means do all legal theorists share this pious view, however. Though nearly all would acknowledge that Hart has given the doctrine of legal positivism the most impressive statement and defense of which it is capable, some critics still maintain that the entire outlook and perspective of legal positivism, even at its best, seriously distorts the nature of law and legal systems, that it only achieves (to use Hart's own phrase against him) "uniformity at the price of distortion." It is to the doubts and theories of such writers that we shall now turn.

Legal Realism

According to Hart, the central concept in terms of which law is to be understood is that of a *rule*. Hart (along with many earlier positivists such as Kelsen) adopts what Ronald Dworkin has called "the model of rules"—the view that law is best understood as a system of rules.[36] Though this view has a certain undeniable appeal to those whose perspective on the law is academic (e.g., philosophy and law professors), it has often seemed misguided to many lawyers, judges, and social scientists doing empirical research on legal behavior—all persons whose contact with the actual workings of legal systems is on a day-to-day basis. Earlier in this century, a group of Americans (loosely led and inspired by Justice Oliver Wendell Holmes, Jerome Frank, and Karl Llewellyn) developed something of a movement or school in jurisprudence called "Legal Realism."[37] Declaring that "the life of the law has not been logic," Holmes ridiculed the idea that legal cases are best understood as the application of rules. If this were so, then why do so many cases get litigated (i.e., why don't people just apply the rules the way they do in chess?) and why is it that, in most cases that do get litigated, the outcome could really go either way, something one would not expect for genuinely rule-governed behavior? Perhaps, suggested Holmes, this is because the law is *not* a system of rules waiting there in a strongbox to be taken out by judges and mechanically applied to cases as they arise. The role of the judge is actually much more discretionary and creative than this. Since the "rules" allow the judge considerable free play, he or she can in fact decide the case in a variety of ways, and the way that is in fact adopted will be more of a function of such factors as the judge's psychological temperament, social class, and values than of anything written down and called "rules." It is time, in short, for more realism about the law, where "realism" is understood to mean a scientific examination of why decisions are in fact reached rather than some academic exercise about how decisions could be constructed as logical consequences of rules. Think of the law, said Holmes, as a "prediction of what courts will decide," and base your predictions of what the courts will decide, said Frank, on a good psychoanalytic understanding of judicial temperament and not on some notion of "the rules."

So baldly stated, legal realism seems overly cynical. There is no government of laws—only a government of men (judges) who can do whatever they

jolly well feel like subject only to the constraints of their own temperaments and what others in society will tolerate. They may decide cases on whim (e.g., sexual attraction to one of the parties) and, though they may be subject to moral and political criticism for this, they can be subjected to no *legal* criticism. For, since there really are no legal rules, they cannot be criticized for failing to follow such rules. And what else could legal criticism be?

Though there are no doubt some judges who behave like this in some cases, most of us probably believe that they are a minority and would not take their arbitrariness as a model for judicial decisionmaking in general. We would probably describe them as not doing their job of attempting to apply the law (thereby showing that we regard them as open to legal criticism) and would no doubt echo the sentiments expressed by Neil MacCormick:

> In the absence of much good evidence, it seems reasonable to suppose that judges and lawyers are, like all humans, capable of occasional fits of humbug and hypocrisy, or of interpreting rooted prejudices as revealed truths. But equally, they are more commonly honest and honorable, capable of real efforts at, if never total achievement of, impartiality and objectivity; through practice, moreover, they have normally done more to develop habits of impartiality than many of those who are most strident in their denunciation.[38]

Not only does the theory seem overly cynical, it also seems open to easy refutation, at least as a definition or analysis of the concept of law. Consider Holmes's slogan: "Law is a prediction of what courts will decide." Some obvious problems arise for this.[39] (1) How do we tell what a court is? Is that not itself a legal question to be answered by applying rules (what Hart would call rules of recognition)? (2) On this model what is a judge himself really doing in interpreting a law in an actual legal case? According to this theory he is not really involved in deciding or interpreting at all. He is rather involved in an attempt to predict what he will decide! But what can this even mean? (3) On this theory we can draw no distinction between what is legally relevant in judicial decisions (e.g., precedents) and what is legally irrelevant (e.g., bribes); for, simply by being a factor in a particular judge's decision, any factor thereby becomes legally relevant. In short, this theory cannot capture an obvious feature of legal decision—namely, that certain considerations (e.g., precedents) function not merely to explain a judge's decision but also rationally and publicly to *justify* that decision in terms of standards shared by (and thus definitive of) a particular legal community. Just because in hard cases there may not be a unique outcome logically demanded by the rules, it does not follow that just anything goes. (4) Even if there are some hard cases that are radically underdetermined by legal rules, it is important to see that the vast majority of legal matters never even get litigated because, given certain rules, their outcome is almost mechanically obvious. It may be unclear just what constitutes "equal protection under the laws" in an exciting and controversial constitutional case

before the Supreme Court, but it is not comparably unclear on what date one is legally required to have one's driver's license renewed in Arizona.[40]

Since lawyers and judges spend much of their time on hard cases (e.g., in law school they read mainly casebooks that contain cases so complex that they are being discussed on appeal), these persons are perhaps inclined to overestimate the underdetermined nature of legal cases and fail to see that the hard and uncertain cases take place against a background of the vast majority of cases that are reasonably clear.

How could thinkers of such obvious intelligence have put forth a theory of law so easily refuted? The answer is that it is a mistake, I think, even to interpret them as attempting to create a general theory of the nature of law of the same type as that found in Austin and Hart, and it is really a cheap shot to take a programmatic remark such as "law is a prediction of what courts will decide" as a theory of this nature. This will make the legal realists open to easy (if unfair) refutation, but it will also cause us to miss some genuine insights that they had about the nature of law and the legal process. The theory of law that seems most plausible to a person is often a function of the *perspective* of that person on the law. Legal realism is, in large measure, the *lawyer's* perspective, and though it is unlikely that this perspective is the whole story, it is almost certain that it is such an important part of the story that any legal theory that leaves it out will be seriously flawed.

The insights of legal realism are mainly negative—a deep skepticism about the model of rules. Such skepticism could still be justified (as a criticism of positivism, say) even if the realists have no plausible theory to put in its place. Indeed, it is perhaps part of the skeptical program of legal realism to be skeptical about the value of *any* general and abstract theory of the law—to suggest instead that we look at the many and varied practices and behaviors we call "legal" and seek, in a somewhat piecemeal way, to build our understanding of law from below in a gradual and accumulative way.

If we do look at the actual practice of judicial decisionmaking, we will surely be forced to admit that it is at least not obvious that in hard cases judges are simply applying rules. And though this may not mean that just anything goes, the apparent presence of judicial discretion in cases where there either are no rules or the rules are vague or conflicting might mean that more than *one* outcome is legally possible—something not compatible with the yes/no, on/off character of rules. There is nothing necessarily cynical about this view; indeed, it might be defended on moral and political grounds as providing an opportunity for an otherwise static legal system to respond to novel cases. Justice Louis Brandeis, for example, believed that in many hard cases judges have to go beyond the rules of the law and decide cases, not on subjective whim or prejudice, but on grounds of good social policy. Thus, judges (so Brandeis claimed) should be aware of the social consequences of their decisions so that they can, where allowed discretion by the underdetermined nature of the rules, make these decisions

wisely for the general good. As a lawyer, Brandeis used to present judges with lengthy briefs containing sociological data about probable impacts of various decisions and policies. Such briefs are today still referred to as "Brandeis Briefs." The elaborate argument that won the day for school integration in *Brown* v. *Board of Education*[41] was a Brandeis Brief that developed an empirical case attempting to show that segregation psychologically harmed black children. This was used to argue that segregation is "inherently unequal," thereby denying black children "equal protection of the laws."

If Brandeis was correct in his general view, then those who condemn "judicial activism" and call for a judicial policy of "strict construction" (i.e., to simply "apply the rules") are speaking incoherently, at least for hard cases. These cases are hard just because they are underdetermined by rules, and thus some kind of "activism" (i.e., judicial use of discretion) is unavoidable. The debate should thus not be over activism versus nonactivism but rather over what kind of activism (reachings beyond rules) is acceptable. A judge can appeal to perceived intentions of founding fathers, a conception of good social policy, general moral principles built into the common law, or do nothing at all; all of these (even the last) is a kind of activism because all represent ways of doing something other than simply applying rules.

The *perspective* (if not the attempts at theory) of legal realism has now been revealed as important and provocative. If legal positivism is a correct theory of law, it must hold for all law, including hard cases. These cases at least seem nondetermined or underdetermined by rules, and so they seem to constitute a counterexample to the model of rules. Recent critics of Hart and positivism (including Ronald Dworkin who certainly would not call himself a legal realist) regard this objection, first developed by the legal realists, as the most serious objection to positivism, and most contemporary debates about legal positivism now center on the question "Can legal positivism provide a correct theory of adjudication (judicial decision) especially in hard cases?" Even Hart sees this problem, accepts that it is potentially the most serious problem for his theory, and makes efforts to refine his theory in such a way that the problem will be resolved and thus any objections based on it overcome. These are matters we shall explore in the next section.

The Reemergence of Natural Law

The theories developed in legal philosophy in recent years have reached such a level of subtlety and sophistication that application to these theories of such traditional labels as "positivism," "realism," or "natural law" is likely to distort as much as clarify the issues involved. All these traditional theories contained some profound insights, and it is thus not surprising that contemporary writers tend to attempt to take the best from each. And this is, of course, as it should be, for the goal of legal philosophy is to attain the most illuminating analysis of law, *not* to make sure that one keeps one's ideological credentials pure in order to merit a certain title for one's theory.