Western Journal of Legal Studies

Volume 6
Issue 1 *Law: Helping Hand or Iron Fist?*

Article 6

September 2015

The Importance of Social Activism to a Fuller Concept of Law

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Abstract
Legal positivists like H.L.A. Hart assert that law does not require morality to exist; in fact it insists on the separation of law and morality. Relying on Lon Fuller, this article argues against that proposition by suggesting that morality is necessarily part of law. Using Pierre Bourdieu's theory of field and capital, which suggests that social values are inherently a part of law, this article argues that the positivist view of law has a deficient theory of justice that can be used to secure injustice against disadvantaged groups in society. In this way, I conceptualize law as a field of contestation. This view enables the position that those who mobilize the right mix of resources, such as economic capital, social capital, cultural capital, political capital, and symbolic capital, are most likely to achieve success or advance their interests. Drawing on an analysis of the rule of law, judicial discretion, and *stare decisis*, this work attempts to demonstrate how social factors are inextricable from law's creation.

Keywords
legal positivism, natural law, HLA Hart, Lon Fuller, jurisprudence, philosophy of law, rule of law, legal system, philosophy, critical legal studies, social justice, stare decisis, justice, theory of justice, morality, judicial discretion

THE IMPORTANCE OF SOCIAL ACTIVISM TO A FULLER CONCEPT OF LAW

JOSEPH YAW ASOMAH*

INTRODUCTION

The law plays a vital role in governing a society. Governance is a form of social control:[1] social control is the "capacity of a society to regulate itself according to desired principles and values."[2] Law is a formal mechanism of social control, which has "(1) explicit rules of conduct, (2) planned use of sanctions to support the rules, and (3) designated officials to interpret and enforce the rules and often to make them."[3] Despite this basic understanding, there is no consensus on the concept of law.[4] A complete concept of law requires an understanding of what law is—its existence—and what law should be—its morality. This duality is represented in the positivist and non-positivist accounts of law, respectively. Generally, positivists maintain that there is no link between the law's existence and morality, while non-positivists maintain that morality is necessarily a part of the concept of law.[5]

H.L.A. Hart, a prominent British philosopher and legal positivist, insists on "the separation of the law as it is and law as it ought to be."[6] Therefore, positivists ultimately see justice formally: what is just aligns with the law.[7] Abiding by the law is considered just regardless of the outcome of its application. However, eminent legal philosopher, Professor Lon Fuller, argued that, "[l]aw, considered merely as order, contains, then, its

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[1] Margaret Platt Jendrek, "Two Models of Formal Social Control" (1984) 12:4 J Crim Just 335.

[2] Morris Janowitz, "Sociological Theory and Social Control" (1975) 81:1 Am J Soc 82 at 82.

[3] FJ Davis et al, *Society and Law: New Meanings for an Old Profession* (New York: Free Press, 1962) at 43.

[4] R Dworkin, *The Philosophy of Law* (New York: Oxford University Press, 1977) at 35; J Raz, *Practical Reason* (Oxford: Oxford University Press, 1999) at 136-141 [Raz]; J Fennis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) at 6-9; HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon Press 1994) at 78-80 [Hart, *The Concept of Law*]; Frank Lovett, "Positive Account of the Rule of Law" (2002) 27:1 Law & Soc Inquiry 42 at 52.

[5] R Alexy, "On the Concept and the Nature of Law" (2008) 21:3 Ratio Juris 281 at 285.

[6] HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 595 [Hart, "Separation of Law and Morals"].

[7] Leslie Green, "Legal Positivism", (January 3, 2003) *The Stanford Encyclopedia of Philosophy*, online: <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/> [Green].

own implicit morality. This morality of order must be respected if we are to create anything that can be called law, even bad law. Law by itself is powerless to bring this morality into existence."[8] Fuller's position recognizes that law's authority, and the recognition of this authority, is itself a moral position.

In this paper, Pierre Bourdieu's theory of field and capital is used to argue that the positivist position—that law and morality are separate—is untenable. As Fuller argued, "the considerations that make up the principles of legality are not *merely* law's ideals; *they are also its grounds*."[9] I use Bourdieu's theory to attempt to fill the gap between law's existence and its morality. Legal positivism denies that the content of the law impacts whether law is just[10] and accepts authoritative law as truth and formal justice. However, powerful societal actors are inclined to use this position as a justification for systematic oppression against disadvantaged groups. In the words of Fuller, "principles of legality are ideals that every legal system should aspire to."[11] Without some standard as to what the law *should* be, social actors have no basis upon which to dispute an unjust law.

If all laws are just, as held by the positivists, then there can be no principled, moral basis for social groups to rebel against. I argue that justice cannot necessarily be achieved by strictly observing laws. A proper conception of justice must go beyond legal positivism. In the positivist tradition, formal justice ignores the possibility that posited laws are inherently unjust. Fuller's articulation of the inner morality of law opposes this notion and argues that legal systems must: (1) have rules which are known; (2) be clear; (3) not be retrospective; (4) not contain contradictions; (5) not place impossible demands on its subjects; (6) not be revised on a temporal basis that prevents citizens from knowing the state of the law; and (7) administer justice in accordance with legislation.[12]

Fuller argued that citizens have two moral duties. The first is to obey the law, and the second is to do what is right and decent:

> On the one hand, we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think is right and decent. When we are confronted with a

[8] Fuller "Positivism and Fidelity to Law – A Reply to Professor Hart" (1957) 71 Harv L Rev 630 at 632 [Fuller, "Positivism and Fidelity to Law"].
[9] Daniel Priel, "Reconstructing Fuller's Argument Against Legal Positivism" (2013) Osgoode Hall Law School Working Paper No 16/2013 at 7 (emphasis added).
[10] *Ibid*.
[11] *Ibid*; Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 39 [Fuller, *The Morality of Law*].
[12] Fuller, *supra* note 11 at 39.

> statute we believe to be thoroughly evil, we have to choose between those two duties.[13]

I argue that this inner morality of law must, at a minimum, promote collective human security and welfare in society. For Fuller, "[l]aw, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behaviour of state officials."[14] Positing the obligation to follow the law as separate from the obligation to achieve justice leads to the conclusion that individuals and groups oppressed by legal injustice maintain a moral position to oppose unjust laws.

In order to demonstrate these claims, I critique the positivist account of law as a background to discuss the need for the involvement of social actors to fight unjust laws. First, I outline the positivist conception that law is a neutral tool and argue that this neutrality merely perpetuates the appearance of objectivity in law. Rather than being a neutral tool, I argue that the law must seek to achieve a moral goal. Second, I argue that the positivist conception of law ignores inextricable social factors that are necessary to produce law. I explore Pierre Bourdieu's theory, which recognizes how law is embedded in a broader sociological context and argue that law is best conceptualized as a struggle among social actors with varying degrees of resources vying for control over the law. Third, I discuss, through a critical perspective, how legal concepts are merely constructions used to further legal positivism. I argue that foundational legal concepts, such as the rule of law, judicial discretion, and *stare decisis*, bolster the positivist contention that law is neutral. Lastly, I investigate how social actors, particularly civil rights movements, may use the law to produce desired social changes.

I. OBJECTIVITY REIFIES A NORMATIVE UNDERSTANDING OF LAW

A. The Positivist Conception of Law

Joseph Raz, an Israeli legal positivist, defines law as a system of norms that provides a framework for the regulation of all social life.[15] Hart offers the following proposition as a summation of legal positivist perspective:

> [F]irst, in the absence of an ex-pressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it

[13] Fuller, "Positivism and Fidelity to Law", *supra* note 8 at 656.
[14] *Ibid* at 632.
[15] Raz, *supra* note 4 at 154.

> was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.[16]

While there are distinctions within the positivist account of law, legal positivism is generally not concerned with the merits of law but merely its existence: law and morality are separate, and law exists without a moral dimension.[17] Law that falls short of societal moral standards cannot simply be considered invalid law, nor can it be disregarded.[18]

Fuller disagreed with Hart's conception of law and morality as separate.[19] Fuller argued that law derives its binding power from morality. However, positivists respond that if the law pursues goals or endorses values that society does not share, then laws may be perceived as unjust. The fact that a law is perceived as unjust, however, does not mean that it is not law.[20] Hart famously defended Nazi law on the basis that, as positive law, Nazi law was still law.[21] The Hart-Fuller debate engaged the broad problems of positivism, but focused on the practical problem of what should be done about the Nazi laws during Hitler's reign. Fuller argued that, although Nazi law was authoritative in the positivist sense, it flagrantly disregarded an "inner morality of law."[22] Hitler's government engaged in activities that breached the law, but were retroactively sanctioned.[23] Laws were passed in secret, and even publicly available laws were enforced using punishment mechanisms that were not provided for in the legislation.[24]

Revisiting the Hart-Fuller debate in 1958, Nigel Simmonds, professor of jurisprudence at the Cambridge University Faculty of Law, posited that legal positivism "take[s] for granted the idea that authorities must decide upon the content of the law and will choose to enact as law those rules that they hope will advance certain goals or implement certain values."[25] Simmonds thus presents the alternative to legal positivism:

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[16] Hart, "Separation of Law and Morals", *supra* note 6 at 599.
[17] Green, *supra* note 7. See also *supra* note 11 at 154 (Raz argues that law is the supreme custodian of the social order: it guides citizens while providing a means for the authoritative settlement of disputes). Hart, *supra* note 6 at 599-601.
[18] Hart, "Separation of Law and Morals", *supra* note 6 at 599-601.
[19] Fuller, "Positivism and Fidelity to Law", *supra* note 8 at 632.
[20] *Ibid*.
[21] Hart, "Separation of Law and Morals", *supra* note 6 at 618.
[22] Fuller, "Positivism and Fidelity to Law", *supra* note 13 at 650, 655.
[23] *Ibid* at 651 ("The threat of such statutes hangs over the whole legal system, and robs every law on the books of some of its significant. And surely a general threat of this sort is implied when a government is willing to use such a statute to transform into lawful execution what was simple murder when it happened").
[24] *Ibid* ("wholesale killings in concentration camps were made 'lawful' by a secret enactment"); see also Fuller, *ibid* at 654 ("first, that it offers no justification whatever for the death penalty actually imposed on the husband, though never carried out; second, that if the wife's act in informing on her husband made his remarks 'public', there is no such thing as a private utterance under this statute.").
[25] NE Simmonds, "Law as a Moral Idea" (2005) 55:1 UTLR 61 at 61 [Simmonds 2005].

adherence to the law, and the law itself, can be interpreted as an embodiment of an "elevated aspiration."[26] Instead of being viewed as an instrument, governance by law in and of itself is seen as being "a virtue of a just political community."[27] In other words, law may have a moral goal that it strives to achieve. Nazi law viewed through this framework, for example, would be considered to uphold the virtue of the Nazi's political community by imposing moral judgments on German citizens who are not a part of it.

Simmonds highlighted a notable duality in the conceptualization law. For a positivist, the law is a set of mechanical arrangements where relations are regulated and objectionable conduct is punished.[28] Law, therefore, is morally neutral, impartial, and objective, given that it can be used for both desirable and non-desirable ends—assuming that justice is desirable and injustice is undesirable.[29] Simmonds argues that law is an "elevated aspiration."[30] He holds that "law cannot simultaneously be a lofty moral aspiration and a morally neutral instrument that is serviceable for evil as for good."[31] Simmonds argues that positivists interpret the law as having an internally consistent process, rendering it predictable, precise, and logical.[32] Within a legal system, an internally consistent process involves robust checks and balances to prevent arbitrary ruling. Since this system is designed to prevent arbitrary rule, it is presumed to be fair or just.

This appearance of justice is evident in some of the foundational legal concepts of liberal democracy, such as the rule of law, legal education, legal reasoning, and the doctrine of *stare decisis*. Together, these factors help reinforce law's image as a neutral mechanism for structuring society and for resolving disputes in a fair manner.[33] For example, the British legal analyst Roger Cotterrell argues that:

> …the judiciary guards vital and carefully nurtured characteristics of its own…authority—the image of impartiality and objectivity in decision-making, a stance of neutrality and aloofness based on judicial wisdom divorced from all political partisanship, and the highest level of technical expertise and adjudicatory skill.[34]

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[26] *Ibid*.
[27] *Ibid*.
[28] *Ibid* (Simmonds writes that if the law pursues goals or endorses values society does not share, laws may be considered unjust).
[29] NE Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press 2007) [Simmonds 2007].
[30] Patrick Capps, "Law as a Moral Ideal: By Nigel E Simmonds" (2008) 28:4 Legal Studies 631 at 631.
[31] Simmonds 2005, *supra* note 25 at 62.
[32] *Ibid*.
[33] *Ibid*.
[34] R Coterrell, *The Sociology of Law: An Introduction* (London: Butterwoods 1984) at 282 [Coterrell].

In other words, even judges themselves attempt to maintain the image of impartiality. As German legal scholar Gustav Radbruch argued, "…positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and injustice reaches such an intolerable degree that the state, as 'flawed law,' must yield to justice."[35] He suggests that law, on the basis of being authoritatively enacted, is strictly enforced even when it seriously and unfairly hurts many people. In Radbruch's words, "A law is law … [this] kn[ows] no restriction whatsoever."[36] Therefore, the positivist view of law may serve statutory injustice, as the law remains supreme regardless of its effects. The injustice and harm caused by Nazi law during the Third Reich caused Radbruch to reconsider this position, and he concluded after the war that his position was incorrect.[37]

While the positivist account attempts to explain what the law is, the explanation itself is non-comprehensive. The denial of any normative character required for law only creates the *appearance* of fairness, which can be ultimately used to secure injustice in society. While this does not directly contradict the positivist account (since positivists would not refute that law can be *used* by humans to serve injustice), it draws attention to the need for justice-oriented advocates to actively lobby and pressure political actors to ensure collective human welfare.

B. Bourdieu's Theory Shows Why the Positivist Conception of Law is Incomplete

This paper takes the position that law is fully informed by, and integrated with, social factors: ultimately, it is not possible to separate the law from its social position. Pierre Bourdieu provides a convincing theory of law that is arguably broader than the positivist account since it encompasses social factors as part of law itself. These social factors do not play a subsidiary role: social factors are the reason why law exists. As I will discuss in the next section, the legal system is dependent on these factors to exist. This will be demonstrated by an evaluation of the various concepts of that system. Bourdieu explains how the law, as one part of a complex society, can be used to advance different interests. As such, Bourdieu shows why positivism is incomplete and why a different conception of law is necessary.

Bourdieu is a structuralist, as he attempts to expose subtle power imbalances in society. He suggests that law is one of many "fields." A field is a structured social space of struggles involving competing social actors using varied resources for the control of

[35] Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law" (2006) 26 Oxford J Leg Stud at 7 (by positive law, Rachbruch meant law that is authoritatively enacted).
[36] *Ibid* at 1.
[37] For a more robust account of Radbruch's changing theoretical position, which has been controversial, see Hart, "Separation of Law and Morals"], *supra* note 6 at 616-617. See also Stanley L Paulson, "Radbruch on Unjust Laws: Competing Earlier and Later Views?" (1995) 15 Oxford J Legal Stud 489 at 489-490 at 489; Lon L Fuller, "American Legal Philosophy at Mid-Century" (1954) 6 J Legal Educ 457.

the right, or capacity, to advance their respective interests.[38] In other words, as a field, the law is a "relatively autonomous social microcosm; the juridical field is the site of a competition for monopoly of the right to determine the law."[39] The field, and thus law, is objective.

The objective field of law is contrasted with the subjective component of society, referred to as "habitus." Habitus is a system of dispositions (lasting, acquired schemes of perception, thought, and action).[40] Dispositions are developed in response to which objective conditions are encountered—such as law, for example. The merging of the objective and subjective in a given field creates "doxa." Doxa refers to the learned, fundamental, deep-founded, unconscious beliefs and values, taken as self-evident universals, which inform an agent's actions and thoughts within a particular field.[41] Within the field of law, certain values therefore inform the actions taken within that field. Doxa tends to favour the particular social arrangement of the field, thus privileging the dominant segment of the population and taking their position of dominance as self-evident and universally favourable.[42] In a doxic state, the social world is perceived as natural and rational.[43]

The struggle within the field revolves around capital or a range of resources, such as power and influence.[44] Loïc Wacquant explains that capital is diverse and encompasses resources that are generally economic, cultural, and social.[45] There is also symbolic capital, "which designates the effect of any form of capital when people do not perceive them as such."[46] He argues that this conversion process grounds the strategies that agents deploy to ensure the reproduction of capital.[47] Symbolic capital refers to socially recognized legitimacy: these are the ideologies most likely to be deemed right, acceptable, or legitimate.[48]

Fundamentally, the scale of power, influence, and resources available to individuals, groups, and organizations in a field are linked to the forms of capital

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[38] Pierre Bourdieu, "What makes a social class? On the Theoretical and Practical Existence of Groups" (1987) 32 Berkeley Journal of Sociology 1. Other fields include education, the arts, politics, and the economy.
[39] *Ibid* (emphasis added).
[40] Pierre Bourdieu, *Outline of a Theory of Practice* (London: Cambridge University Press, 1977) at 72.
[41] *Ibid* at 164.
[42] *Ibid* at 188.
[43] Pierre Bourdieu, "Structures, habitus, practices" in Pierre Bourdieu, *The logic of practice* (Stanford: Stanford University Press, 1990) 52 at 54.
[44] Pierre Bourdieu, "The forms of capital" In J Richardson, ed, *Handbook of Theory and Research for the Sociology of Education* (Westport: Greenwood Press, 1986) at 241-242 [Bourdieu, "The forms of capital"].
[45] L Wacquant "Key Contemporary Thinkers, London and New York" (New York: MacMillan, 2006) at 7.
[46] *Ibid*.
[47] Pierre Bourdieu, "Social Space and Symbolic Power" (M. Adamson, Trans.) *In Other Words: Essays Towards a Reflexive Sociology* (Stanford: Stanford California Press 1990) at 127.
[48] *Ibid*.

possessed and the effectiveness of their deployment. Specifically, actors struggle constantly to gain some sort of leverage over others in the competition for the appropriation of scarce resources within the field of law.[49] Bourdieu's theory thus provides a convincing account of how inequality is produced and reproduced in the law, given the advantage inherent in possessing and deploying the diverse forms of capital among the privileged group. Nonetheless, it also provides room for social change or justice, as social actors are constantly engaged in negotiating power and resources.

II. HOW POSITIVIST PRAXIS PERPETUATES OBJECTIVITY

A. The Rule of Law

In the following sections, I use specific legal concepts to demonstrate how social factors *cause* law to exist. Very generally, the rule of law requires that the law be applied equally to everyone[50] and that no one is above the law. A.V. Dicey, a famous British jurist and constitutional scholar, describes the rule of law as the idea that even those who make and administer the law are subject to it.[51] Roberto Unger, a critical legal studies author, argues that by rule of law, Dicey meant the avoidance of a situation whereby persons in authority exercise "wide, arbitrary, or discretionary powers of constraint."[52] American moral philosopher Tara Smith understands the rule of law as requiring that:

> …the laws not be applied erratically, depending on the idiosyncrasies of the particular men who happen to hold the relevant legal power. The Rule of Law insists on like treatment of like cases, and the relevant likeness is: by the law—i.e., as determined by the criteria that law sets forth. *Objectivity in the law allows a person to know both the content of the legal rules and that they are the standard to which he will be answerable.*[53]

Ultimately, arbitrariness in law can be avoided by ensuring that the rules are knowable in advance to citizens and are not changed without prior notice or warning.[54] The rule of law ensures that the law itself is the sole basis for holding both citizens and public officials accountable.[55]

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[49] Bourdieu, "The forms of capital", *supra* note 44 at 242ff.
[50] RM Unger, *Law in Modern Society* (New York: Free Press 1976) at 192 [Unger]; Tara Smith, "Neutrality isn't Neutral: On the Value-Neutrality of the Rule of Law" (2011) 4:1 Washington University Jurisprudence Review 49 [Smith].
[51] D Derham, F Maher & L Walker, *An Introduction to Law* (NSW: The Law Book Company, 1986) at 184-200 [Derham].
[52] Unger, *supra* note 50 at 192.
[53] Smith, *supra* note 50 at 60.
[54] *Ibid*.
[55] Unger, *supra* note 50; Smith, *supra* note 50 at 59.

As Smith argues above, law cannot exist at the whim of men in order for the rule of law to function. Denying that law has this non-arbitrary character reinforces the impression of impartiality. Positivism does not discount the possibility of arbitrariness: the possibility is just not relevant to a positivist concept of law. For law to be predictable, law must maintain consistency using widely publicized principles. Accordingly, law appears to be "a neutral guardian of the social order," emphasizing equality before the law, irrespective of creed, race, or sex.[56]

If the positivist account of law is accepted, then it is hard to believe that the law could be partisan. As indicated above, to fulfill the rule of law, law must be predictable. One way that predictability is fulfilled is through legal reasoning. For example, "legal reasoning… is intellectual and rational… The judge can come to know enough about the whole complex of law and fact to discover enough of the truth to settle wisely the disputes before the court."[57]

Formal, or objective, justice is how legal positivism secures law's existence by denying its potential morality. Angela Harris, an American critical legal scholar, defines objective justice as "the intellectual consideration and resolution of conflict by [an] impartial and disinterested party."[58] Theoretically, if judges use legal reasoning in the strictest sense (without recourse to personal and political biases), it follows that objective justice would necessarily be reached.[59] Thus, legal reasoning is apparently more likely to prevent personal prejudice that may negatively impact the delivery of justice. According to positivists, this is enough for justice, and thus law, to exist. Ngaire Naffine, a critical legal feminist scholar, describes this phenomenon as "divorced from politics, morals and systems of belief;" she also stated that "law's task is to discern 'the facts' (as they are referred to in court) and find the truth of any given matter place before it."[60]

Despite the apparent strength of the relationship between legal reasoning and the rule of law, critics show how the connection is not so straightforward. Hart, himself a legal positivist, argues that judges may look outside black-letter law for acceptable standards to guide them in deciding hard cases in which there is a legal gap due to indeterminacy in existing laws. This discretion may be based on the ideals of society's morality or justice.[61] However, he accounts for this by arguing that treating like cases alike can prevent discrimination.[62] Thus, for Hart, justice does not require a more

[56] Unger, *ibid*.
[57] Derham, *supra* note 51 at 189.
[58] WJ Harris, *Legal Philosophies* (London: Butterworths, 1980) at 259-260.
[59] *Ibid* ("legal reasoning, whatever it comprises, is supposed to exclude personal bias").
[60] N Naffine, "Blind Justice", in N Naffine, ed, *The Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen and Unwin, 1990) at 24 [Naffine].
[61] Hart, *The Concept of Law*, *supra* note 4 at 128.
[62] *Ibid* at 160.

comprehensive vision of justice: there is no minimum standard for justice other than the existence of law.

American critical legal scholar Karl Klare, however, places doubt on the rule of law and how legal actors uphold it. Contrary to common perception, he argues that legal materials (such as statutes and case law) do not completely determine the outcome of legal disputes.[63] He questions how an adherence to a particular mode of reasoning can set law free from subjectivity that may affect the delivery of justice, or perhaps from equality before the law.[64]

Marxism echoes this skepticism of legal reasoning by attempting to explain injustice in law as a by-product of the whole social structure: "[l]aw is constitutive of all social relations, and reflects and legitimizes the embedded values of the dominant class(es)."[65] In effect, "law does not derive from consensual social values, rather it employs state power to impose class specific values."[66] Law legitimizes the capitalist social order under this view by appealing to concepts like the rule of law. These concepts present a false appearance of checks and balances and, more importantly, of equality and justice.[67] Justice must encompass collective human security and welfare in society. Therefore the law must advance these goals or otherwise be deficient.

B. Judicial Discretion and *Stare Decisis*

Judicial discretion in the legal-reasoning process gives rise to critiques of objectivity in the application of *stare decisis*. However, one could argue that discretion is consistent with objectivity because discretion is exercised in accordance with legal reasoning and legal principles. This position follows the same logic of the positivist view: it is not the theory itself that lacks neutrality, but those who use it as an instrument that may alter its normative character. However, law cannot be divorced from its social apparatus, as embodied by the doxa. This social apparatus is the necessary condition for law to exist and, as Bourdieu argues, the result, the doxa, is a combination of objective law and subjective social values that are accepted as universal truths. Therefore, the positivist assumption that legal education leads automatically to legal reasoning, which in turn will lead to legal neutrality and objectivity, is not entirely correct. Legal reasoning, as part of the field of law, represents certain social values and thus, so does law.

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[63] Karl Klare, "The Law School Curriculum in the 1980s: What's Left?" *Journal of Legal Education* 32 (1982) at 340.
[64] Karl Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62 Minnesota Law Review 265- 339 as cited in Ngaire Naffine, *The Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen and Unwin, 1990) at 27.
[65] Alan Hunt, "Marxism, Law, Legal Theory and Jurisprudence" in Peter Fitzpatrick, ed, *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press, 1991) at 103.
[66] *Ibid*.
[67] *Ibid* at 102-103.

Stare decisis is equally problematic, given that this concept can contribute to arbitrariness and, thus, to injustice. *Stare decisis* requires that judges treat like cases alike with reference to the previous judicial rulings on such like cases.[68] This process is largely considered as logical and involves "the extension by analogy of principles gathered from previous decisions to the circumstances of new cases."[69] The implication from *stare decisis* is that the law is interpreted as a rational accumulation of the judicial wisdom derived from the pragmatic judicial decisions based on a case-by-case approach, rather than being "elaborated from *a priori* general concepts or legislated in the form of codes and statutes."[70] The logic underlying *stare decisis* is to separate judicial decisions from political and personal influences to ensure objectivity, predictability, certainty, consistency, and correctness of judicial verdict. In this light, the assumption is that the judge's verdict is almost invariably predetermined.[71]

However, *stare decisis* is more flexible than it appears at first glance. This is shown through an examination of jurisprudence. Judges use their discretion to sometimes choose between competing precedents.[72] Using legal reasoning and applying legal principles, each precedent could seemingly stand on its own. For example, in Case A, the judge can apply Case B and get one result, but he can also apply Case C and get another (assuming neither case is more authoritative). The judge must resolve the dispute and, most of the time, pick a winner and a loser. Therefore, there are other considerations besides legal reasoning and strict application of legal principles for a judge.

III. BACKLASH: LAW'S DISSIDENTS

This section will argue that the image of neutrality espoused by legal positivism is responsible for certain injustices in given societies. Injustice does not result merely because of how humans use the law: laws themselves can be unjust. Bourdieu supports the contention that the positivist model serves injustice due to power dynamics and resource imbalances. For example, crimes committed by powerful groups in some societies (like political and corporate crimes) are not clearly defined, legislated, and punished.[73] In Ghana, corruption involving government officials is less frequently

[68] Unger, *supra* note 50 ([t]he law must be knowable in advance to guide citizens, that is the law must be predictable and certain; on the contrary, legal uncertainty implies that legal subjects would not know what is expected of them and therefore, they might break the law unknowingly and be sanctioned).
[69] A Sachs and JH Wilson, *Sexism and the Law: A Study of the Male Beliefs and Legal Bias in Britain and the United States* (Oxford: Martin Robertson 1978) at 45.
[70] Coterrell, *supra* note 34 at 18.
[71] Naffine, *supra* note 60 at 27.
[72] D Dyzenhaus, "The genealogy of legal positivism" (2004) 24:1 Oxford Journal of Legal Studies 39 at 44.
[73] D Drake, "Punishment and Corporate Crime", (November 4, 2009) *Punishment and Corporate Crime*, online <http://www.open.edu/openlearn/body-mind/punishment-and-corporate-crime>.

punished,[74] while crimes committed by disadvantaged groups, like stealing of a few tubers of cassava, are more heavily sanctioned.[75]

Some scholars take this argument further, arguing that this neutrality is seized by dominant groups and used as a tool of oppression. African human rights scholar Akinola Atkintayo argues that apparent legal neutrality is largely responsible for perpetuating poverty in some contexts and jurisdictions.[76] Lucy Williams, an American professor of law, similarly argues that private law is responsible for poverty:

> The dominant political discourse in Western nations, reinforced by our legal cultures, teaches that poverty arises naturally and that the legal system bears no responsibility for causing it. *Private law concepts of family, tort, property, and freedom of contract are made to appear as the necessary and neutral framework of social and economic power relations, independently of law.* The dominant political culture denies that these background rules privilege any group or have anything to do to with allocating wealth or income. The role of law in distributing property, valuing waged labour, and consequently devaluing other forms of 'subsistence work' and 'caregiving work,' is almost always invisible. In fact, the stubborn persistence of poverty, in both developed and developing countries, results in significant part from political and legal decisions and institutions that generate and sustain a sharply unequal distribution of wealth and resources.[77]

This suggests, contrary to the positivist assertion that law bears no moral responsibility as an instrument, that law is a *cause* of oppression and inequality.

The systematic oppression of certain groups is also apparent in the laws of the United States, where racism against African-Americans is more pervasive.[78] As a report published by Amnesty International in 2015 stated: "the shooting of Michael Brown in Ferguson, Missouri and countless others across the United States has highlighted a widespread pattern of racially discriminatory treatment by law enforcement officers and

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[74] See Bright Oduro, "Country Report-Ghana" Resource Material Series No 66, 126th International Senior Seminar Participants' Papers.

[75] *Ibid*. See also Kenneth Agyeman Attafuah, "Confronting the Horrors Within: A Trilogy of Compelling Human Rights Violations in Ghana's Criminal Justice System -- Police Killing of Robbery Suspects, Judicial Abuse of Bail, and Prison Conditions", Kama Conference Centre, Labone Accra, September 2013.

[76] AE Akintayo, Planning Law versus the Right of the Poor to Adequate Housing: A Progressive Assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010" (2014) 14:2 African Human Rights Law Journal 553 at 554; LA Williams, "The legal construction of poverty: Gender "work" and the "social contract"' (2011) 22 Stellenbosch Law Review 463 at 468 [Wiliams].

[77] Williams, *supra* note 76 at 468 (emphasis added).

[78] Amnesty International, *Deadly force: Police use of lethal force in the United States* (New York: Amnesty International 2015) at 1.

an alarming use of lethal force nationwide."[79] This finding is controversial because judicial proceedings are viewed as absolute. The grand jury's refusal to indict Officer Wilson in the Michael Brown decision stands in direct opposition to this issue of systemic oppression. The recent killing of Walter Scott, an unarmed African-American man who was fleeing from law enforcement officials, is instructive.[80] Without the video footage by a passer-by, this may not have been possible. His accounts of events had earlier been accepted on the grounds of self-defence. This is a particularly compelling illustration of why actors who demand social justice need to mobilize the necessary resources or capital for their cause.

If disadvantaged groups want to secure social justice, there is a need for the mobilization of the varying forms of capital, as outlined by Bourdieu.[81] However, some pertinent questions come to mind: How do we mobilize the requisite forms of capital to address widespread social inequalities or political corruption? What types of responses are appropriate for dealing with varying inequalities? What is the role of law? While there are no straightforward answers, it is helpful to evaluate various ways that groups, individuals, and organizations can impact their struggle for social justice.

In this section, using specific case studies, I use the concept of transnational advocacy networks[82] to show how to mobilize forms of capital to champion social causes. Using an advocacy network is the process of pleading the cause of others, or defending a cause or a proposition collaboratively.[83] An advocacy network searches for politically and legally receptive venues by building a web of powerful actors to contribute to social change. For example, International Needs Ghana (ING), a non-governmental organization, mobilized different forms of capital to put pressure on the state to protect the rights of *trokosi* victims.[84] ING built a strong coalition of powerful actors, such as the Commission on Human Rights and Administrative Justice, whose influence and power resulted in the criminalization of the *trokosi* practice in 1998. Additionally, in Africa corruption is one of the major factors perpetuating poverty.[85] As a result, concerned citizens in Ghana began an anti-corruption coalition movement. This

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[79] *Ibid*.
[80] Allan Binder and Manny Fernandez, "South Carolina Police Shooting Seen as Crime Strategy Gone Awry" (April 9, 2015) *The New York Times* online: <http://www.nytimes.com/2015/04/10/us/south-carolina-police-shooting-seen-as-crime-fighting-gone-awry.html?_r=1>.
[81] By social justice, I am referring to the disadvantaged community's notion of what is fair.
[82] Margaret E Keck & Kathryn Sikkink, "Transnational Advocacy Networks in International and Regional Politics" (1999) 51 International Social Science Journal 89 at 92 [Keck & Sikkink].
[83] *Ibid*; OV Vieira & AS Dupree, "Reflections on Civil Society and Human Rights" (2004) 1:1 Sur International Journal of Human Rights 47 at 57.
[84] "*Troskosi* is a cultural and religious practice in some parts of Volta region in Ghana which turns virgin girls into slaves of the Gods as a form of reparation for crimes committed by their family members. J Asomah "The demand for cultural rights versus human rights: A critical analysis of the *trokosi* practice in Ghana and the role of the civil society" (2015) 15:1 African Human Rights Law Journal 129 at 131.
[85] Transparency International, "Poverty and Corruption in Africa" (2014) *Transparency International*, online: < http://www.transparency.org/whatwedo/activity/poverty_and_corruption_in_africa>.

movement is pressuring state officials to take proactive steps to fight widespread corruption in the country.[86]

Mobilizing resources for social change is not limited to large organizations. Individuals can also chalk up successes equal in measure by engaging with the law directly. For example, lawyers are ideal social actors because they are well-versed in matters of rights and rights violations in reference to the law. For example, Martin Amidu, a lawyer and civil rights activist, highlights the vital role that lawyers can play in social justice movements. In Ghana, he won civil suits against companies who had illegally claimed millions of US dollars from the state.[87] This wrongful payment of monies deprives the nation of the resources that would otherwise be used for national development.[88] Martin Luther King Jr., a famous civil rights activist, pioneered an unprecedented civil rights movement that highlighted deep-rooted racial injustice against African-Americans in the United States.[89] He argued that citizens have both legal and moral responsibilities to fight unjust laws, such as segregation laws: this resulted in a mass resistance movement.[90]

More generally, the recent and unprecedented advancement in communication technology has provided unique opportunities for mobilizing a wide range of advocacy networks for publicizing and tackling social injustice.[91] This is evidenced by the widespread growth of social media platforms such as Facebook, Twitter, and YouTube. This shift in technology has facilitated the gathering of resources (capital, power, and influence) to initiate, stimulate, and sustain common social action. As indicated, specifically by the Walter Scott case, the smartphone has become a powerful tool for collecting evidence.[92] Advocacy networking can therefore benefit from using the opportunities provided by advancements in communications technology.[93]

The above discussion is a limited demonstration of how individuals, organizations, and other social actors have a crucial role to play in tackling numerous social problems. Building up civil society networks is particularly useful for creating

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[86] JT Mordy, "Civil Society Organizations to Haul Government to Court Over Failure to Reverse Wrongful Payments", (December 9, 2014), *My Joy Online*, online <http://www.myjoyonline.com/news/2014/December-9th/csos-to-haul-govt-to-court-over-failure-to-retrieve-wrongfully-paid-judgement-debts.php>.
[87] *Ibid*.
[88] *Ibid*.
[89] ML King Junior, "A letter from the Birmingham Jail", (April 16, 1963) online: <http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html>.
[90] *Ibid*.
[91] J Thompson, "The New Visibility" (2005) 22 Theory, Culture and Society 31 at 31; AJ Goldsmith, "Policing's New Visibility" (2010) 50 British Journal of Criminology 914 at 914, 931 [Thompson].
[92] G Brown, "The Blue Line on Thin Ice: Police Use of Force Modifications in the Era of Camera Phones and Youtube*"* (2015) British Journal of Criminology at 1; AK Farmer, IY Sun & BC Starks, "Willingness to Record Police-Public Encounters: The Impact of Race and Social and Legal Consciousness" (2015) Race and Justice 1 at 1.
[93] Thompson, *supra* note 91 at 31; Goldsmith, *supra* note 91 at 914, 931; Brown, *ibid*.

the necessary conditions for asserting and realizing justice. These networks have the ability to represent the voice of disadvantaged groups and disseminate their plight widely across various social platforms. This method of dissemination may also uncover injustices and protect private spaces from invasions by the state and market. Finally, civil society networks are crucial for lobbying for policy changes by pressuring, or collaborating with, the legal and political systems.[94]

CONCLUSION

This paper has outlined the positivist conception of law and argued that its main tenet, that law and morality are separate, is deficient. Legal positivism deems the social factors inherent in the field of law irrelevant. Rather than being a neutral tool, I posited that law seeks to achieve a moral goal. I then used Pierre Bourdieu's theory, which places law in a broader sociological context, to show how law is moral in itself. Lastly, I investigated how social actors, particularly civil society groups, may use law to produce some desired social change.

The social order is never strictly static; instead, it evolves over time as social actors are continuously engaged in negotiating for their share of power and resources. Law, as Bourdieu points out, is thus an important field of power struggles. Law conditions, and is conditioned by, social relations. If the doxa espouses the views of the dominant class into the field of law, then injustice can be perpetrated against minorities. However, actors seeking social justice can mobilize against injustices. It is an advantage for an agent to have the capacity to mobilize and deploy the varying forms of capital skillfully. Civil society organizations need to form strong networks in order to fight injustices to elicit both political and legal responses. This is especially likely if they tap into the power of networking, facilitated by the advancement in communication technology. Fundamentally, the histories of most struggles for social justice have involved persistent activism. These struggles have employed demonstrations, strike actions, legal challenges in the courts, negotiation and dialogue, and transnational advocacy networking. Often, this demands perseverance, courage, tenacity of purpose, and an intense passion for justice to ensure success.

[94] Keck & Sikkink, *supra* note 82; OV Vieira & AS Dupree, "Reflections on Civil Society and Human Rights" (2004) 1:1 Intl JHR 47 at 57; MR Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2008).