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# HOLMES AND CARL SCHMITT: AN UNLIKELY PAIR?\*

David Dyzenhaus†

Holmes's case suggests . . . that the positivistic attitude may often represent the emotional resolution of a conflict between the opposing forces of romanticism and skepticism at war in the same breast. Romanticism demands a "fighting faith," the possibility of which skepticism denies. From the emotional impasse which thus results a positivistic philosophy may furnish the only possible escape. It offers the faith which romanticism demands and to which it may make conspicuous sacrifice. Since this faith is avowedly artificial, adherence to it involves no compromise of skeptical scruple.<sup>1</sup>

## INTRODUCTION

Holmes was deeply interested in German philosophical and legal thought. In his major theoretical work, *The Common Law*,<sup>2</sup> he devoted a great deal of space to a discussion of trends in German philosophical and legal scholarship, in particular to the leading practitioners of German legal science of the late nineteenth century. While this was his only sustained attempt to grapple in print with German thought, his interest in things German persisted throughout his life, as the most cursory glance at his correspondence reveals.

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† Associate Professor of Law and Philosophy, University of Toronto. I thank Cheryl Misak and Michael Taggart for comments on a draft of this article and, especially, John Goldberg both for his comments at the Holmes conference and for letting me see a draft of his contribution to this volume. In the latter, Goldberg provides a most charitable and insightful critique of my arguments in earlier work as well as in this article. His criticism of my earlier work is well taken. My response to his critique of this article is for the moment the much too perfunctory one offered in note 67 below.

<sup>1</sup> LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 107 (1966).

<sup>2</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

Nevertheless, it is not easy to assess the influence of German legal scholarship on Holmes, particularly because in *The Common Law* Holmes portrayed the German work on which he focused as fundamentally misguided, engaged in the futile task of trying to make sense of the law as a logical conceptual system. This task was futile because the "life of the law has not been logic: it has been experience."<sup>3</sup> Holmes thought that the common law was close to the experience of mankind. He thus contrasted the common law with the abstractions of German legal science and with continental attempts to rationalize whole systems of law by codification. In *The Common Law*, he went so far as to argue that German legal science was wrong simply because its answers to complex legal questions were at odds with the answers embedded in the common law.

Whatever else changed in Holmes's own understanding of the law, the idea that law is not logic but experience retained its hold. In *The Path of the Law*,<sup>4</sup> Holmes's last elaborate statement of his legal theory, logic (or rational argument) is presented as playing a more or less cosmetic role in the life of the law: it pertains to the way in which judges get from their assumptions to their conclusions, and what ultimately matters are the assumptions.<sup>5</sup>

Hence, it seems as though Holmes, in one sense, was not influenced by German legal scholarship; he engaged with it only to find it deficient. Indeed, he might well have engaged with it in order to find it deficient. Mathias Reimann has argued that German legal science was a stalking-horse for the true target of *The Path of the Law*—the formalism which Holmes found exemplified by Christopher Columbus Langdell.<sup>6</sup>

However, even if Holmes's engagement with German legal science in *The Common Law* is one designed to set it up for a fall, thus discrediting by direct inference, some homegrown legal theories, it would be implausible to suppose this motive from the first. As is often pointed out, Holmes's initial hopes for legal reform bore more resemblance to Langdellian formal-

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<sup>3</sup> *Id.* at 1.

<sup>4</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *Path*].

<sup>5</sup> *Id.* at 465-66.

<sup>6</sup> Mathias W. Reimann, *Holmes's Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72 (Robert W. Gordon ed., 1992).

ism than he cared to admit. Furthermore, Holmes had to teach himself German, and plough through a massive amount of German philosophy and legal theory before he could exploit his knowledge. He did so because of his hope that German legal science would assist him in putting the muddle of the common law in order. In particular, he hoped that the influence of Fredrich Carl Von Savigny's historical school within German legal science would show how the experiential basis of the law, its evolutionary development in response to social and political pressures, could be reconciled with putting the law in order.<sup>7</sup>

So Holmes went to German legal science with hopes of finding a basis for rendering the law more suited as a resource for order and stability. Once these hopes were dashed, he exploited German legal science in the manner Mathias Reimann sketches.

The issue of the influence of German legal scholarship on Holmes is thus a complex one. Since he officially dismissed it as unworthy of influencing the development of common law legal orders, it is not surprising that Holmes's influence on German legal scholarship has been virtually nonexistent. Indeed, even if he had been more friendly to German legal science—possibly finding within it a useful tool for analyzing the common law—I doubt that things would have been different.

This is because Holmes was the quintessential common law lawyer, opposed to the core of his being to grand theoretical systems. The pragmatism of common law is generally so alien to German legal thought that any theory built on its back seems like no theory at all. Even now, when interest in Germany in Anglo-American legal thought is at a peak, it is the systemic features of that thought which are taken seriously, to the almost entire neglect of its common law roots.<sup>8</sup> Holmes is, of course, known in Germany for his wonderful aphorisms,<sup>9</sup> but his noteworthy contribution is perceived to lie in his judgments as a Justice on the Supreme Court.<sup>10</sup>

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<sup>7</sup> *Id.* at 79-80, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Robert W. Gordon ed., 1992).

<sup>8</sup> For an example, see the treatment of Ronald Dworkin, Lon L. Fuller, and H.L.A. Hart in JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

<sup>9</sup> See, e.g., ROBERT ALEXY, *BEGRIFF UND GELTUNG DES RECHTS* 33 (1992).

<sup>10</sup> See, for example, Gustav Radbruch's review of a biography of Holmes in

Nevertheless, there is a way to explore what I take to be my brief—the relationship between Holmes's legal thought and German legal theory—which goes beyond an evaluation of Holmes's reaction to German legal science. I hope to show that Holmes's journey from *The Common Law* to *The Path of the Law* has interesting affinities with what may at first seem to be a very different intellectual journey—that of Carl Schmitt, the German public lawyer and political philosopher. Since Schmitt is best known outside of Germany for his enthusiastic support for the Nazis after 1933, and for his failed attempt to reconfigure his legal theory to advance his career as the Nazi legal philosopher, Holmes and Schmitt seem an unlikely pair. But a comparison of Holmes's intellectual journey to Schmitt's journey from mainstream legal theorist in 1911 to praise-singer of Nazi lawlessness after 1933 reveals much. In particular, it reveals, or so I will argue, that their legal theories had a common basis in a Hobbesian positivism stripped of any normative foundation.<sup>11</sup>

## I. HOLMES, LEGAL POSITIVISM, AND *THE COMMON LAW*

Holmes has been considered an important figure in the various philosophical traditions prominent during his own intellectual development and throughout his career on the bench. He has been called Darwinian or social evolutionist, libertarian or free market liberal, democratic, legal positivist, utilitarian, pragmatist, and conservative verging on Hobbesian authoritarian. In this section, I support those who have argued that Holmes's greatest and continuing theoretical debt was owed to John Austin's legal positivism.<sup>12</sup> Indeed, I argue that

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SÜDDEUTSCHE JURISTEN-ZEITUNG 24 (1946).

<sup>11</sup> Understanding Holmes through the lens of such associations is not a novel approach. See, e.g., Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A. J. 569 (1945) and Ben W. Palmer, *The Totalitarianism of Mr Justice Holmes* 37 A.B.A. J. 809 (1951). See also Yosai Rogat, *Mr Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3 & 254 (1962-63) (challenging Holmes's reputation as a civil libertarian judge).

<sup>12</sup> See, for example, the perceptive essay on Holmes in RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930*, at 95, 110-27 (1987). Cosgrove lists the main sources for and against this view *id.* at 110 n.67. See also William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 COLUM. L. REV. 809 (1990); Saul

Holmes's real debt is to Hobbes through the medium of Austin, but that his version of legal positivism is more crude than that of either Hobbes or Austin.

Austin is most remembered for this sentence in his *Lectures on Jurisprudence*: "The existence of law is one thing; its merit or demerit is another."<sup>13</sup> Here, he states what has come to be known as the "separation thesis" of legal positivism: the thesis that there is no necessary connection between law and the requirements of sound morality. H.L.A. Hart, who coined the term, noted that the separation thesis is the central idea in a history that goes from Jeremy Bentham, the founder of utilitarianism, through his disciple Austin, to Holmes's *The Path of the Law*.<sup>14</sup> For just as *The Common Law* is best remembered for the assertion that experience and not logic is the life of the law, so *The Path of the Law* is remembered for the "bad man." It is remembered for the claim that the law is best understood from the perspective of the man whose only motive for obedience to the law is his wish to avoid the sanctions visited by "public force" on disobedience.<sup>15</sup>

Holmes claims that the nature of law is what makes it possible to understand law from the "bad man's" perspective. Law is a matter of hard social facts, not of controversial moral argument: "The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law."<sup>16</sup> This is an analytical claim about the nature of law, one which Holmes tries to defend by showing how it best makes sense of actual legal problems, in the main by avoiding confusions which attend views that conflate law and morality.<sup>17</sup>

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Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory* 10 HOFSTRA L. REV. 673 (1982).

<sup>13</sup> 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 214 (London, John Murray 1885).

<sup>14</sup> See H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 55-56 (1983). Some 18 years earlier, Fuller organized his critique of positivism on the basis of a history of the same central idea. See FULLER, *supra* note 1. Here I draw on my *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICA IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* 228-36 (1991) and David Dyzenhaus, *Why Positivism is Authoritarian*, 37 AM. J. JURIS. 83, 93-101 (1992).

<sup>15</sup> Holmes, *Path*, *supra* note 4, at 459-60.

<sup>16</sup> Holmes, *Path*, *supra* note 4, at 461.

<sup>17</sup> Holmes, *Path*, *supra* note 4, at 461-64.

Holmes then moves to the topic of the "forces which determine [law's] content."<sup>18</sup> It is in this section of the essay that he declares that logic is merely form and that the real stuff of the law, its motive force in development, is a "judgment as to the relative importance of competing legislative demands."<sup>19</sup> He argues that an awareness of the social and political forces which shape these demands is the only sound basis for both judging judges and getting them to judge better. Furthermore, he suggests that the best available resources for adjudicating between legislative demands are statistics and economics. The only use for the history of the law is to reveal to us irrationality that assists progress through an "enlightened scepticism." History can teach us that laws are irrational survivors, either because they were introduced for a bad reason or because the reason for their introduction has long since ceased to be compelling.<sup>20</sup>

Here Holmes seems to be making some kind of moral or normative claim. Although he maintains a commitment to skepticism about morality, he holds out the hope of enlightened scepticism, of progress a necessary condition of which is the adoption of the analytically defended separation thesis. The separation thesis tells us that if we want to understand law, we must understand that law is law in virtue of particular social facts. For Holmes, these are the facts that make it possible to predict judicial decisions about the application of public force. And in seeing that law is just in virtue of social facts, and not in virtue of some inherent moral basis for a claim to legitimacy, we are enabled to adopt the attitude of enlightened skepticism.

In making a normative claim on behalf of the separation thesis, Holmes situates himself even more firmly within the tradition of legal positivism—a tradition in which the analytical and normative claims for the separation thesis always travel together. The tradition is a complex one, and many different ways have been suggested to aid in sorting out its different adherents. In my view, there are two (intimately related) issues which distinguish one positivist position from

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<sup>18</sup> Holmes, *Path*, *supra* note 4, at 464.

<sup>19</sup> Holmes, *Path*, *supra* note 4, at 466.

<sup>20</sup> Holmes, *Path*, *supra* note 4, at 469.

another: first, how the position connects its analytical and normative parts; second, on what legal institution the position focuses—executive, legislature, or judiciary. Indeed, in the history of positivism the normative generally had priority over the analytical, and the way in which it was given priority in a particular position led to that position's focus on one or another legal institution.<sup>21</sup> I emphasize this fact because the recent history of positivism has been dominated by the attempt, initiated by H.L.A. Hart, to found positivism on a purely analytical basis; and the widespread acceptance of Hart's initiative has, I think, obscured our understanding of the positivist tradition.

For example, Hobbes's legal positivism—his analytical account of what law is—is presented as the solution to the normative problem of the state of nature as he understood it.<sup>22</sup> That problem arises because Hobbes thought that each individual has the right to determine what is right; however, each individual will have different views about what is right. The state of nature is hence a chaos of competing claims as to what is right. To solve this problem and achieve order and stability, we must delegate our right to determine what is right to an absolute sovereign, whose commands we are morally obliged to obey. Positive law is the means for communicating the sovereign's commands to his subjects. As a result, Hobbes is opposed to the common law tradition, both because of the general indeterminacy of the common law and because it gives judges power which should be reserved for the sovereign.

Hobbes's analytical claim about law is thus secondary to the normative part of his theory. His reason for being a legal positivist is a normative one; law, conceived positivistically, is necessary to help solve the problem of the state of nature. Since that problem can only be solved if there is an absolute sovereign power—one unfettered by law—the key legal institution is the executive.

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<sup>21</sup> Here I follow the lead of Fuller in LON FULLER, *THE LAW IN QUEST OF ITSELF*, *supra* note 1, and of Gerald Postema in GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986), which is not to say that either would accept the detail of my sketch of the positivist tradition.

<sup>22</sup> THOMAS HOBBS, *LEVIATHAN* (Crawford B. Macpherson ed., Penguin Books 1986) (1651).



Bentham also deploys legal positivism in the service of a wider, though very different, political or normative agenda. He wants law that lives up to the positivist distinction between law as it is and law as it ought to be. However, positive law is not supposed to preempt the resort of individuals to their own views of right and wrong, as suggested by Hobbes. Hobbes's skepticism about reason, which makes him a subjectivist, is matched by Bentham's generally optimistic confidence in the rational ability of individual reasoners.<sup>23</sup>

Bentham thought that law enacted by legislators should be certain in the sense of being factually determinable by publicly accessible tests. Rather, positive law facilitates the deliberation of right individual reason, which Bentham takes to be reasoning on the basis of utility. Because positive law is certain and predictable, it provides a secure basis upon which an individual can calculate the utility of doing this rather than that. Further, positive law provides the basis onto which general expectations can fasten. Citizens must consider in their calculation the pain of suffering a sanction in the event that they decide to disobey the law. They must also consider reasons for following the law, which will include both its intrinsic merits and the weight appropriately accorded to the fact that others will expect their compliance. But citizens are not under any moral obligation to obey the law merely because it is a law. The only moral obligation for the individual is to act in accordance with utility, which might require disobedience to law. (Although what law requires and what people expect on the basis of law must figure in the utilitarian calculation.)

Similarly, even when the law is clear, judges must calculate whether utility requires that they apply it. This apparent license of discretion granted to judges is not a problem for Bentham's mature view, since he ultimately argued that judicial decisions should not have legal force beyond the decision between the parties. His mature view does not try to make common law adjudication something close to Hobbes's model of

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<sup>23</sup> I rely here on JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES (James H. Burns & H.L.A. Hart eds., The Athlone Press 1977) (1774-76) and JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (James H. Burns & H.L.A. Hart eds., The Athlone Press 1977) (1776), as well as Jeremy Bentham, *Constitutional Code*, in 2 THE COLLECTED WORKS OF JEREMY BENTHAM (James H. Burns et al. eds., 1983).

law as the commands of an uncommanded commander. Bentham decided such a task was impossible. Instead, he advocated eliminating "judge-made law" altogether.

In Bentham's ideal society, judges would adjudicate in the shadow of a code, enacted by enlightened legislators. Legislative enlightenment would be ensured by a system of comprehensive democratic controls, such as a free press, frequent elections, and a right of recall over incompetent legislators. In cases of indeterminacy of law or when judges found that the law caused injustice in a particular case, judges should decide the matter in accordance with utility. Yet this decision would have no legal effect except as between the parties, and the matter would then be referred to the legislature for proper consideration. In sum, Bentham puts the analytical in the service of the normative. And, since his fundamental normative demand is for democracy, the legislature is the institution upon which his legal theory focuses.

Austin also gave priority to the normative over the analytical. In the third of his *Lectures on Jurisprudence*,<sup>24</sup> Austin outlines a theory of authority which leads to a picture of a political society based on utilitarian principles very different from Bentham's. Austin does not argue for Bentham's radical democracy in which each individual is the ultimate arbiter of what should be done. His political and legal theory is much more akin to those rule-utilitarian philosophies which suppose that consequentialist justifications for moral truths might have to be concealed from the public. Austin puts forward a version of what Bernard Williams and Amartya Sen aptly describe as "Government House utilitarianism": "An outlook favouring social arrangements under which a utilitarian elite controls a society in which the majority may not itself share [the beliefs of the elite]."<sup>25</sup>

Austin is not a Hobbesian subjectivist. He holds that correct answers to even the deepest questions about morality are given by appropriate utilitarian calculation. But he lacks confidence in the "multitude" of his society; they are too ignorant to

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<sup>24</sup> I am greatly indebted for insight into this issue to R. B. Friedman, *An Introduction to Mill's Theory of Authority*, in *MILL: A COLLECTION OF CRITICAL ESSAYS* 379-425 (J.B. Schneewind ed., 1968).

<sup>25</sup> Amartya Sen & Bernard Williams, *Utilitarianism and Beyond*, in *UTILITARIANISM AND BEYOND* 16 (Amartya Sen & Bernard Williams eds., 1982).

be trusted with the business of making such calculations. Austin regards the multitude of his day in much the same light as colonial officials regarded the native inhabitants of the territories they governed: he describes the multitude as given to "coarse and sordid pleasures," people with a "stupid indifference about knowledge."<sup>26</sup>

To the extent that the multitude of his day is unenlightened, and are doomed to remain so, they can legitimately be subjected to the dominion of authority. By "authority" Austin means exactly what Hobbes meant—a system of commands which subjects must take as conclusive as to what to do on pain of suffering a sanction if they do not follow the command.<sup>27</sup>

Austin's emphasis on coercion as part of the very definition of command indicates that he sees the need for a non-rational mark of authority—one that compels the obedience of the multitude regardless of their view on the merits of the content of the command. Austin also recognizes that the obedience of the multitude will be extracted not by their conviction about the merits of obeying this or that command or system of commands, but by the fact that there will be a system of positive laws which they know they must obey on pain of coercion.<sup>28</sup>

Most important of all is Austin's debt to Hobbes. Throughout Austin's lectures, he emphasizes his respect for Hobbes, saying that he knows "of no other writer (excepting our great contemporary Jeremy Bentham) who has uttered so many truths, at once new and important, concerning the necessary structure of supreme political government, and the larger of the necessary distinctions implied by positive law."<sup>29</sup> Austin's

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<sup>26</sup> 1 AUSTIN, *supra* note 13, at 134.

<sup>27</sup> 1 AUSTIN, *supra* note 13, at 88-91.

<sup>28</sup> See, e.g., 1 AUSTIN, *supra* note 13, at 299.

<sup>29</sup> 1 AUSTIN, *supra* note 13, at 281. In fact, Bentham gets only four more references in the index to *Lectures on Jurisprudence* than does Hobbes and several of the former are critical while Austin generally praises Hobbes. In addition, Austin opens his lectures by adopting Hobbes's definition of law. 1 AUSTIN, *supra* note 13, at 3. He adopts Hobbes's conception of sovereignty over Bentham's because Bentham, Austin claims, forgot to notice that the supreme commander must himself be completely uncommanded. 1 AUSTIN, *supra* note 13, at 234-35. Like Hobbes, Austin argues that there can be no legal limitation on sovereignty, whereas Bentham thought such a limitation undesirable but not conceptually impossible.

only objections to Hobbes are first that Austin supposes that there is no absolute duty to obey the commands of the sovereign. Second, he rejects Hobbes's reliance on a fiction of an original contract whereby individuals can be taken to have consented to the status quo because of a supposed preference for order over chaos.

But Austin also seems to argue for a doctrine of consent based on the preference for order over chaos. The difference between Austin and Hobbes is, as Austin puts it, the doctrine of consent is "bottomed" directly on the "principle of utility,"<sup>30</sup> rather than on Hobbes's state of nature. What drives his utilitarianism is the "uncertainty, scantiness, and imperfection of positive moral rules." For Austin, the habit of obedience of the multitude comes about either through recognition of the "utility of political government, or a preference by the bulk of the community, of any government to anarchy."<sup>31</sup>

In addition, while Austin allows for the possibility of a general right of disobedience, as well as a right of disobedience to particular laws when utility requires it, he emphasizes the dangers involved in such a calculation—to the extent that it hardly ever seems appropriate.<sup>32</sup> Thus, his first objection to Hobbes is of little force. Indeed, the considerations Hobbes raises against a right of resistance are almost identical.<sup>33</sup>

Austin tries to save Hobbes from the charge of being an "apologist for tyranny" by pointing out that unless one makes the mistake of confusing tyranny with monarchy, the charge is one of supporting bad rule. Austin says that he and Hobbes agree that the principal cause of tyranny is the ignorance of the multitude of "sound political science."<sup>34</sup> When it comes to telling us what is sound, Austin asserts that when the multitude is in a state of instruction, the form of government is a matter of indifference; however, when the multitude is in a state of ignorance, the form of government "is of the highest importance." Austin clearly means that an absolute monarchy is to be preferred to an ignorant representative government.<sup>35</sup>

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<sup>30</sup> 1 AUSTIN, *supra* note 13, at 294-95.

<sup>31</sup> 1 AUSTIN, *supra* note 13, at 294-95.

<sup>32</sup> 1 AUSTIN, *supra* note 13, at 118-20.

<sup>33</sup> See, e.g., HOBBS, *supra* note 22, at ch. 18.

<sup>34</sup> 1 AUSTIN, *supra* note 13, at 281 (emphasis omitted).

<sup>35</sup> 1 AUSTIN, *supra* note 13, at 282-83.

Because there was a system of representative government in existence in Austin's day, his solution to absolute monarchy is the next best thing: it is rule by an elite over a partly enfranchised electorate with limited control over government.<sup>36</sup>

Hence, Austin, with Hobbes, puts forward a doctrine of political responsibility to law which Fuller once aptly described as a "one-way projection of authority"—a doctrine which regards legal subjects as appropriately obedient to the direction and manipulation of rulers.<sup>37</sup> But Austin is forced to cope with representative government. This gives rise to his attempt to provide a conception of appropriate political authority, and of law which serves that conception, which will justify rule by an elite over a partly enfranchised electorate.

My claim that Austin establishes an authoritarian conception of law may seem at odds with his account of the judicial role. Austin argues, against Bentham and Hobbes, that it is appropriate for judges to act as legislators. In fact, he says, the problem is not that judges have the power to legislate, but that they have not exercised it radically enough to correct unclear or improper statutes.<sup>38</sup> This claim goes, of course, totally against the grain of Bentham's work: it gives to judges a power which Bentham at one time was determined to limit and which later he decided had to be altogether eradicated.

However, it is important to notice that when Austin discusses the virtues of legislation, whether emanating from the legislature or the judiciary, he is assuming that legislators or judges or both are instructed in the science of utility. If the assumption holds true for judges but not legislators, the possibility is left open of enlightened judges correcting the statutes of unenlightened legislators—legislators in the grip of the coarse passions of the mob. Thus, Austin expresses an aspiration to reform the common law into a more rational, that is positivistic, system of law; one that is worthy of acting as a basis for legal authority.

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<sup>36</sup> For Austin's hostility to anything more democratic, see JOHN AUSTIN, *A PLEA FOR THE CONSTITUTION* (London, John Murray, 2d ed., 1885).

<sup>37</sup> LON L. FULLER, *THE MORALITY OF LAW* 204 (1969).

<sup>38</sup> 1 AUSTIN, *supra* note 13, at 218; 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 532-33, 641-47 (London, John Murray 1885).

In sum, Austin, like Bentham, put the positivist conception of law to work in the service of a normative, utilitarian theory. But because his theory is closer politically to Hobbes than to Bentham, the basic tendency of his legal theory is authoritarian. He differs from Hobbes mainly in his willingness to give power to the judiciary, because he places more trust in the judicial elite of his day than he does in legislators. Indeed, he regards the capture of the center of political decision-making by an ignorant electorate as an unfortunate fact of political life. While Hobbes advocates a radical centralization of political power in the person of the sovereign, Austin wants some checks on the center because he fears that it will not make the best decisions, as judged by the standards of utility.

Before I place Holmes within this tradition, I will underline Austin's reasons for turning, against the grain of legal positivism, from legislators and the executive, to judges. Austin could make this move because he believed that utility provided standards external to law for evaluating the moral soundness of the law. The move was, that is, dictated by moral considerations. In contrast, for Hobbes the law is necessarily morally sound—at least this is the perspective citizens must adopt in deciding how to act—even if in their hearts they disagree with the sovereign's understanding of what is right.<sup>39</sup>

At the time of writing *The Common Law*, Holmes subscribed more or less to all the basic tenets of the Austinian creed outlined above. This included Holmes's faith that judges, acting on the basis of a rationalized common law, purged of a misleading moral or natural rights vocabulary, could, in Morton Horwitz's words, avoid the "extreme implications both of potentially anarchic individualism and of the threat of tyrannical state power."<sup>40</sup> However, this purge was not to take place in accordance with the standards of utility, but was to happen by bringing the common law closer to customary standards. Holmes did not suppose that the law ought to be reformed in the light of morality, but rather brought into accordance with

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<sup>39</sup> The same reasons dictate Austin's rejection of Hobbes's foundation for the obligation to obey the law. For Hobbes, citizens are under an obligation to obey the law because of their contract with the sovereign. But for Austin, that obligation is justified only by utility.

<sup>40</sup> Morton Horwitz, *The Place of Holmes in American Legal Thought*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.*, 31, 49 (Robert W. Gordon ed., 1992).

what held out the most promise for stability and certainty, the customary basis of the common law. Custom is, for Holmes, equivalent to objectivity.

As Horwitz has convincingly argued, by the time Holmes came to write *The Path of the Law*, custom could no longer plausibly be held out as a basis for reforming the common law.<sup>41</sup> The common law had begun to reflect political battles about the redistributive role of the state, and the best solution was to bring these battles to the surface.

It is not, I think, that Holmes had totally despaired of the role of custom in law. In *The Path of the Law*, he still expresses some romantic hopes for the law as the "witness and the external deposit of our moral life." "Its history," he says, "is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men."<sup>42</sup> But those hopes, as well as the hope that enlightened judges might correct irrationalities in the law, could only last as long as the "race" could see itself as a relatively homogeneous entity, with the values that made it homogeneous sedimented in the law. Once social and political conflicts become radical, the legal expressions of "moral" homogeneity are themselves called into question.

Holmes eventually came to the view, most famously exemplified in his dissent in *Lochner v. New York*,<sup>43</sup> that one must adopt an institutional solution to the chaos of political and legal indeterminacy. He believed that judges should defer to the will of the people as expressed by the legislature. This is not because Holmes is a democrat by conviction. Rather, it is because, in the absence of any principled way of settling the political and social conflicts that enter into the province of the judiciary, security and stability are best served by taking the people's will as moral.<sup>44</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> Holmes, *Path*, *supra* note 4, at 459.

<sup>43</sup> 198 U.S. 45 (1905).

<sup>44</sup> See, for example, the discussion in G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 324-28 (1993). John Goldberg suggests that there are other plausible reasons for adopting the legislature as the institutional solution. I agree, and Bentham's democratic commitments provide a clear example here. But the reasons advanced in the text for Holmes's adoption of the legislature seem to make the most sense given what we know about Holmes's attitude towards democracy.

This doctrine of strict deference may not seem at first to fit well with the central role Holmes gave to judges in *The Path of the Law*. But it must be the case that figuring prominently among the hard social facts which make judicial pronouncements about the law predictable is the dominant judicial ideology about such matters as deference to the legislature. Moreover, the range of such ideologies is limited by the criterion of predictability. To take an obvious example: Ronald Dworkin's recent call to American judges to adopt a "moral reading" of the Constitution would be a priori ruled out because it requires that judges rely on unpredictable judgments about morality.<sup>45</sup>

Only hard facts will do—facts about custom or the people's will. In times of political conflict and social instability, facts about custom are, by definition, no longer available. Facts about the people's will are therefore a promising candidate; these are facts which have won out in the political struggle, their victory marked by their promulgation into legislation.

Like other figures in the positivist tradition, Holmes therefore puts his analytical theory to work in the service of a normative, though not properly moral, theory. Law is whatever will deliver certainty and stability. But on this account, Holmes's legal theory does not so much fit into the positivist tradition as it represents a kind of return to its founder, Thomas Hobbes—with some necessary adaptations made for a more complex political world in which the legitimacy of the people's will is taken as a given.

But these adaptations make Holmes's normative project even more parsimonious than Hobbes's. Any sensitive reader of Hobbes's *Leviathan* knows that he never quite succeeded in constructing an entirely absolutist solution to the problem of the state of nature. The rights of each individual in that state persist in various ways into the state of civil society, so that Hobbes never advanced an absolutely unconditional obligation of obedience to the sovereign. In other words, what distinguishes Holmes from his positivist predecessors, including Hobbes, is that for him the realm of the normative is exhausted by the values of order and stability.

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<sup>45</sup> See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).



## II. CARL SCHMITT ON LAW

Carl Schmitt's first scholarly work, *Gesetz und Urteil* (Law and Judgment), appeared in 1911,<sup>46</sup> some years before the crisis following Germany's defeat in the First World War—a crisis which both gave birth to the Weimar Republic and kept a fatal grip on its progeny. While there is no sense within *Gesetz und Urteil* of the political and social problems already brewing in Germany, it is a response to a crisis of legal order—the crisis of indeterminacy.<sup>47</sup>

Before embarking on an exposition of the themes of *Gesetz und Urteil*, it is worth noting the obvious. When Schmitt thinks of the law he is not thinking of the common law, but of statute or *Gesetz*. He is concerned only with the problem of judges applying laws in a statute book. Nevertheless, because of the way Schmitt conceives that problem, his focus, like Holmes's, becomes one of finding an objective basis for adjudication.

Schmitt identifies liberal legal thought with those movements within German legal science which sought to establish a rational basis for adjudication. These movements attempted to find a rational conceptual structure inherent in the law which would make it possible for judges to be transmitters of a content already contained in the law. Schmitt believes that such attempts not only failed, but were doomed to fail. No matter how clearly legislators try to state the content of the legal norms they legislate, there is hardly ever a clear cut case of law application by a judge that does not require a moment of creative interpretation.<sup>48</sup>

Schmitt emphasizes that the moment of indeterminacy arises as a matter of jurisprudence; the correct understanding of law tells us that indeterminacy arises because the law requires application, and application requires interpretation. This point is made as part of a critique of Bentham for having

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<sup>46</sup> CARL SCHMITT, *GESETZ UND URTEIL: EINE UNTERSUCHUNG ZUM PROBLEM DER RECHTSPRAXIS* [CARL SCHMITT, LAW AND JUDGMENT] (1969) [hereinafter SCHMITT, *GESETZ*].

<sup>47</sup> I am greatly indebted in this section to William E. Scheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*, in 18 HISTORY OF POLITICAL THOUGHT (forthcoming 1997).

<sup>48</sup> SCHMITT, *GESETZ*, *supra* note 46, at 67.

allowed his social and political agenda to drive his theory of adjudication to the point where he advocated eliminating all judicial interpretation of the law.

Bentham, in Schmitt's view, rightly sees that judicial interpretation is creative. But because such creativity is at odds with his desire to make the law predictable in the cause of stabilizing individual expectations, Bentham requires an impossible degree of determinacy of statutory law, a degree which would obviate the need for judicial interpretation.<sup>49</sup>

However, in *Gesetz und Urteil* Schmitt wants some basis for adjudication that can put it, and the law in general, on an objective basis. He rejects the recommendations of the Free Law School, which offered the closest approximation to a common law candidate for providing an objective legal basis for adjudication.<sup>50</sup> The founders of the School, however, while continuing to emphasize the need for judicial discretion, still advocated legal standards to work as constraints on discretion—standards extrapolated directly from the relevant statutes or customary law and more general legal principles. For Schmitt, such standards and principles cannot constrain anything, for they are, by nature, inherently vague.<sup>51</sup>

In short, for Schmitt the problem of indeterminacy arises within the law but cannot be solved by the law. Determinacy cannot be achieved solely by the law binding the judge and so one must look outside of the law. Schmitt's own suggestion asks us to shift our focus from the law to the judicial community—more specifically, to the empirical social relations between judges. His criterion for an objective or correct ("richtige") decision is the following: "A judge's decision can today be taken for correct when we can predict that another judge would have decided the matter in exactly the same way. 'Another judge' means here the empirical type of the modern, legally learned jurist."<sup>52</sup> The law here comes to be little more than one of the

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<sup>49</sup> SCHMITT, *GESETZ*, *supra* note 46, at 63.

<sup>50</sup> See J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 359-60 (1992). The Free Law School played an important role at the turn of the century in discrediting the claims of rationalist legal science. It did so largely by pointing out obvious cases of indeterminacy in law, and then showing how legal science, because of its commitment to determinacy through conceptual analysis, offered absurd resolutions of such cases.

<sup>51</sup> SCHMITT, *GESETZ*, *supra* note 46, at 40-42.

<sup>52</sup> SCHMITT, *GESETZ*, *supra* note 46, at 71. "Eine richterliche Entscheidung ist

main means by which a judge justifies his decision; insofar as one judge can predict that another will rely on the law in a particular way, he should himself rely on the law. Reliance on the law becomes just one practice among the others which together make up the array of practices constitutive of the legal community.<sup>53</sup>

William Scheuerman, addressing Schmitt's "solution" to the problem of indeterminacy, states that,

[a]t least implicitly, Schmitt . . . presupposes a significant degree of political, social, and doctrinal homogeneity within the German judiciary; from Schmitt's perspective, the relative unanimity of socially conservative and deeply anti-democratic views among German jurists in 1912 certainly must have provided some empirical plausibility to this assumption.<sup>54</sup>

Scheuerman's view is accurate in that Schmitt's solution does not make sense except in terms of this presupposition of homogeneity. However, he underestimates the extent to which Schmitt wants the solution to be something distinctively legal.<sup>55</sup> Correctness in law is, Schmitt says, a matter of practice—practice which justifies itself. But that, he claims, does not make correctness a matter of predicting what the "average judge" would decide. Rather, it is a matter of what is correct by dint of methodological observation: "The answer is the product of the postulate of legal determinacy together with the fact that there exists today a body of learned professional judges."<sup>56</sup> Highly professional judges are, that is, engaged in a distinctively legal enterprise because they orient themselves primarily around the legal value of together achieving legal determinacy.

Thus, while Schmitt's solution to the problem of indeterminacy is one that comes from outside the law, in the sense of positive statute law or *Gesetz*, it is still, in his view, a legal solution. This explains why in his next work on legal theory,

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heute dann richtig, wenn anzunehmen ist, daß ein anderer Richter, ebenso entschieden hätte. 'Ein anderer Richter' bedeutet hier den empirischen Typus des modernen rechtsgelehrten Juristen."

<sup>53</sup> SCHMITT, *GESETZ*, *supra* note 46, at 86-87.

<sup>54</sup> Scheuerman, *supra* note 47, at 18.

<sup>55</sup> Although Scheuerman adverts to this possibility in footnote 26 of his manuscript. See Scheuerman, *supra* note 47.

<sup>56</sup> SCHMITT, *GESETZ*, *supra* note 46, at 86.

*Der Wert des Staates und die Bedeutung des Einzelnen* (The Value of the State and the Significance of the Individual),<sup>57</sup> he hints at establishing a theory of law akin to Hans Kelsen's—law is a normative order which allocates norm-making power rather than one which determines the content of norms.<sup>58</sup>

In these two works, Schmitt presents a view of law that is almost identical to the view presented by Holmes in *The Path of the Law*. The problem of how to resolve legal indeterminacy is solved by an appeal to facts about judicial power because we cannot expect law itself to offer a solution. But neither Schmitt nor Holmes appeal to mere power; they want law to make an impact on the decisions as to what law is. Hence they preserve, even if obscurely, some hope for the law figuring in the prediction of how judges will decide cases.

Holmes, as I have said, never gave up on this hope for the future of law but was eventually forced to diminish it to a doctrine of judicial deference to the people's will, whatever its content. Schmitt, by contrast, lost nearly all hope for the law as the Weimar Republic, having survived the first crisis of civil disintegration that led to its founding, succumbed during the late 1920s and early 1930s when Germany became a battleground for increasingly bellicose heterogeneous factions.

It is important, though, to understand that Schmitt was not a passive spectator to the disintegration and destruction of Weimar. While Schmitt is not altogether unambiguous in his views about Weimar in the early 1920s, his publications at a time when Weimar was becoming increasingly stable begin to express a deep hostility to liberal democracy. Schmitt worked to construct a legal and political theory based on a quasi-theological idea focusing on the importance of the exceptional case in grasping the substance of a normal order. It is in the exceptional moment—in law the state of emergency—that the truth emerges with what is true being what wins out in a battle between self-defined friends and enemies. Only a vision founded on an idea of the substantive homogeneity of the *Volk* can

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<sup>57</sup> CARL SCHMITT, *DER WERT DES STAATES UND DIE BEDEUTUNG DES EINZELNEN* [CARL SCHMITT, *THE VALUE OF THE STATE AND THE SIGNIFICANCE OF THE INDIVIDUAL*] (1914).

<sup>58</sup> See Scheuerman, *supra* note 47, at 19-25.

lay the basis to shift from a state of political chaos to that of stability and certainty. Liberal democracy becomes the enemy for Schmitt. It tries to design a rational legal order which denies the exceptional character of politics while simultaneously, through its doctrine of neutrality, making the state vulnerable to capture by its internal enemies. He thus advocates refounding German political and legal order on an illiberal basis, whatever that turns out to be.<sup>59</sup>

Schmitt claims that this basis must be democratic, since it is a kind of "sociological" fact about the twentieth century that any political solution be one which is in the name of the people. In his view, there are no moral standards apart from what people happen to believe in particular places. The conclusion he draws is that liberalism is anti-democratic since it seeks to impose its moral standards on particular nations. A dictatorship in the name of the people is, however, in the spirit of democracy, as long as the dictator can attract acclaim from the bulk of the people, whose role in democracy is limited to saying "yes" or "no."<sup>60</sup>

Schmitt's theory not only drew on influential strands within German conservative thought, but also made a distinctive contribution to them in providing a legal theory to justify the authoritarian trends in politics in the early 1930s. Indeed, Schmitt was the main legal adviser to General Schleicher, the chief mover in Germany's drift to the right. Once the Nazis won power, it was no surprise that Schmitt enthusiastically joined them despite his earlier disdain for their plebeian roots. Schmitt was compelled by his own logic to celebrate the Nazi victory in 1933 since he believed that truth is constituted by the victory of an anti-liberal vision.<sup>61</sup>

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<sup>59</sup> See, for example, the following works by Carl Schmitt: *CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., MIT Press 1988) (1934); *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Rutgers University Press 1976) (1932); *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., MIT Press 2d ed. 1988) (1926).

<sup>60</sup> See *CARL SCHMITT, VERFASSUNGSLEHRE* [*CARL SCHMITT, CONSTITUTIONAL THEORY*] (Dunker & Humblot 1989) (1928).

<sup>61</sup> For a brief account, see David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?* 1997 *AM. POL. SCI. REV.* 91, 121-34. For a more elaborate discussion, see *DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR* (1997) [hereinafter *DYZENHAUS, LEGALITY & LEGITIMACY*].

William Scheuerman argues that the seeds of Schmitt's thought, as it developed from the early 1920s through the Nazi period, are already contained in *Gesetz und Urteil*. The seeds lie in the two major elements of that work: the idea that discretion or unconstrained choice is the result of indeterminacy in the law, and the idea that the stabilizing basis for filling the gap of discretion is homogeneity.<sup>62</sup>

If one moves quickly from these two elements to Schmitt's infamous celebration of Nazi legality in 1933, *Staat, Bewegung, Volk* (State, Movement, People),<sup>63</sup> one can see how the discretionary moment in the law, which occupies Schmitt in 1911, has by 1933 become for him a metaphor for the entire legal order of a liberal democratic state. The law of liberal democracy is nothing more than the space of discretion, with different interest groups competing to capture that space. One can also see how homogeneity, the solution to the problem of unstructured political space, changes in both quality and scope. It changes in scope because Schmitt no longer finds judicial homogeneity to be an adequate solution; one also needs the homogeneity of the people in whose name the central lawmaking body speaks. It changes in quality because that homogeneity is now explicitly conceived as ethnic or racial.

I suggest that Holmes was able to maintain some semblance of hope for law only because, whatever the changes in and disruptions to the political and social context in which he worked, it never seemed that things were out of control. Never did it seem that the only hope for certainty and stability lay in a revolution that would bring about a new political and social order, one capable of stabilization through law. But his basic attitude to the law was one which could be mapped in all important respects onto Schmitt's, and in the circumstances of late Weimar, that logic has as its conclusion, *Staat, Bewegung, Volk*.<sup>64</sup>

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<sup>62</sup> Scheuerman, *supra* note 47, at 23-24.

<sup>63</sup> CARL SCHMITT, *STAAT, BEWEGUNG, VOLK* [CARL SCHMITT, STATE, MOVEMENT, PEOPLE] (1933). For the slower, fully argued version, see Scheuerman, *supra* note 47.

<sup>64</sup> During the conference where this paper was first presented, Judge Richard Posner said of Holmes's conception of law, one with which he seemed to agree, that the task of law is to keep danger at bay. This conception is precisely Schmitt's. As Perry Anderson has pointed out, Schmitt's later work is haunted by

The root of this logic lies in the way in which both Holmes and Schmitt detach Hobbesian legal positivism from its normative basis. I have already shown how Holmes's truncated version of Austinian positivism is in substance Hobbesian positivism with a pseudo-normative basis. I will now show how the same is true of Schmitt.

### III. HOBBSIAN LEGAL POSITIVISM

By 1938, Schmitt had fallen out of favor with the Nazis, as he was outmaneuvered by Nazi hacks in his bid to become the chief legal philosopher of the Third Reich. But besides the dirty facts of political life in Nazi Germany, there was the fact that even at his most obsequious, Schmitt could not bring his vision of law completely into line with Nazi ideology. Simply put, he still maintained a shred of hope for law as an autonomous element in politics, one which could stand in the way of an all powerful state. This hope is expressed, very much between the lines, in a book he wrote in 1938 as a commentary on Hobbes's *Leviathan*, in which he proclaimed himself the twentieth century heir of Hobbes's thought.<sup>65</sup>

According to Schmitt, Hobbes understood that the political order and stability of the modern state turned on eradicating political conflict within the state and displacing it to a matter of external affairs. Furthermore, Hobbes realized that such order had to be maintained by a system of positive law founded on the myth of the great biblical monster, Leviathan. However, Schmitt argues that that myth cannot survive Hobbes's attempts to provide in addition a rational justification for politi-

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a theological image found in Paul's Second Letter to the Thessalonians:

The mystery of lawlessness doth already work: only there is one that restraineth now, until he be taken out of the way; and shall be revealed the lawless one, whom the Lord Jesus will slay with the breath of his mouth, and bring to nought with the manifestation of his coming.

Perry Anderson, *The Intransigent Right at the End of the Century*, 7 LONDON REV. BOOKS 7, 11 (1992). The point of law, that is, is to keep the dangers of lawlessness at bay—to fill the void with something certain and stable, something animated by a secular myth which can take the place that the images of the divine used to offer in anchoring political order.

<sup>65</sup> CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL* (George Schwab & Erna Hilfstein trans., Greenwood Books 1996) (1938).

cal and legal order. In each place that Hobbes appeals to or makes room for individual reason, he subverts his own project. Hence, Schmitt concludes that a deeply anti-individualist or anti-liberal myth is required. Those who do not fit a particular myth's criteria for inclusion should expect no protection from the state.

Schmitt is still drawn to the limited protections that Hobbes offers the individual within the state, especially Hobbes's attempt to build into the very idea of law a prohibition against retroactive law and the maxim *nulla poena sine lege*. It is in Schmitt's emphasis on both these protections and Hobbes's overarching aim of providing the individual with security and protection in return for obedience, that his critique of Nazism is hidden. But these protections make sense only from the perspective of one who, like Hobbes, begins the inquiry with a rational basis for legal order. Since Schmitt rejects just such a basis, because in his view it undermines order, his lament for the protection of the law is pathetic. His elevation of stability and certainty into the exclusive values of legal order leaves him with no basis for criticizing the order which the Nazis constructed.<sup>66</sup>

Hobbes creates a problematic political and legal theory, in that his positivist legal order is one which is supposed to preempt individuals from having public recourse to criticism of the sovereign. Individuals are supposed to act as if the moral law is contained in the civil law proclaimed by the sovereign. However, Hobbes himself cannot follow through on this requirement. Schmitt's and Holmes's solution is to rid the law of its inherently moral traits, while retaining hope for law which depends on retaining those traits.

There is, fortunately, a much better solution which is to construct a fully normative, and hence anti-positivist, theory of law. Every constructive theory of law requires an explicit normative basis, and that basis must be reflected within the structure of the legal order to which it gives rise.<sup>67</sup> In the An-

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<sup>66</sup> I deal with these themes in David Dyzenhaus, "Now the Machine Runs Itself": Carl Schmitt on Hobbes and Kelsen, 16 CARDOZO L. REV. 1 (1994) and, more extensively, in DYZENHAUS, LEGALITY AND LEGITIMACY, *supra* note 61.

<sup>67</sup> The point about the importance of unifying one's legal theory with a normative theory is well made by Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951), responding to a defense of Holmes's positivism



glo-American world, American legal philosophers have been preeminent in this undertaking,<sup>68</sup> but they have not found their inspiration in Holmes's *The Path of the Law*.

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by Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951).

<sup>68</sup> Lon L. Fuller and Ronald Dworkin are the obvious examples. Dworkin's more recent work exhibits, however, some positivistic traits. See DWORKIN, *supra* note 45, at 214. (I discuss the tensions in his work in David Dyzenhaus, *Pornography and Public Reason*, 7 CAN. J. L. & JURISPRUDENCE 261 (1994). These traits are, in my opinion, part and parcel of the recent trend in North American liberalism to adopt a defensive stance in reaction to fundamental challenge from the right wing of politics, a trend most strikingly exemplified in JOHN RAWLS, *POLITICAL LIBERALISM* (1993). The trend amounts to a retreat from giving full justifications for one's political commitments to a claim that these commitments are just what we already have achieved consensus on, something evidenced in their expression in the positive facts of our constitutional law. I discuss these issues in detail in David Dyzenhaus, *Liberalism After the Fall: Schmitt, Rawls, and the Problem of Justification*, 22 PHIL. & SOC. CRITICISM 9 (1996) and in David Dyzenhaus, *Conscience and the Law: Liberal and Democratic Approaches*, in NOMOS XL: INTEGRITY AND CONSCIENCE (forthcoming 1997). It is this trend which, I think, explains the recent resurgence of interest in legal positivism in the United States of America.

Further, in response to John Goldberg's critique of my arguments in his contribution to this volume, I venture that his account of Holmes's attachment to principles of political justice supports rather than undermines my arguments. If all there is to such principles is that they are "necessities" which are "felt" by the people, see John C.P. Goldberg, *Style and Skepticism in The Path of the Law*, 63 BROOK. L. REV. 225, 276-77 (1997), then it becomes a purely contingent matter what the content of those feelings are. Holmes's account of political morality becomes anthropological, in the sense which Ronald Dworkin used to describe Lord Devlin's account of morality. See Ronald Dworkin, *Liberty and Moralism*, in TAKING RIGHTS SERIOUSLY 240, 253 (1977) (discussing PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965)). The account becomes, that is, a mere report of what the majority of people feel is right. One needs to know then what the argument is for enforcing such feelings. The standard response, which Dworkin adopts, is to put this point in terms of a dilemma. Should the feelings be enforced because they are felt or because of their content? Dworkin, of course, opts for (liberal) content. In my own work, including the two articles last cited, I argue for a democratic theory as the route out of the problems created by this dilemma.