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Positivism as Opposed to What?
Law and the Moral Concept of Right

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[Plato observes that] justice is not only in the individual, but also in the state, and the state is greater than the individual; justice is therefore imprinted on states in larger characters, and it is more easily recognizable... It is therefore preferable to consider justice as it is to be found in the state. By making this comparison Plato transforms the question about justice into an investigation of the state; it is a very simple and graceful transition, though it seems arbitrary. It was great force of insight that really led the ancients to the truth; and what Plato brings forward as merely simplifying the difficulty, may, in fact, be said to exist in the nature of the thing. For it is not convenience which leads him to this position, but the fact that justice can be carried out only in so far as man is a member of a state, for in the state alone is justice present in reality and truth.

– G. W. Hegel, Lectures on the History of Philosophy¹

The claim that law by its nature has a moral task...does not imply that nothing but the law can have that task.... I doubt that there are important tasks that are unique to the law, in the sense that they cannot at all be achieved any other way.

– Joseph Raz, “About Morality and the Nature of Law,”²

I. Introductory: A certain picture of morality is present in legal theory.

1. There was a day, apparently, when the life of the legal theorist was simpler and happier than now because discussions of the “nature of law” seemed to have not only a clear point but – what must have been no less exciting -- a clear politics as well. These were the days when the rallying cry of the positivist was the separation of law and morality, and when that cry, or its general spirit, seemed to be captured in Austin’s endlessly quoted dictum, “the existence of law is one thing, its merit or demerit quite another.”³ Just how long these happy days of positivism lasted might be a matter for historical inquiry. But we know that Austin’s immediate successors saw him as having made a decisive break within jurisprudence and finally, as Amos curiously put it, “delivered the law from the dead body of morality that still clung to it”;⁴ and that as late as 1958 and beyond, Hart still linked the main thrust of positivism and its powers of demystification to this same 19th century theme – “the separation of law and morals” as he called it.⁵

As often in philosophy, however, increased sophistication brings increased difficulty. We seem to have come to the exhausted realization that there is nothing in the way of critical attitudes towards the law which the positivist can express in his idiom (“the law does not merit respect”) which his critic can’t propound in his (“such political directives do not merit the title law”). And we’ve seen the multiplication of what apparently looked to Austin like a single question into a great number of different ones. Despite this, legal theory continues to be written as if everyone is

still headed toward an assertion or denial of a “necessary connection between law and morality.” That is still the litmus test for describing the orientation of legal theories, notwithstanding that many now have trouble saying just what the significance of this classification is.⁶ In this situation, I think it is worth asking how the “separation thesis” of the 19th century reformers could have once *seemed* to be such big jurisprudential news; for big it did seem.

There is, in hindsight, a puzzle about this, and the solution to it is illuminating because it suggests that what led legal theory to orient itself around the “separation thesis” was not just an improved understanding - *cum* - demystification of law (call that the standard story) but a certain picture of morality as well. Amos’s description of Austin inverts the usual formula whereby it is the *letter* – the posited law – which killeth; but this is instructive because it suggests that the positivist’s de-moralization of law had, at its origins, something to do with a view about what is living or genuine in the realm of *morality*. Hart’s restatement of the “separation thesis,” in contrast, hands the matter on as if you could raise legal theory’s guiding question of “separation” without really having any very precise idea of what you mean by “morality.”⁷ This, I will suggest, is part of our present troubles.

2. Let us pretend that we know nothing about what Bentham and Austin – our positivistic forefathers – thought about morality, and that we had to reconstruct the thing just on the basis of the kind of description they want to give of law – e.g., that law is just people expressing their wishes that other people do certain things, including wishes that some people make it likely that pain is waiting for people if those wishes aren’t satisfied, and so on. (I’m abbreviating, but the details are all known well enough.) It would be hard to tell very much from just this, but one thing which might be inferred, I think, is that whatever morality is for these legal theorists, it isn’t something which has anything to say about *law*. Or rather, what it does say about law will be just an application of something it would already have to say (or be able to say just as well) anyway, even if there weren’t any law. So morality, on this account, has nothing to say about legal rights, (or about whether there are or should be any, or whether there need to be governments to identify and adjudicate them) except in some derivative way.

Consider apple-picking. Everyone can see that morality doesn’t have a doctrine of apple-picking. You don’t come across this division in any of the great treatises. This is part of the intuitive idea of morality which any theoretical development of it had better respect. Apple picking – just as such – is morally insignificant. But that is not to say that your picking apples can never be brought before the court of morality, just that morality’s jurisdiction over you in such matters arises in virtue of some other description of what you are doing. If your friend badly needs your help, then morality will say that you are heartless and no true friend when it turns out you preferred apple-picking over helping him. Or maybe someone is starving, and then morality, under certain conditions, can speak of your having an obligation to pick some apples. Or (another important case) perhaps the law of your territory forbids picking apples. Then if there is anything to be said about why, morally speaking, you should obey such a law (perhaps not obeying it will cause civil unrest), then morality will say that you have an obligation not to pick apples in virtue of that being enjoined by the law.

Now to say that morality has nothing to say about law is roughly to say that it speaks about it in the way it speaks about apple-picking. The concept of law is the concept of some human goings-on which – just like apple-picking – are, just as such, morally insignificant. If morality speaks about law, this is in virtue of some other more basic doctrines it has and some other description of those legal goings-on which bring it under those doctrines.

Now my main suggestion here will be this, that while the writers who have inherited and sought to improve on the 19th century positivist's starting point have done a great deal to clarify the existence-conditions and other structural features of positive law,⁸ *positivism* has never really existed, save perhaps as a special doctrine about morality, for the simple reason that everyone we can talk to about these matters will have to agree that there is positive law; so a mere explanation of positive law isn't really any distinctive legal-theoretical position. What has happened seems in part to be that while earlier legal theory had understood that terms like "rule" and "norm" were going to be needed in any description of positive law, the problems of merely giving an accurate description of the law after the 19th century positivist were so formidable that people started to think that, if you could just do that much, you will have delivered to people the *concept* of law in some decisively new way, one which exhibits it as just the concept of some morally insignificant goings-on. At the same time it was forgotten that what gave an intelligible motivation to the search for such a concept of law – one that finds no application, or none "strictly speaking," beyond the "province" of positive law⁹ -- is some special idea about practical normativity in general, one which has morality fully exhausting its basic doctrine about human goings-on without ever getting law into view. This would be roughly why today we have competing legal-theoretic answers to the positivist's main question – what it is for the law of a time and place to exist -- while more and more people say that they don't see what turns on the debate between the different answers.

3. Let me put this thesis in terms of what I think of as the best of these contemporary answers. A contemporary positivist is apt to advance "the sources thesis": The existence and content of law is fully identifiable through facts about human behavior and without resort so moral argument; so not even by way of legal provision can moral truth become necessary – and it is never sufficient – for anything to be law.¹⁰ Now, although the thesis today engages dispute with different parties, grant, for the sake argument, that there is a very good argument for it; perhaps the only plausible notion we can have of "civil authority" becomes unavailable on any other account. But why should we take such a thesis as doing anything more – not that this would be any *small* accomplishment – than giving us the right idea of positive law? If the law of a time and place needs to be identifiable without getting into disputes about the moral issues it is there to resolve, then that is what positive law needs to be. *Positivism* only emerges with the claim that the *concept* of law exhausts itself in *positive* law; and this claim, it seems, will have to involve some view of the conceptually complimentary region (morality), to which the law is being compared. If morality had something original to say about law – if part of morality were a doctrine of legal rights, for example, in some stronger sense than the sense in which there are also derivative moral doctrines concerning apple-picking – what motivation would there be for saying

that with the explanation of positive law you've pretty much got the whole topic into view, or that law doesn't have a critical/moral part as well as a positive part? Without the idea that morality is originally silent about law, it would be easy for most people, I think, to be positivist; for this will merely involve a perspicuous representation of positive law, and that is something to be welcomed all around.

I am deliberately reversing the question here. Unlike the classical writers, contemporary legal theorists tend to leave the concept of morality almost completely unexamined; they seek arguments for drawing the limits of "what the law is" on the far or near side of morality, conceived merely as one important region of norms which are valid on their merits. And this gives rise to different ways of slicing things up: to different representations of how much of legal argument is law-creating rather than law-applying, and to different accounts of what is happening when the law seems to refer to morality and provide a legal source for the application of moral notions in legal argument. But if we are to take the positivist position in this debate as one concerning the conceptual relation between (1) legality and morality rather than merely between (2) the notion "the law of a time and place" and "morality," don't we at least have to make clearer why we think that law isn't any part of morality? My thesis here amounts to the suggestion that insofar as the question in (2) gets understood as investigating the conceptual relation mentioned in (1), there is operating in the background a special notion of morality, to which the positivistic answers to question (2) – the limitation of law to just those norms which can be identified on the basis of social sources – is naturally fitted.

There is a strand in Hart's work which seems to suggest that when you have clarified the special notions of "validity" or "existence" or "membership in a system" applicable to legal norms, you have done the main work in giving people the concept of law. But it seems obvious – doesn't it? – that the concept of law is not the concept of powerful people expressing their wishes including the wish that other people use force, etc. And it also isn't the concept of officials accepting and following rules that identify a system of other rules concerning what people must do (even if this is true wherever there is law); for both of these are also the description of a well-organized mafia which takes over a town, the second one merely adding that this mafia likes to follow rules and procedures.¹¹ Don't we need to add something like this: that where there is law, there is a claim not only that force is being used for morally legitimate ends, but (what is not the same thing) that there is a *right* to use force?¹² So part of my question is this: Might it not fall to morality to say that there *is* such a right to use force among human beings, and to say something about what its domain and other constitutive conditions are, which might very well include the existence of positive law or a system of rules of the kind Hart describes? Leaving all this out, however, and keeping merely to the foregoing descriptions of the social facts which make for positive law has struck people as an *especially* perspicuous representation of the concept of law. Indeed, they have tended to say that adding anything else – of the kind needed to distinguish law from a well-run mafia – is a kind of mystification.¹³ And for this to happen, it seems that some strong motivation must be operating, for it isn't any kind of common sense. We should look to an idea about morality to see what forces are operating here.

4. Stated in this very form, I know this will seem far too simple. But I will argue that it does isolate the issue which breaks out at the 19th beginnings of positivism and which accounts for the sense of a radical break with jurisprudence as previously conceived. I also know that my thesis will also strike some people as misguided in advance, since, after all, there *is* this increasingly baroque debate going on today between three different parties: i.e., between the two species of positivist –

1 – those who assert that morality necessarily plays no role in determining the existence and content of the law; and

2 – those who say it doesn't *necessarily* play such a role, that all depends on what the conventionally accepted tests for recognizing law are;¹⁴

and between the lowest common factor of these two positions¹⁵ and

3 – the notional “natural law” critic, who says that morality necessarily does play such a role in determining the existence and content of the law.¹⁶

And since this is clearly a debate about the validity and existence conditions of the law, my thesis must really be missing what is at stake in “positivism” altogether. Positivism is what those who call themselves positivists say it is.

I have no argument with this, however, for my idea is not to legislate which debates people use the word “Positivism” to describe. At the same time, I do note that people increasingly say they don't know what turns on sorting out legal theories in the foregoing way, or why it matters; that an older idea of its mattering on account of its moral-practical consequences is now almost extinct;¹⁷ and that people now say either that they are merely investigating the concept of law, or that, really, it *doesn't* matter. So there is obviously a certain confusion today about what the investment in “Positivism” as some kind of separation of law and morality is all about.¹⁸ In the face of this, my way of arguing that “the separation” question is more radically a question about morality is first to suggest why doubts are justified about both the idea that what is at stake here is something of moral consequence, and the successor idea that “the necessary connection between law and morality” remains the right question for legal theory, even apart from such consequences. This puts us into the presence of a puzzle about why this *seemed* to be the crucial question when positivism first got going, and the idea that a special idea of morality is involved emerges as what needs to be grasped in order to solve the puzzle.

5. Before getting to the argument, one other stage-setting word seems in order. The explanation of what is important about the 19th century stating point has today largely shifted away from talk of the separation or separability of law and morality to talk of law as a certain kind social fact.¹⁹ This doesn't quite have the rallying power of earlier ways of understanding positivism's significance, but it is, I think, a clarifying development, and the thesis I wish to advance may perhaps be more sharply stated in terms of it.

Austin's famous dictum, let it be noted, does not itself explicitly mention morality. It speaks of law as a kind of thing (a kind of norm we would say today) which exists (which is valid we would say) whatever its *merits*. It is the usual case for practical norms to be valid – to bear normatively on action – only in virtue of their merits, or only insofar as what they say is right: “One ought to take the 5:30 train,” “Thou shalt not kill” “The innocent are not to be judicially punished,” “Do not deprive people of their property,” etc. It may harmlessly be stipulated, I think, that the compliment to the idea of a norm valid in this way is the idea of one which is valid in virtue of its *sources*.²⁰ Intuitively, this covers anything to do with how the norm came about, say its being enacted or commanded, or its being conventionally agreed to or recognized, or its being endorsed, sung in the Lydian mode, or otherwise messed about with by people in some special way.

Everyone seems to agree that legal norms are source-based. This is true even in the common law, where people have been most inclined sometimes to deny it. But the truth comes out whenever comparison is made between, say, *our* and *their* rules of tort, contract and the like. Even if— counterfactually – their rules were identical with ours, we should speak of two bodies of (e.g.) contract law with the same content, but not of everyone sharing and following the same law. This is a fairly reliable way to establish that norms are source-based in the relevant sense. In contrast, they don't have *their* norm against intentionally killing people and we *ours*. (If someone insists on representing all norms as source based, this will lead them to say that norms like “Thou shalt not kill” are given to everyone by God.)

Following these stipulations, we can render Austin's meaning in our more contemporary idiom by saying: Legal norms are valid – they exist as norms of law – merely in virtue of their sources (from people messing about with them in the relevant ways) and not in virtue of their merits. This is clearly broader than the idea that there is no conceptual connection between law and *morality*, or even merely the idea that the existence of law does not depend on its satisfying any *moral* requirements, for the law might have or lack various kinds of excellence (aesthetic, economic, prudential, etc) which are not commonly understood as matters of morality. But we might also consider the possibility that Austin's dictum says something much *narrower* than anything which brings into question the conceptual relation between law and morality.²¹ It merely remembers what we mean in speaking of *positive* law, *viz.*, that positive law it is the sort of thing which is fitted with a special notion of validity; it is the sort of thing about which it makes sense to ask, “Does it exist?” or “Is it valid?” and then look for an answer in a very different way than we would look for an answer to questions about the merits of some proposed course of action. That narrow idea seems mis-described as any sort of “separation thesis,” since it merely defines – on the basis of the applicability of a question about the source – the idea of positive law.

Now my thesis is in effect that unless we understand what is “positivist” about Austin's dictum in this very narrow way, we will have to suppose that some special idea about merit-based norms is also involved; such an idea will be needed before a definition of positive law can even seem to say something about the conceptual relation between law and morality. That special idea

might be approached, in the present terms, by picturing morality as a kind of highest, independent court of appeal for the law, one in which the standards to be applied are entirely merit-based (or determined entirely by some uniquely mysterious source); they are not dependent on, or affected by, anything which goes on in the human messing-about which makes law. Even if there were no law, morality would be no less in tact or complete. For what all the law-creation comes to is just more human activity of the kind which was always subject to moral assessment anyway. It might be of course be that people have good moral (and other) reasons to make law; for there might be moral goods or requirements which are going to be very hard to achieve or satisfy – given the known facts about people and the world they inhabit – without creating legal norms, norms which can be identified and followed without having to work out what the reasons for having them in the first place are. There might, in other words, be a moral argument for having legal authorities, and the law might have moral work to do. But this is different from supposing that some moral value – either a new value or one already belonging to morality – might only be realized or achieved when law is made, that morality is not fully realizable without the law.

Given this general picture of things, it is perhaps only natural to feel that when jurists start talking about legal rights and obligations in moral-sounding ways – something which it will require a concerted theoretical effort for them *not* to do (since to talk about such things is, after all, to talk about what people owe each other, and what is that if not morality?) – they are mystifying things, or running grave risks of doing so. And so analytical positivism is born – or at least that is the standard story – and it itself appears at its origin to be infused with a moral task: to undo whatever protects the law from criticism by making it analytically perspicuous that there is nothing which goes on in the realm of the human messing-about which creates law which can't, in principle, be brought to account before the higher moral court of appeal. The early positivist account of law in terms of “command” and “habitual obedience” would have certainly have made this perfectly plain, if it worked; and we can understand in these terms why the legal-theoretical task should then appear to be that of adding to this starting point just the *minimal* normative notions needed to give a plausible description of what everyone can see are the main features of municipal law.

Now I will proceed like this. In section II, I sketch the way the question of the “separation of law and morality” has become more complicated for us in terms of the two developments I mentioned: first, the loss of the question's *moral* significance; second, the discovery of various conceptual questions where the 19th century positivist seems to contemplate only one. The main point here is just to suggest how doubtful it is that the question of “the necessary between law and morality” provides a fruitful way to organize legal theory. Those who feel they already know this can skip this section and turn directly to the puzzle developed in section III, which stands out sharply against the background of such doubts: Why did it once seem so fruitful to make this the guiding question? I complete the account I have already begun of the solution in section IV. Section V sketches a few further implications of the argument.

II. The Separation Thesis turns baroque.

1. *Legal Theory as Conceptual Legislation.* In *The Concept of Law*, Hart says:

What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.²²

Hart speaks here as if drawing the limits of law in relation to morality were a quasi-legislative question: Should we give people this idea about law or that one? Would things go better if we conceived of law in its “best light,” or if we taught people that really any sort of atrocity may be carried out by legal means? The necessity for separating law and morality which Hart describes here is apparently no *conceptual* necessity. It is the alleged necessity of a means for bringing about a putatively desirable end: that of fostering appropriately critical attitudes towards the agglomerations of bureaucratic power known as modern legal systems.²³

Philip Soper finds it strange that “what began as a conceptual theory about the distinction between law and morality has now been turned, at least by some, into a moral theory.”²⁴ But where or when was the conceptual theory? This seems to get things the wrong way around.²⁵ It is hard to find anything which suggests that Hart is mistaken when he tells us that, in making this sort of practical argument for “separation,” he is merely continuing the main drift of English Positivism. For Bentham and Austin don’t seem to be asking sort of question which holds center stage today: that of whether, or under what conditions it is *intelligible* to think of moral considerations as playing a role in determining what the law is.²⁶ A conceptual *conclusion* is in the offing for sure – a delimitation of the “province” of law as distinct from that of both social and critical morality – but it is presented as following merely from a description of the structure of positive law, along with a proper moral/political orientation. As Hart reminds us, the politics which might bring the earnest inquirer to approve a dictum like Austin’s were those of utilitarian reform – the advocacy of liberal legalism (individual liberties, procedural fairness, administrative rationality, etc.) on the grounds of maximizing general happiness.²⁷

When people read The Concept of Law today they understandably want Hart to be up to something more conceptually ambitious – some kind of demonstration that thinking that there is some non-contingent connection between law and morality will land you in incoherence. Perhaps you’ll find yourself committed, for example, to some commonplaces, such as that the law claims authority, or that it makes a practical difference to what people ought to do, while theoretically undermining the possibility or intelligibility of such commonplaces. Such arguments are a recent feature of legal theory but they aren’t to be found in Hart. Indeed, despite the book’s title – *The Concept of Law* – it seems clear from the few passages in which Hart even mentions “positivism” that Hart thinks there is ample room for different *concepts* of law. The practical/political argument, as he casts it, is one in favor of what he proposes to call a “wider” concept of law as opposed to a “narrower” one, which applies a further moral filter to the instances picked out by the wider concept before it counts them as law.²⁸

Hart does say that he thinks that “plain speaking” favors the wider concept, and – since “the wider of these two rival concepts of law includes the narrower”²⁹ – that “nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept”³⁰ But all this seems odder than is generally realized because Hart never explains why we should think of these concepts of law as “rivals,”³¹ or why legal theory should accept the task of making a “*reasoned choice*”³² between them. Isn’t it to be expected, with almost any social phenomena, that there can be different concepts of it, some of which might be good for some purposes and others for others?

Moreover, why does Hart take it as *obvious* that no theoretical purpose would be advanced by adopting some narrower concept? Presumably, he is thinking that the wider concept allows you to say all the same things, without closing off the possibility of making important discriminations. But this argument seems merely to assume that the wider concept is the more basic one, that the narrower one only becomes available by adding an independent moral requirement. The narrow concept of law would, if this is right, be like the concept of drinkable water. Here you start with water, and then draw a circle within a circle to get to the kind you’d want to drink. But this would seem to call for explanation, since it would make the concept of law unusual among concepts which lend themselves to the same sort of division between critical/normative applications and purely social/factual ones. Think of the concepts of “argument” or of “medicine.”³³ Here we see that: (1) there is room for a narrower and wider concept;³⁴ (2) the concepts are not “rivals” – both have their uses; and (3) the critical/normative concept of “argument” is not, in the relevant sense, a “filtered” version of the wider concept, notwithstanding that it can be located entirely within it. The wider concept of argument is in fact parasitic on the narrower one: you can study the history or sociology of arguments about the concept of law, for example, but only because some people have the narrower idea, and put it to practical/critical use. Similar points could be made about “medicine.” For certain theoretical purposes, it may be fruitful to understand as “medicine” all the things which certain persons regarded as “healers” to do their patients, even if what they do is give them poisons. But there is a study of medicine as such social phenomena to be made only parasitically: The critical concept of medicine, which reflects an understanding of the reasons for having such a practice and how it succeeds, is primary.

There is good reason to think law will be like this too, since it is a human endeavor. Generally, we understand human endeavors by understanding their aims and how they succeed. The question of “why” has a certain primacy over the question of “what” they are.

To remember that the argument for “separation” was originally practical and political, however, is already to glimpse one reason why the question was bound to become more complicated for those following in this tradition. For insofar as “the separation thesis”*was* at heart something politically determined, then one thing which ought to have been more clearly recognized some time ago is that the whole issue must lie largely outside the jurisdiction of philosophy. Indeed, I think it must be doubtful whether such an issue admits of a stable settlement at all. For experience shows this about political doctrines, that what is right in one

situation – what works or is expedient – may be wrong in another.³⁵

There are two ways of coming into a recognition of the marginality of legal theory to the separation issue, when it is conceived as that of fostering the right critical attitudes towards the law.

The first is just to see that, whatever legal theory says about what official directives count as law, something will always be presented, in any legal system, *both* (1) as law *and* (2) as morally legitimate. This follows from the fact that the law tells people what they owe to others. Even if the truth-conditions of legal statements refer only to certain social facts and not to any moral truths, it can't be supposed that the existence of such social facts are all that the law or its officials *mean* or represent when they make such statements; “must do” could not be squeezed out of a mere description of what “is.”

Now, the target critical attitudes involve dispositions to conscientiously assess such moral claims. But it hard to see *a priori* how what legal theory says (about whether (1) and (2) must stand or fall together) would tend to foster or suppress such conscientiousness.³⁶ Whether the official theory puts people into possession of the wider or the narrower concept of law, legal officials will make the same claims and mean the same thing, and the practical problems of assessing those claims will remain the same. Much of the debate on this issue seems to proceed (on behalf of positivism) on the false assumption that it is only where the reigning academic theory is of the natural law kind that the law will be systematically presented as carrying moral force; or (on behalf of natural law) that only where the reigning theory is positivistic will legal officials have an easy time presenting “as law” political directives which are immoral or unjust. Against both views, Philip Soper is right to say that “no practical consequences of any kind, or, at least not of the kind that concerns ordinary moral theory, attend this debate at all.”³⁷

But there is another way of coming at the same point. It is undeniable that what people say about the relation between law and morality might be fateful in all sorts of ways, only not the ways which it befits a philosopher to predict. (Perhaps one of the effects of the choice between Hart's two concepts of law will be that persons of a different temperament and character are attracted to careers in law – who knows?)³⁸ The general principle acknowledged in Soper's qualification – “at least not of the kind that concerns ordinary moral theory” – is that the causal effects of the philosopher's teaching do nothing to recommend or discredit it if they arise through misunderstandings or misapplications of it, even if these effects are foreseeable ones within a certain social and institutional context. Thus, the conclusion here is not that positivism wasn't a favorable political development in 19th century England. It is just that, if we are really to reason our way into a “concept of law” on such a quasi-legislative basis, we will have to take account of a wide range of social, cultural and political variables. And why should it be thought that this will always bring us, at any given time and place, to the same conclusion? What seems to have a happy development in the 19th century English experience was arguably not so in the 20th century German experience, or the 19th century American experience with the laws creating property rights – enforceable by the usual process – in other human beings.

Perhaps these historical cross-currents might even have been predicted on the basis of Bentham's original political defense of the separation thesis, for as Hart notes (though without noting its curious implications), the thought of a necessary connection between law and morality is supposed to foster two *opposing* social attitudes – the *quietist's* “This is law, so it just” and the *anarchist's* “This isn't just, so it isn't law” – depending, as it were, on the direction from which one enters into it.³⁹ Kelsen also observes that natural doctrine has lent itself to *both* conservative and anarchical applications.⁴⁰ But suppose Kelsen and Bentham are right about this. It must be a remarkable doctrine that, in negating what the natural lawyer is supposed to affirm, does battle against *both* of these attitudinal tendencies at once. If Kelsen and Bentham are right, then the negation of such a natural law doctrine (the separation thesis) ought to foster – at least for all we know *a priori* -- just the negation of these same social attitudes. So it ought to foster, under the right conditions, a bit of quietism itself. Enter Gustav Radbruch: Positivism was partly responsible, he suggested, for lack of German resistance to the policies of National Socialism. A “narrower” concept of law – one which makes the truth of the claim to be law depend on the absence of gross injustice – is just the tool the German jurists needed.

Historians will make of this what they will. What seems odd is that Hart – while apparently asking just such a question himself – should respond to Radbruch by endeavoring to hold a philosophical (or *a priori*) line. Hart makes two points in this debate. First, it is not under all conditions – not just everywhere – that the separation thesis is apt to be put to work in the unhappy German way, viz., as confirming the jurist's sense (suggested by prudence anyway) that there is good reason to comply with morally iniquitous political directives. But this is reversible: It is not everywhere that the separation thesis conduces to a happy liberalism, so the fact that it sometimes does so also stands in need of further explanation. Second, Hart offers a simple diagnosis of what the conditions were under which positivist views could have played the disastrous role they did: a massive juridical overestimation of the moral force of law. Correct that misunderstanding, Hart suggests – teach people that the law is one thing, and morals another -- and the German jurists would have had available to them just the thought in a positivist form (“This law is too evil to be followed”) which, according to Radbruch they needed a natural law filter to get into view. But as this says that the positivist thesis is quietistic only on the condition of certain *misunderstanding*, surely there is a parallel point to be made in defense of natural law views against Bentham's style of criticism: On a *correct* understanding of natural law views, one could hardly reason from the premise that something is *presented as law* to the conclusion that it must be morally sound; the whole point of the formula is to make trouble for political directives at the stage before such a premise is accepted. Only on a misunderstanding of what entitles us to “certify” anything as law could it even seem to follow from the fact some political directive claims to be the law that it is morally in order.⁴¹

Further trouble along the same lines might be made concerning the indiscriminately broad class of subjects to whom Hart thinks of theoretical legislation concerning the “concept” of law to be given: “What is most needful to make *men* clear-sighted....” But if we are really to adjudicate among legal theories in this political way, then shouldn't we need to concern ourselves not just with the *when* and *where* of attitudes to the law, but with the *who* as well? Robert Cover's study of

the 19th Century American experience with the fugitive slave laws powerfully illustrates – what seems intuitive anyway – that the form of thought on which the positivist’s case relies (viz., “this law is immoral, so I won’t follow it”) is apt to come more easily, psychologically speaking, to the citizen, whose dis-obedience may remain his own private affair, than to the judge whose public role and office are defined in terms of the obligation to apply the law.⁴² Moreover, once it is understood that one size may not fit all – that people in different roles may need different formulas – why limit the options merely to *choosing* between the known varieties of Positivism and natural law theory? Perhaps the optimizing strategy for political life lies in teaching a happy confusion – just what is already apt to happen in the law school survey course in jurisprudence. Karl Lewellyn vividly represented the common law as full of contradictory principles – something he and other Legal Realists perhaps regarded as part the law’s excellence since it affords judges a basis for doing what they independently think right on the merits. Why shouldn’t that be one way of going about the quasi-legislative problem? Adhering to the standpoint of assessment which seems to be contemplated in this debate, the need for theoretical consistency might come to look like a mere philosophical prejudice.

2. *The Multiplication of the Question.* To the properly conceptual question, however, of whether legal norms need to meet some additional test of moral merit before they genuinely count as law, a response appears to be waiting. As morality is already binding on everything that people do, this threatens to make law superfluous: What could be the point of having source-based norms of obligation if you’ve got to settle moral questions in order to decide whether they really exist or what they say? Isn’t the point of having law – or part of the point anyway – to have public standards of conduct which are ascertainable without recourse to the moral reasons on which such standards are supposed to be based?⁴³

Following this thought, we can distinguish between what amount to metaphysical and epistemological versions of the separation thesis. The epistemological versions of “separation” address a question about how the existence and content of law is to be known or identified; they propose an epistemic constraint on any theoretical account of what the law is and how far it extends. The general idea – due to Joseph Raz – is what I earlier identified as “the sources thesis”: The existence and content of law must be such as to be identifiable on the basis of facts about people’s behavior and views (even their views of moral matters), without recourse to argument about what is morally true.⁴⁴

For present purposes, all that matters is how a number of different questions get helpfully distinguished by this conceptual turn in legal theory. The sources thesis is clearly distinct from questions about whether and what “moral principles” must necessarily come into legal argument and decision, as well as from semantic questions about whether the law is making moral claims – or using terms in a moral sense -- when it speaks about rights and obligations.⁴⁵ Also distinguishable here is the question of whether a general, descriptive legal theory can be purely value-free or whether it must rely on evaluative judgments concerning what is important about law and why it might be worth having.⁴⁶ And Austin’s own dictum – “the existence of law is one thing...” – seems rendered ambiguous by these distinctions, since it can be heard in either an

epistemological or a metaphysical register.⁴⁷

Indeed, after these developments, the canonical question – “Is there a necessary connection....” – must seem much too crude an instrument. For clearly, on any fair account, there are *many* necessary connections between law and morality which it would be quite absurd to deny. For example, the law necessarily *resembles* morality in describing what people owe to one another and what they can demand of one another as a matter of right. And this modest connection between law and morality points the way to others. It will have to be acknowledged, it seems, that the law necessarily purports to articulate moral requirements.⁴⁸ It also seems plausible to think, as Hart argued, that wherever there is a stable legal system, something of moral merit is present, if only because given the conditions of human life (such as mutual vulnerability and relative scarcity), all such systems must provide some protection for both person and property.⁴⁹ And perhaps it will be remembered that Hart and Fuller *agreed* that insofar as the law involves general norms (rules which can be correctly or incorrectly re-applied) it necessarily realizes a rudimentary element of justice – that like cases are treated like.⁵⁰ And quite generally: As the sources thesis requires only that law be identifiable on the basis of certain social facts, it leaves open the possibility that the sort of social facts which determine the existence of law might necessarily – at least barring some deep change in the conditions of human of life – be such as to give the law some moral value.⁵¹

Of course, nothing in this list of “necessary connections” between law and morality involves any commitment to thinking that laws or legal systems cannot be evil, oppressive or unjust, or that one always has reason to follow the law, or that moral argument must be involved in the social practices of recognizing or identifying the law. So there is ample room for a positivist or a critic of positivism, who wishes to elaborate *a* sense in which law is or isn’t connected to morality, to claim victory in the debate:

– there is no necessary connection between law and morality, says the positivist, for laws can be unjust.

– *of course, says the critic, but people have moral reasons for creating and maintaining systems of positive law.*

– sure, says the positivist, but that doesn’t mean that the existence and content of the law can’t be identified without recourse to such reasons.

– *naturally, says the critic, for the moral reasons in question are reasons for creating legal authority. Nonetheless, judges must often resort to moral argument.*

–of course, says the positivist, for the law has limits (it is not all the considerations judges should use in deciding cases); but, nonetheless, judges have to render non-arbitrary decision.

– *no doubt, says, the critic, but when judges extend the law, they don’t simply become*

legislators; they appeal to principles which rationalize the existing law.

-- whoever said that all law-creation was the same, says the positivist.

– well, the central point is this: the law has a moral task to do, and so the central case of law is one in which it is successful, says the critic; for to understand what the law is we need first to understand why it is good to have law.

– say what you like about central cases, says the positivist; it doesn't follow that the law is always a morally valuable institution, or that there is always a moral obligation to obey the law.

And so on.⁵²

What is happening in these exchanges? Well, if it is laid down that any legal theory is headed for *the* question of a “necessary connection between law and morality,” then a simple recursively applicable device will tend to bring about the multiplication of the question on its own. Let someone put forward a thesis concerning the separation of law and morality, and then let someone else put forward some objection to it while failing to recognize that the objection was really just discovering another sense which could be given to the question. Soon enough there will be lots of questions in play, but there will be a further question: Which of the many questions should be considered the truly decisive one for this debate? Things go on today as if *one* of the questions must really be the decisive one, but there are different ideas about which one and why. Little wonder then that many people now doubt the value of the theoretical exercise set here, at least pending clarification of why (or to whom or from what point of view) the different questions matter – issues which since the days of Austin seem to be both more clearly recognized but less clearly answered.⁵³

III. The Puzzle about Positivism

1. That was just a crude sketch of the current situation, and of the earlier debate that preceded it. But perhaps it is enough to make us interested in asking just what the question was which started things off and seemed so ground-breaking. The answer seems to be this, the possible existence – in fact, for Bentham, the all too real existence – of iniquitous or bad laws, laws ripe for reform. Listen again to Hart:

What both Bentham and Austin were anxious to assert were the following two simple things: first in the absence of an expressed...legal provision, it could not follow from the mere fact that a rule violated standards of morality that it 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.⁵⁴

Suppose Hart is right about Bentham and Austin. Then there is a puzzle: Who realistically could this have been news to? Who ever failed to see that one can't simply infer from the fact that a rule violated standards of morality that it was not a rule of law?

This assertion seems almost to need a context which is a different *civilization* than ours. Philosophy, on the Greek model, seems to have become first conscious of itself partly by becoming aware of the way the law can be like *this* or like *that*, and way it can go off the rails. That Socrates is punishable as a wrongdoer according to law is after all just the Athenian crowd's *view* of things. This is where legal philosophy *starts*. (Some terribly mistaken operations of the law are also not exactly foreign to the judeo-Christian sources either.) So it might wondered: If the law of Bentham's and Austin's time and place was in need of reform, why not just criticize it? Why the felt need – as the standard story intimates – to *prepare* oneself to criticize it by laying it down that the law is *criticizable* since, after all, its existence is one thing and its merit another?⁵⁵

If we believe this story, we are left to infer that someone must have been saying that *laws* aren't the sort of things you can interrogate in terms of whether they are good or bad, or given for good reasons or not, or whether it would be wrong to disobey them – but *who* was thinking this?

Contemporary positivists are apt to pitch their arguments against Dworkin, but let's leave him aside just here; the intelligibility of a revolution in jurisprudence shouldn't have to depend on what comes a century later. I don't say that one can't dredge up some pre-Hartian suspects to be the targets of the early separation thesis. There is, for example, a careless remark of Blackstone's which has perhaps proved a godsend for positivists looking for someone to argue with.⁵⁶ But that remark has always been taken piecemeal out of a context which contains other statements contradicting it, and which is sensitive to political currents which should be irrelevant to the legal theorist.⁵⁷ In contrast, when we turn to the main traditions of pre-utilitarian legal theory, we find the possibility of iniquitous laws to be there front and center. In fact, anyone can see that Aquinas' or even Kant's discussion of such laws⁵⁸ shows much greater awareness of the different questions raised by legal iniquity (e.g., the differences between moral validity, systemic or constitutional validity, and the empirical liability to suffer sanctions) than anything available in Austin.

Can the old saw *lex injusta non est lex* – which is attributed to Aquinas⁵⁹ – perhaps give the early separation thesis the target it needs?

Well, whatever this says it must be a rather far cry, as Finnis has shown, from denying the possibility of unjust laws, since it in fact begins by referring to them. It is very different from saying that there is no such thing as an unjust law, or that law everywhere comes with a kind of in-built moral filter, such that injustice of certain kinds or degrees renders a rule incapable of being a true proposition of law of a given time and place. That reading comes from contraposition: "If it is law, then it is just." But it is easy to think of statements of the same form which everyone can see are not good candidates for contraposing: "The fair-weather friend is no friend at all." To make sense of "lex injusta" without attributing to St. Thomas a love of paradox, we need to see that he has in view both a social-positive and critical use of the same term (Hart's wider and narrower concepts). As happens, of course, quite commonly: "A *true* boy scout shares his cookies." Or to one's legal spouse: "You say this a *marriage*?" Or even: "Now that's what I call an opera, a steak, a high-dive." Speech seems to be *plain* enough here; and no one has ever been tempted to understand such utterances as claiming that all operas, steaks and friendships are filtered from the

inside against disappointment, or that this way of speaking distorts the questions of appropriate attitudes when such important things as marriages fail to be all they should.

Following Finnis, a provisional explanation will go something like this: Unjust laws are just that – they are *laws* in the positive sense all-right – but (like bad marriages) they are not what they are supposed to be; supposed not in the sense of a merely external standard, but a standard that is presupposed to them and which they claim to satisfy, and which we shall need to bear in mind if we are to understand why we are interested in having such things in the first place.⁶⁰ The point here is to describe a kind of structural doubleness in the realm of *lex* – roughly what we today call “morality.” That can only seem to be introducing a moral filter into the law on the basis of the same assumption which Hart makes in taking it as *obvious* that the “wider” concept of law is the more basic one, with the narrower ones derived by adding additional requirements (§II.1). But Aquinas has clearly begun at the other end (with *lex* or morality). So the work of “*lex injusta*” is best described not as filtering law from impurities, but as representing that impurities are bound to make their way into *morality*. Just as sound arguments are internally related to the possibly of sophistry (you can’t have one without the other), or as human marriages are impossible without bad ones, so the formula may be understood, following Finnis, as saying that morality is incapable of fitting law with a filter, that the alienation of morality in posited rules which purport to express its requirements is part of its very possibility.

The teaching Hart propounds (and the commonplace now of legal theory textbooks) – that positivism rose up against a long-standing “moral filter theory” of legal validity⁶¹ -- belongs, the evidence suggests, to the realm of mythology. One needs motivations for thinking that Hart’s “wide” concept is the primary one before the myth can get going at all. Once it does, it proves a useful myth, because it allows Positivism to understand itself through a single and simple polemical focus. Today we need to realize that the “moral filter” theory belongs not to the history of natural law but to that of legal Positivism: It is a re-making of natural law themes in the image of positivism, with morality cast into the role of an *alternative answer* to the positivist’s central question, that of the validity or systemic existence-conditions of the law of a time and place. The main question *before* the 19th century positivists seems to be not “What is it for law to *exist*?” but rather, “What is it for *law* to exist?,” which is perhaps better expressed by asking “What *kind of thing* law is,” or what kind of thing exists when there is law – the law of a time and place – as the positivist understands it.

The difference between these questions might be brought out like this. Suppose Hart is roughly right: Whenever law exists there are relatively efficacious primary rules of obligation combined with officially practiced second-order rules which identify some of those primary rules as valid members of the same system of law.⁶² It is a further claim that there is nothing beyond this, of a conceptual nature, to say, about what *kind of thing* has its existence in a practice of this sort; the Thomastic answer puts law into conceptual relation with practical reason and basic human goods; the Kantian, into relation with practical reason and freedom. Of course, this not to say that the polemical attack on the previously non-existent “moral filter” theory of legal validity does not *later* invite attempts to challenge positivism by defending views of that general form – one’s which

leave the structure of the positivist's *question* unchanged. The first clear instance of a "moral filter" view comes – unsurprisingly, if this thesis is right – from a "legal positivist"; Radbruch's "conversion" to a "natural law" view seems to amount to nothing deeper than his taking his previous positivist understanding of law and tacking on a moral rider.⁶³ And Dworkin thesis that propositions of law are true if "they figure in or follow from the principles of political morality which provide the best constructive interpretation of the community's legal practice"⁶⁴ might also be described as a kind of natural law theory in the image of positivism – natural law organized around an analysis of what it is for something to be part of the law of a time and place. Perhaps, as the focus of current debate suggests, Dworkin is really the target positivism has always needed: Not having really found that target in the earlier tradition, Positivism was fortunate enough to have been able create it for itself.⁶⁵

2. One further bit of evidence for the mythological status of the "moral filter" theory might be found in this, that Austin presents no argument at all against that theory, as one would expect him to do if it were really a serious historical predecessor to his view. Austin's procedure is rather to begin with a definition of what he calls law "simply and strictly so-called." The 'province of jurisprudence,' is to be limited by this definition; it will concern only the commands given by political superiors. Now from this definition, Austin's separation thesis obviously *follows* as a matter of course, since something more than law "strictly so called" will be needed to describe limits on the behavior which can be politically commanded. Thus, *if* one tries to read Austin's work as aimed against the "moral filter" view, one is apt to feel that a very substantial chapter or book has been omitted prior to his First Lecture – one which would motivate and justify his restrictive definition, on which everything that follows depends.

There is perhaps one notorious argument, but it confirms rather than alters this conclusion:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.⁶⁶

The notion that reasoning can be met and refuted with a forceful assertion of will seems only to have been contemplated with a like seriousness in the political theory of the American western.⁶⁷ Suffice to say that the argument is either irrelevant or it presupposes Austin's definitional point, namely that the *only sense* ("strictly speaking") which can be given to "non est lex" is that of the empirical likelihood of facing sanctions.⁶⁸ Of course, Austin might also have noted that a wicked regime will hang you even for acts which do not violate its laws. Which is just to say that corrupt power has a tendency to do as it likes – and that certainly isn't news.

There is a tendency to suppose that what goes wrong here derives merely from the inadequate underlying account of laws and legal systems – one which doesn't really manage, on the basis of the thin materials of command, sanction and sovereign, to distinguish law from the Syndicate-in-charge.⁶⁹ But that is not all that is wrong. In fact, the instructiveness of the present passage lies in seeing that what goes wrong in it has nothing to do with the account one gives of

positive law or legal systems, one way or another. If one didn't see this, then a modern re-formulation might have the assertion "non est lex" answered by saying, "Well, look here, we legal officials follow some rules for identifying law, and according to these rules, it is a law you've broken all right...". But that is clearly no better, for it seems no less merely stipulative to suggest that the only intelligible application of "non est lex" is to pick out the situation where one of the Gang isn't following the rules. And, indeed, grasping this, why would it be thought that this dialogue is made any less Kafkaesque by merely adding the relevant recognitional practices should incorporate some bits of "morality" into legal validity? Couldn't the legal subject who speaks here intelligibly mean that the official action proposed is unjust in ways that go beyond the rules and even the bits of morality they recognize? And of course incorporating the whole of morality into law would be idle. So it seems that *nothing* in the way of an account of positive law gives the right response here; what positive law might be isn't really the problem.⁷⁰

All this is, I think, of more than merely historical interest. It is an exceptionally stark – and therefore also instructive – example of a dialectical pattern which is quite contemporary as well. Put it like this. What is later understood as "the separation thesis" isn't really presented, and isn't functioning here, as a *thesis* at all, something which invites evidence or argument. It emerges as a mere corollary to a definition; its function is just to identify the object which has been selected for investigation.⁷¹ It amounts to a grammatical commonplace about positive law. To put the matter in terms which might have struck a follower of Austin as mystifying but which gets at the essential point, one might say: Positive law is the kind of thing which must be fitted to appear as the conclusion of a practical syllogism – that is, as something based on practical reasoning. This means it is the kind of thing about which you can always intelligibly ask "why," to which a question about its merits or demerits is always applicable. That question is never turned back with "no reason, it's just so" as it might be if someone asked, say, why good was to be done and evil avoided. My motive for putting Austin's thesis in this somewhat unorthodox way is just to suggest how easily it may be brought in alignment with the theoretical tradition which begins by saying: "The law is a dictate of practical reason."

So the main point is this: Accounts of what positive law is are not sufficient to make one into a positivist; at best they are merely necessary. But the argumentative tendency which persists since Austin consists in supposing that one can defend positivism simply by offering an improved analysis of the structure of positive law – an analysis in terms of the commands of superiors, or in terms of social rules, or conventions for recognizing law, and so on. Important as such endeavors are, they don't yet describe any sort of distinctive legal-theoretical position, for the natural law theorist has always known that there are, say, *the laws* of Athens and Rome and Connecticut, and has always been able to see these as means, and to distinguish them from the ends which belong to the premises of practical reasoning. How is it then that Austin and his successors could suppose that in defining law as a species of human command they were breaking with this tradition in a decisive way?⁷²

That is the puzzle. None of this is meant to be dismissive of 19th century Positivism, only to make this puzzle fresh.

IV. Austin's dictum is more than a commonplace when it is applied in *two* directions

Our pretense (§I.2) can now be dropped. We already know that the early positivist in this tradition had rather special ideas about morality: They were Utilitarians! So my thesis is just that this tends to be treated as an accident, but it wasn't.

Utilitarianism fits our *a priori* bill of requirements (§I.2), for it contemplates that a book could be written laying out the whole of morality at ground level without ever talking about law, or indeed, it seems, without mentioning *any* general norms – including, say, those pertaining to the justice of taking people's property, intentionally or negligently injuring them, compensating them for wrongful losses, returning wrongful gains, and such like. I do not mention these particular norms merely at random, or just to advance my argument by indirectly suggesting that maybe you *can* study part of morality directly by studying the law. It's rather that I haven't myself a very clear idea of what "moral norms" are supposed to be if these *aren't* examples of them. On this point, H.L.A Hart's observations seem sound that "outside the law there is a moral conviction that those with whom the law is concerned have a right to mutual forbearance from certain kinds of harmful conduct," and, indeed, that "such a structure or reciprocal rights and obligations proscribing at least the grosser sorts of harm, constitutes the basis, though not the whole, of the morality of every social group."⁷³

Of course such a structure of reciprocal rights and obligations is also, as we know, the stuff worked up – even, Hart allows, necessarily worked up⁷⁴ – in every legal system. Formally, it comprises what Hohfeld identifies as a distinctive "legal" or "jural" relation: a "claim" right, which is correlative to a "duty" in another;⁷⁵ substantively, such correlative rights and obligations express the idea of justice as the relations with others which are necessary to avoid wronging them. Thus a peculiar normative nexus appears here, expressible in judgments of the form, e.g., "You mustn't (it is wrong to) take that– it is N's".⁷⁶ It is indefinitely extensible, pairwise, across different persons, and it has the familiar property of (to some extent) shutting out the rest of the world: If I must not take that because it is N's, this is a limitation on my aims, even those of benevolence or the spread of justice in the world. (And so it is also, according to the vivid textbook examples of this morality, that I may not harvest the organs of the wicked for better use elsewhere, or intentionally kill people even for the most beautiful purposes.)

Now, given this, one might ask here why no "moral positivist" has appeared to say that the existence of *morality* is one thing, its merit or demerit quite another.

But perhaps that *is* the right way to understand utilitarianism, its legal theory being just one special application of this more general doctrine. For haven't we been told that the social facts which get described and classified by people as, say, "torture" "theft," or "punishing the innocent" are not – just *as such* (qua torture, theft, etc.) – of any moral significance? (That what you propose to do would be "taking what is N's" doesn't, just *as such*, bring any practical reasons into view for creatures whose reasons putatively all have to do with maximizing whatever items

(pleasure, happiness, wealth, desire-satisfaction) inform the utilitarian's theory.) So wouldn't it be good if we could de-moralize *morality* as well by analytically re-describing what is happening when, say, "what is N's is taken" or the "innocent are judicially punished" in a way which makes clear that the "*moral convictions*" people have in such cases are can themselves be brought before the highest court of morality, but are no part of the adjudicational standards to be applied there?

Of course, the image of "morality" as a highest court of appeal will come under strain here, since what will be adjudicated there is not – and this is what makes it the *highest* court – whether it is *just* (much less *lawful*) to take, torture or punish, but only whether one *morally ought* to do it.⁷⁷ (And it would obviously be mistaken to picture this court as following any rules of procedure, or even needing them – what is meant by a court here is really indistinguishable from an ideal observer, armed with the right moral theory and unlimited amounts of information.) And, notoriously, it appears at least *debatable* whether there are any generally valid norms to be applied at this level: While punishing the innocent might be unjust under all circumstances, it doesn't follow, on this view, that there are no circumstances in which one *morally* ought to do it. This would suffice to show that most of what common sense was naively apt to call "morality" was subject to its own "sources thesis": Such general norms are just so many positive representations of what there is reason to do. If they exist, they do so in virtue of the customs, habits, views (or "convictions," as Hart says) of communities of people, and would thus be identifiable without recourse to "moral" argument. *This* must be the "dead body" of morality from which the law, on Amos's account of Austin (§I.1) was finally separated.⁷⁸

2. The solution to our puzzle now will lie in this, that when Austin says "the existence of law is one thing, its moral merit quite another," he means to affirm the independence of law and morality in *both* directions. His point is not just that law always faces the interrogatives of practical reason (something to which everyone can agree), but, more distinctively, that everything relevant to the criticism or justification of the law is itself fully or determinately available independently of the law. Vague as this is – utilitarianism fits this requirement and any articulation of utilitarianism will give it further content – it is possible to see how it *does* join issue with "lex injusta," even on the more charitable (Finnisian) account of it (§III.1). For it amounts to the rejection of the thought that the law might have a critical aspect which could make it – as the analogy with marriage might suggest -- its *own* court of appeal. The point may be put like this: Beyond the uncontroversial claim that there can be bad laws, what in fact drives Austin and his successors is the thought that, as one pursues the chain of reason-seeking interrogatives put to the law, a sharp break must occur: One will have to leave the province of jurisprudence (with its human commands) and enter that of critical morality (with its standards of reason, binding on conduct in virtue of their utilitarian merits.) The break occurs because there is nothing law-like – nothing that the law *interprets* or applies, only something it reckons to produce – as one moves to the highest level of practical reason.

Something in the structure of Austin's discussion can make the point here difficult to see. Thus, it might be objected that the traditional natural law theorists also contemplate such a higher

level of right reason. And Austin displays his structural relation to this moral-theoretic tradition by continuing to speak of critical morality – which for him means the command to maximize happiness – as a realm of higher *law* (natural law, divine law), and so on. So point for point, the objection will say, we still haven't anything distinctive happening here.⁷⁹ Or nothing distinctive except a proper identification of law: While the earlier tradition had supposed that this higher law filtered out bad instances of human law, it was only in the 19th century that people finally understood that human law owes its existence or validity to its sources. That is the usual way of reading Austin, the standard story.

But there *is* a crucial difference here. None of the pre-utilitarian legal theorists dreamed that in the practical ascent from the laws of states you came into contact with something which could, in principle, be more determinate – subject only to the limits of information about what will lead to what – and more exacting in its guidance of human activity than any human code itself. Yet this is just the new idea which utilitarianism brings forward. Indeed, it seems to be no small part of its appeal. Here we might recall how Sidgwick relentlessly takes just this point to establish the superiority of utilitarianism, as he puts it, over all common sense moralities, which still depend on distinctly practical forms of reasoning – on “intuition,” or situational and applicative judgment.⁸⁰ Thus, he pictures the utilitarian demonstrating to the “intuitionist”

that the principles of Truth, Justice, etc. have only a dependent and subordinate validity: arguing either that the principle is really only affirmed by Common-Sense *as a general rule admitting of exceptions and qualifications*, as in the case of Truth, and that we require some further principle for systematizing these exceptions and qualifications; or that the fundamental notion is *vague and needs further determination, as in the case of Justice*; and further, that the different rules are liable to conflict with each other, and that we require some higher principle to decide the issue thus raised; and again, that the rules are differently formulated by different persons, and that these differences admit of no Intuitional solution, while they show the vagueness and ambiguity of the common moral notions to which the Intuitionist appeals.⁸¹

To grasp what is occurring here, one needs to remember that the thought that justice is vague and needs further determination was a commonplace of natural law theory; indeed, it served as part of the argument for the necessary positivization of this region of morality (*lex*), its expression in public, authoritative sources, comprising rules and singular judgments – the sort of human rules and judgments which *might* turn out to be moral corruptions. Thus (continuing to focusing on the region which Hart calls “the basis of morality”) it appears unjust, given, say, normal circumstances, to seize or not to return people's property, or not to pay one's debt, or to launch heavy projectiles into public spaces where they might hit people, or to make a great deal of noise and disturbance affecting one's neighbors. But the circumstances can make a difference to what justice requires in such types of cases: There may be a conditional privilege to seize property when this can avert some public or private injury, say, keeping the insane man's knife from him.⁸² Or one may one might do no wrong by keeping one's roped in a storm to another's dock, even if one thereby destroys the dock;⁸³ and the launching of projectiles may even be a rightful activity if it is a beloved national pastime and the risk to people passing on the street isn't too substantial;⁸⁴ and so too, with the activities which disturb one's neighbors if what is going on is that one's neighbors are peculiarly sensitive to the noise, say on account of a special medical

condition,⁸⁵ or if the general use of property in the vicinity is already of the noisy kind,⁸⁶ and so on. What is new to utilitarianism is thus not the discovery that such a morality is naturally vague, (and requires such further, circumstantially sensitive judgment) but a certain interpretation of this commonplace: viz., as revealing an epistemic *gap* in such a “common sense” morality of justice, and hence the desirability (or even the necessary existence) of “some further principle for systematizing these exceptions and qualifications,” “a higher principle to decide the issue thus raised.” On the classical view, in contrast, what was always understood to be required was a *lower* principle, the completion, realization or actualization of such a morality of rights and obligations through operations of positive rule-making and judgment which constitutively give content to the notion of justice as this indefinitely extensible normative nexus between persons.

The *kind of thing* which law – in its source-based positivity – is might be expressed here by saying: No justice without law – even if it is true that the law can go wrong and be unjust (it can, for example, fail to recognize the presence of whole classes of persons to whom such a morality, such a normative nexus, extends.)⁸⁷ So that there is *this* necessary connection between law and morality – no justice without law – is *also* the explanation of the impossibility of fitting the law with a “moral filter.” (“No justice without law” says: “The judgments of a public legal authority must be binding, even when they get things wrong, if this sort of morality is to be possible; it is the sort of morality naturally fitted for sources.)

The gap-based interpretation of the indeterminacy of justice, will, in contrast, show itself most distinctively in a thought like this: What is seen in the exceptions to the requirements of justice mentioned in the cases above is not that positive law is needed by morality in any essential way (though human nature being what it is, it may be very hard to get along without the law), but that what would ordinarily be a wrongful act can always be rendered right by an appropriate calculation of better consequences. What makes the consequentialist’s gap-involving interpretation of morality so compelling to people at this point in the 19th century⁸⁸ is a worthwhile question. A reasonable guess is that the answer partly involves the wish to reduce the dependence of practical thought on any operations which are distinctively practical, viz., situational judgment of the kind which endeavors to read what matters about the situation, case by case. Austin and Bentham may have been less self-conscious about such motivations than later figures (like Holmes or Posner), but we may presume, I think, in the wildfire with which 19th century utilitarianism takes hold, that thoughts like this are operating in the background.

To sharpen things by contrast, let me say another word about the traditional understanding which is challenged here. It proceeds from an awareness of way the subject matter action is inexhaustibly indefinite and cannot be managed, at least beyond a certain point, by general principles which are correct without qualification. This awareness tends to be revealed by two of its consequences. First, the approach to justice tends to be enumerative, interpretive or bottom-up.⁸⁹ So Aristotle, for example, enters the discussion of justice not through the construction of any notionally ideal standpoint, but with the observation of salient patterns of reasoning in the Attic *law* of his day; and from this he develops his account of two abstract forms of justice, one pertaining to the sharing of burdens and benefits within a community of any size, the other to the

pair-wise normative connections which resurface in Hart's description of the basis of morality.⁹⁰

Second, when one ascends from the law to these structures of justification (which Aristotle calls "forms of justice") one encounters, as was said, not principles which are in principle more determinate than the law or than common sense morality, ones which are less so. Sticking to the region of private law, one finds, for example (in Aristotle and Aquinas), the very abstract thought of pair-wise doing and suffering as subject to a norm of equality; or later, echoing this, in Kant, the postulate of right which says that exercises of free agency must coexist with the freedom of others; or such principles as find their way into positive law as "use what is yours so as not to harm the other (*sic utere tuo...*); or even just the nearly empty precepts of Justinian to live honestly, hurt no one and render everyone his due. (That there is *the other*, distinct from oneself, and that this is normatively significant – the other has a "due," – is the primitive thought here, the germ. one might even say, of the legal part of morality.)

Now obviously these very abstract "principles," if we can even call them that, are a very far cry from supplying any external tests for the moral validity of specific legal rules; and there is an understandably tendency, on the part of those who seek such tests, whether utilitarian or no, to complain that if *this* is what the critical part – the so-called "natural" part⁹¹ – of the law consists in, it is quite empty and useless.⁹² That familiar charge has a point, which is that such notions as "render everyone their due" or "do not use your property in ways that injure the other" are quite evidently just placeholders – indications of the abstract unity – of a certain type of moral concern, a certain type of reason which is engaged by situations in which, well, the other is there, that is his, he's standing there, etc., so there are certain things you mustn't now do. Naturally, such formulas presuppose an account of what the other is entitled to, or of one's obligations to bring consideration of her interests to bear on the choices of action. But this will appear to be an objection only if one has already adopted the "gap" interpretation of justice and its precepts. Otherwise, what needs to be said is just this: It is not because of any epistemic gap, but it is in the very nature of the case – *in principle* the case – that, in this area of morality, there is no account after a certain point to be given, except through authoritative judgment and examples. The private law expresses this point by adopting the principle of "reasonableness" as an interpretation of what is owed to the other. After that, it makes authoritatively binding whatever singular judgment the "fact-finder" makes.

This shows what is wrong with the notion that, as is sometimes said, "we lack a theory of negligence."⁹³ This is not an innocent observation, a kind of neutral starting point which the modern economic utilitarian can be thought to share with everyone else, including the so-called theorist of corrective justice. For the spirit in which the utilitarian is apt to say this overlooks or discounts the fact that the law itself is an elaboration or a determination of the content of the idea of justice involved. The law of negligence doesn't just arrive thoughtlessly into the law (as it happens) of all modern legal systems. This body of law is itself part of a reflective theory of what the other is due; it is invented to give shape and unity to judgments of the form "you mustn't do that—it's his," which the law continues to depend and doesn't replace or dispense with. Interpreted as "the requirement of reasonable care," "negligence" is itself a placeholder; and, like

the more abstract notions, its content will have to depend upon on a capacity to make situational judgments of the relevant form – e.g., “x shouldn’t have turned right since Y was standing there” – in the particular case.

Now because what one finds in this scheme as one ascends from legal verdict to legal rule to more abstract principles (and finally to such so-called natural law precepts as “giving others their due”) is merely an increasingly abstract characterization of the *kind of reason* (or the form of judgment) engaged by a concern with justice in particular cases, there is a point to saying that critical discourse about law – its moral validation or criticism – takes place at least partly within the domain of the “legal.” For the chain of reasons comes to rest here in something which has normative force simply as a matter of its “merit” (rendering others their due – this needn’t be messed-about with to be binding; it merely expresses part of what it is to recognize “another” – a source of moral claims). At the same, however, a full specification of the content in question – viz., what is due to others in various circumstances of concurrence with her – is something that is both epistemically and *constitutively* dependent on a legal practice organized around judgments of the same general form: i.e., “you mustn’t take that– it’s his; you mustn’t do that– he’s there.”

It might sharpen the sense of what is distinctive in the origins of Positivism just to add here that a jurist operating with this sort of scheme is apt to feel that the main normative legal-theoretical problem is not whether one can make a justificatory ascent from the positive law to something that has genuine moral force; his question will rather more likely be whether the *descent* into law – into *determinatio* by public rules and judgment – can be, or has been, appropriately carried off. That is, it will appear obvious that with the cry, arising where ever people share the same natural world – “you’ve done me wrong” – we are in the realm of morality if there is ever such a realm. The question, from this juridical point of view, is to find an appropriate role for law: How, that is, can the rights of the other be made publically determinate and secure in a way which is consistent with their moral basis? I would venture to say that this appears to be the question directly addressed and worked out in the common law, as opposed to contemporary theories about the common law, which presume that the moral basis, if there is any, of personal and proprietary rights, could only be shown by ascent to a theory which “fits” the legal data points, but which somehow makes concrete normative demands independently of them.

To summarize: If this on the right track, I think we can say that an important motivation for the law-delimiting and jurisprudence-restricting project of 19th century positivism is not any need to vindicate the possibility bad laws, and not really, in the first instance any new idea about what sort of thing law is --*except* insofar as certain pressures are exerted on the concept of law by a new idea about morality: morality as fully codifiable or available for articulation *a priori* and independently of the law. If one begins with this picture of morality (and utilitarianism, we may allow, have no propriety rights to it; they’ve just gone the furthest with it), it becomes intelligible why there could arise a felt need to insist on a sharp break in the structure of legal justification, and in that sense to insist on the separation of law and morality. The point, for the utilitarian, you might say is not just to affirm that law is law, whether it be good on the merits or not, but to *get law out of morality*, or to render the higher commands of morality safe from law. It is instructive

here, I think, to re-read Bentham's commentary on Blackstone with these points in mind. His emphasis seems to be this: Just because something is law, it doesn't follow that it passes the tests of utility. That is the contrapositive of the first of the two simple ideas which Hart said the positivist wanted to insist on. We need to get these questions about "morality" into view if the problem raised is not to descend, as it now seems to be doing, into scholastic obscurity.

V. Implications

[Note to the reader: this section is not complete.]

I'll conclude now with a few brief and tentative comments.

As everyone knows, Hart in his 1958 article "Positivism and the Separation of Law and Morals" suggested that the separation thesis could be prized apart, without loss, from the command theory of law, with which early critics of Positivism had supposed it to be fatally wed. Those early critics attacked positivism by criticizing the command theory (there was much to criticize), never realizing that the essential spirit of positivism would live on even apart from such a flawed embodiment. A few years later, in *The Concept of Law*, Hart endeavored brilliantly to show just how this divorce might be effected – how one could reject nearly everything in the Austinian analysis of positive law without incurring any commitment to a necessary connection between morality and law. And of course some post-Hartian discussions endeavor to show how the spirit of Positivism lives on even after it is liberated from Hart's own practice theory of rules. The present reflections suggest that the perceived interest of such improved-positivism (conceived as a continuation of the "necessary connection" question) may depend, to an extent not fully realized, on acceptance of the third feature of Austin's Positivism, on which Hart, in *The Concept of Law* never comments, viz., utilitarianism. Or if not on utilitarianism, then on a vaguer "picture of morality" which is structurally analogous to utilitarianism in the relevant respects.

This class of analogous pictures may be defined negatively here as ones in which there is no room for indeterminate (but still exclusivatory) norms needing completion or determination by a system of public law *at the most fundamental level of morality*. Or as Joseph Raz – with his usual way of going to the heart of the matter – would eventually put it:

Norms always belong to the middle level of practical reasoning...The case for authoritative rules depends on the advantages of the indirect approach, the attempt to maximize conformity with certain reasons (the underlying reasons) not through compliance with them but through compliance with an alternative set of reasons, the rules... This has long been recognized in the discussionsof various forms of rule-utilitarianism.⁹⁴

Talk of indirection or maximizing conformity with underlying reasons makes sense only when the reasons which bear on action are there anyway. That is, they must be there in such a way that it would at least make sense, even if it would amount to practical folly, to endeavor to conform to

them *directly*. So from the thought that the case for authoritative rules depends on the advantages of an indirect approach, it follows at once, on pain of an endless regress, that there is nothing rule-like or norm-like at the ground level of practical reason; if there were, there would have to be a further level which one might endeavor to comply with more directly, and so on.

Here, then, I would suggest, there emerges early positivism's animating thought, or at least one clear rationale for insisting on a sharp break in the justificatory ascent from law to morality. But the question is: Is this picture right? Does anything really compel us to think that in studying the laws which give content to – and thereby make available – the requirements of justice, we are not concerned with “morality” in the most *direct* way possible?

Resources for doubting the “indirect” picture, or for doubting that it can be the whole story about practical authorities, emerge, it seems to me, from within Raz's own thought, in particular in his return to distinctly non-utilitarian notions of the incommensurable plurality of values, as well as to the classical notion of the indefiniteness of matters of action. But this is another story. Suffice for now to say that we today, following Hart, raise the question or questions of the relation between law and morality, without feeling that we need to have any very clear idea of what we mean by morality. We are apt to say, “Let morality be what the best theory says it is. Is law necessarily connected?” Or perhaps only slightly better: “Let morality be what the best theory says it is, so long as it is right reason, and its truths need no human judge. Now, tell me, is law necessarily connected?” I hope I have at least managed to raise some doubts about whether these questions are inevitable ones, or whether they even make sense, just like that; or if they do seem to be real questions, dividing schools of legal theory, whether that isn't because of assumptions about morality which the early positivists (as opposed to we later, more sophisticated ones) at least had the virtue of making visible.

1. Vol II, p. 93

2. 48 Am J. Juris. 11 (2003)

3. John Austin, Province, pp. 184-5.

4. Quoted in H.L.A Hart, “Positivism and the Separation of Law and Morals,” 71 Harvard Law Review 630, ___(1958).

5. Hart, *ibid*; Essays on Bentham, p. 262.

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6. See e.g., W. J. Waluchow, Inclusive Legal Positivism (Oxford, 1994), p. 2 for a statement of the verdict which is becoming increasingly common: “Legal theory is in a perplexing state. Traditional boundaries between rival views have been blurred to the point where one wonders just what the issues are and whether the protagonists are more often than not arguing at cross purposes.” Analogies to speculative theology, to angels and pinheads, now appear; and writing about this tradition increasingly takes on the eulogistic tone. See e.g., Ronald Dworkin, “Thirty Years On,” Harvard Law Review, and cite to James Allen, Roger Shiner, Joseph Raz.
7. Thus it is not untypical today for a theorist to declare that the only thought about “morality” needed to intelligibly raise enter into debate about whether the existence and content of valid laws is determined by morality is just that “people do appeal to standards like the principles of equality, liberty, fairness and justice in assessing social institutions” and that “these activities are not toally nonsensical...but are open to at least some degree of rational argument and assessment.” Waluchow, p. 2-3, n.3
8. And they have accomplished this, let it be noted, notwithstanding the formidable obstacles which the previous mis-descriptions – laws as commands and commands as the representation of wishes, etc. – put in their way). It seems clear that the line about law coming from Bentham and Austin was in danger of dying on account of its association with the “command theory.” See H.L.A. Hart, “Positivism and Separation of Law and Morals” [cite].
9. See Austin, The Province of Jurisprudence, first lecture.
10. See Joseph Raz, The Authority of Law, ch. 3; and “Authority, Law and Morality” in Ethics in the Public Domain.
11. See Elizabeth Anscombe, “On the Source of Authority of the State” in Collected Papers, Vol III.
12. When two parties dispute, the claims of one might be legitimate, but that doesn’t give her the right to the use force; and people don’t in general acquire a right to use force just by having morally justifiable aims. I suspect that this may begin to express why the question of whether something could be “law” even without having to pass through an additional moral “filter” is largely beside the point. Arguments for this view seem to assume that you have law when you have (1) force, (2) organized around procedures and rules, and (3) exercised for a morally justifiable aim. This notionally contrasts with a position which leaves out condition (3). But even if it were true that wherever there is law, the stronger set of conditions are satisfied, this doesn’t yet exhibit the concept of law. For it doesn’t yet suggest why it might be morally justified to exercise force for justifiable aims. It doesn’t explain how anyone could claim a right to do this.
13. See, e.g., Hart, Essays on Bentham [cite to last chapter] (rejecting the idea that the law must even claim to be morally legitimate).

14. For defense of such “inclusive” legal positivism,” see Coleman, Lyons, Hart, W.J. Waluchow, Inclusive Legal Positivism

15. The point of contact between these two positions tends – misleadingly – still to be represented as the thesis that “there is no necessary connection between law and morality” See, e.g., Coleman and Leiter [quote and cite.] The common factor is sometimes also represented as the thought that if the law is morally valuable, it is only contingently so. Neither of these are accurate however: see § ___ below. John Gardner is right, I think, to suggest that the lowest common factor is what he calls “P*” [to be continued]. Cite to Gardner, “Positivism: 5 ½ Myths.”

16. It will, however, be part of the argument for the thesis I am advancing here that this critic is an imaginative imposition on the tradition of legal theory, and did not come into any real existence until after she was imagined: §III below.

17. But see, e.g., Liam Murphey [cite to essay in Hart’s Postscript] who continues to find an argument for positivism in such terms; my remarks in § II below are addressed to this sort of approach.

18. See note _____.

19. The lead here is due to Joseph Raz. See, esp. “Legal Positivism and the Sources of Law” in The Authority of Law, which distinguishes the “sources thesis” (in the two versions which now divide positivists) from the “separation thesis,” and distinguishes both from claims about the *meaning* of terms like right and duty, when they appear in statements of the law (a “semantic thesis”). [Comment on Les Green]

20. See John Gardener, “Positivism: 5 ½ Myths”. Someone might object: This contrast doesn’t hold up because whenever any norm is brought to bear on action, someone’s “view” is involved; practical norms are always the kind of things people engage with – they don’t operate, like the laws of nature, behind our backs. Of course. But the difference is seen in this, that when it is seen that the 5:30 train won’t get you to the meeting on time at all, or that returning the man’s knife under *these* conditions would be injurious to him, the thing either falls entirely to the ground or is valid only with certain qualifications. Generally speaking, you don’t act incorrectly when you follow merit-based norms. Whereas when the validity or existence of a norm is source-based, it exhibits some kind of immunity to practical reasoning and continues to stand up even in resistance to right reason. Concerning the fashionable (“post-modern”) view that all practical norms owe their existence or validity to people’s believing them, accepting them, or engaging with them in some way, it suffices here just to say this: that whatever the sense in which this might be true, it couldn’t be one which entails that all norm-validation is matter of finding out what someone believes or does. Practical reasoning in the first-person case (deliberation about what to do) shows this isn’t so: Whether I ought to catch the 5:30 train is not a question about what I believe.

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21. This is suggested by John Gardner, “Legal Positivism: 5 ½ Myths” 46 Am. J. Juris. 199 (2001). I return to this proposal later.
 22. H. L. A. Hart, The Concept of Law, (Oxford, 1961) p. 206.
 23. This is the gist of his “Positivism and the Separation of Law and Morals”. The thesis is restated more briefly in The Concept of Law, ch. IX.
 24. Soper, “Choosing a Legal Theory on Moral Grounds,” p. 31.
 25. Soper thinks that the good conceptual theory turned into the bad moral and political theory sometime *after* Hart. But early Hart seems to have insisted on the moral-consequential question,
 26. On the lack of just the sort of argument one would expect for such a conceptual thesis, see §___ below.
 27. No doubt, something might also be added, at least in Bentham’s case, about the wish to create democratic codifications of the law in the area where common law judges claimed special expertise.
 28. Hart, Concept of Law, ch. IX.
 29. Concept of Law, p. 209.
 30. *Ibid.*
 31. Hart, Concept of Law, p. ____.
 32. *Ibid.*
 33. These examples are suggested by Finnis [cite].
 34. (Narrow: “That’s no argument for thinking that...”; Wide: “That’s an argument all right, but it is invalid”)
 35. Not surprisingly, those who continue to regard the case for or against positivism as largely a matter of practical political theory today reach different conclusions. Ronald Dworkin finds that it has outlived its usefulness as a form of democratic progressivism. See “Thirty Years On” 115 *Harvard Law Review* 1655, 1677- 1681. Liam Murphy finds that there is still a good political consequentialist case to be made. See “The Political Question of the Concept of Law,” in Jules

Coleman, ed., *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Oxford University Press.

36. (Surely the key thing here is how people are brought up, not the doctrines they are taught concerning what counts as “law.”) Soper cite.
37. Soper, “Choosing a legal theory on moral grounds,” p. 32. A similar conclusion is reached by Waluchow in Inclusive Legal Positivism pp. 80-95, after a sensitive treatment of the issues.
38. Cf. Soper [cite].
39. See Hart, “Separation,” p. 598.
40. See Kelsen, Introduction [cite]
41. Thus when Hart, extending Bentham’s argument in favor of the “wider” concept of law, suggests that the crucial thing is “to preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience” (*Concept of Law*, p. 206.), one response – paralleling Hart’s response to Radbruch – would be to say: “Perhaps that is what is needed, but not everywhere – only in the context of a legal culture disposed to recognize and accept “certifications” of legal validity without any evaluative inquiry into the content of what is being commanded.” Contrast Ronald Dworkin’s enthusiastic wind-up in Law’s Empire which associates law with “a protestant attitude that makes each citizen responsible for imagining what his society’s public commitments to principle are, and what these commitments require in new circumstances.” Law’s Empire, p. 413.
42. Cite Robert Cover, Justice Accused; Joel Feinberg.
43. See Raz [cite].
44. We must accept this, Raz argues, if we are to make sense of the law’s claim to provide authoritative guidance. See “The Sources of Law” and “Authority, Law and Morality”
45. Raz’s argument for the sources thesis – the one from authority (see note ____) does, I think, entail an affirmative to this semantic question.
46. It seems clear that epistemological separation is recommended, on Raz’s account, partly out of a reflective grasp of law as having necessarily certain kind of moral work to do, one which stems from its character as a practical authority. This is especially clear in Raz, “About Morality and the Nature of Law,” 48 Am J. Juris. 12 (2003). On the indispensability of judgments of significance and importance to general legal theory, see, esp., Finnis, Natural Law and Natural Rights, ch. 1. Finnis suggests that such judgments are bound to be moral ones: The theorist must

“decide what the requirements of practical reasonableness really are.” (p. 16; cf. 18); but cf. Julie Dickson [cite].

47. It is now the convention, I think – partly out of a sense that the metaphysical separation of law and morality is implausible – to refer to the epistemological version as the “sources thesis,” and to distinguish it from the “separation thesis.” But that is not to say that everyone’s usage agrees.

48. The previously mentioned point about the “meaning” of legal statements comes into play here: When a legal official asserts the validity or your obligation according to law, they are not merely reporting that you stand in a certain relation to an obligation-imposing practice, even if their own view is that the practice in question is evil and gives rise to no moral obligations.

49. This is what Hart calls “the minimum content of natural law.” See The Concept of Law, pp. 193-200.

50. See Hart, “Positivism and the Separation of Law and Morals,” p. 623-24; The Concept of Law, 206-07. Fuller’s point (from which Hart does not dissent) involves not just the idea of law as normatively general or rule-based, but as something communicated or addressed to reasoning subjects for the guidance of their conduct, hence as something realizing a distinctive and essentially “non-managerial” form of social-control. Obviously, forms of social control are possible which, even if they involve rules do not involve the prospective communication of rules, and hence are not subject to the relevant requirements of procedural justice. See Fuller, The Morality of Law.

51. See Joseph Raz, The Authority of Law: Essays on Law and Morality, pp. 38-39. See also Neil MacCormick, “A Moralistic Case for A-Moralistic Law?”, 20 Valparaiso Law Review 1 (1985) 1 at p. 27: “legal systems have as such a certain moral value in virtue of the formal (and of itself amoral) character which positivist theories ascribe to them.”

52. I’m leaving aside here the further internal exchange between positivists about “incorporation of morality.”

53. It becomes clear that different “points of view” – which light up different aspects of the law as important or salient – are involved. So, vaguely, we have the idea that if you are looking at the law from the lawyer’s professional and practical point of view, you will be impressed by certain things (like the pervasive tendency of legal argument to move back and forth between source-based and merit-based norms without marking a clear difference– e.g., now we’re doing law/ now we’re doing morality) which you’ll want to worry over more if you’re approaching law as a socio-political theorist. But the wider point of view of a “socio-political” study of law isn’t very well defined here, and it should give some pause to remember that at least all of the following claims have been made by theorists claiming to occupy it: (1) that the limits of law are marked at the point

where the question of what is to be done requires recourse to moral argument; (2) that the limits of law are marked at the point where the question of what is to be done requires merely *any* further applicative judgment; (3) that the wider point of view of political theory offers good reasons for privileging the lawyer's professional point of view and identifying the law with all the good grounds for judicial decision. [TBC]

54. Cite, Positivism and Separation Hart later identifies his own "positivism" with these claims: "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality..." *Concept of Law*, 181-2.

55. (A possible analogy: People today criticize social morality, or orthodox religious views, on matters pertaining to homosexuality. But whatever their view on this, does anyone among us think that it needs first to be theoretically established that social morality or religious authority is so much as *criticizable*?)

56. [N]o human laws are of any validity, if contrary to [natural law]. Blackstone, 1 Comm. 41.

57. Contrary to the polemical use which Austin makes of Blackstone in The Province of Jurisprudence, the dominant scholarship finds Blackstone's interest in natural law ideas to be trivial (mere window dressing) and some of it even claims Blackstone as a positivist. See e.g., John Finnis, "Blackstone's Theoretical Intentions" 12 Nat. L.F. 163 (1967) (arguing that Blackstone had a definition of municipal law which have satisfied any positivist, but that his interest in natural law themes wasn't trivial).

58. See Kant, *The Metaphysics of Morals*, §49; on Aquinas, see Finnis, *Natural Law and Natural Right*.

59. But not quite accurately. Finnis [cite]

60. See John Finnis, *Natural Law and Natural Right*, ch. 12. Borrowing a device of Aristotle's – that of the focal or exemplary case – we needn't, according to Finnis, choose a "concept of law." See ch. 1.

61. See Hart's characterization of "the issue between Natural law and Legal Positivism" at Concept of Law, p. 181, and earlier in "Separation".

62. See Hart, *The Concept of Law* [cite]

63. Similarly, Robert Alexy's view seems to accept the question of "what determines the existence and content of the law" as exhausting what there might be to say about "the nature and

concept of law”; Alexy only proposes to add to the positivist’s answer a further moral element. Alexy, “Agreements and Disagreements” in *Law and Justice* in *Global Society*, p. 700:

I have attempted to reply to positivism by defending a non-positivistic view. On first glance, positivism and non-positivism seem to be no more than a single proposition, asserted in one case, denied in the other. A closer look, however, reveals that things are far more complex. Raz’s positivism says a good deal about the close relations between law and morality, and non-positivism includes the classical elements of legal Positivism, namely, authoritative issuance and social efficacy. The difference consists not in some substitution of these two elements by correctness of content, and with it, morality. Rather, the difference consists in adding correctness of content to them as a third element, necessarily included in the nature and concept of law. Positivism and non-positivism share what Raz calls the “social thesis”, but they do this in different ways. Raz’s version is necessarily exclusive, that of non-Positivism necessarily inclusive. Raz calls the necessarily exclusive social thesis... the “sources thesis” It says “that the existence and content of every law is fully determined by social sources.” Nonpositivism contests precisely this and maintains a necessarily inclusive social thesis, which claims that the existence and content of law necessarily depends not only on social facts but also on moral ideas. In this way, law and morality are necessarily connected.

Unfortunately, this does look exactly like what Alexy says it isn’t– a single proposition asserted and denied. Such views seem in principle mysterious, for one want to say: Either the positivist has brought law into view or he hasn’t. And if he hasn’t – if, for example, we feel that we don’t understand how the phenomena described differs from the subjection to a procedurally well-organized gang -- it seems merely desperate to toss an independent element, “not too immoral,” into the conceptual mix. Perhaps the gang isn’t into any kind of extreme immorality; maybe one of their aims is even to get everyone to exercise. Why should anyone imagine that these modest aims make all the difference as to whether or not there is law?

64. Ronald Dworkin, *Law’s Empire* [cite].

65. A sign of this intimacy can be seen in the structural tendency for Dworkinian theory to strike the soft-positivist and as simply something enfoldable into it, as one possible social practice for recognizing law. See e.g., Jules Coleman, *Negative and Positive Positivism*, 11 *J Legal Stud* 139 (1982); cf. E. Philip Soper, *Legal Theory and the Obligation of judge: The Hart/Dworkin Dispute*, 75 *Mich L Rev.* 473 (1977). (Dworkin, *Law’s Empire* 125, 127-28.) It should be noted, however, that Dworkin is, in theory, suggesting a way of breaking with this tradition – a way of connecting law and morality which isn’t just the incorporation of a moral test. For his “interpretive” stance *might* be understood as an implicit rejection of just the picture of morality – as what is there anyway, whatever the law may say – sketched earlier. [tbc]

66. John Austin, *Province of Jurisprudence*, p. 185: “Now, to say that human laws which conflict with the divine law are not binding, that is to say, *are not laws*, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals.”

67. In Shane, for example, where in reference to a dispute between cattlemen and farmers over

property rights, the claim “you can’t do that—it’s his” is met with the challenge “poove it.” which is then naturally understood to invite the drawing of pistols. The Western seems more sophisticated than Austin, however, because this scene is meant as a depiction of the state of affairs before the institution of law. The theme of the western is generally the violent origin of civil authority, the trace in peaceful coexistence of this violent origin.

68. To say “non est lex” in any other sense, as Austin puts it a moment earlier, “is to talk stark nonsense.” Province, p. 185.

69. As Hart remarks (before setting out to improve on Austin’s account), “Law is surely not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.” “Separation,” p. 603; cf. The Concept of Law, chs. 2-4.

70. At root, I suspect the trouble stems from this. To get this dialogue going – to see any “answer” as called for -- it must first be implicitly recognized that the challenges to the notions of legal validity contemplated above are possible, just because there is also this sort of connection between law and morality: the positive law, however determined, can succeed or fail in its constitutive claim to create genuine moral obligations. If this weren’t so, then *all* responses come to no more or less than hanging the man up. But recognizing this, it should be clear that *no* account of positive law need get in the way of “lex injusta...”; to think otherwise typically involve the fallacy – which Austin at least had the virtue of *transparently* committing – of purporting to derive a “must” (an obligation) from an “is.”

71. Cf. John Finnis, Natural Law and Natural Rights, p. 4: “Neither Bentham nor Austin advances any reason or justification for the definitions of law and jurisprudence he favours. Each tries to show how the data of legal experience can be explained in terms of those definitions. But the definitions are simply posited at the outset and thereafter taken for granted.”

72. Note on Gerald Postema.

73. Hart, The Concept of Law, pp. 164-165. (One should ask why Hart reports things here from the “external point of view”)

74. The Concept of Law, ch. 9 [cite]

75. Hohfeld, Fundamental Legal Conceptions [cite]

76. See Elizabeth Anscombe, “On the Source of Authority of States” in Philosophical Papers, Vol II [cite]

77. See Elizabeth Anscombe, “Modern Moral Philosophy” in Philosophical Papers Vol II, p. 39.

78. (I take it that the idleness of asking whether such source-based moral rules must or contingently could incorporate a test given by true morality will be apparent here.)

79. Compare Finnis, *Natural Law and Natural Rights*, p. 290:

“The concern of the tradition...has been to show that the act of ‘positing’ law... is an act which can and should be guided by ‘moral’ principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention or mere ‘decision’; and that those same moral norms justify (a) the very institution of positive law, (b) the main institutions, techniques and modalities within that institution...and (c) the main institutions regulated and sustained by law....what truly characterizes the tradition is that it is not content merely to observe the historical or sociological fact that ‘morality’ thus affects ‘law’, but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens.”

80. This sets the pattern for all modern day arguments for the superiority of normative economic analysis over traditional justice orientated understanding, as in, e.g., Kaplow and Shavell’s work, which incessantly repeats the point about the undemonstrability of one or another of two conflicting determinate judgments. This mistake here lies in the assumption (without argument) that such undemonstrability reveals an epistemic gap (see below) rather than just revealing the area in which the positive law has – in the nature of the case with this region of morality – work to do.

81. Henry Sidgwick, *Methods of Ethics*, p. 421.

82. Plato, *Republic*, Book I.

83. *Vincent v. Lake Erie* [cite]

84. *Bolton v. Stone* [cite]

85. *Rogers v. Elliot* [cite]

86. [cite]

87. Compare Hart, *Concept of Law* [cite]

88. And obviously no less compelling to some today. It is assumed in all the arguments which purport to tell us why some notion of efficiency is the only *possible* interpretation of private law. See, notably, Kaplow and Shavell.

89. On this, see David Wiggins, “Neo-Aristotelian Reflections on Justice” in *Mind* [cite]

90. (Hart, as his notes indicate, is following Aristotle here – though not following Aristotle in identifying and explicating this morality in terms of the operation of a certain legal-institutional form of judgment.)

91. But see Hegel’s appropriate point in the Encyclopedia of Social Sciences, Part III, section 2, at § 502: “The phrase ‘Law of Nature’, or Natural Right, in use for the philosophy of law involves the ambiguity that it may mean either right as something existing ready-formed in nature, or right as governed by the nature of things, i.e. by the notion. The former used to be the common meaning, accompanied with the fiction of a state of nature, in which the law of nature should hold sway; whereas the social and political state rather required and implied a restriction of liberty and a sacrifice of natural rights. The real fact is that the whole law and its every article are based on free personality alone — on self-determination or autonomy, which is the very contrary of determination by nature. The law of nature — strictly so called — is for that reason the predominance of the strong and the reign of force, and a state of nature a state of violence and wrong, of which nothing truer can be said than that one ought to depart from it. The social state, on the other hand, is the condition in which alone right has its actuality: what is to be restricted and sacrificed is just the wilfulness and violence of the state of nature.”

92. This was a favorite complaint of Kelsen’s and more recently of Richard Posner’s. Cite.

93. Posner, “A Theory of Negligence” [cite]

94. Raz, Practical Reason and Norms, [cite].