BLOG

REORIENTING THE LEGAL ACADEMY

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The American legal academy is in a state of disarray. Ideological diversity is frowned upon.[1] Neutrality is no longer a hallmark of law schools.[2] Instead, administrative bureaucrats opt to impose "ideological brands" on their schools to "help fundraising and student recruitment."[3] Often, the ideological brand is a progressive one. This makes sense, as only the progressives emphatically work towards advancing an "unacknowledged vision of the good[.]"[4] And the progressives are correct to do so—there is a good that the law must grasp. However, paradoxically, progressives advance substantive arguments on the morality of law while remaining voluntarily bound by the tight grip of legal positivism. Originalists laudably attempt to correct the progressives' false notion of the good, but do so by arguing that "the law can be identified independent of morality"—they are dead wrong.[5] Law can only flourish when it incorporates "genuine concern for the common good at ever higher levels—individual, family, city, nation, and commonwealth of nations."[6] This is the conservative position, and it is one that conservatives must return to. More importantly, it is a real account of the law. For the American legal academy to recover, both progressives and originalists must reject their tender embrace of legal positivism. The legal academy needs natural law.

The natural law—defined simply for purposes of this essay—posits that there are moral principles which always apply to all persons and serve as the

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1. Ilya Shapiro, *Why I Quit Georgetown*, WALL ST. J. (June 6, 2022, 8:45 AM), https://www.wsj.com/articles/why-i-quit-georgetown-11654479763.

2. Luke Milligan, Commentary, *UofL Law School Is No Longer Neutral*, COURIER J. (Jan. 17, 2016, 4:11 PM), https://www.courier-journal.com/story/opinion/2016/01/13/commentary-uofl-law-school-no-longer-neutral/78655014/.

3. *Id.*

4. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 22 (2022).

5. *Id.* at 23.

6. *Id.*

basis for human action.[7] These principles are reasoned to by men[8] and impose unimputable duties on all.[9] One such duty is the duty to educate—to form, better said—all persons in truth and virtue. By consequence, all men can be said to enjoy a positive[10] "natural right" to an education.[11] Through the proper execution of this duty, the natural law roots of positive law and the supremacy of the common good can be presented to common men. But our educational emphasis on the natural law (and related topics) must not stop at the primary and secondary levels; it must continue into higher education, and even into graduate and professional study. This is especially true of law schools.

Jurisprudentia est divinarum atque humanurum rerum notitia—"Jurisprudence is the knowledge of matters divine and human, and the comprehension of what is just and what is unjust."[12] It "is a subaltern science, that is, a science ultimately deriving its principles from other sciences and ordained to a good distinct from and above itself."[13] Jurisprudence, properly understood, presupposes that the world is the product of a "directing Mind" that "direct[s] everything and arrange[s] each thing in the way that [is] best."[14] It is paramount that students of the law "ought first to know the derivation of the word *jus*."[15] As Ulpian taught, the law derives its name "from *justitia*" because "law is the art of goodness and fairness."[16] Historically, lawyers were trained in the classical legal tradition so that they may rightly be called "priests . . . [f]or [they] cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming . . . [for] a philosophy which . . . is genuine."[17]

The American legal academy does no such thing. Law students are not taught to cultivate justice, to profess what is good and equitable, to divide right from wrong, or to aim at a true philosophy—we are taught how to read the law as to distinguish what is lawful from what is unlawful pursuant to the positive law. The academy's devotion to positivism is unwavering. As a theory,

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7. *See* MARCUS TULLIUS CICERO, *Treatise on the Republic*, in THE POLITICAL WORKS OF MARCUS TULLIUS CICERO 270 (Francis Barham trans., 1841).

8. *See* THOMAS AQUINAS, SUMMA THEOLOGICA 997 (Fathers of the English Dominican Province trans., 1st Complete Am. ed. 1947).

9. *See* CICERO, *supra* note 7 ("true law … urge[s] us to duty").

10. When a person is entitled to something, he enjoys a positive right. When a person is entitled to be free of something, he enjoys a negative right.

11. The Commonwealth of Kentucky recognizes a fundamental state constitutional right to an education. *See* KY. CONST. § 183; Rose v. Council for Better Educ. Inc., 790 S.W.2d 186 (Ky. 1989) (holding that Section 183 infers a personal, fundamental right to adequate education).

12. J. INST. 1.1.1 (S. P. Scott trans., 1932).

13. Aníbal Sabater, *Dante's Lawyers from Hell*, IUS & IUSTITIUM (Apr. 9, 2021), https://iusetiustitium.com/dantes-lawyers-from-hell/.

14. PLATO, PHAEDO 97c (G. M. A. Grube trans., 1977).

15. DIG. 1.1.1 (Ulpian, Institutes 1).

16. *Id.*

17. *Id.*

positivism holds that law has no inherent morality.[18] Justice Oliver Wendell Holmes, Jr.—the quintessential positivist—remarked that society would gain "if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."[19] He mistakenly thought that "by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."[20] "A narrow humanism, closed in on itself and not open to the values of the spirit and to God who is their source, could achieve apparent success," as Justice Holmes thought, "for man can set about organizing terrestrial realities without God."[21] But "closed off from God, they will end up being directed against man. A humanism closed off from other realities becomes inhuman."[22] As Paul VI keenly observed, "Man is not the ultimate measure of man. Man becomes truly man only by passing beyond himself."[23] Justice Holmes was wrong to abrogate the positive law from the natural law, and in so doing, exposed the positive law to illegitimacy.[24] By insisting that law is limited to what is written, Justice Holmes remarkably weakened the law.

Troublingly, positivism tends toward tyranny—rule for private gain. As Augustine observed, "by nature, in which God first created man, no man is the slave either of another man or of sin,"[25] but in a fallen condition, the pride of

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18. Leo XIII, Encyclical Letter *Libertas Praestantissimum* para. 16 (June 20, 1888), https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_20061888_libertas.html. ("Moreover, besides this, a doctrine of such character is most hurtful both to individuals and to the State. For, once ascribe to human reason the only authority to decide what is true and what is good, and the real distinction between good and evil is destroyed; honor and dishonor differ not in their nature, but in the opinion and judgment of each one; pleasure is the measure of what is lawful; and, given a code of morality which can have little or no power to restrain or quiet the unruly propensities of man, a way is naturally opened to universal corruption.").

19. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897) (originally an address delivered by Justice Holmes, then a Justice on the Supreme Judicial Court of Massachusetts, at the dedication of Boston University School of Law's new hall on January 8, 1897). At the time, his advocacy for the schism of law and morality raised numerous eyebrows.

20. *Id.*

21. Paul VI, Encyclical Letter *Populorum Progressio* para. 42 (Mar. 26, 1967), https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_26031967_populorum.html.

22. *Id.* (referencing HENRI DE LUBAC, THE DRAMA OF ATHEISTIC HUMANISM 7 (Edith M. Riley trans., 1950)).

23. *Id.* (referencing BLAISE PASCAL, PENSÉES n. 434 (Léon Brunschvicg ed., 1949)).

24. The "positive law is only inviolable when it conforms—or at least is not opposed—to the absolute order set up by the Creator and placed in a new light by the revelation of the Gospel." Pius XII, Radio Message of His Holiness Pius XII to the People of the Entire World (Dec. 24, 1944) (transcript available at https://www.vatican.va/content/pius-xii/en/speeches/1944/documents/hf_p-xii_spe_19441224_natale.html).

25. AUGUSTINE, CITY OF GOD bk. XIX, at 189 (Jeffrey Henderson ed., William Chase Greene trans., Harvard Univ. Press 1960) (c. 426 C.E.).

vicious men seeks "to impose its own rule . . . on society."[26] The consequence is the enslavement of a people under a tyrannical form. The state should not be viewed as "the totality" nor should it embrace the "totality of human . . . hope."[27] Such a condition "can only drive people into fear from which there is no escape: fear of the collapse of their promises and of the greater void that lurks behind it; fear of their own power and its cruelty."[28] Yet, while the sovereign may perceive to be "not bound by statutes,"[29] the sovereign "is not exempt from the law, as to its directive force."[30] Still, within the positivist regime, "authority is severed from the true and natural principle whence it derives all its efficacy for the common good; and the law determining what it is right to do and avoid doing is at the mercy of a majority."[31] Without a proper formation in jurisprudence, "the genuine notion itself of justice and human right is darkened and lost, and the place of true justice and legitimate right is supplied by material force."[32]

To attain a moral legal system—and to avoid tyranny—the academy must recognize that law is not merely that which is written or pronounced by a sovereign, as the positivists hold.[33] As Aristotle noted, it is "strange to regard politics or practical wisdom as the highest kind of knowledge, when in fact man is not the best thing in the universe."[34] And as Cicero observed, "true law" is not the mere will of the sovereign, but "reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil."[35] With this definition in mind, Cicero maintained that wicked and unjust statutes are not laws at all because "it can be clear that interpreting the name of law involves the significance and sense of choosing what is just and true."[36] The Angelic Doctor affirmed both Aristotle and Cicero, writing that true positive law is "an ordinance of reason for the

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26. *Id.* at 171.

27. JOSEPH RATZINGER, CHURCH, ECUMENISM AND POLITICS: NEW ESSAYS IN ECCLESIOLOGY 148 (Robert Nowell trans., Crossroad Publ'g Co.) (1988).

28. *Id.* at 148–49.

29. DIG. 1.3.31 (Ulpian, Lex Julia et Papia 13).

30. AQUINAS, *supra* note 8, at 1021.

31. *Libertas*, *supra* note 18, at para. 16.

32. Pius IX, Encyclical Letter *Quanta Cura* para. 4 (Dec. 8, 1864), https://www.papalencyclicals.net/pius09/p9quanta.htm.

33. This is an overly broad characterization. John Austin, for instance, believes it is enough for law to be derived from a sovereign. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (J. Murray 1832). But H.L.A. Hart contends it must be derived from a sovereign and consistent with the rule of recognition. *See* H.L.A. HART, THE CONCEPT OF LAW (Oxford Univ. Press 1961).

34. ARISTOTLE, NICOMACHEAN ETHICS bk. VI, at 156 (Martin Ostwald trans., The Bobbs-Merrill Co., Inc. 1st ed. 23d prtg. 1962) (c. 384 B.C.E.).

35. CICERO, *supra* note 7, at 270.

36. MARCUS TULLIUS CICERO, ON THE LAWS bk. 2, *reprinted in* "ON THE REPUBLIC" AND "ON THE LAWS" 153, 157 (David Fott ed. & trans., Cornell Univ. Press 2014).

common good, made [and promulgated] by him who has care of the community."[37]

America's Founders, well-versed in Justinian, Cicero, Aristotle, and Aquinas, acknowledged that the law originates neither from the will of the sovereign nor the governed, but from "the great Legislator of the universe."[38] In fact, John Adams relied on Cicero's account of the law when defending the Constitution of the United States: "Those laws, which are right reason, derived from the Divinity, commanding honesty, and forbidding iniquity; which are silent magistrates, where the magistrates are only speaking laws; which, as they are founded on eternal morals, are emanations of the Divine mind."[39] As conceded long ago by New York's highest court, the "very idea of jurisprudence with the ancient lawgivers and philosophers, embraced the religion of the country."[40] So too in America. For this reason, at the time he advocated for total schism of law and morality, Justice Holmes faced considerable scrutiny.[41]

The law used to be taught with these fundamental principles in mind. The casebook model of teaching—championed by Justice Holmes—intended to erase the moral fiber from jurisprudence.[42] And it did.[43] Now, rather than learn

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37. AQUINAS, *supra* note 8, at 995.

38. JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765), *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 19, 22 (Liberty Fund 2000).

39. JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787–1788), *reprinted in* 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 3, 56 (James Brown & Charles C. Little eds., Little, Brown & Co. 1851).

40. People v. Ruggles, 8 Johns. 290, 295 (N.Y. 1811).

41. *History of Boston University School of Law*, B.U. SCH. L., https://www.bu.edu/law/about/history-of-the-school/ (last visited October 7, 2022) ("[Justice Holmes'] speech shocked many with his view that the law was just a business, predicting what the next court will decide in the next case. He suggested that a contract was just an option either to perform or to pay damages, and noted that a 'bad man' does not care about ethics or lofty ideals—rather, the 'bad man' simply wants to know what will keep him out of jail or allow him to avoid paying damages.").

42. "And is not a principle more exactly and intimately grasped as the unexpressed major premise of the half-dozen examples which mark its extent and its limits than it can be in any abstract form of words?" Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4(1) J. LEGAL EDUC. 1, 7 (1951) (quoting *Judge Holmes' Oration*, 3 L.Q. REV. 118, 121–22 (1887)).

43. "[T]hat third-year students will stumble up and down the centuries in attempting to locate Bracton, Coke, Littleton, Blackstone, Mansfield, Bentham, Jessel, and other legal luminaries of like magnitude . . . at the best it reveals an impressive lack of intellectual curiosity. . . . We all know how difficult it is to induce students so to visualize the stories in their casebooks as to present them, in their abstracts, simply and directly, and as human dispute: it is the rare student who perceives even the surface of life—who evidently *feels* the humanity—in his casebooks. As for the suggestion that students in general see the legal system through myriad details, and draw from their technical cases the deeper lessons of the law's history, I, for one, can only dissent." Francis S. Philbrick, *A Casebook on Legal History*, 31 YALE L.J. 720, 731 (1922).

of the higher goods and the source of all law, the academy tasks students with memorizing only the "black letter" law—that is, the text. In consequence, the legal academy churns out countless lawyers trained in reading and discerning the plain meaning of a text, but virtually none trained in statecraft,[44] lawmaking, and rhetoric—the classic hallmarks of a well-formed student of the law.[45] This is a recipe for disaster.[46]

In fact, positivism has disordered our perception of good lawyering to such a degree that even well-meaning and intellectual conservatives are taken aback that law students in the Ordered Liberty Program at the University of Louisville study natural law: 'The natural law is for theologians and philosophers. Lawyers should just read the law—that's it,' they say.[47] They are wrong. "The notion of natural law in politics, ethics and jurisprudence is inescapable" and "[u]nless we are willing to contend that the concept of a law that ought to be is an inadmissible one, the basis of natural law remains untouched."[48] To be a good lawyer is to recognize the original supremacy clause—that the natural law is supreme and that all men are oriented towards it.

Purvi Shah is a progressive academic who understands that the legal academy is crumbling.[49] She asserts that the academy fails "to take moral responsibility" for "how lawyers are trained, acculturated, and incentivized."[50] She is right to highlight that "[q]uestions of justice rarely are the focus of required law school curriculums or classes, leaving lawyers with substantial analytical gaps in understanding the nature of oppression, what causes it, and what transforms it."[51] However, she misdiagnoses why. She is right that the

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44. "[S]tatesmanship does not create human beings but having received them from nature makes use of them." ARISTOTLE, POLITICS bk. 1, *reprinted in* 21 ARISTOTLE IN 23 VOLUMES 1, 49 (H. Rackham trans., Harvard Univ. Press 1944) (c. 384 B.C.E.).

45. "[P]racticing lawyers, judges, and legal academics are now in the midst of a professional 'identity crisis of immense—if largely unacknowledged—proportions' primarily because of the precipitous decline of the once-dominant professional ideal of the lawyer-statesman. The lawyer statesman is an idealized figure, a lawyer 'possessed of great practical wisdom and exceptional persuasive powers, devoted to the public good but keenly aware of the limitations of human beings and their political arrangements.' . . . [E]xcellence in deliberation—practical wisdom—is the cardinal virtue of judges and practicing lawyers.'" James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1031–32 (1994) (quoting ANTHONY T. KRONMAN, THE LOST LAWYER 354 (1993)).

46. *See* Pius XII, *supra* note 24 ("As they are established on this same foundation, the person, the state, the government, with their respective rights, are so bound together that they stand or fall together.").

47. Paraphrasing a conversation over dinner I had with an intentionally unnamed, impressive conservative at the ancestral home of Russell Kirk in Mecosta, Michigan.

48. Brendan F. Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 NOTRE DAME L. REV. 9, 10 (1939) (quoting BENJAMIN FLETCHER WRIGHT JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 323 (1931)).

49. *See* Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 HOFSTRA L. REV. 11, 11 (2018).

50. *Id.* at 13.

51. *Id.*

academy incentivizes greed and other unscrupulous aspirations: "the sordid truth is the vast majority of American lawyers are working to protect the interests of the rich and powerful" and "more lawyers are working to preserve injustice rather than transform it."[52] However, her proposed solutions are underwhelming.[53] She argues for "rebuilding the ethical compass of law," but does so while endorsing positivism.[54] But frankly, it is not Shah's fault that she misdiagnosed the problem with the academy. She was failed by a positive legal regime like virtually all of us. Those trained in the positivist tradition are creatively stifled.[55] Also, she was likely failed by a positivist undergraduate regime (that is, instilling the groundwork for finding positivism persuasive by emphasizing *only* social contract theory, other classical liberal thought, and postmodernism in the humanities).[56] It is good to teach classical liberal thought and postmodernism. But educators should not teach both at the expense of the ancients and scholastics who developed the classical legal tradition, one infused with natural law. Within the last century, higher education has tragically abandoned the natural law.

Shah also detects that the academy acculturates us to look backward. Although she is wrong to discount the importance of looking back,[57] she is correct to point out that the academy encourages us to look backward for the wrong reason. It is wrong for the academy to acculturate law students to study history *solely to determine the original public meaning or the application of precedent*. Rather, we should look back *to determine fundamental truths and assess whether law is actually law* (recall that an unjust law is no law at all).

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52. *Id.* at 12.

53. One such proposal is for "every law school and legal organization" to "have a *secular* ethics chaplain, a person with whom lawyers can discuss questions of morality and meaning in their work." *Id.* at 16–17 (emphasis added). Or, in the alternative, "case review and staff evaluations can incorporate this new code of ethics." *Id.* at 17.

54. *Id.* at 16 (positing that legal ethics rules should be redrafted and "voluntarily adopted by individuals, organizations, law schools, and law firms," and "*[a]fter [these rules] gain[] critical mass*, [they] can create a common framework for analysis and reflection about our ethical successes and failures as a profession") (emphasis added). Even more, she suggests that man can "architect" its legal regime "to dismantle oppression." *Id.* at 17. And she concludes by approving of positivism's violent tendencies, writing that "[i]t has taken powerful, militant, beautiful movements to transform the law. It took movements to codify, reframe and reimagine what was 'just' under the law." *Id.* at 18.

55. *See generally* Philbrick, *supra* note 43.

56. For more on the connection between social contract theory and legal positivism, see Robert E. Ranney, *Enlightening the Enlightened: A Critique of Enlightenment Thinking and the Secular Religion and on the Need for a Return to Covenant*, 35 REGENT U. L. REV. (forthcoming Spring 2023).

57. Shah's critique recalls that of Justice Holmes: "It is revolting to have no better reason for a rule of law than that so it was laid down at the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *supra* note 19, at 469.

This is what the academy should prepare law students to do. *This* is the only way lawyers, and the academy, can *be* moral.[58]

The natural law and the classical legal tradition are not taught in most universities and law schools. But if legal educators *truly* want to form lawyers who are prepared to tackle difficult real-world situations that require a "moral compass," it will serve them well to first educate themselves on the natural law and then teach it in classrooms. It is not enough for legal educators to hope to instill a moral imagination in the minds of law students unless law students are taught that there is more to the law than what is written on paper—the black letter law.

Ironically, the academy even endorses the positive enactment of Rules of Professional Responsibility. These Rules purport to govern the ethical practice of law as identified by the profession. By reducing ethical rules to text, rather than custom, law schools found it appropriate to teach courses on Professional Responsibility so that the positive rules may be taught to students of the law. To safeguard the "ethical" practice of the law, the academy formulated an exam—the Model Professional Responsibility Exam—to ensure that all prospective lawyers understand the rules governing their professional conduct. As with other positive enactments unhinged from the natural law, the academy weakened legal ethics. Now, professional ethics are demonstrated not by fostering and exercising virtue in practice, but by studying the text of written rules and their application to pass a relatively easy uniform exam.[59] This will not do. If we want to develop advocates for justice, we must teach the meaning of law as understood within the natural law and classical traditions.

The legal academy has lost its way. By tenderly embracing legal positivism, the academy contributed to a great schism between the human and natural law.[60] Consequently, "[h]uman made law has come to be viewed as self-referential, self-justified, and essentially self-restrained."[61] This is dangerous,

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58. Ironically, we churn out immoral lawyers annually, and joke about it frequently, but do nothing to break the vicious cycle.

59. Shah detects the same problem. "The Rules of Professional Conduct, which all lawyers must swear to uphold, offer a baseline standard of legal ethics and professional responsibility for American lawyers. Yet these rules speak primarily about what we should *not* do as lawyers—don't steal our clients' money, don't lie, don't commit fraud, don't disrespect the court. The rules are silent, however, on *what* the *affirmative* role for a lawyer is in society, *which* clients we should represent, *which* circumstances demand our ethical participation, and most importantly, *how* we should work for our clients." Shah, *supra* note 49, at 14. But, a devoted positivist, Shah proposes the problem can be fixed by "writ[ing] a new code of ethics for lawyers" that is "drafted by the generation of lawyers, who are black and brown and who come from communities that are oppressed . . . alongside our representatives from marginalized client communities, many of whom have the most intimate understanding of the failures of our profession." *Id.* at 16. Shah's proposal to redraft the ethical canons of lawyering makes no appeal to discerning what is good, true, and beautiful.

60. To "refuse any bond of union between man and civil society, on the one hand, and . . . the supreme Law-giver, on the other, is plainly repugnant to the nature, not only of man, but of all created things." *Libertas*, *supra* note 18, at para. 15.

61. Brian M. McCall, *Introduction to Natural Law Jurisprudence (Part 1)*, JOSIAS (Oct. 31, 2019), https://thejosias.com/2019/10/31/introduction-to-natural-law-jurisprudence-part-1/.

for without external reference, justification, and restraint, the law cannot advance justice. The academy must distance itself from positivism and reeducate itself on the nature of law. Likewise, to "make the law respectable," the academy must orient students of the law towards the natural law.[62] That is, the academy must reembrace jurisprudence—properly understood—and teach not just how to read the law, but what the law is.

62. LOUIS DEMBITZ BRANDEIS, THE BRANDEIS GUIDE TO THE MODERN WORLD 166 (Alfred Lief ed., 1st ed. 1941) ("If we desire respect for the law, we must first make the law respectable.").