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The Hart-Dworkin Debate and the Separation Thesis of Legal Positivism

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In the postscript to *The Concept of Law*, H.L. A. Hart describes the on-going debate inspired by his book, focusing on the criticisms of Ronald Dworkin. In this essay, I discuss Dworkin's criticisms of Hart, as well as Hart's responses, showing that while Hart responds adequately to some criticisms, he fails to respond adequately to others. I also reconstruct and evaluate the arguments given for and against the separation thesis by Dworkin and Hart. Finally, I argue that the debate about the separation thesis – the thesis that morality and law are separable – is misguided, conflating as it does two distinct questions. These are the questions of what the positive law is, that is, the law that is posited in a specific time and place, and of what the natural law is, that is, the law that is universal and timeless. Once we distinguish these questions, we will see that the answer to the question of whether law is separable from morality depends on which sense of 'law' is relevant, and that there are two different answers corresponding to the two senses of positive law and natural law. Positive law is separable from morality while natural law is not.

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In the postscript to *The Concept of Law*, H.L. A. Hart describes the on-going debate inspired by his book, focusing on the criticisms of Ronald Dworkin. Dworkin (according to Hart) has three major criticisms of Hart's version of legal positivism: (1) the truth of propositions of law does not depend only on questions of plain historical fact; (2) Hart's theory is susceptible to the semantic sting, which suggests that theoretical disagreement about the nature of law is impossible; and (3) there is an inconsistency within soft positivism between allowing that law may depend on "controversial matters of conformity with moral or other value judgments"¹ and the separation thesis of legal positivism. In this essay, I will consider Hart's responses to these criticisms, showing that while Hart responds adequately to (1) and (2), he fails to give a satisfactory response to (3). I will also reconstruct and evaluate the arguments given for and against the separation thesis by Dworkin and Hart. Finally, I will argue that the debate about the separation thesis – the thesis that morality and law are separable – is misguided, conflating as it does two distinct questions. These are the questions of what the positive law is, that is, the law that is posited in a specific time and place, and of what the natural law is, that is, the law that (if it exists) is universal and timeless. Once we distinguish these questions, we will see that the answer to the question of whether law is separable from morality depends on which sense of 'law' is relevant, and that there are two different answers corresponding to the

¹ *Concept of Law*, p. 251

two senses of positive law and natural law. Positive law is separable from morality while natural law is not.

I.

Dworkin understands Hart's positivism as holding that the grounds of law (the facts on which the truth of propositions of law depends) consist in historical facts and linguistic rules – and nothing else. This view is mistaken according to Dworkin. First, the positivist is wrong to exclude a third category of grounds of law containing interpretive claims². Second, the view that the grounds of law are found in linguistic rules leads to a consequence called the “semantic sting”³. Dworkin maintains that among the grounds of law are interpretive claims, due to the nature of law as interpretive practice. He also maintains that such claims are controversial, based as they are on moral principles permitting of theoretical disagreement (disagreement among competent members of the relevant practice). The view that the grounds of law are found in linguistic rules makes it hard to see how disagreement is possible, since all competent speakers must share and accept the same rules to count as speakers of the same language. Because disagreement is not only possible, but occurs frequently, according to Dworkin, the positivist faces the “semantic sting”: in limiting the grounds of law to linguistic rules, he is unable to account for (theoretical) disagreement, and his theory is disproved by the empirical fact that such disagreement exists. Hence, the criticism that grounds of law in addition include interpretive claims and the criticism that the positivist cannot account for theoretical disagreement are connected for Dworkin. Because law is an interpretive practice,

² See Dworkin's discussion of “the plain-fact view” in *Law's Empire* pp. 6-11

³ *Law's Empire* pp. 43-46

involving interpretive claims, and because such claims are made on the basis of controversial moral principles, the positivist is wrong to limit the grounds of law to social facts and linguistic rules.

Hart makes a general reply to these criticisms – he points out that his project is one of description, and that while interpretive legal theory is perfectly valid, it is not a part of his project, so that these criticisms are not applicable to it. In other words, Dworkin’s criticisms stem from a failure to understand Hart’s purpose in working out a positivist view in *The Concept of Law*. Hart explains: “It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin’s conceptions of legal theory”⁴. Hart, in pursuing descriptive legal theory, aims to describe (all) legal systems from the point of view of an external observer. Dworkin, on the other hand, is concerned to articulate the nature of legal practice as it is found in liberal democratic societies, from an internal point of view (the point of view of a participant). Why then does Dworkin think that the lack of an internal perspective represents a failure on the part of the legal positivist? According to Dworkin, purely descriptive legal theory is perverse:

Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective.⁵

⁴ *Concept of Law*, p. 241

⁵ *Law’s Empire*, p. 14

Theories that make reference exclusively to social and historical facts are impoverished and thus inadequate, according to Dworkin. Even more dramatically, engaging in such purely descriptive theorizing is something to warn against:

It was Oliver Wendell Holmes who argued most influentially, I think, for this kind of “external” legal theory; the depressing history of social-theoretic jurisprudence in our century warns us how wrong he was. We wait still for illumination, and while we wait, the theories grow steadily more programmatic and less substantive, more radical in theory and less critical in practice⁶.

Dworkin regards legal theory from an internal point of view as more useful for explanatory purposes, and this is plausible if we wish to understand in detail the legal practice of our own society. But why does he think that legal theory from an external point of view – legal theory which is descriptive and general – is inadequate and misguided in general? Such theory is conducted with a different purpose in mind, and it is unclear whether Dworkin fails to recognize this alternate purpose or whether he does recognize it but sees it as being deficient. As Hart puts it, “Dworkin in his criticism of descriptive jurisprudence seems to rule out the obvious possibility of an external observer taking account in a descriptive way of a participant’s internal viewpoint”⁷. Why he rules this possibility out is never made clear. Hart points out that “Description may still be description, even when what is described is an evaluation”⁸ – it is not clear that Dworkin anywhere addresses this intuitive point. Hence, Hart is right to say that the criticism that

⁶ *Law’s Empire*, p. 14

⁷ *Concept of Law*, p. 243

⁸ *Concept of Law*, p. 244

legal theory must include interpretive claims as grounds of law and the criticism that such claims are liable to produce disagreement and that therefore the legal positivist's failure to account for such disagreement constitutes an objection stem from a misunderstanding of his view. As a descriptive and general theory, Hart's version of legal positivism is not concerned with articulating the internal perspective and the interpretive claims that result from it. Since it is not committed to the existence of such claims as grounds of law, it is not faced with the task of explaining how disagreement about such claims is made possible. In failing to give any rationale for why descriptive legal theory as such is flawed, Dworkin fails to show that this descriptive project is illegitimate.

In addition to this general reply, Hart concedes that legal theory may, but does not have to, include moral claims as grounds of law. In allowing this, he presents his view as a version of "soft" or inclusive positivism. Hence, since moral claims are controversial, there is room for theoretical disagreement on Hart's version of legal positivism. Hart elaborates in the Postscript of *The Concept of Law*:

Dworkin in attributing to me a doctrine of 'plain-fact positivism' has mistakenly treated my theory as not only requiring (as it does) that the existence and authority of the rule of recognition should depend on the fact of its acceptance by the courts, but also as requiring (as it does not) that the criteria of legal validity which the rule provides should consist exclusively of

the specific kind of plain fact which he calls 'pedigree' matters and which concern the manner and form of law-creation or adoption.⁹

The rule of recognition is the ultimate arbiter of legal validity in Hart's theory (since it provides the authoritative criteria for identifying primary rules of obligation¹⁰). While Hart thinks that the existence of this rule depends entirely on a social fact, namely, the acceptance of the rule by the courts, he allows that the rule itself may incorporate a moral principle or value. As such, his doctrine is a form of 'soft positivism', not 'plain-fact positivism', and does not limit the grounds of law to social, historical and linguistic facts:

First, it [Dworkin's interpretation] ignores my explicit acknowledgment that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called 'soft positivism' and not as in Dworkin's version of it 'plain-fact' positivism. Secondly, there is nothing in my book to suggest that the plain-fact criteria provided by the rule of recognition must be solely matters of pedigree; they may instead be substantive constraints on the content of legislation such as the Sixteenth or Nineteenth Amendments to the United States Constitution respecting the establishment of religion or abridgements of the right to vote.¹¹

If Hart endorses only a soft (or inclusive) version of legal positivism, then the criticism that Hart excludes principles subject to disagreement is not applicable, since soft positivism permits of moral principles as grounds of law, and such principles are

⁹ *Concept of Law*, p. 250

¹⁰ *Concept of Law*, p. 100

¹¹ *Concept of Law*, p. 250

controversial, giving rise to disagreement even amongst competent members of the legal field.

It remains to discuss Hart's response to Dworkin's last criticism (labeled as #3 on page 1). This is the criticism that soft positivism is not possible, since it is inconsistent. The core doctrine of legal positivism is that law and morality are separable (the separation thesis). But soft positivism qualifies this view with the addition that moral principles may (but don't have to) be included in the grounds of law. This qualification is clearly at odds with the core doctrine; hence soft positivism is not a consistent view.

That this is the most devastating criticism is acknowledged by Hart:

Dworkin's most fundamental criticism is that there is a deep inconsistency between soft positivism, which permits the identification of the law to depend on controversial matters of conformity with moral or other value judgments, and the general positivist 'picture' of law as essentially concerned to provide reliable public standards of conduct which can be identified with certainty as matters of plain fact without dependence on controversial moral arguments¹².

According to Hart, there are two issues involved in this criticism. First, for the positivist, the account of law in terms of social fact is supposed to "cure the uncertainty of the imagined pre-legal regime of custom-type primary rules of obligation"¹³. If the grounds of law can include principles that are matters of controversy (and therefore are not known and proclaimed by all competent members of the legal profession), they

¹² *Concept of Law*, p. 251

¹³ *Concept of Law*, p. 251

cannot “cure uncertainty”. Legal social orders differ from pre-legal orders founded on custom at least partly in that they include secondary rules in addition to primary ones according to Hart. Primary rules are those prescribing specific actions that those subject to the rules are required to do or abstain from doing. Secondary rules provide ways to annul or modify existing primary rules or to introduce new ones¹⁴. If there are no secondary rules, there is no way to know with certainty which primary rules are actually in effect (since there is nothing one may appeal to in order to determine this). As Hart puts it, “If doubts arise as to what the [primary] rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative... This defect in the simple social structure of primary rules we may call its *uncertainty*”¹⁵. The remedy for this defect is the introduction of secondary rules, and particularly the rule of recognition, which “specifies some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group ...”¹⁶ If the rule of recognition may incorporate a controversial moral principle (a principle that is not recognized as being final and conclusive) – as soft positivism asserts – then it cannot serve this purpose.

Hart responds to this problem by pointing out that it applies only if “the certainty-providing function of the rule of recognition is treated as paramount and overriding”¹⁷. According to Hart, we should be willing to tolerate some degree of uncertainty in a legal

¹⁴ *Concept of Law*, p. 81

¹⁵ *Concept of Law*, p. 92

¹⁶ *Concept of Law*, p. 94

¹⁷ *Concept of Law*, p. 252

system as long as it is not pervasive, that is, as long as this does not present a problem for the majority of cases:

It is of course true that an important function of the rule of recognition is to promote the certainty with which the law may be ascertained. This it would fail to do if the tests which it introduces for law not only raise controversial issues in some cases but raise them in all or most cases.¹⁸

Additionally, Hart suggests that some degree of uncertainty as to the validity of a law may be needed or beneficial for the subsidiary functions of law (he does not elaborate as to which ones):

There is also my general argument that, even if laws could be framed that could settle in advance all possible questions that could arise about their¹⁹ meaning, to adopt such laws would often war with other aims which law should cherish.²⁰

As Hart puts it in chapter 7 of *The Concept of Law*, “It is a feature of the human predicament” to bear two handicaps: our relative ignorance of fact and our relative indeterminacy of aim²¹. In light of these “handicaps”, it is not possible to make full provision for every future possibility in the regulation of a given sphere of conduct. To

¹⁸ *Concept of Law*, p. 251

¹⁹ Given the context of this passage, I infer that the laws in question are the secondary laws, since it is these that are responsible for curing the defect of uncertainty in a legal system.

²⁰ Ibid. p. 251

²¹ Ibid. p. 128

do so would be to practice a ‘mechanical jurisprudence’²², which, Hart thinks, is neither possible nor desirable.

The second issue involved in the charge that soft positivism is inconsistent is that of the determinacy and completeness of law²³. On Hart’s view, legal rules, including secondary rules, are often partially incomplete or indeterminate, in the sense that they do not, by themselves, provide answers to all questions as to their application²⁴: “When the question is whether a given rule applies to a particular case the law fails to determine an answer either way and so proves partially indeterminate... The law in such cases is fundamentally *incomplete*: it provides no answer to the questions at issue in such cases”.²⁵

Dworkin rejects the idea that legal rules may be incomplete in this way, according to Hart. This is because he rejects the inference from the view that a proposition of law asserting the existence of a legal right or duty may be controversial to the view that therefore there is no fact of the matter as to whether the proposition is true or false. “Though its truth or falsity cannot be demonstrated, arguments that it is true may still be assessed as better than arguments that it is false and vice versa”²⁶. Even if a proposition of law is controversial, it may be assessed as true or false for Dworkin. This is because for Dworkin the truth of any proposition of law ultimately depends on the truth of a moral

²² Ibid. p. 128

²³ Hart writes, “Dworkin’s second criticism of the consistency of my version of soft positivism raises difficult and more complex issues concerning the determinacy and completeness of law” (*Concept of Law*, p. 252).

²⁴ One response to this point is to hold that some legal rules (such as the rule of recognition) are behavioral rather than linguistic – they are found in the fact that legal officials engage in a certain kind of behavior, rather than in linguistic formulae whose application may be indeterminate.

²⁵ Ibid. p. 252

²⁶ Ibid. p. 253

judgment as to what best justifies (a legal practice)²⁷. So all propositions of law, on his view, are controversial, but none are incomplete or indeterminate as they are on Hart's version of soft positivism. The positivist, according to Dworkin, wishes to make the objective standing of propositions of law independent of any commitment to any philosophical theory of the status of moral judgments, but Hart's version of positivism is inconsistent with this, as Hart allows for judicial discretion in cases where there is incompleteness or indeterminacy. And this discretion, presumably, would be exercised on the basis of the judge's (controversial) moral views.

Hart's response is that this objection is irrelevant, as it does not matter to the truth of his theory whether judges exercise discretion by appealing to controversial moral principles or in some other way:

For whatever the answer is to this philosophical question [as to the objective standing of moral principles/judgments] the judge's duty will be the same: namely, to make the best moral judgment he can on any moral issues he may have to decide. It will not matter for any practical purpose whether in so deciding cases the judge is making laws in accordance with morality (subject to whatever constraints are imposed by law) or alternatively is guided by his

²⁷ Ibid, p. 253

Hart writes, "According to it [Dworkin's interpretive theory] a proposition of law is true only if in conjunction with other premises it follows from principles which both best fit the legal system's institutional history and also provide the best moral justification for it. *Hence for Dworkin the truth of any proposition of law ultimately depends on the truth of a moral judgment as to what best justifies and since for him moral judgments are essentially controversial, so are all propositions of law*" [my emphasis].

moral judgment as to what already existing law is revealed by a moral test for law.²⁸

In other words, legal theory for Hart should leave open the question of whether moral principles have ‘objective standing’. As such, it does not have any theoretical commitment as to the way in which judges exercise discretion produced by incompleteness and indeterminacy in law. Thus, the objection that soft positivism is inconsistent because it is committed to the view that judges exercise discretion by making law in accord with (controversial) morality is inapplicable.

However, this entails a re-characterization of soft positivism, as it can no longer be viewed as adding the qualification to legal positivism that moral principles can (but do not have to) enter into criteria of legal validity. As Hart says,

Of course, if the question of the objective standing of moral judgments is left open by legal theory, as I claim it should be, then soft positivism cannot be simply characterized as the theory that moral principles or values may be among the criteria of legal validity, since if it is an open question whether moral principles and values have objective standing, it must also be an open question whether ‘soft positivist’ provisions purporting to include conformity with them among the tests for existing law can have that effect or instead, can only constitute directions to courts to make law in accordance with morality.²⁹

²⁸ Ibid. p. 254

²⁹ Ibid. p. 254

But if so, how is this consistent with the understanding of soft positivism as the view that the grounds of law can (but do not have to) include moral principles? This is how Hart understands soft positivism in describing it earlier in the Postscript, and in rebutting Dworkin's criticism that the positivist cannot account for theoretical disagreement about the grounds of law³⁰. Hart gives no answer to this question, and therefore does not succeed in addressing Dworkin's third criticism. Soft positivism cannot consistently hold the view that the grounds of law may include moral principles and the view that it is an open question whether moral principles and values have objective standing as facts. More importantly, the notion of soft positivism is intrinsically contradictory, as the legal positivist holds that only social facts can serve as grounds of law – this is the separation thesis of legal positivism. Hart fails to address this obvious point, and so fails to adequately respond to Dworkin's third criticism – that there is an inconsistency in soft positivism between the positivist picture of law and the qualification that soft positivism introduces. The positivist picture of law is defined by the separation thesis, on which the grounds of law are separable from morality. This means that the grounds of law *exclude* moral principles – to simultaneously hold that they include such principles – as the inclusive legal positivist holds, at least for some cases – is incoherent.

In the next part of this essay, I will reconstruct the arguments given for and against the separation thesis by Hart and Dworkin respectively. I will also evaluate their arguments, with the aim of clarifying this central strand of the Hart-Dworkin debate.

³⁰ Ibid. p 250

II.

Hart discusses the separation thesis in detail in the chapters “Justice and Morality” and “Laws and Morals” in *The Concept of Law*. He essentially gives two arguments for the separation thesis. The first involves a consideration of the differences between law and other forms of social standard or rule. The second argues that a concept of law which permits a distinction between the invalidity and the immorality of a law enables us to think more clearly about rules that are iniquitous but have all the features of law within a given legal system, such as for example those enacted under the Nazi regime.

To summarize the first argument, moral obligation is to be differentiated from legal obligation, according to Hart, in virtue of four features: (1) the importance of morality, (2) its immunity from deliberate change, (3) the voluntary character of moral offences, and (4) the special form of moral pressure. The first points out that the moral always plays an important, non-trivial role in most people’s lives, whereas not all things legal are widely recognized as having great existential importance. The second recognizes that morals cannot be altered by deliberate declaration: “Standards of conduct cannot be endowed with, or deprived of, moral status by human fiat, though the daily use of such concepts as enactment and repeal shows that the same is not true of law”³¹. The third points out that moral blame presupposes that the offender could have done otherwise, but this does not necessarily hold for legal responsibility or liability: “legal responsibility is not necessarily excluded by the demonstration that an accused person

³¹ *Concept of Law*, p. 176

could not have kept the law which he has broken”³². Finally, the fourth feature brings out that the pressure to conform with moral standards is of a different nature than the pressure to conform with legal standards – the former is, in a sense, internal; it involves shame and guilt, whether these are accompanied by external punishments, such as ostracism or expressions of contempt, or not. This is in contrast with legal pressure, which consists only of threats of external, physical punishment.

I think that these four features differentiating legal from moral obligation are accurate, but that they do not provide a reason to think that law and morality are separable. If law is a species of morality, then these may well be its differentia (the features differentiating it from other species of the same genus).

Hart’s second argument involves the thought that it would be more helpful or useful to have a broader concept of law – one which allows for rules that are legally valid but do not conform to standards of morality. Hart uses the example of the post-World War II trials in Germany, which raised the question, “Should informers who, for selfish ends, procured the imprisonment of others for offences against monstrous statutes passed during the Nazi regime be punished?”³³ Furthermore, “Was it possible to convict them in the courts of post-war Germany on the footing that such statutes violated the Natural Law and were therefore void so that the victims’ imprisonment for breach of such statutes was in fact unlawful, and procuring it was itself an offence?”³⁴ But as Hart himself admits, the relevant issue concerns the question of

³² *Concept of Law*, pp. 178-179

³³ *Concept of Law*, p. 208

³⁴ *Concept of Law*, p. 208

how best to formulate the notion that certain statutes were not genuinely obligating: should we say that those statutes were not laws, or that they were laws and thus legally binding but iniquitous and thus not morally binding, or not actually capable of commanding obedience? However we decide this question as to the best formulation, it will not tell us whether law and morality are conceptually separate (or separable). If we prefer one formulation to the other it will be because of its utility in the context of common linguistic practice, not because it gives us the right view of the relation between law and morality. Although Hart may be right to say that one formulation is more sensitive to moral complexities, and allows us to see them with greater ease, this does not by itself give a good argument for the thesis that the content of law is independent of moral standards, or that the question of a statute's legal validity is independent of the question of its moral status.

Dworkin's explicit discussion of the separation thesis occurs in the chapter "Jurisprudence Revisited". In this chapter, Dworkin raises the question, "How is a community's law different from its popular morality or traditional values?"³⁵ Also, "How is it different from what true justice requires of any state, no matter what its popular convictions or traditions?"³⁶ More directly, Dworkin brings up the "old debate about law and morals" on page 98. This debate, he maintains, has often been presented as a contest between two semantic theories: "positivism, which insists that law and morals are made wholly distinct by semantic rules everyone accepts for using 'law', and natural law, which insists, on the contrary, that they are united by these semantic

³⁵ *Law's Empire*, p. 96

³⁶ *Ibid.*

rules”³⁷. Dworkin states that the debate actually only makes sense if we construe it as a contest between political theories: “a contest about how far that assumed point of law requires or permits citizens’ and officials’ views about justice to figure in their opinions about what legal rights have been created by past political decisions”³⁸. Furthermore, “the argument is not conceptual in our sense at all, but part of the interpretive debate among rival conceptions of law”³⁹. Once we realize this, Dworkin claims, we need not worry about the right answer to the question whether immoral systems, like that of the Nazi regime, count as law. This is because the meaning of what we say is dependent on context, and we may express either the “narrow” sense of ‘law’ or the ‘broad’ sense, which determination is made evident by the contextual features of the speech act. In Dworkin’s words:

For our language and our idiom are rich enough to allow a great deal of discrimination and choice in the words we pick to say what we want to say, and our choice will therefore depend on the question we are trying to answer, our audience, and the context in which we speak. We need not deny that the Nazi system was an example of law, no matter which interpretation we favor for our own law, because there is an available sense in which it plainly was law. But we have no difficulty in understanding someone who does say that Nazi law was not really law, or was law in a degenerate sense, or was less than fully law. For he is not then using “law” in that sense; he is not making that

³⁷ *Law’s Empire*, p. 98

³⁸ Ibid.

³⁹ Ibid.

sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion. His judgment is now a special kind of political judgment for which his language, if the context makes this clear, is entirely appropriate.⁴⁰

I agree that the meaning of a word is determined, at least in part, by contextual features of the speech act in which it occurs. Thus, either the narrow sense of ‘law’ or the broad sense may be expressed using the same term, and the determination of which sense is being expressed is made by looking to the speaker’s purpose in speaking. Thus, I agree that the debate about “law and morals”, taken as a purely conceptual debate, is hard to make sense of. But neither does the debate seem to be a matter of a contest between political theories, for the question as to the truth of the separation thesis is not a question about the extent to which the moral views of citizens or officials should be allowed to determine or influence their views about legal validity. Nor is it, in my view, an interpretive question, if what is meant by this is the question of whether the separation thesis conduces to the best interpretation of collective coercion (the ultimate object of law), in the sense of that interpretation which best fits the values of a liberal democracy. Rather, I take the “debate between law and morals” to conflate two distinct questions: the question of what law has been posited in a given society at a given time, and the question of whether the posited law is in accord with the universal natural law.

⁴⁰ *Law’s Empire*, pp. 103-104

I will now consider Dworkin's implicit argument against the separation thesis – an argument implied by his conception of interpretive principles and their role in legal reasoning. According to Dworkin, legal reasoning involves not merely rules but principles as well. Unlike rules, which apply in an “all or nothing” manner, principles give reasons or weights in favor of one outcome rather than another. These principles, according to Dworkin, are already normative, or essentially moral in content. This is because the very existence of such principles derives from the best moral and political interpretation of the relevant history of past decisions within a community. Thus Dworkin writes,

According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.⁴¹

Furthermore:

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.⁴²

Because the principles involved in legal reasoning are arrived at by the method of “best interpretation”, the principles already contain moral content (since the best

⁴¹ *Law's Empire*, p. 225

⁴² *Law's Empire*, p. 243

interpretation just is the interpretation which most closely fits the moral values of a liberal democracy, for Dworkin). Thus, for Dworkin, legal principles occupy an intermediary space between legal rules and moral principles, as Andrei Marmor explains in “The Nature of Law”. He describes Dworkin’s position as follows:

Legal rules are posited by recognized institutions and their validity derives from their enacted source. Moral principles are what they are due to their content, and their validity is purely content dependent. Legal principles, on the other hand, gain their validity from a combination of source-based and content-based considerations... The validity of a legal principle, then, derives from a combination of facts and moral considerations. The facts concern the past legal decisions which have taken place in the relevant domain, and the considerations of morals and politics concern the ways in which those past decisions can best be accounted for by the correct moral principles.⁴³

It follows, from this description of Dworkin’s view, that the separation thesis cannot be maintained, as Marmor goes on to point out, since the principles which are part of the justification of legal validity are normative or moral in nature.

Dworkin’s argument against the separation thesis is valid, but is it sound? This depends on the truth of two claims – the claim that legal reasoning is as Dworkin presents it, that is, founded on a combination of (normative) principles and historical facts (including facts about legal rules), and the view that the principles in question are those following from the best interpretation of a community’s practice. The former

⁴³ “The Nature of Law”, p. 5

claim sounds like a good description of any kind of practical reasoning, including legal reasoning, insofar as it depicts such reasoning as involving both empirical facts and normative principles. It is the latter claim that is problematic, insofar as Dworkin leaves out of his account the criteria for what makes something count as a “best interpretation”. As I have already noted, by “best interpretation” Dworkin seems to mean that interpretation which best fits the values of a liberal democracy. But he fails to specify in virtue of what it is that one interpretation is a better fit with such values than another, and more crucially, what it means for a liberal democracy to have a definite set of values, given that the primary characteristic of such a society is precisely the plurality of values held by its members.

Dworkin’s account of interpretation consists of three stages. The first stage is the “pre-interpretive” stage “in which the rules and standards taken to provide the tentative content of the practice are identified”⁴⁴ (actually, Dworkin qualifies, some kind of interpretation is needed even at this stage, requiring consensus among members of the “interpretive community”). The second stage is the interpretive stage “at which the interpreter settles on some general justification for the main elements of the practice identified at the pre-interpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is.”⁴⁵ Finally, the third stage is the “post-interpretive” stage: “at which he [the interpreter] adjusts his sense of what the practice ‘really’ requires so as better to serve the justification he accepts at

⁴⁴ *Law’s Empire*, p. 66

⁴⁵ *Ibid.*

the interpretive stage”⁴⁶. These stages are usually not explicitly recognized: “People’s interpretive judgments would be more a matter of ‘seeing’ at once the dimensions of their practice, a purpose or aim of that practice, and the post-interpretive consequences of that purpose”⁴⁷. But presumably this “seeing” of a purpose, for Dworkin, involves, essentially, the interpretive stage “at which the interpreter settles on some general justification for the main elements of the identified practice”. At this point, one may ask, how exactly does the interpreter settle on the general justification for a given practice, which justification is then the basis for judgments about legal validity? Presumably it is on the basis of certain values that the interpreter upholds, but which are not inherent in the society itself (Dworkin is concerned, throughout his theorizing, with liberal democratic societies specifically, and such societies, by their nature, do not have a uniform set of values, but are characterized by the pluralism of values held by their members). Insofar as Dworkin fails to specify what the source of the values used in arriving at the best interpretation is – insofar as he fails to indicate how exactly we arrive at such an interpretation – his theory is vacuous. It is not that the claim that legal principles derive from the best interpretation of a community’s practices is false; rather, it is simply uninformative in the absence of an account of the basis for considering one interpretation of a given practice as being “the best”.

In summary, the separation thesis is central to the debate between Dworkin and Hart, as described in the postscript to *The Concept of Law*. Hart argues for the separation thesis, firstly pointing out four important differences between moral and

⁴⁶ Ibid.

⁴⁷ *Law’s Empire*, p. 67

legal obligation, and secondly arguing that a concept of law which permits criticism of statutes and systems that have all the features of law but fail to be moral or just – criticism of such statutes or systems *as laws* – is a more helpful or useful concept. Dworkin explicitly argues that his conception of law as integrity is more abstract than the question as to the relation between law and morality, and is therefore neutral with regard to competing answers to this question⁴⁸. At the same time, it follows from his account of law as integrity that the separation thesis is false. On this account, legal reasoning involves both principles and facts, where the principles are grounded in or derived from the best interpretation of a community's practice. Because the best interpretation contains moral content, so do the principles which are derived from it.

In evaluating these arguments, I concluded that while Hart does point out important differences between moral and legal obligation, the separation thesis does not follow from the existence of such differences. Just because moral and legal obligation are different in certain respects, it does not follow that they are completely separate. In addition, the fact that a concept is more useful or helpful does not establish the separation thesis. I agreed with Dworkin that which concept is more useful or helpful depends on the context of speech, so that we can talk of statutes which have the main features of law but fail to conform to moral standards as either wicked law or not law at all, as we see fit, depending on context. I also agreed that the question of the separation thesis is not purely a conceptual or semantic question. However, I do not

⁴⁸ He also argues that which concept of law is more useful or helpful depends on the context of speech, and that we can figure out which sense is intended (i.e. wicked law or no law at all) without restricting the meaning of the word 'law' to one of these senses.

think it to be a political or an interpretive one, as Dworkin maintains. Rather, I believe the debate about the separation thesis to result from a conflation of the concepts of positive law and natural law. When we disentangle these concepts, we can see that positive law, by definition, is the law that has been posited in a specific society at a given time, and is not dependent on any moral truths, while natural law is by definition the moral standard by which actions are judged. In considering Dworkin's implicit argument against the separation thesis, I agreed that it is plausible to think that legal reasoning involves both empirical (including historical) facts and normative principles. However, part of this argument is the claim that such principles are based on "the best interpretation" of a community's practice, with the relevant community being the entire liberal democratic society. Insofar as such a society is not defined by a collectively shared set of values, it is unclear what the basis for designating one interpretation as "best" is. In failing to identify this basis, Dworkin's account of law as integrity is ultimately vacuous or empty of content, and so does not provide a sound justification for holding that the separation thesis is false.

III.

I will now set out my view that the debate about the separation thesis is misguided, since it conflates the two notions of natural law and positive law. When we distinguish these notions, we can see that positive law is separate from morality whereas natural law is not.

The natural law is identified with the first principle of practical reason by Thomas Aquinas in the *Summa Theologia*. Following Aquinas, I understand the notion of natural law as such a principle, which is self-evident. As Aquinas puts it:

As stated above, the precepts of the natural law are to the practical reason,
what the first principles of demonstrations are to the speculative reason;
because both are self-evident principles.⁴⁹

This principle is concerned with the goodness or badness – the morality – of actions, and refers to the final end or *telos* of human beings. In contrast to this is the positive law – the law posited in a specific time and place, and in a specific society. This law reflects the wishes or commands of those who are in a position to legislate, rather than the natural good of all human beings. Positive law is characterized by the relevant historical, social, political, and linguistic facts, whereas natural law (sometimes referred to as “moral law”) is characterized by the facts of human flourishing, which are moral facts. Thus, positive law is separate from morality, while natural law is not. The question of the separation thesis at the heart of the Hart-Dworkin debate is thereby dissolved, when we distinguish these two concepts of law.

IV.

An important strand of Hart’s soft positivism is the view that the rule of recognition may, but does not have to, include morality. As Hart writes in the postscript to *The Concept of Law*, “The rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been

⁴⁹ *Summa Theologia*, First Part of the Second Part, Question 95, Article 2

called ‘soft positivism’ and not as in Dworkin’s version of it ‘plain-fact’ positivism”⁵⁰.

Assessing this claim requires understanding the idea of a rule of recognition, so I will briefly discuss it here.

For Hart, the rule of recognition is a secondary rule that provides authoritative criteria for identifying primary rules of obligation⁵¹. These criteria can take a number of forms, including reference to an authoritative text, to legislative enactment, to customary practice, to declarations of persons in specific positions, or to past judicial decisions in particular cases⁵². In modern societies, Hart writes, the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents, with these sources of law standing in relations of subordination and primacy. Finally, Hart states that frequently the rule of recognition is not stated, but its existence is shown “in the way in which particular rules are identified”⁵³, or that the rule is “seldom formulated; instead it is used by officials...”⁵⁴ The use of such unstated rules, for Hart, is characteristic of the internal point of view⁵⁵. What exactly an unformulated rule would look like – a rule that is only shown or used, but not explicitly stated – is of course a question that remains standing. Hart compares such a rule to the rule of a game:

⁵⁰ *Concept of Law*, p. 250

⁵¹ Hart introduces the distinction between primary and secondary rules on pg. 94 of *The Concept of Law*, as follows:

The remedy for each of these three main defects [the static character of rules, uncertainty about the scope and existence of rules, and the inefficiency of social pressure as a mechanism for the maintenance of the rules] in this simplest form of social structure consists in supplementing the primary rules of obligation with secondary rules which are rules of a different kind.

Secondary rules, for Hart, are concerned not with the obligations and duties of individuals but with identifying and changing the primary rules, and their presence indicates a legal, rather than a pre-legal, social order.

⁵² *Concept of Law*, p. 100

⁵³ *Ibid.* p. 101

⁵⁴ *Ibid.* p. 102

⁵⁵ *Ibid.* p. 102

“In the course of the game the general rule defining the activities which constitute scoring (runs, goals, etc.) is seldom formulated; instead it is used by officials and players in identifying the particular phases which count towards winning”,⁵⁶.

Joseph Raz, writing in *The Authority of Law*, construes the notion of a rule of recognition as follows:

The statement that a law is part of a legal system only if it is recognized by the law-applying organs – the courts – of the system means only that it would have been acted on by the courts had they been presented with the appropriate problem. That a court would apply a law if faced with a case to which the law applies is an indication that either the law exists in the legal system or that the law will be bade by the courts when they have an opportunity to do so.⁵⁷

⁵⁶ Ibid. p. 102

This discussion of rules which are not articulated linguistically but are rather used or shown is similar to a discussion in Wittgenstein’s *Philosophical Investigations*:

The rule may be an aid in teaching the game. The learner is told it and given practice in applying it. – Or it is an instrument of the game itself. – Or a rule is employed neither in the teaching nor in the game itself; nor is it set down in a list of rules. One learns the game by watching how others play. But we can say that it is played according to such-and-such rules because an observer can read these rules off from the practice of the game – like a natural law governing the play. – But how does the observer distinguish in this case between players’ mistakes and correct play? – There are characteristic signs of it in the players’ behavior. Think of the behavior characteristic of correcting a slip of the tongue. It would be possible to recognize that someone was doing so even without knowing his language (PI §54).

Rules that are not linguistically encoded but that are seen to be underlying a practice or language-game are said to be *shown* for Wittgenstein – a technical term developed in the *Tractatus Logico-Philosophicus*, referring to that which lies outside the limit of language. These rules are the governing principles of a practice, and because language itself is a practice (a “social technique”), there must be principles governing it, which themselves cannot be encoded or expressed in language, since they are the transcendental conditions of its intelligibility. It is in a way such as this, I take it, that the rule of recognition functions for Hart, since it may be taken note of by the relevant officials even without its being explicitly formulated.

⁵⁷ *Authority of Law*, p. 90

For Raz, the rule of recognition is essentially the criterion for a given law's being part of a legal system. This criterion is constituted in part by the recognition of the courts – the law-applying organs – that it is a law and in part by the fact that the courts recognize it as previously existing:

Recognition by the courts or other law-applying organs is not a complete criterion of identity because these organs often have power to make new laws, and often what law they are going to make can be determined in advance. As a first step towards completing the criterion, one must incorporate in it reference to the fact that the law would not only be recognized by the courts but would be recognized as previously existing law.⁵⁸

Raz points out that for Hart, a rule exists as “a matter of fact” if there is a practice supporting it. However, he says, on Hart's account, it is not clear whose practice determines the existence of the rule of recognition:

Whose practice constitutes the conditions for the existence of the rule of recognition? Hart's answer is far from clear. Often he refers to ‘the practice of courts, legislatures, officials or private citizens’. On occasion, while including reference to the behavior of private citizens, he attributes special importance to the practice of the courts. Finally, we are told – and this should be regarded as Hart's position – that the behavior of the population is not part of the conditions for the existence of the rule of recognition. Its existence consists in

⁵⁸ *Authority of Law*, p. 90

the behavior of the ‘officials’ of the system, by which he presumably means law-applying officials.

Although the rule of recognition can be said to consist in the practice of law-applying officials, this does not mean that it is complete, or useful for determining in all cases whether a law is part of a given legal system or not:

First, as was pointed out above, the rule of recognition, even if it is one rule, may be incomplete, which means that the system may not include any means of resolving conflicts... Secondly, there may be two or more rules of recognition that provide methods of resolving conflicts...⁵⁹

Raz points out that in addition to rules of recognition, legal systems may have another type of rule, which is also an ultimate rule, in the sense of being a criterion of legal validity. This type of rule he calls a “rule of discretion”, and states that such rules guide the court’s discretion in the choice of laws to adopt and apply, but do not deprive courts of the freedom to make choices about these matters, in the way that rules of recognition do⁶⁰.

Both Hart and Raz understand the rule of recognition as the source, or at least the crystallization, of the criteria of legal validity. For both, it seems, the existence of the rule of recognition depends on the existence of a social practice wherein legal officials reflect on primary rules, such as those concerning duties and obligations, and assert, endorse, or modify them. Both Hart and Raz also seem to maintain that the rule of

⁵⁹ *Authority of Law*, p. 96

⁶⁰ *Ibid.* p. 97

recognition may be incomplete or indeterminate, such that it does not settle all possible queries about legal validity. Raz also points out that there may be multiple rules of recognition in a given system, which may give inconsistent answers to questions about the legal validity of a primary rule. While Hart does not indicate how conflicts between the applications of different rules of recognition could be resolved, other than to note that some degree of uncertainty is tolerable and may even be necessary for “other aims which law should cherish”⁶¹, Raz proposes that there are rules of discretion providing guidance in such situations. Speaking of these rules, Raz writes,

Laws of discretion, on the other hand, whether ultimate or not, merely guide the courts’ discretion in the choice of laws to adopt and apply; they limit the courts’ freedom of choice but do not deprive them of it.⁶²

Raz concludes,

Every legal system rests on its ultimate laws, which commonly means on a set of ultimate laws of recognition and discretion. The former provide the ultimate criteria of validity of the laws of the system, the latter guide the courts in the exercise of their powers to modify the system when deciding unregulated disputes and creating precedents for the future.⁶³

⁶¹ *Concept of Law* p. 251-252

⁶² *Authority of Law*, p. 97

⁶³ *Ibid.* p. 97

The idea of a rule of discretion might solve a significant problem faced by Hart's theory. This is the problem that the rule or rules of recognition are incomplete, or fail to give determinate answers to questions of legal validity, especially if they may include reference to moral principles, as the soft positivist maintains. However, it would not solve the difficulty between reconciling the separation thesis of legal positivism and the concession that the soft positivist makes (namely, that moral principles can be incorporated into the criteria of legal validity). Insofar as the legal positivist asserts the independence of legal validity from morality, he cannot also accept that moral principles may be among the sources of law. A legal theorist may accept the doctrine of rules of discretion, as propounded by Raz, and may allow that moral principles enter into the rules of discretion, understood as either the ultimate arbiters of legal validity or on a par with rules of recognition in the deliberations of legal officials and judges, but he cannot then be counted as a legal *positivist*.

V.

That this is not a view shared by Raz is indicated by his claim that the social fact thesis and what he terms the moral thesis of legal positivism are in fact independent, and that one does not follow from the other, as is typically thought. Raz writes that three issues are at the heart of the dispute between legal positivists and their opponents: (1) the social thesis, (2) the moral thesis, and (3) the semantic thesis. The social thesis is the claim that what is law and what is not is a matter of social fact. The moral thesis is the claim that the moral value of law or the moral merit it has is a contingent matter dependent on the content of the law and the circumstances of the

society to which it applies; and the semantic thesis holds that terms like ‘rights’ and ‘duties’ cannot be used with the same meaning in legal and moral contexts⁶⁴.

According to Raz, the moral and semantic theses are often thought to be necessitated by the social thesis, as follows:

Since by the social thesis what is law is a matter of social fact, and the identification of law involves no moral argument, it follows that conformity to moral values or ideals is in no way a condition for anything being a law or legally binding. Hence, the law’s conformity to moral values and ideals is not necessary. It is contingent on the particular circumstances of its creation or application. Therefore, as the moral thesis has it, the moral merit of the law depends on contingent factors. There can be no argument that of necessity the law has moral merit. From this and from the fact that terms like ‘rights’ and ‘duties’ are used to describe the law – any law regardless of its moral merit – the semantic thesis seems to follow. If such terms are used to claim the existence of legal rights and duties which may and sometimes do contradict moral rights and duties, these terms cannot be used with the same meaning in both contexts⁶⁵.

Raz maintains, in opposition to this line of thinking, that neither the moral nor the semantic theses follow from the social one. For him, the mere assertion of the social thesis leaves open whether “those social facts by which we identify the law or

⁶⁴ *Authority of Law*, p. 38

⁶⁵ *Ibid.* p. 38

determine its existence do or do not endow it with moral merit”⁶⁶. If they do endow it with such merit, says Raz, then the law has of necessity a moral character, and if not, it is completely contingent whether the law (or a given system of laws) in fact conforms to a given set of moral values and ideals⁶⁷. With regard to the semantic thesis, Raz asserts that all the positivist is committed to holding is that “the use of normative language to describe the law does not always carry the implication that the speaker endorses the law described as morally binding”⁶⁸. He elaborates on this as follows:

Put somewhat more precisely this means that normative language when used to state the law does not always carry its full normative force... This does not justify the view that terms like rights and duties are used with a different meaning in legal and moral contexts⁶⁹.

I do not agree with this assessment of legal positivism. I think that what Raz terms the moral thesis does in fact follow from the social thesis: if the validity of law is merely a matter of social facts, such as facts about customs, history, or linguistics, then it is thereby independent of morality. In other words, the social thesis and the separation thesis, as I have understood it in this essay, are not conceptually separable: the separation thesis follows from, or is a conceptual part of, the social thesis. Conversely, if we accept that laws are legally valid only if they are morally binding, we cannot at the same time maintain the social thesis, on which the validity of laws is a matter not of morality but of the existence or non-existence of social facts. Raz, as

⁶⁶ Ibid. pp. 38-39

⁶⁷ Ibid.

⁶⁸ Ibid. p. 39

⁶⁹ Ibid. p. 39

far as I can tell, does not provide any reason for thinking that it is in fact an open question as to whether, on the assumption that the social thesis is true, law has of necessity a moral character. It seems to me that Raz's reasoning is based on a failure to distinguish facts from moral principles or norms. If morality is just a matter of facts of a particular sort, albeit viewed from a "participant's perspective", then I can make sense of the claim that moral facts may enter into the diverse social facts that are the grounds of law (such as for example historical facts and precedents, linguistic facts, cultural facts, and facts about a given society's customs). However, I think this is not the case – morality is not just a set of facts such as those I've just listed. Morality or the "moral law" is the series of prohibitions and requirements that stem from respect for the rational element in human nature (however we spell out the metaphysics of this – whether in Aristotelian terms, in terms of the Intellect, or in Platonic terms, in terms of the rational part of the soul, or in some other way). This element calls for respect because it is free: whereas much of human nature, as well as the natures of other living creatures around us, is deterministic, or determinately grounded in material and final necessity (e.g. in the material and teleological orders), there is an element that is not determined but acts without being caused to act by something else. This is the rational, or intelligent, element of human nature, and its freedom is manifested in activities such as theoretical contemplation, abstract philosophy, the liberal arts and the creation of fine art, among other things. The moral law is simply the series of imperatives and prohibitions that are the logical consequences of respect for intelligence as it is manifested in humans. For example, one injunction of the moral law is "do not kill". This injunction is a ramification of respect for intelligence as manifested in humans in

that killing another human being destroys an intelligent nature, and because intelligence is free, it is a good and calls for preserving (the only good, actually, on my view); similarly for other injunctions of the moral law, such as those against lying and theft. The injunctions of the moral law, on my view, are not a number of facts concerning a given society, but are rather the logical consequences of respect or reverence for freedom in the world, where by “freedom” I mean a kind of causality that is not the causality of either biological processes or physical laws. As such, they are not a matter of social fact, if social facts are understood in a positivist sense, that is, as phenomena ultimately grounded in physical laws and which can be discovered and investigated through empirical means. Because the moral law stems from the existence of a different kind of causality, which, by its nature, cannot be studied through scientific means (since it is not a form of either final or biological necessity or of the necessity of the laws governing physical or material change), it is not properly describable as consisting of facts (again, on the assumption that “facts” here are understood to be phenomena amenable to objective and detached investigation and observation). I conclude that the claim, as put forward by Raz, that the social thesis and the moral thesis are logically independent, such that the positivist, in being committed to the social thesis, is not thereby committed to the moral thesis (or the separation thesis), is false. The separation thesis follows from the social thesis, since, if the legal validity of positive law is grounded in social fact, it cannot thereby or at the same time be grounded in the moral law.

Concerning the semantic thesis –which, in its weaker form, states that the use of normative language when used to state the law does not always carry its full normative

force – I think that something like this is in fact a consequence of the social thesis, contra Raz. About this thesis, Raz says that even the non-positivist can agree with it, and that it does not, by itself, justify the view that terms like “rights” and “duties” are used with a different meaning in legal and moral contexts⁷⁰. Firstly, it seems to me that to say that the use of normative language when used to state the law – the use of terms like “duties” and “rights” – does not carry its full force just means that it does not carry a moral force or meaning. And this seems to suggest that such terms do have a somewhat different meaning in different contexts (which should not be a claim problematic in itself, for Raz, since all words have (at least slightly) different meanings in different contexts, if we accept a contextual semantics, at any rate). Secondly, while a non-positivist can agree with the “semantic thesis”, in the sense that one need not be a positivist to assert that certain terms have different meanings or connotations in different contexts, only a positivist would assert that legal terms specifically lack moral force or connotations. This is because the legal positivist is committed to the social thesis, and the semantic thesis in its stronger sense does follow from it: if the grounds of law consist exclusively in social facts, the terms used to express these grounds are terms belonging to factual discourse, not moral discourse

VI.

In his essay, “Legal Validity”, Raz distinguishes between two versions of the semantic thesis typically endorsed by the natural law theorist. These are: (1) that normative terms like ‘right’, ‘duty’, ‘ought’ are used in the same sense in legal, moral,

⁷⁰ *Authority of Law*, p. 39

and other normative statements; and (2) that (all) legal statements are moral statements⁷¹. According to Raz, the legal positivist is committed to rejecting the second thesis but not the first. Raz argues for this view by way of distinguishing between three types of statement: internal statements, external statements, and statements from a point of view.

The distinction between internal and external statements is due to Hart in *The Concept of Law*. Internal statements are those made from the internal point of view; external statements are those made from the external point of view. The internal point of view is that of a participant in a social practice, while the external point of view is the point of view of a detached observer. Hart elaborates on this distinction as follows:

When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view’⁷².

According to Hart, the external observer can assert that the group accepts the rules, without accepting them himself, or he can merely record observed regularities in the behavior of the members of the group, codifying these as rules (thus being detached at a further remove from the internal viewpoint). The participant however not only is

⁷¹ Ibid. p. 158

⁷² *Concept of Law*, p. 89

able to state what the rules of the given social practice are, but accepts them as reasons for action:

What the external point of view, which limits itself to the observable regularities of behavior, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility⁷³.

According to Hart, legal theory must take into account both points of view. However, statements of legal validity concerning particular rules are internal statements “expressing the point of view of those who accept the rule of recognition of the system, and, as such, leave unstated much that could be stated in external statements of fact about the system”⁷⁴. It is such external statements of fact that the legal positivist is concerned to articulate.

In addition to external and internal statements about law, Raz, following Kelsen⁷⁵, recognizes a third category: that of “statements from a point of view”. These are statements that, while having normative force, do not endorse the commands or

⁷³ *Concept of Law*, p. 90

⁷⁴ *Ibid.* p. 108

⁷⁵ Raz cites Kelsen’s *The Pure Theory of Law*, 2nd ed., p. 218n

imperatives they contain. As Raz (following Kelsen) puts it, “statements from a point of view” are statements that “assert what is the case from the relevant point of view as if it is valid or on the hypothesis that it is but without actually endorsing it”⁷⁶. To make this notion clearer, Raz distinguishes between ordinary normative statements and “detached normative statements”, the latter of which he identifies with “statements from a point of view”:

A detached normative statement does not carry the full normative force of an ordinary normative statement. Its utterance does not commit the speaker to the normative view it expresses⁷⁷.

The possibility of making such statements, according to Raz, shows that normative language can be used without a full normative (or moral) commitment or force. To explain this, he uses the example of the kind of statement characteristic of the lawyer and law teacher, “for they are not primarily concerned with applying the law to themselves or to others but in warning others of what they ought to do according to law”⁷⁸. Another way of putting this is that legal scholars and practicing lawyers can use normative language when describing the law and making legal statements without thereby endorsing the laws they describe. Furthermore:

This kind of statement... is to be found whenever a person advises or informs another on his normative situation in contexts which make it clear that the

⁷⁶ *Authority of Law*, p. 157

⁷⁷ *Authority of Law*, p. 153

⁷⁸ *Ibid* p. 155

advice or information is given from a point of view or on the basis of certain assumptions which are not necessarily shared by the speaker⁷⁹.

It is into the category of statements such as this – “statements from a point of view” – that much of the discourse about law and legal validity falls into, according to Kelsen and Raz⁸⁰.

The application of the three-way distinction between internal statements, external statements, and statements from a point of view to the debate about legal validity is that there is a class of statements about what the law is which have normative force but are not such as to be automatically endorsed by the speaker in uttering them. Another way of putting this is that “one may know what the law is without knowing if it is justified”⁸¹, if the theory of “statements from a point of view” is right. It follows from this that one may make statements about legal validity without “full normative force”, e.g. without thereby accepting or endorsing them. Hence, there is a class of legal statements that are not moral statements, so the (second) semantic thesis of the natural law theorist must be rejected by the legal positivist (and conversely, the semantic version of the separation thesis, whereby legal discourse is separate from moral discourse, is to be affirmed).

This does not mean, according to Raz, that all legal positivists are committed to rejecting the first semantic thesis endorsed by the natural law theorist. (This, again, is the thesis that normative terms like ‘right’, ‘duty’, ‘ought’ are used in the same sense

⁷⁹ Ibid. p. 156

⁸⁰ Ibid. p. 157; see footnote 17

⁸¹ Ibid. p. 158

in legal, moral, and other normative statements). For Raz, the legal positivist may, and should, accept this thesis:

It [the first thesis] is one that positivists can and should adopt, for only through it and the doctrine of statements from a point of view can we understand the possibility of detached statements which are all the same normative and not merely statements about other people's actions or beliefs, etc.⁸²

Such statements, Raz admits, depend on the “full-blooded” normative statements, in the sense that there would be no point in making them unless people made the “full-blooded” kind of statement, or the kind of statement which does have moral force. In other words, Raz (following Kelsen) proposes that there is a class of statements about law which are non-moral yet normative – they are “detached normative statements”, given from a particular point of view but not thereby endorsed – and so not all legal statements are moral statements (even if all legal statements are, in this specialized sense, normative). This is a semantic version of the separation thesis, claiming that legal statements are separate from moral statements (or that legal discourse is separate from moral discourse). According to Raz, this claim should be acceptable to both the legal positivist and the natural law theorist, since it allows that all legal statements are normative (again, in the specialized sense designated by the term “detached normative statement”). This, Raz proposes, represents a possible common ground between the

⁸² Ibid. p. 159

legal positivist and the natural law theorist, so that “the gulf between natural law theorists and positivists need not be as unbridgeable as is sometimes imagined”⁸³.

I think that if Raz and Kelsen are right about the existence of this third class of “detached normative statements”, or “statements from a point of view”, we can use this notion to more sharply distinguish between the concepts of natural law and positive law. The concept of positive law may be explicated as the law described and expressed by such statements, whereas the concept of natural law may be explicated as the law expressed by “full-blooded” normative statements, or statements that do have moral force. It seems plausible to me that there is such a class of statements as “detached normative statements”, partly due to the examples given by Raz in the course of his discussion of legal validity (e.g. the statements about law made by legal scholars or practicing lawyers⁸⁴) and partly because it seems to be knowable a priori that it’s possible for there to be statements which are normative but not yet moral (with legal statements falling into this type). Of course, an account of such statements would be helpful; according to Raz, Kelsen did not have a complete explanation of such statements, and such an explanation has yet to be given:

⁸³ Ibid. p. 159

⁸⁴ Another example cited by Raz and due to Kelsen is that of an anarchist professor of law:

An anarchist emotionally rejects the law as a coercive order; he objects to the law; he wants a community free of coercion, a community constituted without a coercive order. Anarchism is a political attitude, based on a certain wish. The sociological interpretation, which does not presuppose a basic norm, is a theoretical attitude. Even an anarchist, if he were a professor of law, could describe positive law as a system of valid norms, without having to approve of this law. (*Authority of Law*, p. 156; taken from *The Pure Theory of Law*, 2nd ed., p. 218n).

We still await a full analysis of such statements... The discussion of the nature of normative discourse would have been saved from many confusions and mistakes had it not overlooked the prevalence of such statements⁸⁵.

⁸⁵ Ibid. p. 157

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