

# On Law and Justice

A REJOINDER

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Richard Hammill [The Church *Does* Need a Law School, Summer 1969]<sup>1</sup> has obviously touched on a controversial subject. Since the publication of this article, a lawyer and a nonlawyer as well have discussed the question of whether or not it would be desirable to establish an Adventist law school,<sup>2</sup> and one might therefore say that the subject has been so well elucidated that there is hardly much else to add. However, Hammill discusses some basic issues, legal and philosophic, which are controversial and on which, throughout history, philosophers and jurists have tried hard to reach a satisfactory agreement. Because Hammill's article is fragmentary and tendentiously misleading, I think that further comments on it are justified.

Hammill regrets that too many lawyers approach law in a completely secular framework. He maintains that the place of law in society can be understood more realistically in the light of Christian doctrine and the divine claim on man. If he means that the theory of law as science should benefit by philosophy of religion, then I think that he is right. It would probably be stimulating and fruit-bearing if lawyers, when carrying on their scientific study, worked in close collaboration with sociologists and philosophers in the field of religion. But if Hammill wants to stress a lack of aim at realism in jurisprudence, then I think that he does not understand this point and that he makes poor and hasty conclusions.

Hammill sweepingly makes short work of two outstanding legal scholars: Holmes from the new world and Kelsen from the old. The reader easily gets the impression that Holmes and Kelsen are false prophets. Because he is presented with feeble facts and with the idea that the source of law is

God, and that law is an extension of God's will and God's order, the reader is led to think that the Decalogue is the second edition of the law. (True, our "secular" laws follow the general direction of these commandments, although deprived of their theological basis.) Hammill further claims that the commandment "Thou shalt not bear false witness" hides itself behind the Law of Contracts. Finally, Hammill concludes that the church needs a school of law to teach about the source of law, its nature, and its existence to provide for justice.

What kind of shocking sins of omission has Hammill found in jurisprudence? What mistakes ought to be corrected by an Adventist law school — mistakes which, according to Hammill, have contributed to the idea that most law schools are pervaded by legal philosophies that do not accept that law exists to provide for justice?

The problem concerning the origin, the nature, and the binding force of law has occupied the minds of philosophers, social reformers, and jurists from ancient times. Although theories and doctrines have varied through the ages, with some simplification we can divide the ideas into two main groups.

1. On one side, one finds old views that operate with law as an idealistic, normative phenomenon; that is, law consists of a coherent system of norms which, either because of their own inherent qualities or because of the authority of the forces or social authorities that create and uphold the law, are binding for the individuals. The first of these views is typical of the different variants of "natural law;" the last appears in mutually rather heterogeneous schools that can be classified within the term *legal positivism*.

2. On the other side, one finds modern schools that look on law as a complex of social facts and events of such a real nature that they are accessible for objective study and analysis with empirical methods. Among the modern schools one finds the *American realist movement*, whose foremost mental father is Oliver Wendell Holmes. Holmes was a pragmatic positivist or a judicial skeptic whom Hammill would perhaps call an ethical relativist.

It is true that Holmes was one of the most influential exponents of relativism — at least in the common law world. In his famous essay "The Path of the Law,"<sup>3</sup> Holmes gives an entirely empirical and skeptical definition of the law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Consequently, if he were literally interpreted, there could not be, according to Holmes, any connection between law and ethical ideals. Hammill remarks that "this concept . . . has become a fundamental concept in modern jurisprudence."

The latter statement is not so. This definition in itself is onesided, exaggerated, and utterly incorrect.<sup>4</sup> "As has been pointed out by many competent critics, Holmes himself, neither as a jurist nor as a judge, adhered to this statement."<sup>5</sup> Therefore it seems to be incorrect to assume from this remark that Holmes wanted to eliminate the "ought" from jurisprudence and that his philosophy of law is indifferent to any values. One can ask whether Holmes here pretended to say more than that judgments of values cannot be scientifically proved. If that is not so, his views might be, and in reality were, radically different from the proposition that values do not count.

Kelsen, on the other hand, tries to make jurisprudence immune from political conflict by eliminating values from jurisprudence. In his "pure theory of law"<sup>6</sup> Kelsen places law outside the world of time and space. His aim is to demonstrate how law should be treated without being mixed up with elements alien to its true nature. This means in particular that law must be sharply distinguished from ethics, on one hand, and from the facts of social life and the natural world in general, on the other hand. Kelsen's "pure theory of law" is of primary interest as an attempt to reach a kind of solution to the validity problem of the law. However, he has not made a more thorough analysis of the nature of the rules of law. Kelsen's theory may be looked on as an *extreme* among modern attempts to elucidate the nature of the rules of law in order to express it in a more correct manner and thereby expose the background of the untenable theories which, after the classical theory of "natural law," have appeared in the form of the will-of-the-state theory of historical legal positivism.<sup>7</sup>

Another extreme position is represented by the Swedish jurist, Karl Olivecrona, one of the Scandinavian realists. Contrary to Kelsen, he looks on the rules of law as a phenomenon that belongs to the world of time and space. The Scandinavian realists' scientific method of approach is characterized by the fact that their works never begin with a definition of law. In order to come out with a definition, they must analyze the facts first. This procedure consists simply of taking up such facts as are covered by the expression *rules of law*, and from the very start there is no attempt to make any assumptions concerning the nature of these rules.

In general, I think that we could learn much from this approach. A jurist, whether Christian or not, must devote himself to his work with a humble mind and without first having bound himself to a "patent solution." Holmes' approach to the judicial function in a free and democratic society was first of all a philosophy of humility. As Friedmann puts it: "He perceived the arrogance or the ignorance of many of his predecessors who had

asserted their faith and their prejudices under the guise of objectivity. Against this, Holmes did not assert another dogmatic faith, but a philosophy of responsible and humble skepticism, based on a careful study of the problem involved and the scrupulous weighing of the conflicting values and interests at stake."

We Adventists should be proud of and rejoice in our message. But let us strive for humility and, above all, for temperance in all things. We must intelligently and without bias scrutinize things — especially questions of this far-reaching and difficult nature. Then, perhaps, with increased knowledge we will be able to put away from our Christian belief seeming disagreements. A better understanding between the church and the jurists might be one of the results. Only in such a manner — through an intelligent and unbiased study of the great and difficult questions of law — would we be able to obtain mutual benefit and gain "a more adequate view of the place law holds in all areas of life — including religion." Thus may Hammill's aims be reached.

#### REFERENCES

- 1 Richard Hammill, The church *does* need a law school, *Spectrum* 1:5-11.
- 2 John Jerry Wiley, Discussion: an Adventist law school? No! *Spectrum* 2:71-80.
- 3 *10 Harvard Law Review*, p. 457 (1897).
- 4 Friedmann, *Legal Theory*, fifth edition (London: Columbia University Press 1967), p. 293.
- 5 Friedmann.
- 6 Friedmann, *supra* note 4, p. 275.
- 7 Karl Olivecrona, *Law as Fact* (London: Oxford University Press 1939), p. 22.