Reason and Reality in Jurisprudence

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PHILOSOPHY, it is said, springs from wonder, and the dialogues of Plato show that the first inclusive wondering was largely concerned with legal-political problems. From Plato to Hegel, the period covered in Huntington Cairns' notable history, law continued to be important, if not always central, in philosophic thought. Then specialization set in. Philosophy suffered fragmentation, jurisprudence became the province of legal scholars, and social science was departmentalized.

I am not one of those who deplore specialization; in any case, I doubt that it is possible, even if it were desirable, to diminish the pursuit of expert knowledge in complex societies. But jurisprudence has traditionally rested on a very wide perspective and the loss of its unifying functions is especially unfortunate because of the present extraordinary need to understand and improve legal institutions. The current situation does not call for depreciation of specialization but, instead, it challenges scholars to transcend the jurisprudential specialties and, with whatever aid can be derived from them, to construct a legal philosophy that more adequately meets present needs.

In arranging the jurisprudential stage, it is usual to oppose natural law philosophy to positivism. Since the question of the moral validity of positive law is, for many, of paramount importance, that is certainly a pertinent formulation of perennial issues, and it also presents them in a dramatic way which reveals that jurisprudence is a debate. The jurisprudential terrain, however, includes much more than the ethics of law, important as those questions are. It seems to me, moreover, that if we probe for more general criteria, we find that the schools of legal philosophy are more significantly divided into those which center on reason or on reality or on both. This classification allows the opposition of natural law philosophy and positivist jurisprudence, but other important indications are also supplied. Thus, by reference to this classification, legal positivists are closer to natural law philosophers than is ordinarily recognized, and both of them are opposed to the factual positivism of realist jurisprudence. For example, the principal postulate of natural law philosophy is reason, and even if that is not to be

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2. Cairns, Legal Philosophy from Plato to Hegel (1949).
identified with the analytical cognition stressed by neo-Kantian positivists, it is clear that these schools have close ties in their common appreciation of the mental aspect of law. On the other hand, the array of the *dramatis personae* which places all positivists in the same camp, must make them very uncomfortable. In fact, they are no less uncompromising in their criticism of each other than they are of natural law jurisprudence. For example, Kelsen's criticism of American Realism and the sharp attack on him by Scandinavian Realists, while they do not invalidate grouping all positivists together on the ground that all of them ignore or deny the moral validity of positive law, do suggest the more significant relevance of reason and reality.

Accordingly, it is with reference to these basic polarities, reflecting perhaps, some influence of William James' classification of "tender-minded" and "tough-minded" philosophers, that important problems of current jurisprudence will be discussed in these lectures. But instead of espousing the banner of the tough-minded, as did James, or that of the tender-minded, as have idealists, I shall defend the position that the perspective of an adequate jurisprudence must take due account of both reason and reality.

This formulation of the basic issues of contemporary jurisprudence raises difficult problems and it imposes a standard of criticism that is much more onerous than that which legal philosophers have usually employed. For, in the first place, although some classifications are better than others, hardly any legal philosophy falls neatly within any single class. Where positive law is concerned, however the term is defined, it is practically impossible to avoid some empirical reference; hence, despite their emphatic avowals to the contrary, not only the conceptualist schools but also nominalist jurisprudence, in one way or another bring facts within their province. So, too, and even more plainly, realist jurisprudence has not escaped the "contamination" of its subject matter with ideas. Accordingly, concentration upon reason or reality is a matter of degree.

But unless persistent efforts are made to come to grips with the underlying issues in jurisprudence, we must be content with distortion and oversimplification. These hazards of a necessarily polemical enterprise are often aggravated by the sweeping condemnation of disapproved legal philosophies, e.g. Austin's contempt for the "confused" thinking of natural law writers and his castigation of their ethics as "childish and babbling rhetoric." Such criticism retards the progress of jurisprudence, for what is involved concerns neither moderation nor diplomacy but instead, the extremely important question of getting at the fundamental issues of jurisprudence.

That the polemical problem continues to raise difficulties is shown in Professor Lon Fuller's lectures, where, towards the end of an extended, very severe criticism of legal positivism, he states: "Austin's theory, which suffered no contamination from the backward state of the social sciences of his day, remains today just as true, and just as lacking in significance for human affairs, as in 1832." This statement seems to assert three things—that the social sciences available to Austin were "backward," that they had no effect on his theory, and that that theory is "true" only in a trivial sense. The social science available to Austin included the work of Hobbes, Locke, Hume, Adam Smith, Bentham, Bishop Butler, the psychologist Brown, and James Mill, and his library included books by Kant, Savigny and other classics. We need not consider whether the works of these writers are "backward" by comparison with 20th-century social science because Professor Fuller was leveling his criticism primarily at legal positivism. Hence it is only necessary to note that Hans Kelsen, the present leader of that school, is unusually well informed regarding 20th-century social science and he has even made important contributions to it. That the best of their contemporary thought influenced their theories can also be fully documented in both Austin's and Kelsen's publications. And I shall later submit in some detail that legal positivism is very significant in extremely important human affairs.

That there must be a fundamental reason for such dubious criticism seems evident. I believe the root of the difficulty is the failure to recognize that legal philosophies rest upon more or less definite perspectives and aim at more or less definite objectives. The perspective of a legal philosophy is most directly and significantly expressed in the definition of "positive law"—the ultimate conception. But because of the pervasive failure to deal with the respective perspectives which the various definitions reflect, an enormous volume of jurisprudential criticism is largely irrelevant.

With a view to clarifying these issues, I have been suggesting for some time that three principal perspectives determine most definitions of positive law and, thus, their congruent legal philosophies. In brief summary, these perspectives are: that of concern regarding a moral obligation to obey the commands of a government, that of legal practice, and that of empirical legal science, the sociology of law. If we visualize a harsh dictatorship, we at once appreciate the relevance of the first perspective, within which natural law philosophy was nurtured. In that perspective, it makes sense to distinguish law from mere commands.

The second perspective, that of "lawyers' law," is easily apprehended in demo-

6. Fuller, The Law in Quest of Itself 103 (1940).
ocratic states where an obligation to obey the commands of the sovereign is usually assumed. When a lawyer is consulted, when lawyers carry on their research, the perspective of both client and lawyers is focused on the probability of the State’s employing its coercive apparatus. In that perspective, all the commands of the sovereign are important, and that is largely the orientation of legal positivism. Finally, the perspective of the legal sociologist is that of any empirical scientist. He must bring facts within the range of his work; indeed, if he is to be a legal sociologist rather than a sociologist or a psychologist, he requires a factual definition of law itself.

Even these brief outlines of the principal contexts in which positive law has been defined indicate, I hope, that if criticism is to do more than assail superstructures, if it is to come to grips with the major issues, it must take account of the perspectives of jurisprudence. That the perspectives intermingle, e.g. that lawyers must be alert to the better solutions available to courts, complicates the analysis of legal philosophies but does not alter its requirements. Nor, as I shall be concerned to show, does the recognition of the importance of perspectives imply that the legal philosopher’s task terminates when he has laid them bare. There are ways of testing the validity and fruitfulness of a perspective and its expression in a jurisprudence, both from the position professed or implied by its author and, also, by reference to other perspectives and purposes.

The course of these lectures which I have thus charted is consequently not an easy one to pursue. A legal philosophy whose perspective is grounded in reason and reality, while it criticizes theories which neglect one or the other of these ultimate polarities, is also apt to find a significant contribution there. This however, does not signify that the present need is the mere selection of valid components from all legal philosophies and the summarization of them in an eclectic jurisprudence. Reason and reality are not static things which can be piled on a grocer’s scale. No more than intelligence, will and feeling can be added one to the other to produce a living personality can a defensible jurisprudence be constructed in any such mechanical manner. Entirely new questions arise when a synthesis is attempted. An inquiry that attends to both reason and reality, while it may appeal to lawyers and intelligent laymen as good sense and also as relevant to important practical problems, must satisfy more critical standards. These are to be found in the integrative tendencies in philosophy and psychology extending from Plato and Aristotle to Whitehead and beyond. This perspective imposes extremely difficult metaphysical tasks, e.g. as regards the basic conceptions of jurisprudence; nor is it easy to find ways to express novel combinations in apt terms. But for many reasons which I shall discuss, it seems to me to be the best of all possible routes to an adequate jurisprudence.
CONCEPTUALIST JURISPRUDENCE

With his "cogito, ergo sum" Descartes, the 17th-century mathematician, reconstructed philosophy on consciousness and ushered in the modern era of conceptualism. Hardly more than a decade after the publication of his Method, Hobbes wrote that "all laws are declarations of the mind. . . ."7 Hobbes defined positive law as "those Rules, which the Common-wealth hath Commanded . . . for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary to the rule."8 Such a rule was, for him, a "declaration, or manifestation of the will of him that commandeth . . ."9 [the Common-wealth]. Hobbes left no doubt regarding the meaning of the above ethical terms: "Every man," he said, " calleth that which pleaseth, and is delightful to himself, GOOD; and that EVIL which displeaseth him: insomuch that while every man differeth from other in constitution, they differ also from one another concerning the common distinction of good and evil."10 It followed that "no Law can be Unjust."11 These have remained the principal tenets of legal positivism, although, as we shall see, there are very important differences among legal positivists, which have been ignored. Bentham's most important analytical contribution12 has only recently been published; in any case, it was John Austin's lectures, 1828-1832, at the University of London, which firmly established modern legal positivism.

(a) Austin's Imperative Theory

Hobbes' positivism is usually attributed to the fact that he lived in a turbulent period of civil wars. Cromwell or a strong king was the only hope of averting anarchy, and any kind of order was preferable to chaos—hence the Leviathan. But the inadequacy of such biographical "explanation" of a jurisprudence is evident when we ask why 19th-century liberal England produced Austin's legal positivism. The obvious influence was Austin's interest in certain legal ideas, including the basic conceptions of Roman law as expounded by German commentators. Bentham's Utilitarianism supplied his ethical theory. The liberalism of the times exerted a negative influence—e.g. it did not encourage questions regarding the legality of a dictator's decrees, such as legal philosophers in less fortunate times and countries have been prone to raise. There was an important environmental factor in the rise of the middle class of traders, following the Industrial Revolution, which greatly heightened the need for the security of

7. HOBSES, THE ELEMENTS OF LAW 147 (Tonnes ed. 1928), first published in 1650. Descartes' Method was first published anonymously in 1637, then in 1644.
8. HOBSES, LEVITAIIAN 226 (Everman's Lib. 1950).
9. Id. at 231.
11. HOBSES, LEVITAIIAN 299 (Everman's Lib. 1950).
transactions and multiplied legal problems vastly beyond those of the earlier
economy. But, as I have indicated, the most influential factor was the keen,
critical, if not inventive, mind of John Austin who, sadly frustrated in the
practice of law, discovered an outlet, indeed, his raison d'être, in the detailed
analysis of legal conceptions.

It hardly occurred to the practitioner, transplanted to the academy, that
"law" had been and could be defined in different contexts and that the purposes
and premises of the diverse definitions supplied the underlying issues. His interest
was wholly that of the practising lawyer in a democratic state. In that role, he
asked, what is positive law? And the almost obvious answer was—the commands
of the sovereign "without regard to their goodness or badness." Austin's
purpose and the context of his inquiries are most clearly shown in his lecture
On the Uses of the Study of Jurisprudence. Referring to the value of legal
science among the Roman jurists, he emphasized that, "In every principle they see
a case to which it may be applied; in every case the rule by which it is determined.
. . ." Such knowledge, he said, would prepare students for the practice of law
in England. General jurisprudence helps one to understand particular English
jurisprudence and that "can scarcely incapacitate the student for the acquisition
of practical knowledge in the chambers of a conveyancer, pleader, or draftsman." Indeed, "the study of the general principles of jurisprudence . . . has a tendency
(by ultimate consequence) to qualify for practice. . . ." And he concluded his
lecture with some remarks about the law faculty and legal education in London,
which reveal his complete devotion to the practising lawyers' perspective: "The
instructors," he said, "even if not practising lawyers, would teach under the eye
and control of practitioners: and hence would avoid many of the errors into which
the German teachers of law, excellent as they are, naturally fall, in consequence
of their not coming sufficiently into collision with practical men. The realities
with which such men have to deal, are the best correctives of any tendency to
antiquarian trifling or wild philosophy to which men of science might be prone.
In England, theory would be moulded to practice." Perhaps no greater tribute
has been paid the English Bar than the continued emphasis of British legal
philosophers on the practical perspective of Austin's jurisprudence.

For Austin, law was thus a general command of the sovereign to his
subjects. The sovereign was a definite person or group of persons habitually

13. AUSTIN, op. cit. supra note 5, at 176-77.
14. Id. at 1116.
15. Id. at 1118.
16. Ibid.
17. Id. at 1125-26.
18. "Or the notions of sovereignty and independent political society may be
expressed concisely thus.—If a determinate human superior, not in a habit of
obedience to a like superior, receive habitual obedience from the bulk of a given
society, that determinate superior is sovereign in that society, and the society
(including the superior) is a society political and independent." Id. at 226.
obeyed by his or their subjects and, in turn, obeying no other power habitually. This is the gist of the so-called "imperative" or "will theory" of law and from our present vantage point, the striking fact about it—other than the mere borrowing from Hobbes—is the omission of any reference to the reason or morality of the commands, insisted on in the long history of jurisprudence from the Stoics to Hobbes. This, however, was no accident or thoughtlessness on Austin's part. On the contrary, the separation of law from morality and concentration on analysis of the commands of the sovereign and other basic concepts were Austin's principal purpose. No more than present teachers of jurisprudence was he primarily interested in legal reform; in any case, he distinguished jurisprudence from legislation.

It has become commonplace to criticize Austin severely, to deplore his influence, and to treat him as made of the same cloth as are 20th-century positivists. I believe much of this criticism is fallacious and that until careful re-appraisals of Austin are attempted, important issues of contemporary jurisprudence will remain clouded. The unfortunate fact is that Austin's tomes make extremely dull reading. Repetitious beyond endurance, detailed and unrelieved by hardly any organization of the text, compiled, after his death, from lectures and notes, it is little wonder that even scholars prefer to read essays about him rather than to drive their lagging spirits through the two dreary volumes which contain this sensitive lawyer's life's work. The most important fact about it is that Austin's purpose was to prepare law students for their future practice.

He proceeds to attain that in a very orderly manner. First, he places all laws within the class of commands. Except for his view that laws are general commands, his criterion was not the form which distinguishes commands from other sentences but, instead, "the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded." Duty is liability to incur the sanction. Thus, he said, command, duty and sanction are "inseparably connected terms."

Austin then distinguished laws in the above sense of commands, from scientific "laws" which he views as a misnomer since laws "proper" imply desires, intelligence and volition. Of these laws, there are three types which comprise the class of commands—divine, positive, and positive morality. He excludes the first from the province of jurisprudence (i.e. they are not positive laws) on the ground that they are of extra-human origin, and he later adds that the sanctions are religious ones. Then, he excludes positive morality from the province of jurisprudence. Although, like positive law, it originates in human action,
"morality severs them from positive law."\(^{23}\) Here, one must be careful not to assume that he intended to imply that positive law was non-moral. For he states later that positive morality itself may or may not be moral;\(^{24}\) and the context of the above distinction also makes it clear that he was here concerned only with a difference in the kinds of human sovereigns, i.e. the fact that positive laws are established by political superiors while positive morality is not.\(^{25}\) Austin joins the laws of positive morality, i.e. commands of persons who are not political superiors, with mere opinions, e.g. fashions, rules of honor and international, so-called, "law."\(^{26}\) This makes "positive morality" a mixed class but Austin's purpose was simply to clear the field of everything but positive law.\(^{27}\) The term "morality" alone, he said, is ambiguous—it means either positive morality or "deserving of approbation."\(^{28}\) In current usage, he was saying that positive morality means mores (moral attitudes) which conform to or oppose ethical principles.

Having excluded all "proper" laws or commands except positive laws, from the province of jurisprudence, Austin carefully scrutinized the architecture of the positive law he knew, and he compared it with that of other mature legal systems. He looked for "principles, notions, and distinctions" common to such legal systems. And he found them in the conceptions of duty (absolute and relative), right (\textit{in rem} and \textit{in personam}), liberty (Hohfeld's privilege), injury (criminal and civil—torts, breaches of contract and quasi-contract), sanction (punishment or redress), sovereignty, independent political society, persons, acts, forbearances and things which, last, were distinguished from events and facts.\(^{29}\) In a lower level of abstraction, Austin distinguished motive, will, intention, recklessness and negligence. Finally, his legal science was expressed in the organization of rules of law by reference to their purposes and to various legal categories, such as the law of persons, law of things, sanctions and procedures.

In view of current tendencies to dismiss legal positivism from the sound agenda of jurisprudence, it may be well to pause briefly to note some of the functions of the basic conceptions which legal positivism, borrowing probably from Roman law, has preserved and explicated in great detail. It will be observed that some of them are identical with concepts of positive law but that most of them, e.g. sanction, sovereign, right, duty, event and so on, are not terms of positive law. They are terms of jurisprudence, i.e. jurisprudence refers to positive law. It is the more abstract ideas and terms which comprise the basic conceptions.

\(^{23}\) Id. at 89.
\(^{24}\) Id. at 175-76.
\(^{25}\) Id. at 181, 225.
\(^{26}\) Id. at 89.
\(^{27}\) This is summarized id. at 174.
\(^{28}\) Id. at 90.
\(^{29}\) Id. at 359.
\(^{30}\) Id. at 368-69.
and the vocabulary of jurisprudence. Thus jurisprudence elucidates positive law by explaining it in terms other than those of positive law.

It is important, next, to recognize the relation that the terms and conceptions of jurisprudence bear to positive law. The latter are also generalizations, but of a much narrower type. For example, there are rules of positive law stipulating that anyone who kills a human being intentionally shall be punished thus and so, that anyone who negligently injures any person or damages property must compensate, anyone who, having contracted etc., fails, etc., must make redress either specifically or in compensation. All such rules imply a legal system—as Austin stated, "... every right is the creature of Law." These rules, therefore, not only refer to certain classes of fact, they also signify certain imperatives and valuations, implied in the application of various types of sanction. Thus, the jurisprudential notion of duty is a distillation of all the relations of all persons subject to all the sanctions of all the rules of law. Since positive law has the empirical and qualitative references noted above, it follows that the terms of jurisprudence, whose subject matter or "referent" is positive law, refer ultimately to those same facts, ideas, imperatives and valuations.

The basic conceptions, which may be termed the "ontology" of law, serve jurisprudence in the same way that other basic notions and postulates form the foundations of other sciences and disciplines. In physics, for example, these include matter, energy, mass, velocity and inertia; and the laws of physics are stated in terms of them. They refer to common properties found in an infinite number of facts and motions, e.g. each chemical "element" specifies what is common to matter existing throughout the universe. So, too, the right-duty conception or universal represents the ultimate jural relation to which all the legally significant events, behaviors and transactions in the universe are reduced. There are hundreds of thousands of rules of law, millions of persons, and many more millions of acts, events and transactions that have legal significance. The right-duty relation signifies what is finally wanted to be known, i.e. whether the defendant must or need not do something or must or need not forbear from doing something for or to the plaintiff. What seems evident is that if basic conceptions comprise the foundation of jurisprudence, the contribution of legal positivism in preserving and elucidating them is extremely important.

Despite Austin's assertion that "the philosophy of positive law is concerned with law as it necessarily is, rather than with law as it ought to be..." his

31. Id. at 354.
32. "Accordingly, I proceeded to examine the import of the term 'Right,' considered as an expression for all rights, or for rights abstracted from the generic and specific differences by which their kinds and sorts are separated or distinguished...." Id. at 420.
33. Id. at 33.
work differs sharply in several important respects from present legal positivism. The difficulties confronting criticism become apparent when it is recognized that Austin held that there was moral truth in an objective sense and that he warmly espoused a science of ethics. It is also necessary to see that the version of natural law he opposed was that “right or justice . . . is absolute, eternal, and immutable . . . perfectly self-existent, to which . . . law conforms, or to which . . . law should conform.”34 As to this, Austin simply said, “I . . . cannot understand it . . ..”35

But while Austin severely criticized a transcendental law of nature,36 some of his discussion closely approximates humane versions of natural law philosophy. For example, he recognized “the law of nature” in ius gentium, and said, “there are legal and moral rules which are nearly or quite universal, and the expediency of which must be seen by merely natural reason. . . .”37 Austin even recognized the fusion of natural law with positive law. “The natural law,” he said, “is a portion of positive law and positive morality.”38 He spoke of “the frequent coincidence of positive law and morality, and of positive law and the law of God . . .”39 of “the portion of positive law which is parcel of the law of nature”40 and of “laws which are positive law as viewed from one aspect, but which are positive morality as viewed from another . . . .”41 Austin states that he classifies these as positive laws but he also states that if he “affected exquisite precision,” he would place them in both classes. The reason he does not do that is interesting—he “could hardly indicate the boundary by which those classes are severed without resorting to expressions of repulsive complexity and length.”42 Accordingly, a great deal of Austin’s discussion must be read as an expression of the intention to distinguish positive laws from other commands, not to say what they had in common.

Although we cannot shut our eyes to Austin’s final commitment to the lawyer’s perspective which distinguishes the Imperative Theory from natural law philosophy, neither should we ignore his ethics or the fact that his positivism was moderate and flexible, indeed, in a sense, ambivalent. On the one hand, he defends his practical perspective, as when he explains Hobbes’ assertion that “no law can be unjust,” by noting that it is “merely a truism put in unguarded terms.”43 A pernicious statute, he states, might be called irreligious and immoral. "But to

34. Id. at 310.
35. Ibid.
36. Id. at 179.
37. Id. at 216.
38. Id. at 179.
39. Id. at 204.
40. Id. at 205.
41. Id. at 186.
42. Ibid. For similar statements of the fusion of custom, positive morality and positive law, see id. at 185, 204.
43. Id. at 275-76.
call it illegal were absurd. . . ."44 On the other hand, in addition to the above quoted statements, Austin held "it is manifest that law natural, considered as a portion of positive, is the creature of human sovereigns. . . ."45 For Austin, "justice is nearly equivalent to general utility."46 Thus, when law and morality were "what they ought to be . . ." or " . . . in so far as law and morality accord with the Divine commands, legal and moral rules have been fashioned on the principle of utility, or obtained by observation and induction from the tendencies of human actions."47 Austin was very much interested in the "higher things," the intellectual and moral values. He was a warm advocate of benevolence and disinterestedness48 and he spoke respectfully of the law of God.49

These were not merely personal characteristics which do not affect jurisprudential issues. Their least significance is to absolve legal positivism from insistent charges brought against it, which sometimes insinuate that legal positivists are insensitive persons and that legal positivism is necessarily indifferent to ethics and empirical knowledge. Austin was alert to the creative role of judicial decision and it need only be added, so far as legal reform is concerned, he was Bentham's disciple. If Austin's reasons for excluding moral validity from the essential criteria of positive law are borne in mind, i.e. the perspective of lawyers' law, the important issues concerning legal positivism can be correctly determined.

Austin's quarrel was with the intuitionist school, especially that represented by Bishop Butler. He was extremely critical not of Butler's avowal of the existence of moral truth, but of the thesis that man has an instinct or sense of justice which instantaneously recognizes and approves the good and disapproves the bad.50 Austin insisted that a theory of morality which could give no reasons for such approbation and disapprobation, other than ascribing them to an innate instinct was fallacious. For example, it could not account for the frequent differences in valuation, the uncertainties felt in dealing with moral problems, and the length of time required to form moral judgments.51 Hence, he argued, intuition is an extremely unreliable tool, indeed, it is not a test of moral truth at all—"if he likes it he knows not why." But we should not be misled by Austin's criticism of Intuitionism. "The jus naturale," he said, "would be liable to little objection, if it were not supposed to be the offspring of a moral instinct or sense, or of innate practical

44. Id. at 275.
45. Id. at 205.
46. Id. at 276.
47. Id. at 127.
48. Id. at 168-69.
49. Id. at 106, 113, 179. "To crush the moral sentiments, is not the scope or purpose of the true theory of utility. It seeks to impress those sentiments with a just or beneficent direction: to free us of groundless likings, and from the tyranny of senseless antipathies; to fix our love upon the useful, our hate upon the pernicious." Id. at 120.
50. Id. at 107.
51. Id. at 154.
principles.” It is because “it is closely allied . . . to that misleading and pernicious jargon, [that] it ought to be expelled . . . from the sciences of jurisprudence and morality.”

Austin’s intent was to use scientific methods of observation and induction to discover what that ethical truth was. “The science of ethics,” he said, would “determine the principles whereon [positive law and morality] must be fashioned in order that they merit approbation . . . it affects to expound them as they ought to be.” In his emphasis upon benevolence, moral character and intellectual curiosity, Austin anticipated the enlightened Utilitarianism of the younger Mill. In his espousal of objective methods of ethical inquiry, he anticipated 20th-century scholars who emphasize factual research and induction in their efforts to place ethics upon a scientific basis.

It is possible to say all of this about Austin’s ethics without agreeing with his criticism of the intuitionist theory, especially if that is supplemented by other methods of inquiry, e.g. logical analysis, judging the compatibility of various courses with one’s general moral position, consulting informed opinion and considering the solutions of others in similar situations. Moreover, there are many situations where absolute duties are recognized and performed regardless of any consideration of consequences, e.g. in keeping promises. Ordinary speech also reflects such intrinsic values and it certainly makes sense in some situations to ask whether there is an obligation to act, without any reference to consequences. When Austin was challenged regarding the competence of anyone to determine the utility of a course of conduct, he answered that there was no other rational test to apply, that the choice was only between assessing the utility of the consequences and superstitious reliance upon a fictitious innate moral sense or instinct. The experience of end-seeking and value-realization, e.g. the intrinsic value of rational procedure, the disvalue of destroying life or property without any thought of consequences and many other instances of present appreciation of values are emphasized in natural law philosophy rather than in Utilitarianism. Austin seems not even to have been aware of the ambiguity of “utility,” that it has instrumental connotations, and that unless one considers the value of purposes and ends, he ignores the more subtle aspects of ethical knowledge which intuitionists and natural law philosophers have emphasized. And he uncritically accepted Hume’s thesis that there was nothing distinctive in the subject matter of the then-called moral (i.e. social) sciences and no reason why they could not be as exact as the physical sciences. “Ethics,” he said, “would rank with the sciences which are capable of demonstration.” But while one may have definite reserva-

52. Id. at 216.
53. Id. at 177. See also id. at 127, 140.
54. Id. at 137.
55. Id. at 127, 140.
56. Id. at 141.
tions about Austin's proximity to natural law philosophy, it must also be remembered that he recognized the existence of moral truth no less than do natural law philosophers, and his jurisprudence, unlike that of current legal positivists, allowed ample range for criticism of positive law on ethical grounds. As will be seen shortly, there are other important differences which set Austin apart from current legal positivists.

Just as it is helpful in elucidating Austin's jurisprudence to keep in mind that Intuitionism and unclear uses of "law" were his targets, so is it important to consider the criticism which has been leveled against him. From Sir Henry Maine to Sir Carleton Allen, Austin's sovereign has been treated very severely. In some societies where custom and customary laws are dominant, as well as in federal states, it is often difficult and sometimes impossible to locate a determinate person or persons who wield the maximum power.

It seems to me, however, that there are at least two answers to this criticism; and that they are not to be found in Austin's work is not decisive if the question concerns not Austin's defects but the substantial validity of his theory. One of these answers has been supplied by Professor C.A.W. Manning who pointed out that in every society there is a "habit of obedience," the functioning and recognition of authority, and that that supplies the empirical referent of "sovereign." The other answer is a logical one, namely, that the idea of "command" implies a superior, a dominus or sovereign, and that that suffices to support an imperative theory of law. There are other problems concerning sovereignty which have become acute in an age when international cooperation requires the abandonment of 17th century notions of national supremacy. But they are not directly relevant to the present inquiry.

There is, however, a criticism of Austin's theory, made by Holmes as long ago as 1870, which has become important in legal sociology. Holmes, perceiving the relevance of perspective, acknowledged that Austin's "definition of what lawyers call law is doubtless accurate enough," but, he said, "it seems to be of practical rather than philosophical value." Holmes doubted that only political superiors can make positive law; but his principal point was that the definiteness of a rule and the certainty of its enforcement were more important than its origin in a sovereign. He referred, as an example, to a gross breach of social etiquette which would surely result in ostracism, and he contrasted the almost certain enforcement of that and other rules with the total lack of enforcement of various rules of "lawyers' law." For the indicated reason, he also disagreed with Austin's exclusion

57. ALLEN, LAW IN THE MAKING 3, n. 2 (5th ed. 1951).
of international law from the scope of positive law, asking, "Is not that law which is certain in form and in sanction?"

In accord with Holmes' emphasis on enforcement, legal sociologists encounter many norms in associations and sub-groups which were not laid down by the State's sovereign, but which are nonetheless habitually obeyed, and their violation is regularly met by coercive measures. It is true that these sanctions are often not physical ones, although they may be, (e.g. punishment of a child or of a member of a gang of criminals by its leader), that membership in and withdrawal from these groups are usually voluntary, and that if these norms conflict with the laws of the State, they must give way to them. These differences, however, from a sociological viewpoint are not very important and, as noted, the origin of the rules in the commands of the sovereign is irrelevant to the kind of questions social and legal scientists investigate. In Austin's defense and in elucidation of the problem, it must be said that he was interested in the practice of law, not in the sociology of law. But, as we shall see, this issue cannot be fully resolved by reference to the divergence in the perspectives of legal philosophies.

In recent years an increasing number of critics of legal positivism have emphasized various versions of natural law philosophy. But there are important differences among these legal philosophers. For example, Professor Fuller places Austin in the company of Kelsen, and I shall return to this question shortly. The principal differences may be discussed in relation to Professor Fuller's thesis that "... legal positivism ... insists on drawing a sharp distinction between the law that is and the law that ought to be. ... Natural law, on the other hand ... denies the possibility of a rigid separation of the is and the ought, and ... tolerates a confusion of them in legal discussion." Professor Fuller's criticism of legal positivism seems to represent the traditional natural law perspective and, in any case, the purpose of law or in law has been a perennial theme, emphasized in modern jurisprudence by Jhering and many others. It is also evident that in democratic states, the normal assumption is that laws are, by and large, morally valid. On the premise that "law" means morally valid law or that purpose is immanent in law, legal positivism errs in separating law from morality and purpose. That is the gist of this age-old criticism.

But despite a superficial simplicity, it is, in fact, extremely difficult to elucidate this problem because differently based terminologies and perspectives intermingle; and some interesting criticism has been directed against Professor Fuller's present-

61. AUSTIN op. cit. supra note 5, at 188-89, 221.
63. E.g. in op. cit. supra note 6, he discusses legal positivism without suggesting that there are any differences in the ethical positions of Austin and Kelsen.
64. Id. at 5.
It is especially significant that Morris Cohen, who, perhaps more than any other legal philosopher, may be considered the leader of the current revival of natural law thinking in this country, should have taken serious exception to Professor Fuller's discussion. The problem merits careful analysis.

With reference to Professor Fuller's statement that natural law "tolerates a confusion of is and ought in legal discussion," one's inclination is to assume that "confusion" was intended to refer to the characteristics of positive law, not to a confused discussion of them. But as one reads Professor Fuller's text, it appears that he actually was referring to confused discussion. For example, he speaks of "a certain coalescence of the is and the ought" in the natural law philosophies, and he defends them from the charge of "obfuscation" by referring to their "... refusal to force reality into a dichotomy...." But the coalescence of the is and ought of positive law not only differs from, it is hardly an excuse for, a confused analysis of it.

Morris Cohen was objecting to a thesis which he thought contradicted both common usage and the evaluation of laws. He was saying, in effect, surely it makes sense to assert this is a good steam engine, that is a bad one, this is a bad law, that is a good one. Professor Fuller, in replying recently to Cohen's criticism, states that all he said is (1) "that a law must be interpreted in the light of some purpose" and (2) "that this purpose should not be subjected to a false 'logic' derived from experience in dealing with non-purposive facts." But does it meet Cohen's criticism to respond that laws must be interpreted in the light of some purpose? And Cohen was eminent among American scholars in insistence on the significance of purpose and culture in human societies.

A clue to the difficulty is revealed in Professor Fuller's response to Professor E. W. Patterson's criticism that purposive interpretation does not require a confusion of is and ought. Professor Fuller states: "Does he mean to assert that he can take any given rule of law and tell just where the rule as it is leaves off and where the rule as people think it ought to be begins? If he cannot effect this separation, then... he too is compelled to tolerate a 'confusion' of is and ought." But, it may be suggested, the test which Professor Fuller requires to support his thesis seems to reify law, as though it were a thing like a concrete pavement with grass shoulders or a mixture of sand and sugar, where it is literally
and physically possible to separate the elements. But how does one separate an idea or a unitary body? What can be done is to distinguish the components of a law. This is an act of mind and involves no operation upon the subject matter. For example, the human personality is an integration of intelligence, will and feeling, and although it is impossible to separate these functions, it is commonplace to distinguish them.\(^7^3\)

That this issue concerns much more than verbal problems is indicated in other parts of Professor Fuller's discussion. For example, he states that, "Though the natural law philosopher may admit the authority of the state . . . it will be found in the end that he draws no hard and fast line between law and ethics. . . ."\(^7^4\) But it is quite clear that the Prince, Ruler or Sovereign is as essential in the natural law philosopher's definition of positive law as it is in legal positivism.\(^7^5\) For example, Rommen states: "The natural law calls imperatively for specification by positive enactments, even though it is at the same time the measure and guideline of the positive law. It requires the positive law . . . Without such a positive norm no certainty and no order at all could arise in view of the number and diversity of the deductions . . . An authoritative determination of the conclusions is plainly needed in order that these, as norms which emanate from authority and demand obedience, may be able to support conscience and reason."\(^7^6\)

In order to clarify the above issues, it is necessary to distinguish two problems—(1) the question whether the ethical validity of the sovereign's commands is essential to their being law from (2) criticism of law.\(^7^7\) The first question concerns the nature of positive law and its definition or description. While natural law philosophers agree with legal positivists regarding the origin of law in the political sovereign, they deny the sufficiency of the positivist criteria. The natural law philosopher accepts the positivist criteria as necessary ones, but he also requires the moral validity of the commands, as essential to their being positive law. It is in this sense that natural law thinking tolerates, indeed insists upon, the fusion of the formal-factual positivist criteria of the sovereign's commands with their ethical validity. But this insistence does not render it any the less able or desirous of drawing "a hard and fast line between law and ethics" than does legal positivism. As was indicated above, the meaning of this differs from that of positivist separation, i.e. in natural law terms, the line is drawn between ethical principle plus positivity (the formal-factual criteria of

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73. Morris Cohen refers to the twilight zone and notes that while it is impossible to separate day and night, it is possible to distinguish them. *Op. cit. supra* note 66, at 243.


75. A relevant summary of the definition of "positive law" and references are given by Ago, *Positive Law and International Law*, 51 Am. J. INT'L L. 681 (1957).


77. This is discussed in connection with the relation of Plato's *Republic* to *Laws* in Hall, *op. cit. supra* note 1, c. 3 (1959).
law) and ethical principle; while in legal positivism, the line is drawn between positivity (i.e. "law" in positivist terms) and ethics. I have long been very critical of the positivist exclusion of valuation from the definition of law. But the elucidation of legal positivism must take account of its perspective; and it is equally important, in criticism of positivism, not to misinterpret the relevant natural law position.

With reference to the second question, natural law philosophers, legal positivists and laymen distinguish existing laws from other, preferred laws. Indeed, almost any criticism of a law implies that there is a difference between "the law that is" and "the law that ought to be." For example, if one criticizes the present rule on contributory negligence and advocates adoption of a comparative negligence rule, he is distinguishing the law that is from the law that ought to be, without implying that the present law is not a valuation, that it does not include an ought element. "The law that is" is in the sense that a value is now embodied in positive law, that the actualization of a value is implemented by legal instrumentalities. There is no reason why a present law, i.e. a present coalescence, may not be criticized and abandoned in favor of a better one which, e.g. facilitates greater realization of the same value or substitutes a better value.

In sum, positivists assert (1) that law is not necessarily ethically valid and also, (2) they distinguish Is from Ought. In the writer's view the first position is defensible up to a point from the perspective of lawyers' law; but it is also vulnerable because, among other reasons, as I shall try to show, the lawyers' perspective is not sufficient to meet the lawyers' needs. As regards (2), it is submitted that on either positivist or natural law premises, it is necessary to distinguish Is from Ought whether those terms refer to fact and value or to present legally implemented values and other values which are not legally supported. 78

The above difficulties in Professor Fuller's discussion result, I believe, from a lack of appreciation of the contributions of legal positivism and of interest in the general problem of what an adequate jurisprudence should include. For example, Professor Fuller ignores the problems of classification, 79 the basic problems concerning the conceptions or ontology of jurisprudence, and the fact that legal positivism has not only been their principal repository but has also provided the only sustained modern elucidation of them.

It is especially unfortunate that some of Professor Fuller's remarks imply a depreciation of the "rule of law," despite the fact that limiting official power by law has the highest moral significance. He speaks of "the law as it is" as "an

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78. Ibid.
79. See id. c. 9.
accidental configuration," and he even said, "The question is whether drawing a sharp line between the two [positive law and morality] is important." Perhaps those who have worked in criminal law are especially sensitive to the desirability of drawing a sharp line between law and morality and consequently recognize the importance of the legal positivists' purpose and contribution in that regard.

In other ways, also, Professor Fuller's discussion unwarrantably concedes the charge that natural law philosophy undermines the "rule of law." For example, in discussing the preparation of a brief, he asks whether the lawyer should choose his "point of anchorage" "in rules of law" or "in the rightness of his client's case," and he advocates the latter. Here, Professor Fuller seems to have fallen into the same kind of error which he charges positivists with committing. "In general" and in democratic countries, the correct "point of anchorage," it is submitted, is in legal rules and the "rightness of the client's case." There are obviously many qualifications on this answer, which cannot be dealt with in the abstract. But in so far as any generalization may be ventured, it must surely be along lines which do not oppose law and morality. If a choice between them is presented as the central issue in jurisprudence, most legal philosophers in democratic countries may be expected to prefer law and Austin's moderate positivism.

(b) Kelsen's Pure Theory

Equally significant, but for quite different reasons, is the criticism of Austin by Hans Kelsen, for here we encounter not a clash of sharply divergent perspectives but the logical extension of conceptualism to its final limits. Writing his first important books almost a century after Austin, but without having first read him, Kelsen, the distinguished exponent of current Legal Positivism, presents a much more refined conceptualist jurisprudence than did his illustrious English predecessor. There are enough common ties to include both philosophers within the same school of thought; but there are also sufficient differences to imply important consequences in jurisprudential criticism.

The neo-Kantian revival which began at the end of last century exerted a very strong, if indirect, influence upon Kelsen. In that idealist philosophy there can be no direct knowledge of the external world. The categories of the mind—quantity, quality, space, time, etc.—impose an order on, and make intelligible, what would otherwise be chaos. Here, indeed, there is a sharp, fundamental gap between mind and fact, value and existence; and this is reflected in Kelsen's

81. Id. at 36.
82. Id. at 13.
83. Id. at 14, 15, 111, 112, with which cf. id. at 135-37).
84. Hermann Cohen and Paul Natorp were the leading writers.
rigorous separation of the realm of physical nature from the mental sphere, the realm of ideas.

Because of his naturalistic ethics, however, Kelsen did not deal with law and morality in the way that Austin did. Kelsen, ignoring Kant's philosophy of the practical judgment, denied any validity to ethics. Instead, he followed the tenets of the Vienna School of logical positivism which held ethical judgments meaningless, except as emotional ejaculations or masks of ulterior motives. In Kelsen's words, "from the point of view of rational cognition, there are only interests, and hence conflicts of interest." Justice, he said, is merely an "irrational" ideology. Accordingly, one can hardly say that Kelsen separated law from morality without hazarding a misrepresentation. Kelsen merely dismissed morality as irrational; and if there was a separation of realms by him, it was the separation of the idea of law from what he regarded as extraneous facts, including emotive expressions.

The further significance of this can be ascertained by considering Kelsen's criticism of Austin, which reveals more fully the wide gap between these exponents of legal positivism. Kelsen's first criticism is the rather startling assertion that "Austin... pays no attention to the distinction between 'is' and 'ought' that is the basis of the concept of the norm." What impels such an acute critic like Kelsen to place this at the very beginning of his discussion, despite Austin's repeated exclusion of the "ought" from the essential criteria of positive law? The point of Kelsen's criticism is that Austin "does not employ" "the central concept of jurisprudence, the norm," hence, he misses the distinctiveness of the ought—the ideational realm of normativity. For Kelsen, rules of law are pure norms, i.e. pure ideas which must not be confused even with the psychological process of thinking those ideas. Norms ("oughts") are meanings or significances formed and apprehended by cognition. Austin, lacking this knowledge, could not correctly formulate the notion of a pure norm and thus his jurisprudence lacks what is central in Kelsen's.

Kelsen's second criticism is a corollary of the first one, namely, that, for Austin, laws are commands in the psychological sense, i.e. they are factual expressions of the will of actual persons. In Austin's words, "... commands, it is manifest, proceed not from abstractions, but from living and rational beings." Here, too, the Imperative Theory is fallacious, states Kelsen, because a command exists only so long as the will of the commander exists. But all the legislators may be dead and, in any case, a statute does not represent the actual will of the entire legislature, since some of the legislators opposed it. Therefore "law cannot be

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86. Id. at 54.
87. Ibid.
88. Austin, op. cit. supra note 5, at 113.
the psychological will of the lawmakers." It is, instead, "a rule stating that an individual ought to behave in a certain way." Legal rules or norms are expressed in propositions having a distinctive structure, i.e. joining the concept of a circumstance or delict to the concept of a consequence or sanction by means of a verb meaning "must be" or "shall be," in the imperative sense. The subject matter of jurisprudence is thus a system of ideas expressed in propositions which exhibit this distinctive structure and express certain meanings. Kelsen calls them "hypothetical judgments."

Kelsen's third criticism is a further purification of the Imperative Theory by excluding a factual characteristic of Austin's view of sanctions, namely, the psychological fact of obedience through fear. "From the standpoint of a strictly analytical method," states Kelsen, "this formulation is not correct." "And psychic coercion is not a specific element of the law," he adds, since moral and religious norms are also coercive in that sense. In any case, psychological motives must be excluded from the sphere of "cognition [which is] directed only to the content of the legal order," i.e. only to legal ideas. Accordingly, states Kelsen, Austin's theory is "not analytical or normative jurisprudence." From that viewpoint, it is the meaning expressed in the norm which stipulates physical coercion, not the actual influence of this upon human behavior, that is relevant.

Fourth, Kelsen criticizes Austin's definition of legal duty in terms of the actual "chance" of incurring the sanction, on the ground that it is sociological, not analytical. Kelsen makes much of a quotation from Max Weber's sociology of law which is almost identical with Austin's definition. Both definitions are stated in terms of fact. This, insists Kelsen, is incorrect from the point of view of analytical jurisprudence, which is concerned with the idea of what the courts must do, not with what they do or the actual probability of what they will do.

Of the remaining criticisms by Kelsen, the most characteristic is that Austin's theory "has no legal concept of the state." His "independent political society" and his "sovereign" are sociological or political conceptions, not juristic ones.

89. Kelsen, supra note 85, at 55.
90. Id. at 56.
91. "By reason of the sanction working on their wills or desires, the parties obliged by a law proper commonly adjust their conduct to the pattern which the law prescribes." Austin, op. cit. supra note 5, at 212.
92. Kelsen, supra note 85, at 57.
93. Ibid.
94. Ibid.
95. Id. at 58.
96. "The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligations: ..." Austin, op. cit. supra note 5, at 92.
98. Kelsen, supra note 85, at 63.
99. Id. at 64.
Kelsen’s Pure Theory, in contrast with this Austinian empiricism, “derives its concepts only from an analysis of positive law.”¹⁰⁰ In this view the State is not composed of individuals forming a political society; it is, instead, a “legal order.” In other words, the legal order which is set up by the State “is the state itself.”¹⁰¹ “Positive law” and “state” are synonyms.

This is the outcome of the rigorous analytical method of excluding all but the minimum of factual reference that is necessary to render concepts intelligible. In Kelsen’s words, “Facts are considered in this jurisprudence only to the extent that they form the content of legal norms.”¹⁰² Not only are all other references to fact excluded as irrelevant to positive law but, as was noted, the question of the ethical validity of legal rules is completely ignored as mere “nonsense.” The province of jurisprudence is thus severely restricted to analysis of pure legal ideas.

The distance between Austin’s Imperative Theory and Kelsen’s Pure Theory seems considerable when one recalls Austin’s view of ethics and ethical knowledge, his acknowledgment that in determining the meaning of positive laws, it is often important to consider their ethical significance,¹⁰³ and the abundance of empirical reference in his jurisprudence. In addition, Austin was very modest in the specification of his purpose, to educate lawyers, while current positivists seem to place no limits on the relevance of their perspective and theory of positive law. All this must be taken into account as well as Austin’s insistence that some laws were bad or even pernicious. If we are not to be the victims of classifications of legal philosophies, we should accordingly bear in mind that when we place Austin and Kelsen in the school of legal positivism, that is a makeshift arrangement.

There is no escaping facts in a discipline concerned with law, and reality disowned, enters the province of jurisprudence surreptitiously. Despite Kelsen’s insistence upon the purity of positive law, its admitted reference to a minimum of fact, the illicit inclusion of fact in the basic norm (Grundnorm), the stipulation of a minimal efficacy as a condition of law or of the validity of law, and enforcement by physical coercion render the Pure Theory both significant and incompatible with its author’s avowals.¹⁰⁴ And, although Austin’s jurisprudence was relatively “impure,” he, too, was a child of 18th-century conceptualism.¹⁰⁵ Moreover, it is only

¹⁰⁰ Ibíd.
¹⁰¹ Ibíd.
¹⁰² Id. at 50.
¹⁰³ AUSTIN, op. cit. supra note 5, at 125.
¹⁰⁴ The writer has discussed Kelsen’s theory in his LIVING LAW OF DEMOCRATIC SOCIETY, c. 2 (1949) and in STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY, c. 2 (1958).
¹⁰⁵ E.g. he spoke of “mere matter of fact.” op. cit. supra note 5, at 1123. Although he was apparently familiar with Savigny’s work, it had no perceptible influence on him.
necessary to advert to the increasing significance of the sociology of law to recognize that both Austin and Kelsen are far from having provided an adequate jurisprudence. We shall have occasion to discuss this further in the third lecture and to consider there, also, the inadequacy of legal positivism even with reference to the needs of practising lawyers.

But, of course nothing I have said in criticism of conceptualist jurisprudence is intended to suggest that its distinguished exponents were too "mental." All thinking is valuable; and one can only say, the more the better. The criticism is directed at the relative isolation of mind from reality. When mind concentrates upon itself, narrowing the subject matter of its jurisprudential inquiry by depreciating or excluding the facts and values that are required to give its concepts vital significance, it not only misses very much that is extremely important, it ends in imbalance and, as we shall see in the next lecture, it falls an easy victim to nominalist jurisprudence.

II

FACTUAL POSITIVISM

(a) Realism

In current jurisprudence "reality" means fact, indeed, in the positivist view, it is confined to observable fact. The most interesting representatives of fact-oriented jurisprudence are the American Legal Realists and the Scandinavian Legal Realists. We are familiar with the former as advocates of certain tendencies rather than as constituting a definite school of thought. Some of them emphasized the sharpening of concepts and their precise adaptation to the relevant facts. They were keen critics of the judicial process and made important contributions to legal sociology.106 For the present purpose, however, we shall consider not these contributions, but the extreme empiricism that found expression in Legal Realism.

We must remember, if we wish to appreciate the intent of both American and Scandinavian Legal Realism, that it was the heir not only of Hume's naturalistic view of social science but also of the positivist sociology founded by Comte and made persuasive by the success of physical science. Comte had argued that "In the metaphysical state, which is only a modification of the first [theological state], the mind supposes, instead of supernatural beings, abstract forces, veritable entities (that is, personified abstractions) inherent in all beings, and capable of producing all phenomena."107 That was the superstition to be

106. Cf. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY, chapters 2 and 7 (1958).
107. COMTE, THE POSITIVE PHILOSOPHY 26 (Martineau trans., 1858).
combatted by positivism. "Every theory," said Comte, "must be based upon observed facts . . .,"108 hence, "the positive philosophy . . . restricts [human imagination] to discovering and perfecting the co-ordination of observed facts. . . ."109 Moreover, it was persuasive, regardless of metaphysical preferences, that, granted the objective of a factual science of law, the legal scientist, no less than the physicist, must have a field of observable data regarding which he could generalize discovered uniformities. Thus, positive law was defined as "official behavior," the Ought of law was to be temporarily excluded from what the law Is, and legal rules were sometimes given either an insignificant role in the judicial process or they were wholly excluded as a mere facade.

Not only American critics but many others pointed out the impossibility of distinguishing official from non-official behavior unless legal rules were employed to determine who were officials. It followed also that the promised legal science of American Realism would be indistinguishable from general positivist sociology. And the use of ideas by Realists, many of them illuminating and incisive, stood out in sharp contrast to the anti-metaphysical disparagement of rules of law. This seemed to many to provide a striking demonstration of the impossibility of ignoring the normativity of law and other conceptions which render phenomena legally intelligible.

It is precisely in connection with this central question that Scandinavian Legal Realism is especially significant. This school of thought, stemming from the general philosophy of Hagerstrom, is represented in jurisprudence by Lundstedt, Olivecrona and Alf Ross, whose book, *Towards a Realistic Jurisprudence* (1946) is probably the best exposition of it available in English.110

Professor Ross poses the principal problem of jurisprudence in terms of "the dualism of reality and validity in law,"111 i.e. law is viewed in traditional jurisprudence as both a fact and as a binding ethical norm, as existence and as validity, as real and as ideal, as physical and as metaphysical. Because traditional jurisprudence is a dualism, he continues, it is self-contradictory, a bundle of antinomies. Thus, the validity of law is determined in relation to relevant facts, and those facts are determined in relation to the validity of law, e.g. Austin's commands of the sovereign (defined in factual terms) assumes his legitimacy.112 So, too, Gray defines law as rules laid down by courts, but who courts are is determined by reference to, or the assumption of, law.

"Antinomy" here may mean circularity of definition. But in another

108. Id. at 27.
109. Id. at 452.
110. Other representative studies are: LUNDSTEDT, LEGAL THINKING REVISED (1956) and OLIVECRONA, LAW AS FACT (1939).
111. ROSS, TOWARDS A REALISTIC JURISPRUDENCE 11 (1946).
112. Id. at 58.
context, the "antinomy" is found in the fact that the definition of a rule of law solely in terms of validity has no relation to facts and requires, to complete it, the inclusion of the effectiveness of law; and vice-versa. Here "antinomy" seems to mean the incompleteness of definitions of law in terms which are exclusively ideal or exclusively factual and, also, to imply the necessary, if surreptitious, reference to the omitted element. Ross formulates several "antinomies" but some of them are said, e.g. in the context of discussing the sources of law\(^\text{113}\) and elsewhere,\(^\text{114}\) to be variations of the first noted antinomy. In any case, the central antinomy arises from some implications of the dualism of traditional jurisprudence. It concerns the dualism of what we have become accustomed to calling the Is and the Ought of positive law.

Professor Ross indicates the direction of his solution by severely criticizing traditional jurisprudence as "metaphysical." Its conceptions, he affirms, are illusions, phantoms, "magico-mystical" notions. "It will readily be recognized," he states, "that the antinomies ... will be dissolved if the law is considered as a phenomenon ..." [if] "the irrational realities are substituted for the rationalized fictions ..."\(^\text{115}\) Thus Ross' intent is clear—he wishes to supplant the dualism of traditional metaphysical jurisprudence with a monistic positivist jurisprudence that is superior by virtue of its scientific unitary quality.

Before presenting his theory, Ross criticizes the other principal efforts to transcend the dualism of traditional jurisprudence and to achieve a monistic theory of law. They have taken two directions. One of them, represented by Kelsen, is the conceptualist theory which excludes factual reality and reduces law to pure ideas. The other, represented by American Legal Realism, excludes concepts and reduces all law to behavior. In Ross' terms, Kelsen sees only validity in law, the American Realists, only fact. Ross criticizes each of these monisms from the perspective of the other, which combined, become, curiously enough, the dualistic perspective of traditional jurisprudence. One is therefore forewarned that Ross recognizes at least the importance of the intentions or claims of traditional jurisprudence. But his pronounced positivism also makes it abundantly clear that in the end, he will be found in the camp of extreme empiricism.

Ross' theory is a refinement of the behaviorist tenets of extreme American Realism. It went astray, he states, echoing Kelsen and various other critics, in failing to recognize the "validity" or, as we might say, the ought aspect of law. Thus, the definition of positive law in terms of predictions of what courts will do \(^\text{116}\) misses the normativity of law. It is therefore irrelevant, e.g. to the position of the judge who is not interested in predicting what judges will do. He is trying

\(^{113}\) Id. at 133.
\(^{114}\) Id. at 171-72.
\(^{115}\) Id. at 157, 202.
\(^{116}\) Id. at 72.
to solve a problem and feels the pressure of legal rules. And to assert that law is "official behavior" and then to study the behavior of certain persons, who mirabile dictu turn out to be officials, covertly admits the validity of law, i.e. the legal ideas by reference to which officials are selected and known. So, too, in discussing the sources of law, Ross dismisses the American Realists' inclusion of psychological, economic, ideological and other factors which influence decision, as lacking reference to distinctive legal sources and to legal validity.

How then does he overcome the dualism of traditional jurisprudence, escape the antinomies which Kelsen failed to do, and achieve a monism which, unlike that of American Realism, also takes due account of the validity, the normativity, of law? Ross' solution is simple and direct—validity "has no meaning, is a mere word."117 What is actually found in consciousness, he states, are "rationalized expressions of certain subjective experiences of impulses." Thus, "'notions' of validity mean certain peculiar disinterested behavior attitudes."118 "It is the subjective experience of these which the mind owing to a natural illusion rationalizes in the idea of a 'validity' as something objectively given."119

The strategy of Ross' theory is thus quite simple. Since the validity or normativity, the Ought of law, is meaningless, a fiction, an absurdity, a phantom and a myth, a sound jurisprudence will substitute the reality for the fiction, the fact for the phantom—in a word, factual disinterested attitudes for validity.120 In this way121 the dualism of traditional jurisprudence is overcome. Thus, too, a monism which, unlike American Realism, takes due account of the validity of law is achieved!

Such a theory obviously requires considerable support and the support supplied by Ross is an imagined history of the origin of disinterested attitudes. Ross asks the reader to imagine that certain supernatural beings interfered in human affairs by punishing behavior (which he does not characterize). This would give rise to interested impulses or attitudes to avoid behavior that is punished. Then, on that basis, rules of conduct might be established solely in terms of the risk of punishment. But these would not be positive laws, states Ross; it would only describe the actual behavior of the supernatural officials, reflecting the fallacy of the American Realists. In "real life," the ability of the rulers to exercise compulsion results from their being regarded as authorized,

117. Id. at 77.
118. Ibid.
119. Ibid.
120. Id. at 78.
121. In further exposition, his thesis is that law is exhausted in three psycho-physical realities—an interested behavior attitude, namely, "an impulse of fear of compulsion," "a disinterested behavior attitude having the stamp of validity" and "an actual inductive reaction between these two"—each tends "to cause and stabilize the existence of the latter...." Id. at 78-79.
as competent officials whose commands are valid. But this presupposes the crucial "disinterested attitudes." These, we are told, are "spontaneous feelings or behavior attitudes" engendered in situations like the above hypothetical one.\(^{122}\) The "notion of competence," i.e. validity, is "a rationalization deduced from this behavior attitude."\(^{123}\) In sum, "disinterested impulses to action [are] created by social suggestion. . . ."\(^{124}\)

Perhaps, in fairness to Professor Ross, we should summarize his theory in his own words, namely, "If, first, we assume a community based on a pure system of compulsion . . . there would in this community arise collective customs caused by an interest in avoiding compulsion. But the more firmly these customs became established, making the exercise of compulsion comparatively rare, the more would the collective custom, by virtue of its social suggestive power, produce spontaneous disinterested impulses to action having the stamp of validity; that is to say, the compulsory order of things would gradually establish itself as valid or legitimate. In the great majority of instances the citizens would obey the law not for fear of punishment (interested behaviour), but simply because 'the law is the law, and the law has to be obeyed,' a general behaviour attitude of compliance and respect for the 'existing' order of things having developed (disinterested behaviour)."\(^{125}\)

Enough has been stated of Professor Ross' theory to permit analysis of it to proceed without serious neglect of his collateral arguments. It may at once be granted that a careful appraisal of this theory requires one to attend to the major facets of modern factual positivism; nor does the following criticism depreciate the significance of Ross' attempt to transcend the dualism of traditional jurisprudence.

The obvious difficulty with Ross' theory concerns "disinterested attitudes." Such attitudes are either factual, as Ross argues, or, like Duguit's social solidarity, they are normative facts, i.e. they include the idea of validity. If disinterested attitudes are wholly factual, there still remains the problem of getting from that existential datum to the realm or "illusion" of validity. Ross is careful to avoid the use of any ethical terms in describing the hypothetical situation of the supernatural rulers whose only method of governing is the use of compulsion. If he had made the slightest attempt to distinguish some uses of compulsion from other ones, if he had made the slightest reference to the possibility of any choice by the subjects or of any ground for obedience other than avoidance of brute compulsion, he would unavoidably have been required to distinguish the situations and customs which engendered disinterested attitudes from those which engen-

\(^{122}\) Id. at 80.

\(^{123}\) Id. at 81.

\(^{124}\) Ibid.

\(^{125}\) Id. at 81-82.
dered the interested ones. Since this could be done only by using ethically significant terms, it would have rendered his account patently inconsistent with his avowals. But silence and the omission to discuss an obviously important question are no substitute for proof. If all attitudes are factual reactions to compulsion and customs of avoiding compulsion, there must be crucial differences in compulsion and its uses and in the congruent customs to account for the differences between disinterested attitudes and interested ones.

Second, the problem of validity is neither solved nor avoided by assuming that disinterested attitudes are only facts. If they are only facts, they nonetheless participate in actions that have moral significance. For example, some people practice racial discrimination and most persons would agree that that is immoral. So, too, it is possible to define "disinterested" in purely factual terms, e.g. to stipulate that a disinterested judge is one who seeks no private profit, who does not know the litigants, and so on. But the only point of characterizing such an attitude as disinterested is that correct action, e.g. the discovery of right law, is possible under that condition. If there is no such possibility, if there is no recognition of the validity of some decisions as opposed to the invalidity or injustice of biased ones, what is the occasion for, or the point of, characterizing an attitude as "disinterested"? Thus it is pointless to give "disinterested attitude" a purely factual definition unless a significantly different factual meaning is given "interested attitude"—but the only relevant significance of either term is ethical. No mere refusal to recognize that somewhere along the way in analysis of that pair of terms, the idea of sound valuation must be admitted, can serve as elucidation of their differential meaning.

The evident fact is that it is difficult to think of any term which more definitely means or implies validity than does "disinterested attitude." The small dictionary on my desk defines the word as "not influenced by regard to personal advantage" and lists as synonyms, "fair," "impartial," "unbiased." Each of these terms literally breathes connotations of moral validity which distinguish such attitudes from biased, selfish, irrational unjust attitudes. Accordingly, if disinterested attitudes are normative facts, Ross' theory is only the illicit introduction of validity into allegedly purely factual premises.

It will be noted also that Ross' supposition of the genesis of disinterested attitudes—supernatural rulers and so on—is not a theoretical "model" constructed in relation to facts; it does not delineate an ideal type distilled from, or even relevant to, history. Nor is it a summary of theories of current archeology and anthropology. Ross' supposition serves no theoretical purpose; it simply allows him to restate in detail the premise with which he started his inquiry.

If a legal sociologist wishes to discover what the most likely theories are
regarding the genesis of political society and the characteristics of law, i.e. if he seeks hypotheses which have been tested against the available facts, he will find some in the literature of recent anthropology. There is, e.g. Robert Redfield's *The Primitive World and Its Transformations* (1953). Instead of Ross' extreme empiricist supposition regarding the origin of the validity of law, Redfield finds persuasive evidence that even preliterate peoples had moral codes and that at least some individuals among them regularly expressed critical evaluations. "The point upon which we are to insist," states Redfield, "is that in this early condition of humanity the essential order of society, the nexus which held people together, was moral . . . Each precivilized society was held together by largely undeclared but continually realized ethical conceptions . . . And I follow Eliseo Vivas when he writes: ' . . . they probably had the same degree of moral sensibility, though perhaps focused toward different objects than those toward which we, the men of contemporary technological society focus ours.'"\(^{126}\)

What distinguishes modern civilized man from his preliterate ancestors is " . . . something that imposes the privilege and complicating duty of intellectual integrity, self-criticism, and generalized disinterestedness."\(^{127}\) Disinterestedness, far from being an emotional attitude or impulse, is thus a precious achievement. It is also noteworthy that Mr. Justice Frankfurter, referring recently to "the qualities which should be sought for in members of the Supreme Court," said: "The first requisite is disinterestedness; the second requisite is disinterestedness; the third is disinterestedness. This means, in short, the habit of self-discipline so inured that merely personal views or passions are effectively antisepticized and thereby bar a corrosion of judgment leading to arbitrary determinations."\(^{128}\)

It is not a scientific construction but a naturalistic ethics,\(^{129}\) like Kelsen's, that is the perspective of Ross' monistic positivism. This is evident in his assertion that validity is merely the "rationalization of the irrational,"\(^{130}\) in his tenet of the "complete absurdity of metaphysical justice,"\(^{131}\) and in his thesis that "the 'function' or 'aim' of law . . . is exclusively that of creating peace."\(^{132}\) "The truth is," he adds, "that men are fanatical ideologists who can be induced by a

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130. It will also have been perceived that the persuasiveness of Ross' refutation of the American Realists' failure to deal adequately with the validity of law does not result from his factual interpretation of validity (as attitudes). Instead, its persuasiveness depends upon that of the traditional view of validity and the illicit, hardly avoidable suggestion of that in Ross' criticism.
131. *Id.* at 117.
132. *Id.* at 116.
suitable suggestion to do anything whatever, even to die, for an idea,"\textsuperscript{133} i.e. in Ross' terms, an emotional impulse. 'The result of such restrictive preoccupation with fact is that the meaning of the normativity of law, its binding quality or "validity," is simply ignored. The assertions that there are only emotional attitudes, that the moral quality of law is an illusion and that ethical and legal ideas are only rationalizations contradict everyday moral and legal experience and are irrelevant to the solution of legal problems and, thus, to jurisprudential issues. The illusion, if there is one, arises from the self-defeating dogma that human thought is a myth and the notion that the use of such terms as "phantom," "fiction" and so on is an explanation of ideas and knowledge.

Even if it be assumed that disinterested attitudes are only facts, Ross' theory does not in the least explain the ideas of law. Indeed, he does not even attempt to account for any transformation of disinterested factual attitudes into the definite legal ideas which constitute mature legal systems. Suppose there are disinterested attitudes, that they are wholly factual, and that human beings are addicted to an illusory objectification of them. Do these suppositions provide the slightest explanation of the positive law of advanced societies with its vast organization, nicety, precision and range of legal ideas? There must be some rational process whereby disinterested attitudes are transformed into the complexities of positive law which, on the whole, are suited to the analysis of the facts, transactions and problems that comprise the subjects of adjudication. Ross ignores even the rational functioning of logic in classifying the various branches of law and in organizing them internally. And, of course, his theory does not even touch the practice of the lawyer working daily with technical legal ideas, e.g. tax, corporation, administrative and other regulations whose foundation in factual attitudes is extremely remote, if not completely non-existent. In sum, Ross' realistic jurisprudence suggests an attempt to account for the relativity and quantum theories by attributing them to an illusion of the sensation of matter. But sensing facts is one thing and theoretical physics, as well as a modern legal system, is quite a different one.

An ironical toll for preoccupation with fact makes it impossible to take account of the facts. For despite avowals of scientific intention, a restrictive realistic jurisprudence boomerangs upon itself. Thus, for Ross, the reality of law is only "an actual element of compulsion."\textsuperscript{134} The descriptiveness of rules of law, the behavior which manifests their incidence, their operation in institutions and even the social attitudes which sustain many legal ideas escape his net. The fact, as Whitehead and others have shown, is that fact is not a simple matter, it is not something simply there, waiting to be collected. The discovery of fact is dependent upon thought. Without ideas there are no facts to be discovered, and

\textsuperscript{133} Id. at 86.
\textsuperscript{134} Id. at 78.
a jurisprudence which holds that ideas are rationalizations, illusions, fictions and absurdities only closes the door to the possibility of an empirical science of law.

We are thus led to the utterly self-defeating consequence of the theory that laws are meaningless, fictive, absurd, etc., i.e. to the implications of that theory for jurisprudence itself, including Ross' realism. If the rules of the law of property, crimes, contracts, commercial instruments, etc. are "meaningless rationalizations" and "illusions" because they are metaphysical, upon what ground is one to ascribe any validity to Professor Ross' theory of interested and disinterested attitudes, psycho-sociological processes, rationalization and the rest? Yet, Ross' theory is certainly presented on the supposition that it is valid. Thus, the extreme realistic legal philosopher, no less than the psychological behaviorist, exhibits the paradox of rationality in a world that is, in his account, irrational.

(b) Nominalism

Extreme realistic empiricism culminates in nominalism, the view that a universal is "an arbitrary fiction of my mind" or "nothing at all,"135 and this, as we have seen, is the doctrine Professor Ross applied to legal conceptions. Again, in a recent article, where he discusses logical and linguistic implications of his theory, Ross states, "Words like 'ownership,' 'claim' and others, when used in legal language . . . are words without meaning, i.e. without any semantic reference. . . ."136 Indeed, in this view, there is nothing to communicate since nominalism is "the doctrine that things called by the same name have only the name in common. . . ."137 If words are not symbols which communicate the common characteristics or resemblances of things, they can only be viewed in relation to other words, isolated from reality. Above all, they cannot serve as parts of sentences which describe realities.

I have called attention to the metaphysical foundation of extreme factual realism because the corresponding nominalist jurisprudence with which we are most familiar is the British variety; and that might seem to be based upon Austin. As I have pointed out, however, Austin was far from being a nominalist. His definitions had descriptive reference and he sometimes even spoke of "essences." This must deter any tendency to assume that current British nominalist jurisprudence is merely an extension of legal positivism.

At the same time, it is easy to see why Austin, if he did not encourage

136. Ross, Tu-Tu, in SCANDINAVIAN STUDIES IN LAW 149 (1957). Cf. "I determine the essence or nature which is common to all laws that are laws properly so called." AUSTIN, OP. CIT. SUPRA NOTE 5, AT 82, ALSO 83, 405.
137. JOSEPH, AN INTRODUCTION TO LOGIC 31 (2d ed. 1916). Cf. DEWEY, LOGIC—THE THEORY OF INQUIRY 263 (1938).
nominalism, did not bar its rise in jurisprudence. It was not difficult to step from his conceptualism to nominalist jurisprudence. Given the "anti-metaphysical" metaphysics of extreme factual positivism, it makes no difference whether the legal philosopher starts with legal terms or whether he begins with behavior. If the two inquiries are pursued far enough and with sufficient consistency, the product will be nominalist jurisprudence—the treatment of law as a system of words. We have seen this in Ross' realistic jurisprudence, e.g. concerning the meaning of legal terms, and we shall now consider it in the jurisprudence of Dr. Glanville Williams, whose orientation is in the language of law.

In a series of essays on Language and the Law, Dr. Williams first summarizes a logical positivist theory of language; and he then applies it to law. Some insight into the metaphysical foundation of his approach is suggested by the fact that he approves Ogden and Richards' statement that redness and justice are simply "phantoms due to the refractive power of the linguistic medium." When we appear to speak of relations," he adds, "we are merely using the words as tools, which does not involve actual referents corresponding to them." That these "tools" are only instrumental to other words is also indicated in the assertion that, "Philosophers of the so-called 'realist' school from Plato onward have mistaken for a fundamental characteristic of reality what is merely a characteristic of language."

Will this theory of language satisfy those who seek an answer to problems that concern the communication of knowledge of facts, qualities and relations? For example, pointing to a man carrying an infant, someone suggests, "they are father and son." Another asks, "if A is greater than B, and B is greater than C, what is the relation of A to C?" A third calls attention to the work of physicists and other scientists and asks, what characteristics of physical nature permit such manipulations to go on? Are the theories of physics also a mere matter of words? If they say nothing about external realities, it is strange indeed that action in reliance upon them results in the construction of bridges and the correct prediction of future events.

It is in its definition of "definition" that the central thrust of nominalism is bared. Definition, we are told, means replacing the word to be defined by other words. But we are directly warned by Dr. Williams that "This view of definition throws overboard the theory [of descriptive or real definition] initiated by

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139. Id. at 83.
140. Ibid. Italics added.
141. Ibid. It will be noted that "realist" is here used in the traditional sense implying universals, and not in the almost opposite sense of extreme empiricism which we have been considering.
Aristotle and widely accepted after his day."¹⁴² Thus Aristotle goes the way of Plato and the reader awaits the revelations of the new linguistics and the deeper insights that are to illuminate the difficult problems of jurisprudence. These are hardly provided in the assertion that "genera and species are . . . no more than subjective conveniences of classification."¹⁴³ which apparently transforms biology, chemistry and all other sciences into dull prose lacking any important relations to fact. But we may dismiss such misgivings since we are assured that "what is important is a subjective or emotional matter"¹⁴⁴ and that value judgments "merely express emotional reaction to reality."¹⁴⁵ Since law consists of value judgments, it follows that "the whole of the law consists of emotive statements."¹⁴⁶ All this "rejection of metaphysics [by] Logical Positivism," we are informed, "is gratifying to the Anglo-American jurist . . ."¹⁴⁷ But no evidence is adduced that would give this assertion more than a verbal status. Nor is any attempt made to demonstrate that the rule in Shelley's case, the rule against perpetuities, and the rules of negotiable instruments are emotive utterances!

Dr. Williams then applies this theory of language to the definition of positive law.¹⁴⁸ He holds that "this question is purely a verbal one . . ."¹⁴⁹ and the fact that not only Austin but also Pollock, Bryce and very many other eminent scholars have maintained that there are better and worse definitions of "law" does not alter Dr. Williams' simple thesis that all that is involved is Humpty Dumpty's classic formula: "The question is which is to be master—that's all."¹⁵⁰ Thus, he criticizes Austin for speaking of "law properly so-called," i.e. for his insistence on the "proper" use of the term. Dr. Williams, if it may be pardoned, properly points out that Austin's purpose was to elucidate lawyers' law and that he should not have assumed that his definition was valid for every use of the term "law." His infraction, however, in Dr. Williams' eyes, was not a minor one. He used descriptive definitions¹⁵¹ and that is why, despite their general agreement with much of Austin's theory, he is guilty of the worst of all possible errors in the estimation of nominalists.

Although he had castigated "the sterile discussion of definitions of the word

¹⁴². Id. at 388.
¹⁴³. Ibid.
¹⁴⁴. Id. at 389.
¹⁴⁵. Ibid.
¹⁴⁶. Id. at 390.
¹⁴⁷. Id. at 396.
¹⁴⁹. Id. at 147.
¹⁵⁰. Id. at 151.
¹⁵¹. "Nor is he [Austin] one of those writers who, starting with a word 'sovereignty,' ask themselves, What shall I mean by it? Where shall I place it? He starts with an assumption of fact—the existence, or assumed existence, in the world, of some political societies, as defined by him, and asks, What Is the essence of such an assumed situation of fact?" Manning, supra note 58, at 197-98.
law that has done so much to discredit jurisprudence,"152 Dr. Williams decided ten years later that the definition of “crime” and “criminal law” was an “effort worth making.”153 I have discussed his essay elsewhere154 and will merely note that after rejecting all descriptive definitions, Dr. Williams comes to the following conclusion: “a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal.”155 And since Dr. Williams holds that “what is important is a subjective or emotional matter,”156 and since he also identifies law with emotive utterances, it is clear that he has cast off all the moorings of jurisprudence to reality. Thus nominalist jurisprudence and extreme empiricism arrive at the same terminus. Both terminate not in description or insight, but in words that refer to other words which finally refer to the words with which one started. It is an interesting commentary that it was Bertrand Russell, in his presidential address to the Aristotelian Society, who said: “The treatment of words by the Logical Positivists has in it, to my mind, an element of superstition. They seem to think that we can know all about words without knowing anything about ‘facts.’”157

Thus we see the consequence of a progressively intensified particularism. First, there is the moderate positivism of Austin, whose concepts had considerable empirical reference.158 Next, Kelsen, rigorously pursuing Kantian conceptualism, restricts factual references to the minimal requirements of intelligibility; and valuation becomes an irrational ideology. Finally, combining doctrines of mathematical logic with the naturalistic ethics of logical positivism, nominalism excludes all reference to facts and values, and concentrates, in intention, wholly upon words. In the nominalist view, the greatest error in the entire history of jurisprudence is that the metaphysics of Plato and Aristotle, especially their theory of language and definition, found acceptance. The remedy is very simple—one need only recognize that words have no intrinsic meaning and that anyone may with equal propriety use the term “law” in any way he chooses.159

I submit, with respect, that Dr. Williams, misconceiving the central problem of jurisprudence, has erected a straw man. He believes that throughout the history of jurisprudence philosophers thought words had a peculiar intrinsic nature which made them fit particular facts, and that he is supplying a new

152. Williams, supra note 148, at 150.
154. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY, C. 1 (1958). Chapters 6 and 10 of this book also contain discussions of Professor Herbert Hart's similar theory.
155. Williams, supra note 153, at 130.
156. Williams, supra note 148, at 149, 152.
158. See note 151 supra.
159. Supra note 148, at 153.
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20th-century discovery when he denies that. But this has been common knowledge since Plato. For example, Plato said, ". . . there is nothing to prevent things that are now called 'round' from being called 'straight' and vice versa; and things will be no less fixed and definite if we change their names and call them by opposite terms. The same may be said of definition. . . ." 160 There is no more reason, e.g. why "book" should be used to refer to certain objects rather than "livre," "libro," or "buch"; hence the long arguments spun on the assumption that word-magic is at the bottom of disputes about "law" are irrelevant to jurisprudential issues.

The principal difficulty in jurisprudence, stated in terms of the language problem, results from the fact that no one starts with a linguistic tabula rasa. One meets a living functioning language, and if he wishes to communicate, which, it seems necessary to emphasize, is the purpose of jurisprudence, he cannot be the master of his words. He must for the most part conform to, and build upon, existing usage, and the margin of effective originality is strictly limited.

Second, when one speaks about positive law, he cannot successfully assume that anything and everything he says about it is equally important or equally unimportant. For while it is true, as Dr. Williams urges, that nothing has only a single characteristic, it does not follow either that there are no important differences or that importance is a matter of emotion. Twenty-five hundred years of jurisprudence reveal some evidence of what is important, e.g. the perennial issues; and the struggle for freedom from tyrannical government, in which context natural law definitions of positive law are especially pointed, is also important, most persons would agree. The argument of subjectivism is self-defeating, as we have seen. For example, its proponents are hardly in a position to argue that determining whether the definition of law is a verbal issue is a purely subjective matter since in that view all discussion, including their own, is subjective, i.e. meaningless. The alternative is that, whatever law means or is, some things said about it to describe it or elucidate it are more important than others. They are more important because they contain more truths or come closer to them. And that, in turn, implies that there are better and worse linguistic usages.

Third, despite assertions to the contrary, the fact is that there has been sufficient agreement regarding the definition of "positive law" to render the disputes about that central issue quite meaningful. For, whatever else legal philosophers have said about positive law, they have with rare exceptions, agreed that positive law has the formal characteristics of "commands of the sovereign" and that it is enforced by physical sanctions. For example, as was seen above, natural law philosophers do not dispute the origin of positive law in the ruler's commands.

So, too, Pollock, in criticizing Austin's definition, states that, "... definition, if exclusively insisted on, errs by elevating what is at most one characteristic of law into its essence; that contrariwise, by losing sight of what is really an essential constituent, it narrows the proper scope of law and tends to an unsatisfactory view of its operation...."\(^{161}\) Thus, even if there are uncertainties, there is also sufficient agreement about certain of its characteristics to permit intelligent discussion of law.

Debates regarding "positive law" have arisen not because it was assumed that a writer cannot define his terms, but because non-positivist writers, both natural law and sociological, have insisted, while positivists have denied, that within the agreed province of positive commands, there are additional important criteria, i.e. certain facts and values, which should also be taken into account.

That this is not a merely verbal dispute becomes evident if we consider why philosophers insisted through the ages that there were better and worse uses of the word "law." Why were they not content to add qualifying adjectives such as "good" and "bad" and thus avoid much of the dispute with positivism? One answer has been indicated above. A living language is an institution, not merely a collection of symbols or numbers. Given a living language, the established use of the word "law" and the requirements of communication set limits to literary license. As Professor R. Robinson has stated with reference to the principal, i.e. the communicative, function of language, "On the one hand, we scholars see that there is no natural connection between a thing and its name; on the other hand, people constantly ask us which name is correct, and they are right to do so. . . . The correctness of a name depends on the answer to the question: what do we want from this name, and what character will make it best do what we want it to do?"\(^{162}\)

Accordingly, natural law philosophers, e.g. will not abandon a restricted meaning of "positive law" because much more than mere usage is involved. Adherence to the importance of the rightness of commands is, in the light of traditional usage, incompatible with the abandonment of a meaning of "positive law" which has communicated that perspective and purpose for many centuries. The practice of law is important, but it is also important to oppose dictators and to guide courts towards sound decisions. In sum, legal philosophers have important communications to make and, given the existing language, there are better and worse ways of conveying their meaning.

\(^{161}\) Pollock, Law and Command, L. Mag. AND Rev. 3d Ser., 191 (1872), quoted by Williams, op. cit. supra note 148 at 149. Italicis added.

\(^{162}\) Robinson, A Criticism of Plato's Cratylus, 65 Philos. Rev. 332 (1956). Cf. "It is by criteria derived from consideration of the requirements of the referring task that we should assess the adequacy of any system of naming." Strawson, On Referring, 59 Mind, N.S. 341 (1950).
Even as regards neutral, ordinary affairs, linguistic change does not solve problems. It is easy to say, e.g. that there is nothing about the words "water" and "child" which necessitate their being applied only to certain things and persons and nothing to prevent an agreement (on paper!) that henceforth "water" means beer and "child" means mature person. But can language habits be changed in that summary way? And, if they could, what would be accomplished since it would still be necessary for some purpose to distinguish "water" from ale and "child" from persons past fifty years of age. The current superstition in jurisprudence is the notion that difficult problems can be solved merely by manipulating words. In pointing this out at the conclusion of a close analysis of the work of several logicians, Dewey and Bentley criticize their acceptance of "...the words man utters as independent beings—logicians' playthings akin to magicians' vipers or children's fairies..." Logics of the type we have been examining flutter and evade, but never attack directly the problem of sorting out and organizing words to things, and things to words, for their needs of research. They proceed as though some sort of oracle could be issued to settle all puzzles at once with logicians as the priests presiding over the mysteries.

So, too, legal sociologists require a definition of positive law which, e.g. indicates important differences between a technical tax regulation and the law on homicide. Legal sociologists often study social norms that are not positive laws in Austin's sense, but are only "positive morality," despite the difference in origins, however, they detect no substantial differences in conduct. They, too, must insist upon a definition of law which serves their purposes. It is thus clear that the various perspectives of divergent legal philosophies and definitions cannot be resolved by a stroke of the pen. Nor, if a fuller accord than now exists concerning terminology is to be reached, will it be the result of winning adherents to the view that only verbal questions are involved. It can be achieved, as I shall attempt to show in the next lecture, only by determining what is the common ground of the various schools and by increasing jurisprudential knowledge in the light of that discovery.

In sum, defining "positive law" is not a merely verbal matter except in a specious unrealistic sense. For (1) in a living language the term already has certain meanings, as have numerous other related words. One can redefine these terms on paper, but general acceptance of the new meanings even among scholars is another matter.

(2) In order to communicate effectively one must by and large conform to established meanings. Accordingly, there are rigorous limits on the extent

163. Dewey and Bentley, Knowing and the Known 38 (1949).
of departure from them that can be taken consistently with effective communication.

(3) The assumption of positivists, despite their avowals of verbalism, is that non-positivist definitions of "law" must give way to theirs. Definition is merely verbal, they say, ergo the positivists' definition is the "proper" one! But there are other rational interests in established meanings of "positive law," and it is not sound to ignore the perspectives which are required to sustain other legal philosophies.

Finally, (4) the legal scientist cannot, like the logician, completely ignore established usage, although he must certainly alter it to suit his more exact purposes. But this is not a simple matter. Among many such scholars, for example, it has become increasingly recognized that all societies generate and conform to systems of norms, which are goal-directed and, thus, express valuations. The legal scientist's principal purpose is to develop and test theories which necessarily specify the conditions of their relevance and valid operation, e.g. freedom from dictation, social need, and so on. Norms thus developed and adhered to, must, for his purposes, be distinguished from others which are arbitrarily imposed. It would therefore be misleading for a scientist to speak of "good laws" and "bad laws" because that would imply his approval or disapproval of them, when his intent is to indicate their relation to his theory.

We seem to have reached certain conclusions regarding jurisprudence, e.g. that some legal philosophers have concentrated on concepts, while others have been preoccupied with fact; and also, that unless and until the perspectives of legal philosophies are examined, one is apt to indulge in peripheral criticism or in dubious polemics. There are undoubtedly other descriptions of the perspectives of legal philosophies than those I have presented. For example, one might focus on some specific ones such as the *Volksgeist* of historical jurisprudence, the pleasure-pain principle of Bentham's philosophy, Duguit's functionalism, Pound's interests, and so on. With reference to the definition of "positive law," I have suggested that three rather definite perspectives have had great influence—the practical one of the lawyer and the citizen, especially the litigant, that concerning the moral obligation to obey the commands of a government, and the perspective of the scientist who requires a distinctive legal-empirical subject matter. It has seemed to me that, intersecting and encompassing all these perspectives are the wider ones of reason and reality. In the modern specialization of jurisprudence, one or the other has been emphasized in two positivisms—legal and factual. In the final lecture I shall discuss some interrelations of these perspectives and thus, perhaps, suggest the outlines of an integrative jurisprudence.
The Perspective of Integrative Jurisprudence

If criticism of legal philosophies is formulated without reference to the perspectives of the prevailing specializations, it is not very significant to argue, e.g. that Austin should have adopted a natural law perspective instead of the one he chose. For some practical purposes, all the commands of the sovereign are positive law, and that is readily recognized in a democratic state. But it does not follow that perspectives are immune from criticism or that philosophies do not exhibit the vulnerability of their foundation. For, at least in jurisprudence, a perspective cannot be severely insulated without resulting losses. For example, that Austin's conception of positive law is the most useful one for litigants and practitioners will certainly be questioned these days when the judicial process is more realistically understood and the problem-solving character of adjudication is known to be typical rather than marginal. This has often been emphasized and it is possible to show why, despite Austin's appreciation of judicial legislation, even his moderate positivism imposes unnecessary limitations on the effectiveness of legal practice.

Whatever opinion one holds regarding such practical criticism of legal positivism, it must be granted that, important as is the lawyers' perspective, there are other perspectives which are equally important. If one considers the range and character of legal problems, it seems axiomatic that jurisprudence should not be restricted to the province of lawyers' law, and the history of jurisprudence and its inclusiveness almost everywhere support the presumption. Moreover, the limitations resulting from preoccupation with a single perspective are serious ones, e.g. the incompatibility of avowing the purity of concepts and at the same time admitting fact in important connections in order to sustain a philosophy. It is only necessary to refer to the sociology of law to indicate the inadequacy of legal positivism for other inquirers than lawyers, and I shall shortly submit that even from the lawyer's point of view, legal positivism does not suffice.

Legal positivism, for certain practical reasons, took all the commands of the sovereign as the subject matter of jurisprudence. It therefore required, nor could it avoid, a very general definition of positive law. For the inclusion of all these commands within the class of positive law meant the inclusion of technical, archaic and, as Pollock noted, even irrational, commands. In other words, it included commands having every conceivable factual and qualitative reference. The consequence is that it is impossible to find much that is common among positive laws thus selected.

This problem is typical of the dilemma of any theorist. The wider the net cast, the fewer are the common properties of what is caught. Accordingly, if the
discovery and specification of more common properties are desired, in order to
make possible a wider range of knowledge, the more selectivity there must be,
the narrower must be the definition of the class. If, e.g. you wish to say what is
common to all life, you must limit yourself, perhaps in the manner of Aristotle, to
its nutritive property. But if you restrict yourself to the class of human beings, you
can discover nutritive, sensitive, rational, spiritual and other common characteris-
tics. This suggests that more significant theories and a much larger body of juris-
prudential knowledge than are available in legal positivism can be constructed
upon criteria found in a selected body of sovereign commands.

Let me illustrate how this affects legal positivism, meeting Austin on his own
ground, where he argues that a knowledge of legal science helps lawyers to under-
stand their law better. Accepting the test of utility, let us consider legal positivism
in relation to criminal law and compare it with the utility of a theory constructed
on descriptive definitions, i.e. having empirical-qualitative reference. There is the
positivist conception of law, as simply a general command of the sovereign. Because
of this premise and the consequent exclusion of the ethical significance of any
criminal laws from his definition of criminal law, Austin is unable to distinguish
criminal from non-criminal law except by reference to the fact that the State, not
a private person, institutes and controls a criminal proceeding. What help does
this theory of criminal law give lawyers? Does it provide them with ideas or
knowledge which they can use in the analysis of the many diverse problems which
arise in practice in the large field of Austin's "criminal law?"

A full estimate of the utility of legal positivism of this area would require a
lengthy discussion of the descriptive theory of criminal law which I have presented
elsewhere in detail. I can only say here that that theory, constructed initially by
reference to the felonies and major misdemeanors, defines criminal law in terms of
seven principles, namely, legality, mens rea, conduct (effort) and its concurrence
with mens rea, harm, causation, and the punitive character of the sanction. These
principles are generalizations derived from the fusion of specific rules, defining
the particular aspects of different crimes, with various doctrines, e.g. those con-
cerning insanity and mistake. Thus, the principles are derived from the substantive
character of the criminal law, limited, as above, to rules and doctrines which are
congruent with the principles.

The result, it is believed, organizes the defined field of criminal law by

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164. Austin, op. cit. supra note 5, at 518. In one place, at 397, he adds that
the criminal sanction is punitive, but usually he shared Bentham's view that all
legal sanctions are "evil," without distinguishing among evils. He also held that
there was no difference in the ends or purposes of sanctions since all of them are
deterrents (520). And he found no difference in the respective "tendencies" of civil
and criminal harms (417). It may be concluded that Austin viewed "punishment"
formally or indiscriminately "evil."

165. supra note 1, c. 1, 13 and, Hall, General Principles of Criminal Law
(1947). See also, Allen, Legal Duties and Other Essays in Jurisprudence 233
(1931).
providing a set of apt ideas. It also helps lawyers to analyze previously unexamined criminal laws. And it supplies a basis for understanding and criticism of the problems which fall within the more widely determined Austinian field, e.g. strict liability, the objective standard, the felony-murder rule and so on, as well as proposed reforms. Is it not likely that the lawyer who is armed with such a theory of criminal law, using a set of ideas that are significant with regard to the admittedly most important areas of criminal law (in the wide sense) will function more effectively in his various roles than a lawyer who is equipped with Austin's theory?

It will have been noted that the above theory of criminal law draws upon all three of the perspectives discussed above and thus exemplifies their inter-penetration. This suggests that if we generalize the descriptive theory of criminal law to include the entire field of positive law we should be able to construct an integrative jurisprudence. Despite their inter-penetration, however, combining the various perspectives in a single jurisprudence raises extremely difficult problems. Some may understandably hold that each perspective serves its own important purposes and that each must remain isolated from the others. Shall we conclude that legal positivism, natural law philosophy and empirical legal science are incompatibles, that one can only elucidate each of them apart from the others and that efforts to effect a synthesis are futile? This, it seems to me, is the ultimate challenge to legal philosophers who seek to transcend the specialities. Various current integrative tendencies in philosophy, e.g. in the work of Whitehead, Urban, Sheldon and Dewey and Bentley, in their joint book, represent a long tradition stemming from Aristotle (and I would add some of Plato's dialogues), and indicate that much more than an eclectic jurisprudence is attainable if reason and reality are held in intimate interrelation.

I have tried to show in the above instance of criminal law theory, how the perspective of legal positivism can and should be extended to include the perspectives of natural law philosophy and legal science, drawn from the empirical, qualitative references of legal terms. So, too, each of the other perspectives is also intertwined with that of lawyers' law. For, as we have seen, natural law philosophy requires that positive law be found among the ruler's commands. And, as Kelsen and others have pointed out, legal sociology presupposes the lawyers' formal conception of law, although this does not, it seems to me, require it to accept the ontology of legal positivism or all lawyers' applications of political sovereignty. Because of these interrelations, there can be no question of the relevance of at least some aspects of the various legal perspectives and philosophies for each other. It is possible to do much more than recognize that. We can, I think,

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166. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY, c. 1 (1958).
167. URBAN, BEYOND REALISM AND IDEALISM (1949).
169. DEWEY AND BENTLEY, KNOWING AND THE KNOWN (1949); also Dewey's essay Body and Mind, in his PHILOSOPHY AND CIVILIZATION 299 (1931).
greatly accelerate the progress of jurisprudence by determining a common province of positive law.

This implies that the definition of positive law and all the other basic conceptions of jurisprudence will be both formal and descriptive, i.e. they will have empirical and qualitative references as well as formal ones. The significance of this is evident when we recall that the high-level abstractions of jurisprudence refer to ideas of lesser generality, which may be designated "legal theories," and these refer to the rules of positive law. And the rules, which are also abstractions but of much less generality, obviously have empirical-qualitative reference, e.g. to end-seeking human conduct. It follows that that, too, is the ultimate reference of the high-level abstractions of jurisprudence.\(^{170}\) This provides the initial insight regarding synthesis and there are many ways of elucidating and applying it, e.g. the above descriptive theory of criminal law. It is necessary, first, however, to indicate the direction of synthesis by reference to the monistic-dualistic issue previously discussed.

Other things equal, one may concede the superiority of a single theory which provides a unitary explanation of various data and problems, over a dualistic theory which rests on divergent mutually exclusive postulates; and one gathers that this is especially applicable to physical science. But jurisprudence is a social discipline; hence the ideational characteristics of the subject matter must be distinguished from the factual ones: reason and reality are polar elements and the one cannot be reduced to the other. Indeed, if anything has been established in recent years in the social disciplines, it is that reductionism, i.e. the (attempted) reduction of thought to material things and their movements, is hardly more than a pretense. It would be without jurisprudential significance if it could be done. It cannot be done without completely transforming the significance of human actions and the social attributes of personal interrelations. Accordingly, if monism requires that ideas or "validity," as Ross terms it, be reduced to fact or, as extreme nominalists would have it, that reference to factual resemblances be excluded,\(^{171}\) one can only say that monistic jurisprudence is a fallacy. A much more defensible case could be made that dualism is inescapable in any significant jurisprudence. Indeed, the strength of traditional jurisprudence is precisely that it eschews crude reductionism and deals with mind and fact as distinctive and important.\(^{172}\)

\(^{170}\) HALL, *op. cit. supra* note 166, c. 1.

\(^{171}\) "It [Dewey's theory] differs fundamentally from nominalism in holding not only that the general has its ground in existence (and hence is not a mere convenient memorandum or notation for a number of singulars), but that symbolization is a necessary condition of all inquiry and of all knowledge, instead of being a linguistic expression of something already known which needs symbols only for the purposes of convenient recall and communication." DEWEY, *LOGIC-* THE THEORY OF INQUIRY 263 (1938).

\(^{172}\) See, e.g. CASTBERG, PROBLEMS OF LEGAL PHILOSOPHY (Bergen, Norway).
But the consequence, I should like to suggest, need not be the antinomies of traditional jurisprudence. Without destroying or ignoring the basic differences between ideas and facts, the antinomies can in certain extremely important respects be transcended in a jurisprudence whose perspective is based on the integration of reason and reality in human conduct. The central insight of this jurisprudence is that man is distinctive as the integration of thought and fact. He is simultaneously the rational-valuing-physical animal. In the perspective of integrative jurisprudence, positive law is a unique coalescence expressed in human conduct. The logical difficulties encountered in deriving fact from value or value from fact arise from viewing law as comprised of sentences or ideas; and the consequent antinomies are not resolved, but are only avoided, in the particularistic monisms. In man's conduct, however, mind and fact coalesce—human action is the unification of otherwise disparate processes.

If we visualize the simple conditions of primitive society, the location of positive law in distinctive conduct is persuasive and, as anthropological studies attest, that is widely recognized. As a matter of fact, the written paraphernalia of modern legal systems were slow in making their appearance. For example, Pollock and Maitland, writing of Anglo-Saxon law, say, "Our Germanic ancestors were no great penmen, and we know that the reduction of any part of their customary laws to writing was in the first place due to foreign influences."—

Of what did Anglo-Saxon law consist? "The only substantive rules that are at all fully set forth have to do with offenses and wrongs, mostly those which are of a violent kind, and with theft, mostly cattle-lifting . . . the law of property is almost entirely left in the region of unwritten custom and local usage." There were also fragmentary rules concerning persons, courts and legal process. But Pollock and Maitland inform us that the inclusion of a complex web of conduct is essential in determining the province of Anglo-Saxon law. The "written laws and legal documents . . . assume knowledge on the reader's part of an indefinite mass of received custom and practice. They are intelligible only when they are taken as part of a whole which they commonly give us little help to conceive." I think it is possible and necessary to say something more, namely—what is unintelligible is not law. We should also recall that in the old procedure litigants were required to plead their own cases, then permitted to bring friends into court to advise them, and later, pleaders were employed to recite the required formulas. For many centuries any "free and lawful" person could appear as an attorney.

If we therefore lay aside the accumulated layers of conditioning by mature

173. 1 Pollock and Maitland, History of English Law 26 (1923).
174. Id. at 43.
175. Id. at 26.
176. Id. at 211-13.
legal systems, the significance of certain conduct becomes evident.\footnote{Cf. CAIRNS, THE THEORY OF LEGAL SCIENCE (1941).} Even if one were not intent on testing a theory there are good reasons for not initiating inquiry with an explication of the abstractions of traditional or positivist jurisprudence. There would seem to be advantages to be gained in initially avoiding exclusive concentration upon the complexities of writing, systematization, and the accidental accretions which preoccupy legal philosophers. If, instead, we observe simple actions which express legal ideas and purposes, we have a datum which is important in all legal philosophies—positive law as the distinctive coalescence, in human conduct, of legal ideas, facts and valuations. This is a wide definition which draws upon the perspectives of legal positivism, natural law philosophy and modern legal realism. In terms of subject matter, this definition of positive law refers to a distinctive fusion of reason and reality.

Someone has objected that I have not pointed to any "agreed entity" to which this definition refers. But insistence upon an "agreed entity," while it is easily satisfied in logic and mathematics, raises difficult problems in an inquiry concerned with facts. Even in physical science there is no agreed entity in a naive realistic sense. Moreover, at least in fields like law, jurisprudence and other social science, where terms like contract, right, group, community and so on are employed, there are obvious limitations on the possibility of pointing at visible things in communicating high-level definitions; nor is that necessary. For example, we know that a chiliagon is a polygon with a thousand angles, but we cannot even imagine a plane having anywhere near that many angles. In any case, it is fallacious to assume that ostensive definition, i.e. speaking words accompanied by pointing at a visible object, is an instance of an "agreed entity." One can point at anything but since even the simplest thing has many characteristics, there is no communication unless the person addressed shares relevant knowledge.

Of course, some definite reference to the subject matter is needed at the outset to permit the reader to pick up the trail of a discussion. That is provided in the integrative definition by pointing to certain lawyers' laws, i.e. more accurately, to certain visible marks in "official" books representing attributes of positive law which have been recognized as essential by almost all schools throughout the history of legal philosophy, and by observing certain conduct in relation to the ideas represented by those marks. After this initial reference, subsequent steps can be taken to define the indicated positive law more fully.

Neither a natural law philosopher nor a scientist would be interested in all lawyers' laws because they include technical rules, unethical commands, obsolete statutes, special regulations concerning particular trades or industries, and so on. A scientist would be interested only in those lawyers' laws which are recognized and
are regularly reflected in human conduct. A descriptive definition is what he requires, and that is not a matter of mere preference. It is a matter of what empirical science is, and of what one must do and say if he is building or discussing such a science. Accordingly, a relevant selection from lawyers' law is necessary to demarcate a unified field of empirical-qualitative data. The historical reminders of primitive and early law not only emphasize the central importance of such data, they also provide insight into the meaning of legal knowledge.

I see no reason to believe that legal knowledge, call it science or sociology of law, as you will, is essentially different when the ideas of law are written, complex and articulated by a profession or because the term "law," for some purposes, is used in a wide sense to include technical lawyers' law. The conclusion to which we are drawn is that although there are specialized arts and skills, there is only one science of law. Its discoverers are Plato and Aristotle, for it is in their work that the foundations of the master science, the legal-political discipline, or what I call integrative jurisprudence were laid.\textsuperscript{178}

If there is only one knowledge or science of law, there is only one subject matter that constitutes law. The jurisprudential problem is to discover and describe that subject matter, and also to reduce verbal difficulties regarding it. The subject matter is actual positive law, which I have described as a type of conduct that is distinctive in its expression of legal ideas. It is, in other words, the subject matter of the empirical legal scientist. I do not intend to restrict this vocational designation to current legal sociologists. If modern exponents are considered, Montesquieu, Savigny and Maine are obviously major contributors; and legal historians and political scientists are also among those who have contributed to our legal knowledge. But, while empirical-qualitative knowledge of law extends back to Ancient Greece, e.g. Aristotle's reference to the constitution as "a way of life," it is also true that in this century we have become aware of legal sociology as a definite discipline and have made systematic contributions to it. In any case, it is the entire effort to understand law-in-action, however the disciplines and schools of thought

\textsuperscript{178} "I must confess that I cannot regard this [the question of the separate existence of [Ideas] as being of such serious import as Aristotle would have us believe. The question really at issue between himself and Plato can be narrowed down to comparatively small dimensions. To begin with, I think there can be little doubt that the main meaning of the theory of Ideas is the assertion of the existence of universals as something distinct from individual things. . . . With this goes the assertion that the mind is capable of detecting the elements of identity between different things, and that these are the objects of all thinking (as distinct from perception), and in particular of science. Further, there is the assertion (necessarily bound up with what goes before) that universals are as objective as the individuals in which they are involved. With all this Aristotle is in absolute agreement. He is in no sense a conceptualist, but a realist (in the old sense of the word) pure and simple. Again, when Plato asserts the separateness of the Ideas, it is quite certain that he does not mean spatial separateness; the Ideas are nowhere." Ross, Platonic Philosophy and Aristotelian Metaphysics, Proc. Austral. Soc. N. S. V. 146 (1925). See Plato, Parmen, 130b-135c; Phaedo 100d, 102 ab; Rep. 476c, 556, 598a.
contributing to it have been labelled, that is here immediately relevant. Analytical jurisprudence has greatly contributed to this knowledge by elucidating not imaginary sentences but propositions of actual law.

So far as extant legal sociology is concerned, the points in legal positivism requiring revision concern the political sovereign and other so-called formalities of law. It seems to me that these difficulties can be resolved. Formality in legal positivism includes not merely adventitious circumstances but also recurrent ones that are amenable to scientific study. Much of the process of law-making, legislative and judicial, meets the latter requirement. This applies also to the political sovereign. Here, again, the conditions of scientific inquiry demark an area of phenomena that are operative among sub-groups as well as in the great society. Authority is essential in any group which persists over a period of years; and this implies the recognition of authority and concomitant attitudes that support it. In sum, in so far as the formalities insisted upon by legal positivism denote recurrent actualities, they are in the realm of empirical legal science. Those which do not may serve practical uses.

There are certain additional questions to be considered regarding the sociology of law, e.g. the wider interests of the State, the dominant position of its norms when they are opposed by those of lesser associations and communities, and so on. But these, it seems to me, raise questions of degree. They do not present data of such a different character as to require a different type of knowledge to explain them. In the above ways, a common subject matter is determined to be the province of positive law. By reference to that and the relevant knowledge, the practical divergences of legal positivism and natural law philosophy find both the meaning and the support which render them significant.

If there is only one science of law, it follows that the various specialists have drawn upon particular parts of it which, for good reason, they have emphasized or supplemented. In the realm of legal knowledge, one must distinguish fortuitous or irrational rules from those which make sense by reference to the facts and qualities which substantively characterize them. The functions of a lawyer may require him to deal with any command of the sovereign. But in so far as he has any knowledge of law, apart from logical and grammatical minima, he knows it as manifested ideas, as action, as functioning in society. Even the knowledge that some commands are archaic, fortuitous or irrational is only an inference from knowledge of law-in-action. And the logic and grammar of law are not learned in the abstract, nor do they inhabit an alien world. Regardless of formal potentialities and academic manipulations, the sentences analyzed are those which express ideas of actual positive law or they are suggested by them.

179. See Authority (Nomos 1, ed. Friedrich, 1958).
There are, of course, certain things lawyers learn only from experience which cannot be communicated. This might suggest that the lawyers' knowledge, since it is intended primarily to influence decision and action, is practical and different from the theoretical knowledge of the philosopher and legal scientist whose purpose is simply to understand law. It seems to me, however, that whatever merit this Aristotelian distinction may have in other contexts, it is not decisive as regards law and jurisprudence. Whatever the perspective, law is significantly in the realm of action, e.g. those who do not view law as conduct speak of it as a rule of conduct. Lawyers draw upon relevant knowledge and they make adaptations of it to suit their purposes. The fact that beyond and in addition to that they develop individual skills does not contradict the existence of that legal knowledge or lawyers' use of it. They contribute to legal science or at least to the possibility of constructing it, as is evident if one considers the progress of evidence, Brandeis' briefs and the work of administrative boards. That the lawyers' potential contributions have remained largely unexploited is a challenge to legal scientists, not any indication that it is irrelevant to legal science. It is the limitations of individual lives, special interests and technicalities which have obscured the fact that there is a knowledge or science of law and that it is common property.

I do not suggest that this science or the definition of law in terms of certain conduct as a distinctive coalescence will or should supplant technical knowledge and other definitions of law. It is obviously important on some occasions and, in any case, it will assuredly continue to happen, that lawyers will call other commands of the sovereign "law," that natural law philosophers will sometimes oppose that, and that legal sociologists will continue to have verbal preferences. What is involved is not primarily or immediately linguistic usage but progress in legal knowledge—presumably verbal improvements will also be made.

But it is submitted that the descriptive definition of positive law in terms of certain conduct should be recognized as having a priority of significance among the various definitions of positive law, and this, for several reasons, some of which have been indicated. First, that definition denotes an area within which the adherents of the various schools can find positive law according to their particular versions. They will continue to disagree regarding rules or data that lie outside that definition, but that is another matter.

Second, the above area of agreement would be important in the practical solution of problems. Especially in international affairs and in many personal problems, the principal need is to transcend the belief that divergent philosophies necessarily imply disagreement and divergent actions.

Third, the descriptive definition of positive law is entitled to priority especially because it rests upon fact rather than upon individual preference. If some restraint
is to be imposed upon the claims of philosophers that they can define "positive law" in any terms they choose, it is that of legal experience which is no less compelling in legal science than are natural data in physics. If it were seriously contended that in jurisprudence words alone, i.e. in other than their symbolic use, are equally or more important, then we would need to consider some very drastic consequences, e.g. if jurisprudence can include any kind of discourse, there can be no jurisprudence.

As a matter of fact all legal philosophers somehow take account of law-in-action. Both Austin and Kelsen postulate a minimal efficacy of commands or norms to qualify them as positive law. Natural law philosophy grew not from armchair speculation about commands, but from their ruthless enforcement; and it has also emphasized the adaptation of principles to particular factual circumstances. And Sir Carleton Allen has suggested, "... if law exists in order to regulate actual relationships, its regulation must be effectual: it is not law at all unless somehow and somewhere it is enforceable . . . ."180 Given the insight that law-in-operation, law functioning as human conduct, is the primary datum of jurisprudence, the pertinent question vis a vis positivism is—among the numerous commands which sovereigns have issued, are there some which are distinguishable from others in terms of their factual and qualitative reference, and is it important to distinguish them from others? If that inquiry is carried to its ultimate referents—the data denoted by the selected rules—we deal with the distinctive conduct which is the subject matter of integrative jurisprudence. Since symbols are as necessary as their referents are important, the above could be stated in terms of the theory that jurisprudential language, if it is to discharge its functions, must finally, if not immediately, refer to facts and values. It follows that there are better and worse terms and that syntactical explications have only a very limited or preliminary significance.

Thus, finally, as was illustrated above in relation to criminal law and in various other connections, the descriptive determination of the province of positive law is paramount because of its significance for theory. Theory is concerned with recurrent happenings. Theory implies order, including real relations among the data comprising the subject matter. It is impossible to understand anything that occurs only once and has nothing in common with known occurrences. When we speak of knowing laws even in an ordinary sense, we speak of something which we have experienced. This indicates the pertinence and importance of customary law and other spontaneously developed law, e.g. in the democratic process. It is not that legal scientists are addicted to ideology, but instead, that they require conditions that are relevant to the operation and discovery of general truths. In order that theory be possible, conditions must obtain which make the discovery of truths

180. ALLEN, op. cit. supra note 165 at 10.
possible. It is therefore necessary to distinguish some commands from others, and
to do that by reference to data that have theoretical significance. In other words, if
we are told that "a law is a law is a law," we learn nothing about law. If it is
pointed out that legal rights imply law, that right and duty are correlatives and so
on, we receive important information. But unless those conceptions, as well as the
terms of positive law, are referred to significant realities, legal knowledge is only
an application of formal logic.

Much of this is now widely recognized, e.g. in the use of so-called "non-legal"
materials in law schools; hence a question may be raised regarding the reasons for
going beyond that to construct an integrative jurisprudence. For example, there is
nothing to prevent a moderate legal positivist like Austin from consulting ethics
and empirical science; and Kelsen allowed the possibility of a sociology of law by
suggesting that sociologists study parallel factual processes. But this does not dis-
prove the theoretical significance of the integrative perspective, including the
descriptive definition of positive law, or the importance of empirical legal science
for all specialists. In fact, these examples and the practices of positivists, e.g. the
admission of fact, concede the main point and only leave it to be noted that if
the designated knowledge is important, it is equally important to render it precise
and systematic, i.e. science rather than common sense.

Moreover, the sociologist assigned by Kelsen to study parallel processes,
would undoubtedly enter a demurrer. In Kelsen's view he would not be studying
law at all and, what is more pertinent, in his own view, he would be required to
deal with fortuitous and irrational commands; and that he cannot do. Besides,
legal scientists wish to construct a science of law, not of parallel data, and they
cannot concede that positivist usage must be recognized when an empirical science
is involved. There is also a vagueness regarding the "paralleling" of conduct
which requires clearing up. "Parallel" might include reluctant and occasional
conformity and also the regular spontaneous conformity accorded rational rules.
In sum, progress, in jurisprudence consists not only in the perception of the
interpenetration of perspectives and in elucidating the points of common reference
of the various specialties to functioning laws. It consists also in following the trail
of common reference until theories can be formulated, tested and organized as
knowledge. To the extent that this body of knowledge grows and becomes clear
and precise, it provides an increasingly valuable reservoir upon which all
specialists may draw, whatever their purpose and regardless of their appreciation
of its theoretical character.

As I have suggested, recognition of the priority of the descriptive definition
of positive law does not imply that other definitions of positive law will be or
should be dropped. Lawyers, arguing their cases, will know that the commands
of the sovereign must prevail but they will also know scientifically determined
positive law as the major guide of their professional efforts. So, too, the legal sociologist will continue to include norms within the scope of his studies, which are not the State's laws, and to exclude many which are. But, he too, no less than the lawyer, will have the construct of an empirically and qualitatively verified positive law before him to guide his research.

A jurisprudence oriented in reality as well as in reason does not view legal institutions merely as externalizations of internal states. Reality is physical, biological and social and the expression of human purposes is manifested in patterns and hierarchies. The behavioral facts of law—human bodies and movements, artifacts, supporting feelings and attendant social attitudes—are rooted in necessities which encourage natural law philosophers to speak of finding rather than creating correct laws. There are physical and biological facts which condition the possibility and character of rule-making—if there is any interest in securing conformity; and there are physical-biological properties of human beings which even "omnipotent" parliaments cannot alter. There are laws of gravity, movements of matter, properties of the surface of the earth and of its contents as well as birth and aging. There are some things which legal sanctions cannot do, and there are many stubborn facts to which law, in any realistic sense of the term, must adapt. More than we are apt to consider, is the character of legal institutions determined by these physical and biological factors.

We find almost equally inexorable necessities in the social realm. Maine criticized the Austinian school for "throwing aside all the characteristics and attributes of Government and Society except one. . . . The elements neglected in the process," he said, "are always important, sometimes of extreme importance, for they consist of all the influences controlling human action except force directly applied or directly apprehended. . . ."181 If we ask, accordingly, what are the social prerequisites of a surviving society of human beings, we might agree on the following: some more or less permanent form of marriage to provide for procreation and the care of children; some division of labor which includes the discharge of non-economic functions; some apportionment of property to assure a minimal means of achieving the society's goals; some degree of communication, including the transmission of established usages to the young and of at least an elementary knowledge of facts that make reciprocal services sufficiently efficient; and finally, the limitation of force and fraud.182 Law incorporates all of these functions. And the same stubborn property that causes law-in-action to place definite limits on the wilfulness of legal philosophers, also challenges them to discover its conditions and characteristics. An integrative juris-

182. I am indebted for the above to Aberle, Cohen, Davis, Levy and Sutton, The Functional Prerequisites of a Society, 60 Ethics 100 (1950).
prudence would study them as distinctive actions that are expressed in legal institutions. 183

It is impossible here to discuss the types of knowledge and the methods of providing them which, together, comprise the kind of empirical legal science which I would include in an integrative jurisprudence. But it is possible to show that we are no longer under the necessity of discussing only methodology or of prognosticating results. Instead, even within the limits of American legal scholarship, there have already appeared substantial contributions to an empirical science of law. Such knowledge consists of intensive case-histories and, also, of generalizations which more or less approximate those of rigorous science. The methods employed are those of vicarious participation in specific problem-solvings and also those which approximate the logic of physical science. This reference to physical science does not imply acceptance of behavioristic theories but, instead, the correlation of legal processes with other significant variables. Finally, it may be added that it is with reference to such necessities and prerequisites as were noted above, as well as to the distinctive nature of human nature that a jurisprudence may claim to have objective validity.

I have been discussing factual aspects of the coalescence which, in the integrative perspective, comprises positive law. We must attend with necessary brevity to its mental component, which is much more inclusive than the cognitive faculty specified in the Pure Theory. Every legal philosophy includes, if it does not articulate, a theory of the nature of human nature which reflects contemporary views. And almost everything has been said about human nature that seems possible to say about anything. Man has been described as material, spiritual, mechanical, rational, animal, divine, violent, benevolent, cooperative, selfish, individualistic, social, emotional, thoughtful, and also, not to exhaust the list but only to demonstrate that something new can be said even about man, the existentialists tell us that man has no nature. There is nothing to be gained in adding still other views of man's nature to the already lengthy catalogue, which often reveals their authors' natures more than any contribution to the psychology of man.

There are, however, two or three points to be noted about man, which are especially important. The first is that man is an abstraction, a universal. We never encounter man, but only particular men, women and children. It follows that what one includes in his conception of man has a bearing upon the purpose of his enterprise, even if it is also true that purpose cannot supply what is non-existent. It is therefore not only important that there be an "economic man," it is also necessary that there be a "jurisprudential man." As suggested, it will be a

183. See Bodenheimer, Law as Order and Justice, 6 J. Pub. L. 191 (1957) and Cairns, The Community as the Legal Order to be published in Nomos 2, the second annual Proceedings of the American Society for Political and Legal Philosophy (1959).
"construct," composed of characteristics of human beings that are relevant to and consistent with legal experience and a congruent jurisprudence.

The nature of the Ancient Greeks and the Greek psychology of man are especially pertinent. Greek nature was unspecialized and balanced. This is indicated, e.g., in Aristotle's suggestion that it is a good thing to know how to play a flute but not to know how to play it very well. Greek inclusiveness is revealed not only in the perspectives of their great philosophers (you will recall Whitehead's remark that all Western philosophy is a series of footnotes to Plato) but also in their literature, even in the ancient epics. And who has ever seen the Parthenon without experiencing an exhilarating wonder of the magic of Greek symmetry! That balanced perspective found expression in the work of Plato and Aristotle, in the view that justice is a harmony of the various functions of personality and of the diverse roles of citizens. So, too, justice is the mean, the correct proportion, between claims and merit.

The psychology of Plato and Aristotle reflect this balanced perspective of reason and reality. For Plato, reason, spirited conation, and desire are the principal components of man's nature. Aristotle is more detailed and he views human nature as inclusive of three modes of activity, the nutritive, the sensitive and the rational. Both he and Plato emphasized the integration of the various functions, with reason dominant. This psychology of man has persisted into our own times. It is the living psychology of the intelligent layman and it permeates the common law.

The salient psychological facts in this century are the establishment of behaviorism as an academic discipline and the pervasive influence of psychiatry. Since law is deeply grounded in mental states such as intending, knowing, etc., I can only affirm that I do not know any contribution behaviorist psychology has made to our knowledge of human nature which affects legal problems. Gordon Allport's recent little book, Becoming, includes a critical analysis of behaviorism which will renew your confidence in the living psychology of intelligent lay and legal experience. There is an appreciation of complex motivation, high level integration, "rational functioning," and even of conscience and free action as going to the distinctive core of human nature. An "adequate psychology," states Professor Allport, "cannot be written exclusively in terms of stimulus, emotional excitement, association, and response. It requires subjective and inner principles of organization of the sort frequently designated by the terms self or ego."

186. Allport, Becoming, Basic Considerations for a Psychology of Personality 60 (1955).
And he concludes an appraisal of new tendencies in American psychology by affirming that "The emerging figure of man appears endowed with a sufficient margin of reason, autonomy, and choice to profit from living in a free society."\(^{187}\)

Psychiatry raises much more difficult problems. What must be noted at the outset is that there are many psychiatries and also that, just as Platonism is often quite different from Plato, so Freudianism cannot be assumed to be Freud. Freud, as I read him, distinguishing what he says in the context of analysis from what he says in that of therapy, provided in the latter an almost rationalistic view of human nature, e.g. the supposition that once the unconscious has been revealed, the ego will make desirable adaptations. The particular concern for law and jurisprudence is the irrationalism of human nature upon which many of Freud's followers insist, reflected e.g. in the "irresistible impulse" thesis that persons of normal intelligence may nonetheless be unable to prevent themselves from committing murder, robbery, or rape. This contradicts the integration of human functions. It depreciates human understanding. And it is not compatible with the oft-repeated assertion that the problems of human responsibility lie outside the domain of psychiatry. It is a thesis which, while it has hitherto concentrated on criminal responsibility, threatens all legal responsibilities and, thus, the rule of law. It is surely no lack of interest in science and legal reform which impels one to ask for the evidence that supports the "irresistible impulse" thesis. Until such evidence is produced or catastrophe imposes an official psychology, lawyers and legal philosophers have no alternative except to adhere to the enduring truths that, whatever else man may be, he is a rational being and that he functions as a unit.\(^{188}\)

Thus, I should like to conclude these lectures by suggesting that, while reason and reality are boundless subjects, this much about them is indubitable and extremely important: there is order in reality, cosmos, not chaos—at least the systematic structure of physical science is universally recognized—and man is its discoverer. I have tried to draw some implications of these truths for jurisprudence, and to indicate their interrelations. Reason and reality certainly hold mysteries that baffle and intrigue, as do most "ultimate" problems. Facing such questions in our present state of knowledge, some philosophers have preferred to narrow their field of study in the manner of the positivisms I have discussed. Others who grapple with the more difficult problems, e.g. concerning the basic conceptions, can often do little more than reject fallacies, criticize improbable theories, demark a position whose principal virtue is that of least vulnerability and, perhaps, draw some comfort from a few affirmative insights regarding the character and

\(^{187}\) Id. at 101.

\(^{188}\) E.g. Huxley, The Uniqueness of Man, 28 Yale Review 475 (1939) Hall, op. cit. supra note 166, c. 15 (1958) is a detailed discussion of psychiatry and criminal responsibility.

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constituents of a defensible legal philosophy. This not too happy position of those who would recapture the traditional inclusiveness of legal philosophy accounts, in part at least, for the fact that I have been able to offer only an integrative perspective, not an integrative jurisprudence.

It is hazardous to describe one's own work, but there may be some value in knowing an author's conception of his effort. It seems to me that I have tried to join legal realism and natural law philosophy in a viable union, after freeing the former of anti-intellectualist tendencies and the latter of neglect of empirical knowledge. Or, one might prefer to say that I have tried to expand the enduring core of natural law philosophy to include an equal interest in relevant empirical knowledge. So, too, I value the rule of law and the elucidation of legal concepts in legal positivism, but find that school of thought much too restricted to deal with the factual and ethical dimensions of positive law. In any case, it makes little difference where one's thinking begins. What is important is where and how it ends and, even more, that inquiry proceed without inhibition as to its scope or character and without deliberate intention to support a particular school of thought. Unfortunately, however sincere the endeavor, equal sensitivity to reason and reality remains largely an ideal.

In his effort to create an adequate jurisprudence, the legal philosopher must draw upon his final resources, spin his web of gossamer as best he can, and tell his tale to those who kindly listen. In an apparently authentic letter of Plato, he makes the curious statement that he never has and never will write his philosophy. He was, it seems to me, only saying that no very important philosophy ever gets fully written. Many scholars from the Ancient Greeks to our own strenuous times have contributed to an integrative jurisprudence. I have been discussing why I think that jurisprudence is worth writing.