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SHAKING LOOSE FROM AN OLD JURISPRUDENCE: WHAT IS THE PRICE?

by

James E. Herget*

[The positivist’s] picture of law as a system of rules has exercised a tenacious hold on our imagination, perhaps through its very simplicity. If we shake ourselves loose from this model of rules, we may be able to build a model truer to the complexity and sophistication of our own practices. ¹

SHAKING loose from a firmly held point of view² opens new vistas that can logically lead to theretofore unsuspected conclusions. We are sometimes uncomfortable with the new conclusions. If we are intellectually honest, however, we must be willing to work out all of the ramifications of a new theoretical framework.

This Article endeavors to explain why the modern theory of law (also called positivism, analytical jurisprudence, formalism, the normative science of law, or the pure theory of law) has remained the dominant point of view in spite of devastating criticism from many quarters during the past century. The intent is to establish that the modern theory is in actuality a part of political ideology and that therein lies its staying power. Section II frames this argument by tracing the historical origins of the modern theory and its development alongside the evolution of classic political liberalism. This section also explores the logical connections between the two doctrines. Section III discusses the institutionalization of the modern theory, and section IV briefly examines the phenomenon of appropriation of the modern theory by nonliberal political regimes. Finally, section V addresses the implications of rejecting the modern theory.

Section I initiates the discussion by taking note of a longstanding intellectual battle in jurisprudential circles between legal skeptics and legal formalists. The skeptics’ criticism of formalism is accepted as effective for purposes of this Article, although most skeptics have offered little or nothing by way of a substitute theory. This criticism raises the question of why the formalist theory has continued to be the accepted model of a legal

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² "Shaking loose" is a better term than the more pretentious "becoming enlightened," or the more fashionable "raising one's consciousness" traceable to the Marxist notion of class consciousness.
system in the twentieth century and why alternative proposals have largely been ignored.

I. FORMALISTS VERSUS RULE SKEPTICS AND OTHER CRITICS: STATING THE PROBLEM

For roughly the past one hundred years, a jurisprudential war has been fought over what counts as law and how judges decide cases according to law. The two proponents in this battle may be characterized as the formalists and the skeptics. The formalists' position was well established by the end of the nineteenth century and remains the prevalent jurisprudence in the world today. It has been, however, the subject of criticism by skeptics for a long time.

Historically, the skepticism seems to have begun in Germany. In the late nineteenth century a leading formalist, von Ihering, began to have grave doubts about the prevailing jurisprudential views. At the turn of the century the German scholar Eugen Ehrlich, led by similar misgivings about the formal science of law, determined to found a "second science" of law, which would be called the sociology of law. Roscoe Pound was the eminent advocate of that view in this country. In the early decades of the twentieth century a group of German scholars known as the Freirechtschule espoused a general skepticism toward the power of legal rules to determine judicial decision-making. A comparable group of American thinkers known as the legal realists advanced many of the same views in the 1920s and 1930s. The criticism has continued to the present time. The central problem focused upon by both the formalists and the skeptics, which put them into direct conflict, was the question of how judges decide cases according to law.

3. What counts as law and the method judges use to decide cases according to law are not the only questions debated in modern jurisprudence, perhaps not even the most important ones; but in one form or another they have remained the most persistent issues.


7. R. Pound, My Philosophy of Law (1941), reprinted in C. Morris, supra note 6, at 532.


From the positivist or formal viewpoint the judge is required to ascer-
tain the facts and then subsume them under the appropriate legal rule or
principle. In most cases this task is relatively simple. In difficult cases
the judge has to use the rational tools of analysis and exegesis to find the
correct rule. Judicial decisions are criticized as correct or incorrect, de-
pending upon whether the judge's premises are properly or improperly se-
lected and whether his reasoning is sound or fallacious. Judges rely on
assistance from legal scholars to assure that their reasoning and conclu-
sions are correct.

From the skeptic's point of view this position is mostly nonsense. True, some cases might be so simple that legal rules can be applied
mechanically. In most cases, however, the judge must make personal
value judgments in ascertaining the facts and in finding the applicable rule
of law. Rules of law are plentiful and often come in paired opposites. No
authoritative guide to picking rules exists other than the judge's intuition
and his own sense of fairness. Some skeptics have claimed that a clever
judge can decide a case in accordance with his own preference and then
can devise a formal rationalization for his decision that would please a
positivist. Rules of law do not make judicial decisions predictable, al-
though decisions can be rationalized in terms of acceptable doctrine. Cer-
tainty in the law and fidelity to the legislative will are illusions.

These two extreme positions cannot both be right. The skeptics have
convincingly demonstrated that judicial decisions are not "determined" by
the positive law. On the other hand, the formalists have shown that judi-
cial decisions cannot be "valid" unless they conform to the positive law.
This puzzle of adjudication has been the central battleground in a long-
standing jurisprudential war.

While the skeptical criticism squarely hit its mark, the legal skeptics
were not the only ones to question the modern view of law. Students of
the Anglo-American common law had for a long time raised serious ques-
tions about the judicial process. How could unelected judges make law
through precedent without subverting the democratic process? The stan-

10. Of course, this statement of the positivist position on the question is simplified and
generalized. Undoubtedly, each individual positivist theoretician would give a different ac-
count. The textual statement is, however, representative and accurate enough for present
purposes.

11. Again, a generalized and simplified statement is given.

12. This position will not be reargued here. Some of the main criticisms are summa-
rized in section V infra. Readers are further referred to various writings in collections of
jurisprudence under the headings of legal realism, legal skepticism, or judicial process. See
e.g., D. Lloyd, supra note 4, at 451-564. Two of the most persuasive expositions are:
Taking Rights Seriously, supra note 1); Hughes, Rules, Policy and Decision Making, 77 Yale
L.J. 411 (1968). The skeptical criticism has been mostly negative. Few skeptics have made
alternative proposals. In fairness, however, no claims to advancing a comprehensive philos-
ophy were made by the American legal realists. See Llewellyn, Some Realism about Real-
ism, 44 Harv. L. Rev. 1222 (1931), reprinted in K. Llewellyn, Jurisprudence: Realism

standard positivist explanation of this power of courts was that the legislature delegated such power. Since no express delegation could be found in past legislative pronouncements, it was regarded as implied or as the result of an implicit rule of recognition. In the United States the Federal Constitution and many state constitutions expressly placed the judicial power in the court system. The judicial power could be and was construed to include the power to make law by stare decisis. This attempt to bring judicial lawmaking into the ambit of the positivist model was reinforced by the notion that judges could make law only interstitially or within a narrow area between the broader confines of legislative policy, as well as by the admitted fact that the legislature can always change judge-made law. Nevertheless, this rationalization was suspect for a long time and became especially difficult to accept when United States courts thwarted congressional and state legislative policy in constitutional cases.

In addition, beginning in the late nineteenth and early twentieth centuries, students of society sought to emulate the successful natural sciences by adopting their "scientific" methods, as they were then perceived. Luminaries such as Max Weber, Emile Durkheim, and others attempted to establish a science of society which was not teleological but scientifically objective. Knowledge of human society would be obtained from empirical observation leading to hypotheses, theories, and possible laws of human behavior. No a priori principles or assumptions would be admitted. Traditional political theory, since it included normative assumptions, would have to be rejected as nonscientific. The nonempirical, positivist view of law would have to be replaced. Apparent advances in psychology, sociology, economics, and anthropology led to optimism that a society could be studied and understood through a naturalist, objective, operational, and quantified method. Thus, methodological considerations reached a state of sophistication in the scholarly world that called into question the accepted jurisprudence.

A few legal scholars have made a serious attempt to engage in the scien-

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14. See Hart's analysis of Austin's struggle with this problem. H. L. A. HART, supra note 4, at 43-48. Austin suggested that the sovereign gave tacit commands. Hart's own resolution of this problem suggests that nations in the common law tradition follow a "rule of recognition" that allocates to courts the power to make law in cases not covered by legislation or prior precedent. Id. at 98. Whether Hart's explanation is any more persuasive than Austin's is debatable.

15. See, e.g., U.S. CONST. art. III, § 1; TEX. CONST. art. V, § 1; VA. CONST. art. VI, § 1.

16. The legislature, of course, cannot change judge-made law in the more complicated case of constitutional interpretation in the United States under the doctrine of judicial review. In this circumstance the electorate must look to constitutional amendment to rectify mistakes of the judiciary and has done so at least twice. See U.S. CONST. amends. XI, XVI.

17. The classic example is treated in most constitutional law casebooks under the heading of "substantive due process." See, e.g., W. LOCKHART, V. KAMISAR & J. CHOPER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 420-79 (5th ed. 1980); see also R. McCLOSKEY, THE AMERICAN SUPREME COURT (1960), for an elaboration of the theme that the Supreme Court institutionalized our natural law heritage while the legislatures institutionalized our democratic heritage, thus permitting the American political mind to be schizophrenic.

scientific study of law by using empirical techniques. Perhaps the high point of this movement in America was the creation of the Law Institute at Johns Hopkins University in 1928.\textsuperscript{19} Traditional legal scholars responded to these empirical attempts with attitudes ranging from encouragement to contempt. Down to the present time scholarship of this type has been but a small part of the vast bulk of scholarly discourse in the law reviews, legal treatises, and texts, despite funding and encouragement from the American Bar Foundation\textsuperscript{20} and other national funding agencies.

The theory under which these studies have been carried out remains obscure. Some sociological work appears to rely upon the traditional principles of the philosophy of science.\textsuperscript{21} In other cases the positivist view of law seems to be assumed. Indeed, much of this interdisciplinary work creates some serious confusion of aims and methodology.\textsuperscript{22}

In addition to fostering a more scientific effort to explain law and legal systems, the skeptical critique moved in two other directions. The first move was to substitute a rough and ready pragmatism for the modern theory. This pragmatic viewpoint sees law as merely a word and arguments about its definition as futile. Lawyering alone is important. Lawyers need to know how to practice an art. Skill in advocacy is the principal subject matter for the law school curriculum. This sort of pragmatism is, of course, no theory at all; it is simply an attitude. While widespread, this attitude presents no serious intellectual challenge to the modern theory of law.

The other noteworthy development arising from the early skepticism is the jurisprudence of Lasswell and McDougal. An adequate description or critique of that jurisprudence is beyond the scope of this discussion.\textsuperscript{23} Suffice it to say that in many ways the Lasswell-McDougal approach is a striking departure from the modern theory of law and presents a real, affirmative alternative. It has not, however, gained many adherents, probably for the reasons adduced later in this paper.\textsuperscript{24}

The juristic developments just recounted failed to make a significant impact upon the general acceptance of the modern theory of law. That theory also came under attack from outside the world of legal scholarship on

\textsuperscript{19} See W. Twining, \textit{supra} note 9, at 52-53.

\textsuperscript{20} The Bar Foundation has been active in promoting empirical research and publishes a journal devoted primarily to that type of scholarship. See 1 \textsc{Am. B. Found. Research J.} iii (1976) (introduction to the journal).

\textsuperscript{21} See, \textit{e.g.}, A. Ryan, \textit{The Philosophy of the Social Sciences} (1970).

\textsuperscript{22} See Black, \textit{The Boundaries of Legal Sociology}, 81 \textsc{Yale L.J.} 1086, 1086-87 (1972).


\textsuperscript{24} A symposium on the 25th anniversary of the publication of Lasswell and McDougal's revolutionary 1943 proposals for legal education, \textit{supra} note 23, can be found in 54 \textsc{Va. L. Rev.} 583 (1968). The authors contributing to this symposium attempt to explain why the Lasswell-McDougal proposal and other Lasswell-McDougal ideas never caught on in the world of legal scholarship.
a number of grounds.25 These criticisms, some of them penetrating, have also failed to dislodge the modern theory from its preeminence. Why does the positivist theoretical structure continue to stand in spite of the obvious cracks in the walls? Or, to change the metaphor, why can't we shake loose?

II. THE MODERN THEORY OF LAW AS AN IDEOLOGICAL APPENDAGE

A. Ideology and Jurisprudence

To minimize ambiguity an elaboration of what is meant by the term "political ideology" follows. A political ideology is a framework of thinking about certain aspects of society. Political aspects of society include the exercise of power, coercion, or authority by persons or groups within the society. Ideology means an integrated set of concepts that are, for the most part, logically consistent and mutually supportive. A political ideology is, then, the set of ideas and vocabulary by which we organize, understand, explain, and evaluate political phenomena.26 Although, in a sense, political theorists are the architects of political ideology, the term is much broader than theory alone or the theory of a single thinker such as Montesquieu or Bentham. At any given time in history, a political ideology is subscribed to by a large number of people, including ordinary laymen as well as social scientists. It may not be perfectly understood, and all its ramifications may not be realized, but it can be taught and passed on to others through education, propaganda, and simple emulation of ongoing practices. Language eventually assimilates a political ideology. The meanings of "judge," "constitutional right," and "sovereign" imply certain notions about how society is or should be organized and conducted. Words become "theory impregnated."27

25. Anthropologists have asserted that the modern theory is an ethnocentric folk system peculiar to western countries. See L. POSPISIL, THE ETHNOLOGY OF LAW 1-7 (2d ed. 1978). Historians and social scientists have deplored the narrow view of legal change that the modern theory requires. See 1 F. HAYEK, LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER 33-46, 72-89 (1973). Sociologists have noted the modern view's failure to explain legal compliance and noncompliance. See J. MERRYMAN & D. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 355-90 (1978). Another area of severe frustration and puzzlement in the world of legal scholarship caused by the modern theory of law is the problem of administrative discretion. Administrative agencies apparently violate the separation of powers doctrine, combine policymaking with adjudication, often act with relatively little statutory authorization or limitation, and otherwise behave in ways difficult to analyze in the framework of the modern theory of law. See generally K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

26. The notion of ideology, traceable through Marx to the intellectuals of the French Revolution, is extremely complicated. At least two schools of thought contemplate the relationship between ideology and social theory. One holds that all social theory is ideology, that we are forever trapped in our own point of view and cannot escape it. The other holds that a method that strives for objectivity and constant empirical verification can gradually lead us beyond our cultural limitations and we can approximate true objective reality in social theory. See G. LICHTHEIM, THE CONCEPT OF IDEOLOGY 3-46 (1967); A. RYAN, supra note 21, at 220-40; Rudden, Law and Ideology in the Soviet Union, 31 CURRENT LEGAL PROBS. 189 (1978).

27. The suggestive term "theory impregnated" is taken from P. WINCH, THE IDEA OF A
The historically important political ideologies, including the liberal synthesis, have a dual aspect. They are both descriptive and prescriptive. The concepts that the ideology uses and integrates describe both what society is and what it should be. In the view of the liberal synthesis, for example, the lawmaking power of a society is and should be vested in the legislature, or in persons accountable to the public at large. If a society is found in which some other person or group appears to be exercising lawmaking power, then that exercise must be explained as either an express or implied delegation of power from the legislature or as an illegal usurpation of power. This amalgamation of prescriptive and descriptive functions, so characteristic of ancient Greek thought, has been a source of serious confusion in jurisprudence.

At this point the relationship of political ideology to jurisprudence remains to be expounded. Contextually, the term jurisprudence means an explanation or theory of law. In the ordinary affairs of life there is no mystery about what is meant by law or a legal system. Everyone is familiar with lawsuits, court houses, law books, traffic tickets, lawyer's fees, senate bills, and judicial robes. Jurisprudence seeks logically to organize these legal phenomena, to generalize about them, to connect them to other areas within our understanding, and to give insight into them. Obviously, however, legal phenomena are social and political phenomena, a subcategory of human interaction in general and of that part of human interaction that involves coercion and authority. Therefore, in order to explain law in a useful or meaningful way, it has traditionally been necessary to use concepts that are compatible with those that are generally used to understand society or political activity. Jurisprudence, therefore, has tended to be the application or extension of political ideology to legal phenomena.

B. Intellectual Sources of the Liberal Synthesis

A number of political ideologies have preceded the liberal synthesis in western society. Of particular importance was Thomism, a prevailing viewpoint in the late medieval period. Thomas Aquinas, of course, was concerned with the explanation of natural law, divine law, and human law in the context of his great schematic integration of Aristotelian and Christian thought. His successful system became the main framework for intellectual Christendom. The coming of the Reformation broke the unity of the church, offered new theologies, and thereby raised new questions about the relationship of God and social institutions. Because of the divisions

28. See E. PATTERSON, supra note 13, at 117-46.
29. For a thoughtful discussion of this point, see Black, supra note 22, at 1086.
30. Juridical or legal theory is a less parochial term since the equivalent of the English jurisprudence in romance languages means case law or judge-made law. The text makes clear, however, that the discussion does not address case law. For a concise description of jurisprudence, see D. LLOYD, supra note 4, at 1-18.
within Christendom, achieving a consensus regarding the justification of political power on the basis of religious doctrine became impossible. These divisions opened the way for various versions of secular natural law and state of nature theories. Successful challenges to the King's power in England prompted influential secular justifications for governmental power by both Hobbes\textsuperscript{32} and Locke.\textsuperscript{33} This ideology based upon secular natural law was the forerunner of the liberal synthesis.

This is not to say, of course, that the liberal synthesis was sympathetic to previous theory. Indeed, the chief motivation for the formulation of liberal principles and the modern theory of law was probably a reaction to older views that were seen as justifications for unjust social relationships. Illustrative of this reaction was Bentham's vitriolic condemnation of the notions of natural rights and natural law that had been so comfortable to Locke and Jefferson.\textsuperscript{34}

Advances in science build upon the work of previous scientists. In contrast, each philosopher or political scientist is thought by many to build his own castle from the ground up. This thinking, however, is untrue. While social theorists have usually begun anew in constructing their theory, often in reaction to prior theory, they have been willing to borrow ideas from earlier writers when those ideas served a useful purpose within their own framework of thinking. Similarly, in the creation of the liberal synthesis a number of ideas first proposed in earlier times became incorporated in the ultimate framework. Thus, the liberal synthesis had many architects.\textsuperscript{35}

The mention of theoretical architects should not mislead us into thinking that the liberal synthesis is merely a matter of intellectual or academic concern. This set of complementary ideas has had a powerful effect on the way government and law has been perceived and judged by politicians, lawyers, officials, judges, commentators, and teachers. The vocabulary that we have traditionally used to discuss political, constitutional, and le-

\begin{itemize}
\item \textsuperscript{32} Hobbes wrote \textit{Leviathan} in 1651 and \textit{De Cive} in 1642 principally to justify the return of the monarchy during the English Civil War and to justify a strong government. \textit{See} S. LAMPRECHT, \textit{INTRODUCTION TO T. HOBBS, DE CIVE OR THE CITIZEN} xiv (1949); \textit{see also} J. RANDALL, \textit{THE MAKING OF THE MODERN MIND} 185-88 (1940).
\item \textsuperscript{33} Commentators generally regard parts of Locke's Second Treatise, in \textit{J. LOCKE, TWO TREATISES OF GOVERNMENT} (1690), as the justification for the Parliament dominated system of government that evolved in England after the Glorious Revolution of 1688. \textit{See} G. CHRISTIE, \textit{JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW} 212-17 (1973); \textit{see also} J. RANDALL, \textit{supra} note 32, at 341-49.
\item \textsuperscript{34} Bentham called the doctrine of natural rights embodied in Locke's writings and the American Declaration of Independence "nonsense upon stilts." \textit{D. LLOYD, supra} note 4, at 172 n.9.
\item \textsuperscript{35} Space will permit the acknowledgement of only a few of the leading thinkers and their contributions. Grotius, Bodin, and Hobbes developed and used the concept of sovereignty. Hobbes, Locke, and Rousseau explained the social contract while Jefferson and Adams sought to effectuate it. Locke and Montesquieu elaborated upon the idea of separation of powers. Following the lead of Descartes, a long line of rationalist and enlightenment philosophers taught that society could be designed, and Bentham identified legislation as the grand instrument for such design. A notion familiar in medieval times was put to new uses at the end of the eighteenth century as the rule of law. Through the federalist papers Madison, Hamilton, and Jay advocated the practical application of many of these ideas. \textit{See generally}, J. RANDALL, \textit{supra} note 32, at 172-202, 334-64.
\end{itemize}
gal questions mirrors the ideology. The powerful grip that the liberal synthesis holds upon contemporary thinking is largely due to the logical consistency of its major subconcepts supported by the subtle connotations of political rhetoric. 36

1789 provides a convenient date to mark the emergence of the liberal synthesis as a recognized ideology. That year witnessed the beginning of the French Revolution and the adoption of the United States Constitution, both events institutionalizing many of the ideas of the synthesis. Theorists refined the ramifications of the ideology in the following half century while the basic attitudinal framework spread throughout Europe and the Americas.

C. Components of the Liberal Synthesis

The pole-star of the liberal synthesis, as the name might suggest, was the idea of freedom. 37 The American Revolution, the French Revolution, and the many revolutions that followed in nineteenth century Europe and Latin America all sought to overthrow existing regimes regarded as illegitimately suppressing the freedom of the individual. The individual sought to destroy the special privileges and powers of the nobility, the church, and the King and to alleviate the coercive power of these feudal institutions. Under the new order individual freedom was to be maximized, and no one could be involuntarily subjected to the coercive power of another. From this basic notion a number of consequences flowed.

Proceeding from the idea of individual freedom, the liberal synthesis can be conveniently analyzed into four interrelated component concepts: the republican principle, the legal monopoly principle, the design principle, and the rule of law. Together these concepts constitute the political ideology that has been predominant in western thought for almost two hundred years.

The republican principle is an extension of the idea of the social contract. The social contract was the secular natural law philosopher's solution to the problem of justifying the coercive power of government, including the enforcement of the law. The justification was based upon consent. How did society know that its people would consent to abide by rules, to pay taxes, etc.? The original argument, in its simplest form, was that rational persons would agree that a society that imposed a government

36. See P. Winch, supra note 27; see also Rudden, supra note 26, at 204, where the author states: "The ideology first describes things as they are; this leads to rules; and the latter include a duty to believe the description. Once this is done the system is sewn up." Id.

37. On liberal revolutionary ideology generally, see H. Laski, THE RISE OF EUROPEAN LIBERALISM (1936); W. Orton, THE LIBERAL TRADITION (1945); G. Ruggiero, THE HISTORY OF EUROPEAN LIBERALISM (1927). See also W. Friedmann, Legal Theory 477-510 (3d ed. 1953). The narrative that follows is a composite elaboration of the main features of classic political liberalism. It is intended to be representative of liberal thinking generally, not a summary of some individual theorist's view. Classic liberal economic theory, while certainly a part of the nineteenth century political liberal's Weltanschauung, has not been incorporated in this description because it was thought to be peripheral to the politics-jurisprudence relationship.
with coercive power would be more stable and more enduring than a society without a government. The republican principle extended this argument and required the citizenry as voters to select those persons who would make governmental policy through the electoral process. Thus, under the republican principle the authority and legitimacy of law and all governmental power is derived from the people acting through their elected spokesmen. No coercive power can be legitimately exercised in society unless it can be logically traced back to the people through their legislative representatives.

Two related ideas are inherent in the republican principle. First, the principle implicitly recognizes that no one person or group is likely to have a monopoly on political wisdom, at least for any extended length of time. Hence, a political mechanism is required that assures frequent evaluation of government policies by the governed through new elections or otherwise. Political pluralism is not only contemplated, but is regarded as a positive virtue. In a pluralistic society one political faction is less likely to gain control and impose its ideas and policies on the rest of society. Secondly, the republican principle presupposes a free interchange of political ideas. Without such interchange, the rest of the political apparatus is likely to falter or to come within the grasp of a tyrannical faction.

A discussion of the republican principle easily leads to a discussion of the legal monopoly principle. Only the legislature can make law. This license does not preclude a delegation of power to other governmental functionaries, however, provided sufficient direction is given to insure that their discretionary acts are clearly in furtherance of the legislature’s policies. This delegation may be implied in appropriate circumstances. Clearly, however, no other person or group within society can legitimately be coerced through the power of the law. Labor unions, churches, business corporations, political associations, and universities cannot make binding law.

The legal monopoly principle also espouses that only two politically and legally relevant social entities exist in society, the individual and the state. The individual, who is naturally free, has political and legal rights and can create new rights and obligations by contract or other voluntary act. The state, as the collective instrument of the citizenry, has the power to create and modify rights and obligations on behalf of the people. Again, such entities as the family, the church, business enterprises, and educational institutions have no power to create or modify legal rights and duties.

The design principle complements the monopoly principle. Since only duly elected legislators can enact laws by following the appropriate majoritarian machinery, all laws must be deliberately created. No law can exist in areas where the legislature has not acted, nor can laws ever change except through legislative action. Law itself, including constitutional law, is an instrument consciously designed to achieve certain ends by controlling the behavior of individuals through rules. The design principle rules out any idea that law can be derived from custom, history, or social mores.
This theory does not necessarily mean that natural law or the law of God cannot exist, or that the law of the state (positive law) may not reflect or in some way imitate the higher law, merely that these are questions of theology and philosophy. They are not a part of the liberal synthesis. In the liberal view the law that political theory must deal with as a practical matter is the positive law whose origin is traceable to the will of society's majority.

Finally, the rule of law is a comprehensive notion that completes our description of the liberal synthesis. This idea, sometimes called the principle of legality\(^ {38} \) or the Rechtsstaat,\(^ {39} \) initially means that society's political power should be and is organized in accordance with general principles. A constitutive framework must designate the specific powers allocated to governmental officials. This delegation of powers can be accomplished through a single written constitution, through a series of authoritative documents, through the actual practice of widely known and understood conventions, or through some combination thereof. The imperative requirement is that persons charged with running the government derive their powers from general rules, and the legitimacy of their actions are limited by those rules; as John Marshall said, "a government of laws, and not of men."\(^ {40} \) Of course, these constitutive rules derive their legitimacy from the republican principle, and as a further corollary, governmental action, to be legitimate, must conform to whatever procedural rules are prescribed. Thus, the legislature cannot pass a law without a majority vote; the president cannot make law by decree; a court cannot pronounce judgment in a case without giving the parties their day in court. These kinds of limitations by rule constitute due process of law in its broadest sense.

The rule of law in the liberal synthesis entails a subordinate but important notion that government must be so organized that power is exercised through functionally divided institutions, through the legislative, executive, and judicial arms. A mixing of functions can lead to unwarranted concentration of power in one person or group of persons with the risk of abuse and thus loss of individual freedoms. The separation of powers is a practical method of assuring that due process in the broad sense is observed through checks and balances. The province of the legislator is to decide what the legal rules will be. The province of the court is to apply them to individual cases. For a legislature to impose legal liability ad hoc in individual cases would be violative of its own constitutive rules. For a court to attempt to act arbitrarily in disregard of the law, or to attempt to make new law, or to attempt to change the legislative policy through interpretation would be inconsistent with both the republican principle and the rule of law. Judges are bound by the law.

\(^{40}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
A related idea implicit in the rule of law is the principle of *nulla poene sine lege*; no individual can be subjected to laws retroactively or to secret laws. Penal laws are to be construed narrowly in favor of the accused. Legislation must have a prospective application, must be promulgated in clear and unmistakable terms, and must not be twisted or modified by courts in its application. This principle clearly favors legislation over judge-made law, and, indeed, favors comprehensive codification.\(^{41}\)

Law must also take the form of general rules applied evenhandedly. The principle of reciprocity, also called reversibility or the veil of ignorance,\(^{42}\) is a central requirement of the rule of law. Rules must be made and applied in such a way that what is required of or given to one person today may be required of or given to another in the same situation tomorrow. To be fair, any rule or principle of decision should be fashioned as though the rulemaker did not know to whom his rule applied, including the possibility that it might apply to himself.

The foregoing brief outline of the liberal synthesis may be summarized as follows: Legitimate governments are established through the consent of the individuals in society; their political representatives have the only power to make law that is a deliberately designed instrument to achieve social objectives; the only entities in the social universe having political and legal powers are the individual and the state; the powers of the state must be separated into the legislative, judicial, and executive, and all government officials are subject to the rule of law. These concepts are both descriptive and prescriptive. They constitute both the conceptual framework through which we understand society and the standard for evaluating any given society.

**D. The Task of Jurisprudence Under the Liberal Synthesis**

The task of jurisprudence or legal theory under the liberal synthesis follows from the logic of the synthesis itself. Law is a deliberately constructed instrument intended to control the behavior of people in society. It alone is authoritative and legitimate, and carries coercive sanctions. Care must be taken to assure that social policies, political concepts, and norms of morality that do not originate with the legitimate lawgiver are not given authoritative sanction. To sanction such authority would constitute an invasion of freedom never consented to by the individual. The task of legal scholarship is to help preserve freedom from usurpation by organizing the vast array of legal rules, doctrines, and sources in an intelligible way that clearly defines the law.

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41. Credit for articulation of this principle is attributed to Cesar Beccaria. C. BECCARI A, ESSAY ON CRIME AND PUNISHMENTS (1764), reprinted in M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 346 (1951).

42. See J. MERRYMAN, supra note 38, at 27-34; see also Pound, Codification in Anglo-American Law in THE CODE NAPOLEON AND THE COMMON LAW WORLD 267 (B. Schwartz ed. 1956).

This organizational task is twofold. First, the modern legal theory must unmistakably identify the law to determine legally binding rules or principles of behavior. Under this prong of jurisprudential effort must come an explanation of the connection between the rules of law, which are of course authoritative and potentially coercive, and the legitimate political power established by the republican principle. Secondly, jurisprudence must clarify the mass of legal rules and principles to insure its proper understanding and use. This clarification proceeds in two directions. In one direction, law must be broken down logically into component parts by classification and subclassification, for example, criminal law and civil law, procedural law and substantive law, commercial law and family law. In the other direction, isolated individual rules of law and discrete doctrines of law must be synthesized and interrelated into broader classifications to enhance consistency and comprehension. Comprehension necessitates some degree of system. The first method of clarification is analysis; the second is exegesis or synthesis. Both methods are necessary to make the instrument of law workable.

In performing its identification function, legal theory under the liberal synthesis must attack the notion that morality, religious doctrine, natural law, political doctrine, custom, good taste, or other sources of normative rules of behavior can have the force of law. To recognize that legal obligation could emanate from these sources would be contrary to the republican principle and the legal monopoly principle. Jurisprudence must, therefore, erect a definitive intellectual barrier dividing that which is legal from that which is merely moral, customary, or socially preferred. The positivistic identification of law has traditionally been accomplished by a definition or set of definitional concepts that establish the rules of law as those posited or set forth to control human behavior by the sovereign. From this connection with political ideology, positive law derives its dual nature as both prescriptive and descriptive. Positive law is binding or valid precisely because it has the imprimatur of the republican principle, but this is also the reason why it is law.

This theoretical position, the modern view of law, does not necessarily entail the notion that the law is always right or desirable from everyone’s point of view. Indeed, the positivists favor the assertion that only when law is clearly identified can it be subjected to moral or social criticism. This kind of evaluation of law from outside the system Bentham called censorial jurisprudence, as opposed to expository jurisprudence.44 Under the liberal synthesis any particular law or scheme of regulation can be criticized as nonuseful, morally wrong, wasteful, frivolous, counterproductive, or violative of natural rights. Even if these criticisms are correct, however, they do not affect the validity of the law. Only the legislature can do that. Again, the liberal synthesis admits of a pluralistic political process, which can sometimes produce bad policy and is often imperfect; but the principle

that legitimate law can only come out of that political process remains intact. This principle in turn means that the evaluation of law or parts of a legal system on the basis of such criteria as utility, justice, natural law, or intuition is a matter of public policy or politics to be resolved through the political process. Censorial jurisprudence becomes simply political discourse.

Conversely, evaluation of law in terms of internal consistency, faithfulness to legislative intent, conceptual clarity, and comprehensiveness in the sense of providing a rule for every situation, is a matter for jurisprudence. Thus, jurisprudence is solely expository. The province of jurisprudence is conveniently limited to identification, analysis, and exegesis of the positive law. It is an activity engaged in by legal scholars, and to a lesser extent, when necessary, by lawyers and judges. It is an activity that requires long training, high intelligence, and a considerable capacity for the use of words and logic. By its very nature jurisprudence need not look beyond the law library to perform its function.

E. Legal Autonomy and Its Function

The ironclad separation of law from morality and politics, which the modern jurisprudence demands, also gives the legal system autonomy. Legal questions are rationally resolved by jurists according to juristic methods and postulates. Political questions are resolved through the rough and tumble of politics. The two are not different in degree, but in kind. Because this autonomy can be achieved, legal systems can be described independently from the political systems that create them. Further, a general model or theory of legal systems can be constructed that will appropriately explain all particular local or national systems. This model is the intellectual expression or formulation of the modern theory of law, and the proponents of the modern view, including the most recent respected authorities, have accordingly set forth their theories as universally applicable. 45

As noted earlier, the autonomy of the legal system demanded by the modern view results in a theory of judicial decisionmaking that precludes the introduction of political and moral considerations into legal argumentation. 46 The next step is to consider the logic of legal autonomy at the top of the positivist pyramid and to inquire about its political function. The key to understanding the role that autonomy plays in the modern theory can be found by examining a puzzle pondered by all positivist theorists, the difficulty of deriving normative propositions of law (statements carrying legal obligation or “oughtness”) from general descriptive statements about society. 47 How does law get its validity? 48

46. See the discussion supra under the heading “The Task of Jurisprudence Under the Liberal Synthesis.” Note that this stricture distorts the explanation of the judicial process.
47. Some clarification of terms is called for at this point. A theory, or at least a social theory, is expressed in language. Language is composed of statements or propositions. Propositions may be descriptive or normative. Descriptive propositions state what “is” and
The modern view asserts that laws are valid normative propositions because they can be derived from a master rule that designates how laws are made. How do we know that the master rule is valid? The answer has created a dichotomy between the two leading positivist thinkers of the twentieth century. According to Hans Kelsen the validity of the master rule (Grundnorm) must be assumed or presupposed for any given legal system and no possibility of empirical verification exists. This answer, while straightforward, leaves us uneasy. H.L.A. Hart, influenced by a more empirical tradition, takes a subtle and ingenious approach to the question. According to Hart we are not permitted to ask whether the master rule (rule of recognition) is valid; rather, we may only ask if it is in fact observed in the society under consideration. Thus, all the rules of a legal system are valid; they are true in the sense of being derivative of other rules. The master rule, however, is different. It is true or false as a matter of fact; hence, in principle it is empirically verifiable. Even in Hart's system only the master rule is empirically verifiable. Determining whether a specific rule of the system is valid through any empirical test is impossible.

From the point of view of simple logic, how does Hart move from factual premises to normative conclusions? His argument seems deceptively simple. In challenging the validity of a legal rule Hart merely fol-

hence can be true or false. Normative propositions state what "ought to be" and hence can be right or wrong but never factually true or false. Consider two descriptive propositions: (1) all Irishmen have red hair; and (2) a catfish is a mammal. Both statements assert the truth of something. They do not purport to state what should be or should not be. The first statement is empirically verifiable because its truth can be tested by obtaining factual information. If we assume that we know the meaning of the terms catfish and mammal, then the truth of the second statement is established by resort to logical argument from definition or other premises and not by empirical verification.

Now consider the following normative proposition: John should promptly pay his bills. This statement does not purport to assert whether John has paid or usually pays or will promptly pay his bills. It does not assert anything about John's behavior; it makes an assertion about what he ought to do. Since no assertion is made about anything factual, the proposition cannot be empirically verified. The truth of the proposition can be established by logic if we assume or are given certain premises, for example: All moral agents should pay their bills promptly; John is a moral agent. In this sense the truth of a normative proposition can be established. A premise must be found that is normative (contains "ought" language) and for that reason cannot be subject to empirical verification. The truth of the premise, of course, can be demonstrated by deductive argument from some broader normative premise. No point exists, however, in which the truth of any normative proposition can be empirically established. Indeed, it aids clarification to call normative propositions that can be correctly deduced from other propositions "valid" rather than "true" since "true" may connote a factual basis. Apparently, David Hume was the first to explain what has come to be called the "naturalist fallacy." D. HUME, A TREATISE OF HUMAN NATURE (1777), reprinted in D. LLOYD, supra note 4, at 26. See generally V. PRATT, THE PHILOSOPHY OF SOCIAL SCIENCE 90-93 (1978); C. TAYLOR, NEUTRALITY IN POLITICAL SCIENCE (1967), reprinted in THE PHILOSOPHY OF SOCIAL EXPLANATION 139, 162 (A. Ryan ed. 1973).

48. See E. PATTERSON, supra note 13, at 147-72, for a discussion of different jurisprudential approaches to the question of law and its validity.

49. Kelsen, Professor Stone and the Pure Theory of Law, 17 STAN. L. REV. 1130 (1965), reprinted in D. LLOYD, supra note 4, at 326. Harris, the English exponent of Kelsen's pure theory, calls the master rule the "basic legal science fiat." J. HARRIS, supra note 4, at 70-81.

50. H.L.A. HART, supra note 4, at 102-07.

51. See supra note 47.
low its pedigree up the ladder to the master rule as illustrated in this very simplified argument:

1. You must compensate X. (Why? 2 & 3)
2. You have injured X. (Fact)
3. "One causing injury to another must make compensation" is a rule of the legal system. (Why? 4 & 5)
4. "One causing injury to another must make compensation" is a rule enacted by R. (Fact)
5. Rules enacted by R are rules of the legal system. (Fact)

Statement 5 is presumably the rule of recognition. Its truth can be determined by empirically studying the society in question to determine whether R's rules are generally regarded as comprising the legal system.

This argument is, however, fallacious. A more careful analysis reveals that the normative element represented by the "must" in statement 1 (the conclusion) has been surreptitiously introduced through the ambiguity of language in statement 3. The argument can be properly reconstructed as follows:

1. You are legally bound to compensate X. (Why? 2 & 3)
2. You have injured X. (Fact)
3. "One causing injury to another must make compensation" is a legally binding rule. (Why? 4 & 5)
4. "One causing injury to another must make compensation" is a rule enacted by R. (Fact)
5. Rules enacted by R are legally binding. (Why? 6 & 7)

Thus, we can see that a normative premise must accompany the purported master rule (statement 6) in order for normative conclusions to follow. The normative premise may be assumed (statement 7a) in the manner of Kelsen, or it may be a definition (statement 7b) as Hart seems to suggest. As reconstituted, nothing is logically wrong with the argument.

Why should we use these assumptions or definitions to support our theory when a more straightforward answer would be to supply the normative content for law with a normative political statement? For example, suppose that instead of being a definition or assumption, proposition 7 in the argument above is offered as a political proposition. Thus, in a liberal society propositions 6 and 7 might be restated and the argument continued as follows:

6. R is a representative assembly elected by the people. (Fact)
7. A representative assembly elected by the people makes rules that are legally binding. (Why? 8 & 9)
8. Rules that are legally binding can only be made by consent. (Why? 10 & 11)
9. A representative assembly elected by the people can consent to the imposition of rules on behalf of the people. (Why? 12 & 13)

Further propositions would presumably be drawn from the realm of political theory. Thus, the propositions that persuasively support the master rule and provide the normative basis of legal validity are political propositions. Legal argument converges upon and becomes political argument. The validity of law depends upon the validity of the political system.\(^5\)

Unfortunately, this simple and straightforward way of justifying the normative content of law runs afoul of that important component of the liberal synthesis, the rule of law. Once we admit that legal propositions derive their validity from political propositions, we are forced to examine the hierarchy of political principles to determine whether a potential contradiction exists between any of these principles and legal rules. There may, indeed, be no hierarchy. Possibly, in given circumstances some political principle may even conflict with the rule of recognition (or Grundnorm). If a moral or political principle of great weight, for example, the right to life, comes in conflict with a mere rule of law like the prohibition against physicians performing abortions, which shall prevail? If we find that the legislature that enacted all the laws of 1976 was not democratically constituted, that is, constituted according to the republican principle, does this mean that those laws are not law? Why not? Recourse to political propositions as guides to behavior or judicial decision would involve inquiry into vague norms that shade from principles into policies, which in turn are goal oriented and hence come into conflict with other goals and policies at some point.\(^5\)

Law and politics apparently become one impenetrable morass. Recall that one of the two tasks of jurisprudence under the liberal synthesis is to identify what counts as law. Only one criterion of identification can be admitted. In the modern view there can be only one Grundnorm. Otherwise official power would not be limited by legal rule, but by political expediency.\(^5\)

Another aspect of the rule of law, the separation of powers, also militates against deriving the validity of law from politics. In the modern theory political principles and policies guide lawmakers; law guides judges. Legislators are free to fashion rules toward whatever ends they see fit. Judges are bound to decide cases according to law. If political and legal propositions are essentially the same thing, the distinction between legislation and adjudication becomes attenuated. The modern theory requires then, in the interests of its own consistency, that the legal system be autonomous. This perceived autonomy may have some important psychological and social effects. Policymakers are insulated from the consequences of their policies, with the result that political criticism of judges is regarded as inappropriate. While the congressman's image may be that of “one of

\(^5\) This is the position of Marxist theory on this point. See infra text accompanying notes 64-72.

\(^5\) See R. Dworkin, supra note 1, at 82-84.

\(^5\) See infra the discussion of Soviet theory accompanying notes 68-75.
those fools in Washington," the judge's image is that of the impartial dis- 
penser of justice who must apply the law as written, however foolish that 
law may be. The lawyer or jurist is similarly insulated from the moral or 
political criticism reserved for politicians because his energies are confined 
to the law.

III. THE INSTITUTIONALIZATION OF THE MODERN THEORY

The liberal synthesis and the view of law that developed with it are not 
simply theoretical constructs or the playthings of academics. They have 
been institutionalized in the structure of western society's legal systems. 
Much of constitutional law incorporates the concepts of the liberal synthe-
sis; for example, the separation of powers, the subordination of judicial 
decisions to legislative will, due process, and majority rule. These doc-
trines and principles of our system are established in enactment, judicial 
interpretation, treatise, and practice. Public debate of political issues as-
sumes the instrumental character of law and the unquestioned validity of 
the democratic process. Legal argument and legal opinion demand justifi-
cation in terms of authoritative rules with their appropriate pedigree.

The educational process has also contributed to the institutionalization 
of the modern view. In secondary schools and colleges our system of gov-
ernment is taught mainly as liberal ideology, and the corresponding model 
of law as the rational instrument of political authority is implied or af-
irmed.55 The principal, if not exclusive, means of achieving social change 
today is thought to be through the enactment of new legislation.

In the law schools, however, the modern view receives its most impor-
tant sustenance. Like the medieval monks who preserved and transmitted 
thetical learning in the dark ages, the law faculties indoctrinate suc-
ceeding generations into the mysteries of the positivistic viewpoint, not 
through the overt teaching of jurisprudential theory, but through example, 
technique, and inference.56 In the law schools the neophyte lawyer is 
plunged into the logical games of analysis and exegesis, usually called le-
gal reasoning, in which the body of rules laid down by appropriate author-
ity is examined, dissected, compared, extended, and distinguished.57 He is

55. See, e.g., two texts commonly used in undergraduate political science courses: F. HARRIS, AMERICA'S DEMOCRACY: THE IDEAL AND THE REALITY (1980); S. PATTERSON, R. DAVIDSON & R. RIPLEY, A MORE PERFECT UNION (1979). These texts are not uncritical, but they clearly criticize from the viewpoint of the liberal synthesis.


57. The editor of the first law school casebook, Christopher Columbus Langdell, ex-
plained the use of the case method:

Law considered as a science consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases
taught that he must have an understanding of these rules and the ways in which they can be manipulated, because courts make decisions based upon them and legislation is drafted in accordance with them.

Viewing what the lawyer must know as a regime of interrelated rules is a very efficient organizing principle. The organization may be at a low level of abstraction with the interrelationships between categories being omitted, such as we see in legal encyclopedias and digests ("abatement" to "zoning"); or, more typical of continental law teaching, higher categories may be synthesized by rational process until great overriding legal concepts are arrived at ("juridical act," "subjective right"). The organizational framework engendered by this view is determined by logical connection and is not necessarily related to either social context or the lawyer's tasks. Thus, such diverse human activities as purchasing a refrigerator, agreeing to play baseball for pay, and playing a slot machine are all subsumed under the conceptual heading of contract. Most of the subjects of law are taught today in courses organized along these conceptual lines. This method has the great advantage of making a large body of law rational and hence usable.

Precision in thinking is perhaps the greatest contribution that the modern view has made toward the teaching of lawyering. An insistence on the careful use of language and an ability to manipulate legal terms and concepts are indispensable requirements for any lawyer. Argumentation within a closed system is clearly one of the most important of lawyerly skills. The law schools spend much time in making students analyze cases and interpret statutory materials. Indeed, the hallmark of the law school seems to lie in the dialectic of legal propositions as taught through the Socratic method.

Learning the law in the law schools is thus analogous to learning to play a very intellectual game. The heart of this game is argumentation within loosely delineated boundaries. The argumentation itself is important, not the result of the argument. A law student is taught to pride himself on being able to argue both sides of an issue equally well. Broad questions of policy or justice, while occasionally referred to, are basically outside the scope of inquiry. This approach tends to result in little or no connection between the thinking of social scientists, historians, and philosophers, and the thinking of legal scholars. The modern, positivistic view of law is not broad enough to take into account the perspectives of other disciplines. Social scientists, historians, and philosophers, using their own particular

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through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.


58. See J. Merryman, supra note 39, at 78, 81.

59. This generalization of course overlooks efforts in many American law schools today to emphasize an awareness of moral and social issues as well as to learning the skills of lawyering. While these efforts expand the scope of law school education, just as often they assume a positivistic notion of law itself.
methodologies, seek to find the truth. Academic lawyers, in contrast, seek to work out the logic of their own doctrines drawn from the basic authoritative rules postulated by the system. Thus we can see how the modern view of law is perpetuated in spite of much valid criticism. It has been institutionalized in the constitution and the traditions of legal practice as well as in the educational structure.

IV. Appropriation of the Modern Theory

While the liberal synthesis continues to be the dominant political ideology in many western countries, the twentieth century has seen considerable erosion of the ideology. For some political thinkers one brand or another of Marxism has wholly supplanted the liberal synthesis. Fascism, temporarily at home in Germany and Italy in the 1930s, is apparently still an accepted political world view in some of the emergent Asian and African nations and perhaps elsewhere. In the United States democratic relativism seems to have affected, if not modified, the more traditional liberalism at the academic level. Strangely enough, however, modern legal theory seems almost as healthy as ever. It is as though liberalism had created an efficient machine, and then the machine was duplicated through some sort of clandestine espionage and put to work for other masters. This Frankenstein phenomenon merits closer examination.

As earlier noted, the modern theory of law has grown up as a philosophy congruent and complementary to the liberal synthesis. This political synthesis consisted of four main principles: the republican principle, the legal monopoly principle, the design principle, and the rule of law. The principles of legal monopoly and design have a strong appeal to any political movement that wishes to establish a new type of society and to throw off the shackles of previous regimes. A perspective that sees law as the exclusive instrument of state policy unrestrained by any notions of natural law, religious doctrine, or local custom is certainly agreeable to the aims of most revolutionaries. Instead of the republican principle, however, some notion of true and good political leadership by an elite is offered as a substitute. The underlying political theory is, of course, substantially changed thereby, but the exclusive and instrumental nature of law remains attractive. With appropriate legislative modifications in policy, the same machinery that serves liberalism can serve socialist legality, nationalism, fascism, or other political ideologies. Indeed, this conversion seems to be what has happened.

This explanation is, however, too simplified for the appropriation of the

60. See J. Harris, supra note 4, at 70-106. Considerable empirical research has also been done in recent years by legal scholars, particularly with the support of the American Bar Foundation. These scholars, however, represent a small minority of legal academics.

61. E. Purcell, supra note 18, at 235.


modern theory by Marxist theorists, since there is more to be said about law in the Marxist view than the modern theory would admit. A brief examination of the Marxist ideology is therefore in order. According to this ideology, law is the instrument of the ruling class and is used to perpetuate that class in power. Law is also one of those aspects of culture, however, that is determined by the type of economy, or means of production, underlying any given society. Thus, a society with a feudal economy will have feudal law, a capitalist economy will have a capitalist law, and a socialist economy will have a socialist law. While the type of economy determines the type of law, the law can be used as the instrument of a revolutionary ruling group along with such other instruments as education, propaganda, and military force to change conditions in society in order to hasten the progress toward a new type of economy. The ultimate economy and society that mankind will move into is communism, in which each person contributes according to his abilities and receives according to his needs. At this point law and the state will wither away because they are no longer needed. This withering away concept, even if taken seriously, need not concern us since the Marxists themselves have not recently speculated about it.

What does concern us is the status of law in the Marxist countries of today. According to Soviet theorists, the Soviet Union has moved from the dictatorship of the proletariat established by the 1917 revolution to "a state of all the people." This is a transitional stage of development that will eventually lead to true communism. The political apparatus of the state is under the control of the Communist Party, which is an elite composed of those who supposedly understand the future of society and are committed to lead the country in the right direction. Until all of the people, including the workers, reach a stage of consciousness in which they can understand their true destiny, they cannot be allowed to interfere with or participate in the making and carrying out of social policy. Law and the state, along with the other instruments of social control, must therefore be maintained until the appropriate social conditions have been attained. For the Marxist, then, an elite such as the Communist Party is regarded as the legitimate political authority in socialist society. This part of Marxist theory, the main political part, replaces the republican principle of the liberal synthesis. The design principle and legal monopoly principle are completely accepted. Thus, the modern theory of law, except for the conne-

64. In contrast, Fascism apparently never developed any sophisticated jurisprudence. G. LICHTHEIM, supra note 26, at 225-37; see also Rudden, supra note 26, at 189.


66. We do not attempt here to consider the emerging views of the Chinese communists, which may well vary fundamentally from those held in the Eastern European communist countries. See J. HAZARD, supra note 65, at 519-28.

tion with the liberal principle of the rule of law, is congruent to Marxist political theory.

Although the Soviets acknowledge the principle of socialist legality,\textsuperscript{68} whether this is roughly equivalent to the rule of law, perhaps with an extra-egalitarian slant, is unclear. Lenin did say, "[Law] is politics,"\textsuperscript{69} and, of course, the police state practices of the Soviet Government over the years raise serious questions about whether even socialist legality is any real part of the Soviet philosophy. Clearly, though, the Supreme Soviet, the guiding political body at the national level, is above the law.\textsuperscript{70} Other features of the official Soviet system, such as the "comrades' courts" and the constitutional duty to respect the "rules of socialist human intercourse,"\textsuperscript{71} suggest the possibility of officially sanctioned conduct that has the potential of being contrary to law.

Assuming that the rule of law is substantially less secure as a political principle in the Soviet Union than in western countries, what effect does that have on the acceptance of the modern view of law? Several possible consequences may arise. The legal system will certainly be viewed as less than autonomous;\textsuperscript{72} separation of powers will be rejected or will take a different form;\textsuperscript{73} retroactive laws, including criminal laws, may be justified; and official acts, especially at higher levels of government, will not be limited by constitutional or legal rules.\textsuperscript{74} Law will take on a definite political caste and will be much less important in the culture of Soviet society than in countries with a tradition of the rule of law. Except for the last point, each of these propositions suggests a possible jurisprudential problem because of its potential inconsistency with the remainder of the modern theory of law. We would, therefore, expect that jurisprudential inquiry in the Soviet Union would be pursued along these avenues.\textsuperscript{75}

In the meantime some version of the modern view of law is alive and healthy around the world. Indeed, one of the first western institutions that emergent nations have adopted in their efforts to modernize and promote economic development is a positivistic conception of law and legislation.\textsuperscript{76} The rational, instrumental, secular, and monopolistic attributes of the modern theory are compelling to those who would restructure society.

\textsuperscript{68} R. David & J. Brierly, supra note 62, at 193-94. Socialist legality is explained thus: "Soviet citizens must obey Soviet laws because they are just; and they are just because the state is a socialist state which exists in the interests of all and not that of a privileged class." \textit{Id.}

\textsuperscript{69} J. Hazard, W. Butler & P. Maggs, supra note 65, at 5.

\textsuperscript{70} R. David & J. Brierly, supra note 62, at 210.

\textsuperscript{71} \textit{Id.} at 254; Rudden, supra note 26, at 191-204.

\textsuperscript{72} Roberto Unger makes the same conclusions regarding what he calls the "postliberal" society. \textit{See} R. Unger, \textit{Law in Modern Society} 192-223 (1976).

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} Some of these issues are indeed discussed in the authorities cited supra note 65.

\textsuperscript{76} For a thought provoking discussion of this phenomenon, see L. Friedman, \textit{The Legal System: A Social Science Perspective} 218-22 (1975).
V. IMPLICATIONS OF REJECTING THE MODERN THEORY

This Article has attempted to demonstrate the conceptual congruence of the modern theory with political ideology, and has suggested that the acceptance of the political ideology has entailed acceptance of the legal theory. The final question for consideration is whether rejection of positivism also entails rejection of the liberal synthesis or modern political ideology generally. That question is answered by advertent to six of the most important criticisms traditionally leveled at the modern theory and by considering their implications for political theory as well. As stated before, these criticisms are here accepted as essentially valid.77

1. The modern theory of law is nonempirical and nonscientific; hence, it cannot lead to explanation of causal relationships or scientific laws. This criticism suggests, although it does not prove, that the liberal synthesis itself is unscientific. This proposition is hardly startling, and, even if true, it does not undermine the integrity of the liberal synthesis or its capacity to organize our thoughts about political life. To the extent that it purports to be descriptive of actual legal systems, however, a nonscientific political theory does not have the attractive feature of self-correction through empirical verification that all scientific theories enjoy.

2. The modern theory of law cannot explain nondeliberate change in law. Something is seriously wrong with the design principle if law can change significantly over long, and sometimes shorter, periods of time without deliberate guidance or calculation by human beings, and as a result people are coerced or brought into conformity with policies and rules that no individual, much less the legislature, has designed. A failure of the design principle in turn entails a failure of the republican principle.

3. The modern theory of law is ethnocentric folklore peculiar to certain western societies. This charge suggests that the liberal synthesis, or perhaps more broadly, modern political ideology, is ethnocentric. Being ethnocentric does not undermine the validity of the theory for its use and application in our own society, but it does suggest that alternative or more comprehensive political and legal theory is necessary to account for what happens in quite different societies. It also implies that the moral and political values incorporated in the liberal synthesis are culturally relative. This does not rule out the possibility that certain values are absolute and are found in all societies, but moral skepticism is also consistent with this view.

4. The modern theory of law fails to recognize the operation of legal processes, other than the official ones, in society. Various groups and organizations in society generate their own law through rule-making and rule-applying. Members of these groups are coerced into conforming to such law under the threat of expulsion or other sanctions. The legal monopoly

77. See supra notes 3-25 and accompanying text.
78. See supra notes 12 & 25.
principle is thus constantly violated. Since this principle derives from the republican principle, it too is violated.

5. Administrative agencies and many units of local government combine adjudication, policymaking, and administration in the same body, sometimes using the same procedures. In addition, they often make regulations having the force of law without any real guidance from legislative mandates. The modern theory of law must resort to fictions to bring the operation of these agencies within its ambit. In fact, the separation of powers aspect of the rule of law is violated by the combined adjudicative-legislative practice, and the legal monopoly principle is violated by the largely unchecked lawmaking discretion of these agencies.

6. Finally, judicial decisionmaking cannot be adequately explained by the modern theory of law. The outcome of litigation is often, if not always, the result of a number of factors that are nonlegal in the positivist sense. Judges and juries use their own ideas of justice, of economic reality, and of other subjective notions in arriving at decisions. Principles of fairness and morality common to the community play a part and often prevail over legal rules. Thus, the parties to a case are often judged by and coerced by nonlegal rules. Sometimes these rules are arrived at and announced in the very case under consideration, so that they are in effect applied to the parties' conduct retroactively. Such rules also carry over to subsequent cases in the Anglo-American system through the doctrine of stare decisis.

This realistic view of judicial decisionmaking is contrary to all of the principles of the liberal synthesis. It violates the republican principle because the judges, not the people's representatives, are making a part of the law. It violates the legal monopoly principle because norms of decision are drawn from community morality and perhaps unarticulated subjective notions of fairness. It violates the design principle for the same reason. The rule of law is violated because rules are sometimes applied retroactively, and judges both make and apply rules contrary to the separation of powers.

This brief survey clearly indicates that the reasons for rejecting the modern theory of law are also reasons for rejecting the liberal synthesis. While it may be relatively easy to shake loose from the old jurisprudence, it may not be so easy to shake loose from our notions of democratic government.

79. This was realized by some of the early critics of positivism in the United States. Some seem to have lost their nerve or changed their positions. Unfortunately, the intellectual battle at this time was fought not between positivism and realism, but between natural law and realism with positivism often considered together with realism. For a fascinating account of this bit of intellectual history, see E. Purcell, supra note 18, at 159-218.