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# A POLITICAL FRONTIER OF JURISPRUDENCE: JOHN CHIPMAN GRAY ON THE STATE

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## INTRODUCTION

Properly speaking, John Chipman Gray (1839-1915) was not a real “Realist.”<sup>1</sup> Austin was the original stimulus to his jurisprudential reflections, and Bryce and Pollock were his most warmly acknowledged contemporaries.<sup>2</sup> His reading in nineteenth century German and French jurisprudence was wide and deep, and it contributed greatly to his reflections on the law. Although he conceived his main contribution to legal theory as early as 1897, published as *The Nature and Sources of the Law* in 1909,<sup>3</sup> it is surely neither injudicious nor unjust to see in it a prototype for the “Realism” of the American law schools in their intellectual ferment of the 1920s and ’30s. Gray’s critique of Austinian analytical jurisprudence led him to his well known proto-realist definition: “The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.”<sup>4</sup>

Gray’s definition is part and parcel of the doctrine that “the law of a state . . . is not an ideal, but something which actually exists.”<sup>5</sup> This leads to the view that the actual rules laid down by the courts are distinct from the sources, namely Statute, Precedent, Custom, Equity or Morality, and Doctrinal Writing,<sup>6</sup> upon which judges draw in laying down these rules. It thus follows that the enquirer of juristic truth must look closely into the way in which the courts make and apply the rules that constitute the Law, the use to which they put the sources they are bound to draw upon, and the sense in which and grounds upon which they are “bound” to use these sources exclusively in shaping the law. Then must come the *why?*<sup>7</sup> of all that—the underlying explanation of the system.<sup>7</sup>

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<sup>1</sup> See W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 20-22 (1973). In some respects, Twining seems to me too dismissive of Gray.

<sup>2</sup> See J. GRAY, *THE NATURE AND SOURCES OF THE LAW* vii-viii (1st ed. 1909).

<sup>3</sup> J. GRAY, *supra* note 2.

<sup>4</sup> *Id.* at 82.

<sup>5</sup> *Id.* at 92.

<sup>6</sup> *Id.* at 118-20.

<sup>7</sup> *Id.* at chs. 8-13. Cf. W. TWINING, *supra* note 1, at 14-15, 20-22.

Although Gray's starting point and immediate concerns are not identical with those of the later generation of brilliant American lawyers who made up the "Realist movement" *stricto sensu*, it is far from fanciful to think of their enquiries as a continuation of his. Therefore, a paper on Gray's work is not out of place in the present Symposium.

My concern here is with a key part of his underlying explanation of legal systems—his theory of the State.<sup>8</sup> Here, as in the rest of his legal theory, one sees a style of thought meriting the description "realist." The thrust of Gray's investigation is always towards political actuality as well as legal formality. He had a brilliant (if flawed) analysis of the conceptual presuppositions implicit in talk of the State as well as a sharp eye on the political forces that sustain the existence of "the State" so analysed. There is much to be learned from Gray's preliminary charting of this political frontier of jurisprudence, and this Symposium affords a welcome opportunity to draw attention to an important and neglected element in the work of an important but neglected thinker.

In what follows, I shall give a short account first of Gray's analytical conception of the State, following which is a discussion on his political theory as to what keeps a State in being. Finally, I shall offer some brief criticisms of both.

## I

### GRAY'S ANALYSIS OF THE STATE

The power of conceiving an abstraction which is imperceptible to any of the senses, which yet has men for its visible organs, and which, although not having a will and passions, may yet have the will and passions of men attributed to it, this power is one of the most wonderful capacities of human nature.<sup>9</sup>

Why is this power so wonderful? Its wonderfulness, for Gray, is in effect that it is the power whereby we can conceive of pluralities of individual human beings as forming not mere aggregations, but associations.<sup>10</sup> Associations in this sense are conceived as having personhood distinct from that of any of the individuals who are its members. The association can make decisions, take actions, pursue interests of its own, and be damaged in its interests or frustrated in its

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<sup>8</sup> See *id.* at ch. 3. I follow Gray's practice of capitalizing "the State" and "the Law" when expounding Gray's theory, but not otherwise.

<sup>9</sup> *Id.* at 48.

<sup>10</sup> "Association" is my own term, not Gray's.

aims and decisions. This is all possible although the association does not have an existence in *in rerum natura* comparable to the personate and corporeal existence of the individuals who associate themselves together.

The conceptual key Gray offered to unlock the puzzle presented by this phenomenon of associations as personate entities was the concept of "attribution."<sup>11</sup> Gray observed that we sometimes attribute the will of one being to another. Infants, for example, are unable to exercise their will by making decisions for the protection of their interests. The legal technique of ascribing "rights" of various sorts to individuals can function as a protection of their interests only through acts of will, such as the acts requisite to raising a legal action. How can infants be persons enjoying legal rights and thus enjoy the distinctively legal mode of protection of their interests? The answer is that, for legal purposes, we treat the decisions of guardians and others as the decisions of infants. The same is true of persons of unsound mind, animals (if we are minded to give them legal personality), things, and supernatural beings.

Gray called this intellectual device of "attribution" a "fiction." This is not a historical fiction like those the Romans used to effectively amend the scope of their civil law (for example, the fiction that peregrines were, for certain purposes, Romans), or those by which the English Common Lawyers for centuries managed to keep an ancient system of forms of actions in tolerably near touch with the social exigencies of the times. Gray's fiction is instead a "dogmatic fiction."<sup>12</sup> A dogmatic fiction is not a matter of changing the law by pretending that the operative facts of an historical legal norm have been met in a given case. Rather, it is a beneficial conceptual tool which enables us to organize our thinking and acting. In modern usage, it allows us to conjure up "institutional facts" in order to better cope with our existence in a world of brute facts.<sup>13</sup>

Such a dogmatic fiction requires rules that define the circumstances in which the acts and decisions of one person are to be attributed to another. Developing rules allows us to treat that other as having competently acted or decided with a view to exercising rights or fulfilling obligations. So far as the rights and obligations in question are rights or obligations under the Law of the State, rules that attribute one being's acts of will to another are legal rules.

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<sup>11</sup> J. GRAY, *supra* note 2, at 30, 36-62.

<sup>12</sup> For Gray's account of the two sorts of fiction, see *id.* at 30-35.

<sup>13</sup> See MacCormick, *Law as Institutional Fact*, 90 LAW Q. REV. 102 (1974).

Incorporated associations must be understood in the same terms within that legal order. Corporations necessarily have members who come together for the pursuit of common interests.<sup>14</sup> We legally protect such interests, however, by ascribing rights to the corporation as an entity distinct from any and all of its individual members. Yet the ascription of rights to a corporation makes sense only if the corporation is supposed to have a will.<sup>15</sup> Again, the acts of will, although the corporation's acts for legal purposes, are actually acts performed by individuals or groups of individuals casting votes under appropriate voting rules. Only because we have rules for attributing such acts to the corporation is it possible for us to conceive of the corporation as a person acting under the law. The same holds true for those acts that count as fulfillment of a corporation's legal obligations.

This account of legal corporate personality is transferable to non-state spheres.<sup>16</sup> Insofar as we conceive of associations as having personality for moral or religious purposes, the same intellectual process of attribution is implicit in such conceptions. In this case, however, the rules for attribution do not belong within the Law of the State.

What, then, of the State? If the State is an entity possessed of Law, is it a personate entity too? Gray believed so; States stand in legal relationships of right and obligation with their citizens and with each other (contrary to Austin's view). Furthermore, States issue commands in the form of laws to their citizens and make decisions in disputes between citizens, as well as between citizen and state. The explanation of this concept of the State as an acting, right-holding, decisionmaking person is materially identical to the explanation of the

<sup>14</sup> J. GRAY, *supra* note 2, at 49.

<sup>15</sup> As to the analysis of rights, Gray is a proponent of what is sometimes called the "will theory" or "choice theory" (as opposed to the "benefit theory" or "interest theory"). See *id.* at 20 ("The legal rights of a man are the rights which are exercisable on his motion."); *id.* ch. 1 *passim*. For a critique of the will theory, see MacCormick, *Rights in Legislation*, in LAW, MORALITY, AND SOCIETY 189-209 (P. Hacker & J. Raz eds. 1977).

<sup>16</sup> According to Gray,

[i]t is sometimes said that all corporations are creatures of the State. This is not literally accurate. Whenever men come together for a common purpose, it is the course of human nature for them or their leaders to personify an abstraction, to name it, and to provide it with organs. Such organized bodies may be of every degree of importance, from the Roman Catholic Church down to the poker club that meets at a village tavern.

J. GRAY, *supra* note 2, at 554; cf. F. MAITLAND, *Moral Personality and Legal Personality*, in 3 THE COLLECTED PAPERS OF FREDERICK WILLIAM MAITLAND 304 (H. Fisher ed. 1911). Gray's correct observation that the required rules for "attribution" need not be rules of State law is surely the solution to Maitland's puzzle, that often the bodies that most obviously have "personality," such as a club or a church, are the ones that lack corporate status at law.

existence of personate associations and corporations. Certain human beings hold positions and exercise functions as legislators, administrators, and judges. Their acts in those capacities are all attributed to a single entity. Therefore, they are all conceived as "organs" of that entity. The entity in question is "the State," and the functionaries are "organs of the State." To achieve this view, however, requires artificial rules of attribution, the *sine qua non* of the "dogmatic fiction" here involved.<sup>17</sup>

In the terms of the opening quotation to this section, the State is "an abstraction . . . imperceptible to any of the senses, which yet has men for its visible organs." That we can conceive of such an entity requires exercise of "one of the most wonderful capacities of human nature."

## II

### THEORY OF THE STATE

The State, according to Gray, is capable of issuing commands. Its general commands are those framed in legislation by its legislative organs; its more particular commands are those issued by the executive and administrative organs. Although general or legislative commands are known in ordinary speech as laws,<sup>18</sup> these are properly only "sources" of the Law, that is, the rules the judicial organs of the State lay down to determine questions of legal right and wrong.<sup>19</sup> This formulation plainly treats the State as a higher-order concept than the Law, in the sense of positive law, so that the initial and the continuing existence of the State must have some further and ulterior explanation. Gray's explanation was a political one.

In every non-anarchic society, Gray maintained, there are persons who really rule that society. They bring the State into existence as a functioning entity and sustain its continuing existence:

In every aggregation of men there are some of the number who impress their wills upon the others, who are habitually obeyed by the others, and who are, in truth, the rulers of the society. The sources from which their authority flows are of the most diverse character. . . .

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<sup>17</sup> See note 8 and accompanying text *supra*. Cf. H.L.A. HART, *DEFINITION AND THEORY IN JURISPRUDENCE* 17-21 (1953) (arguing that the corporate entity is merely an extension of legal rules and not a fictitious entity).

<sup>18</sup> See J. GRAY, *supra* note 2, at 85-86.

<sup>19</sup> See notes 4 & 6 and accompanying text *supra*.

Such rulers may have official position, but often they are without it. A king-maker or president-maker, the favorite of a monarch, the boss of State politics, may pride himself on his private station. Nor does the machinery of government make any great difference. The real rulers of a country, are probably not much more numerous in a democracy than in a monarchy. . . .

These rulers, sometimes suddenly and obviously, . . . but oftener by degrees and obscurely, create or uphold, by personification, an abstract entity and impose a belief in it on the mass of which they form a part; and they bring this abstract personality to play a part in real life by giving it as organs real human beings, bound together in their action by artificial rules.<sup>20</sup>

The "artificial rules" to which Gray here refers are none other than the "constitutional" rules that coherently assign public powers and duties of legislation, administration, and adjudication to certain specifically or generically identified persons and which, *eo ipso*, enable us to attribute their official acts to the State.<sup>21</sup>

Thus, in Gray's view, the formal constitutional order under which the State is organized is supported by brute political power—the ability of some people to dominate others. The personification of a state is an essential element in this domination process. Admittedly, the existence of a constitutional state may actually limit the power of the real rulers as they succeed in building up a widespread belief in it and commitment to it. For the very business of exercising political power through such machinery imposes constraints at least on the way in which power can be exercised.<sup>22</sup>

We should delude ourselves, however, if we supposed that the organs of a state are free to exercise their discretion in whatever capacity they think best. They must defer to the will of the real rulers. It is possible, of course, that the holders of official state positions may be among the real rulers of a society—indeed, their holding of official positions may tend to transform them from being formal to being real rulers—but it is not necessarily or even usually the case that there should be any perfect identity as between real rulers and constitutional organs.<sup>23</sup>

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<sup>20</sup> J. GRAY, *supra* note 2, at 65-66.

<sup>21</sup> *Id.* at 68.

<sup>22</sup> It must be borne in mind . . . that the creation and upholding of the personified abstraction of the State, and the furnishing it with organs, react powerfully on the rulers of the people. The fact that a person is an official of the State has some tendency to make him not only a formal but a real ruler; the existence of the machinery furnishes an obstacle to change; and the leaders have their own desires and imaginations profoundly affected by the existence, especially the long-continued existence, of the belief in the organized personality of the State.

*Id.* at 66.

<sup>23</sup> *Id.* at 65-66.

It is especially unlikely that, "except in a very primitive community,"<sup>24</sup> the judges are the real rulers. Although the Law is roughly whatever the judges determine it to be, judges may not exercise unfettered discretion:

The half-a-dozen elderly men sitting on a platform behind a red or green cloth, with very probably not commanding wills or powerful physique, can exercise their functions only within those limits which the real rulers of the State allow for the exercise; for the State and the court as an organ thereof are the product of the wills of those rulers.<sup>25</sup>

We cannot account for the Law without accounting for the judges' positions as organs of the State. We cannot, in turn, account for the judges' positions without accounting for the artificial rules that establish these and other organs of the State, and which thus make intelligible the existence of the personified State. Finally, we cannot account for the artificial rules save on the supposition that some persons somewhere want this set-up to exist and can "impress their wills" to that end upon their fellow citizens. In other words, "[t]he elephant may rest on the tortoise but in the last result we have to go back to the wills of those who rule the society."<sup>26</sup>

Hence, jurisprudence presupposes politics and political power-relations. The task of jurisprudence, however, is neither the analysis of such relations nor the identification of the real power-holders. Its concern is with the state and its law, not with the political relationships that are preconditions for the existence thereof.<sup>27</sup> Perhaps this is the sense in which we ought to understand Gray's otherwise puzzling remark that "[t]he real rulers of a political society are undiscoverable."<sup>28</sup> If such rulers were always undiscoverable in principle, Gray's theory might seem to fall down flat. On the other hand, if he meant only that it is extremely difficult to settle who has real power in a given society at a given time, despite its being obvious that someone

<sup>24</sup> *Id.* at 116.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 118.

<sup>27</sup> *Id.* at ch. 7.

<sup>28</sup> See generally *id.* at 77.

To determine who are the real rulers of a political society is well-nigh an impossible task,—for Jurisprudence a well-nigh insoluble problem. To estimate, even approximately, the power that a certain statesman or demagogue has or had in a political society is a problem whose elements are too conflicting and too obscure for human judgment.

*Id.* at 76. Gray also stated that "[t]he sources of this power [of the real rulers] are, indeed, so various, and its mode of action so subtle and often unknown even by those who exercise it, that it is impossible to define or even closely trace it." *Id.* at 65.

has it, then Gray may at least escape the charge of explaining the hitherto unknown by reference to the absolutely undiscoverable.

That charge, however, is probably an unfair one on either reading of this point. As I argue in the last section of the present paper, Gray's suggestion that "real rulers" may be undiscoverable in some countries interestingly foreshadows some contemporary discussions among political sociologists. For present purposes, he can certainly be acquitted of seeking to explain the unknown but knowable by reference to the undiscoverable. On the contrary, the possibility that real rulers may be undiscoverable is the basis for his critique of Austin's doctrine of sovereignty. Under that doctrine, the identification of law is itself contingent upon the identification of an habitually obeyed but not habitually obedient person or group. That politically identified person or group is a sovereign, and positive law comprises the general commands issued by or under authority of the sovereign.<sup>29</sup>

Gray, in common with several contemporaries who criticized Austin's confusion of political with legal sovereignty,<sup>30</sup> sought to drive a wedge between politics and law for certain analytical purposes. That there be real rulers habitually obeyed by their fellow humans is indeed a precondition of the State's existence; however, we can identify the State and its organs and constitution without discovering (even if we cannot find out) whose wills keep the State going. Hence, law is identifiable apart from the actual or possible discovery of who really rules. This would not be the case if Austin's doctrine were accepted.

### III

#### CRITICAL AND COMPARATIVE COMMENTS

Kelsen alone among jurists has produced a theory of the state to match Gray's in perceptiveness and insight.<sup>31</sup> Indeed, Kelsen's story markedly resembles Gray's analysis. Kelsen maintained that States and other corporate persons function on the basis of the "imputation"<sup>32</sup> (*zurechnen*—compare "attribution" in Gray) of certain acts of

<sup>29</sup> J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 9-33, 191-361 (H. Hart ed. 1954).

<sup>30</sup> See, e.g., J. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 503-52 (1901); A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 72-76 (10th ed. 1964) [1st ed. 1885].

<sup>31</sup> See H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 181-241 (A. Wedberg trans. 1961). See also H.L.A. HART, *supra* note 17.

<sup>32</sup> See H. KELSEN, *supra* note 31, at 93-109 (in relation to "natural" and "juristic persons"); *id.* at 99 (discussing imputation); *id.* at 191-92 (application of imputation to the State).

will to a particular legal point of imputation, such as the state of Germany, the United Kingdom, the United States, the University of Edinburgh, or Standard Oil of New Jersey. Nor is this radically different from similar imputations of acts of will to natural persons (and not only infants and idiots, as per Gray). The following quotation from Kelsen is indicative of the marked similarity in ideas between the two authors, although they seem to have developed their ideas quite independently:<sup>33</sup>

The State is, so to speak, a common point into which various human actions are projected, a common point of imputation for different human actions. The individuals whose actions are considered to be acts of the State, whose actions are imputed to the State, are designated as "organs" of the State.<sup>34</sup>

On this point, held in common by Kelsen and Gray, it seems to me that they are entirely correct. What makes it possible to treat any group as having personality—a capacity to act "in its own right"—is this very process of "attribution" or "imputation" under rules or norms, the process to which they draw attention in such markedly similar terms. Although Kelsen originally formulated his version of the common theory in opposition to then prevailing sociological theories, at the present time it is accepted by some social theorists, such as Michael Lessnoff.<sup>35</sup> Thus, the Gray-Kelsen view totally demystifies the apparent puzzle of group personality.

There is, however, an important difference between the two beyond their point of agreement. As we saw, Gray's account makes the State a precondition to the Law, and, in turn, grounds the existence of the State in facts of political power relations. Kelsen, in contrast, treated this as a false dualism: "The dualism of law and State is an animistic superstition."<sup>36</sup> In Kelsen's view, the truth is that the personified State is simply a personification of the legal order:

To impute a human action to the State, as to an invisible person, is to relate a human action as the action of a State organ to the unity

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<sup>33</sup> Kelsen's first work on this subject, *DIE STAATSLHRE DES DANTE ALIGHIERE*, appeared in Vienna and Leipzig in 1950. Even the second edition of his more mature *DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF* (Verlag J.C.B. Mohr, Tübingen 1928) makes no reference to Gray. But in *General Theory*, he gives generous though critical recognition to Gray's notion of attribution. See, e.g., H. KELSEN, *supra* note 31, at 107. Gray had clearly not read Kelsen—certainly not when he first formulated his position in 1897. See J. GRAY, *supra* note 2, at vii-viii. The only possible common source among those expressly cited by Gray and Kelsen in the works reviewed is C. BERGBOHM, *JURISPRUDENZ UND RECHTSPHILOSOPHIE* (1892), and it is not cited on the relevant point.

<sup>34</sup> H. KELSEN, *supra* note 31, at 191.

<sup>35</sup> M. LESSNOFF, *THE STRUCTURE OF SOCIAL SCIENCE* 78-79 (1974).

<sup>36</sup> H. KELSEN, *supra* note 31, at 191.

of the order which stipulates this action. The State as a person is nothing but the personification of this unity. An "organ of the State" is tantamount to an "organ of the law."<sup>37</sup>

There is a good deal to be said in favor of Kelsen's view over Gray's in this matter. Gray maintained that only in the presence of artificial rules sustained by real rulers can we achieve the necessary attribution of human acts to a State as its acts. These rules, it appears, are constitutional in character, as they are certainly constitutive of the State. Yet they fall outside of Gray's definition of the Law. Constitutional rules in themselves seem to count for him only as "sources" of the Law. Only as interpreted by judges in decisionmaking and as transformed by them into rules for determining rights can they be counted within the Law. By Gray's own view of it, certain presupposed rules<sup>38</sup> are the necessary condition for conceiving of dispute-deciders as "judicial organs of the State." Because there is "law" only where there are such "judicial organs," it seems wrong to deny the *legal* character of the presupposed constitutional rules. Thus, it seems impossible to accept that the State has logical priority as a concept over the Law.

Is Kelsen, then, correct in simply assuming an identity between state and legal order?<sup>39</sup> Surely not. We may allow that a legal order is more than an abstract system of logically coherent legal norms; it is the order constituted by a community of human beings conducting themselves by and large in conformity with the abstractly conceived normative system. Within some such social normative systems, however, it is a noticeable feature that we exclusively confer certain governmental powers, such as legislating, administering laws in certain ways, and adjudicating, on certain legally identified individuals and groups. In the discretionary fields left open by the prevailing norms of law, these groups conduct themselves in ways that cohere together under the guidance of common principles and policies. Thus, the State is neither the whole legal order nor the whole community of persons living in legal order; it is the personified unity to which society

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<sup>37</sup> *Id.* at 192.

<sup>38</sup> When I speak of presupposed rules, I do not mean to adopt the Kelsenian idea of the *Grundnorm* as a mere presupposition. I prefer on such points a modification of Hart's concept of the "rule of recognition" as the ultimate rule of a legal system. See H.L.A. HART, *THE CONCEPT OF LAW* ch. 6 (1961); cf. N. MACCORMICK, H.L.A. HART ch. 9 (Edward Arnold Ltd., London 1981, forthcoming).

<sup>39</sup> Kelsen does not restrict himself to the simple identity of the State and the legal order. See H. KELSEN, *supra* note 31, at 193-95 for his distinction between "the formal and the Material Concept of the State." Kelsen's theory of the "Material Concept" of the State represents his better thought on this matter. Moreover, it is markedly similar to Gray's theory, though far more thoroughly elaborated.

imputes the actions of legislative, governmental, and judicial functionaries. We can make sense of the obvious truth that states can act against, in favor of, and generally with respect to their own citizens as well as other states. The rhetoric of politics, of course, often involves claims that the State acts in the name of the interests of all its citizens. Although such rhetoric might be true in given cases, the more it is resorted to, the more contestable it seems.

It would appear that we ought to accept Kelsen's rather than Gray's view as to the impossibility of accepting the State as a logical precondition to the legal order even though it is the State, or at least State organs, which determines the Law *vis à vis* its citizens. By using Kelsen to correct Gray, however, one in effect is using Gray to counter-correct Kelsen for his error of simply identifying "state" and "legal order."<sup>40</sup> The state is an element within one kind of territorially defined legal order.

A related difference between Kelsen and Gray concerns the relevance of political power to the explanation of state and law. Gray's opinion on this has already been expounded. In contrast, Kelsen treated legal order as a precondition of political power rather than *vice versa*: "Social power is possible only within social organization. . . . Social power is always a power which in some way or other is organized. The power of the State is the power organized by positive law—is the power of the law; that is, the efficacy of positive law."<sup>41</sup> This thesis no doubt has much force as against those who argue that the State is itself a mysterious higher order personate entity possessed of power enabling it to govern men. It does not, however, so easily defeat Gray's thesis. Gray treated the State not as a condition but as a consequence of the power of the "real rulers" of society. The State is, we recall, a mechanism through which these rulers exercise their power, albeit a mechanism whose use qualifies and modifies the power thus exercised.<sup>42</sup> While it is doubtless true, as Kelsen asserted, that the exercise of social power requires social organization, it does not follow that the power that procures and sustains such organization is the power of the organization.

To put it another way, the efficacy of a system of positive law may be explicable by reference to the activities of individuals—not necessarily officials—who make it their business to see to it that the law is kept efficacious. One can believe that there is an efficacious

<sup>40</sup> *But see* note 39 *supra*.

<sup>41</sup> H. KELSEN, *supra* note 31, at 190.

<sup>42</sup> G. POGGI, *THE DEVELOPMENT OF THE MODERN STATE* (1978). Although Poggi neither uses nor relies on Gray's or Kelsen's analysis, his account is perfectly compatible with either.

legal order in contemporary Poland and that there is a working Polish state without supposing that the real rulers of Poland are all officials or even residents of that state. One might also refer to the position of the Ayatollah Khomeini in Iran while reflecting on Gray's words about the real rulers of society who "impress their wills upon the others":

The sources from which their authority flows are of the most diverse character. They may be, or may pretend to be, divinely inspired. It may be their physical strength, their wisdom, their cunning, their virtues, their vices,—oftenest, perhaps, their assiduity and persistence,—that have given them their power.<sup>43</sup>

Surely Gray is both realistic and accurate in asserting that relationships of political power are conceptually distinct from and also causally relevant to the existence of law and state. This is correct even though, as he also recognized, the existence of a state legal order modifies over time the character of a political power and the possible ways of using it.

More contestable, perhaps, is the suggestion that there are always a few powerful people who dominate others and whose will sustains the state and the legal order. Gray's remark that these rulers are "undiscoverable" admittedly weakens this suggestion as does his further observation that "[t]he sources of this power are, indeed, so various, and its mode of action so subtle and often unknown even by those who exercise it, that it is impossible to define or closely trace it."<sup>44</sup> If the operation of power is apt to be "subtle and unknown" in this way, one is, as I earlier observed, entitled to doubt its value as an explanation of law or anything else, and one is perhaps driven back for jurisprudential purposes towards Kelsen's position.

The difficulty and complexity of this topic is certainly indicated by the controversies surrounding it in the works of the political sociologists. If, as Robert Dahl argues, the politics of democratic communities are thoroughly pluralistic, then there may be in such communities many contending groups, none of which has overriding power for all purposes.<sup>45</sup> In that case, although there is real rule, there is no possibility of identifying any single set of real rulers. Believing in them is simply a manifestation of the fallacy of the conspiracy theory of government.

In contrast, Steven Lukes has argued that a "three dimensional" analysis of power, which fully accounts not only for political decisions

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<sup>43</sup> J. GRAY, *supra* note 2, at 65.

<sup>44</sup> *Id.*; *cf. id.* at 76; note 28 *supra*.

<sup>45</sup> See R. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).

but also for those “non-decisions” and suppressions of latent conflict which keep certain questions off the political agenda, may in turn undermine the pluralistic thesis.<sup>46</sup> It would be out of place to enter here into detailed discussions of this dispute, though I am bound to say that I find myself on the one hand unconvinced by Dr. Lukes’s suggestions and on the other hand persuaded that they do, if correct, fully support Gray’s remarks about the subtlety and complexity of the nature and exercise of political power. Certainly, one does find in Lukes an attempt to grapple with the way in which prevalent ideologies, especially a “hegemonic” ideology in Gramsci’s sense,<sup>47</sup> may have the effect of consolidating the political influence of the members of particular interest groups. In adopting this line of reasoning, however, one would settle the conflict in Gray’s view between his individualistic conception of “real rulers,” whose will dominates others, and his ostensibly more “structuralist” view of the exercise of power, implicating individuals who know not what they do, in favor of the latter conception.

Here we embark upon a topic that needs far more elucidation and investigation to develop a full and thoroughgoing critique of Gray’s work. Such a critique would surely lead to Kelsen’s trenchant observation about “the overwhelming interest that those residing in power, as well as those craving for power, have in a theory pleasing to their wishes, that is, in a political ideology.”<sup>48</sup>

The task of this paper has not been to provide such a full and thoroughgoing critique, nor does it propose that as the most desirable way to advance understanding of the political frontiers of jurisprudence. The point has only been to demonstrate that any work on this frontier ought fully to account for, and give due credit to, the neglected but brilliantly pioneering sketch which John Chipman Gray gave us.

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<sup>46</sup> See S. LUKES, *POWER: A RADICAL VIEW* chs. 4-7 (1974).

<sup>47</sup> See A. GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 326-40 (1971); S. LUKES, *supra* note 46, at 46-48 (citing A. GRAMSCI).

<sup>48</sup> H. KELSEN, *supra* note 31, at xvii. Kelsen, of course, was well aware that the content of law is dependent upon the exercise of power, which involves drawing upon the political ideology that sustains the power-holder’s position. His insistence on the “purity” of his theory of law is, *inter alia*, an insistence that it is not the task of the juristic scientist to supply the needs of the political power-holders by supplying them with an ideology, or to buttress an existing one.