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BOOK ESSAY

IN DEFENSE OF MODERN LEGAL POSITIVISM

PETER MIRFIELD*

Professor Mirfield uses the example of a recent casebook to show that the process of excerpting passages from various writings about jurisprudence as a method of introducing the study of jurisprudence has very grave dangers attached to it. These dangers are demonstrated by "The World of Rules: The Jurisprudence of Positivism," a chapter of W. Michael Reisman and Aaron M. Schreiber's Jurisprudence: Understanding and Shaping Law. Professor Mirfield contends that Reisman and Schreiber's presentation of positivism is incomplete and is, in places, framed with inaccurate summaries and characterizations.

ONE MAY, perhaps, be unconvinced of the merits of studying discrete legal subjects via the medium of extracts from cases, articles and the rest. Linking commentary from casebook editors seems more often to reveal their idiosyncracies than to lead the student reader to fruitful enquiry. But, this may be a cry from a legal tradition rather different from that of the United States. These may be matters upon which reasonable people, lawyers even, may properly differ. I would be somewhat more resolute in denying the value of the "bleeding chunk" approach to "jurisprudence," whatever vastly varying material may lie between the covers of volumes bearing that title. Acquaintanceship with the recently published work, *Jurisprudence: Understanding and Shaping Law: Cases, Readings, Commentary*,¹ written and edited by Professors W. Michael Reisman² and

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1. W. REISMAN & A. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW: CASES, READINGS, COMMENTARY* (1987).

2. Wesley Newcomb Hofeld Professor of Jurisprudence, Yale Law School. L.L.B., 1963, Hebrew University; L.L.M., 1964; J.S.D., 1965, Yale University.

Aaron M. Schreiber,³ has done nothing to persuade me away from my prejudice. The reasons will appear in due course.

I ought, in fairness, to reveal another feature of my philosophy of the study of law before going any further. I can think of almost nothing with which I more profoundly disagree than the following sentiment expressed by the editors near the beginning of their book and repeated, in different terms, at times later therein:

Legal theory or jurisprudence is of importance only if it contributes to problem-solving for our profession and society. If it does not, there is no reason why it should be incorporated in the law school curriculum and distract the attention of those preparing to serve their communities and fellow citizens from matters of real importance.⁴

I confess distaste for the notion that lawyers "serve" their communities and fellow citizens; the word smacks too much of ordination and calling for me. I think it safer to regard the generally rather mundane life led by the average legal practitioner as being closer to the job of a plumber than the office of a priest. However, the substance of what the editors are saying is far more significant than the way in which it is expressed.

It seems to me that what separates law from other intellectual disciplines is far less important than what it shares with them. A good lawyer is not to be confused with a good legal practitioner, though the former will, I hope and believe, tend to become the latter should he or she choose to enter practice. I am almost tempted to say that the value of legal theory lies precisely in the fact that it has no practical utility. Certainly its value does not lie in its capacity to prepare students for the practice of law, even practice at the problem-solving level. Rather, its value lies in that which it shares with, for example, theories of history or literary criticism, namely its capacity to advance one's understanding of the intellectual discipline which is its subject.

Having regard to Reisman and Schreiber's attitude to legal theory, it is not surprising that the branch of legal theory known as "positivism" comes in for rough treatment. Of Hans Kelsen's⁵ *Pure Theory of Law*,⁶ they say that it "almost seems to have been designed for the bureaucratic universe . . . [I]t would appear to be amoral and an-

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4. W. REISMAN & A. SCHREIBER, *supra* note 1, at 11.

5. (1881-1973). An Austrian, Kelsen drafted the 1920 Austrian Constitution and served on the Austrian Supreme Constitutional Court before emigrating.

6. H. KELSEN, *PURE THEORY OF LAW* (1967).

ethical, primarily concerned with understanding and providing guidelines for behavior in complex organizations.”⁷ Certainly, the theory is “amoral and an-ethical,” for these are aspects of its purity. But, it is hard to see how Kelsen’s theory can be said to have been concerned with understanding behavior, and for precisely the same reason. Were Kelsen concerned with this, he would be engaged in sociological jurisprudence, and would thus be compromising the purity of the exercise.⁸ And, it is surely clear beyond a peradventure that Kelsen’s theory was *not* concerned with providing guidelines for human behavior. His science of law was intended to be entirely descriptive, albeit that the object of its description was a system of legal norms which are themselves prescriptive in nature and form. As he said in *Pure Theory of Law*, “the science of law can only *describe* the law, it cannot *prescribe* a certain behavior like the law created by the legal authority (in the form of general or individual norms).”⁹

It is true, as the editors, Reisman and Schreiber, point out, that some judges have purported to use the “Pure Theory” as providing them with justification for recognizing a revolution as having been *legally* successful.¹⁰ However, this use has been subjected to cogent and convincing criticism precisely because it treats as prescriptive a theory which is itself entirely descriptive.¹¹ It is right to add that James Harris¹² has suggested that things may not be as straightforward as this, and that the theory properly has “indirect social suggestive force for judges.”¹³ But, that is very far from a claim that this is the primary concern of the theory, and Reisman and Schreiber do not, in any event, rely either explicitly or implicitly upon Harris’s argument. In other words, it is one thing to argue that an unwelcome (for Kelsen) but logically necessary feature of the theory is that it does speak to judges and other bureaucrats, quite another to argue that this was his theory’s major point or purpose.

This misleading assessment of Kelsen is no more than a sideswipe, for it is at the Anglo-Saxon version of positivism that the attack is

7. W. REISMAN & A. SCHREIBER, *supra* note 1, at 381.

8. See generally H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 162-64 (1961); H. KELSEN, *PURE THEORY OF LAW* 1 (1967).

9. H. KELSEN, *PURE THEORY OF LAW* 73 (1967) (emphasis in original).

10. The leading example is *Madzimbamuto v. Lardner-Burke* [1968] 2 S. Afr. 284. See also *State v. Dosso* [1958] 2 Pak. Sup. Ct. Rep. 180; *Uganda v. Comm’r of Prisons* [1966] E. Afr. 514, 535-39.

11. See Hopton, *Grundnorm and Constitution*, 24 MCGILL L.J. 72, 83-86 (1978). See also Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution*, 19 U. TOR. L.J. 326, 342-44, 351-52 (1969).

12. Tutorial Fellow, Keble College, Oxford. B.C.L., 1966; M.A., 1966, Oxford University; Ph.D., 1973, London University.

13. Harris, *When and Why Does the Grundnorm Change?*, 29 C.A.M.B. L.J. 103, 125 (1971).

substantially directed. Chapter Seven, "The World of Rules: The Jurisprudence of Positivism,"¹⁴ deals with what is now often called Hartian positivism. That said, I am not sure that Professor H.L.A. Hart¹⁵ would recognize much of what is contained in the commentary in that chapter as based upon an accurate picture of his published views. If this caricature image of modern positivism represents the view of that doctrine held by the academic lawyer in the United States, it is small wonder that it seems to have little support here, at least in the law schools. Let me describe what I understand to be Hart's own doctrine of legal positivism before I go on to explain what is wrong with Reisman and Schreiber's treatment of that doctrine.¹⁶

First, Hart stresses that law has social sources. In general, law is laid down by human beings for other human beings (hence, it is posited), but, even where this is not the case, law has a social source, "being entirely rooted in the actual practices (doings, sayings and thinkings) of persons in society."¹⁷ In particular, the rule of recognition¹⁸ of any given legal system operates as a social rule requiring judges and officials of that system to recognize as law rules made in accordance with its requirements. There is, therefore, a "pedigree" test of the validity of (alleged) legal rules. Secondly, Hart, like Jeremy

14. W. REISMAN & A. SCHREIBER, *supra* note 1, at 269-312.

15. Herbert Lionel Adolphus Hart's principal works include: H.L.A. HART, *THE CONCEPT OF LAW* (1961) [hereinafter *CONCEPT OF LAW*]; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) [hereinafter *Positivism and Separation*]; H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

16. What follows is no more than a thumbnail sketch. This is not the place for an extended discussion of the major features of and problem with that doctrine. For such a discussion, see N. MACCORMICK, H.L.A. HART (1981).

17. *Id.* at 159.

18. See *CONCEPT OF LAW*, *supra* note 15, at 66-67, 92-120.

[A rule of recognition] will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument. . . .

In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions.

Id. at 92.

Bentham¹⁹ and John Austin²⁰ before him, denies that there is a *conceptual* overlap between law and morality;²¹ the legal validity of a rule is one thing, its moral value another. This is not to say that morality does not influence the formation of particular laws, nor that there is no overlap, so far as subject-matter is concerned, between law and morality.²² Thirdly, Hart emphasizes that *rules* are the basic material of law.²³ This is not the appropriate place to discuss whether Hart leaves room for the operation of nonrule standards such as principles, policies and analogies, nor whether, if he does not, his theory can or should be adapted to cater for them.²⁴ Finally, Hart argues that, because rules have a core of certainty as well as a penumbra of doubt, "the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case."²⁵ Nonetheless, in what Professor Ronald Dworkin²⁶ describes as "hard cases,"²⁷ that is, cases in which no rule of law clearly governs, it can be argued that the courts perform a rule-producing, rather than a rule-applying, function. The problem which surfaces again here is whether, in such cases, the rule produced is generated by an exercise of strong discretion unbound by any legal standard whatsoever, or whether judges are under an obliga-

19. (1748-1832). A prolific writer with a great variety of interests, Bentham, the originator of utilitarianism, was educated in law and published widely in the field of law and morals. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789), expounds his theory of the principle of utility. He was active as a legal and social reformer.

20. (1790-1859). Fellow utilitarian and friend of Bentham, Austin taught Jurisprudence at University College, London. His major work, J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832), is a product of those lectures.

21. CONCEPT OF LAW, *supra* note 15, at 181-89, 203-07.

22. *Id.* at 199-200.

23. For a discussion of Hart's important distinction between primary and secondary rules, see N. MACCORMICK, *supra* note 16, at 92-120.

24. The literature on this question is voluminous. The criticism that Hart's theory failed to provide for principles was made first in Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). This, Dworkin's seminal article, has been widely reprinted. *E.g.* R. DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1977); Dworkin, *Is Law a System of Rules?*, in *THE PHILOSOPHY OF LAW* 38 (R. Dworkin ed. 1977) (here a modified version of the article is presented); Dworkin, *Is Law a System of Rules*, in *ESSAYS IN LEGAL PHILOSOPHY* 25 (R. Summers ed. 1968). A number of authors have replied to Dworkin's criticism. *E.g.*, Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972); N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 229-58 (1978); Waluchow, *Herculean Positivism*, 5 OX. J. LEGAL STUD. 187 (1985).

25. CONCEPT OF LAW, *supra* note 15, at 132.

26. Professor of Law, New York University School of Law; Professor of Jurisprudence & Fellow, University College, Oxford. A.B., 1953, Harvard University; B.A., 1955, Oxford University; LL.B., 1957, Harvard University.

27. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 45 (1967).

tion to use nonrule standards in the process, or whether the process is sometimes of the former kind and sometimes of the latter.

Reisman and Schreiber's seventh chapter, "The World of Rules: The Jurisprudence of Positivism," begins, in dramatic style, with a suggestion that the reader imagine himself a judge in Nazi Germany, sworn, by virtue of his office, to uphold viciously racist laws.²⁸ It moves quickly to the trial of Billy Budd and Captain Vere's defense of application of the strict letter of the law in Budd's case.²⁹ The editors then say, "Captain Vere stated a central thesis of positivism, the ethic of obedience to the rules—no matter what."³⁰ The editors go on to say:

The audience to whom the order is directed, is expected to ignore any inconsistency between the content of the order and its own morality. The dissonance that is thus established between law and morality has created many ethical problems for the positivist. This 'separation' of law and morality is another leitmotif of positivism and is explored in the next chapter.³¹

It seems to me that the student reading this book and coming across legal positivism for the first time is likely to be thoroughly prejudiced against it from the start. The effect of these early paragraphs is that positivists are moral monsters, sworn to unthinking adherence to rules, no matter how unjust or even brutal. No doubt the editors did not intend to smear positivism with the allegation that it was, in some part, a contributing factor to the success of Nazism, but one might be forgiven for getting that impression. Any such allegation is as plausible as blaming Richard Wagner's music for Nazism or homosexuals for the downfall of Rome.

Now, it is true that Hart, like Bentham and Austin before him, insists upon the value of separating law from morality.³² So, in the context of a functioning legal order, judges have a legal obligation to recognize as rules of law all rules that satisfy the criteria laid down by the rule of recognition,³³ while ordinary citizens have a legal obligation to obey such of those rules as are duty-imposing in nature.³⁴ However, the legal "ethic" of obedience must be placed in its proper

28. W. REISMAN & A. SCHREIBER, *supra* note 1, at 269.

29. *Id.* (quoting H. MELVILLE, BILLY BUDD 244-46 (F. Freeman ed. 1948)).

30. *Id.* (citing R. COVER, JUSTICE ACCUSED (1975)).

31. *Id.* at 269-70. One wonders if use of the word "leitmotif," associated with the music dramas of Richard Wagner, is coincidental.

32. CONCEPT OF LAW, *supra* note 15, at 203-07.

33. *Id.* at 112-14.

34. *Id.* at 113.

context. Hart has been assiduous in stressing the limited importance of legal validity.³⁵ The presence of legal obligation is not, by any means, conclusive of questions of moral obligation. Reisman and Schreiber are fully aware of this point for, in the next chapter, they quote the following words of Hart: "If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention."³⁶

In truth, the "evil law" presents an ethical problem for all legal theorists, natural lawyers, realists and the rest no less than positivists; that problem is in no sense the "creation" of the positivists. It would have assisted the reader's ability to think carefully and conscientiously about Hart's answer to that problem had the preceding passage been presented in full at the outset, rather than being held back for the middle of the following chapter. This is especially so having regard to the fact that the Preface invites teachers to be selective in the sections they assign to their classes.³⁷

A second shortcoming of Reisman and Schreiber's analysis is also revealed by the very first page of "The World of Rules." The editors say that "Positivism . . . is a jurisprudence which conceives of law as the order, in the form of a rule, of a political superior to a political inferior."³⁸ The notion of law as orders of this kind is reasonably and properly attributable to both Austin and Bentham,³⁹ though the latter's theory of law was more complex and subtle than the former's.⁴⁰ But this is not Hart's view of law, and it is hard to believe that it is the view of any other modern positivist, either. So far as Hart is concerned, three chapters of *The Concept of Law*⁴¹ are largely an attempt to refute the notion of the political sovereign barking out orders to his subjects. This is not the place to discuss in any detail Hart's reasons for rejecting it, but one point should be made. For Hart, it is, in a

35. *Id.* at 68, 97-107, 195-207.

36. W. REISMAN & A. SCHREIBER, *supra* note 1, at 335 (quoting *Positivism and Separation*, *supra* note 15, at 620). See also CONCEPT OF LAW, *supra* note 15, at 203-07.

37. W. REISMAN & A. SCHREIBER, *supra* note 1, at xiii-xiv.

38. *Id.* at 269.

39. Austin uses the term "command" rather than "order." See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 5 (n.p. 2d ed. 1861 & photo. reprint 1970). Bentham preferred "mandate" to both "command" and "order." J. BENTHAM, *OF LAWS IN GENERAL* 10-15 (H.L.A. Hart ed. 1970) (from a manuscript originally published posthumously as J. BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* (C. Everett ed. 1945)) (Hart indicates, at xxxi, that the text was "substantially completed in 1782.'). On the notion that law is laid down by a superior to an inferior, see J. AUSTIN, *supra* at 15, 170-91, and J. BENTHAM, *supra* at 1, 18.

40. See H.L.A. HART, *ESSAYS ON BENTHAM passim* (1982).

41. CONCEPT OF LAW, *supra* note 15, at 18-76.

sense, the rule of recognition which is sovereign within any given legal system; the notion of political superiors and inferiors has no part to play in his theory.⁴² It might have been possible to forgive this as a lapse by Reisman and Schreiber and for them to be taken to be referring only to the early positivists. However, having quoted at length from *The Concept of Law*,⁴³ they refer later in "The World of Rules" to "the concept developed by Austin and Hart of law as rules (by political superiors to political inferiors)."⁴⁴ Now, it is right to say that this passage appears in the Notes which follow the editors' extracts from Hart's book. So, it may be said, these are remarks designed to stimulate an informed response from students who have read those extracts, rather than a statement of the editors' own understanding of Hart. This is hardly a satisfactory reply, for the student who has read only those extracts is in no position to challenge the remarks as being inaccurate. It is to elsewhere in Hart's book that one must look, first, for a repudiation of the simplistic superior/inferior model,⁴⁵ and, second, for the concept he puts in its place.⁴⁶ Yet nothing from either of these discussions is extracted in the editors' Chapter Seven, "The World of Rules." It seems that one must conclude that there really is a basic error here, though it is possible that they have some (unstated) argument at their fingertips in support of their position. If so, it would have been interesting to have heard it.

Next, we are asked, "[I]s it accurate to assume—as Positivists do—that such decisions are objective and simply entail applying a fixed rule to an objectively definable fact situation before the court?"⁴⁷ Reisman and Schreiber go on to suggest that such a mechanical, some would say "slot-machine," view of judicial decision making is untenable.⁴⁸ Quite right: it is untenable. However, this is hardly a stick with which to beat modern Hartian positivists. Hart himself regards the process as being anything but objective and simple. The following passage from *The Concept of Law* reveals Hart's view that all rules have, to some degree or other, an "open texture":

42. See, e.g. *id.* at 49-76.

43. W. REISMAN & A. SCHREIBER, *supra* note 1, at 282-92.

44. *Id.* at 293 n.4.

45. CONCEPT OF LAW, *supra* note 15, at 49-76.

46. *Id.* at 97-120.

47. W. REISMAN & A. SCHREIBER, *supra* note 1, at 293 n.6. Again, it is right to point out that this question appears in the Notes which follow the extracts from *The Concept of Law*, so that students might be expected to challenge that assertion. However, once again, they are not given any of the passages from that book which would enable them to mount such a challenge.

48. *Id.*

Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases. Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.⁴⁹

Nor does Hart consider this to be a *bad* feature of legal rules. He says:

In fact all systems in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.⁵⁰

Plainly, Hart here acknowledges as both inevitable and sometimes desirable the possibility of practical discretion in making decisions. He does stress that there is sometimes a tendency to regard too much as “perennially open or revisable in precedents,”⁵¹ and that the degree to which the texture should properly be left open varies with the subject matter of the legal material in question.⁵² So, judges exercise their creative function in the context of a varying level of constraint.⁵³ Nonetheless, Hart would find there to be nothing wrong *in principle* with the view that “the decision-maker, a judge or some functional equivalent, must innovate and engage in a process of making choices,”⁵⁴ a view which Reisman and Schreiber present as contradicting that of the positivist.

Reisman and Schreiber are aware of Hart’s true position, for they make reference to the “open texture” argument.⁵⁵ However, they fail to present extracts from the part of *The Concept of Law* in which Hart explains and develops that argument; the reader is left to deduce

49. CONCEPT OF LAW, *supra* note 15, at 123.

50. *Id.* at 127.

51. *Id.*

52. *Id.*

53. N. MACCORMICK, *supra* note 24, at 246-55.

54. W. REISMAN & A. SCHREIBER, *supra* note 1, at 305 n.4.

55. *Id.*

from Dworkin's critical treatment of Hart's theory⁵⁶ what the latter had to say. Their view of the effect of the open texture argument upon Hart's stance seems to be that it demonstrates his "de facto defection"⁵⁷ from positivism; the argument is a "stratagem" to which Hart is compelled to "resort."⁵⁸ At no point is it explained why the open texture argument may be said to deprive Hart of his positivist credentials, nor is the reader presented with any counter-explanation. It is certainly not Dworkin's position that Hart is thus made a defector. On the contrary, Dworkin argues that the acceptance of the notion that rules have an open texture, together (he alleges) with the admission that judges exercise strong discretion in hard cases, demonstrates the inadequacy of positivism as a theory of law.⁵⁹

If Reisman and Schreiber really are claiming that a belief in "slot-machine" decision-making is a necessary feature of positivism, then it would seem that the apparent arch-positivist himself, John Austin, must be excluded from the fold. They refer to Hart's claim that neither Bentham nor Austin held the view "that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, or moral standards."⁶⁰ Hart supports this argument by reference to a number of quotations from Austin's works.⁶¹ One such quote may suffice to suggest the tenor of Austin's position. Austin castigated the common law judges for causing the system of equity to develop because they "would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages."⁶² Hart concludes that "only an entire misconception of what analytical jurisprudence is and why [Austin] thought it important has led to the view that he, or any other analyst, believed that the law was a closed logical system in which judges deduced their decisions from premises."⁶³

56. *Id.* at 294-305 (quoting Dworkin, *Is Law a System of Rules?*, in *THE PHILOSOPHY OF LAW*, *supra* note 24, at 38-40, 42-52, 54-58, 60-65).

57. See W. REISMAN & A. SCHREIBER, *supra* note 1, at 305 n.4.

58. See *id.*

59. *Id.* at 300-01, 304-05 (quoting Dworkin, *Is Law a System of Rules?*, in *THE PHILOSOPHY OF LAW*, *supra* note 24, at 53-55, 64-65).

60. *Id.* at 270 n.* (quoting *Positivism and Separation*, *supra* note 15, at 601 n.25).

61. *Positivism and Separation*, *supra* note 15, at 609 nn.33-35.

62. J. AUSTIN, *Groundless Objections to Judicial Legislation*, in 2 *LECTURES ON JURISPRUDENCE* 647 (5th ed. 1885 & photo. reprint 1972), quoted in *Positivism and Separation*, *supra* note 15, at 609 n.35.

63. *Positivism and Separation*, *supra* note 15, at 608.

If Reisman and Schreiber disagree with Hart on this point, it is surely incumbent upon them to say why and to produce evidence in support. This they wholly fail to do, thus leading one to conclude that their view of positivist legal theory is shot through with misunderstanding and confusion.

They have no more time for, or patience with, "positivist" judges than they do for "positivist" theorists. The indicted villains here are Justice Roberts and (more surprisingly) Justice Holmes.⁶⁴ The positivist theory of the Supreme Court of the time was, it seems, to blame for the fact that that Court struck down the early "New Deal" legislation.⁶⁵ This theory is said to be best exemplified by the following passage from Justice Roberts' opinion in *United States v. Butler*:

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.⁶⁶

There can be no doubt that Justice Roberts was here espousing a strict, literalist, even mechanistic, interpretation of the Constitution, nor that the result was to strike down legislation (the Agricultural Adjustment Act 1933) which modern liberals and, probably, many others of rather different political persuasions would regard as being utterly reasonable and sensible. However, it should be plain from what has been said in this Essay that the theory of legal positivism does not

64. See W. REISMAN & A. SCHREIBER, *supra* note 1, at 306-11.

65. *Id.* at 308-09.

66. *United States v. Butler*, 297 U.S. 1, 62-63 (1935), *quoted in* W. REISMAN & A. SCHREIBER, *supra* note 1, at 308.

entail a theory of the Constitution such as this. One may, perhaps, be forgiven for quoting once again from Hart:

The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down

. . . .

. . . In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims.⁶⁷

Justice Roberts may well have been a prey to this vice, but it is wrong to identify it as a vice of positivism.

Finally, Reisman and Schreiber's criticism of *McBoyle v. United States*⁶⁸ is less than fair. The object of their attack is Justice Holmes, hardly the most obvious standard-bearer of positivism among American judges. The question in *McBoyle* was whether the defendant had been properly convicted of transporting a "motor vehicle" in interstate commerce knowing it to have been stolen, the difficulty being that it had been an airplane which he had taken across state lines.⁶⁹ Section 2 of the National Motor Vehicle Theft Act 1919 defined "motor vehicle" to "include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."⁷⁰ The key words here were the last ten, which might be regarded as wide enough to embrace an airplane.

Justice Holmes, speaking for a unanimous Court, saw problems both of construction and of principle or policy with such an expansive view of section 2. The problem of construction was that the word "vehicle," he opined, "calls up the picture of a thing moving on land."⁷¹ Hence, the better, first-impression interpretation of the words, "not designed for running on rails," placed the emphasis more upon "running" than upon "not designed for . . . rails." An airplane is obviously not designed for rails, but also cannot, comfortably at least, be said to "run." Support for such an interpretation would, because of the shared nature of the express examples of "motor vehicles" given

67. CONCEPT OF LAW, *supra* note 15, at 126-27.

68. 283 U.S. 25 (1930).

69. *Id.* at 25.

70. *Id.* at 26.

71. *Id.*

in section 2 as land vehicles, be given by the *ejusdem generis* rule. Lest this be thought an unduly textual approach, Justice Holmes referred to the reports and debates in Congress relating to the Act. Nothing, it seems, had been said in Congress about airplanes.⁷²

The argument of principle or policy he expressed eloquently as follows:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.⁷³

This is clearly no more than a particular working-out and explanation of the familiar and well-established idea that criminal statutes should be construed strictly in favor of the defendant. There is plenty of authority supporting that idea, not least in the Supreme Court itself.⁷⁴ It was argued by one commentator only shortly after the decision in *McBoyle* that, since the defendant had clearly committed a crime under state law, there was less to be said for the decision in terms of fairness than would usually be the case,⁷⁵ but even he accepted that “[t]he result [did] not seem improper.”⁷⁶ Given these circumstances, it is baffling to find Reisman and Schreiber giving *McBoyle* as an example of “Positivism’s often rigid construction and distortion of the objectives of legislation.”⁷⁷ They say that rigid construction and distortion of this type is “sometimes quite ludicrous,” though it is not entirely clear from the context whether they wish to apply that phrase to Justice Holmes’s reasoning in *McBoyle* or to reserve it for Justice

72. *Id.*

73. *Id.* at 27 (citing *United States v. Thind*, 261 U.S. 204, 209 (1923)).

74. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). See also, e.g., *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Bass*, 404 U.S. 336 (1971); *Rewis v. United States*, 401 U.S. 808 (1971); *Bell v. United States*, 349 U.S. 81 (1955).

75. Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 759 (1935).

76. *Id.* at 758 n.53.

77. W. REISMAN & A. SCHREIBER, *supra* note 1, at 307.

Roberts's infamous opinion in *Butler*.⁷⁸ In any event, with or without the epithet "ludicrous," the criticism seems quite unfair. Justice Holmes did make reference to the proceedings of Congress in trying to discover whether the legislation was intended to apply to aircraft. Furthermore, he relied upon a widely supported principle or policy of the common law, one which might reasonably be taken to condition Congressional attitudes to the objectives of the legislation in question.

One is reminded of Professor Lon Fuller's⁷⁹ example of the statute making it punishable by a small fine "to sleep in any railway station."⁸⁰ He gives as one problematical case that of a man who had brought to the station a blanket and pillow and "had obviously settled himself down for the night" but who is arrested "before he had a chance to go to sleep."⁸¹ He indicates, albeit rhetorically, that there would be nothing amiss about convicting such a man on the basis that "'sleep' as used in this statute [should be taken] to mean something like, 'to spread oneself out on a bench or floor to spend the night, or as if to spend the night.'"⁸² It may be thought significant that Fuller would be prepared to regard as "sleeping," for the purposes of the statute, a person who he had earlier described as having been arrested before he had had a chance to go to "sleep." However, perhaps even Fuller would have jibbed at the idea of applying a definition so contrary to the picture evoked in the common mind (and other minds too?) by the word "sleep" had the offense been one which, as in *McBoyle*, had resulted in a sentence of three years in prison and a \$2,000 fine. In any event, there is surely very much more to be said for Justice Holmes' position than Reisman and Schreiber acknowledge.

It is academically legitimate to attack positivism as a theory of law for its lack of "realism" or for its limited focus. Reisman and Schreiber themselves make these points in several places.⁸³ Whether these criticisms carry any force and whether, even if they do, it matters very

78. *Id.* The introductory matter for the section on positivism in American judicial practice concludes thus: "More puzzling, indeed sometimes quite ludicrous, is Positivism's often rigid construction and distortion of the objectives of legislation. Consider the following examples." *Id.* The selection from *McBoyle* follows immediately, while the extract from *Butler* is given next, after an editorial passage placing that case in the context of the early New Deal. *Id.* at 308.

79. (1902-1978). Carter Professor of General Jurisprudence, Harvard Law School, 1948-1972. A.B., 1924; J.D., 1926, Stanford University. His chief work with respect to Hart is L. FULLER, *THE MORALITY OF LAW* (1964).

80. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958).

81. *Id.*

82. *Id.*

83. W. REISMAN & A. SCHREIBER, *supra* note 1, at 270, 281, 293-94, 306, 310-11.

much so far as the intellectual appeal of positivism is concerned, is another matter; my own predilections will probably be clear enough. However, it will not do to attribute to the positivist legal theorists positions they clearly did not and do not hold, and then to attack those positions. Nor does it assist critical thinking to conflate positivism with mechanical jurisprudence. If the student must read Reisman and Schreiber's book, let him or her omit "The World of Rules" or, better still, read it with *The Concept of Law* open at his or her elbow.

