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# STYLE AND SKEPTICISM IN *THE PATH OF THE LAW*

John C.P. Goldberg<sup>†</sup>

## INTRODUCTION

As Neil Duxbury notes, Holmes consistently provokes strong reactions in his readers.<sup>1</sup> The substance of those reactions, however, is notably inconsistent. Some tend toward the view that Holmes is an empty vessel; a font of legal aphorisms for every occasion.<sup>2</sup> Others find Holmes to have advocated a bleak and noxious account of law that equates right with might.<sup>3</sup> Still others seem to believe both.<sup>4</sup> This panel on the European reception of *The Path of the Law*<sup>5</sup> contains representatives of the first two positions. Dr. Duxbury argues that the success of Holmes's essay is proof that Holmes's significance owes less to the content and coherence of his ideas than to the stylish and suggestive manner in which he expressed them. In contrast, Professor Dyzenhaus reads the essay as advancing a comprehensive political theory that endorses an amoral and deeply cynical account of law and adjudication.<sup>6</sup>

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<sup>1</sup> Neil Duxbury, *When Trying is Failing: Holmes's "Englishness,"* 63 BROOK. L. REV. 145 (1997).

<sup>2</sup> I hear this judgment most frequently from members of the legal academy not devoted to the arcane world of legal theory. Some theorists have said as much in print. See, e.g., Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 707 (1982).

<sup>3</sup> Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569, 571 (1945).

<sup>4</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 49-50, 56 (1977) (Holmes propounded "highly ambiguous" yet "radical and despairing" account of law as forcible imposition of majority will).

<sup>5</sup> Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *Path*].

<sup>6</sup> David Dyzenhaus, *Holmes and Carl Schmitt: An Unlikely Pair?*, 63 BROOK. L. REV. 165 (1997).

Speaking in broad terms, there is another quite different scholarly take on Holmes—one evidenced on this panel by Professor Twining and in the papers of other conferees, including Judge Posner and Professor Grey. These interpreters maintain that, when handled with sufficient care, Holmes's rhetoric reveals a nuanced liberal theory of law and adjudication. Professor Twining, a representative of this "camp," insists, for example, that Holmes has been done a disservice by those who mistake the "bad man" for the hero of *The Path of the Law*, when in fact it represents only one aspect of Holmes's vision.<sup>7</sup>

As is perhaps already evident from the foregoing, I am sympathetic to the views of the latter group, and this article aims to promote their cause by taking issue with Duxbury and Dyzenhaus.<sup>8</sup> Part I attempts to rebut Duxbury's argument that Holmes's legacy can be reduced to a notion of style divorced from substance. Part II maintains that Dyzenhaus errs in contending that Holmes's commitment to a version of legal positivism led him to endorse a cynical, statist account of law and a passive theory of judging. This contention, I argue, is mistaken both as a conceptual argument about legal positivism and as a descriptive claim about *The Path of the Law*. Part II concludes by offering evidence in support of the claim that Holmes's theories of law and adjudication are best described as a relatively moderate and liberal form of positivism.

## I. HOLMES'S INTELLECTUAL LEGACY: DUXBURY ON STYLE

Neil Duxbury argues that Holmes's continuing influence as a legal theorist owes in part to his command of written English. Although this claim is in one sense uncontroversial, I will attempt to show first, that Duxbury has underestimated the difficulty of producing a satisfactory account of style, and second, that one finds within his seemingly unobjectionable thesis an insistent challenge to Holmes's place in the history of American jurisprudence. I conclude that this critique may owe more

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<sup>7</sup> William Twining, *Other People's Power: Holmes, The Bad Man and English Positivism*, 63 BROOK. L. REV. 189 (1997).

<sup>8</sup> Because there is considerably less distance between Professor Twining's paper and my own—indeed our two papers could be read as offering complementary accounts of Holmes as a moderate skeptic—I have structured this article around my conference commentary on the Duxbury and Dyzenhaus papers.

to Duxbury's assessment of the jurisprudence of Holmes's era, or to Duxbury's approach to intellectual history, than to his holding a low opinion of Holmes.

#### A. Holmes's "English" Style

Duxbury seeks an explanation for the success of *The Path of Law*, and of Holmes's academic writings generally, and finds that it lies in Holmes's combination of American ambition and English style. As to ambition, Holmes provides an early instance of "American" scholarly brazenness by attempting to frame and answer very large and abstract legal questions.<sup>9</sup> In style, however, Holmes could not be more removed from modern American academia: his grand claims are made in prose that is noticeably free of jargon, prolixity, and footnotes. In this regard, according to Duxbury, Holmes is quite "English."<sup>10</sup>

Duxbury attempts to refine the notion of English style by breaking it down into its component characteristics, describing it as "undemonstrative, unempathetic, casual, insouciant even"; as well as "harsh, scandalous, aloof, unfashionable, cryptic, fatalistic and self-contradictory, and yet also perceptive, challenging, inspired and inspiring."<sup>11</sup> The gist of these descriptions is that Holmes wrote in a manner which, by the standards of his time and today, is more literary and less technical than typical academic writing. Unlike the average professor, Holmes was willing to employ ordinary, albeit provocative, vocabulary, short sentences with relatively few qualifying adjectives and clauses, and a loose, nonlinear organization. He was thus willing to tolerate the appearance of imprecision and even self-contradiction in order to obtain maximum rhetorical effect.

Thus defined, Holmes's Englishness is exemplified by *The Path of the Law*. The essay is short, purporting to defend ambitious theoretical claims about law in the space of twenty pages.

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<sup>9</sup> Duxbury, *supra* note 1, at 147-48 (describing American theorists' ambition). I take it that this is why Duxbury asserts that the English "probably could never produce" a jurist such as Holmes. Duxbury, *supra* note 1, at 150.

<sup>10</sup> Duxbury, *supra* note 1, at 163.

<sup>11</sup> Duxbury, *supra* note 1, at 152.

It is also, at least by modern law review standards, loosely organized (it lacks headings) and entirely unsupported, featuring all of six (not very informative) footnotes. The essay is filled with delphic phrases, including what Duxbury nicely describes as its "Taoistic" title.<sup>12</sup> It also tends to make points by way of illustration and allusion, rather than extended argument. For example, the conceptual separation of law from morality is expressed through the device of the imagined "bad man."<sup>13</sup> Likewise, the notion of anti-formalist legal methodology is conveyed through a cryptic reference to the jurist of the future as "the man of statistics and the master of economics."<sup>14</sup>

### B. *Style as Causal Agent*

"English" may not be the best name for the prose style just described. It is, after all, clearly not the only style favored by leading English legal scholars—consider, for example, Bentham, or H.L.A. Hart. Moreover, there are American writers who display mastery of this style, including Holmes and Cardozo. Perhaps a more accurate name would be the "classical" style, denoting the style characteristic of the classically trained, nineteenth and early twentieth century "Man of Letters"—that species of amateur, generalist intellectual which predated the professional academy and its specialized, technical discourses.

Labeling quibbles aside, Duxbury surely is correct that the style of *The Path of the Law* appears to the modern academic eye to be literary and casual. Still, we are left with important questions. How does the casual style of Holmes's work explain its lasting impact? Why has it not had the opposite effect of rendering Holmes's scholarship academically suspect? Duxbury's explanation of the causal power of casual style is, at this critical juncture, quite underdeveloped.<sup>15</sup> Nevertheless, I

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<sup>12</sup> Duxbury, *supra* note 1, at 156.

<sup>13</sup> Holmes, *Path*, *supra* note 5, at 459.

<sup>14</sup> Holmes, *Path*, *supra* note 5, at 469.

<sup>15</sup> Duxbury is content to rely on off-the-cuff notions about style, as am I. It would undoubtedly behoove us both to learn something more about the subject. A good, if perhaps dated, introductory source may be the elegant and informative "style" entry in PORTER W. PERRIN, *WRITER'S GUIDE AND INDEX TO ENGLISH* 716-

believe one finds in his analysis two claims. The first is that the causal efficacy of style is fundamentally un-intellectual—that style operates at an emotional, sub-conscious, or aesthetic level, engaging the sensibilities, not the sense, of its reader. The second is that Holmes had a good “feel” for the sensibilities of the academy.

Holmes moved in the intellectual circles of Boston, and he later became an active participant in “high-society London intellectual life.”<sup>16</sup> Out of these experiences, Duxbury suggests, Holmes developed an appreciation for intellectuals’ tastes and a knack for communicating with an elite audience. In particular, he came to appreciate that certain styles of writing were likely to be effective because they played to this audience’s conception of themselves as astute and sophisticated. The English style, by virtue of its simple, elliptical prose, “assum[es] an educated audience . . . which does not need, and would not especially welcome, having too much spelled out to them.”<sup>17</sup> In other words, intellectuals are drawn to the English style because it implicitly affirms their own account of who they are, or whom they aspire to be; it “makes us *feel*, as it were, complimented.”<sup>18</sup> Attuned to this psychological and aesthetic fact, Holmes chose to convey his ideas in stylized and somewhat disorganized prose, knowing (if only tacitly) that, in so doing, he would draw in his audience by implicitly crediting them with the ability to perform for themselves any necessary refinement and elaboration.

According to Duxbury, this same shrewd sense of style explains in part why *The Path of the Law* continues to resonate with legal academics a century after its initial delivery. Indeed, the essay can only have a greater resonance today because it stands out as a striking departure from the stiff, earnest, and overbearing professorial style of the modern law review article. To the American law professor, the essay is a scholarly indulgence—“reading [it] must be rather like taking a holiday and being able to call it work.”<sup>19</sup>

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24 (3d ed. 1959).

<sup>16</sup> Duxbury, *supra* note 1, at 154.

<sup>17</sup> Duxbury, *supra* note 1, at 158.

<sup>18</sup> Duxbury, *supra* note 1, at 159 (emphasis added).

<sup>19</sup> Duxbury, *supra* note 1, at 163.

Duxbury's analysis thus boils down to the plausible proposition that Holmes's feel for the aesthetic sensibilities of his audience constitutes one among several factors—including, presumably, the content of the essay and the reputation of its author—that explains the continued influence of *The Path of the Law*.<sup>20</sup> Yet the reasonableness of Duxbury's conclusion should not blind us to certain difficulties in his position.

Consider first the distinction between style and substance, defined as the merits or validity of the thoughts being expressed. For certain purposes, it is fairly easy to distinguish between the two. For example, Judge Posner has argued that the noxiousness of the substance of Holmes's notorious epigram in *Buck v. Bell* ("Three generations of imbeciles are enough.") can neatly be separated from its rhetorical virtues.<sup>21</sup> Even granting this distinction, it does not follow that one can so easily attribute causal efficacy to style independent of substance. Suppose the vast bulk of Holmes's opinions expressed values as discordant with our own as those of *Buck*. Or suppose Holmes's writings were filled with the following epigrams, along with consistent supporting text: "The law pays tribute not to experience but to logic"; "It is revolting to have no better reason for rejecting a rule of law than that it was laid down in the time of Henry IV"; "For the rational study of law the black-letter man is the man of the present, but the man of the future is the man of biology and the master of eugenics."<sup>22</sup> Perhaps these are stylistically inferior to their actual Holmesian counterparts. If they are not, to the extent we find them unappealing, we do so because they fail on the merits. The same point may be made in the reverse: are not academics inclined to award "style points" to *The Path of the Law* because the style vividly conveys substance?

Matters only get more complicated when we attempt to distinguish the force of Holmesian style from the force of what might be called Holmesian intellect—his rhetorical skills from

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<sup>20</sup> See Duxbury, *supra* note 1, at 163 (Holmes's style of expression is "one of the many reasons for Holmes's influence").

<sup>21</sup> Richard A. Posner, *Introduction*, to *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.*, at xvi-xvii (Richard A. Posner ed., 1992) (discussing *Buck v. Bell*, 274 U.S. 200 (1927)).

<sup>22</sup> G. Edward White raised an example similar to these during the conference.

his analytic ability.<sup>23</sup> Recall that, on Duxbury's account, style functions as a causal agent by virtue of the psychological make-up and aesthetic sensibilities of its audience: *The Path of the Law* is a success because Holmes wrote about law in a style that legal academics find agreeable. But does not style operate at the level of intellect? Again, suppose we can agree with Posner that Holmes's *Buck v. Bell* opinion adopts good literary form in the service of bad ends. Are we also prepared to say that its rhetorical force in advancing those ends is distinct from the conceptual mastery conveyed by Holmes's felicity of expression? While Duxbury sees in Holmes's style only rhetorical skill—a talent for enamoring an audience—one could argue that Holmesian style equally serves to demonstrate intellectual dexterity, thereby fostering in his audience the belief that engagement with the text will be intellectually rewarding. Indeed, the virtues of *The Path of the Law* both as a teaching tool and as scholarship would seem to lie not merely in its employment of literary devices like the "bad man," but in its *successful* use of such devices to illuminate, explain and analyze (rather than simply to signal, recite or allude to)<sup>24</sup> complex and abstract propositions, such as the proposition that law is distinct from morality. Holmes's superb written style thus provides evidence of a superb and subtle mind.

Finally, even if we could separate the style of *The Path of the Law* from its substance and intelligence, Duxbury's explanation for the essay's success faces an additional hurdle: the essay was not written in a vacuum. It followed years of scholarly research into the histories of Roman, German and Anglo-

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<sup>23</sup> I mean "analytic ability" to suggest both the "technical" capacity for careful, rigorous, logical analysis and the less technical "feel" for making arguments that are not only logical, but appropriate and astute.

<sup>24</sup> Duxbury credits Holmes for his "wonderfully allusive, but not explanatory" statements in *The Path of the Law* concerning the importance for law of the study of economics. Duxbury, *supra* note 1, at 160. I agree with Duxbury that these passages do not come close to providing a systematic account of law and economics—how could one passage, paragraph or article?—but they do not strike me as ever having been intended to found a sub-discipline within the academic study of law. Rather, the talk of economics and statistics is Holmes's (stylish) way of emphasizing that, since, many legal decisions ultimately cannot be divorced from judgments about conflicting social and political goals, lawyers faced with the task of making those judgments ought not simply rely on legalisms or their amateur instincts, but should instead attempt to inform themselves as much as possible about the desirability and attainability of those goals.



American law, which culminated in the publication of *The Common Law*. While portions of that book, particularly its famous opening paragraphs, are written in the "English" style, much of it consists of plodding, dry, turgid, relatively well-supported, and sometimes quite ingenious historical and doctrinal analysis.<sup>25</sup> Before one can attribute causal significance to the style of *The Path of the Law*, one must consider and discount the effects of this earlier, often unstylish work. Is it not plausible that the later essay would not have been a success without the earlier unstylish work serving to vouch for Holmes's scholarly bona fides?<sup>26</sup>

These objections hardly defeat Duxbury's ultimately uncontestable claim that Holmes's written style has figured in the continued impact of his writings. Nevertheless, they do bring into question his implicit claim that style operates purely at an aesthetic or subconscious level. And if style contains an intellectual component, then one cannot pass judgment on Holmesian style without passing judgment on the merits of Holmesian thought.

### C. *Duxbury's Quiet Indictment of Holmes*

#### 1. Diamonds and String

How, then, does Duxbury's account of Holmes's style fit into an evaluation of the substance of Holmes's work? Any account of a writer that isolates his style can appear, merely by the choice of focus, to denigrate that substance. Duxbury, however, takes pains to avoid this negative implication. He sometimes credits Holmes with intelligence and acuity.<sup>27</sup> More frequently he affects agnosticism as, for example, when he refuses to say whether Holmes deserves credit for the con-

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<sup>25</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 110 (1992) (*The Common Law* "meets several tests for a classic—it is obscure and inaccessible, in addition to being rarely read.").

<sup>26</sup> It seems to me that we are more prepared to take seriously the views of someone departing from mainstream professional conventions if he or she at some point displays mastery of those conventions which she rejects. For example, we take Richard Rorty's literary anti-philosophy seriously because he came to that view only after a significant engagement with analytic philosophy.

<sup>27</sup> Duxbury, *supra* note 1, at 161.

scious use of effective style, or whether the English style is superior or inferior to the styles which others have employed.<sup>28</sup> These disclaimers notwithstanding, I believe that Duxbury's analysis of Holmes the stylist actually contains a quiet but relatively strong critique of Holmes the jurist.

This point may be illustrated by contrasting passages written by Judge Posner and Duxbury. First Posner:

It is natural to suppose that Holmes's place in history depends on the magnitude, soundness, and durability of his contribution to law and thinking about law. Perhaps it does, but this volume has been constructed on a different premise; that Holmes's true greatness is not as a lawyer, judge, or legal theorist in a narrowly professional sense of these words, but as a writer and, in a loose sense that I shall try to make clear, as a philosopher—in fact as a “writer-philosopher”; and that his distinction as a lawyer, judge, and legal theorist lies precisely in the infusion of literary skill and philosophical insight into his legal work.<sup>29</sup>

...  
... [T]he variety of intellectual influences that played upon Holmes's subtle and receptive intellect, together with his power of articulation and the daring with which he brought his intellectual storehouse and rhetorical imagination to bear on his professional tasks, makes Holmes a central figure in the intellectual history of this nation, and one who deserves to be more widely and appreciatively read than he is.<sup>30</sup>

Now Duxbury:

[T]his apparent lack of planning [in Holmes's writing] is more often responsible for generating the impression that his writing is inspired rather than derivative (even when it is derivative).<sup>31</sup>

...  
... Holmes's literary style was certainly different from anything that we encounter in contemporary legal writing. But my claim is merely that we are attracted to that difference, not that Holmes was a better legal writer than are any of our contemporaries. What mainly survives of Holmes, above and beyond his literary style, is his capacity to inspire and impassion. Whatever their other faults, even the worst studies of his accomplishments tend not to be routine

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<sup>28</sup> Duxbury, *supra* note 1, at 159-63.

<sup>29</sup> Posner, *supra* note 21, at xvi.

<sup>30</sup> Posner, *supra* note 21, at xx.

<sup>31</sup> Duxbury, *supra* note 1, at 152.

or unengaged. If, as Flaubert remarked, there rests within every lawyer the debris of a poet, Holmes has without doubt instigated the recovery of some fascinating debris.<sup>32</sup>

Posner, as much as Duxbury, wishes to attribute Holmes's success in part to his "literary skill." But for Posner, who is obviously an enthusiast, Holmes's style is a feature of his intelligence. Posner's Holmes self-consciously employs his literary powers to organize and communicate profound insights. Hence, he is a jurist who deserves to be read. Duxbury's Holmes perhaps also ought to be read, but for different reasons, reasons which suggest that Duxbury is not an enthusiast of Holmes. For Duxbury, Holmes's greatest virtue is that he had the good taste to adopt the English style.<sup>33</sup> The value in *The Path of the Law* thus resides chiefly in its provision of a literary escape from the tedium of academic legal writing. True, it provides inspiration, but even that seems to owe more to its vagueness than to Holmes's profundity. Thus, "[w]hat mainly survives of Holmes, above and beyond his literary style, is his capacity to inspire and impassion."<sup>34</sup> *The Path of the Law* ultimately provides not insight, but an *occasion* for insight; a stimulant which causes readers to recover, apparently from within themselves, "some fascinating debris."<sup>35</sup>

One thus does not have to dig very far beneath the surface of Duxbury's paper—particularly when it is read in conjunction with his treatment of Holmes in *Patterns of American Jurisprudence*<sup>36</sup>—to find a fairly strong critique. In tracing the development of American legal thought, the latter work gives Holmes a very modest role: he appears as a transitional figure with one foot in the era of legal formalism and the other in the

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<sup>32</sup> Duxbury, *supra* note 1, at 164 (footnote omitted).

<sup>33</sup> Duxbury is not quite prepared to credit Holmes with being a master rhetorician; he holds out the possibility that Holmes merely adopted the English style by imitation or intuition, rather than conscious choice. Duxbury, *supra* note 1, at 154.

<sup>34</sup> Duxbury, *supra* note 1, at 164.

<sup>35</sup> Discussing the opening arguments of *The Path of the Law*, Duxbury concludes: "There seems, in fact, to be not all that much substance to what Holmes is saying here; but then it is so often the case that the effectiveness of his observations rests not so much in what he says as how he says it." Duxbury, *supra* note 1, at 158.

<sup>36</sup> NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 32-46 (1995) [hereinafter DUXBURY, PATTERNS].

post-formalist world of legal realism.<sup>37</sup> That he combined these and other opposing tendencies in American and European legal thought, moreover, is not taken as a sign of dialectical or synthetic aptitude. Rather it is symptomatic of the fact that Holmes was "a passionate reader and dilettante," rather than a "professional academic."<sup>38</sup> Indeed, this Holmes is described as an indiscriminating amateur, a "polyglot" who collected various strands of late nineteenth century thought, including German historicism, philosophical pragmatism, Langdellianism, social Darwinism, and political liberalism.<sup>39</sup> By virtue of his deft writing, he managed to turn this incoherent assemblage into an attractive and influential body of work, but this only earns Holmes the title, "the master of ambiguity," a dubious honor previously conferred on Holmes by Grant Gilmore, one of Holmes's harshest critics.<sup>40</sup>

In Duxbury's writings on Holmes one thus hears more than a faint echo of H.L.A. Hart's review of *The Common Law*,<sup>41</sup> which Hart subsequently reprinted with the title *Diamonds and String: Holmes on the Common Law*.<sup>42</sup> Hart, too, praised "the magic and sonority of [Holmes's] style."<sup>43</sup> And, although prepared to credit Holmes with insights into legal history, Hart cautioned that *The Common Law* should not be read as a serious work of legal theory. In Hart's eyes, Holmes's attempts at philosophy were "shallow," his reasoning "obscure and hasty," and thus the book had theoretical value mainly as a "stimulant."<sup>44</sup>

Duxbury, largely reiterating Hart, finds Holmes's work to be of interest, if at all, for its occasional inspirational "diamonds." But his criticism is perhaps even more severe than Hart's. For, in Duxbury's view, there may not be any real

<sup>37</sup> DUXBURY, PATTERNS, *supra* note 36, at 32.

<sup>38</sup> DUXBURY, PATTERNS, *supra* note 36, at 33.

<sup>39</sup> DUXBURY, PATTERNS, *supra* note 36, at 34-35, 41-44, 46.

<sup>40</sup> DUXBURY, PATTERNS, *supra* note 36, at 64; see also GILMORE, *supra* note 4, at 56.

<sup>41</sup> H.L.A. Hart, *Holmes's Common Law*, 1 N.Y. REV. BOOKS 15 (1963).

<sup>42</sup> H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 278 (1983) [hereinafter HART, ESSAYS].

<sup>43</sup> HART, ESSAYS, *supra* note 42, at 278, 285.

<sup>44</sup> HART, ESSAYS, *supra* note 42, at 278.

"diamonds" in the essay, only paste. Whatever insights can be found within it seem to belong not to Holmes, but to his readers.<sup>45</sup>

## 2. Duxbury on Legal History

Reading between (and outside) the lines, I thus find within Duxbury's account of Holmesian style a forceful indictment. This treatment may strike Duxbury as tendentious, and perhaps it is. Certainly it is not consonant with the generally benign tone of his paper. This disparity between tone and content poses a final interpretive problem: how to square Duxbury's facially neutral disposition with what I have described as his strong critique of Holmes's jurisprudence.

In fact, I think they can be reconciled. As I will try to establish now, Duxbury's dissatisfaction with Holmes probably does not stem from the presence of defects unique to Holmes. Rather, it is likely part of a more general critical disposition toward the scholarly method Holmes employed, toward the jurisprudence of the Progressive era, or perhaps even toward the very enterprise of jurisprudence. Duxbury's critique of Holmes is not pointed because it is not intended to single him out: Holmes's flaws are merely those of a particular scholarly approach, a generation, or perhaps even an entire intellectual discipline.

That Duxbury conveys his critique of Holmes in an agnostic tone may indicate that, despite his appreciation of the virtues of English style, he is somewhat less enamored of it—or at least the mode of analysis with which it is associated—than he lets on. As we have seen, Duxbury locates the beauty and power of the English style in its acceptance of incompleteness; it lacks the earnest and tedious style of the turgid scholarly article that is determined to dot every 'i' and cross every 't'. However, the English style and the English stylist are equally subject to a charitable and a not-so-charitable interpretation. Charitably described, the English stylist is like Posner's Holmes, the writer who is fully capable of drawing all the salient distinctions and connections, but, who for the sake of rhetorical efficacy, elects not to.<sup>46</sup> Uncharitably described, he

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<sup>45</sup> See *supra* text accompanying notes 33-35.

<sup>46</sup> Duxbury, *supra* note 1, at 161-162 (attributing to Holmes acuity and a rela-

is the Holmes that sometimes appears in Duxbury's book and paper, the "dilettante" whose manner of explanation and analysis substitutes linguistic elegance and ambiguity for rigor and precision.<sup>47</sup> It may be that Duxbury believes that other writers who have employed the English style are entitled to the charitable description even if Holmes is not. Alternatively, Duxbury's analysis may belie his distrust of "soft" nineteenth and early twentieth century scholarship, scholarship which evidences classical, rather than economic or analytical, training. If so, we should not be surprised to find a strong critique of Holmes's thought within Duxbury's nominally agnostic account; Holmes is vulnerable to such criticism merely because he wrote in an age of a prescientific scholarship.

A similar explanation may derive from Duxbury's relatively low opinion of the jurisprudence of the American Progressive era running from, say, Holmes through Cardozo. Duxbury, like many modern historians, tends to regard this era as the awkward teen years of American legal intellectual history—the period in which theorists began to abandon the childish faith of formalism, yet had not fully embraced the adult, realist notion of law as inherently unstable and political.<sup>48</sup> Needless to say, this characterization generates a certain unwillingness to take theorists like Holmes, Pound and Cardozo seriously. They are

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tively self-conscious use of understatement).

<sup>47</sup> Duxbury, *supra* note 1, at 158 (Holmes's style often crumbles under scrutiny).

<sup>48</sup> See DUXBURY, PATTERNS, *supra* note 36, at 46 (Holmes a "convenient inroad" to realism); DUXBURY, PATTERNS, *supra* note 36, at 64 (no coherent anti-formalist philosophy emerged in Progressive period). For a variation on this assessment, see HORWITZ, *supra* note 25, at 109-43, 189-92 (describing Holmes and Cardozo as transitional figures in American legal history). In my view, the standard division of the history of modern American Jurisprudence into three parts—formalism, realism and postrealism—needs rethinking. It is clumsy (because it washes over important distinctions and similarities between eras and theories) and possibly biased (by making realism the watershed moment in American legal history, it privileges utilitarian and skeptical theories of law by rendering them as the default position in jurisprudence).

Professor Grey's excellent review of *Patterns of American Jurisprudence* (which I came across while this paper was in draft) notes this feature of Duxbury's book and takes issue with it. See Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 514-17 (1996). Professor White has partly resisted the intellectual-historical orthodoxy by identifying some of the salient differences between Progressive era and realist jurisprudence. See G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

instead examined for signs of latent realism. Here again, to the extent Duxbury sees in Holmes the defects of a scholarly generation, he has no occasion to single him out for sharp rebuke.

Finally, there may be one other aspect to Duxbury's rendition which explains his nominally agnostic, yet critical attitude towards Holmes. The clue that leads to this alternative account is found in Duxbury's description of Holmes as a theorist who pulled together several strands of late nineteenth century thought. From this depiction of Holmes as a gatherer of ideas floating about in his epoch, one can detect a particular account of intellectual history—one which combines a notion of ideas as independently existing phenomena with a picture of history modeled on Wittgenstein's rope, which consists of many strands, none of which runs its full length.<sup>49</sup> According to this model, the great figures in the history of ideas are those who manage to take a set of conceptual strands that are in some sense already "in the world," and to form a distinct, eye-catching pattern of rope. (Imagine that each strand is a particular color, and that the great figures succeed in weaving a striking pattern.) Holmes fits this description because he managed to conjoin pragmatism, Darwinism, liberalism and other ideas that had struck a chord with late nineteenth century audiences. The next generation of legal theorists likewise picked up some of these strands, added some new ones, and spun together a new, but equally loosely constructed, segment of conceptual rope that came to be identified as "legal realism."

This reconstruction of Duxbury's approach to intellectual history, although admittedly a stretch,<sup>50</sup> would permit the reconciliation of Duxbury's skepticism about the substance of Holmes's ideas with the agnostic tone of his paper. If Duxbury is not much of a Holmes enthusiast, this may be only because he does not think that an intellectual historian should be an

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<sup>49</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 67 (G.E.M. Anscombe trans., 1958).

<sup>50</sup> But not a preposterous stretch. See DUXBURY, *PATTERNS*, *supra* note 36, at 2-3 ("Jurisprudential ideas are rarely born; equally rarely do they die . . . . Ideas—along with values, attitudes and beliefs—tend to emerge and decline, and sometimes they are revived and refined."). For a brief description and defense of a version of this view of intellectual history, see G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* at ix-xii (1985).

enthusiast of any theorist.<sup>51</sup> If intellectual history is nothing more than an endless rope in which some strands are added, some picked up and others dropped, the fact that Holmes's collection of ideas was not original, profound, coherent or true does not tarnish his reputation. These criteria are in some sense irrelevant. Moreover, we can find in this understanding of history a ready explanation for Duxbury's interest in Holmes's style. If any given theorist's historical significance consists of the causal efficacy of his or her ideas, the historian should be interested in knowing what it is that renders particular combinations of ideas efficacious. Style emerges as a candidate for the role of an historical-causal agent. By describing Holmes as a stylist, Duxbury can explain Holmes's impact in terms of his ability to weave an eye-catching segment of rope.<sup>52</sup>

If these speculations about Duxbury's historical method can be borne out—or if the preceding claims about Duxbury's attitude toward classical scholarship or Progressive era jurisprudence are warranted—then it would not be accurate simply to label Duxbury a critic of Holmes. He is no more a critic of Holmes than of any other theorist of Holmes's era, or perhaps any era. But even if Duxbury does not denigrate Holmes, he should not be mistaken for an admirer. For Duxbury, Holmes remains simply the stylist, "the master of ambiguity."<sup>53</sup> I have

<sup>51</sup> Grey, *supra* note 48, at 511-12 makes a similar observation.

<sup>52</sup> One finds a very different type of intellectual history in Holmes's own work. Perhaps the easiest way to illustrate the contrast is to compare the attitude with which Holmes approached the objects of his study with the attitude of a historian who has embraced the theory of history that I have ascribed to Duxbury. One cannot help but imagine the latter to be engrossed, yet utterly detached, even mildly amused, with the task of charting the busy, but ultimately futile work of each successive generation of theory-weavers. While Holmes himself has been famously accused of "Olympian" detachment, his detachment—which, like that of the historian I have described, no doubt derives from a conviction that history has demonstrated the ultimate transience of civilizations and, with them, ideas—was in one respect considerably less extreme. Holmes, after all, did not merely locate theorists within a historical stream of theories. Whether dealing with Kant's ethics, the Roman account of property, or ancient Teutonic rules for liability of bailees, Holmes sought both to trace the origins and influence of these ideas *and* to engage them; to challenge their validity on their premises and his. My posited historian, by contrast, refuses fully to engage theorists such as Holmes, because she treats them like historical way stations—as vessels temporarily housing assemblages of ideas.

<sup>53</sup> DUXBURY, PATTERNS, *supra* note 36, at 64.



tried to suggest why this cannot be the case—why style devoid of substance cannot explain our continued interest in him. What remains for consideration is the nature of Holmes's substantive vision.

## II. HOLMES AS THE "BAD MAN": DYZENHAUS ON POSITIVISM AND MORAL SKEPTICISM

In pairing Holmes with Carl Schmitt, a German philosopher with Nazi sympathies, Professor Dyzenhaus revives a criticism that has dogged Holmes's reputation at least since Ben Palmer's 1945 tirade, *Hobbes, Holmes and Hitler*.<sup>54</sup> The claim is that Holmes embraced an amoral and deeply skeptical positivism that reduces law to "the gunman . . . writ large,"<sup>55</sup> and thus sanctions as legitimate even the most wicked political and legal regimes.

Although directed in this instance at Holmes, Dyzenhaus's attack is part of an ongoing critical engagement with legal positivism. As an aid to understanding his present critique of Holmes and his broader critique of positivism, this Part will attempt to situate the former within the latter. Part II.A provides a brief, background exegesis of the longstanding debate over whether legal positivism generates theories of law that are defective because they entail theories of adjudication that require judges to uphold and enforce wicked laws. Part II.B explores Dyzenhaus's entry into that debate on behalf of the antipositivist position in his book, *Hard Cases in Wicked Legal Systems*.<sup>56</sup> Part II.C explains how the critique of Schmitt and Holmes provided in Dyzenhaus's conference paper signals a significant modification of his anti-positivism in that he appears no longer to condemn legal positivism per se, and instead finds wanting only a particular form of legal positivism deriving from a strong form of moral skepticism. Towards the end of Part II.C, I argue that this modification amounts to a concession that there is no necessary or analytic connection between

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<sup>54</sup> Palmer, *supra* note 3.

<sup>55</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958) [hereinafter Hart, *Positivism*].

<sup>56</sup> DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (1991) [hereinafter DYZENHAUS, *WICKED LEGAL SYSTEMS*].

either legal positivism or moral skepticism on the one hand, and a statist conception of law and adjudication on the other, and thus to a concession that there is no a priori reason to believe that, because a theorist such as Holmes is a moral skeptic and a legal positivist, he is also committed to a complacent, statist judiciary. Finally, part II.D returns the focus to Holmes by arguing that Dyzenhaus misattributes such a commitment to *The Path of the Law* when in fact it—like *The Common Law*—offers a modestly skeptical, politically moderate account of law that leaves a significant role for moral norms in law and adjudication.

### A. *Legal Positivism and The Judicial Function*

#### 1. Positivism and The Moral Argument for the Separation Thesis

“Legal positivism” has long resisted precise definition,<sup>57</sup> nevertheless, most would ascribe to it at least the following two related propositions. First, legal positivism holds that “law” (in contrast to custom or private commands) is the body of rules or norms promulgated by those offices or institutions conventionally recognized by the citizenry of a given society, or its officials, as the maker of authoritative, binding norms and rules. Positivists have often referred to these offices and institutions as “the sovereign.” Second, it holds that since law is always the product of the acts of historically contingent sovereign institutions, there is no guarantee that any given law or legal system will maximize utility, respect natural rights, or otherwise conform to principles of morality or justice.<sup>58</sup>

Historically, the first positivist proposition about the sources of law was offered as a response to, and as a critique of, theories of common law which held that judges, by means of a skill only they possess (legal reasoning), find law in the customs and traditions of the citizenry. Thus driven by the con-

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<sup>57</sup> See Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CAN. J. LEGAL JURISPRUDENCE 361, 361 (1996) (critical notice of WIL J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994)).

<sup>58</sup> See Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241, 246-47 (Dennis Patterson ed., 1996).

cern to distinguish with maximum clarity authoritative official law from non-authoritative custom, these early accounts of positivism tended to present a picture of the sovereign law-maker as a single or unified executive or legislative entity.<sup>59</sup> The second proposition, which is often referred to as the "separation" or "separability thesis"—the notion that law and morality bear no necessary connection—was offered as a means of distinguishing positivism from the natural law tradition, which claims that, strictly speaking, there is no such thing as an "immoral law," only moral laws or immoral exercises of power.<sup>60</sup>

Broadly speaking, arguments for and against legal positivism fall into two categories. The first class includes conceptual, linguistic, and/or descriptive arguments attempting to establish or refute the claim that positivism provides the most accurate account of what law is (what makes law "law"), or at least the best account of how we or people like us employ or use the concept of law.<sup>61</sup> The second set of arguments for and against positivism are normative rather than descriptive. These claim that positivism is or is not attractive because it provides an account of law that allows or does not allow citizens, lawyers, judges and legal scholars to do certain things better than they could do otherwise.<sup>62</sup>

An example of the latter is Holmes's argument in *The Path of the Law* that acceptance of the separation thesis will promote clarity in legal analysis. If we can remember that law is distinct from morality, he says there, we will stop using morally-laden and ambiguous terms such as "duty" and "right" when describing our legally protected interests and our legally

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<sup>59</sup> See, e.g., THOMAS HOBBS, LEVIATHAN 201 (Michael Oakeshott ed., Collier 1962) (1651) (criticizing the view that common law is a distinct form of law that does not flow from acts of the executive or legislative sovereign power).

<sup>60</sup> Coleman & Leiter, *supra* note 58, at 246.

<sup>61</sup> Thus much—but not all—of the debate between H.L.A. Hart and Ronald Dworkin concerns whether positivism accurately captures what legal actors mean when they invoke the idea of law.

<sup>62</sup> If positivism is best understood solely as a set of non-normative, analytic or descriptive claims about law, then the normative objections to positivism discussed herein may not have much force. If positivism correctly defines what law is, then it is not an objection to positivism—although it is an objection to law—that adopting it produces certain bad consequences. For purposes of this Article, I am content to note that numerous theorists, including leading positivists such as H.L.A. Hart, have thought it appropriate to make normative arguments concerning positivism. See NEIL MACCORMICK, H.L.A. HART 160 (1981).

enforceable obligations, thus permitting a precise, "scientific" description of those interests and obligations.<sup>63</sup> A second normative argument asserts that positivism's separation thesis enhances citizens' and officials' ability to fashion a just legal system. By sharply distinguishing law from morality, positivism sharply distinguishes legal obligation from moral obligation, and thus withholds from legal obligations any moral authority. Acceptance of positivism and the separation thesis thereby can have the salutary effect of preventing citizens and officials from indulging in unjustified law-worship, providing them with the critical distance necessary to permit frank evaluation and bold revision of law in light of morality. This moral argument for the separation thesis is perhaps most closely associated with the British utilitarian positivist tradition running from Jeremy Bentham through H.L.A. Hart.<sup>64</sup>

## 2. Critique of the Moral Argument: Fuller and Cover

The above-described normative arguments claim that positivism is an attractive theory of law because it promotes the attainment of certain expedient or moral goods. These arguments for the separation thesis, particularly the moral argument, have been subjected to powerful critiques by Lon Fuller and Robert Cover.<sup>65</sup> Although their theories differed in many respects,<sup>66</sup> Fuller and Cover both argued that positivism cannot claim as one of its virtues that its acceptance will promote moral criticism of law. Seizing on the early positivists' opposition to judge-made common law, they argued that such a claim is contradicted by positivism's inherent commitment to an ex-

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<sup>63</sup> Holmes, *Path*, *supra* note 5, at 459-60.

<sup>64</sup> See, e.g., Hart, *Positivism*, *supra* note 55, at 597.

<sup>65</sup> The following summary is based on Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) and ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>66</sup> One important difference is that, whereas Fuller offered his critiques of positivism in support of an alternative account of law, Cover seems to have believed that, despite all its defects, positivism was the only available account of law for modern societies skeptical about the existence of natural rights and natural law. Thus, although as explained below, see *infra* text accompanying notes 129-132, Cover appeared to hold out hope for judicial acts that resist the statist tendencies of law positivistically conceived, his critique of positivism carries with it a tone of resignation.

tremely passive, deferential description of the judicial function. Positivism, they thus argued, disables perhaps the most important class of potential law scrutinizers—judges—from engaging in moral scrutiny as they interpret and apply the law.<sup>67</sup>

Indeed, as demonstrated by historical instances of judicial willingness to enforce wicked Nazi and American slavery laws, positivism, by divorcing law's validity from law's morality, generates a concept of the judge as the good soldier—one who does not hesitate to carry out whatever edicts issue forth from executive or legislative bodies.<sup>68</sup> Thus, one finds otherwise upstanding German and American judges in the thrall of positivism disingenuously claiming that they have no choice but to enforce the plain terms of oppressive statutes, while simultaneously denying countervailing appeals to justice and equity on the grounds that such considerations are *ultra vires*—not matters properly entertained by judges.<sup>69</sup>

Fuller's and Cover's moral critique of positivism can be broken down into three distinct claims. First, it claims that positivism generates a particular theory of the judicial function within a political system. Specifically, positivism posits the executive or legislature as the sovereign lawmaker. A positivistically conceived judiciary, by contrast, exercises no sovereignty of its own—has no authority or responsibility to make law.<sup>70</sup> Instead, the judge's job in adjudicating legal disputes is limited to two functions. (Here it is easiest to think in terms of cases of statutory interpretation.) She must engage in a procedural inquiry into the pedigree of the law in question to determine whether the rule or norm before the court consti-

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<sup>67</sup> Fuller, *supra* note 65, at 637; COVER, *supra* note 65, at 119-21.

<sup>68</sup> Fuller, *supra* note 65, at 648-57 (discussing behavior of Nazi judges); COVER, *supra* note 65, at 159-91 (discussing behavior of American antebellum judges).

<sup>69</sup> Fuller, *supra* note 65, at 637; COVER, *supra* note 65, at 119-21. Cover tended to express his critique in psychological terms—he suggested that judges operating on positivist premises were psychologically unable to question, reinterpret or renounced wicked laws. See, e.g., COVER, *supra* note 65, at 227-29 (discussing “cognitive dissonance” experienced by judges). Nevertheless, he maintained that this psychological connection in turn evidenced a conceptual linkage between positivism and judicial quiescence. See COVER, *supra* note 65, at 258-59 (judicial abdication owes in part to the positivist “juristic competence” of the antebellum era.).

<sup>70</sup> Fuller, *supra* note 65, at 634 (arguing that Benthamite positivist tradition supports legislative supremacy); COVER, *supra* note 65, at 29, 131-32.

tutes a valid act of the society's sovereign institutions. Having done this, she must then determine the precise content of the law in question.<sup>71</sup>

In its second aspect, the Fuller-Cover critique claims that positivism must also endorse a particular method by which this latter interpretive function will be performed. Specifically, positivism presupposes that judges will be able to decide cases by employing interpretive techniques that promise to be both non-controversial and highly determinate, such as plain language analysis, originalism, or a mechanistic account of stare decisis.<sup>72</sup> Positivism's endorsement of this sort of 'formalist' decision making flows from its account of the judicial function: such methods of adjudication are the only ones consistent with the claim that adjudication does not entail the exercise of the sovereign's law-making power.<sup>73</sup>

Finally, one finds, particularly in Cover's analysis, an intriguing if somewhat cryptic claim that positivism's account of the judicial role creates a judicial ethic that stands diametrically opposed to the account of law and morality contained in the moral argument for the separation thesis. According to Cover, positivism not only generates a normative argument that judges should *not* scrutinize the substantive merits of laws (and should instead accept an amoral, passive and mechanistic account of adjudication), it generates the strongest possible version of such an argument; namely, that judicial passivity is necessary to ensure the very survival of civilized society.<sup>74</sup> Positivism, on this view, supports the notion that anything less than unflinching judicial fidelity to the institutions of the sovereign will entail anarchy.

According to Fuller and Cover, these features of positivism—its conception of the judicial function, its theory of interpretation, and its theory of judicial fidelity to the State—explain the historical, empirical fact that judges who have embraced positivism have behaved in a manner exactly contrary to the picture of the open-minded, critical, reformist

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<sup>71</sup> Fuller, *supra* note 65, at 647.

<sup>72</sup> Fuller, *supra* note 65, at 661-69 (attributing belief in plain meaning approach to Hart's positivism); COVER, *supra* note 65, at 136, 232-36 (discussing originalism and formalism).

<sup>73</sup> Fuller, *supra* note 65, at 637; COVER, *supra* note 65, at 232-36.

<sup>74</sup> COVER, *supra* note 65, at 229-32.

official invoked by positivists in support of the separation thesis. By offering a theory of law with a procedural conception of legal validity, a theory of adjudication and interpretation that stresses the constrained and nondiscretionary nature of adjudication, and by sanctioning the strongest possible justification for such restraint, positivism causes judges to ignore the substance of the laws they apply, and to enforce indiscriminately all rules and norms actually generated by their sovereign, no matter how arbitrary, irrational or cruel.<sup>75</sup>

### B. *Dyzenhaus on Legal Positivism and Hobbesian Political Theory*

In *Hard Cases in Wicked Legal Systems*, Professor Dyzenhaus sought, through a study of South African decisions, to take up the anti-positivist mantle of Fuller and Cover. Just as they had argued that positivism's moral defects were evidenced by judicial validation of wicked American and German laws, he argued that the positivism of South African judges was responsible for their willingness to enforce immoral apartheid statutes.<sup>76</sup> In making this claim, however, Dyzenhaus took more seriously than his predecessors the arguments of modern positivists, and thus his analysis marked a significant advance in the debate over the moral argument for the separation thesis.

#### 1. Taking Hart Seriously: Positivism and Judicial Discretion

To understand Dyzenhaus's development of the moral critique of positivism requires an additional piece of exposition. In this instance, the subject is H.L.A. Hart, arguably the leading legal positivist of this century.

The critique of positivism found in the work of Professors Fuller and Cover are stated in very broad terms. Positivism, they seem to say, simply cannot tolerate the notion of an inde-

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<sup>75</sup> In Fuller's effective imagery: "The German lawyer was . . . peculiarly prepared to accept as 'law' anything that called itself by that name, was printed at government expense, and seemed to come 'von oben herab.'" Fuller, *supra* note 65, at 659.

<sup>76</sup> DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at vii-ix.

pendent judiciary that engages in a non-mechanical form of legal reasoning.<sup>77</sup> Stated as such, their critique seemed ungenerous, if not unfair, to sophisticated versions of positivism such as Hart's. Indeed, one of the central features of Hart's work is its attempt to divorce the defense of positivism as a theory of law from the rejection by earlier positivists, such as Jeremy Bentham, of the notion of judicial discretion and judge-made law. In fact, according to Hart, it is a *virtue* of positivism that—in contrast to theories of natural law and common law—it clearly identifies instances of discretionary judicial law-making.

Hart famously defined law as a system of authoritative primary (regulatory) and secondary (power-conferring) rules.<sup>78</sup> Any legal system containing a secondary rule that judges must decide all disputes properly before them is guaranteed to be a legal system in which some discretionary adjudication occurs. This conclusion follows from what Hart called the "open texture" of rules.<sup>79</sup> In order to cover classes or categories of conduct, rules, whether statutory or judge-made, must necessarily be expressed in general and abstract language. Judges applying rules will inevitably confront hard cases—disputes in which the language of the rule does not yield a definitive answer. In such cases, the judicial obligation to decide will *require* judges to exercise discretion unconstrained by the language of statute or case-holding.<sup>80</sup> This does not mean that judges will simply flip a coin, nor does it mean that they ought to always decide such cases by reference to moral considerations, as opposed to considerations of expedience.<sup>81</sup> It does mean, however, that judges will inevitably face cases in which they have to "legislate and so exercise a creative choice be-

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<sup>77</sup> See *supra* text accompanying notes 70-73.

<sup>78</sup> H.L.A. HART, *THE CONCEPT OF LAW* 77-79 (1961).

<sup>79</sup> *Id.* at 124-25.

<sup>80</sup> See Hart, *Positivism*, *supra* note 55, at 614, 629.

<sup>81</sup> See H.L.A. Hart, *Problems of the Philosophy of Law*, 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 264, 271 (Paul Edwards ed., 1967), reprinted in H.L.A. HART, *ESSAYS*, *supra* note 42, at 88, 107 (judges required by judicial conventions to appeal in hard cases to "a wide variety of individual and social interests, social and political aims, and standards of morality and justice").



tween alternatives."<sup>82</sup> It also means that, in certain instances, their choice should and will be guided by moral considerations.<sup>83</sup>

According to Hart, then, the attempt to attribute a particularly passive, mechanical account of adjudication to legal positivism's theory of law rests on a fallacy; there is no inconsistency whatsoever between the positivist claim that law is a body of rules enacted by recognized sovereign institutions, and the claim that judges can and do sometimes exercise sovereignty (make law), or the claim that they should sometimes exercise their independent moral judgment. To the contrary, he argued that it is a virtue of legal positivism that its account of law and rules clearly distinguishes instances of discretionary and non-discretionary adjudication. By contrast, non-positivist theories of law, particularly theories of common law, tend to conflate discretionary and non-discretionary decisions by describing the former metaphorically, as instances in which "judges are only 'drawing out' of the rule what, if it is properly understood, is 'latent' within it."<sup>84</sup> Positivism treats such talk as obfuscation. Decisions in hard cases are not interpretive—they are simply judicial law-making, i.e., judicial acts of sovereignty. Contrary to the arguments of Fuller and Cover, Hart's positivism directs both judges and observers of the legal system to acknowledge that judges cannot and should not always mechanically follow legislative or executive directives.

## 2. Relocating The Problems of Positivism

Hart's account of positivism offers a partial response to the anti-positivist arguments of Fuller and Cover. In particular, it responds to their broadest claims that positivism entails the adoption of an account of the judicial function under which judges are never authorized to exercise discretion or engage in moral deliberation in the course of deciding disputes before them, and thus must act merely as the unreflective conduits of

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<sup>82</sup> Hart, *Positivism*, *supra* note 55, at 612.

<sup>83</sup> Hart, *Positivism*, *supra* note 55, at 613 (in exercising discretion to sentence criminal, judge is expected to rely on his moral judgment).

<sup>84</sup> Hart, *Positivism*, *supra* note 55, at 612; *see also* Hart, *Positivism*, *supra* note 55, at 614 (refusing "invitation" to treat discretionary decisions as decisions guided by principles or ends implicit in law).

political decisions made by other institutions.<sup>85</sup> Yet, in *Wicked Legal Systems*, Professor Dyzenhaus aimed to bolster the Fuller and Cover position even while conceding to Hart that positivism does permit discretionary judicial decision-making, and thus does not logically entail a commitment to an intolerably passive account of the judicial function, or to formalism in statutory and common law interpretation. Indeed, Dyzenhaus accepted that Hart's account of judicial discretion successfully demonstrates that legal positivism does not logically entail a theory of adjudication under which judges have no authority or occasion to make substantive moral judgments in their application of law.<sup>86</sup>

Notwithstanding this concession, Dyzenhaus claimed to find in the performance of the South African judges he studied evidence of a connection between positivism and judicial acquiescence to immoral laws somewhat different than the one described by Fuller and Cover. For, as Fuller and Cover might have predicted, those South African judges who displayed a positivist understanding of law did *in fact* embrace originalism in statutory interpretation (albeit not a mechanical or formalistic originalism), and did *in fact* always deny that they possessed or should exercise the discretion that Hart's positivism allowed them. Thus, even though Hart had shown that Fuller and Cover were wrong to argue that positivism itself entails across-the-board judicial passivity, the strong correlation between the two in the opinions of the South African judges seemed to confirm the existence of some other analytic link between them.<sup>87</sup>

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<sup>85</sup> Hart's account does not, by contrast, dissolve the problem (much discussed by Cover) that positivism poses to the judge confronted with the task of applying a valid, clear, and clearly wicked law. In such a case, there would appear to be no room for judicial discretion, and Hart's positivism would apparently leave the judge with the options of applying the law faithfully, applying the law disingenuously (i.e., to lying), or resigning. Whether this result renders positivism a particularly defective theory of law is a much-disputed question.

<sup>86</sup> See, e.g., DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 58 (acknowledging that Hart rejects formalism and originalism as inconsistent with positivist account of adjudication in hard cases); DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 242-47 (accepting for purposes of argument the Hartian notion of judicial discretionary law making).

<sup>87</sup> DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 213, 217-20 (describing commitment of positivist South African judges to nondiscretionary, "plain fact" approach to adjudication).

Fuller's and Cover's mistake, according to Dyzenhaus, was to look for this correlation within the narrow confines of legal theory. In fact, the connection between positivism and acquiescent adjudication cannot be found within legal positivism *per se*. Instead, it is generated by the broader background political theory that supports legal positivism, and of which legal positivism forms one part; namely, the political theory of Thomas Hobbes.<sup>88</sup>

Hobbes built his theory on the premise that individuals left to their own devices will always disagree about who is entitled to what. Ongoing, violent conflict could thus only be avoided if each person ceded his natural right to exercise his own judgment as to what is right or fair to the sovereign, a unitary and absolute authority (a monarch or a legislative body).<sup>89</sup> In return, the sovereign would impose on all citizens a set of rules determining their rights and duties, thereby eliminating controversy and unrest, and providing citizens with the security that would permit them to go about their lives within the confines of these rules.<sup>90</sup>

A positivist account of law flows quite naturally from this account of the state. For a Hobbesian, law is not a natural order; it is rather the set of artificial rules posited by the sovereign and imposed by it on the citizenry. The proper judicial role would also seem to follow from these Hobbesian premises. It consists only of discovering and enforcing the commands which the sovereign has in fact issued. The relationship between sovereign and judge on this model appears unidirectional: the judge is a subordinate official created by the absolute sovereign and charged with the job of faithfully executing the sovereign's commands.<sup>91</sup>

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<sup>88</sup> DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 221-22.

<sup>89</sup> See HOBBS, *supra* note 59, at 200 ("For in the differences of private men, to declare, what is equity, what is justice, and what is moral virtue, and to make them binding, there is need of the ordinances of sovereign power . . .").

<sup>90</sup> HOBBS, *supra* note 59, at 200 ("[E]very subject in a commonwealth, hath covenanted to obey the civil law, either one with another, as when they assemble to make a common representative, or with the representative itself one by one, when subdued by the sword they promise obedience, that they may receive life . . .").

<sup>91</sup> HOBBS, *supra* note 59, at 205 (judge owes loyalty only to sovereign, whose "intendments" he is to enforce).

The central argument of *Wicked Legal Systems* is that the statist tendencies of positivism are located not in positivism itself, but in the Hobbesian political theory that positivism presupposes. A judge who accepts positivism *as part of her acceptance of Hobbes's political theory* will always operate on the premise that her own will and her own moral judgment have no legitimate role to play in the making of law.<sup>92</sup> This is because on Hobbes's account, judging cannot consist of the exercise of Hartian discretion: such a manner of adjudication explicitly requires judges to make law in violation of the sovereign's exclusive right to make judgments about what is prudent, reasonable, right, and fair.<sup>93</sup> Thus, even if Hart was correct that a judge often will have no choice but to exercise discretion (because, given the nature of rules, the sovereign cannot possibly express itself clearly as to all matters which will come before the judge), according to Dyzenhaus, the positivist judge will never be willing to concede that she possesses that discretion, much less that she ought to exercise that discretion by engaging in a frank determination of what the law (morally or expediently) ought to be. Instead she will, perhaps vainly or disingenuously, insist on deferring to any available evidence of the will or intent of the sovereign. For to acknowledge the existence of judicial discretion would violate the premises of the "political ideal" which led the judge to embrace positivism in the first place.<sup>94</sup> Thus, according to Dyzenhaus, Hart's attempt to rescue positivism from Fuller's and Cover's critique was destined to fail because "[his] claim

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<sup>92</sup> DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 224.

<sup>93</sup> HOBBS, *supra* note 59, at 199 ("The judgment of what is reasonable, and of what is to be abolished, belongeth to him that maketh the law, which is the sovereign . . ."). Hobbes also makes this point in his attack on common law method: "where men build on false grounds, the more they build, the greater is the ruin. . . . [T]herefore it is not that *juris prudentia*, or wisdom of subordinate judges, but the reason of this our artificial man the commonwealth, and his command, that maketh law. . . ." HOBBS, *supra* note 59, at 202. Hobbes also states:

In all courts of justice, the sovereign, which is the person of the commonwealth, is he that judgeth: the subordinate judge ought to have regard to the reason, which moved his sovereign to make such law, that his sentence may be according thereunto; which then is his sovereign's sentence; otherwise it is his own, and an unjust one.

HOBBS, *supra* note 59 at 202.

<sup>94</sup> DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 224 (describing positivist judges' adherence to a Hobbesian political ideal).

about [judicial] discretion is . . . in pragmatic contradiction to the authoritarian ideal which perforce drives [his] conception of law."<sup>95</sup>

### 3. Problems with the Hobbesian Turn

By responding to the strongest arguments put forth by the positivists it ultimately critiques, *Wicked Legal Systems* marked an important advance in the prolonged normative debate over positivism and the separation thesis. In so doing, it also managed to avoid many of the confusions that have plagued this debate, particularly the tendency among anti-positivists to lump together criticisms of positivism with criticisms of mechanical or deductive jurisprudence.<sup>96</sup> As Dyzenhaus explains, although the positivist judges he studied all subscribed to a method of statutory interpretation which denied that judges retain discretion to decide the case before them by appeal to principles of prudence or morality, none of them maintained that the determination of legislative or executive intent was a simple or deductive enterprise.<sup>97</sup>

*Wicked Legal Systems* also offered an explanation that ties together more tightly the assemblage of antipositivist criticisms found in Fuller's and Cover's critiques. In particular, Dyzenhaus's linkage of positivism to Hobbesian political theory explains Cover's intriguing but somewhat mysterious claim that positivism causes judges to attribute the strongest possible moral justification to maintaining a passive role within the political system.<sup>98</sup> Indeed, this explanation lies at the heart of Dyzenhaus's account of the "pragmatic contradiction." Even if any given exercise of independent judicial judgment does not in fact threaten to provoke civil unrest, each such act does, given the premises of Hobbesian political theory, undermine the sovereign's claim to absolute authority, and thus undermines the terms on which the social order is constructed. The key to preventing the Hobbesian war of all against all is the relin-

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<sup>95</sup> DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 243.

<sup>96</sup> See Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2090-93 (1995) (describing tendency of some American theorists to conflate formalism and positivism).

<sup>97</sup> DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 91-92.

<sup>98</sup> See *supra* text accompanying note 74.

quishment by each citizen to the sovereign of the right to exercise judgment. Unwavering judicial acquiescence to the commands of the absolute sovereign is therefore necessary to the continued legitimacy of the sovereign, and thus to the maintenance of order and the avoidance of anarchy.

To praise *Wicked Legal Systems* for its clarity and rigor, is not, however, to assert that its argument is without difficulties. Two problems, in particular, afflict that argument. First, it is ambiguous as to the strength of the relationship between Hobbesian political theory and the Hartian account of discretionary adjudication. At times, it appears to assert that legal positivism logically presupposes Hobbesian political theory—that the latter is the only justification of the state which can justify adoption of the former. It would follow from this that Hartian legal positivism, by proceeding from Hobbesian premises yet calling for the exercise of judicial discretion, is conceptually incoherent, and that judges who embrace positivism are logically committed to a rejection of discretion. Yet one also finds in the book a weaker version of this argument which concedes that one can be a non-Hobbesian legal positivist, and thus that *some* positivists can coherently endorse a Hartian (non-acquiescent) theory of adjudication.<sup>99</sup> On this version, Dyzenhaus's critique of positivism is more a piece of descriptive rather than conceptual jurisprudence, asserting as an empirical matter that positivist judges (or at least South African positivist judges) were in fact Hobbesians, and it is only because of this contingent fact that they were not willing to engage in Hartian discretionary adjudication.

Perhaps because of this ambiguity, *Wicked Legal Systems* also does not provide a satisfactorily nuanced account of the relationship between Hobbes's political theory and his account of law and adjudication. Indeed, it seems to me a case can be made from chapter 26 of Hobbes's *Leviathan* ("Of Civil Laws") that even Hobbes's early positivist theories of law and adjudication are substantially more complex than Dyzenhaus's argu-

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<sup>99</sup> Compare DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 239-42 (positivist conception of law "only" makes sense given Hobbesian premises), with DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 247 (criticizing modern positivists for "as yet" failing to provide a political theory adequate to reconcile positivist theory of law with a meaningful notion of judicial discretion).

ment suggests, and like Hart's, actually sanction an important role for robust, discretionary, even moral adjudication.<sup>100</sup>

Hobbes does define law positivistically as the command of the sovereign. He thus rejects the notion of natural law, understood as a set of universal and *authoritative* principles of right and justice. But his rejection of natural law is of a particular and limited nature. Hobbes does not deny the *existence* of universally valid principles of justice. Rather he denies that they possess the binding authority that characterizes law. "Natural law," in other words, refers to something that is natural, but not to something that is law: it identifies universally acknowledged, yet frequently flouted, principles of fairness and justice.<sup>101</sup> The problem represented by the state of nature is not the absence of principles by which to determine who is entitled to what, but rather that people, because of widespread ignorance, the inherent manipulability of language, and natural self-preference, routinely misunderstand or ignore those principles.<sup>102</sup> Hobbes's rejection of natural law thus does *not* flow from skepticism about the possibility of knowing what justice and morality entail. Access to their basic principles is in fact at hand: "The laws of nature . . . need not any publishing, nor proclamation; as being contained in this one sentence, approved by all the world. Do not that to another, which thou thinkest unreasonable to be done by another to thyself."<sup>103</sup> Rather, Hobbes is skeptical about people and their willingness to obtain and act on this knowledge.<sup>104</sup>

<sup>100</sup> Dyzenhaus actually acknowledges this complexity in *Wicked Legal Systems*. See DYZENHAUS, *WICKED LEGAL SYSTEMS*, *supra* note 56, at 236 n.57.

<sup>101</sup> HOBBS, *supra* note 59, at 199-200 ("For the laws of nature, which consist in equity, justice, gratitude and other moral virtues on these depending, in the condition of mere nature . . . are not properly laws, but qualities that dispose men to peace and obedience.").

<sup>102</sup> HOBBS, *supra* note 59, at 200, 214.

<sup>103</sup> HOBBS, *supra* note 59, at 203.

<sup>104</sup> None of this should be especially surprising to readers of Hobbes. The entire Hobbesian argument is, after all, constructed on the moral premise that each individual citizen is born free and equal—the "natural liberty of men"—from which it follows that no private citizen has the right to force his own judgments on another, and that the sovereign must be established by individuals ceding their natural right to judge for themselves what is right and wrong. See HOBBS, *supra* note 59, at 200 ("natural liberty of men"); HOBBS, *supra* note 59, at 213 ("It is equity which is the law of nature, and therefore the eternal law of God, that every man equally enjoy his own liberty.").

That Hobbes's rejection of natural law does not derive from a strong form of moral skepticism significantly complicates his account of positive law and adjudication. In particular, it permits the possibility that the sovereign might choose to incorporate the content of natural law into its commands, thereby rendering natural law's hortatory principles authoritative.<sup>105</sup> Hobbes's "incorporationist" positive theory of law, in turn, permits a rather subtle account of adjudication.<sup>106</sup> Once the sovereign commands that the citizenry abide by the general principles of natural law or equity, these general equitable principles become binding law by virtue of their incorporation into a sovereign command. Their incorporation does not, however, render them any more easily applied to particular disputes. Judges faced with disputes within this equity jurisdiction are thus left to determine of their own accord what the law is, which in these instances, is also what the law ought to be. Indeed, for this class of cases, says Hobbes—railing against the tendency of common lawyers to rely too heavily on precedent—nothing can "discharge the present judge of the trouble of studying what is equity, in the case he is to judge, from the principles of his own natural reason."<sup>107</sup>

The sovereign's incorporation of natural principles of justice into positive law likewise affects the proper method of statutory interpretation. The goal of statutory interpretation is to divine the intent or spirit of a law from its literal terms. Nevertheless, according to Hobbes, no less than Hart, the fickle nature of language entails that there will always be instances in which the sovereign fails to articulate its intent, yet nevertheless expects citizens and officials to act in accordance with it. When faced with such open-textured commands, the judge is instructed by Hobbes to ask what the sovereign would have decided had he thought about the case at hand. But this turns out not to be a simple factual inquiry into sov-

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<sup>105</sup> According to Hobbes, this possibility is neither remote nor speculative: sovereigns have, as it turns out, tended to command their citizens to comply with natural justice. ("The law of nature therefore is a part of the civil law in all commonwealths of the world."). HOBBS, *supra* note 59, at 200.

<sup>106</sup> There is, of course, today a lively literature in analytic legal philosophy on "incorporationist" positivism. See, e.g., Perry, *supra* note 57, at 362.

<sup>107</sup> HOBBS, *supra* note 59, at 201; see also HOBBS, *supra* note 59, at 204-05 (in cases governed by "common equity" judge must "verify" what equity requires).



ereign intent, for the judge is instead directed to consider what equity requires.<sup>108</sup> The latter is the relevant inquiry because, in the absence of direct evidence to the contrary, the sovereign will be presumed to have issued commands consonant with equity and reason.<sup>109</sup> In other words, since the judge's ultimate commission is to divine the intent behind the sovereign's commands, and since the intention of the sovereign is presumed to be an intent to do equity—"for it were a great contumely for a judge to think otherwise of the sovereign"—the judge "ought . . . if the word of the law do not fully authorize a reasonable sentence, to supply it with the law of nature, or if the case be difficult, to respite judgment till he have received more ample authority."<sup>110</sup> Only if the law clearly commands an inequitable outcome must the judge apply it so as to effect that result.<sup>111</sup>

As it turns out, then, Hobbes himself appears to have rejected Dyzenhaus's claim that Hobbesian political theory entails a consistently acquiescent account of the judicial function. Rather, in his own hands, Hobbes's modest moral skepticism generated a subtle account of the interrelation of law, adjudication, and morality—one that, like Hart's, seems immune to the charge that it generates the account of judging to which Fuller, Cover and Dyzenhaus object. Indeed, Hobbes's positivism would seem to demand that judges frequently exer-

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<sup>108</sup> HOBBS, *supra* note 59, at 203. ("For example, if the sovereign employ a public minister, without written instructions what to do; he is obliged to take for instructions the dictates of reason; as if he make a judge, the judge is to take notice, that his sentence ought to be according to the reason of his sovereign, which being always understood to be equity, he is bound to do by the law of nature . . . .").

<sup>109</sup> HOBBS, *supra* note 59, at 209 ("[T]he will of another cannot be understood but by his own word, or act, or by conjecture taken from his scope and purpose; which in the person of the commonwealth, is to be supposed always consonant with equity and reason.").

<sup>110</sup> HOBBS, *supra* note 59, at 209. To give Hobbes's example, if a statute states that a man forcibly thrust out of his home by another is entitled to be forcibly restored to his home, a man who is nonforcibly (but wrongfully) ousted from his home should be accorded relief under the statute notwithstanding its literal inapplicability because such an inequitable result could not have been the intention of the law maker. HOBBS, *supra* note 59, at 209.

<sup>111</sup> HOBBS, *supra* note 59, at 201.

cise independent moral judgment, because the sovereign has, by incorporating natural law into positive law, commanded them to do so.

### C. *Legal Positivism and Strong Moral Skepticism*

#### 1. Hobbes Revisited

*Wicked Legal Systems* thus never satisfactorily articulated what it is about the relationship between Hobbesian political theory and positivism that generates across-the-board judicial acquiescence to evil legal regimes. In my view, Professor Dyzenhaus now shares this dissatisfaction. Indeed, his present paper, I would suggest, constitutes a conscientious effort to refine and elaborate the relationship between Hobbesian political theory, legal positivism and judicial complacency in the face of evil laws.

That Dyzenhaus's paper is a continuation of his previous efforts is apparent from its structure and focus. Its heart consists of brief accounts of the positivist legal theories of Hobbes, Bentham, Austin, Holmes and Carl Schmitt. Notably, each account attempts to elaborate on the relationship between the theorist's commitment to legal positivism and the broader normative political theory of which that positivism forms a part.

One feature of this sequence is, however, novel and striking. Dyzenhaus is very much concerned to distinguish among positivists. Hobbes, Bentham and Holmes may all be legal positivists, but they differ because their positivisms derive from very different normative visions. In drawing such distinctions, Dyzenhaus clearly signals his abandonment of the strong version of the "pragmatic contradiction," which asserts that legal positivism necessarily presupposes Hobbesian political theory.<sup>112</sup> The issue is no longer why legal positivism generates a corrupt and acquiescent account of adjudication, but why *certain forms* of positivism do so. On this score, at least, Dyzenhaus now concedes that there is a distinction to be drawn between relatively benign and invidious forms of positivism.<sup>113</sup>

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<sup>112</sup> See *supra* text accompanying notes 95, 99.

<sup>113</sup> Dyzenhaus is probably still sufficiently unattracted to positivism to concede

What, then, determines whether a given positivist theory of law will be capable of generating an acceptable account of law and adjudication? As in *Wicked Legal Systems*, the claim here is that everything depends on the content of the background political theory. In the book, as we have seen, the villain was Hobbes. In this paper, however, Hobbes is given something of a reprieve. Dyzenhaus instead reserves his harshest words for two new villains: Carl Schmitt and Holmes.

Dyzenhaus begins his paper by reiterating the claim of *Wicked Legal Systems* that Hobbesian positivism appears to generate a problematic account of law and adjudication because of its skeptical premises.<sup>114</sup> It turns out, however, that this picture is not a fair portrayal of Hobbes. For Hobbes "never quite succeeded in constructing an entirely absolutist solution to the problem of the state of nature."<sup>115</sup> Instead, "[t]he 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."<sup>116</sup> Hobbes designed his authoritarian system with the "overarching aim of providing the individual with security and protection," an aim which presupposes the acceptance of a normative proposition about the natural equality and freedom of individuals.<sup>117</sup> This in turn indicates that Hobbes was not the full blown skeptic Dyzenhaus once made him out to be, and, by implication, suggests that the theories of law and adjudication that flow from his premises need not be so consistently authoritarian as Dyzenhaus once believed.<sup>118</sup>

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that it exists in any genuinely salutary forms.

<sup>114</sup> Dyzenhaus states:

[The war of all against all comes about] 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.

Dyzenhaus, *supra* note 6, at 171.

<sup>115</sup> Dyzenhaus, *supra* note 6, at 179.

<sup>116</sup> Dyzenhaus, *supra* note 6, at 179.

<sup>117</sup> Dyzenhaus, *supra* note 6, at 22-23.

<sup>118</sup> Dyzenhaus's reassessment of Hobbes is already evident in his 1994 article on Schmitt. See David Dyzenhaus, "Now the Machine Runs Itself": Carl Schmitt on Hobbes and Kelsen, 16 CARDOZO L. REV. 1, 6-7 (1994).

## 2. The Positivism, Skepticism, and Statism of Schmitt

Hobbes having been partially vindicated, Dyzenhaus's search for the source of the intolerably passive account of the judicial function must continue. Returning to his Fullerian roots, he redirects his focus toward the modern paradigm of evil law—Nazi Germany—and finds a new nemesis in Carl Schmitt, whose work in some ways provides the focus of his conference paper.

According to Dyzenhaus, Schmitt, like Hobbes, believed the fundamental problem of political theory to be the establishment of order in the face of human-created chaos. However, his diagnosis of the source of this disorder was significantly different from Hobbes's. For Schmitt, the problem goes beyond the fact that people tend to be ignorant, confused and self-centered and thus tend to ignore or misunderstand basic principles of justice. The problem in modern society is that there are no principles of justice, or at least that there is no way of demonstrating that any given account of what is just is superior to any other.<sup>119</sup> Modernity is a condition marked by the abandonment of both traditional modes of moral justification (appeals to custom, tradition, religion) *and* of the enlightenment hope of a scientific or rationalist justification of normative principles. Thus, it is a locus of irreducible moral conflict—a collection of individuals and groups serving warring gods.

From these premises, Schmitt mounted a radical critique of Weimar liberal-democracy.<sup>120</sup> Liberal democratic institutions, he maintained, could only result in a perpetual, destabilizing and finally meaningless succession of political fights among individuals and interest groups with different visions of what is good and just.<sup>121</sup> Although this problem of irreducible, empty political conflict was uniquely modern, Schmitt believed that Hobbes had long ago hit upon the solution: the construction of an artificial and absolute order.

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<sup>119</sup> Dyzenhaus, *supra* note 6, at 181-182; see also Dyzenhaus, *supra* note 118, at 5-6, 13.

<sup>120</sup> My description here of Schmitt's project is extrapolated entirely from the account offered by Dyzenhaus in this and earlier works.

<sup>121</sup> Dyzenhaus, *supra* note 118, at 16.

Schmitt, however, had learned from Hobbes's mistake of attempting to build the case for absolutism on moral, individualist premises, since (as Hobbes's incomplete authoritarianism demonstrates), those premises could always be used to form claims of right against which the acts of the absolute sovereign could be interpreted or judged. Avoiding this mistake required the establishment of an absolute sovereign by fiat rather than reason. Thus, Schmitt apparently envisioned the revolutionary overthrow of Weimar by a charismatic leader, one who would found a new Germany and claim absolute authority for himself.<sup>122</sup>

Aware of the inherent instability of liberal societies, this sovereign would embrace and promulgate an illiberal German ideology which would describe the country as an ethnically homogenous and ideologically orthodox Volk, an organic nation free of internal political dispute.<sup>123</sup> By providing this state religion, the sovereign could ensure order and stability, thereby artificially creating the conditions under which citizens could ascribe a telos to their lives, namely the perpetuation of the people and their nation. Although it is not clear from Dyzenhaus's description, law's primary function within this political system apparently would be to maintain this order.<sup>124</sup> Subordinate officials, including judges, would then function as the enforcers of measures taken by the sovereign to maintain and perpetuate this order.

In Schmitt, Dyzenhaus appears to have found a theorist who has managed to construct a political theory which, unlike Hobbes's, actually succeeds in "elevat[ing] . . . stability and certainty into the exclusive values of legal order . . . ,"<sup>125</sup> and who fully justifies an account of the judicial function from which any notion of discretion or critical scrutiny is removed. But what exactly is it about Schmittian political theory that permits it to succeed in constructing a genuinely statist theory of law's function and a genuinely passive account of adjudica-

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<sup>122</sup> Dyzenhaus, *supra* note 6, at 183.

<sup>123</sup> Dyzenhaus, *supra* note 6, at 183-84.

<sup>124</sup> Presumably, the criminal law, and in particular, sedition laws, would be centrally important to Schmitt's project.

<sup>125</sup> Dyzenhaus, *supra* note 6, at 187.

tion? What is it that separates Schmitt's truly invidious positivism from the less invidious or benign positivism of the other members of this tradition?

Part of Dyzenhaus's answer must be this: the British positivist tradition, exemplified by Hobbes, Bentham, Austin and later Hart, lies on the far side of a conceptual divide that Schmitt has crossed. Each of these other theorists is, in an important sense, "premodern." They are premodern because none endorses the radical moral nihilism that defines "modernity." Bentham and Austin (and later Hart, who appears to be a throwback) were in fact antiskeptics: they anchored their arguments for legal positivism on what they took to be the objectively defensible normative principle of utility maximization.<sup>126</sup> Other classical positivists, such as Hobbes, were skeptical only of the empirical likelihood of moral agreement, not of the existence or content of true moral principles. The classical British positivists thus possess an attribute that disqualifies them from playing Dyzenhaus's bad man: they stand on the far (nonskeptical) side of the inchoate historical and conceptual divide between premodernity and modernity. It is only when that boundary is crossed that one can find the extreme moral skepticism that fuels the lethal form of legal positivism found in Schmitt.

This answer, of course, prompts the next question: What makes strong moral skepticism and legal positivism such a deadly cocktail? Perhaps the best way to appreciate this point is to recall the moral argument for the separation thesis as originally propounded by the British positivists. That argument maintains that the strength of positivism lies in the fact that it permits citizens and officials to engage in a forthright moral critique of the law.<sup>127</sup> Obviously, the central premise of this claim is that there is a publicly available set of values by which to critique law. Absent such values, the moral argument for the separation thesis makes no sense. A political theory founded on strong skepticism which incorporates legal positivism cannot possibly defend positivism on the ground that it permits reform of the law towards some objective or shared conception of justice or morality.<sup>128</sup>

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<sup>126</sup> Dyzenhaus, *supra* note 6, at 169-77.

<sup>127</sup> See *supra* text accompanying note 64.

<sup>128</sup> Hence Hart's insistence that positivism not be confused with strong moral

As a negative proposition, then, we can see why strong skepticism undermines the moral argument for the separation thesis. Nevertheless, it still does not follow that positivism driven by a strongly skeptical moral theory *must* generate a statist theory of law or a complacent account of adjudication. Even if it is true that judges cannot claim to be interpreting and reforming law so as to render it in conformity with a shared notion of fairness or goodness, this does not entail that they should never interpret or reform law in light of *some* notion of fairness and goodness.

Ironically, one may find a radically skeptical modernist with aspirations for an active judiciary in none other than Professor Cover. His theories of law and adjudication, like Schmitt's, appear to accept the premise that value judgments are personal or limited in validity to one's cultural, or religious social sub-group.<sup>129</sup> Nevertheless, Cover maintained that one of the social functions which law ought to serve is that of structuring and articulating, through rules and decisions moral or normative frameworks ("nomian worlds"), which enable individual citizens and groups to articulate their own conceptions of value.<sup>130</sup> Given this function, Cover hoped that judges would interpret doctrine and statutes in light of their own conceptions of justice and human flourishing.<sup>131</sup> One thus can find in Cover's work strong moral skepticism generating a plea for judges to act as modern "prophets"—as persons who, through the interpretation and application of law, create and expose values, despite the fact that these values have no universal warrant.<sup>132</sup>

If this is a plausible interpretation of Cover (or even a coherent account of law and adjudication), then Schmitt's relativism alone cannot explain his endorsement of statism and judicial acquiescence. Rather, the explanation in his case lies in some intermediate premise, namely the notion that it would

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skepticism. See Hart, *Positivism*, *supra* note 55, at 597.

<sup>129</sup> See Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 15, 28-30 (1983) (describing generation and "mitosis" of normative orderings and the distinct *nomos* inhabited by the Amish).

<sup>130</sup> *Id.* at 68.

<sup>131</sup> *Id.*

<sup>132</sup> COVER, *supra* note 65, at 259 (lamenting the tendency of antebellum judges to act as "priests" rather than "prophets").

be a good thing if Germany attained through dictatorial government the maximum degree of ideological orthodoxy and a strong resistance to economic, political and cultural change. These substantive values, it would appear, explain Schmitt's apparent endorsement of a barren conception of law as exclusively devoted to the maintenance of order, and justify his commitment to a passive or deferential account of adjudication.<sup>133</sup>

But if it is not Schmitt's moral skepticism that is doing the conceptual work here—if it is instead his political commitment to order and stability as paramount values—then Dyzenhaus appears to have painted himself into a conceptual corner. This can be seen most clearly if we take a moment to review the bidding. We began with the British positivists' claim that one virtue of positivism is that it permits a clear-eyed moral assessment of the law.<sup>134</sup> Fuller and Cover rejected this claim by arguing that positivism inhibits such an assessment by endorsing a theory of the judicial function under which judges must blindly accept and apply even the most wicked laws.<sup>135</sup> Hart provided a partial response to these critics by defending a version of positivism that sanctions a significant place for discretion and moral reasoning in judicial decision-making.<sup>136</sup> In light of Hart's response, Dyzenhaus attempted to redirect the Fuller and Cover critique away from the tenets of positivism and toward the Hobbesian political ideal of the absolute sovereign.<sup>137</sup> Now, however, Dyzenhaus concedes that it is neither positivism nor Hobbesian political theory per se, that is responsible for generating the acquiescent model of adjudication decried in *Wicked Legal Systems*. Rather, it is the peculiarly modern combination of positivism and strong moral skepticism. But, as just demonstrated, even this combination only has the *potential* for generating disastrous theories of law and adjudication; a remaining active ingredient still needs to be added, namely that of Schmitt's order-fetishism.

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<sup>133</sup> Because Schmitt abandons Hobbes's social contractarian account of absolute authority, he cannot (as perhaps could Hobbes) justify judicial deference on the grounds that the terms of the social contract bar an individual other than the sovereign from exercising his own moral judgment.

<sup>134</sup> See *supra* text accompanying note 64.

<sup>135</sup> See *supra* text accompanying notes 65-75.

<sup>136</sup> See *supra* text accompanying notes 78-84.

<sup>137</sup> See *supra* text accompanying notes 85-95.



Even conceding that Dyzenhaus has at last located the conceptual source of unacceptably acquiescent theories of law and adjudication, notice what has happened here. First, we are no longer presented with a critique of legal positivism. It is true that positivism derived from strong moral skepticism can generate an unacceptable account of law and adjudication, but that defect, as we have seen, flows from the skepticism rather than the positivism. Indeed, given that the main alternative to positivist theories of law are natural law theories which presuppose some objective account of morality, it may not be possible for a strong skeptic to be anything other than a positivist.<sup>138</sup> Moreover, it is not even strongly skeptical positivism that we are worried about, but rather strongly skeptical positivism which incorporates Schmitt's extreme political commitments. What started out as a critique of positivism appears to conclude as a critique of an unusually extreme and unpalatable political vision. In fact, Schmitt's political theoretical commitments appear to be so strongly antiliberal that there is a sense in which law and adjudication cease to be the problem. We have more than enough reason to reject Schmitt before ever getting to those phenomena. Thus, what was in the work of Fuller and Cover an attack on legal positivism as a theory of law now appears to have been refined away to an attack on the facially atrocious political philosophy of Carl Schmitt.

#### D. *Enter Holmes*

If the payoff of Dyzenhaus's project is to be something more than a critique of radically authoritarian accounts of law and adjudication that derive from strongly authoritarian political visions, Schmitt has to serve as an illustration of a larger conceptual problem. Now, at last, we can appreciate why Holmes in fact plays a much more important role in Dyzenhaus's conference paper than appearances might first suggest. It is by identifying Holmes with Schmitt that Dyzenhaus attempts to establish more general links between strong moral skepticism and unacceptably statist theories of law and adjudication; links that do not depend on Schmitt's overt commitment to a fascist state.

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<sup>138</sup> I thank Scott Shapiro for making this point at the conference.

## 1. Horwitz's Two Holmes

To enhance his case for the claim that Holmes belongs next to Schmitt on the modernist and cynical end of his historical and conceptual spectrum of positivists, Dyzenhaus draws a sharp distinction between the early and the late Holmes. The early Holmes, the Holmes of *The Common Law*, is described as a relatively benign, premodern admirer of common law adjudication.<sup>139</sup> The later Holmes, the Holmes of *The Path of the Law*, has made the transition to positivism, modernism, and strong skepticism.<sup>140</sup> It is this Holmes—the cynical proponent of judicial deference to legislative and executive acts of power—which Dyzenhaus wishes to establish as the American Schmitt.

Since Dyzenhaus freely acknowledges that his account of the two Holmes' incorporates Professor Horwitz's treatment of Holmes in his recent history of modern American legal thought,<sup>141</sup> a brief recounting of Horwitz's arguments in support of this account is required. According to Horwitz, the early Holmes was consumed by the effort to develop a unified theory of civil and criminal liability.<sup>142</sup> That theory was designed to provide an account of law that steered between two traditional, yet unpalatable extremes in American jurisprudence.<sup>143</sup> On the one hand stood the natural rights tradition, which fused law and morality, and conceived of civil and criminal liability in punitive terms, as a sanction for defendants who have acted in an immoral and subjectively blameworthy fashion. This account of law troubled Holmes because he believed that moral standards of blameworthiness are inherently vague, and thus rendered liability inexact and unpredictable (and unfair and inefficient), particularly when judgments of blameworthiness are left to mercurial juries.<sup>144</sup> On the other hand stood utilitarian positivist theories of law, under which civil and criminal liability is conceived as a form of regulation; a mechanism by which the government can promote through sanctions certain

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<sup>139</sup> Dyzenhaus, *supra* note 6, at 177.

<sup>140</sup> Dyzenhaus, *supra* note 6, at 177-78.

<sup>141</sup> HORWITZ, *supra* note 25.

<sup>142</sup> HORWITZ, *supra* note 25, at 112.

<sup>143</sup> HORWITZ, *supra* note 25, at 112-13.

<sup>144</sup> HORWITZ, *supra* note 25, at 116.

desired policy ends, such as economic growth. Holmes found this theory politically unacceptable in that it appeared to sanction legislative supremacy, and with it, ill-conceived populist measures to redistribute wealth from the rich few to the poor masses through, for example, the imposition of statutory compensation schemes.<sup>145</sup>

*The Common Law* was, on this account, designed to provide a theory of law and liability that mediated between these two extremes. By endorsing the objective fault (reasonable person) theory of liability for both civil and criminal law, Holmes incorporated an average or intersubjective standard, thereby avoiding the arbitrary and unpredictable moralism of natural rights theory. By retaining the notion of fault as an autonomous common law legal doctrine, Holmes avoided ceding to legislatures the competence to determine liability. The progressive common law judge, the intelligent, incremental innovator, thus emerges as the moderate hero of the early Holmes's theory of law.<sup>146</sup>

Holmes's solution, of course, worked only if one was prepared to accept the concept of objective fault—a concept which Holmes intended to be both shared, public and accessible (at least to good judges)—yet distinctly legal and apolitical. Its acceptance in turn presupposed the existence of nebulous but nevertheless judicially discernible customary norms of reasonableness. "For Holmes, some conception of the 'average,' the 'normal'—in short, some conception of custom lay in the background of his early thought."<sup>147</sup> The linchpin of the early Holmes's defense of common law adjudication was thus the notion that Americans shared some core beliefs about what constitutes acceptable and unacceptable conduct. In the absence of customary or shared norms, the Holmesian solution collapses and law must return to one of the two poles of natural rights or positivism.

The transition from the early to the late Holmes (and from pre-modernity to modernity) is marked by just this collapse. According to Horwitz, by 1897, amid "[t]he radical social and economic conflicts of the 1890s," Holmes could no longer en-

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<sup>145</sup> HORWITZ, *supra* note 25, at 124.

<sup>146</sup> HORWITZ, *supra* note 25, at 124-25.

<sup>147</sup> HORWITZ, *supra* note 25, at 136.

dorse the notion of shared customary norms.<sup>143</sup> Indeed, by the time he wrote *The Path of the Law*, Holmes could only conceive of society, as did Schmitt, as a locus of competing political groups and classes. "With the collapse of a customary theory of law amid social and economic struggle," Holmes converted to positivism.<sup>149</sup> He conceded that law was policy, and that "[p]olicy was . . . a coercive imposition of the state."<sup>150</sup> There being no agreed-upon moral principles or values, law for the later Holmes could only be the coerced resolution of conflict—the imposition of order on terms set by the sovereign, which in the case of American democracy, happened to be the legislature. Thus, as Horwitz reads it, Holmes's dissent in *Lochner v. New York*<sup>151</sup> flows logically from his mature, skeptical positivism. "If law is merely politics, then the legislature should in fact decide. If law is merely a battleground over which social interests clash, then the legislature is the appropriate institution for weighing and measuring competing interests."<sup>152</sup>

In Horwitz's account of the later Holmes, Dyzenhaus finds all the attributes of Schmitt. The later Holmes, as much as Schmitt, lived in a nihilistic universe in which no conception of goodness or fairness could be rationally advanced over another, and which posed the specter of perpetual conflict and the threat of social disintegration. In the absence of accepted notions of good or right, the only faith to which Holmes could subscribe was the artificial faith of the sovereign; the later Holmes worshipped nothing more than the sovereign's power to impose order, to shape society on its terms.<sup>153</sup>

Dyzenhaus admits that Holmes never pined for Schmitt's fascist dystopia; however, this merely indicates that American society had never approached the degree of disintegration Schmitt had seen in Weimar, and thus never prompted Holmes to consider the steps that might be necessary to maintain the very possibility of sovereign-imposed order.<sup>154</sup> Instead, given

<sup>143</sup> HORWITZ, *supra* note 25, at 138.

<sup>149</sup> HORWITZ, *supra* note 25, at 140.

<sup>150</sup> HORWITZ, *supra* note 25, at 137.

<sup>151</sup> 198 U.S. 45 (1905).

<sup>152</sup> HORWITZ, *supra* note 25, at 142.

<sup>153</sup> Dyzenhaus, *supra* note 6, at 179.

<sup>154</sup> Dyzenhaus, *supra* note 6, at 185.

the relative stability of American democratic political institutions, Holmes could afford to endorse a skeptical form of majoritarianism. In the absence of agreement about the good, it would be determined by the majority, not because of some normative theory justifying majority rule as good or fair, but simply because acceptance of majoritarianism would perpetuate order. This, says Dyzenhaus, is the political theory of *The Path of the Law* and the *Lochner* dissent:

[J]udges should defer to the will of the people as expressed by the legislature. Th[is] 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>155</sup>

Thus, "[Holmes's] basic attitude to the law was one which could be mapped in all important respects onto Schmitt's . . ."<sup>156</sup> For Holmes as for Schmitt, "the realm of the normative is exhausted by the values of order and stability."<sup>157</sup>

## 2. Holmes's Modest Skepticism

The critical question for Holmes scholarship raised by Horwitz's and Dyzenhaus's analysis is thus a perennial one: what manner of skepticism does one encounter in Holmes? Is it the cynical statism of Schmitt or a more modest skepticism within the liberal tradition? Because *The Common Law* adopts a relatively mild political tone, this question, as Horwitz's analysis makes clear, is closely tied to the question of whether *The Path of the Law* should be read as a significant departure from Holmes's earlier work.

As just described, Horwitz and Dyzenhaus posit a Holmesian transformation—"an astonishing intellectual leap"—from *The Common Law* to *The Path of the Law*.<sup>158</sup> In fact, their reading is not borne out by the language and sentiments of the two texts, nor by other of Holmes's writings. In-

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<sup>155</sup> Dyzenhaus, *supra* note 6, at 178.

<sup>156</sup> Dyzenhaus, *supra* note 6, at 185.

<sup>157</sup> Dyzenhaus, *supra* note 6, at 179.

<sup>158</sup> HORWITZ, *supra* note 25, at 143 & n\*.

deed, as I will argue in this subsection, Holmes's work is far more impressive for its continuous advocacy of modestly skeptical liberalism than for its discontinuities.<sup>159</sup>

Horwitz relies heavily on the following passage from *The Path of the Law* as indicative of the later Holmes's darker, modernist skepticism.

The logical method and form flatter the longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceedings.<sup>160</sup>

According to Horwitz, "[w]hile Holmes's criticism of formalism is not new, his association of logic with a 'longing for certainty and repose' is."<sup>161</sup> The suggestion is that the later Holmes appreciated, as the earlier did not, that a belief in the ability of reason to resolve legal and moral disputes indicates a primitive or immature psychological need for certainty, when in fact there is none to be had.

As the remainder of the paragraph not quoted by Horwitz makes clear, there is nothing at all new in this passage.<sup>162</sup> It expresses not radical skepticism, but the same modestly skeptical historicism—the idea that reason and logic operate within historically contingent and disparate conceptual paradigms or frameworks—that is at the heart of *The Common Law*.

You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time,

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<sup>159</sup> See RICHARD A. POSNER, *OVERCOMING LAW* 283 (1995) ("The continuity of Holmes's thought is more remarkable than its eddies.").

<sup>160</sup> HORWITZ, *supra* note 25, at 141 (quoting Holmes, *Path*, *supra* note 5, at 466).

<sup>161</sup> HORWITZ, *supra* note 25, at 141.

<sup>162</sup> Cf. POSNER, *supra* note 159, at 277 ("Beware a Horwitz bearing ellipses.") (citation omitted). Judge Posner suggests that Horwitz also misreads the implications of this passage for contract law. POSNER, *supra* note 159, at 275-77.

and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.<sup>163</sup>

This is vintage, skeptical Holmes. It is not, however, nihilism. Indeed, one can only read strong skepticism into this passage by reading its most skeptical sentences and clauses ("[y]ou can give any conclusion a logical form"; questions of policy are "battle grounds") while ignoring the not-strongly skeptical conclusions which Holmes reaches (no claims are capable of "exact quantitative measurement"; no proposition is "good for all time" or "self-evident"; the validity of claims depends in part on the attitudes and beliefs accepted by the "public mind"). Holmes does not deny that legal or moral conclusions can be justified, only that this justification can take the form of transhistorical, transcultural or mathematical demonstration. Indeed, Holmes's final point—that even a principle which his fellow Americans accept as obviously true, namely, Spencer's rendition of Mill's harm principle, is not deducible from self-evident premises—presupposes that his audience is likely to mistake its collective belief that the principle is justified with the notion that all peoples in all situations will similarly conclude that it is justified.

Horwitz also argues that *The Path of the Law* marks the "daring[ ] and original[ ]" presentation of the prediction theory of law.<sup>164</sup> In fact, however, the prediction theory was always an integral part of Holmes's account of customary common law. As early as 1872, Holmes wrote that "in a civilized state it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely, the judges, by whom it is enforced, say is his will."<sup>165</sup> Law is already conceived as judge-made, and thus the critical issue for lawyers and citizens is to know what, in fact, the courts do.

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<sup>163</sup> Holmes, *Path*, supra note 5, at 466.

<sup>164</sup> HORWITZ, supra note 25, at 140.

<sup>165</sup> Oliver Wendell Holmes, Jr., *Book Notice*, 6 AM. L. REV. 723, 724 (1872) (emphasis in original).

Crucially, prediction is not derived from knowledge of the individual judge and his personal preferences. Prediction is only possible because there exist objective and determinate sources of law, including precedent and social custom, upon which judges conventionally rely.

The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered.<sup>165</sup>

Thus, when it first appears in Holmes's thought, the prediction theory of law is part and parcel of a model of law and adjudication that treats legal reasoning as potentially rational and partly determinate. In its later invocation in *The Path of the Law* there is no suggestion that these ideas have somehow been decoupled. Indeed, that essay's concluding defense of "jurisprudence"—the study of law's general principles—presupposes that some form of objective legal reasoning is possible: "If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy."<sup>167</sup>

*The Path of the Law* contains other textual embarrassments to Horwitz's thesis. His entire account is premised on the notion that Holmes ultimately recognized the futility of the objective fault theory of liability which formed the preoccupation of his pre-skeptical common law days. Yet Holmes continued to endorse and advocate this theory in *The Path of the Law* and later essays, not to mention in subsequent judicial decisions.<sup>168</sup> Likewise, Horwitz finds within Holmes's mention

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<sup>165</sup> *Id.*

<sup>167</sup> Holmes, *Path*, *supra* note 5, at 475.

<sup>168</sup> See *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927) (establishing common law rule for determining negligent driving at railroad crossings); Holmes, *Path*, *supra* note 5, at 471 (asserting as the general theory of tort liability the infliction of temporal damage by a responsible person acting under circumstances which a person of common experience would know to pose a danger of such harm); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 450-51 (1899) (predicting imminent acceptance of general theory of tort liability based on unified principle of objective fault).



of the future "man of statistics and master of economics" a statement of extreme moral skepticism. Yet, it reads as a pragmatic statement about the need for intelligent reasoning about means and ends: "we are called upon to consider and weigh the ends of legislation, the means of attaining them, and the cost."<sup>169</sup>

There is, in sum, little if any textual support in *The Path of the Law* for the "two Holmes" thesis and the claim that Holmes was a profound skeptic about legal or moral justification. This does not mean that Holmes was not skeptical about some things. It is clear from the long passage quoted above that Holmes was very skeptical of transcendental arguments that attempt to establish propositions as "self-evident" or valid for "all time."<sup>170</sup> In modern parlance, Holmes was an antifoundationalist.<sup>171</sup> And, as modern antifoundationalists such as Richard Posner and Richard Rorty like to remind us, there is no reason to associate antifoundationalism with thoroughgoing or illiberal moral skepticism. Certainly, there is no basis for finding such an association in the work of Holmes.

Although the proper account of the relationship between Holmes's skepticism and his liberalism requires more elaboration than can be given here, I can begin to articulate it by providing a brief analysis of Holmes's justification for the common law system of tort liability. In *The Common Law*, Holmes says the following:

[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. . . . It is [thus] intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.<sup>172</sup>

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<sup>169</sup> Holmes, *Path*, *supra* note 5, at 474 (emphasis added). Professor Grey argues that Horwitz's treatment of Holmes also errs in reading the early, academic Holmes as a proponent of judicial innovation and then contrasting the later Judge and Justice Holmes as a conservative formalist. According to Grey, Holmes consistently maintained that significant legal innovation properly ought to occur through legislation. See Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 28, 32 (1995). While Grey is no doubt correct that Horwitz's contrast is overstated, Grey himself may overstate Holmes's commitment to judicial deference.

<sup>170</sup> See *supra* text accompanying note 163.

<sup>171</sup> See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 799-804 (1989).

<sup>172</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 144 (43d prtg. 1949)

Notice that, even here, Holmes evinces a kind of moral skepticism. Tort law, he says, is unconcerned with morality; it imposes liability for certain acts not because they constitute "wrongs," but because they generate "harms." If Horwitz and Dyzenhaus are prepared to read strong moral skepticism into *The Path of the Law*, they should be equally prepared to find that disposition in this earlier passage. Yet such a reading would err in failing to appreciate Holmes's particular understanding and usage of terms like "wrong" and "policy." I will first address the former.

Holmes famously tended to equate moral wrongs with "culpable" acts.<sup>173</sup> He defined culpable acts as those acts undertaken by persons out of a desire to injure others or with actual indifference to the physical well-being of others; they are the acts of wicked or depraved individuals, people with bad hearts.<sup>174</sup> As such, Holmesian moral wrongs are akin to mala in se: they constitute conduct by persons who flout basic, primitive standards of human decency or morality. Actors who commit them are deserving of punishment commensurate with their moral "guilt."<sup>175</sup>

In his early academic writings, Holmes seems to have drawn a link between morally culpable misconduct and the criminal law, and to have distinguished criminal and civil law on that basis. Victims of culpable conduct had lost their right to seek private vengeance. Nevertheless, they could look to the State to avenge wicked acts on their behalf through punitive criminal sanctions.<sup>176</sup> Criminal law, on this account, is fundamentally concerned with the actual culpability of the accused—whether he or she acted with wrongful intent or indifference. Civil law, by contrast, does not sanction conduct *because* it evidences moral guilt (although it may sanction con-

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(1881) [hereinafter HOLMES, COMMON LAW].

<sup>173</sup> See, e.g., Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 653 (1873).

<sup>174</sup> Holmes, *supra* note 173, at 652-53; see also Oliver Wendell Holmes, Jr., *Trespass and Negligence*, 14 AM. L. REV. 1, 23 (1880) (describing immoral conduct as the conduct of one with a "bad . . . heart").

<sup>175</sup> Holmes, *supra* note 173, at 652.

<sup>176</sup> See Holmes, *supra* note 173, at 652; see also Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 6 (1870) (discussing modern displacement of private power to punish criminal conduct).

duct which in fact turns out to be morally wrong), but instead sanctions conduct simply because it causes harm. Civil damages are for this reason almost always compensatory: whereas criminal law is concerned with enforcing genuine duties to refrain from immoral acts, civil law is a form of regulation or taxation—the state gives one the option to refrain from conduct that turns out to be harmful or to pay for the harm.<sup>177</sup>

A crucial moment in the development of Holmes's thought occurred in the period leading up to the publication of *The Common Law*. For it apparently was in this period that he rejected the distinctions just drawn between criminal and civil law, and with them, the notion that *any* part of law—civil or criminal—corresponds to natural standards of morality. Formal notice of this change is given in Lecture II of *The Common Law*, which pronounces as mistaken any attempt to link criminal sanctions to the moral culpability of the offender. These sanctions must instead be understood as a regulatory device by which the State may deter certain forms of harm-generating conduct.<sup>178</sup> Accordingly, a criminal law prohibiting murder is not ultimately interested in the accused's intent. Rather, it sanctions a conviction if it is proven that the accused failed to take reasonable steps to avoid a foreseeable serious harm or death.<sup>179</sup>

The change in Holmes's treatment of criminal law thus would seem to indicate that Holmes had become a positivist by 1881 rather than 1897. *The Common Law* fully endorses, at least as a description of modern legal systems, the positivist notions that law is the product of contingent acts of institutions with law-making authority, and that no part of modern law necessarily correlates to notions of natural morality. Holmes, moreover, apparently came to endorse this positivist account of modern law in part out of skepticism about the existence of natural wrongs or inherently wicked acts. It is because there are no such things, or at least no agreed-upon

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<sup>177</sup> Holmes, *supra* note 165, at 725 ("liability to a civil action is not a penalty or sanction of itself creating a duty," thus, "it does not necessarily imply culpability, or a breach of duty, as Austin thought, who looked at the law too much as a criminal lawyer").

<sup>178</sup> HOLMES, *COMMON LAW*, *supra* note 172, at 37-38, 46.

<sup>179</sup> HOLMES, *COMMON LAW*, *supra* note 172, at 53-54, 75.

ways of conclusively determining and defining them, that Holmes is prepared to divorce even criminal law from morality.

Yet, in contrast to the strong skepticism described by Horwitz and Dyzenhaus, the skepticism I have described is of a limited nature. When Holmes says that criminal and civil law violations are not sanctioned as "wrongs," he is claiming only that these acts are sanctioned regardless of whether we agree that they constitute acts violating natural, universal moral commands. This proposition hardly entails the embrace of moral nihilism, nor does it entail accepting that law has no purpose other than that of advancing the will of the majority or the stability of society.

In fact, the language of the above-quoted passage from *The Common Law* on the purpose of tort law suggests the contrary.<sup>180</sup> Like much of *The Path of Law*, it begins with seemingly skeptical sentiments (tort law is about remedying harms not wrongs), only to conclude with an unabashedly normative argument. In this case, the argument is that the common law of torts, by adopting a uniform standard of objective negligence, expresses and to a certain degree enforces a commitment to liberty. Our society, the passage suggests, holds as one of its constitutive principles that individuals' lives are not inherently bound up with others'; people are to a large extent free to pursue their own well-being and to disavow responsibility for the well-being of others. This freedom, however, must be constrained (to an extent compatible with maintaining that freedom) for the obvious reason that its exercise has consequences for others; it can significantly inhibit or destroy others' freedom by damaging their physical integrity and property. Tort law instructs us to take precautions against interfering with others' security, or to indemnify (in theory, to restore) those who suffer injury as a consequence of the exercise of our liberty. In other words, modern tort law is founded on a commitment to a relatively wide distribution of some security, and therefore liberty. At the same time, it respects the very liberty it protects by limiting liability to those harms that might have been avoided with a reasonable amount of foresight and effort.<sup>181</sup>

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<sup>180</sup> See *supra* text accompanying note 172.

<sup>181</sup> This is not to say that the distribution of liberty will be equal. In particular,

Notwithstanding his moral skepticism, Holmes thus appears to have defended the objective fault standard in tort law on the moral ground that it respects and perhaps promotes liberal political principles. It is true that Holmes rarely made reference to a "principle" of liberty.<sup>182</sup> Again, however, we must be careful to avoid a misreading of Holmesian usage. To the extent Holmes avoided the rhetoric of principle, he did so because he believed that it inevitably carried false connotations of foundationalism and the existence of a transcendental moral order. He thus preferred to make the case for liberty in terms that he hoped would be philosophically deflationary. Liberty, he might say, is "sound policy".<sup>183</sup> It is a belief with no celestial warrant, yet one which Holmes and his fellow citizens believed was justified and to which they were strongly committed. Tort law founded on the objective fault principle is justified in part because it expresses and is compatible with a traditional, fundamental value shared by people living in modern, liberal, capitalist society. Thus, Holmes maintained that, even if there is no necessary connection between positive law and morality, law could and should correspond to certain normative principles endorsed in the "public mind."<sup>184</sup>

On this brief reconstruction, Holmes's positivism flowed from only a moderate moral skepticism. As such, it is not vulnerable to the anti-positivist critique advanced by Fuller, Cover and Dyzenhaus. Indeed, if it is fair to conclude that Holmes the judge followed Holmesian theory, we have clear evidence that his theory did not generate the statist theory of adjudication that Dyzenhaus attributes to him. The judge, as much as the theorist, consistently claimed that judges faced with questions of statutory interpretation retained discretion to "make" law.<sup>185</sup> Even Holmes's *Lochner* dissent—interpreted by

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some members of the community—Holmes famously posits the congenitally clumsy—will have their liberty severely curtailed so that a relatively wide distribution of liberty can be achieved. HOLMES, COMMON LAW, *supra* note 172, at 108.

<sup>182</sup> But see, e.g., HOLMES, COMMON LAW, *supra* note 172, at 96 (general adoption of strict liability would constitute unjust infringement on liberty).

<sup>183</sup> HOLMES, COMMON LAW, *supra* note 172, at 50.

<sup>184</sup> See *supra* text accompanying note 163.

<sup>185</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1916) (Holmes, J., dissenting) ("judges do and must legislate" in the interpretation of statutes); *Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting) (urging that statutes be read "intelligently"); Oliver Wendell Holmes, Jr., *The The-*

Horwitz and Dyzenhaus to stand for an unflinching judicial deference to legislative power—offers little support for the anti-positivist position. In reality, the opinion urges courts to exhibit caution in deciding cases from the “top down,” on the basis of a comprehensive theory of justice they purport to find in the Constitution, particularly when the theory in question is not easily reconciled with data provided by relevant precedent.<sup>185</sup> The *Lochner* dissent, like the rest of Holmes’s writings, is not the work of a militant statist, but that of a moderate skeptic and political liberal.<sup>187</sup>

### E. *Postscript: Continuing the Search*

If Professor Dyzenhaus is to extend his attack on strongly skeptical positivism beyond Schmittian fascism, he must look beyond Holmes. As long as he continues to search within the relatively liberal traditions of Anglo-American legal theory, he may find this search frustrating.<sup>188</sup> Even if an Anglo-American Schmitt were discovered, what I hope to have shown here is that the existence of such a theorist would not support a general indictment of positivism or even strongly skeptical positivism per se. At most, it would provide evidence of an

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ory of *Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899) (rejecting intentionalism in textual interpretation).

<sup>185</sup> See *Lochner v. New York*, 198 U.S. 45, 76-77 (1905) (Holmes, J., dissenting) (majority decides on “an economic theory”; “Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics”; “a Constitution is not intended to embody a particular economic theory”; “General propositions do not decide concrete cases”; majority’s theory irreconcilable with recent decisions).

<sup>187</sup> For a similar reading, see Robert Brauneis, “*The Foundation of Our Regulatory Takings’ Jurisprudence: The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon*,” 106 YALE L. J. 613, 643-44 (1996).

<sup>188</sup> The more radical skepticism of Schmitt (without the fascistic political commitments) can perhaps be found in some of the writings of Judges Robert Bork and Learned Hand. See David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1376-79, 1388-97 (1990) (reviewing ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)) (arguing that Bork accepts extreme moral skepticism and deduces from this skepticism that the current majority of Americans may enforce through positive legislation any measures on which they can agree, but acknowledging that Bork believes these claims are compatible with the notion that judges may invoke liberty-protecting constitutional provisions as a basis for limiting the power of current majorities); Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 531 (1994) (Hand “may have been a full-fledged, out-and-out skeptic when it came to morality”).

empirical association between strong moral skepticism, positivism, an authoritarian account of law, and a correspondingly passive account of adjudication.

## CONCLUSION

Professor Dyzenhaus's paper provides a thoughtful and thought-provoking, but ultimately unpersuasive, attempt to attribute radical skepticism and antiliberalism to *The Path of the Law*. In so doing, it also provides an interesting perspective on Neil Duxbury's observation that the essay's influence is in part attributable to the style in which it was written. That Holmes wrote about law, adjudication, morality, and liberty in vibrant, engaging and elliptical prose does indeed help to explain why *The Path of the Law* continues to receive scholarly attention more than a century after its publication. But these very attributes also seem to have left Holmes, and his greatest essay, unusually vulnerable to underestimation and misattribution. In this respect, at least, the style of *The Path of the Law* has disserved its substance.