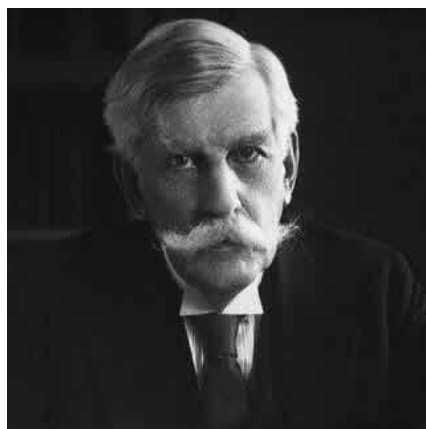


“Positivism and the Separation of Law and Morals”

PHIL 420
Philosophy of Law
Distance Delivery
Lecture Three

Holmes Lecture



- **Invited lecture**
- **Legal publication**
- **Honoring Holmes**
 - **Clarity**
 - **Boldness**
 - **Possible errors**
- **Treating Holmes as sympathetic to positivism**

Defense of the Positivists' Project



- **Bentham and Austin**
- **Utilitarianism**
- **Severability thesis**
- **Austin on divine commands**
- **Bentham on divine commands**
- **Hart on divine commands**

What Positivism Is Not



- **Historical connection between law and morals**
- **Moral judgments can be brought into the law**
- **Without explicit human actions morals are not in the law**
- **Constitutions**
- **Sentencing**
- **Morality and the law**

Austin's Errors



- **Positivism**
 - **Analytic clarity**
 - **Severability thesis**
 - **Command theory**
- **May reject part without rejecting whole**
- **Gunman objection**
 - **Gangster law**
 - **Cult-leader law**
- **Legislation in constitutional democracies**
- **Commands in the military**
- **Rights**

Legal Realism



- **Holmes**
- **Judges deciding cases**
 - **Their language**
 - **Their behavior**
- **Vehicles in the park**
 - **Clear cases**
 - **Hard cases**
 - **Semantic indeterminacy**
 - **Legal action is required**
- **Might all law be like this?**
- **Importance of moral judgments**
- **“Formalism”**

Nazi Law



- **WW II**
- **Gustav Radbruch**
- **Unjust laws**
- **Civil disobedience**
- **Revolution**
- **Evil wife example**
 - **Her defense**
 - **Court's rejection**
 - **Hart's dissatisfaction**
- ***Ex post facto***
- **Nazi war crimes**