decisions and claimed, at least, to lay aside their own preferences in fidelity to the law. (Interestingly, in the aftermath of the revelation of Nazi atrocities in Europe, Frank declared himself, in the Preface to the Sixth Edition of his *Law and the Modern Mind,* to be a follower of the natural law teaching of Saint Thomas Aquinas on the basic questions of law and morality. Nothing in his earlier writings, he insisted, was ever meant to suggest otherwise.[35])

Of course, realism had its appeal precisely because it was, from a certain vantage point, realistic. Trial lawyers take issues of venue and voir dire very seriously because they know—and knew long before the O.J. Simpson case—that who is on the jury can be critical to whether facts are found favorably to their clients. And one of the first questions lawyers at any level of litigation want to know the answer to is who are the judge or judges who will be making determinations of law at the trial or on appeal. Often enough, different jurors or a different judge or judges means different results. So far forth, the phenomenon of law includes strong elements of "subjectivity."

But the realists overstated their case. Their argument falters under the same question we put to Holmes a little while ago. From the point of view of conscientious judges, the law is not—for it cannot be—a prediction of their own behavior. Often they, like Holmes, will be faced with what they themselves perceive to be a duty to follow rules whose application generates outcomes that run contrary to their personal preferences. True, a willful judge can simply give effect to his prejudices under the guise of applying the law, at least until reversed by a higher court of appeal (if there is one). But this is no modern discovery. And it is no more a threat to the possibility of law's objectivity than is the fact that people sometimes behave immorally a threat to the objectivity of morals. Just as a conscientious man strives to conform his behavior to what he judges to be the standards of moral rectitude, the conscientious judge strives to rule in conformity with the controlling rules of law. And no account of the phenomenon of law which ignores the self-understanding of such a judge—no account which, that is to say, leaves his point of view out of account—can do justice to the facts.

This, I think, was clear to H.L.A. Hart. He above all other English-speaking juridical thinkers, in the wake of legal realism, recog-

35 *See* JEROME FRANK, LAW AND THE MODERN MIND (6th ed. 1949).

nized that the shortcomings of legal skepticism and the radical denial of law's objectivity had mainly to do, not with the dangers of its project of debunking to the body politic by its capacity to undermine the public's faith in the rule of law, but rather with realism's inability realistically to account for the phenomenon of law as it functions in human societies. Realist theories failed to fit the facts. And they failed to fit the facts because they approached the phenomenon of law from a purely external viewpoint. The problem, according to Hart, was not that legal realists were bad lawyers; it was that they were bad psychologists and social scientists, even as they looked to psychology and social science to explain the phenomenon of law.

Social phenomena—phenomena created or constituted, at least in part, by human judgment, choice, cooperation, etc.—can never adequately be understood, Hart argued, without adopting what he called the "internal point of view."[36] This is the point of view of those who do not "merely record and predict behavior conforming to rules" or understand legal requirements as mere "signs of possible punishment," but rather "*use* the rules as standards for the appraisal of their own and others' behavior."[37]

On this score, Hart faulted not only the legal realists, but also the leading figures in his own intellectual tradition, the tradition of analytical jurisprudence inspired by Thomas Hobbes and developed by Jeremy Bentham and his disciple John Austin. The problem with their jurisprudential theories, Hart observed, is that they too fail to fit the facts. And they fail to fit the facts because they do not take into account the practical reasoning of people whose choices and actions create and constitute the phenomenon of law—people for whom legal rules function as reasons for decisions and actions.[38]

Hart in no way denied the wide variability of legal rules. Beyond some basic requirements of any legal system—what Hart called the "minimum content of natural law"—there could be, and in fact one finds in the world, a great deal of variation from legal system to legal system. But in all societies that have achieved a legal order—that is, moved from a prelegal order to a regime of law—law exhibits a certain objectivity and autonomy from other phenomena, including other normative systems. And the law of any system is not truly under-

36 *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 11–18 (1980). For a critique of Hart's idea of the importance of the internal point of view from a perspective sympathetic to Hart's legal positivism, see Jules Coleman, *Authority and Reason*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 287 (Robert P. George ed., 1996).

37 H.L.A. HART, THE CONCEPT OF LAW 95–96 (1961).

38 For a defense of Austin and Bentham against Hart's criticisms, see L. Jonathan Cohen, *Critical Notice: Hart, The Concept of Law*, 71 MIND 395 (1962).

stood by the theorist proposing to give an intellectually satisfying account of that system until he understands the practical point of the law from the perspective of actors within the system who do not perceive their own deliberations, choices, and actions to be "caused," but rather understand themselves to be making laws for reasons and acting on reasons provided by the laws.

In his masterwork, *The Concept of Law*, Hart invited his readers to treat his analysis as "an essay in descriptive sociology."[39] But his was a sociology designed to make possible the understanding of legal systems "from the inside." So what he proposed, and what the tradition of analytical jurisprudence has now more or less fully accepted as Hart's most enduring contribution, is that even "the descriptive theorist (whose purposes are not practical) must proceed . . . by adopting a practical point of view[; he must] assess importance or significance in similarities and differences within his subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject-matter."[40]

If Hart rejected the externalism of Bentham and Austin—with its understanding of law (in Hobbesian fashion) as constituted by commands of a sovereign ("orders backed by threats") who is habitually obeyed by a populace but who in turn obeys no one—he retained their commitment to "legal positivism." He described this much misunderstood commitment as the acknowledgment of a "conceptual separation" of law and morals. Although he was yet another moderate liberal in his politics, Hart did not mean by "positivism" the idea that law ought not to embody or enforce moral judgments. True, in his famous debate with Patrick Devlin over the legal enforcement of morals,[41] Hart defended a modified version of J.S. Mill's "harm principle" as the appropriate norm for distinguishing legitimate from illegitimate state enforcement of morality; but he fully recognized that this principle itself was proposed as a norm of political morality to be embodied in, and respected by, the law. Moreover, he understood perfectly well that the content of legal rules reflected nothing so much as the moral judgments prevailing in any society regarding the subject matters regulated by law. So Hart cheerfully acknowledged the many respects in which law and morality were connected, both

39 HART, *supra* note 37, at vii.

40 FINNIS, *supra* note 36, at 12.

41 *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

normatively and descriptively. In what respect, then, did he insist on their "conceptual separation?"

As I read *The Concept of Law*, as well as Hart's later writings, the "conceptual separation" thesis strikes me as rather modest. It has to do above all, I think, with the legitimate aspiration of the descriptive sociologist to keep his descriptions, to the extent possible, free of coloration by his own normative moral views. One can recognize a law, or even a whole legal system, *as* a law or legal system, irrespective of whether one believes that that law or legal system is just; indeed, even a gravely unjust legal system can be, from a meaningful descriptive viewpoint, a legal system. And what is true of the descriptive sociologist or legal theorist can also be true of the judge who may conclude in a given case that the law—identified by authoritative criteria or standards of legality—provides a rule of decision in the case at hand which is, from the moral point of view, defective. In repudiating what he took—wrongly, in my view—to be the defining proposition of the natural law theorist, Hart denied in an unnecessarily wholesale fashion the proposition *lex iniusta non est lex.*

Although his views in fundamental moral theory are frustratingly elusive, nothing in Hart's positivism commits him in any way to the moral skepticism, subjectivism, or relativism characteristic of the positivism of, say, Hans Kelsen,[42] or that one detects in the extrajudicial writings of Oliver Wendell Holmes. In fact, the student of Hart's who has remained closest to his views in legal theory, Joseph Raz, combines Hartian legal positivism with a robust moral realism.[43] Hart and Raz have both insisted—rightly, in my view—on the necessity of some conceptual separation of law and morality for the sake of preserving the possibility of moral criticism of law. As John Finnis has recently observed, the necessary separation "is effortlessly established [by Aquinas] in the *Summa*, [by] taking human positive law as a subject for consideration in its own right (and its own name), a topic readily identifiable and identified *prior* to any question about its relation to morality."[44]

Nevertheless, Hart's positivism generated one of the century's most fruitful jurisprudential debates when it was challenged by Lon L. Fuller in the late 1950s.[45] Fuller—whose careful explication and

42 *See* Hans Kelsen, *The Natural-Law Doctrine Before the Tribunal of Science, in* WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS BY HANS KELSEN 137 (1971).

43 *See generally* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

44 John Finnis, *The Truth in Legal Positivism, in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 195, 203–04 (Robert P. George ed., 1996).

45 See LON L. FULLER, THE MORALITY OF LAW (1969).

working out of the diverse elements of the Aristotelian ideal of the "Rule of Law" constitutes a genuine achievement of twentieth century legal philosophy—proposed an argument to show that law and morality are, as a matter of brute fact, more tightly connected than Hart's positivism would allow. He sought to show that law necessarily embodies an "internal morality" that defies Hart's "conceptual separation" thesis.[46] He offered to argue the point, not as a normative matter about moral standards that positive law *ought* to meet, but rather on Hart's own terms, as a descriptive proposition about moral standards that law has to embody before even the purely descriptive theorist can recognize it as law.

In the *Morality of Law*, Fuller offered an apparently "value free" definition of law that any legal positivist ought to be able to accept: "Law is the enterprise of subjecting of human behavior to the governance of norms."[47] Nothing in this definition demands that those who make and enforce the laws be wise, virtuous, benign, or concerned in any way for the common good. Still, some things follow from it. For example, people cannot conform their behavior to rules which have not been promulgated, or which lack at least some measure of clarity, or which apply retrospectively. So promulgation, clarity, and prospectivity are aspects of the "Rule of Law." Where they are absent, no legal system exists or, at most, only a highly defective legal system exists. And there are other requirements, including some significant measure of reliable conformity of official action with stated rules. Taken together, Fuller argued, the "Rule of Law" constitutes a *moral* achievement.

While adherence to the "Rule of Law" does not guarantee that a legal system will be perfectly just—in fact, all legal systems contain elements of injustice—it does mean that a certain minimum set of moral standards must be met before a legal system actually exists. And, sure enough, or so Fuller supposed, grave injustice is rarely found in systems in which the rulers—whatever their personal vices and bad motives—govern by law. It is in societies in which the "Rule of Law" is absent that the most serious injustices occur. Of course, Hart wasn't buying this for a moment. While he admired and for the most part accepted Fuller's brilliant explication of the "Rule of Law," he saw no reason to refer to its content as an internal *morality*. He contended, moreover, that there is no warrant for supposing that a system of law could not be gravely unjust, or that the "Rule of Law"

46 For Hart's response, see H.L.A. Hart, *The Morality of Law*, 78 HARV. L. REV. 1281 (1964–65).

47 LON FULLER, THE MORALITY OF THE LAW 106 (2d ed. 1969).

provided any very substantial bulwark against grave injustice. Indeed, Raz later argued against Fuller that the "Rule of Law" was analogous to a sharp knife—valuable for good purposes, to be sure, but equally useful to rulers in the pursuit of evil objectives.[48]

The Hart/Fuller debate (like the Hart/Devlin debate) was an illuminating one. I count on it every year for one or two lively meetings of my seminar in Philosophy of Law at Princeton. My own judgment is that Fuller scored a powerful point in establishing a certain moral value of the "Rule of Law," but that Hart rightly resisted Fuller's somewhat exaggerated moral claims on its behalf. In any event, I do not think that Fuller undermined the central appeal of the "conceptual separation" thesis: the methodological aspiration to avoid confusing "law as it is" with "law as it ought to be."

Nor do I think that Ronald Dworkin's celebrated critiques of Hart's positivism are telling.[49] Hart's theory has, as I have suggested, certain implications for the question Dworkin has been most concerned about—namely, the question of judicial discretion in "hard cases"—but these implications are quite limited. Hart is fundamentally interested in developing methodological tools to enable the descriptive legal theorist to give a refined and accurate account of law in a given society. Thus, for example, he proposes the union of "primary" and "secondary" rules as "the key to the science of jurisprudence"; he distinguishes "duty-imposing" from "power-conferring" rules; and he develops the idea of a rule (or rules) of recognition to which actors in a legal system have resort as establishing criteria of legal validity. Hart's jurisprudence is not "court-centered." In this respect, it differs sharply from the jurisprudence of Dworkin and most other American legal philosophers, including, interestingly enough, Holmes and the legal realists.

For Hart, the question of how much law-creating (or "legislative") authority a judge has, if any, or where that authority obtains, is not to be resolved at the level of general jurisprudence. Different legal systems differ—indeed, reasonably differ—on the question of how such lawmaking authority is to be allocated among judges and other actors in the overall political system. To be sure, Hart observes that legal rules are inevitably "open textured" and, thus, in need of authoritative interpretation in their concrete application; and this entails a certain

48 *See* Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 226 (Joseph Raz ed., 1979).

49 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 1–130 (1977). For Dworkin's more recent criticisms of legal positivism, see RONALD DWORKIN, LAW'S EMPIRE ch. 3 (1986). For Hart's reply to Dworkin, see HART, *supra* note 37, at 238–76.

measure of judicial discretion and lawmaking authority as a matter of fact, even in those systems which exclude it in theory. Does this mean that the wall between legal validity and the moral judgment of judges is porous, even in systems of avowed legislative supremacy (such as the British system)? Yes, indeed. Does it vindicate Dworkin's "right answer" thesis? Not at all. Hart's legal positivism is, in fact, completely compatible with the recognition that judges in some legal systems are invited or even bound under the positive law of the constitution to bring moral judgment to bear in deciding cases at law. Hart's is not a theory designed to show judges how they can resolve cases without making moral judgments, though neither is it a theory offering to justify their doing so (as Dworkin's is). The theory simply isn't addressed to such questions.

What I think Hart *is* to be faulted for is a certain failure to see and develop the fuller implications of his own refutation of Benthamite and Austinian positivism and of his adoption of the internal point of view. Some of these implications are acknowledged by Raz in his recent work.[50] The central or focal case of a legal system, to borrow a principle of Aristotle's method in social study, is one in which legal rules and principles function as practical reasons for citizens, as well as judges and other officials, because of people's apprehension of their moral value. Aquinas's famous *practical* definition of law as an ordinance of reason directed to the common good here has its significance in *descriptive* legal theory. As Finnis remarks,

> [I]f we consider the reasons people have for establishing systems of positive law (with power to override immemorial custom), and for maintaining them (against the pull of strong passions and individual self-interest), and for reforming and restoring them when they decay or collapse, [we find that] only those moral reasons [on which many of those people often act] suffice to explain why such people's under-taking takes the shape it does, giving legal systems the many defining features they have—features which a careful descriptive account such as H.L.A. Hart's identifies as characteristic of the central case of positive law and the focal meaning of "law," and which therefore have a place in an adequate concept (understanding and account) of positive law.[51]

Yet Hart himself, in *The Concept of Law* and elsewhere, declined to distinguish central from peripheral cases of the internal point of view

50 *See* Joseph Raz, *Formalism and the Rule of Law*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 339 (Robert P. George ed., 1992). *See generally* Neil MacCormick, *Natural Law and the Separation of Law and Morals*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 105 (Robert P. George ed., 1992).

51 *See* Finnis, *supra* note 44, at 204.

itself. Thus, he treated cases of obedience to law by virtue of "unreflecting inherited attitudes" and even the "mere wish to do as others do" from morally motivated obedience of fidelity to law. These "considerations and attitudes," like those which boil down to mere self-interest or the avoidance of punishment, are, as Finnis says, "diluted or watered-down instances of the practical viewpoint that brings law into being as a significantly differentiated type of social order and maintains it as such. Indeed, they are parasitic upon that viewpoint."[52]

This is in no way to deny any valid sense to the positivist insistence on the "conceptual separation" of law and morality. It is merely to highlight the ambiguity of the assertion of such a separation and the need to distinguish, even more clearly than Hart did, between the respects in which such a separation obtains and those in which it does not. Still less is it to suggest that belief in natural law or other forms of moral realism entails the proposition that law and morality are connected in such a way as to confer upon judges as such a measure of plenary authority to enforce the requirements of natural law or to legally invalidate provisions of positive law they judge to be in conflict with these requirements. Important work by Finnis and others has clearly identified the misguidedness of such a suggestion. The truth of the proposition *lex iniusta non est lex* is a moral truth, namely, that the moral obligation created by authoritative legal enactment—that is to say, by positive law—is *conditional* rather than absolute. The prima facie moral obligation to obey the law is *defeasible.*

What about law's objectivity? Does law "exist" prior to legal decision? Can judicial reasoning be guided by standards internal to the legal materials? At the end of the twentieth century we can, I think, affirm a position more subtle than the one Holmes asserted at the end of the nineteenth. Yes, the standards to guide judicial reasoning can be internal to the law of a system that seeks to make them so, though never perfectly. Positive law is a human creation—a cultural artifact—though it is largely created for moral purposes, for the sake of justice and the common good. That is to say, law exists in what Aristotelians would call the order of technique, but it is created in that order precisely for the sake of purposes that obtain in the moral order. So, for moral reasons, we human beings create normative systems of enforceable social rules that enjoy, to a significant extent, a kind of autonomy from morality as such. We deliberately render these rules susceptible to technical application and analysis for purposes of, for example, fairly and finally establishing limits on freedom of conduct, as well as

52 FINNIS, *supra* note 36, at 14.

resolving disputes among citizens, or between citizens and governments, or between governments at different levels. And to facilitate this application and analysis we bring into being a legal profession, from which we also draw our judges, that is composed of people trained in programs of study that teach not, or not just, moral philosophy, but the specific tools and techniques of research, interpretation, reasoning, and argument relevant to *legal* analysis.[53]

To stress law's objectivity and relative autonomy from morality is by no means to deny the Thomistic proposition that just positive law is derived from the natural law. For Aquinas himself did not suppose that positive law was anything other than a cultural artifact, a human creation, albeit a creation of great moral worth brought into being largely for moral purposes. Nor did he suppose that a single form or regime of law was uniquely correct for all times and places. His stress on *determinationes* by which human lawmakers give effect to the requirements of natural law in the shape of positive law for the common good of their communities—enjoying, to a considerable extent, the creative freedom Aquinas analogized to that of the architect—reveals his awareness of the legitimate potentially very wide variability of human laws. Whomever Holmes may have had in mind in criticizing those "text writers" who saw law as a set of deductions from a few axioms of reason, the charge has no applicability to Aquinas. In this, as in so many other respects, the Angelic Doctor was a man of the twentieth century and—if I may engage in a bit of prediction and prophecy myself—of the twenty-first and beyond.

53 I develop these thoughts at greater length in *Natural Law and Positive Law, in* THE AUTONOMY OF LAW: ESSAYS IN LEGAL POSITIVISM, *supra* note 43, at 321.