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FROM LEGAL THEORY
TO INTEGRATIVE JURISPRUDENCE *

JEROME HALL **

The legal philosopher in this country is expected not merely to indulge his speculative fancy but, also, to teach a course in positive law; fortunately, this encourages him to test his legal philosophy against his knowledge of a branch of law which, in turn, may be illumined by the legal philosophy. The purpose of these lectures is to give some examples of this and, especially, to discuss the progress of thought from specific legal problem-solving to legal theory and, thence, to jurisprudential generalization and coherence. These stages of legal thought are represented, respectively, in the work of lawyers and judges, the theories of particular fields of law, philosophies of law and, finally, the interrelation of the legal philosophies in a coherent jurisprudence. Even if legal thought does not culminate in such an inclusive philosophy of law, still, as I shall try to show, jurisprudence is advanced if the above distinctions are observed.


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"Theory" has many meanings, but all of them include that of generalization, the discovery of "the one among the many." In the philosophy of science, however, "theory" connotes much more than that. It implies a system of generalizations in terms of basic concepts and so interrelated as to contribute to each other's meaning; from such a system of knowledge significant inferences can be drawn in terms of which the relevant field of data is explained.

"Legal theory" is often used as a synonym for "jurisprudence," but there are important distinctions to be drawn between the theory of a particular field of law or even the "sum" of all such theories and the theory of all law, which last is preferably therefore called "jurisprudence."  

For reasons of specialization, I shall discuss criminal theory; happily, most lawyers are familiar with criminal law. It seems possible, moreover, that the plan and method employed in constructing the theory to be discussed can be applied to other fields of law; the results might be very interesting. That scheme and method are very simple. Beginning with the core of the common law of crimes and thus with universally recognized criminal law, e.g., that of homicide, rape, robbery, and larceny, one asks the following questions: (1) What parts of that criminal law pertain only to what is distinctive in each of those crimes? (2) What parts of that law pertain to all those crimes? (3) What common ideas underlie and characterize the entire selected criminal law, defined by joining both of the above parts? The concepts, "rule," "doctrine," and "principle" refer, respectively, to the above indicated parts or aspects of criminal law. The doctrines are expressed in the propositions of law concerned with insanity, infancy, intoxication, mistake, coercion, necessity, attempt, conspiracy, solicitation and complicity. The principles concern *mens rea*, act (effort), the concurrence (fusion) of *mens rea* and act, harm, causation, punishment and legality. Thus, the doctrines

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do not express what is common among the rules; their meaning is different from that of the rules and that is why the doctrines must be added to the rules to define the criminal law. On the other hand, as stated, the principles are the common notions that permeate the entire criminal law.

The basic ethical postulate of this theory is that only the voluntary commission of legally proscribed harms is within the scope of criminal liability; this implies the restriction of \textit{mens rea} to intentionality and recklessness. The meaning of all the "rules," "doctrines" and "principles" (and of the positive law they designate) is, in part, determined by the indicated teleological relationship between criminal conduct and harm as well as by the rational interrelation of harm and punishment.\footnote{Hall, \textit{General Principles of Criminal Law} (2d ed. 1960).}

Since the significance of any theory depends on the range and aptness of the criteria employed and on the degree of coherence and simplicity that is achieved, its significance increases as more data, \textit{e.g.}, more formally stated criminal laws (of one's own country, of other countries and, finally, of all countries) are brought within its orbit. Accordingly, although one may begin with the above universally recognized crimes, all other crimes consistent with the theory are subsumed by it; plainly, the field of modern penal law within the orbit of the above theory is very large.

theory, the principal purpose will be to elucidate the nature and functions of legal theories. Finally, it will be the purpose of this lecture to contrast the realistic theory of criminal law, which Professor Honig criticizes, with prevailing formal analysis of criminal law and thus to forge a link between legal theory and the philosophies of law which are the subject of the next lecture.

Professor Honig acknowledges that until the late nineteenth century German criminal theory was not "clearly enunciated"; but in the latter part of the century, he states, and, especially in this one, several "systems of criminal law" were presented by German scholars.\(^5\) He does not state what these "systems" are nor does he say what he means by "system" and "legal theory"; it seems evident, also, that the meaning of some of the principal terms of the theory of criminal law he discusses was not adopted by him. It is difficult, therefore, to apprehend Professor Honig's intention when he writes, \(\text{e.g.}\), that in this theory, "principles relate to elements of the rules that are part of the definition of the crime in question, whereas doctrines are concerned with circumstances that are to be taken into consideration in the application of the rules to concrete cases."\(^6\) A specific indication of the influence of his legal training and approach is shown in Professor Honig's discussion of strict liability, where he interprets the American law (or the speaker's discussion of it) to mean that the defendant must have been negligent to be held liable, which, in fact, happens to be the German law on this subject.\(^7\) These preliminary instances of what is typical of the article indicate that serious difficulties are met when a scholar undertakes the arduous task of interpreting a legal theory which is very different from his accustomed thinking; this, indeed, is the basic concern of legal comparatists. To discover these difficulties and to draw perti-
nent inferences regarding the nature and functions of legal theories, it is necessary to discuss Professor Honig's argument in some detail.

Beginning first with the principles, he states, with apparent approval, that in the above theory the principle of punishment stands outside the definition of crime, i.e., of criminal conduct. While this is true in the indicated sense, the fact is also that in the theory all principles are interrelated; punishment thus bears a rational relation to the harm which, in turn, is the goal of the criminal conduct. More serious questions were raised concerning the relation of the principle of legality to the other principles. Professor Honig's impression that this principle was treated as having "no relation to the essential elements of crime" is remarkable in view of the lengthy discussion of this subject. Without setting out his argument, it may be stated that in the theory, nulla poena sine lege was viewed as the essential positive vehicle in which various descriptions of mens rea, act, harm, causation, and punishment are included (subject to constitutional and other limitations). But the principle of legality is not a pure form like a letter or number; for example, it obviously concerns human conduct, and its specifications regarding strict construction and retroactivity also have descriptive significance.

A more definite question regarding legality was raised with reference to the fact that in the speaker's theory, criminal omissions rest on the same basis as overt criminal conduct, including the requirement of a legal duty imposed by criminal law. Professor Honig holds, however, that an additional legal duty uniquely relevant to criminal omissions is a duty imposed by private law. He dismisses the instances cited, e.g., failure to file a tax return, perform official duties and so on, on the ground that these concern "public law" and "plain omissions [which] do not cause tangible harms proscribed by criminal law." Nonetheless, the fact remains that these are criminal omissions and that there was no duty to act imposed by private law. And the view that harms proscribed by criminal law are "tangible"

8 Id. at 275.
9 HALL, op. cit. supra note 2, ch. II.
10 Honig, supra note 3, at 278.
reflects an unwarrantably restrictive notion of "harm" for reasons shortly to be noted; it is certainly not the meaning of "harm" in the above theory of criminal law.

By "plain omissions," Professor Honig probably has in mind the distinction drawn in German treatises between the above "plain" omissions (e.g., to pay taxes) and omissions which are not "plain" or "genuine" because the relevant harms can be caused by overt action. It would require a wide survey to test the validity of this distinction; directly, it would seem, e.g., that a road can be made impassable by overt conduct as well as by failing to keep it in repair. But even if the accuracy of the distinction is granted, its theoretical significance is dubious because its effect is divisive, not unifying, since it does not bring all criminal omissions within a single generalization.

The crux of the above question concerning omissions turns on whether all of them (excepting the "plain" omissions) rest on a civil legal duty and differ in this regard from overt criminal conduct. There are, of course, many instances where the private law requires action, e.g., performance of a contract, but where the omission or even deliberate refusal to perform is not criminal. While this does not directly touch the question whether certain criminal omissions are also breaches of private law, it is relevant to the question in issue since it involves the meaning of "legal duty imposed by civil law." The position maintained by the speaker was that, as regards this question, it is the sanction that is decisive, not the fact that there is a provision in a civil code or a statute on family law which, e.g., requires fathers to provide medical assistance, food and so on for their children. When fathers are prosecuted, the charge is that they violated criminal law, not civil law; and in a cogent theory, legal duties are not viewed apart from their sanctions.

To support his thesis, Professor Honig would need to show that, unlike overt criminal conduct, the selected omissions also violate a civil duty for which civil sanctions are also imposed, for example, that fathers who violate their duties and motorists involved in accidents who fail to give aid are civilly liable for damages. This question is complicated in German law by a general provision that damages may be recovered for criminal
harms; this, however, seems not to have been applied, e.g., to injuries sustained by failure to be rescued (a duty imposed by German law) and the like. Perhaps he can prove his thesis concerning the type of criminal omission he refers to: in Instan,' reliance was not on a private law duty enforceable by judgment for damages but on the "moral duty" arising from the relationship of the parties. It was for this reason and because of similar relationships that the speaker suggested that it was not the civil law but moral attitudes and other social factors which influenced the imposition of criminal liability for certain omissions. Finally, for the various reasons indicated above, the significance of proof that the civil law supports Professor Honig's position, even if forthcoming, would be very limited in the absence of theoretical use of the above distinction between criminal omissions.

In addition to the above difficulties, Professor Honig's position seems to me to be further complicated by his view of "harm." In the above criminal theory, "harm" means an actual disvalue and it includes more than physical damage and personal injury; for example, political crimes, libel, sexual crimes, including rape, and others are harmful quite apart from any "tangible injury," which hardly affects the gravity of these crimes. In criminal attempts, solicitations, conspiracies, and possession of narcotics, stolen property and the like, the difference is one of degree of harm. The above theory therefore rejects the distinction "between crimes resulting in factual injuries to other persons and crimes consisting merely of the perpetrator's act." There is the harm of increased public apprehension of the commission of the intended crime and there is also the harmful change effected in the pre-existing situation by the introduction of a dangerous element into it. It is therefore difficult to understand the persistence of the notion that criminal harms are only "tangible," particularly in countries where the theory of values expounded by Hartmann, Scheler and others is well known.

11 (1893) 1 Q.B. 450, 454.
12 Honig, supra note 3, at 276.
13 Professor Honig gives the impression that all German scholars accept the distinction between formal and material crimes and harms, but some of them seem to share the writer's criticism of that distinction. See H. Mayer, Strafrecht 126-27 (1953) and Maurach, Deutsches Strafrecht, A.T. 201 (1954).
In the present discussion it is especially pertinent to ask, if one agrees with Professor Honig that some crimes (not excluded as arbitrary) do not cause any harm—what is the consequence of that so far as legal theory is concerned? No sound theory is internally inconsistent; hence the principal consequence for a theory which includes “harm” as an essential element is that, to the indicated extent, it is narrowed in the field it subsumes as “crimes.” The choice therefore seems to be between a realistic theory of criminal law, such as that under discussion, which cannot accommodate merely “formal crimes,” and the formal generalizations about “crimes” which do include them; this question will shortly be discussed.

No exception was taken by Professor Honig to the view that the “concurrence” of *mens rea* and external act is a principle of criminal law; he limited his criticism to the interpretation of certain cases, approving a decision reached in an interesting American case, with which German law is in accord but which the speaker found questionable. What should be added, for the purpose of the present discussion, is that the principle of concurrence is strained in cases where there was an intentional, but not a criminal, trespass, *e.g.*, wilfully taking a chattel without *animus furandi* and later converting it with that criminal intention. Our courts invoke the fiction of “continuing trespass” to find the concurrence of a criminal taking and the required *mens rea* and, therefore, larceny at the time of the *mens rea*. This is an instance where a realistic legal theory does not fit a part of the positive law which is accepted as sound law. I shall later note other instances of “gaps” between such a legal theory and the criminal law.

Professor Honig then criticizes the view of causation in which the principle of *mens rea* was held to qualify the requirement of factual *sine qua non* and substantial or effective cause to comprise “legal causation” in criminal law, *i.e.*, “causing” in the above theory means voluntarily actualizing a *mens rea* in a proscribed harm. This, he argues, is required for guilt but not for causation; instead of defining causation by reference to *mens rea*, he states that “causation” means “the objective suitability of the conduct
to produce the harm in issue."¹⁴ This seems to me, again, to reveal a failure to view the discussed theory "from within." Instead, it was apparently assumed that negligence is and should be within the penal law; this obviously requires a view of "causation" which is not compatible with the postulate of the theory from which negligence was expressly excluded. As stated, "causation" was there restricted to teleological causation, reflecting the Kantian philosophy in which the sphere of human action is sharply distinguished from that of physical change. Within the expressly limited area reference to *mens rea* is therefore essential. From this point of view, the use of "causation" to include both negligent behavior and voluntary conduct confuses the scientific meaning of "cause," the co-variation of variables, with authorship.

It may be thought that this issue is a merely verbal dispute because criminal liability is finally determined by reference to a required *mens rea*. If *mens rea* is defined to include inadvertence the final result is liability; but if inadvertence is excluded from *mens rea*, the result is exculpation. Why, then, should one insist on a particular view of "causation"? The differences, it is submitted, are both theoretically and practically important. For example, in some jurisdictions where the principle of *mens rea* has not been critically articulated, a teleological view of causation can nonetheless lead to sound results. This was recently shown in Pennsylvania cases which reversed earlier convictions under a felony-murder statute because those decisions adopted the proximate cause rule of tort law—in effect, the view of causation stated by Professor Honig in terms of "the objective suitability of the conduct to produce the harm in issue." These recent cases, especially *Redline* and *Root*,¹⁵ also indicate that a teleological view of causation in criminal law clarifies the principle of *mens rea*.

Finally, it may be noted that the principle of causation is not a synonym for "criminal liability." The former is distinguishable from the latter, which is the "over-all" judgment based on the

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¹⁴ Honig, *supra* note 3, at 280.
assumption that all the principles have been satisfied by the occurrence of the "material" facts. The law may have been changed before judgment, to exclude liability; yet it could be meaningfully said that the accused caused a proscribed harm. More important is that the difficulty noted by Professor Honig probably arose from the fact that in the above theory it is impossible to articulate any principle fully without referring to or implying the other principles. But this does not make it impossible to distinguish the meaning of the various principles.

Professor Honig criticizes the exclusion of negligent behavior without, however, adding to recent discussions of that subject. He seems to grant that punishment does not deter negligent behavior or, at least, that deterrence is not an important consideration; it is "correction that is aimed at." This concedes most of the argument usually relied on by those who think negligence should be retained in penal law. In addition, he, too, merely assumes that mildly punishing negligent persons at infrequent intervals educates them, presumably, that it makes awkward persons efficient and makes insensitive ones realize that they have duties to perform and also makes them attentive to dangers of which they were previously unconscious. He also maintains that the contrary position, that no such correction can be shown, applies as well to the punishment of intentional harm-doers. That may be true, but the punishment of voluntary harm-doers was based on moral desert, not on rehabilitation, although, of course, this should also be considered.

Professor Honig then raises a difficult question with reference to the imputation of awareness to a defendant on the basis of the

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16 "His conduct does not correspond to that carefulness and consideration which everyone owes to his fellow-citizens. This fact justifies punishment in case negligence causes harm." Honig, supra note 3, at 277. Cf. Hall, Negligent Behavior Should Be Excluded From Penal Liability, 63 Colum. L. Rev. 632 (1963).

17 Honig, supra note 3, at 281.

18 There is a substantial nineteenth and early twentieth century literature in Germany by distinguished scholars, e.g., Radbruch and Kohlrausch, opposed to the present view of their law that inadvertent negligent behavior is properly within the criminal law, and several scholars there are engaged in a critical reexamination of this question, e.g., Arthur Kaufmann, Das Schuldprinzip 182-83 (1961). See Hall, The Purposes of a System for the Administration of Criminal Justice (Edward Douglass White Lecture, Georgetown University, Oct. 9, 1963).
"reasonable man" standard; he submits "that awareness becomes fictitious" if it is determined in that way. This problem concerns the distinction drawn between the "reasonable man" standard used in fact-finding and the "reasonable man" standard used as the measure of criminal liability. The former was held necessary; the latter, both unnecessary and unsound.

The former is necessary because we cannot "see into the hearts of men." In the absence of a confession, the only way one can decide whether a person intended to commit a criminal harm or was aware of the dangerousness of his action is, in the light of one's experience with ordinary conduct, to draw an inference to that effect from what he does and says, the facts in the situation, and other relevant evidence. In most serious crimes no question is raised about the inquiry or methods used to come to a decision in the above respect; if a person takes a knife from his pocket and plunges it into someone's body and he is sane and sober, we instantly and almost instinctively decide that he intended to do what he did. In problematical situations, we draw inferences in the way indicated above on the assumption that the defendant was a "reasonable man." I know no way of greatly improving this method of inquiry although the current mode of instructing the jury can be improved by the inclusion of reference to what the particular defendant thought or believed at the time of the conduct in issue. Nor is its validity impaired by the fact that if there is something peculiar about a person, even though it falls short of insanity, those facts should be taken into account if an accurate imputation of the required mens rea is to be made. This is expressed in provisions regarding "diminished capacity" or "diminished responsibility" and in instructions which require the jury to consider the defendant's state of mind even if he does not fall within any recognized class of impaired persons.

Quite different is the use of the "reasonable man" as a standard of liability; in the present law, this leads to the imposition of liability (or more serious liability) even though the facts con-

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19 Honig, supra note 3, at 281.
transcend the usual imputation, i.e., they reveal that although the defendant was sane, he was not a "reasonable man," at least at the time of the harm in issue. Recent decisions in England and Australia have stimulated considerable support of the subjective standard of liability.

Professor Honig's criticism of the doctrines, as defined in the given theory, seems to have encountered particular difficulty probably because this aspect of the theory is quite different from continental analysis of the General Part of penal codes. Crucial to an understanding of the "doctrines" is recognition of the fact that the rules of criminal law (the Special Part of continental codes), as defined in this theory, are incomplete definitions of crimes, which require that the doctrines be added to them. It is true, of course, that if one reads the rules literally, as they appear in codes or statutes, most of them seem to state complete definitions of crimes. This may also have suggested that the rules completely define crimes as regards normal persons and normal situations, and that the doctrines concern exceptional situations or abnormal persons; we, too, are apt to think of them as "defenses," a procedural concept.

It seems to me, however, that. from the point of view of constructing a theory of substantive criminal law, these interpretations are mistaken. In the first place, the meaning of "normal" or "abnormal" cannot be assumed, nor is it stated in the rules; their meaning requires reference to, and depends on, certain doctrines. The decisive fact, however, is that a theory is a set of propositions that comprise a coherent body of thought. To construct a theory of criminal law in that sense, one must place all the relevant data "on the table," so to speak, including the substantive implications of the "defenses," and arrange the pieces to construct a pattern or system in which the essential ("material") elements of the criminal law are placed in significant interrelation.

When one does that, (indeed, even without such analysis) he is immediately alerted to the fact that if the defendant was insane or an infant at the time of the harm-doing, he did not commit a crime. As regards those doctrines, it is obvious that the rules of criminal law state only distinctive aspects of the
specific crimes, not complete definitions of them; for although the
defendant did everything specified in the rules on larceny or
homicide or robbery and so on, none of those crimes was com-
mited if he was insane or below the age of legally fixed capacity.
The contrary view, that the rules state the entire definitions,
including the *mens rea* and so on, violates the aesthetics of
theory-construction, especially that of simplicity; it leaves two
lines of discourse which are unrelated and which, moreover, are
not expressed in terms of ultimate concepts. It may be correct
and necessary at a certain point in procedure to speak of a
punishable act as is sometimes done (compare the use of
“prima facie” in common law); but from the perspective of the
theory of substantive criminal law, there is no such thing as a
punishable act which is not a crime.

The validity of the theory concerning the doctrines of insanity
and infancy seems to be granted by Professor Honig, but beyond
that he rejects them on two grounds, the first of which is that the
doctrines have differential effects; for example, while insanity
and infancy lead to exculpation, intoxication and mistake have
various effects. But is the specified meaning or function of
“doctrine” in the above theory contradicted by the fact, for
example, that intoxication may entirely exclude criminal liability
in crimes against property while in criminal homicide it may
result in manslaughter rather than murder? These variations do
not alter the fact that the rules do not state complete definitions
of crimes and that the addition of the law referred to by the
doctrines is required for the complete statement of the penal law.

In his criticism of the doctrines of attempt, solicitation, and
conspiracy, Professor Honig, like others, seems to have confused
the positive law of attempt to murder, conspiracy to rob, and
so on with the meaning of “doctrine” in the theory of that law.
One source of this difficulty is indicated in Professor Honig’s
statement: “These specific attempts are, if I understand Hall
correctly, consummated crimes.” 21 In fact, the term “relational
crimes” was employed to distinguish criminal attempts and so on
from what were designated the intended “ultimate crimes.” 22 The

21 Honig, supra note 3, at 284.
22 Hall, op. cit. supra note 2, at 218, 574-75.
difference is not that the latter are crimes and that the former are not crimes but, as indicated, that the latter are consummated, while the former are relational, crimes.

The principal difficulty, however, seems to have concerned the fact that in the definition, say, of robbery or murder, nothing is said about attempt, solicitation or conspiracy; how then, asks Professor Honig, can it be held that the doctrines qualify the rules? Obviously, it is possible to define a specific consummated crime such as robbery or murder without saying anything about the above doctrines. But this does not negate the thesis of the theory that it is characteristic of (almost) every consummated crime (perjury may be an exception) that a lower degree of that crime, especially of its harm, can be committed and that that is also criminal; in addition, the above doctrines must obviously be added to the rules in order to take account of such crimes as attempt to murder, conspiracy to rob, and so on. In other words, it is characteristic of almost all consummated crimes that one may commit them, attempt to commit them, solicit or aid someone to commit them or conspire with others to commit them; these usually lesser harms are also criminal. It is this common characteristic of criminal law which is expressed in the doctrines of attempt, solicitation and conspiracy.

The final point to be considered concerns Professor Honig's criticism of the statement that excuse and justification are mainly procedural notions and that "they are fallacious and misleading when they are applied as notions of substantive penal theory." Unfortunately, he took the latter part of this statement to mean that justification and excuse do not have substantive significance although it was pointed out that they must be reduced, finally, to ultimate principles of criminal law. For example, if one asks why the defendant should be excused, the answer must be in terms of insanity or mistake or some other doctrine which ultimately implies, say, the absence of mens rea. "Justification" raises additional problems but, again, if one asks why the infliction of a harm was justified, the answer is finally in terms of the relevant principles of criminal law. It was for this reason

23 Id. at 233; Honig, supra note 3, at 286.
that, while recognizing the procedural service of justification and excuse, they were excluded from the ultimate concepts of the above theory of substantive criminal law.

It is impossible here to discuss other aspects or types of criminal theory, but it may be added that continental scholars have long distinguished the general part from the special part of criminal law; from the viewpoint of the theory discussed above, one would question treatment of the latter as complete definitions of crimes, while the former seems to be a mélange of procedural and substantive concepts which serve very different functions. Continental theory also distinguishes the external element, the internal factor connoting guilt, and legality; this is overly simple and although it recognizes certain common characteristics, it lacks system. A related European theory seems to proceed from the elucidation of the external facts violative of penal law to those parts of that law which concern fault (analogous to prima facie case); this has been criticized by European scholars on the ground that the subjective factor of fault cannot be excluded from the so-called external factor. (An illustration in American law is found in the case of pleas of "justification" by police officers for harms they inflicted when the officers did not believe that a felony was in progress although that turned out actually to be the case.) From the viewpoint of the theory discussed above (but not from a procedural viewpoint), it is unwarranted to consider some "material" factors first and, later, to alter their legal significance by a consideration of other "material" factors; as suggested, all the "material" factors must be considered in their simultaneous interrelationship.

Some reference was made to gaps between the realistic theory discussed above and the actual positive law. A distinction must be drawn, however, between the stretching of "concurrence" to fit the continuing trespass cases and the so-called "gap" between the above theory and the positive law which includes strict liability, objective liability, negligence, and so on. The first gap is inevitable. In this regard, a theory of criminal law parallels the situation in the exact sciences where it is recognized that no theory exactly fits all the facts; it is an ideal model or representation of a field of data, not a photograph. There is no point in
lamenting such inevitable limitations of a theory; what is relevant is a better theory, e.g., one which is more accurate, more coherent, and more inclusive without loss of descriptive significance.\(^4\)

The other kind of "gap" is a gap only from the viewpoint of a formal theorist or from that of one who not only approves the inclusion of strict liability, negligence or other types of objective liability within penal law but also believes he can include them in a realistic theory.

This indicates the directions or types of valid criticism of legal theories. One such criticism, e.g., of the above realistic theory of criminal law, would recognize and accept its basic postulate, the restriction of penal liability to voluntary conduct. A scholar familiar with a different legal system (or an American scholar who believes negligent behavior and the like should be punished) would need to test the above theory in relation to that part of his national criminal law that is restricted to the voluntary commission of proscribed harms. Proceeding on that premise and within the consequent limits, he might seek inconsistencies in the theory or statements in it which can be rendered more precise or he might further explore the differences in the functions of some of the principles and doctrines, as compared with those served by others. In addition to that, it would be possible to argue, for example, as a distinguished German legal scholar maintains, that there is a voluntary element in negligent (inadvertent) behavior. If this were established, the above theory might be improved by having a larger field of formally recognized crimes brought within its orbit. All of this would be consistent with the postulates and purpose of the theory.

Another type of valid criticism might accept a theory as far as it went, but hold that another theory was required to account for data which were properly within the field of criminal law, though not subsumed in the existing theory, e.g., that there is another sound principle of liability in addition to that based on voluntary harm-doing. This seems to be the situation in physics regarding light; two theories are required to explain the relevant data. Conversely, cogent criticism would not merely assert, e.g., that

\(^4\) HALL, op. cit. supra note 1, ch. I.
the above criminal theory is invalid because it does not subtend negligence; if the postulate of voluntary harm-doing is accepted it must also be recognized that the theory is valid as far as it goes. One might then provide a second theory in terms of negligence, strict liability, and so on (which would seem to be substantively dubious and theoretically unsatisfactory); or one of the other indicated directions might be taken.

There is also a more drastic type of criticism, challenging the postulates of a theory. For example, it might be argued that the premise of voluntary harm-doing is invalid and that all human conduct is determined; if that were accepted, not only would the above principle of causation be invalidated, the meaning and interrelationships of all the basic concepts would be disproved and a very different set of concepts would be substituted for them. Finally, one might take a wholly different perspective and direction without challenging the postulates of a theory. This seems to have been done in the construction of the procedurally oriented theory of criminal law noted above. Perhaps the most important inference to be drawn regarding any valid criticism of a theory is that its prerequisite is to "get inside" the theory if one wishes to understand it.

We come to closer grips with the differences among legal theories if we compare the above realistic theory of criminal law with its “formal” counterpart. Apart from the important criterion of systematization, realistic theories may be contrasted with relatively formal generalizations in terms of their denotations and connotations, their underlying policies, and their functions. If one tests their significance against the most important part of the common law of crimes, it is plain that a theory which subsumes sound as well as unsound rules, just as well as unjust ones and so on, can be descriptive only in very general terms and in very few respects. A realistic theory of criminal law which excludes arbitrary, irrational and fortuitous commands, strict penal liability and, I also think, ordinary (inadvertent) negligence is far more accurate in its description of the most serious crimes, indeed, of almost all the common law of crimes.

A realistic theory of criminal law is also much more precise than the formal generalizations. Among the latter, for example,
mens rea is only the vacuous state of mind expressed in the commission of any "crime" which is defined by reference to terms of "punishment" or is characterized by a procedural datum, e.g., control of the litigation by the State. In that wide abstraction, mens rea may include intention, recklessness, negligence and the bare consciousness found in strict liability; mens rea means any "mental state" (which may mean the absence of any actual mental state) expressed in doing anything forbidden by "penal law," formally defined. A realistic theory distinguishes these various states of mind and employs terms which specify the distinctive factors; in certain respects it therefore opposes the formal generalizations. In the formal generalization, conduct is not distinguished from behavior. So, too, in contrast to a relatively empty concept of "effect" or "consequences," which may refer to anything, good, bad or indifferent, the realistic notion of "harm" connotes definite disvalues; these differences also apply to causation. Similarly, a formal view of "punishment" has no moral connotation. It is an evil or privation imposed for somehow causing whatever is the condition of the imposition of the sanction; presumably, that condition can be an act of benevolence.

The superior descriptive significance of a realistic theory results from the logical canon that the narrower the denotation, the greater the connotation. It is for this reason as well as because of acceptance of the postulate that penal liability be limited to voluntary harm-doing that it was possible to construct a theory of criminal law as contrasted with the pre-existing formal generalizations which had not been systematized, accepted numerous "mentes reae" and took little account of the significance of "harm" and "causation."

Finally, and perhaps most important, is the moral connotation of the realistic theory; a definite uniform ethical policy can be formulated in those terms while that is impossible or very problematical as regards the formal generalizations. In sum, a realistic theory not only "fits" the most important and perhaps the largest part of formally recognized criminal law; it also has very definite moral significance. By reference to its policy, what goes on in the legislature and the judicial process that is con-
sistent with the theory is approved, and what is incompatible
with the theory is disapproved.

It is equally necessary to recognize, however, and even to
emphasize that the advantages of a realistic theory do not imply
that the relatively formal generalizations regarding criminal law
are insignificant or superfluous. Regardless of realistic theories,
an innocent, careful man may be fined or imprisoned because
he deviated from a rule sanctioned in terms of “punishment”;
men pay damages and so on by order of courts regardless of the
ethical validity of the relevant laws. There are inevitable differ-
ences of opinion concerning the ethical validity of many rules, and
some of them are of indifferent ethical significance or are of such
a detailed character that no definite evaluation of them can be
established. It is not only the moral validity of rules of law that
is frequently doubtful; the meaning of the rules apart from that
(the unavoidable vagueness at the periphery of any descriptive
proposition) also gives rise to differences of opinion. These facts
alert the lawyer and the citizen to the importance of a perspective
in which the justice or rationality of a rule of law is irrelevant.

To state the matter in this way may seem to give only grudging
acknowledgement to formal generalization as a sort of negative
service. But this is quite unwarranted. A realistic theory of a
branch of law depends, in part, on the formal view of it, a matter
which escapes attention because legal scholars do not emphasize
the fact that they work within the framework of the formal
theory and that their contribution is a qualification of it. As
regards the above theory of criminal law, e.g., books on religion,
ethics, etiquette or the by-laws of sub-groups were not examined
to find rules to serve as candidates for the field of “criminal law”
of that theory. A legal scholar begins almost instinctively with
“the commands of the Sovereign” sanctioned in terms of “punish-
ment”; the implicit formal premise guides realistic inquiry not
only in the above respect but also when it is applied to the
official interpreters and their reports. This emphasis on the
“positive” aspects of penal legislation and judicial precedent can
lead to the neglect of non-legal thought; on the other hand, un-
less some priority is given formally identified criminal laws and
decisions, the principle of legality dissolves.
Where factual meaning and moral validity are certain, order is easily discerned and maintained. It is the inevitable doubt, uncertainty, and ignorance of the relevant moral values and factual meaning of rules that render formal theory necessary. One need only recall the differences in ethical opinion regarding negligence and other important areas as well as the ethically indifferent quality of numerous rules to see how great is the reliance on the formal view of criminal law. Far from inferring that formal theory is a "necessary evil," it should be recognized that disorder is a permanent fact of social life as well as a constant threat. The formal premise is therefore just as "basic" from the outset as is the premise of a realistic theory; to hold that a formal theory of criminal law is superfluous or invalid is to assume human perfection. Since formal generalizations are constructed on a higher level of abstraction to include criminal laws which a realistic theory includes and, also, criminal laws (in its terms) which a realistic theory excludes from its field of data, they also provide the most general notions of what is common to good, bad and indifferent criminal laws. In sum, the greater descriptiveness, systematization and moral significance of a realistic theory must be weighed against the needs met by the greater inclusiveness of the formal generalizations.

I have tried in this lecture to exhibit the nature and purposes of legal theories, to indicate why one must "get inside" a theory in order to criticize it cogently, and to reveal some of the limitations of theories as well as their functions. Finally, in immediate relation to the next lecture, it was submitted that a realistic theory cannot supplant a formal one; both are required.

II

*Legal Positivism and Natural Law Philosophy*

To understand legal positivism and natural law philosophy, one must take account of the political context in which they originated and of their respective policies shown, as regards the former, for example, in Hobbes' *Leviathan* and Austin's orientation. For when Austin speaks of "command" he is apt to speak also of "obedience" or "disobedience." But disobedience was relegated to the extremely remote possibility of revolution and,
Legal positivism was constructed on the premise that order, certainty and regularity require obedience to the commands of the Sovereign regardless of their ethical validity. This, however, is morally unacceptable; the quest for justice is as "basic" as is the need for order. Inevitably, there is constant tension and frequent clash between the drive for order and insistence on justice.

This was discussed in the first lecture in terms of a realistic theory of criminal law which in certain respects opposes, and in others is supplemented by, generalizations which subsume all formally stated "penal" laws. The legal philosopher who builds upon one or the other type of theory constructs a natural law philosophy or a legal positivism; he generalizes concerning all "law," as he defines it. Thus, the clash in the lawyer's realm of specific problem-solving is "writ large" to comprise first, the theories and, then, the above legal philosophies. It was concluded, for various reasons, that both realistic and formal theories of law are needed and, as suggested above, that is also true of the congruent legal philosophies.

This, however, runs counter to the long prevailing opinion that legal positivism and natural law philosophy are basically and completely opposed, that only one of them is sound and that one or the other must be chosen. For the reasons stated above, however, which were illustrated in the first lecture, I am bound to question this wide assumption; on the other hand, it seems incredible that the historic opposition between legal positivism and natural law philosophy should turn out to be a mistake or a pseudo-issue.

The thesis to be submitted in this lecture is that the two philosophies do conflict in the realm of practical problem-solving (this explains and warrants the prevalent attitude) but that there is a "higher" phase of jurisprudence where both natural law


26 "As devotees of freedom, we must accept the fact that order is a necessity, freedom a comparative luxury. And as regards the legal order, it is unanimity that is imperative; if free agreement is not reached, it must be imposed, or chaos will ensue." Knight, Science, Society, and the Modes of Law, in The State of the Social Sciences 11 (White ed. 1956).
philosophy and legal positivism are recognized as serving essential functions. Before this thesis can be developed, however, several problems which obscure discussions of these legal philosophies must be considered.

Both natural law philosophy and legal positivism have attracted or repelled many scholars. Those who think the former expounds what is most precious in law may resent any criticism of it despite the fact that criticism on the ground that it is not an adequate jurisprudence does not depreciate the service rendered within the chosen limits. On the other hand, skeptics who associate all natural law philosophy with "metaphysics" reject even wholly secular versions of it; for them, a test of the "adequacy" of a jurisprudence is that it reject natural law philosophy. Similar attitudes mar discussions of legal positivism; for some, it is a symbol of the perennial attack on the validity of any theory of values, while for others it, alone, represents the science of law. One cannot hope to alter deeply rooted preferences but insofar as serious misconceptions are involved, it should at least be possible to narrow the area of disagreement.

Other difficulties concern the fact that legal positivists are sometimes ethicists, while, on the other hand, natural law philosophers recognize the necessity of the authority of the State to "determine," articulate and implement natural law (ethical principle). One can hardly fail to be impressed by the fact that the staunch legal positivist, Bentham, e.g., devoted his life to making law become what it ought to be, and that in practice, lawyers assume that the "commands of the Sovereign" have at least a prima facie status as law; they do not speak of "mere commands" as opposed to "law".

Additional complications arise from the fact that scholars who defend "legal positivism" sometimes seem to support a philosophy which, by reference to the history of jurisprudence, resembles natural law philosophy or the sociology of law or a mixture of both rather than legal positivism. Consequently, in the well-known Fuller-Hart debate, for example, it is not easy to dis-

27 Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958); Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958).
cover what the issues are. Both scholars want just laws, both seem to reject the theory that law is a command, both require conditions necessary for the survival of a legal order, both accept a theory of judicial interpretation which postulates that there is a clear core of meaning as well as a vague periphery in rules of law. Both even agree that retroactive criminal law would have been the best solution, probably in the sense of the "least objectionable" one, by the present German government, regarding cases of outrageous conduct during the Nazi regime, e.g., a wife who informed on her husband in conformity with Nazi statutes.

This last agreement raises troublesome questions regarding both legal positivism and natural law philosophy. How can a legal positivist support retroactive legislation when there was law (in his sense) at the time of the conduct in issue without at the same time implying that law in that sense is merely verbal? On the other hand, how can a natural law philosopher, whose raison d'etre is "right law", find any merit in retroactive criminal law as a way to build a moral legal order when such enactment only makes "legality" hypocritical? For the above various reasons it seems evident that certain important questions must be clarified if jurisprudence is to be freed of the indicated uncertainties.

The first need is to recognize that what is distinctive in a legal philosophy is different from what it has in common with another legal philosophy. Human beings are distinctive in their abstract thinking, use of language, and so on, but they share various characteristics with lesser creatures and with physical objects. Second, the elucidation of the doctrinal aspects of a legal philosophy (its meaning) is different from a discussion of its effects or functions. As to the latter, e.g., it is possible that in some countries legal positivism has encouraged mechanical adjudication and isolation from the current of social thought, although this does not seem to have been the case in England or the United States; in any case, the effect of a legal philosophy depends partly on how it functions vis-à-vis an opposed legal philosophy.

In actual problematic situations, lawyers frequently compromise not merely as a matter of expediency, but because they recognize merit in each other's position; or the morality of the law is indifferent or there is only a minor deviation from sound
standards and so on. But in the relevant higher realm of constructing the legal theories and legal philosophies, there is no such thing as compromise; compromise there means incoherence. The meaning of the legal theories and philosophies must therefore be bared to reveal their basic clash; what is distinctive must be maintained consistently to the very end.

Even greater difficulties are met if one ignores the practical orientation of both legal positivism and natural law philosophy (as extensions of the practically oriented theories); the issue then is apt to be formulated in general terms of command versus command fused with morality. But when the issue is stated that way, everyone tends to be a natural law philosopher, for who would not have one plus one rather than one alone? In democratic states and, certainly, in common law jurisdictions, who would not agree that "in general" positive law is more than sheer fiat?

But, it will be asked, is it not the fact that natural law philosophers recognize and require authority (and, thus, the "command of the Sovereign") as well as its moral validity; does not that raise the issue with legal positivism? The fact of the requirement and avowal must be granted as well as their usually beneficient influence. But it is nonetheless true that the distinctive feature of natural law philosophy is not revealed in that posture. Instead, the issue is obscured; for in that statement of it the natural law philosopher shares the value of positivity with the legal positivist.

To reveal the distinctive feature of these legal philosophies, one must extend each of them to its extremity. The natural lawyer cannot always have a fusion of command and morality since we do not live in Utopia; insistence on "fusion" therefore implies disobedience when there is only the positive command. Similarly, to reveal what is distinctive in legal positivism it must be tested against despotic systems, not by the way it has functioned in democratic states. What is compatible with the distinctive character of legal positivism is that the most outrageous enactment of a dictator must be recognized as law.

This does not imply that legal positivism is opposed to sound, just law or to resort to the purpose of enactments and other aids
to sound adjudication. What legal positivism in its distinctive meaning opposes is disobedience and nullification of the commands of the Sovereign. When the position is—this enactment of the legislature or this judicial decision is not law because it is unjust and it should therefore not be obeyed or enforced—that is what natural law philosophy insists on and legal positivism opposes. At this point, the natural lawyer's avowal that he, too, recognizes and wants authority and command is no longer heard. He wants authority when it is right (or when he so believes) but he will not obey unjust authority; his positivist critics call this "anarchy". Thus, the distinctive meaning of these legal philosophies is revealed when their ultimate implications are related to action.

It is curious, therefore, that Kelsen, unlike Austin, weakens the case for legal positivism by insisting that law need not be general; a specific judgment against a particular person is law in his theory. But in Austin's jurisprudence and in any relevant historical context what is distinctive in legal positivism is not the use or threat of physical force to compel obedience to specific commands, but the coercive maintenance of order. Kelsen acknowledges that a specific judgment must be viewed in relation to the legal generalizations from which it was derived; this seems to concede the generality of law. Once the generality of the Sovereign's commands is admitted as a feature of law and a tenet of legal positivism, some minimal order is implied as well as the conceptualization characteristic of rational thought. This, of course, does not imply that bare order backed by force is desirable or that it can satisfy human wants. It calls, however, for the distinction of moral values from other values and for recognition that legal positivism requires and implements the value of order. This is its distinctive policy; but in actual operation vis-à-vis natural law philosophy it contributes in other ways, as well, to the composite character of a just order.

For example, if one considers the construction and maintenance of the "rule of law" in its Western moral significance, the contri-

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29 Hartmann, Ethics (1932).
bution of legal positivism seems evident.\textsuperscript{30} How else could one account for the strong defence of *nulla poena sine lege* by the vast majority of scholars in democratic states? For the crucial test of the rule of law is not raised in the cases where it protects the innocent from overzealous prosecution, although that, of course, is very important. The crucial test, as is shown in the twentieth century dictatorships, is met in cases of anti-social conduct which do not fall within the orbit of any existing criminal law. I believe the overwhelming consensus of scholars in this field is that such conduct should not be punished because the preservation of legality requires their exculpation. (International cases and revolution raise special questions.) Logically, this should apply, also, but with opposite effect, to an unjust criminal law; here, however, in democratic states positivism retreats before the demands of morality, while in harsh dictatorships the voice of justice is silent. But the present point is that the value of legality does not always coincide with that of justice or morality. Accordingly, natural law philosophy does not suffice and, as indicated, it should sometimes be opposed.

That morality seeks perfection, not law, was first revealed in Plato’s *Statesman* where the issue was that of law versus the perfect justice of the philosopher-king.\textsuperscript{31} The case for the latter turns upon the generality and rigidity of law. It can never therefore be perfectly suited to the uniqueness of the facts and persons in specific situations; if social changes occur, the gap between the law and perfect justice in the particular case widens. Plato did not cast this issue in terms of the positivist view of law (which would have made it impossible for him finally to prefer law as the best solution in any actual State) but in terms of just law versus perfect justice. The implication of the *Statesman* is plain, however, that knowledge of justice or morality unaided by legal authority will not suffice in any existing State. This is usually avowed by natural law philosophers who, however, do


\textsuperscript{31} Hall, *op. cit. supra* note 1, at 61-64.
not acknowledge its implications regarding the service of legal positivism.

This is nonetheless the gate through which legal positivism enters to contribute to a just law, a relatively moral order. It advances the idea of order via its concept of law; it implements regularity and certainty. This is its distinctive contribution. For in actual practice, justice also depends on generalization; the very heart of it is equality and universality. The fused character of a just legal order thus reflects the joint functioning of these philosophies.

In sum, legal positivism, pushed to its distinctive extremity, ends in bare order maintained by physical force, while natural law philosophy, facing its crucial test, terminates in anarchy. But just as the skilled tight-rope walker uses a rod weighted at both ends to support his perilous posture, so, too, natural law philosophy and legal positivism are counterweights required to maintain a just legal order in a precarious balance between the regime of a concentration camp and utopian anarchy.

The policy and functions of legal positivism depend upon the positiveness of positive laws. “Positivity” refers to the fact that these laws are the product of, are “posited” by, human effort and that the evidence of this is observable. Beyond the suggested contrast with natural law created by God, legal positivism has difficulty in distinguishing positive laws from ethical principles and it encounters much more serious obstacles in distinguishing positive laws from mores and the by-laws of sub-groups.

It is not easy to distinguish positive laws from ethical principles whose violation is disapproved, since “sanction” extends from the imposition of physical privations to merely raising an eyebrow. Even if it is thought that the differences are sufficient to warrant the sharp distinction of positive laws from ethical norms, that, plainly, does not apply to the mores and by-laws of sub-groups. Since the by-laws of sub-groups are of human construction and are articulated by leaders (certain mores might also be included),

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additional criteria are needed if one wishes to distinguish them from positive laws.

There is a large literature on this subject, concerned especially with the sanction, which cannot be discussed here. The required final inference, it seems to me, is that the state's legal sanction is not distinctive (as Kelsen claims) in that it alone consists of measures of physical force; not only the Mafia but also the family, American Indian societies and others impose physical sanctions, and they also rely on recognized norms. In addition, some of the State's sanctions are not measures of physical force.\(^3\)

Moreover, whatever doubts one may have regarding this question, it is sufficient for the present subject if it is granted that that question is moot. For this has the same significance as regards a legal philosophy oriented to action as though it were assumed or found to be impossible to distinguish positive law from all other norms in terms of substantive criteria. And if it is doubtful whether the State's positive law can be distinguished from all other norms in terms of the coerciveness of its sanction, the dropping of command and coerciveness and apparently, also, of the Sovereign \(^3\) makes it quite impossible to distinguish, much less separate, that positive law from other norms in terms of substantive differences.

In his treatment of this problem, Austin's insight was superb even if he did not state his jurisprudence in the most logically apt terms. For in daily life and in adjudication and wherever else it is practically important to know what the law is because the crucial requirement concerns action, the command of a "determinate political superior" is essential.\(^3\) Accordingly, while Austin's definition or theory of law is inadequate if it is read as a theoretically sufficient description of substantive criteria, it is


\(^3\) Hart, supra note 27, and Hart, The Concept of Law (1961). In the writer's view, it may be possible sociologically to distinguish positive law from other norms by use of cogent set of descriptive criteria; but the positive law, thus distinguished, would include certain by-laws of subgroups as well as many laws of the State. See supra note 33.

\(^3\) Austin, 1 Lectures on Jurisprudence 191-96, 228 (4th ed. 1879).
rendered adequate to the above practical purpose by the simple fact that the meaning of "determinate political Sovereign" is in practice quite certain. 6 "Determinate" means "precisely identifiable"; it refers to the particular human beings who are recognized public officials and to particular books and reports which contain the official pronouncements which also conform to the specified structure of sanctioned commands (since the designated officials do and say many other things).

Austin states the case for legal positivism mostly in terms of the need for clarity, especially to reject 'intuitionist ethics" which, he thought, obscured the determination of positive law. But the history of legal positivism shows, I believe, that it rests finally on the value of social order ("obedience", in Austin's terms). The orientation of legal positivism to the value of order, in the context of the rise of the secular State, was not emphasized by Austin because in his time Britain was already far advanced as a liberal State. The adherence of present-day scholars to legal positivism because of their experience in a fascist State 7 is a significant reminder of the underlying policy of this philosophy of law. It is for these reasons that the heart of legal positivism and its great contribution to practical life is its separation of positive law from morals, mores, religion, fashion, the by-laws of subgroups, and so on, and that its corollary is the sanctioned command of a determinate Sovereign or an equivalent formula.

Recognition of the practical orientation of legal positivism is also the clue to further clarification of "Sovereign" in Austin's definition of positive law. Most of the voluminous criticism has followed empirical lines drawn by Maine, e.g., that in some societies there is only customary law and no sovereign like

6 "The problem of the source of law dominates the positivist theory because its definition of law is essentially a doctrine of the source of law." Stumpf, Austin's Theory of the Separation of Law and Morals, 14 Vand. L. Rev. 117, at 120 (1960). "Legal positivism is a view according to which law is produced by the ruling power in society in a historical process. In this view law is only that which the ruling power has commanded, and anything which it has commanded is law by virtue of this very circumstance." (Italics added.) Moór, quoted by Bodenheimer, Jurisprudence 92-93 (1962).

Austin's ever issued a command of the type he required. In complex political organizations, especially in modern federal states, it is difficult to discover where the ultimate power lies; no actual sovereign is unlimited in his authority, and so on. But these matters do not invalidate the use of "the Sovereign" in legal positivism. In the first place, "the Sovereign" is satisfied by "politically organized society", and there are good reasons to hold that every society is politically organized; ubi societas, ibi ius. Even if this is doubted (the anthropology of the subject is uncertain) the situation is not altered so far as legal positivism is concerned. The reason is not merely that Austin specified "advanced political societies", but also and chiefly because the relevant need and criterion of validity in legal positivism are practical, not theoretical. Austin was not discussing law as a legal sociologist but as a scholar oriented to practice—the practice of law, the action of courts and other officials and, most of all, the action of those who must obey the law. In that practical perspective it is sufficient to provide a definition of law which, concretely applied, effects the definiteness that is required in law if action is to be guided by it. When the Sovereign's final organ has rendered its decision, the relevant command has been stated in very specific, definite terms. What must be done has been, or can be, made quite clear.

Kelsen criticizes Austin on the ground that "command" and "sanctions" have psychological connotations; what is required in analytical jurisprudence are pure ideas. Although this criticism is cogent, it may still be maintained that a de-psychologized command is not a pure norm signifying a "hypothetical judgment" and that Austin's perception was sound. If the idea of command is to be excluded from the meaning of "law", the correlative notions of obedience and disobedience are also excluded; but one who violates a law without any feeling of

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38 It is sometimes forgotten that Maine accepted Austin's theory as valid for its purposes. Maine, The Early History of Institutions 381, 357, 374-75, 385 (1875) and Maine, Ancient Law 97-98 (1861).


psychological constraint “disobeys” a “command” of the State, as those words are ordinarily used. This meaning of “law” may, of course, be abandoned in a juridical science if a better one is available; but it is far from evident that “hypothetical judgment” serves this purpose. Similarly, other empirical arguments directed against Austin, e.g., that “command” implies the will of a living person, that legislators have various wills or that this is often wholly unknown and so on, are irrelevant to the meaning of “command” in a juridical science oriented to practice.

In Kelsen’s theory, it is only the “primary norm” addressed to officials which includes the sanction.41 But since that sanction must be imposed not on themselves, but on offenders, the normativity, the “mustness”, of law is thereby lost. The individual vis-à-vis the legal apparatus decides what he must do, not what certain officials must do to him if he commits a legal harm. Kelsen states, to be sure, that individuals “ought” to obey the secondary norm, but in his theory, this is only “an epiphenomenon of the ‘ought’ of the sanction.”42 While his statement (that individuals ought to obey) may be defensible as an ordinary use of “ought” (and therefore not subject to criticism from that point of view) it is inconsistent with his strict use of that term in reference to the sanction. If the citizen is under a legal duty to obey the law, “law” has the significance of a command that is sanctioned. While it is sometimes helpful to analyze law in terms of rules or norms expressed in a structure designated “hypothetical judgment” and the like, that does not exhaust the idea of law; on the contrary, if nothing further is added it distorts its normative meaning. Inclusion of the idea of “command” may, of course, require the use of a more complex pattern of the structure of law than Kelsen provided, if the offender is to be located vis-à-vis the sanction and the officials who must impose it. This, however, raises no serious problem for current logic nor does it imply that law is only imperative.

It is well to recall, finally, that “command” and “Sovereign” not only were not invented by Austin, they are not peculiar to legal

41 KELSEN, op. cit. supra note 28, at 61.
42 Id. at 60.
positivism. That law is a command of the ruler or Sovereign has been in vogue from the very beginning of jurisprudential borrowing from references to the "commands of God". In Blackstone's terms, e.g., a law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." It happens also that the sanction is of such importance that legal philosophers who disagree on many other issues agree on the inclusion of the sanction in law. For the above reasons, "determinate political sovereign," "command" and "sanction" are essential to the practical purposes of both legal positivism and natural law philosophy.

In sum, the great contribution of modern legal positivism is not that it defined "positive law" in terms of substantive characteristics in such a way as to distinguish it from ethics, the by-laws of subgroups, mores, and so on. Its great contribution is in the realm of practice, especially in the solution of practical problems in terms of action to be taken; as a consequence, it safeguarded "the rule of law" and other values of the modern democratic state. Austin provided criteria which, freed of the uncertainty arising from disagreement in moral valuations and applied to particular legislators, a particular person who is chief executive, certain men who are judges, police, sheriffs and so on, as well as to certain "official" statutes, judicial decisions and the like, gave definite guidance to action, including that of the officials.

Because of the above indicated function of "Sovereign" and other concepts in legal positivism as well as its concentration on analysis, the notion has arisen that this jurisprudence is a formal science. Almost from the beginning of its publication, writers, comparing it with Maine's, described Austin's work as formal, logical or "analytical; this was elaborated by Holland who, influenced also by philology, said jurisprudence is a formal science of law. But Gray replied, "Jurisprudence is, in truth, no more a formal science than Physiology," and the present leader of

43 1 BLACKSTONE, COMMENTARIES 44.
44 Kessler, supra note 30.
45 Stephen, Book Review, 118 EDINBURGH REV. 222, 225 (1883).
legal positivism has also rejected this interpretation of his Pure Theory, and for good reason.

"Formal" has a well-established reference to mathematics and logic, where the formal ("pictorial") interrelation of propositions is contrasted with the descriptiveness and factual validity of premises and their implications. The formalism of philology is less pronounced than that of logic since the terms of grammar refer to language while logic interrelates the form of propositions regardless of any (material) meaning.

But the terms of the most "formal" legal theory or legal philosophy are relatively descriptive. The sanction in legal positivism, for example, refers to and in general terms describes the actions of officials imposing privations on human beings; the hypothesis or delict and the relevant jurisprudential discourse also have descriptive reference to facts and actions. Austin's jurisprudence is descriptive in many other respects, e.g., as regards "the Sovereign," "command" and other concepts. So, too, while Kelsen criticizes the excessive empiricism of Austin's jurisprudence, he admits and requires references to facts in sufficient degree to render jurisprudential concepts intelligible. Thus, the Grundnorm, the required minimal efficacy of the legal system, the apparatus of compulsion and many other aspects of the Pure Theory negate the supposition that legal positivism is a formal science.

"Formal" as applied to legal positivism takes its meaning in relation to legal sociology and natural law philosophy. It therefore means: less descriptive than natural law philosophy and legal sociology or, more definitely, the exclusion of ethical and factual specifications which are required in natural law philosophy or legal sociology. Similarly, it sometimes means a definition of "positive law" and other concepts which expresses the minimal

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49 The problem is complicated by other meanings of "logic," such as Dewey's instrumental problem-solving logic and the recent use of "logic" as a synonym for "dialectical inquiry."
51 Kelsen, supra note 40.
agreement noted above in the two traditional philosophies as regards the criteria deemed essential in positive law.

For the reasons stated above, the interpretation of legal positivism as only or primarily a method of analysis obscures a jurisprudence oriented to the value of order and based on the descriptiveness of the required concepts. Moreover, the logical analysis of concepts is not the monopoly of legal positivism or of any other legal or other philosophy. Logic is the common instrument of all thinkers. The fact that the elucidation of basic legal concepts has been particularly cultivated in modern legal positivism does not negate the interest of earlier natural law philosophers in the analysis of concepts; neither does it bar the construction of a realistic ontology of law by present-day natural law philosophers. One need only observe the meticulous care with which Max Weber analyzed the concepts of his sociology of law (as well as of his general sociology) to perceive that analysis is not a unique characteristic of legal positivism or of analytical or other philosophy.

If “analysis” is employed in a special sense, associated with recent or current “analytical philosophy,” many other difficulties arise. Apart from that of determining the meaning of “analytical philosophy,” the plain fact is that legal positivists were and are philosophers of law, intent on constructing a practical juridical science and therefore interested in certain very important meanings of “positive law.” The analysis of the words “law,” “rules” and so on and of their use in various contexts may be very helpful but it is not synonymous with, or a substitute for, legal positivism.

The final group of problems to be considered concerns ethical aspects of legal positivism and natural law philosophy. The particular obstacle in the way of their analysis is the association of legal positivism with age-old polemics on ethics, beginning in the Platonic dialogues and continuing to this day in discussions of “emotive” and other positivist theories of ethics. The clash of ethical theories was accentuated by the rise of sociological

52 Urmson, Philosophical Analysis, at ix (1956).
positivism; those who were skeptical of values or of any ethical knowledge were strengthened in their attitude by the dramatic progress of physical science and consequent expectations regarding value-free social science. The root of current jurisprudential obscurity is the failure to distinguish the above positivisms—ethical, legal, and sociological.

Ethical positivism and sociological positivism are aspects of a single thorough-going empirical, "anti-metaphysical" point of view; sociological positivism, intent on the construction of behavioral social science, draws upon ethical positivism to "reduce" values to factual equivalents. There is accordingly no opposition between these types of positivism; they are comrades-in-arms.

The jurisprudential problem may therefore be narrowed first to the confrontation of legal positivism with sociological positivism and ethical positivism. Legal positivism, except for its insistence on the positivity of law, is at the opposite pole from sociological positivism. The one, especially Kelsen's theory, concentrates on the elucidation of certain "pure concepts" and it excludes all except the minimal facts required for their intelligibility, while the other consists mainly of the description of observable facts and depreciation of conceptualism as "metaphysical." As regards the temperament of its exponents, the two modes of thought are also at opposite poles; in James' terms, there is tender-minded interest in ideas at one extreme, and tough-minded insistence on observable fact at the other. If legal positivism is thus freed of confusion with sociological positivism, one may confront the directly relevant questions of the ethics of legal positivism and how that compares with natural law philosophy.

In the recent past, criticism of legal positivism by natural law philosophers seemed to rest on the assumption that positivist ethics is an essential phase of the criticized jurisprudence. It therefore seemed necessary to point out that Austin was a Utilitarian and that leading American legal positivists, such as Gray and Hohfeld, were likewise far from being ethical positivists.

54 "We have no knowledge of any thing but Phenomena . . ." MILL, AUGUST COMTE AND POSITIVISM 6 (1866).
55 Hall, supra note 39, at 360-62.
Conversely, the fact that Kelsen ranges from acceptance of "emotive ethics" to a positivist relativism does not imply that his views of ethics are an essential aspect of legal positivism. This is not because of any preference for the way Austin and other legal philosophers in the Anglo-American tradition have "done" legal positivism; it is based on the fact that legal positivism can be purged of emotive and other positivist ethics without the least loss in its distinctive purpose and functions.

The above clears the path of unwarranted prejudice against legal positivism. It indicates that there is no warrant for inferring either that Austin's jurisprudence was basically different from Kelsen's or that the elimination of Kelsen's ethical positivism provides a sound basis for distinguishing legal positivism from a resulting "analytical jurisprudence." In the history of jurisprudence, those terms have been used as synonyms, and that remains valid; the decisive fact is that Austin and Kelsen agree on what is basic in legal positivism, namely, that the moral validity of the command of the Sovereign (or of a norm issuing from the Grundnorm or its lesser implicates) is irrelevant to its being law. While Austin was a Utilitarian, he excluded the utility of the Sovereign's commands from the essential criteria of positive law. The fact that he allocated that question, as a genuine one, to legislation does not alter the significance of his exclusion of ethical validity (by his standard) from the criteria of law. His position so far as that crucial question is concerned was therefore precisely that of Kelsen's; the fact that the latter found no place whatever for ethical principles or for ethics in any rational sense is immaterial to this issue.

There is another important aspect of this question to be considered when one contrasts legal positivism with natural law philosophy in the above regard. It is possible to argue that in Austin's jurisprudence, law had instrumental value in a much narrower sense, i.e., only as regards order, than that which he attributed to "utility"; this may even be said of Kelsen's theory. But what both unalterably oppose is the natural law thesis of the intrinsic value of law. (The two positions parallel the Utilitarian and retributive theories of punishment.) This problem is closely related to, if it does not equally depend on, the intuitive
apprehension of moral validity; in any case, Austin's vigorous attack on "intuitionism" will be recalled. There is an additional related difference between the rationalist ethics of natural law philosophy and that of legal positivism, namely, the former's thesis of the descriptiveness of ethical principles, including those embodied in positive laws; this implies a view of ethical truth analogous to truth in science.\(^{56}\)

What is important, in sum, as regards legal positivism is not that Austin was a Utilitarian while Kelsen was a positivist or skeptic in ethics (indeed, Kelsen's position has the advantage that it cannot mislead since it is made abundantly clear that law need not be ethical) but that the thesis that law has intrinsic moral value is barred by legal positivism—that is precisely what must be rejected if obedience to law is to be freed of confusion.

It must be noted, finally, that the issue of legal positivism versus natural law philosophy is also confused by the failure to distinguish two important meanings of "ought," namely, the "ought" implied in criticism and the "ought," or better the "oughtness," employed in theoretical discussion. The first "ought" is relevant to action, to such questions as, what ought I do? What ought the legislature enact or the court decide? Various answers have been suggested to questions employing this meaning of "ought": one ought to do what is right; one ought to obey the law; one ought to act in such a way that the universalization of his action will result in the greatest good, and so on. Relevant answers are thus in terms of action. Accordingly, when a rule of law is criticized, e.g., when that of contributory negligence is said to be inferior to that of comparative negligence, the implication concerns action by individuals as well as by courts and ministerial officers.

On the other hand, the "oughtness" of law is the subject of theoretical inquiry ("ontology" of law). The purpose there is not to criticize in order to decide what to do, it is to understand and to describe law as end-directed, as including an ideal or value (as Plato, e.g., found the partial actualization of the ideal of the Republic in the state of his Laws).\(^{57}\) In this context law

\(^{56}\) Ewing, Second Thoughts in Moral Philosophy (1959).
\(^{57}\) Hall, op. cit. supra note 1, at 68-71.
cannot be reduced to "isness" in the sense that physical objects simply exist; hence the temporary "divorce" of the Is from the Ought (i.e., oughtness) of law for purposes of a descriptive science of law is fallacious. (The realists, however, usually meant "ought" in the sense implying criticism.) In a sounder sociological view, laws are end-seeking actions, distinctive conduct actualizing values. This will be discussed in the next lecture.

Evidently, then, it is the first "ought" of law, that related to action, which the legal positivists bar from the definition of "law." For the implication of the thesis that "only morally valid commands of the Sovereign are law" is that an immoral command or one criticized on that ground ought not be obeyed. Conversely, what is relevant in legal positivism is not the ontological character of law but criticism based on that, which raises the issue of obedience. It is not confusing (but necessary and helpful) in theoretical discussion to say that law is a composite or coalescence. The positivist charge of "confusion," however, concerned the "ought" relevant to action.

To conclude that legal positivism makes a basic contribution to a just legal order is far from stating that it is an adequate philosophy of law. The rationality and moral validity of a legal order painstakingly constructed in a millenium of thoughtful experience render such a claim by legal positivists implausible. On the other hand, natural law philosophy cannot accommodate all that goes on and much that must go on in the legal process of a modern state. It provides no theory of morally indifferent or morally invalid commands of the Sovereign, and ignores ethical disagreement and other uncertainties except in offering counsel in critical situations. Other important jurisprudential problems are plainly outside the orbit of both of these traditional legal philosophies, as will shortly be discussed.

But if we agree, as lawyers are bound to do, that the axiom of relevant jurisprudential thought is stated in terms of a "just legal order," it should also be recognized that both legal positivism and natural law philosophy are necessary to achieve that goal. What is decisive of that is not the fact that in any legal system the method of trial is to some degree adversarial and that
the logic of this culminates in the opposed legal philosophies. One could conceive of a system where one person, the symbol not of the philosopher-king but of the great human law-givers or judges, was entrusted with the entire law-process from law-making to adjudication and enforcement. This would not dispense with the need for legal positivism and natural law philosophy. For what we find at bottom are the ultimate ideas and values of order and justice, neither of which can be reduced to the other. In the history of human societies these ideas have been elucidated in various ways and they have been incorporated into different legal institutions; especially in democratic states, the ideal is the fusion of order and justice to provide the best that is obtainable outside of Utopia. In inevitably imperfect human conditions, the Giant Legal Positivism will therefore continue to confront the gentle but insistent Messenger of Justice in their trying joint enterprise. Let us be thankful that both can live and work in the same world.

III

Toward Comprehensive Vision

In the solution of actual legal problems, there is both give and take between the adversaries; and although legal theories, bound to the rigor of logic, run their distinctive courses, it was also concluded, for various reasons, that both realistic and formal legal theories are needed. In the second lecture, this was generalized in the thesis that both legal positivism and natural law philosophy perform important functions, the one centering on and implementing order, the other, justice, and that the product of their joint functioning is the institution of a just legal order.

The concessions made in specific problem-solving and the recognition of the need for that as well as for both types of legal theory and legal philosophy must be distinguished from the adversarial roles of these participants, theorists and philosophers. It is the implied interrelation, integration or synthesis of legal
philosophies, as it has variously been termed, which is the subject of this concluding lecture.\(^8\)

If one is a legal positivist or a natural law philosopher, he is apt to regard jurisprudence as a debate, and he chooses the side he prefers. But such a restrictive view encounters serious difficulties in addition to those already discussed. For example, in the light of empirical jurisprudential contributions since Montesquieu and Savigny and, increasingly, since the progress of social science in this century, on what ground, save personal preference, is it possible to ignore the sociology of law or to bar it from the province of jurisprudence? Once admitted there on equal terms with the traditional legal philosophies, it is hardly possible to avoid raising questions about its relations to legal positivism and natural law philosophy.

The sociology of law, in the presently intended sense, is a philosophy of law which must be distinguished from the empirical science or social science of law which is also called "sociology of law"; this reflects the general distinction between the philosophy of science and science. Ehrlich's *Fundamental Principles of the Sociology of Law* is mostly philosophical, e.g., in its elucidation of theories, while various studies by Llewellyn, Underhill, Moore and, perhaps, the speaker's *Theft, Law and Society* were efforts to contribute to the social science of law. The above distinction is necessary despite the fact that most of the writing on "sociology of law" discusses its philosophy and also contributes to the relevant social science.

Just as there are behavioral and humanistic tendencies in social science, including that of law, so also are there corresponding philosophies in the sociology of law. One of them is very similar to, perhaps identical with, the philosophy of physical science; the other is a humanistic sociology of law.

Their common interest is in generalization; but generalizations do not have the same structure or significance in both of them. The behavioral science of law seeks universal generalizations ex-

pressed in terms of the co-variation of factual variables. The humanistic sociology of law not only encourages less extensive generalization, such as that discovered in the comparative study of two or three sets of data, as well as generalization in terms of trends; in addition, it views the wider theoretical generalizations, in part at least, as descriptions of rational responses to similar conditions, not merely physical reactions. Humanistic legal sociology also draws upon history and case-histories for intensive study of particular institutions, and since it is concerned with the study of problem-solving (on the premise that there are better and worse solutions), it finds valuation meaningful and necessarily included within its scope.\(^{59}\)

The above differences may be more sharply described by reference to the respective definitions of "positive law," designating the subject matter of these legal sociologies. From Savigny to the American and Scandinavian Realists and into the present, legal philosophers, exploring facts in relation to law or the factuality of law, have sought a theory of law in terms of "law and society," "law-in-society," "living law," "law-in-action" or "normative fact"; from the previously indicated rigorously scientific viewpoint, "law" was defined by the realists as "official behavior," "disinterested attitudes" and so on.

A social discipline obviously requires a factual or partly factual subject matter; this was the realists' sound insight. But in a humanistic perspective, social action is not solely factual. It also reflects the "internalization" of norms as well as human freedom; the relevant normativity of law is not therefore expressed by "behavior" or "factual attitude." The progress of sociology, especially in the work of Durkheim and Weber, the rise of phenomenology, and twentieth century theories of value all imply that social action is the central datum to be studied and that it must be distinguished from behavior by the inclusion, in the former, of norms and the end-seeking represented in the actualization of values. In this humanistic-sociological perspective, positive law is a distinctive type of social reality; it is certain conduct which represents a fusion of legal ideas (norms) with facts and

\(^{59}\) Hall, Comparative Law and Social Theory, ch. 2 (1963).
values. Specifically, "positive law is social conduct expressing norms that imply values, deviation from which, implying a judicial process, causes harms that are and must be met by the imposition of sanctions." While it is impossible to elaborate this here, its relevance to the performance of a contract, for example, may be noted. The parties behave in observable ways, expressing certain ideas (their legal rights and duties) and, as they move toward performance, they actualize the value of keeping a promise. The conduct of judges, the sanctions-process, and other important aspects of law-as-conduct can be described in similar terms.

It should next be recalled that in a sociological perspective, neither the command of the Sovereign nor its sanction is substantively distinctive; e.g., the Sovereign has his counterpart in the head of a family, trade union and other associations. In this perspective, the State and its agencies are specialized social organs; only those commands of the Sovereign and the by-laws of various sub-groups which meet the substantive criteria stated above are included in the subject matter of a humanistic sociology of law.

It might appear, accordingly, that there are three different kinds of positive law or three different types of data, each of which is designated "positive law," namely, commands of the Sovereign, those of his commands which are morally valid, and the conduct expressing the norms and so on, as previously stated. But on closer inspection, this initial view must be sharply altered. Indeed, certain common characteristics and interrelationships are plainly indicated. Natural law philosophy operates within the wider bounds of legal positivism; hence the respective types of law are unified as regards morally valid commands of the Sovereign. Within this area of law but in still narrower bounds is law-as-conduct; but this is enlarged by inclusion of by-laws of sub-groups. Of equal importance with the above logical interrelations are the indicated substantive criteria they share. The significance of this is increased if the social reality of law is

60 Id. at 78.
61 See p. 180 supra at note 33.
viewed as the substratum from which many of the State's positive laws have been abstracted. Thus, the definition of positive law in terms of certain distinctive conduct represents a synthesis of the properties stressed, respectively, in the dominant legal philosophies, namely, idea (concept, rule), value and fact. Many of the State's laws are logical extensions of the norms derived from the social reality of law. But technical, arbitrary or otherwise unsound rules of law are excluded from the natural law and the sociological perspectives. So, too, positive law in the natural law perspective might not be expressed in social action, e.g., a new law or one which was not "obeyed" although it was ethically valid. I believe the indicated interrelations can be brought into simple coherence not only by reference to the above noted common criteria but also by reference to the types of the departures from them, such as those made by logical extension or by reference to interrelated practical and theoretical purposes, to be discussed shortly.

With reference to the principal types of legal philosophy, it should be noted that the integration that is possible and significant is to be sharply distinguished from the reductionism characteristic of the unification of science movement. Whatever logical analysis might contribute, one needs only to contrast the concepts of legal positivism and natural law philosophy to see at once that terms which included both sets—if one could invent such a vocabulary—would obliterate important meanings. What is therefore sought in integrative jurisprudence is significant juxtaposition of subject matters ("law") and the principal types of jurisprudence—a pattern in which each legal philosophy retains its distinctive meaning and perspective and is also brought into significant interrelation with the other principal legal philosophies.

The nearest approximation to a genuine synthesis is, perhaps, found in the humanistic sociology of law in which perspective, it will be recalled, law is a fusion of certain norms, facts and values. For this reason, the humanistic sociology of law is closely connected with both legal positivism and natural law philosophy.

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62 HALL, op. cit. supra note 59, ch. 4.
It depends on natural law philosophy for the discovery and elucidation of the ethical principles involved in correct legal problem-solving. This is not because legal sociologists are expected to criticize or reform positive laws but because, wishing to understand and describe the process of legal problem-solving, they must "participate" in it and thus in the relevant valuation. Natural law philosophy is therefore a necessary half-way house in the sociological inquiry.

On the other hand, natural law philosophy depends on humanistic legal sociology to explore and elucidate the social reality of law, especially the normal or natural conditions in which the rationality and moral validity of law (i.e., the law discovered or made in those conditions) are expressed. It is this fund of knowledge of the actual character of such a body of law, from which, e.g., the common law was derived, which supports the contrast of law with mere commands. The fact that the natural law philosopher draws upon this theoretical knowledge of law is not inconsistent with the fact that, in the sphere of practice, a command of the Sovereign may be binding on conscience even if it is not generally obeyed; per contra, conformity is not decisive of the moral validity of a command.

The relation of legal positivism to the sociology of law is shown in the descriptiveness of the concepts of the former; even if Austin erred in concentration on familiar political institutions, the descriptive character of Kelsen's theory reveals its tie to the actuality of law and relevant knowledge.

The dependence of humanistic legal sociology upon legal positivism is more problematical. If the question is viewed in terms of a necessary division of labor or on the assumption that the logical analysis of concepts is within the sole province of legal positivism, the dependence of legal sociology is evident. Even if it be granted, as it seems to me, that the analysis of concepts is an instrument of every philosophy of law, it is still the case that the analysis of the more formal or extensive legal concepts facilitates the work of legal sociologists as well as that of natural law philosophers. Just as their common substantive criteria intersect in the principal definitions of "law," so, too, the congruent types of analysis would seem closely related. The
problem is complicated by the fact that the bodies of jurisprudential knowledge designated "legal positivism," "natural law philosophy" and "legal sociology" are not mutually exclusive. The lines drawn above do not therefore strictly conform to the texts of the legal philosophers, all of whom have more or less employed the above descriptive criteria and ways of "doing" jurisprudence. There is nonetheless a significant degree of common interest and common product. The interrelation of distinctive characteristics can also be discerned, for reasons to be discussed next.

The significance of the above interrelations is increased if they can be set in a wider meaningful context. This has been suggested at various times in the preceding discussion; it is now necessary to deal explicitly with the relevant major problem, the distinction between practical and theoretical knowledge. As has been indicated, the hypothesis upon which the general pattern of interrelations is to be constructed is that legal positivism and natural law philosophy are oriented to practice while the sociology of law is oriented solely to the acquisition of knowledge. The natural law philosopher and the legal positivist are more or less tied to each other by their common orientation; dealing with practical problems, each exerts pressure on the other, and both of them draw upon the sociology of law to support their respective values. At the same time, the legal sociologist views this joint enterprise not only as a principal source of data but also to incorporate concepts formulated there which, modified to suit his descriptive purpose, are used in the acquisition of theoretical knowledge.

The implications of the ancient distinction between practical and theoretical knowledge and, indeed, the validity of the distinction itself are far from evident. The distinction stems from Aristotle 63 who sometimes stated it in terms of the respective motives—that of influencing action and that of simply wanting to understand. Among the Scholastics, emphasis was placed on the difference between instrumental knowledge, i.e., practical knowledge used as a means, and intrinsically valuable theoretical

knowledge. Kant's critiques contrasted pure and practical reason. The origin and enduring interest in these ideas should disabuse one of the current notion that practical knowledge is the pedestrian sort of thing associated with plumbing or the repair of automobiles.

It is sometimes implied that all knowledge concerned with action is practical and, consequently, that all knowledge of law and morality is practical. With the rise of social science, however, it has been widely recognized that there is knowledge of action that is acquired simply to understand it and which sometimes also approximates the structure of pure science. Accordingly, it seems impossible to distinguish practical from theoretical knowledge by merely general reference to action. The necessary distinction is in terms of knowledge which guides or can directly guide action as contrasted with purely theoretical knowledge.

Most characteristic of the former type is purely practical knowledge which concerns action here and now in this specific situation, where only the insight gained in past experience and, perhaps, some general influence of wisdom derived from theoretical knowledge lead to a correct solution. These insights into the nuances of concrete situations cannot be generalized. There is, e.g., the knowledge acquired by an experienced trial lawyer which cannot be transmitted in a set of principles; it takes the form of intuitions, attitudes, the "feel" for an apt thrust, instantaneous timing, and so on. In democratic states this knowledge is also characteristic of the way adjustments are made in the conflict of interests and values, e.g., liberty versus equality or order versus justice. Such problems are solved piecemeal in specific contexts, not as mere compromises (although that too may be operative) but on the basis of valid insight into the particularities of those problems which, however, escape any but the most vacuous generalizations. In sum, this purely practical knowledge is characterized by the specificity of the problems and required solutions, the contingency and uniqueness of the facts, and the lack of organization of the congruent knowledge.

In legal practice, one distinguishes directly operational legal concepts, such as those found not only in substantive law but also in procedure, *e.g.*, declaration, petition, motion to quash, injunction, judgment and so on, from the wider concepts, such as right-duty, borrowed from jurisprudence and applied to the specific facts. In legal theories, there is only generalization, but since these theories are closer to particular fields of law than are the congruent legal philosophies, they are also more intimately connected with the action relevant to the respective fields. In the still more abstract realm of legal positivism and natural law philosophy, the advance towards theoretical knowledge continues, hence the concepts are farther from the specific facts and required actions. But the jural concepts—right, duty, power, privilege, and so on—remain “action-concepts.”

In sum, if we consider only what is distinctive, there is, at one extreme of the spectrum, practical knowledge shown in dealing with the unique aspects of actual problems and, at the other extreme, there is theoretical knowledge (sociology of law) which is irrelevant to direct action. The intermediate positions are held, respectively, by practical-theoretical knowledge, *i.e.*, by legal theories and, between that and theoretical knowledge, by legal positivism and natural law philosophy, *i.e.*, theoretical-practical knowledge.

Certain questions may be raised regarding the above distinction between practical and theoretical knowledge. In everyday life and in dealing with actual legal problems, practical thought is already infused with theory. Again, in the work of scientists in laboratories, experiments are “changes,” and discoveries concern human action in “control” of nature. These facts, however, do not invalidate the above distinction, but only imply that practical and theoretical knowledge cannot be sharply separated. Among modern philosophers it has also been urged that all knowledge is practical and that the difference concerns only the relative “proximity” of knowledge to action.66 “Problem-solving”

is so widely cast by them that even the most theoretical inquiries are related to ordinary human interests. But, again, this does not exclude the significant use of the above distinction for various purposes.

More pressing questions concern the legal philosophies discussed above. The large part of ethics devoted to the analysis of concepts (for some scholars this comprises the entire function of ethics) may cast doubt upon the premise that natural law philosophy is distinguishable from purely theoretical knowledge. But the direct relevance of natural law philosophy to action, change, and especially its emphasis on sound valuation warrant its distinction, as theoretical-practical knowledge, from the purely theoretical knowledge of legal sociology and integrative jurisprudence. Accordingly, as regards natural law philosophy, one would include in the relevant field of ethics not only the analysis of ethical concepts but also the study of the descriptive character of ethical principles as well as the distinctive ethical problems arising from the coercive character of the legal apparatus.

The above interpretation of legal positivism differs particularly from, though it is not wholly opposed to, the view that it is a purely theoretical science. It is, however, no new discovery that legal positivism has an ideological cast; for example, Frederick Pollock, agreeing with an earlier opinion by Brunner, spoke deviously of "Austin's particular form of Naturrecht." Even if this was an exaggeration, its implementation of the value of order gives legal positivism a practical aspect distinguishing it on that account from the purely theoretical knowledge of legal sociology. Legal positivism, in addition to its analytical function, is not only generally descriptive of law, it is also built upon the premise that there are better and worse solutions of legal problems; in Hobbes, this practical intention is obvious. The crux of the matter therefore is not simply that the concepts of legal positivism are "action-concepts" (there are also incorporated into

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67 Cf. "Thus, pure theoretical knowledge, or science, has nothing directly to say concerning practical matters, and nothing even applicable at all to vital crises." PEIRC, 1 COLLECTED PAPERS 348 (Hartshorne and Weiss eds. 1931). Cf. Hobbes' thesis that "knowledge is power."

68 10 L.Q.REV. 100 (1894).
and modified by the sociology of law) but that the knowledge provided in legal positivism guides or can directly guide action in the solution of practical problems.

The principal challenge to this interpretation of legal positivism is raised in Kelsen's jurisprudence. He frequently states that the pure theory is a science—presumably a purely theoretical one; but despite his emphasis on "structural analysis" he denies that it is a formal science. On the contrary, he insists that, "An analytical description of positive law as a system of valid norms is, however, no less empirical than natural science restricted to a material given by experience." 69

Several reservations must, however, be taken to this thesis. First, Kelsen's emphasis on "science" is in the context of a reference to two thousand years of "intellectual approach" to law, implying that he has in mind the wide notion of Wissenschaft, not the distinctive meaning of "theoretical knowledge." Again, he contrasts his science with the "metaphysics" of natural law philosophy; but history, e.g., is sometimes equally positive, yet it is far from being a science. This ambiguity regarding "science" runs through his discussion. Second, Kelsen grants that "normative science" not only elucidates but also depends on the meaning of "ought" (in the sense of "must"); his claim that the former is "no less empirical" than recognized empirical science is therefore hardly persuasive.70

Third, Kelsen's insistence on the purely scientific character of his legal positivism is strongly supported by him on the ground that legal norms are a proper subject of cognition, but that their moral validity is not; this, he asserts, is a matter of merely personal ideological preference. Logical positivist ethics has been in steady retreat for several years and it is sharply and, I think, persuasively opposed by cognitivist ethics. In any case, Kelsen does not explain why it is possible to understand the empirical meaning of legal rules but not the meaning of ethical principles; despite this avowal, his work is replete with interpretations of them. The difference, if any, concerns not the "cognition" of

69 Kelsen, op. cit. supra note 28, at 163.
70 Id. at 162-63.
legal rules apart from their ethical significance, but the objective validity of the respective ideas or meanings.

Fourth, there is the interesting fact that while Kelsen aligns his jurisprudence with ethical positivism and scientific empiricism, he is also at great pains to restrict "law" to the pure idea of law; this, he points out, must be distinguished even from the psychological process of being conscious of (i.e., thinking) a legal norm. But what sort of "empirical science" is it which has the least possible connection with fact, and whose sole subject matter consists of pure ideas? In any case, the fact seems to be that pure theory is descriptive to the required "minimal" degree, i.e., sufficient to help guide action.

Finally, another very important question must be raised concerning the subject matter of his normative science for, as Kelsen recognizes, "science of law" implies a distinctive subject matter requiring that legal norms be distinguished from all other norms. Kelsen supports his position by holding that the legal sanction is a measure of physical force\(^1\) and that this is the basis for distinguishing the State's legal norms from all other norms. For previously stated reasons, however, this position cannot be maintained. In addition, one can hardly ignore the centrality of the Grundnorm in Kelsen's jurisprudence; he relies chiefly on that, not on substantive differences between laws and other norms. Thus the Grundnorm is only a more formal conceptualization of Austin's "Sovereign"; we return to the dependence of legal positivism on a relatively formal criterion which, applied to designate certain norms, officials and reports, suffices for practical, but not for theoretical purposes.

For the above reasons, it must be concluded that even Kelsen's attenuated relatively formal legal positivism is far from being a purely theoretical discipline; from its very foundation in the Grundnorm, it is permeated by its relevance for practical decisions involving action. When the basic policy of legal positivism is recalled—its orientation to order—one may, while granting the increase in theoretical knowledge, conclude nonetheless that it is a theoretical-practical discipline. It is, indeed, its tie to practice

\(^1\) Id. at 26-28.
which gives particular significance to Kelsen's contribution to jurisprudence.

If one views the work of lawyers as specific engagements at the foot of a mountain, the antagonists stand, respectively, at the side of justice and order—not at the outset, perhaps, but eventually, when each position has reached its distinctive extremity. When he ascends the mountain and stops at the first stage, surveying the situation, the legal scholar may generalize what a participant in the specific problem-solving represents in terms of a theory of a particular field of law based on the postulate of one or the other position; the theory is realistic or formal.

When one ascends farther up the mountain and, as a legal philosopher, views similar struggles in all branches of the law, he constructs legal positivism or natural law philosophy, generalizing about all law, as understood in his perspective. This has been the most frequented stopping-point of legal philosophers in the history of jurisprudence.

From the very beginning of philosophic interest in law, however, another tendency has also been operative. Recognizable in Plato and marked in Aristotle, it is revealed at a point on the mountain level with that of the natural law philosopher and the legal positivist; but now the perspective is that of pure inquiry, which in recent years has been called the "sociology of law" in a wide sense. From this position, the inquirer, intent only on understanding what goes on, not on influencing action in the correct solution of practical problems, studies the contests at the foot of the mountain as well as the legal theories and their wider generalization in natural law philosophy and legal positivism; and he also studies other kinds of social control than that by the State, e.g., that of various sub-groups, including their imposition of sanctions. The study of customary law, the by-laws of sub-groups, the processes of law-making and adjudication in democratic states and segments of such processes elsewhere in time and place lead to sociological meanings of "law"; in those contexts law is seen as a rational, freely constructed natural artifact, a distinctive type of conduct.
In this very important tendency, one is required to make a still higher ascent where he views the products of both practical perspectives from their origin in specific problem-solving to the legal theories of particular fields of law to natural law philosophy and legal positivism; but, at this stage, the problem concerns the interrelations of these practices, theories, and philosophies of law. This may culminate in the coherence of all the practically oriented knowledge.

The consequent pattern of interrelations to be explored is complicated by the fact that there is a constant traffic between the practically oriented legal philosophers and the theoretically oriented ones. This continues intermittently and there is no reason to think that any of these tendencies or types of knowledge will become passé. There is, accordingly, a still higher place on the mountain where the legal philosopher surveys all the arguments, theories and legal philosophies described above, ranging from the wholly practical to the purely theoretical ones; his problem is to interrelate these types of jurisprudential knowledge. Some of these interrelations have been discussed above.

Not the least merit of the integrative perspective, it seems to me, is that it stimulates efforts to understand divergent legal philosophies. The need is evident since, unfortunately, the history of jurisprudence reveals that many of the greatest legal philosophers sometimes devoted their extraordinary gifts to the demolition of "straw men." Bentham, e.g., attacks a theory of natural law which no natural law philosopher presented; he substituted the fact of pleasure and pain for ethical principle and therefore never came to grips with natural law philosophy. Again, when Kelsen criticizes "natural law philosophy" he seems to have in mind only certain phases of early versions of it. The current natural law philosophy which has its foundation in the ethical theories of Hartmann, Ross, Ewing and, to some extent, Lewis and Dewey, is wholly ignored. So, finally, as though by an act of poetic justice, much of the criticism of Kelsen's jurisprudence, e.g., that he has not resolved the "duality" of law since he ignores its factuality, that some ethical principles contradict laws, and so on, loses sight of the basic postulate and practical orientation of legal positivism.
There is apt to be an important point in such criticism; but the halting progress of jurisprudence suggests the need for study of the implications and possible uses of criticism. An approach to this question was made in the first lecture with reference to legal theories, which is equally applicable to criticism of legal philosophies. Everything depends, however, on “getting inside” a legal philosophy, and there is no easy way to do that.

Among the few assured methods is the cultivation of the history of jurisprudence. This would encourage disinterested efforts to report the thought of legal philosophers as precisely as possible and it would also help to fix the meaning of basic terms with consequent advantage in the current construction of new concepts. In addition, placing legal philosophies in the political contexts in which they arose and functioned would add greatly to the significance of the texts; as was previously noted, for example, Austin’s jurisprudence, seen in relation to Hobbes’ *Leviathan* and those turbulent times, acquires meaning which he (Austin) did not articulate.

While the history of jurisprudence would render legal philosophers more appreciative of the large jurisprudential terrain that lies outside their particular interest, there is a more pervasive influence—the subject of this lecture. The integrative perspective reflects a perennial phase of human thought which is characteristic of the common effort to construct a coherent view of experience. A jurisprudence which builds on the integrity of thoughtful daily life as well as on the work of lawyers serves the indispensable purpose of philosophy brought to earth. Its quest for comprehensive vision is an everlasting reaching-out for significance, which can never attain its goal or be abandoned.

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