

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Articles

Faculty Scholarship

1988

Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law

Philip E. Soper

University of Michigan Law School, psoper@umich.edu

Available at: <https://repository.law.umich.edu/articles/2862>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Jurisprudence Commons](#), and the [Legal Theory Commons](#)

Recommended Citation

Soper, E. Philip. "Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law." *Creighton Law Review* 22 (1988): 67-88.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

**MAKING SENSE OF MODERN
JURISPRUDENCE: *THE PARADOX OF
POSITIVISM AND THE CHALLENGE
FOR NATURAL LAW****

PHILIP SOPER†

Karl Llewellyn once said, referring to Roscoe Pound's work in jurisprudence, that it was difficult to tell on what level the writing proceeded: sometimes it seemed to be little more than bedtime stories for a tired bar; at other times it appeared to be on the level of the after-dinner speech or a thought provoking essay, neither of which were quite the "considered and buttressed scholarly discussion" that one expected to find.¹

Llewellyn's complaint serves as a warning, though a somewhat ambiguous one, to those who give lectures on jurisprudence. On the one hand, I do not plan to present the oral equivalent of Pound's multi-volume treatise on the subject and so may, perhaps, be permitted to proceed on the level of the after-dinner speech. On the other hand, Llewellyn's remark suggests that the subject of jurisprudence is never suited to anything less than the "buttressed" scholarly discussion that is to be found in dusty tomes and that an after-dinner speech imitates only at the risk of losing or boring one's audience.

This problem of discovering the point and intended audience of jurisprudence is, in fact, one of the topics I intend to address. Moreover, it is not a problem confined only to those who undertake to address the subject in a single lecture. I have mentioned Llewellyn's reaction to Pound, but one can turn to Pound himself and discover that he was well aware, writing over 50 years ago, that "in recent times, there has been a growing impatience with" central issues of jurisprudence—an impatience that did not, obviously, dissuade Pound from devoting one of the five volumes of his treatise to yet another discussion of these same issues.² Perhaps if Pound had been a bit

* This article was prepared in connection with the Dean Louis J. TePoel Lecture delivered by Professor Soper at the Creighton University School of Law on March 16, 1988.

† Professor of Law, University of Michigan Law School; B.A., M.A., Ph.D., Washington University (St. Louis), 1964, 1966, 1971; J.D., Harvard Law School, 1969.

1. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 435 n.3 (1930).

2. See II R. POUND, JURISPRUDENCE pt. 3, § 57 at 99 (1959).

more inclined to identify the causes of the impatience he observed, Llewellyn would have found less to criticize.

It is also possible, of course, that jurisprudence, like any other topic, generates interest in proportion to more contingent factors, such as new discoveries in the field which revive dead debates. Such a view was expressed by Judge Cardozo in a speech on jurisprudence that he gave (also fifty years ago) to the New York Bar Association. Cardozo began by acknowledging that in an earlier period the reaction of his audience to the topic of jurisprudence would probably have resembled the alleged reaction of an Oxford professor to the topic of philosophy: everyone should know just enough about the subject to find that he can do without it. But Cardozo went on to "marvel at the change that has come over us."³ Jurisprudence in the early 30's, Cardozo thought, was alive and professionally exciting because of the recent emergence of the legal realists and the new challenges that their work represented for prevailing views about the nature of law and the judicial decision.

Like Pound, I am aware that the interest of the academic and legal community in issues of jurisprudence cycles through periods of intense excitement and enormous ennui. Like Cardozo, I think that we are presently in a phase of renewed interest, now some twenty years old, that is unmatched in the entire history of the field. Part of my goal in this article is to give you a sense of what has happened during these last two decades and to explain why the field seems alive and vital now in a way that many once thought impossible.

I shall proceed as follows: First, I shall define some of the terms I have been using, beginning with the term "jurisprudence" itself. Second, I shall introduce two distinctions that I think help categorize the various answers that have been given to the question about the nature of law that is at the focus of traditional jurisprudence. Third, with these distinctions in mind, I shall provide a very quick summary of the major theories about law that existed in the literature up until the last twenty years. Finally, I shall describe the developments of the last few years and defend a thesis involving the implications of those developments for both sides of the traditional dispute about the connection between law and morality.

JURISPRUDENCE

"Jurisprudence," as currently used, refers to at least three distinct enterprises. The most comprehensive of these is the one men-

3. B. CARDOZO, *Jurisprudence*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 7 (1947).

tioned in the degree that most American law schools now award upon graduation. Students regularly become doctors of jurisprudence, even though most have never been required (and many have never elected) to take a course in "jurisprudence." In this broad sense the term seems to mean simply "the study of law;" its referent is whatever subject matter a law school, bar association, or other official body designates as a prerequisite for the practice of law.

A second usage comes closer to designating both the subject of this article and a more traditional meaning. Jurisprudence in this second sense is "the science of law." It differs from "the study of law," not in the scope of what is studied, but in the way the study proceeds. The object of this form of jurisprudence, as the term "science" suggests, is less the mastery of specific legal doctrines than the discovery of general principles that explain the shape of the legal world just as scientific principles explain the shape of the physical world. A familiar example of this second enterprise is "analytical jurisprudence," which explores the meaning of basic legal concepts like "property" and "contract" in much the same way that a philosopher might; that is, independent of the study of particular rules of property or contract law.⁴

Analytical jurisprudence, in addition to being a familiar form of the "science of law," also illustrates how this sense of the term is related to the first sense. I said that it was possible and even frequently the case that one could complete the "study of law" and receive a degree in jurisprudence without ever having taken a course in the "science of law." That statement is no doubt true if one is talking about a separate course in "jurisprudence," but it is almost certainly false if one is talking about exposure to the science of law in the normal course of legal study. First year courses and first-year casebooks inevitably include, along with legal materials, healthy chunks of material exploring the meanings of basic legal concepts and speculating about the social or economic origins and effects of legal rules. This relationship of mutual dependence between the study and the science of law seems both inevitable and desirable. An understanding of the wider context in which legal concepts have meaning and an appreciation of the social setting in which legal doc-

4. Analytical jurisprudence is not, of course, the only "scientific" approach to law. The communication between law and other disciplines, which began earlier in this century and appears to have recently accelerated, has produced a range of "jurisprudential" courses that probably look much like courses in sociology, anthropology, economics, or political science to the outsider. The inclusion of these courses in a law school curriculum presumably reflects the belief that each of these disciplines will bring the general and scientific principles of its field to bear on the subject of law in a way likely to produce a more basic understanding of the legal system.

trine operates surely enhances a lawyer's ability to apply doctrine and anticipate its change and development.⁵

The third sense of jurisprudence is the one with which I shall be concerned in this lecture. Like the science of law, jurisprudence in this third sense seeks general principles rather than the mastery of specific legal doctrine. It is thus an example of the second type of enterprise. What identifies the study as an independent branch is the subject matter selected for investigation, namely the concept of law itself. If jurisprudence in the first sense is "the study of law," and in the second "the science of law," we might say that jurisprudence in this third sense investigates the "nature of law."⁶ To avoid further confusion, I call this third form of jurisprudence "legal theory." It is a field largely constituted by the rather impressive body of literature, which Thurman Arnold called a "maze of metaphysics," on the question "what is law?"⁷ The great divide within the field has always been between positivists, who claim that there is no necessary connection between law and morality, and natural law theorists, who claim that such a connection exists.

The foregoing review of various senses of "jurisprudence," helps identify the topic of discussion; also it helps pinpoint one particular

5. The question of the optimal balance to be struck between the "science" and the "study" of law may well permit different answers for different individuals and within different areas of law; it is certainly a question on which reasonable persons (and curriculum committees) have been known to disagree. The only clear mistake in striking this balance is the assumption that one or the other of these enterprises can be eliminated entirely from the practice or the study of law. Indeed, the bad reputation that "analytical jurisprudence" still has in some circles is probably an unfortunate leftover from a time when courts and legal writers were thought to be making just this assumption—*viz.*, that conceptual analysis alone could explain legal doctrine and determine the results in all cases. That such a claim seems false today warrants limiting, but not eliminating, the place of conceptual analysis in law. The challenge of legal realism, after all, was directed not only at formalism and the excessive pretensions of the analytical branch of the "science of law;" it was also directed at any ordinary "study of law" that paid insufficient attention to the empirical roots of law that other "scientific" disciplines could reveal.

6. By and large, inquiries into the nature of law have been conducted as subdivisions of the general field of "analytical jurisprudence." The inquiry has been into the meaning of law just as one might explore the meaning of contract or property. The justification for viewing these inquiries as constituting a separate field, rather than as just another of the several subjects studied by analytical jurisprudence, is partly historical and partly logical. Historically, inquiries into the nature of law, particularly the question of the connection between law and morality that has always been the driving force behind the enterprise, pre-dated most of the other specialized "science of law" courses and produced what is by now an impressive and separate literature. Logically, the concept of law does seem to enjoy a certain priority respecting its relative position in the realm of basic legal concepts. Whatever the explanation, this field of jurisprudence enjoys a life of its own with its own biorythms of depression and exuberance and its own small coterie of friends and detractors within a larger world of total strangers.

7. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 216 (1935).

puzzle about legal theory that I address more fully below. That puzzle can be seen by asking the same question about legal theory I have already answered in the case of the other two senses of "jurisprudence:" what is the connection between investigations into the "nature of law," on the one hand, and the "study" or the "science" of law on the other? The evidence I have provided for the relationship of mutual dependence between the science and the study of law seems embarrassingly absent in the case of the nature of law. A law school course in contracts or property inevitably considers at some point the abstract question of what is meant by those concepts. But no course typically pauses to ask what is meant by "law." Indeed, if the analogy with analytical jurisprudence as it operates in these other areas of legal study is pressed, one might expect law schools, if there *were* a similar relation of mutual dependence between legal theory and the general study of law, to require students to consider the nature of law issue prior to, or in connection with, all other courses of study. But it is the rare school that makes such courses available, even as an option, at the outset of a student's career. It is equally rare to find disputes about the nature of law incorporated into other law school courses as an integral part of the study of law. Whether a student in the course of his or her studies ever encounters the nature of law issue is usually left to chance or choice.

If the empirical evidence for the connection between legal theory and legal study is weak, it is probably because of the weakness of arguments that put the case for legal theory in terms of its utility to the practicing lawyer or judge who must argue or decide a case. It is easy to see why a difficult contracts case might force a judge or lawyer to think more broadly about the meaning of "promise" and its role in society in order to apply existing precedents. But what kind of issue typically requires a judge or lawyer to consult the legal theories of John Austin or H.L.A. Hart or Ronald Dworkin in order to shape or resolve a legal argument? The closest examples that come to mind, at least if one selects examples by reference to the claims that legal theorists have recently made for their models of law, are those in which a judge is asked either to ignore what seems to be a clear legal directive, or to fill an apparent gap in the existing law. But it is precisely in these difficult cases, where there is no consensus about the result required by existing law, that competing theories about the nature of law seem indistinguishable in regard to the practical guidance they offer. No sensible lawyer suggests to a judge that the correct result in a case turns on whether law is seen: (1) as the consequence of some basic juristic hypothesis; or (2) as a "natural law" above man-made law; or (3) as the will of a sovereign; or (4) as the "principled" interpretation of past political decisions. These com-

peting theories of law do not help because they are too vague. They simply reintroduce the judge's dilemma at a higher level of abstraction. If there is no consensus about the correct legal result in a case, one can hardly expect to find consensus about what the basic juristic hypothesis requires, or what "natural law" dictates, or what the sovereign would approve, or what result would be most "consistent" with past practice. At the level where legal argument occurs, these various theories about law cannot make the difficult case less difficult and so must leave the phenomenology of judicial decision-making unchanged.

What, then, is the point of legal theory? That is the major question that I will address in the balance of this article and it helps explain the sense in which I have undertaken to "make sense" of modern jurisprudence. I do not propose to "make sense" of legal theory by criticizing existing theories and arguing for my own pet version, though I shall inevitably do both of those things along the way. My main objective is to offer some suggestions about how best to understand what legal theory is, or ought to be, about. In particular I shall describe two ways of categorizing legal theories. These two ways of thinking about the purpose of a theory about the nature of law cut across the traditional division between positivism and natural law and provide clues to what is at stake in the continuing debate.

TWO DIMENSIONS OF LEGAL THEORY

What is the point of legal theory? I propose a general answer to that question. I shall then use that answer to sketch in a very rapid way the major developments that have occurred within this field in the last twenty years.

The point of legal theory is best seen in contrast to the point that is assumed by much of the existing literature. To develop that contrast, two distinctions are needed. The first distinction concerns the perspective from which the inquiry into the nature of law takes place. Put another way, the distinction concerns the intended audience of the legal theory. The critical distinction here is between the outsider and the insider. The outsider is, for example, a sociologist or legal philosopher or other academic who is interested in distinguishing legal systems from other systems of social control that they resemble, such as moral systems or coercive systems. The intended audience consists of other outsiders; other academics or legal philosophers who are also attempting to characterize and distinguish legal systems. The outsider's perspective, typically, is disinterested and detached. The only goal is knowledge of the world, of how best to de-

scribe or understand phenomena that resemble each other in some ways but differ in others.

With this perspective, contrast now the perspective of the insider. The insider is a citizen, lawyer, judge or other official who is actively engaged in the practice of law. This person is trying to identify, apply, or get advice about particular legal norms. When the insider asks "what is law," he or she is usually motivated by immediate practical concerns, such as the wish to know the consequences of particular conduct—actions that are either in active contemplation or that have already taken place.

The second distinction concerns, not the perspective from which the study proceeds, but the goal of the study. Put another way, the distinction involves the motivation for undertaking the inquiry in the first place. The typical goal of the outsider, for example, is knowledge about reality, about the differences between legal systems and other systems of social control as reflected both in our language and in the world. Where this is the goal, I shall call the inquiry an epistemological one. The general form of the question that identifies and motivates such an inquiry is: "What is the case?" To be contrasted with this epistemological goal is the other great goal of human inquiry that philosophy has always treated as an independent, if related, field: the moral concern to know, not "what is the case?" but "what ought I to do?"⁸

With these distinctions, I can now state, and then proceed briefly to illustrate, a thesis about what has happened in legal theory. Legal theory has gone through three stages. The traditional approach took

8. These two distinctions between intended audience and motivating goal generate four different candidates for the point of legal theory. First, legal theory might be aimed at the epistemological concerns of outsiders; indeed, this is just the example used above in defining the outsider as an academic attempting to distinguish legal systems from other systems of social control. Second, legal theory might be aimed at the moral concerns of outsiders, although this is a more difficult case to illustrate. It is more difficult to illustrate because, by definition, the outsider is detached, carrying on an inquiry into the nature of law apparently for its own sake, rather than for the sake of more immediate practical concerns. It might seem odd to call such an enterprise a moral one, but we need not rule out the possibility. Indeed, the issue that this possibility raises is a rather lively one, resembling the question in moral philosophy about whether it is possible to investigate the meaning of moral terms (metaethics) without making substantive moral judgments. It is also important to note that these categories are not mutually exclusive, but often overlap. Thus, even the insider concerned about the moral question "What ought I to do?" may find he must go back and forth between insider and outsider perspectives as he asks about the meaning of moral terms at the same time that he tests and applies those meanings in his life. Third, legal theory might be aimed at the epistemological concerns of insiders by providing models to guide lawyers and judges in determining what is the law. Finally, legal theory might be aimed at the moral concerns of insiders by examining the connection between the concept of law and the moral obligation to obey law or the moral justification for imposing sanctions for breach of legal duty.

the relevant perspective to be that of the outsider and the relevant goal to be the epistemological one. The second stage proceeded to address insider concerns, applying models of law to questions about how to identify law.⁹ Both of these stages are alike in their intended goal (epistemological) but differ in their intended audience. The third stage, which has only emerged in the last decade, pursues a new goal: the moral one. In this stage, the point of asking "what is law" is to see whether we can plausibly maintain a connection between the conclusion that something is law and the moral claims that we make in the name of law, for example, that we are morally justified in what we do to others when laws are broken.

These three approaches to legal theory, three possible ways of understanding what legal theory is about, help explain the unhappy reaction to much of the writing in the field, as suggested by some of my prior remarks. The first form of legal theory, involving detached analysis of the concept of a legal system, is a perfectly appropriate academic enterprise; but it is almost guaranteed to have only the most limited contact with the concerns of insiders. The second stage, which takes the insider's concern to identify particular laws as the point of legal theory, re-establishes contact with the insider's world, but at a level too abstract to offer much specific guidance about how actually to go about identifying particular legal norms. The third approach largely ignores this problem of how to determine the law in particular cases. Instead, the central problem for this approach is posed, not by the difficult case, but by the easy one. What does it mean, for example, to say that one "ought" to obey the speed limit or register for the draft? However clear the *legal* obligation in such cases, the overriding problem for this approach is to explain why we call it an *obligation*. How does that term, when used in law, relate to the idea of moral obligation?

I assume it is clear by now that my own candidate for the point of legal theory is some form of this third approach. Before turning to consider the implications of this suggestion for the continuing debate between positivism and natural law, I shall briefly return to the question concerning the connection between legal theory and legal study and indicate how this new view about the point of legal theory helps answer that question.

The difficulty in explaining why the study of law should include a study of legal theory arose on the assumption that the value of a

9. These stages are not sharply separated in time and are not claimed to be strictly chronological. A single writer's work, moreover, will often fall into more than one of the categories defined in the text. The categories are intended as devices for conceptualizing the major ways that legal theory has been conducted, rather than as a strictly historical account.

law school subject lies in its ability to help one decide actual cases or understand legal doctrine. But it is a very narrow view that measures value, even to a lawyer, solely in terms of potential utility in resolving legal issues. Legal theory, I would prefer to say, bears the same relation to the practice of law as a liberal arts education bears to the pursuit of a business career or other occupation. Like philosophy or the humanities in general, the inquiry into the nature of law explores issues that, fortunately, do not have to be settled in order for ordinary business to proceed. The value of the inquiry lies in the help it provides, not in answering the question "what is the law in this case," but rather, "why am I a lawyer in the first place?"

Lawyers participate in and support a system that claims the moral right to use sanctions to enforce "legal" decrees. Whether that claim can plausibly be defended, and what happens to the concept of "law" if it cannot, is the question that legal theory in this third sense addresses. It is when one turns from the automatic acceptance of one's role and the "obligations" attached to that role to ask more general questions about the meaning and point of such a role that legal theory in this third sense has value. Like the humanities, that value is most clearly revealed in those moments of serious reflection on the point or purpose of life that lift us out of day to day pursuits to consider the larger concerns common to us simply as humans.

Something similar to this, I believe, is what Professor Fuller had in mind when he struggled to identify the purpose of debates about the nature of law in lectures he gave, again nearly fifty years ago. Professor Fuller stated:

Though there are no doubt many permissible ways of defining the function of legal philosophy, I think the most useful is that which conceives of it as attempting to give a profitable and satisfying direction to the application of human energies in the law. Viewed in this light, the task of the legal philosopher is to decide how he and his fellow lawyers may best spend their professional lives. . . . [I]f the lawyer shapes himself by his conception of the law, so also, to the extent of his influence, does he in turn shape the society in which he lives. When this much may be at stake we cannot dismiss a dispute concerning the proper definition of law as a mere logomachy.¹⁰

AN OVERVIEW OF RECENT DEVELOPMENTS

So much for the general thesis. Let me now illustrate by providing some detail and reviewing some of the specific answers that have

10. L. FULLER, *THE LAW IN QUEST OF ITSELF* 2-4 (1940).

been given to the "what is law" question. In what I called the first stage of jurisprudence, legal philosophers, sociologists, or other academics debating among themselves about how best to characterize "law," three models dominate the literature. The first model is what I shall call the coercive model. It was explicitly developed and defended a century-and-a-half ago by John Austin, then a law professor at the University of London. Indeed, Austin began his course in legal study for first-year students by doing exactly what I suggested would be required if we treated the concept of law the same way we do other concepts in analytical jurisprudence: he devoted the first six lectures of the course to setting out the criteria that determine what is and is not "law" and thus what is appropriately included within a course of legal study. He set out, in short, to "determine the province of jurisprudence," and that is just the title of the book that resulted from subsequent publication of Austin's lectures.

Austin's claim was simple: the distinctive feature of law is its coercive force. Unlike morality or other systems of social control, law effects control by attaching a very significant and unique sanction to its commands. The entire collective power of the state stands behind the legal directive, threatening those who disobey with loss of life, liberty or property. Austin also thought that these legal directives originated from acts of human will—what Austin, following Hobbes, called the commands of a sovereign.

This coercive model of law seems to entail a corollary proposition that now serves, broadly, as the identifying mark of all positivist theories of law. The coercive model implies that there is no necessary connection between law and morality—at least in content. What humans command and enforce with threats is one thing; whether what they command is morally right or just is another.

Austin's view is a very commonsensical one. It will remind you of Justice Holmes' remark that if you want to know what the law is, think of it from the viewpoint of the bad man. All that matters in determining what the law requires is an appreciation of what will happen to you if you act in a certain way.

However commonsensical Austin's view, it didn't prove very satisfactory, even to positivists. Two other positivist models of law have been developed since Austin's model. Both of them began where Austin did by conceding that law is coercive in a way that morality is not. But both insist that law has, in addition to this coercive dimension, another dimension that makes a legal norm different from a simple command or order backed by a threat. The first model is illustrated in the work of Hans Kelsen, who wrote a century after Austin. Kelsen was an eminent legal scholar in Germany and Austria in the

early part of this century. In fact, he was one of the main authors of the Vienna Constitution. But he left that career behind when he was forced to flee Nazism. He eventually came to this country where the only job he could find was as a research assistant at Harvard Law School. He then moved to Berkeley where he remained as professor of political science until his death in the last half of this century.

It will be easier to explain how Kelsen's answer to the question of the nature of law differs from Austin's if I reformulate the question in terms of the idea of legal obligation. I have already suggested that the question, "What do we mean by legal obligation?" is the central focus of the third approach to legal theory, which aims at moral concerns of insiders. But it has also become, at least since the time of Kelsen's writing, another way of asking how legal systems differ from other systems of social control. If legal systems work by somehow inducing people to respond to their "legal obligations," a natural question for the scientist or legal philosopher is how this idea of "obligation" induces such behavior and how it compares to the use of "obligation" in other contexts such as moral contexts. A philosopher who undertakes such an inquiry, while still remaining detached from substantive moral judgments about the practice, is like the anthropologist who investigates the operation of tabus or totems in primitive society while refraining from substantive judgments about the validity of the beliefs that underlie those rituals. At least that is the theory.

Austin's answer to this reformulated question is clear: to say that you have a legal obligation not to exceed 65 miles per hour on rural interstates just means that you risk incurring the organized sanctions of the state if you do. Kelsen thought this was not enough. The answer to why one has an "obligation" not to speed is that the legislature passed a law to that effect. If you now ask why you have an obligation to do what the legislature says, the response is: "because the Constitution authorized the legislature to pass such laws." My six-year old daughter, of course, knows the next question in this game: "Why should I care about what the Constitution says?" Here, says Kelsen, the answers must end: but they end the same way that they do in any moral, or religious, or other normative system. They end because one must start somewhere with "First Principles" which cannot themselves be further demonstrated or derived from other principles.

The point is that law shares with other such systems, like morality, a basic underlying conviction: a claim that the system is justified in the demands it makes and the sanctions it imposes. It is a claim, if you will, about the meaning of law from the viewpoint of law itself.

Another way to express the idea is in terms of the apparent belief of those who enforce the system, for example, judges or other officials. The judge who fines or jails you for speeding will be understood to be endorsing, in the sense of morally approving, this use of state force.

This model of law is sometimes called the "belief-based" model of law.¹¹ But it is important to recognize that this model is not about the actual, private beliefs of any particular judge. Judges can be cynics about morality in general or skeptics about the morality of the particular laws they enforce, and thus have either no beliefs about, or even positive distaste for, the morality of what they do. In this respect, the parallel between law and other normative systems, like religion, is maintained. A priest may privately have doubts about, or even disbelieve, the truth of the religious norms he professes; but he must recognize that the position he occupies, that of a priest, is one that will take him to be endorsing the religious propositions he asserts.

It is clear that this "belief-based" view of law is still a positivist theory of law. Though it adds an additional feature to the coercive model, it still insists that there is no necessary connection between law and morality. The law requires only a belief in justice; whether that belief is true or not, is another matter.

This brings me to the third model of law, suggested in the work of H.L.A. Hart. Hart's book, *The Concept of Law*,¹² represents the high-water mark of positivism. It also set the stage for the new turn in jurisprudence. Hart appeared to side with Kelsen in the dispute with Austin. Law does not simply force people to comply for there are always some people, at the very least judges or officials, who accept the basic rules of the system they administer in a way that makes their allegiance voluntary, not compelled. But Hart thought that Kelsen's "basic presupposition" was too mysterious. Hart proposed to turn this question of the voluntary attitude toward law into an empirical question. Just look and see what officials accept as the basic rules of the system, and forget about whether or not the attitude that underlies such acceptance is like the attitude assumed by other normative systems, such as morality and religion.

Professor Noonan, in a review of Hart's book, called this model of law "Monopoly writ large"¹³ (in contrast to Austin's model, which Hart had dubbed, "the gunman writ large"). This is an apt characterization, for the answer under Hart's model to the question "why am I

11. See J. RAZ, PRACTICAL REASON AND NORMS 147-48 (1975); J. RAZ, THE AUTHORITY OF LAW 53-77, 146-62 (1979).

12. See generally H. HART, THE CONCEPT OF LAW (1961).

13. Noonan, Book Review, 7 NATURAL LAW FORUM 169, 176-77 (1962).

obligated to drive under 65 mph" is just like the answer to the question "why am I 'obligated' (when playing chess) to move my bishop diagonally?" There is nothing to say in response to either of those questions under the game model except that those are the rules we've accepted. Why judges accept the rules they do is irrelevant; whether anyone thinks chess would be a better game if the bishop could move differently is irrelevant; all that matters is determining the rules by which we are playing.

I can summarize these three models by contrasting the answer each gives to the question: "Why do I have a legal 'obligation'?" The game model replies "just because (those are the rules);" the coercive model replies "because or else;" the belief-based model replies, "because we believe it is right." Again, I hope it is clear why all of these models were thought to be examples of positivist theories of law. Determining the rules of the game is one thing; whether those rules are good, or whether the game is worth playing, is another. Claiming that law is just is one thing; whether the claim is true is another. Determining what has been commanded is one thing; whether the commands are just is another.

THE IMPLICATIONS FOR POSITIVISM

The above account more or less describes the state of affairs until about twenty years ago. Of the three positivist models of law, Austin's (classical) model was somewhat in disfavor. I think it is fair to say that most positivists today embrace the belief-based model over the "game" model implied by Hart's theory.¹⁴

What explains the emergence of the belief-based model of law as the strongest form of positivism? Why were positivists unhappy with Austin's, Holmes' and Hobbes' explanation of what legal obligation means? The explanation, it seems, is this: as long as legal theory

14. See, e.g., N. MACCORMICK, H.L.A. HART 159-62 (1981). The best defense of the "game theory" of law may result from viewing the theory as a species of the "belief-based" view of law. That is to say, if justice itself is a concept that has meaning only within the "language game" of morality, then Hart's view would be consistent with the theory that law claims to be just: law and justice both turn out to be primarily conventional so that questions about the ultimate point of the game or convention are meaningless. Needless to say, this view of morality, which some trace to Wittgenstein, is controversial.

In defense of Hart's theory, it should be noted that the game model is a perfect analogue of the law's claim that liability is determined simply by establishing that a valid rule has been breached. (Questions about the merits of the rule are irrelevant.) In this respect, Hart's perception of the *phenomenology* of law seems more accurate than Raz's. The only problem in Hart's account arises from his reluctance to acknowledge that this claim about the finality of rules must itself be an implicit claim of political or moral theory (as, in the end, it is also in the case of games). See generally H. HART, *ESSAYS ON BENTHAM* 153-61, 162-68 (1982).

took the outsider's point of view and the epistemological goal as the relevant parameters of the study, the claims that insiders made for their legal directives seemed less important than the obvious sanction, directed at the self-interest of all members of the legal system. Everybody worries about sanctions. That is why Austin's model is so appealing: it connects the obligatory force of law to the universal interest in avoiding unpleasantness. Now there would never be any reason for thinking that there was anything missing from this coercive model of law *unless and until* one begins to think about how the matter looks from the perspective of those who are actually administering the sanctions. And from that perspective, one thing is immediately obvious. The kinds of things that legal officials do to people—fine them, imprison them, even execute them—are among the most serious things that people can do to each other. They couldn't possibly be done, under any ordinary view of morality, if one didn't think it was morally permissible to do them.

The turn to the belief-based form of positivism is, therefore, a partial retreat from the outsider's epistemological perspective to the insider's moral one. But it is important to understand just how much of a shift this retreat represents. The classical form of positivism, as represented in the theories of Austin and Hart, was a conceptual theory, not a moral theory. Positivism has always been what philosophers call meta-ethical theory. The claim that there is no necessary connection between law and morality has always been a claim about the *meaning* of both concepts, law and morality. But this claim about the meaning of the concepts was not itself thought to depend on substantive value judgments. What is different about the turn to the belief-based model is that the legal philosopher is no longer simply "reporting" on the usage of the concepts he is analyzing; rather, he is now making a claim of his own about which perspective, the "bad man's" or the official's, is more important in explaining how legal systems work. By recognizing the official perspective as at least as important as the "bad man's," positivism becomes more than just a meta-ethical theory or a conceptual claim about the meaning of terms; it becomes a substantive argument about the importance of a certain aspect of legal systems. Holmes' "bad man" and the new positivist will find themselves at odds, not because they are looking at different aspects of the legal system or because they disagree about the rules for using the term "law," but because they take different substantive positions on the question of what is important about law.¹⁵

15. One objection to this account must be considered. It is possible that an observer's claim about what is most "important" in explaining how we use a term is de-

Here then is the first paradox. The best explanation for why the belief-based model is to be preferred to the purely coercive model must itself be an explanation that involves an implicit value judgment and thus competes, on the level of the insider, with differing value judgments about what is important about legal systems. The disputes among positivists about the best way to model the separation of law and morality has itself become a dispute about values.¹⁶

I do not know whether "paradox" is the correct way to describe this development, and I do not mean to suggest that the development is inconsistent with the positivist's basic claim about the separation of law and morals. The development has an air of paradox only because it is usually thought that one of the advantages of positivism is that it enables one to identify "law" without becoming engaged in the value disputes that underlie moral claims. That advantage now seems lost if the new model itself depends on debatable value judgments.

There is, however, a more serious problem with the belief-based model of law. The paradox I have just described is one that applies mainly to the intramural disputes among positivists about how to

terminated, not by reference to the observer's own personal value judgments about the importance of the term, but by reference to the existing classification system which he simply observes. Thus we use "chair" to designate "furniture on which we can sit," rather than "furniture on which we can sit comfortably," because it is more "important" to have a concept that designates the former class of objects than just the latter (even though the latter "matters more" in choosing a chair). An observer could recognize the purpose that led to this classification and report it accurately, including its relative "importance" to us, without ever making a substantive judgment of importance herself.

One might suggest the same is possible for law: an observer could simply "report" that our use of the term makes the "most important" criterion in deciding whether to classify a system as "legal" either the claim of justice, or the threatened sanction. But it seems very unlikely that this can explain positivism's move from the coercive to the belief-based view of law. To most people, the potential sanction seems at least as "important" in explaining how we use the term, as does the claim of justice. To recognize the latter as "just as important" seems to involve the observer's own personal assessment of importance—an unconscious identification with the perspective of the official.

Positivism would not be a moral theory if it were content simply to describe the various "points of view" that different members of society have about what is important about law. But then it would have to "report," along with the perspectives of the bad man and the official who believes law is just, the perspective of the conscientious moral citizen who believes that official decrees obligate (and hence have the force of "law") only when they are not too unjust. The result would be simply a repetition of the range of options open to legal theory, from positivism to natural law; there would no longer be anything to disagree about (except for minor descriptive details).

16. For an explicit move to just such a substantive moral theory as the underlying justification for positivism, see MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 VAL. U.L. REV. 1 (1985). MacCormick argues that individual sovereignty of conscience will be encouraged by teaching citizens to view law and morality as separate. But this argument ignores the fact that the question of the connection between law and morality cannot simply be stipulated, but must be determined by reference to a substantive political theory about the obligation to obey the law. See Soper, *Choosing a Legal Theory on Moral Grounds*, 4 SOC. PHIL. & POL'Y 31 (1986).

choose between the coercive and the belief-based models. The enlightened positivist, conceding that legal theory can no longer be as "pure" as once was thought, might happily embrace and defend the value judgments underlying the move to the belief-based model. He might say, as indeed he can and should, that the whole sense of how a legal system differs from the rule of gangsters, the orders of terrorists, or the whims of tyrants is lost if we do not see that law, at least, thinks its use of force is justified and can be morally defended. This view still leaves intact the basic claim about the separation of law and morality: law may claim that its use of force is just; but whether that claim is true or not is a separate matter to be decided by turning to moral, not legal theory. Thus, one might think the basic, identifying mark of positivism remains unaffected by the turn to the belief-based model, even though legal theory itself must be conceded to be more than a purely conceptual enterprise.

But this response has two curious consequences. The first is that it condemns the new, belief-based model of law, even more radically than the classical, outsider's approach, to a position of nearly total irrelevance for the insider. The new positivist begins by taking sides in a dispute about whether we ought to distinguish legal systems from the rule of gangsters. Having sided with those who want to make this distinction, he then explains that in order to make the distinction, the legal system will have to claim that what it does is just. Having made that pronouncement he leaves the stage. The effect is not unlike that produced by the classical comic routine in which the stranger stops his car to ask a farmer, who is fixing a fence, if he knows the way to town. The farmer looks up, says "yes," and goes back to fixing the fence! The positivist's legal theory, which already had very little to say about how actually to find the law in particular cases, has nothing to say about how to form the moral judgments that it now claims are essential to the idea of law.

Again, it was Lon Fuller, fifty years ago, who found this aspect of positivism among its most unsatisfactory features:

[n]aturally any legal theorist would like his theories to serve some useful purpose, and this means that they ought to have something significant to say about the actual content of the law. On the other hand, positivism cannot permit its desire to be useful to interfere with its chance of achieving some formal criterion which will separate law from morality, for if that criterion is lost, of course positivism is lost with it. Unfortunately, however, positivism finds itself in a situation where it seems impossible for it to be useful and

positivistic at the same time.¹⁷

Again, I do not want to overdraw the indictment. After all, the value of legal theory does not lie in its ability to help lawyers or judges decide actual cases. Thus one has to acknowledge that the positivist who insists on sticking with the belief-based model of law may claim that his model is accurate, even though it isn't intended to be used directly by insiders attempting to draft or interpret laws or form beliefs about their merits.

The positivist's position here can perhaps best be appreciated by comparing what he says about law with an imagined parallel view about another type of normative system such as religion. Imagine a sociologist or philosopher who develops a model of religion that finds the most important feature to be the claim of truth or insight that underlies religious "laws," rather than the specific threats about life after death that may or may not accompany the injunction to follow God's law. It would misconceive the point of this model to accuse it of being unable to actually tell insiders, adherents of the religion, how to settle specific issues that arise within the religion, such as whether annulment is permitted in particular cases, or when, if ever, abortion is permitted. In the same way, the positivist is misunderstood if his model of law is denounced for its inability actually to guide decision-making under law. Being useful in that sense is neither the goal nor the criterion for a successful academic model of law.

This is, I believe, a precise analogy for the positivist's position in his defense of the belief-based theory of law. But there is one very serious flaw in the analogy which brings me to the major paradox of the new model. The claim of justice within law differs in a striking way from the claim of "truth" or "justice" within a religion. The claim of justice in law is a claim that we are morally justified in imposing sanctions simply because that is the law. Of course, we like to think that we have the content of the law right—that the 65 mph speed limit strikes the right balance between convenience, safety, and energy conservation, or that the Selective Service laws justifiably balance the individual's right to liberty against the community's need for self-defense. But the striking fact about law is that even if we are wrong in our judgment about the content, we think that citizens have a duty to obey and society a right to punish for breaking the law. The only issue that is relevant when you are brought in for speeding is whether you broke the law: whether the law is a "good" one is irrelevant, unless, of course, the law itself has exceptions which allow

17. L. FULLER, *supra* note 10, at 89-90.

one to question the justice of the law, as in constitutional cases, or to raise a necessity defense as in criminal law.

This special posture of the law toward its own legal norms is critical for any theory that purports to model legal systems as they actually operate. Indeed, the problem with the belief-based theory of law is that it tends to conceal this special posture. The belief-based theory suggests that there is only one basic attitude toward law, when in fact there are two. The two basic claims of a legal system are:

- (1) that the content of the law is just; and
- (2) that legal sanctions for breaking the law are just even if the content of the law is not just (i.e., even if the first belief turns out to be false.)

The first of these claims is the feature that the belief-based model fastens on as a special characteristic of legal systems. But this is a mistake. The belief that what one does is "right," i.e., morally permissible or required, is not peculiar to law at all and is certainly not the most salient feature of an individual's confrontation with the law. Anyone who knowingly acts in ways that affect the obvious interests of others presumably believes that such action is morally justified. If he does not, if, for example, he does not care about morality, he is at least likely to *pretend* that what he does is justified (perhaps because he knows that others will demand a moral justification). Thus, to make this belief about the justice of the law's *content* the central feature of a legal theory is very misleading. The content of laws can obviously be unjust, so the most that we can conclude from this version of the belief based model is that "law has pretensions of doing justice."¹⁸ The "pretense" of justice, which is the phrase David Lyons uses, is precisely where the belief-based model leads as long as it pertains only to the surface claim about the content of the law.

"Pretense" is not a neutral term. It is a term that trades on the obvious fact that beliefs can be wrong by positively encouraging suspicion—urging one to look for the error, rather than to assume that the belief is correct. This attitude of suspicion may be justified if we are still talking about the first level of belief—the belief that the content of the law is just. But it is the second belief—the belief that law obligates even if it is unjust (just because it is "law") that typifies the legal system and distinguishes it from other examples of normative systems (like religion). And this claim about the state's moral right to allegiance even if the laws are unjust cannot so easily be branded a "pretense"; it is, after all, the classical claim of political theory, embraced a long time ago by Socrates and defended in our own Western

18. Lyons, *Soper's Moral Conception of Law*, 98 ETHICS 158, 162 (1987).

culture by philosophers as diverse as Kant and Hobbes.¹⁹

If this claim is correct and if the peculiar claim of law is not just that the content of the law is right, but also that the law is justified in punishing regardless of content, just because the law was broken, then the paradox of positivism is acute. The problem is not just that positivism fails to be both true and useful, as Fuller thought. Rather, the problem is that even if positivism is true, it cannot be believed to be true. Insiders must act as if positivism is false, i.e., they must believe that there is a connection between the sanctions they impose and their ability to justify them, just because it is the law, even though positivism claims that this belief about the connection between law and morality is false.

Consider three possible responses to this alleged paradox. First, one might deny that insiders do in fact typically claim that sanctions are justified just because the law is broken. If this is an empirical question about the typical posture of the law toward lawbreakers who admit their guilt but want to challenge the "justice" of the law, it is fairly clear that the evidence does not support this response. If a defendant tries to put into issue, not the question of whether he broke the law, but instead the question whether it was a justifiable law, we would exclude the evidence on the ground that it is irrelevant. Unless there is a constitutional or other *legal* basis for such a challenge, in which case the defendant is trying to prove he did not break the law after all, we would not even listen. We would not lis-

19. See Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 65 (1985). The confusion that results from failure to distinguish these two kinds of belief about law's moral force is illustrated in Lyons, 98 ETHICS at 158. Lyons argues: (1) that law is fallible and that it is a virtue of positivism to recognize this fallibility; and (2) since law is fallible, the assumption that there is an automatic obligation to obey law is implausible - the burden of proof should be on those who assert such an obligation.

The first of these claims about the fallibility of law (in its content) is obvious. No legal theory ever claimed otherwise. The second claim about who has the burden of proof in deciding whether there is an obligation to obey even unjust laws is at best unclear. Lyons' claim that those who assert such an obligation have the burden of proof seems to confuse the fact that law can be unjust in content with the assumption that unjust laws cannot obligate. But that is exactly the classical claim of political theory, as Lyons recognizes. See Lyons, 98 ETHICS at 163-64.

In the end, the question of "burden of proof" is a *non sequitur*. My claim is that legal systems imply (purport, pretend, believe) that law carries moral force regardless of content. That is an empirical claim, the evidence for which I discuss in the text. If the claim is correct, then legal theory cannot deny the connection between law and morality (as positivism does) without engaging in political theory. Lyons says that positivism leaves open the question whether "law as a matter of social fact [has] significant connections with morality." *Id.* at 164. But that is false. The claim that there is no necessary connection between the social fact and the moral conclusion is the essence of positivism and denies what legal officials assert. If positivism is to be defended, it must be through political theory; it cannot hide behind conceptual analysis and it cannot content itself with suggesting that the burden of proof on this issue lies elsewhere.

ten, not because we think the law is infallible, but because we think it does not matter. We believe that even if the law is wrong, or misguided, it still creates obligations to obey and disobedience still justifies imposing state sanctions. At most, we leave to juries the possibility that they might nullify the law in the interests of justice, although we do not want to know about it if they do. Considered simply as an empirical matter, it seems unlikely that the positivist could show that this deeper claim about the connection between law and morality is not a typical claim from the viewpoint of the law.

Consider then a second strategy for the positivist. The positivist might say that the claim that sanctions are justified just because the law is broken is too implausible; nobody could defend it morally, so it is not worth treating as a component of the insider's attitude toward law. The only belief that "counts" is the belief that the content is just; we can ignore the crazy additional idea that, even if the content is wrong, we are still justified in punishing deliberate lawbreakers. Of course, for the positivist to take this line puts him at odds with two-thousand years of political theory in which philosophers have been making exactly this claim. From Socrates' impassioned defense of the state's right to put him to death although unjustly accused, to Hobbes' pessimistic claims about the necessity of deferring to whatever sovereign happens to exist, political theory has found quite plausible the idea that a proper understanding of law brings with it an acknowledgment that law's moral authority is not dependent on getting the content of the law right. It may be that this view is wrong; but it is not implausible. At the very least, it can not be dismissed out of hand without even engaging in arguments of political theory to show why the view is wrong.

As a final defense, the positivist might say that even though many people do claim that sanctions are justified just because the law has been broken, and even though that claim is a controversial one within political theory, the only "essential" feature of law is the belief that the content is just. That belief is sufficient to distinguish law from force, and thus there is no need to investigate, however plausible or frequently made, the additional claim of political theory that the broader kind of belief entails.

This article has suggested that this aspect of law, the belief that the content is just, is the most trivial aspect of law. It is little more than a psychological truism about how conscientious persons act toward those who are known to be seriously affected by their actions. But the important point about this last response of the positivist is that it brings us back to where we began: how does one decide, among the various internal perspectives toward law that are possible,

which is most important? If it is true that law presents itself as justified, both: (1) in content; and (2) regardless of content, how does one go about deciding which, if either, is the more important attitude? No positivist theory of law, to my knowledge, squarely confronts this issue. If one did, I suspect that the same evidence I have just cited about the frequency with which the content-independent claim is made both empirically and within political theory would make it just as difficult to ignore this particular attitude as it was for positivists after Austin to ignore the belief about content.

THE IMPLICATIONS FOR NATURAL LAW

To this point this article has contained very little about natural law. This section will illustrate how the turn toward the moral concerns of the insider affects this side of the debate. Until twenty years ago, natural law as a legal theory appeared to have few adherents. Professor Fuller was the most vocal advocate of the view insisting on a connection between law and morality. And though much of his unhappiness with positivism was justified, in ways already noted, his ability to explain what was wrong with the theoretical separation of law and morality was limited. It was limited partly because he wrote at a time when legal theory seemed to assume that these debates were all attempts to characterize law from the outsider's perspective. Thus, however much Fuller insisted that a model of law should include the purpose as well as the letter of law, the response was the same: since purposes can be evil as well as good, the positivist's claim about the separation of law and morality will remain intact even if purpose is included.

Ronald Dworkin, in the last twenty years, found a new way of expressing Fuller's concerns. He did so by making explicit what was implicit in Fuller's writings, namely, that legal theory should be directed at insiders and tested by its ability to address insider concerns. Thus, Dworkin from the beginning took the phenomenology of judicial decision-making, as it appears from the litigant's and lawyer's viewpoint, to be the relevant phenomenon and showed that positivism could not account for the nature of legal argument in difficult cases.

But Dworkin's explicit turn to the insider's perspective did not by itself constitute much of a challenge to the basic claim about the separation of law and morality. As long as Dworkin's concern was primarily with the question of how to find the law in difficult cases or the epistemological concern, his theory was no more able to guide actual decision-making than was the positivist's. The theory became, at best, a more accurate academic model of law, as viewed from the

outside, and it was easy for the positivist to respond in much the same manner as he had to Fuller. Even if we include the broader principles of society within the idea of law, and even if we include a society's entire underlying political theory within "law," law and morality remain distinct because societies can, after all, be based on gravely mistaken and immoral political theories.

It is probably clear, then, where the challenge for natural law lies. Natural law should turn, not just to the insider's perspective, but also to the insider's moral concerns. The challenge for natural law is to defend the claim of political theory that this article has already identified as presenting a dilemma for the positivist—the claim that there is a connection between the mere fact that something is law and the obligation to obey or the justification of state coercion. This, of course, will require natural law theorists to do political theory as part of legal theory, a connection that I have insisted in my own work is essential if legal theory is to make further progress.

I am happy to see that in Dworkin's latest book, *Law's Empire*, there is now an explicit acknowledgment that the point of his elegant theory of adjudication is not so much to guide one to answers in hard cases, but to show what law must be if it is to serve as a justification of state force. I am even happier to see in this latest book on legal theory several pages, out of the book's several hundred, actually devoted to political theory and to a discussion of the obligation to obey the law, just because it is the law. In my view, Dworkin's only mistake lies in the relevant proportion of space devoted to political theory as compared to his particular theory of adjudication. The proportions should be reversed: natural law theorists should defend on the merits the phenomenon that they have always perceived and insisted on preserving in a model of law, namely (again in Fuller's words) the perceived connection between the ideas of law and of "fidelity to law."

One final caution. Natural law theorists cannot, of course, simply assert that the connection exists just because people say it does, any more than positivism can deny that it exists whatever people say. Political theory must become a part of legal theory from whichever side one starts. But natural law theorists should welcome this challenge if for no other reason than that it provides an opportunity to demonstrate exactly what their basic view commends: refusing to draw a sharp line between law and morality, in legal theory as well as in law itself.