

## Positivism and the Inseparability of Law and Morals

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H.L.A. Hart's Holmes Lecture gave new expression to the old idea that legal systems comprise positive law only, a thesis usually labeled "legal positivism." He did this in two ways. First, he disentangled it from the independent and distracting projects of the imperative theory of law, the analytic study of legal language, and non-cognitivist moral philosophies. Hart's second move was to offer a fresh characterization of the thesis. He argued that legal positivism involves, as his title put it, the "separation of law and morals."<sup>2</sup> Of course, by this Hart didn't mean anything as silly as the idea that law and morality should be *kept separate* (as if the separation of law and morals were like the separation of church and state.)<sup>3</sup> Morality sets ideals for law, and law should live up to them. Nor did he mean that law and morality are *separated*. We see their union everywhere. We prohibit sex discrimination because we judge it immoral; the point of prohibiting it is to enforce and clarify that judgment, and we do so by using ordinary moral terms such as "duty" and "equality." To the extent that it

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<sup>2</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals," in his *Essays In Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), First published 71 *Harvard Law Review* 593(1957). [Cited below as *PSML/EJP*]

<sup>3</sup> The association of this idea with Hart seems to be a confused interpretation of a thesis he *did* hold, namely that the law ought not to prohibit harmless deviation from conventional moral standards. (See H.L.A. Hart, *Law, Liberty and Morality* (1962). That is a normative thesis about legislation, is not a theory of the nature of law. If positive law necessarily enforced conventional morality, the recommendation would have been pointless.

suggests otherwise the word “separation” is misleading. To pacify the literal-minded, Hart might have entitled his Lecture, “Positivism and the *Separability* of Law and Morals.”<sup>4</sup> That captures well his idea that “there is no necessary connection between law and morals or law as it is and law as it ought to be.”<sup>5</sup>

Lon Fuller refused to take Hart at his word. He thought Hart *was* recommending that “law must be strictly severed from morality”<sup>6</sup> for, if he wasn’t, then why did Hart say it is *morally* better to retain a “broad” concept of law, one that applies even to wicked legal systems? And anyway, if positivists *weren’t* recommending separation, then what advice *were* they offering politicians who have to design constitutions or judges who have to decide cases?

The answer, of course, is that they weren’t offering advice. They were trying to understand the nature of law. Fuller’s inability to grasp the project flowed from his apparent conviction that such attempts amount to nothing better than “a series of definitional fiats.”<sup>7</sup> He was certainly not the last to have doubts about the prospects for a philosophical understanding of law, nor the first to think it more important to change the world than to interpret it. The only surprising thing was that Fuller also supposed that world-changing could be assisted by philosophy-changing. He thought jurists could improve society by treating philosophies of law, not as efforts to understand social reality, but as “direction posts for the application of human energies.”<sup>8</sup> In which direction should they point? Towards a much greater “fidelity to law.” But that was scarcely the beginning. Fuller also wanted general jurisprudence to see to it that constitutions not “incorporate a host of economic and political measures of the type that one would ordinarily

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<sup>4</sup> Hart sometimes described the thesis he opposed as claiming that law and morals are “indissolubly fused or inseparable” (*PSML/EJP*, 50) I think Jules Coleman first used the term, “separability thesis.” See his “Negative and Positive Positivism,” in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984), 29.

<sup>5</sup> Hart, “Positivism and the Separation of Law and Morals,” 57. n.25.

<sup>6</sup> Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” 71 *Harvard Law Review* 630 (1957), 656 [Cited below as *PFL*]

<sup>7</sup> *Ibid.*, 631

<sup>8</sup> *Ibid.*, 632

associate with statutory law,”<sup>9</sup> and he wanted it to give solace to trial judges who have expertise in commerce but find themselves under the thumb of a Supreme Court with no business sense.<sup>10</sup> Legal positivism’s laxity about such things agitated him: “What disturbs me about the school of legal positivism is that it not only refuses to deal with [these] problems... but bans them on principle from the province of legal philosophy.”<sup>11</sup>

In truth, there are no bans. But legal positivists do hold that (for example) opposition to economic provisions in constitutions has to be defended on its merits, not dressed up as a supposed inference from, or presupposition of, a theory of the nature of law. Positivists think general jurisprudence should have no pretensions to be a “guide to conscience,”<sup>12</sup> and they are neither surprised nor disappointed when it proves “incapable of aiding [a] judge”.<sup>13</sup> The mission of legal positivism is not to promote economic liberalism or even “fidelity to law.” It should be oriented, not to any of these pieties, but only to truth and clarity—what Hart called “a sovereign virtue in jurisprudence.”<sup>14</sup> It is this project, not some other one, which reveals the “separation of law and morals”.

The victory of Hart’s Lecture in promoting this slogan was virtually total. People who know nothing else about jurisprudence know that legal positivists are those who maintain the separability of law and morality. The one group amongst whom the slogan did not catch fire was legal positivists themselves. Joseph Raz notices that the separability thesis is logically independent of the idea that legal systems contain positive law only: “The claim that what is law and what is not is purely a matter of social fact still leaves it an open question whether or not those social facts by which we identify the law or determine its existence do or do not endow it with moral merit. If they do, it has of necessity a moral character.”<sup>15</sup> Jules Coleman considers the thesis undeniable and

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<sup>9</sup> *Ibid.*, 643

<sup>10</sup> *Ibid.*, 646

<sup>11</sup> *Ibid.*, 643

<sup>12</sup> *Ibid.*, 634

<sup>13</sup> *Ibid.*, 647

<sup>14</sup> Hart, *PSML/EJP*, 49.

<sup>15</sup> Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 38-39; and *Practical Reason and Norms* (Princeton: Princeton University Press, 1979), 165-70.

therefore useless as a demarcation line in legal theory: “We cannot usefully characterize legal positivism in terms of the separability thesis, once it is understood properly, because virtually no one—positivist or not—rejects it.”<sup>16</sup> John Gardner, on the other hand, maintains that the separability thesis cannot characterize positivism for the opposite reason: it is “absurd...no legal philosopher of note has ever endorsed it.”<sup>17</sup> Amid such cacophony, it was perhaps to be expected that some onlookers find the thesis “hopelessly ambiguous” and the half-century of debate about the separability of law and morals “entirely pointless.”<sup>18</sup>

In this paper I offer a different diagnosis. The separability thesis is neither ambiguous, absurd, nor obvious. On the contrary, it is clear, coherent, and false. But it is false for reasons Fuller did not notice and which throw into sharp relief, and grave question, his celebratory view of law.

### **What the Separability Thesis is *Not***

The separability thesis is not a methodological claim. It bears only on the object-level domain, that is, on laws and legal systems.<sup>19</sup> Hart’s method was to approach the nature of law through a hermeneutic study of the concept of law. He considered this method non-committal with respect to the value of its objects and in that respect morally neutral. But that is not the engine of the separability thesis: there is no reason why a non-committal

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<sup>16</sup> Jules Coleman, *The Practice of Principle* (Oxford: Clarendon Press, 2001), 152. “Virtually” no one, I take it, to allow for those who interpret the natural lawyer’s tag “an unjust law is not a law” as meaning that there *are* no unjust laws, and also for Ronald Dworkin, who denies that there are *any* shared criteria of legality, and who thus satisfies Coleman’s thesis vacuously.

<sup>17</sup> John Gardner, “Legal Positivism: 5 ½ Myths,” 46 *American Journal of Jurisprudence* (2001), 223.

<sup>18</sup> Klaus Füber, “Farewell to ‘Legal Positivism’: The Separation Thesis Unravelling,” in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996), 120.

<sup>19</sup> It is therefore what Stephen Perry calls “substantive” as opposed to “methodological” positivism: Stephen R. Perry, “The Varieties of Legal Positivism,” 9 *Canadian Journal of Law and Jurisprudence* (1996), 361. For the view that the separability thesis includes at least one methodological commitment, see James Morauta, “Three Separation Thesis,” 23 *Law and Philosophy* (2004), 111-135.

method cannot discover that there are necessary connections between law and morals.

It is perhaps worth noting that Hart's discussion of the moral and pragmatic reasons for retaining a broad concept of law cast no doubt on his commitment to methodological neutrality. The separability thesis rests wholly on his destructive arguments against the necessary connection thesis. The moral and pragmatic considerations that he mentions respond to something that is "less an intellectual argument ...than a passionate appeal".<sup>20</sup> The appeal comes from a conceptual reformer who asks us to revise the concept of law so as to deprive wicked legal systems of whatever allure attaches to the label "law". Radbruch was making a "plea... for the *revision* of the distinction between law and morals."<sup>21</sup> The only possible response to a revisionist plea is a pragmatic one, because "though an invitation cannot be refuted, it may be refused..."<sup>22</sup> So Hart is not arguing that law has the nature it would be good for it to have, and not supposing that pragmatic considerations establish the separability of law and morals. He is arguing that there are pragmatic reasons *against* pretending that the nature of law is other than what it is shown to be by a neutral method.

Neither is the separability thesis to be identified with the social fact thesis or the sources thesis—this is why its connection with legal positivism is controversial. Coleman came to think that "properly understood" the separability thesis was only a claim about "the *content* of the membership criteria for law," and thus the thesis, so understood, is indubitable.<sup>23</sup> If the quoted phrase means *what the criteria are*, then it is probably true that no one holds that *they* are necessarily moral, not even a Thomist like John Finnis, who sensibly acknowledges that "human law is artefact and artifice, and not a conclusion from moral premises..."<sup>24</sup> Coleman therefore infers that the real demarcation line turns on the "existence conditions" for the not-necessarily-moral criteria. He

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<sup>20</sup> Hart, *PSML/EJP*, 72

<sup>21</sup> Hart, *PSML/EJP*, 75, emphasis added.

<sup>22</sup> *Ibid.*, p.72.

<sup>23</sup> Coleman, *Practice of Principle*, 152.

<sup>24</sup> John Finnis, "The Truth in Legal Positivism," in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996), 205.

says that positivists maintain, while others deny, that these are conventional or social.<sup>25</sup>

One may, with fair warning, use “separability” however one likes. Coleman’s use diverges from Hart’s, for it neglects one of Hart’s central teachings: “There are *many* different types of relation between law and morals and there is nothing which can profitably be singled out for study as *the* relation between them.”<sup>26</sup> Hart’s thesis is that *none* of these relations holds as a matter of necessity. So far from zeroing in on one narrow question about law and morals, Hart’s theory is pluralistic to the point of tedium. He canvasses just about everything that anyone ever thought might constitute some kind of necessary connection and then argues<sup>27</sup>, one by one, that “it ain’t necessarily so.”

For similar reasons, the separability thesis cannot be identified with the view that the existence and content of law depends on its sources and not on its merits. We have already noticed one way in which the sources thesis is less stringent than the separability thesis: the sources thesis only excludes the *dependence* of law on morality and, as Raz notes, this leaves it open whether there are other sorts of necessary relations between them (including, for example, relations of entailment *from* law *to* morality). In another way, however, the sources thesis is more stringent than the separability thesis. It excludes from the criteria for identifying law not only morality but *any* merits, that is, any evaluative considerations that would argue in favour of making or sustaining a possible legal rule. Hart is interested in all sorts of relations between law and *morals*; he never pauses to consider what positivism holds about, say, the relationship between law and economics. According to the sources thesis, the fact that a certain legal rule would be inefficient is no better reason for doubting its existence than the fact that it would be inhumane or unjust. John Austin put it this way: “A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by

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<sup>25</sup> *Ibid.*, 152, 153. For my own view see Leslie Green, “Positivism and Conventionalism,” 12 *Canadian Journal of Law and Jurisprudence* 35 (1999).

<sup>26</sup> H.L.A. Hart, *The Concept of Law, 2nd Edition*, eds. P.A. Bulloch and J. Raz (Oxford: Clarendon Press, 1994), 2, 185. emphasis mine [cited below as *CL*].

<sup>27</sup> See Hart, *PSLM/EJ*, *passim*, and Hart, *CL*, 185-212.

which we regulate our approbation and disapprobation.”<sup>28</sup> Austin intends the quantification *for all* “*texts*”.

### What the separability thesis is

So the separability thesis is not the methodological neutrality thesis, not the social thesis, and not the sources thesis. It is the contention that there are no necessary connections between law and morality. Do not mistake the breathtaking sweep of the thesis for ambiguity. It applies to various relata (to individual laws and to legal systems, to positive morality and to valid morality); to various relations (causal, formal, normative); and to various modalities (conceptual and natural necessities). It boldly proclaims that, among all the permutations and combinations, you will not come up with any necessary connections at all.

Let’s catch our breath. “Connection” is not a technical term; it is simply any sort of relation. Connections matter because we do not fully understand law until we understand how it relates to things like social power, social rules, and morality. With respect to the last, the loudest disputes involve law’s relation to valid (or ideal) morality, but the separability thesis applies no less to conventional morality. It rejects not only the “natural law” view that there must be moral tests for law, but also the opinion of those “consensus sociologists” who suppose that all legal systems reflect the spirit, traditions or values of their communities.

The only tricky idea is that of a *necessary* connection. Hart gives “necessity” a large and liberal interpretation. Apart from thinking that a necessary relation is one that cannot fail to hold, he espouses no firmer commitment as to the nature of necessity in the social studies. In particular, he does not attempt to take any advantage that might be gained from arguing that what is naturally necessary or humanly necessary is not *really* necessary. He allows for necessary truths that are contextual, that depend on stable empirical features such as our embodiment, mutual vulnerability,

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<sup>28</sup> J Austin, *The Province of Jurisprudence Determined*. Austin, Ed. W.E. Rumble, 1995. (Cambridge: Cambridge University Press, 1995), 157. Hart notices this issue at *PSLM/EJ*, 52-3, but the only trace it leaves in the subsequent argument is when he points out that not all “oughts” are moral “oughts”: *PSLM/EJ*, 69.

and mortality which are therefore “reflected in whole structures of our thought and language.”<sup>29</sup> To call a feature of law that is so deeply rooted a “contingency” would be misleading, for although it could change in tandem with human nature, the fact that it would *take* a change in human nature shows that is essentially unavoidable. So “why not call it a ‘natural’ necessity?”<sup>30</sup> These contextual features are, after all, “*no accident*.”<sup>31</sup> Finally, remember that “necessary” and “contingent” are not contradictories. For example, from the denial that there are necessary moral tests for the existence of law it does not follow that there are contingent moral tests. There may be none at all. (So the separability thesis lends no support to Hart’s view that in some legal systems the validity of law depends on moral argument. More about this later.)

Why should legal theorists care about necessities of any sort? A bad answer is that necessary truths are important truths. This is a prejudice. Rousseau says, “laws are invariably useful to those who own property and harmful to those who do not.”<sup>32</sup> Suppose that is neither false nor necessarily true. There is no denying that it is just as important as many necessary truths about law (for example, that every legal system contains norms). Moreover, the relationships *between* necessary truths and contingent truths often contribute to our interest in the necessary truths. Every legal system necessarily contains power-conferring norms, which play an important structural role in law. But they are also important because they provide facilities to certain agents on certain terms. They therefore have a relation to the distribution of social power within a society, a matter of the first importance in legal and political theory.

The fundamental reason for legal theory to care about necessary features of law is more direct. What is necessarily true of law shapes the concept of law, and to grasp the concept of law is to grasp what cannot fail to be true of law, wherever or whenever law turns up. Because law is not a natural kind it is not plausible to

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<sup>29</sup> Hart, *PSML/EJP*, 80; *CL*, 192, 200

<sup>30</sup> Hart, *PSML/EJP*, 80.

<sup>31</sup> Hart, *CL*, 172.

<sup>32</sup> Jean-Jacques Rousseau, *The Social Contract*, I, 9



suppose that its nature could be completely hidden to us, to be revealed only in some yet-undiscovered microstructure. This does not deny that some of law's putatively necessary features are open to doubt: the concept of a legal system is no more determinate than the concept of a political party. Nor does the fact that some feature of law is necessary ensure that everyone will agree about that fact: a person's grasp of the concept of law may be incomplete. But a complete theory of law must strive to determine what is necessarily true of law, including law's relations to other phenomena.

### *Law's Necessary Connections to Morality*

There are many necessary relations between law and morality, including these:<sup>33</sup>

(N<sub>α</sub>) Necessarily, law and morality both contain norms.

(N<sub>β</sub>) Necessarily, the content of every moral norm could be the content of a legal norm.

(N<sub>γ</sub>) Necessarily, no legal system has any of the personal vices.

Is this just a smart-alecky trick? Does anyone maintain, contrary to (N<sub>γ</sub>), that law *could* have, say, the vice of infidelity? Probably not literally. (At any rate, not an Anglophone philosopher.) Some philosophers do think it a bad idea, or pragmatically self-defeating, for certain moral norms to be made the content of legal norms; but that does not contradict (N<sub>β</sub>). A few seem to deny (N<sub>α</sub>): some legal realists write as if law were nothing but a set of predictions about what will happen, rather than a system of prescriptions about what should happen; but it isn't clear how serious they are. In any event, the point is not that these three theses have never been denied, nor they are undeniable, but that they are true.

Possibly Hart caught a glimmer of truths like (N<sub>α</sub>) to (N<sub>γ</sub>) but thought that they should be bracketed as trivial exceptions.

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<sup>33</sup> For other, similar, examples see Joseph Raz, "About Morality and the Nature of Law," 48 *The American Journal of Jurisprudence* 1 (2003).

Perhaps that is why in his very last formulation of the separability thesis he seems to hedge a bit: “there is no *important* necessary or conceptual connection between law and morality.”<sup>34</sup> Considerations of importance are interest-relative, and I tend to think that (N<sub>α</sub>) and (N<sub>β</sub>) are rather important truths about law. Moreover, as I said above, some necessary truths get their theoretical interest through their relation to contingent truths. (As we shall see, (N<sub>α</sub>) together with some other truths leads Hart to conclude there is a special relation between law and justice—and that is very interesting, if it is true.) There is no need to labour the point, for there are other necessary connections between law and morality that no one would think trivial or unimportant to a theory of law.

*(a) Derivative Connections*

Raz argues that it is an open question whether positive law does or does not necessarily have moral properties. Fuller did not see how it could be: if the existence and content of the law is a matter of fact, then how can any proposition about value follow just from a proposition about law? How could there be “an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it”?<sup>35</sup> All that needs to be said is that a necessary connection does not require that the conclusion follow *solely* from propositions about the nature of law. It may follow from those together with other necessarily true propositions about morality and human well-being. (Even Hume believed that whether a promise has been made is a matter of social fact, and also that there is an obligation to keep promises made. Promises have no “peculiar quality;” but they are binding.)

The second error lies in thinking that the presence of evils collateral or countervailing to the necessary benefits of positive law shows that those benefits are merely contingent. Hart sometimes makes this mistake. He concedes that there are two “reasons (or excuses) for talking of a certain overlap between legal

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<sup>34</sup> Hart, *CL*, 259 (emphasis added).

<sup>35</sup> Fuller, *PFL*, 656.

and moral standards as necessary and natural.”<sup>36</sup> The first is the famous “minimum content” thesis. Legal systems cannot be identified by their form or structure alone. Law has a necessary content; it must contain rules that regulate things like violence, property, and agreements in a way that promotes the survival of (at least some of) its subjects. The second is the thesis that every legal system does at least administrative, or “formal,” justice.<sup>37</sup> Hart holds that, necessarily, every legal system contains general rules, that general rules cannot exist unless they are applied with some constancy, and that such constancy is itself one kind of justice. “[T]hough the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice.”<sup>38</sup> Hart sympathetically develops both the minimum content thesis and the germ-of-justice thesis and then stops just short (I *think* he means to stop short) of concluding that these prove there to be a necessary “overlap” of law and morals. His ground for hesitation seems to be that neither establishes a moral duty to obey the law, and that each is consistent with the most stringent moral criticism of a legal system that realizes them. Legal systems satisfying the minimum content and germ-of-justice theses may be “hideously oppressive,” denying to “rightless slaves” the minimum benefits of a legal system, and applying immoral rules with all the “pedantic impartiality” of the rule of law.<sup>39</sup> All of this is true; but does not defeat the necessary connection thesis. It shows that the values necessarily contributed by the minimum content and the germ of justice may be accompanied by serious immoralities. If every legal system necessarily gives rises to A and B, then it necessarily gives rise to A, even if B counts on the demerit side.

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<sup>36</sup> Hart, *PSML/EJP*, 81.

<sup>37</sup>The thesis is subject to stringent criticism by David Lyons, “On Formal Justice,” 58 *Cornell Law Review* (1973) 833; and also by John Gardner, “The Virtue of Justice and the Character of Law,” 53 *Current Legal Problems* (2000) 1. I try to make some sense of the thesis in “The Germ of Justice,” forthcoming.

<sup>38</sup> Hart, *CL*, 206; cf. 160, compare Hart, *PSML/EJP*, 81: the rules of procedural justice “are designed to ensure that rules are applied only to what are genuinely cases of the rule or at least to minimize the risks of inequality in this sense.”

<sup>39</sup> Hart, *PSML/EJP*, 81.

*(b) Non-Derivative Connections*

The above arguments rely on the supposition that a legal system is effective amongst people with natures much like our own living in circumstances much like our own. There are necessary connections between law and morality that are even more direct.

*(N<sub>1</sub>) Necessarily, law regulates some of the objects of morality.*

Morality has objects, and some of those objects are necessarily law's objects. "Just as natural and positive law govern the same subject-matter, and relate, therefore, to the same norm-object, namely the mutual relationships of men...so both also have in common the universal form of this governance, namely *obligation*."<sup>40</sup> Wherever there is law there is morality, and they regulate the same subject-matter (and regulate it by analogous techniques).

This is broader than the minimum content thesis. Some consider that Hart is too timid in limiting the minimum content to survival-promoting rules. Actually, unless "survival" is understood in a vacuously broad way, the claim is too bold: there are lots of suicide clubs around these days. It is nonetheless true that societies whose legal systems facilitate unrestrained consumption, national glory, or religious purity at the expense of survival do have a common content. They regulate high-stakes interests, as the society (or its elite) sees them. If we encounter a normative system that regulates only low-stakes matters (such as games or courtesies) then we have not found a legal system. It is of the nature of law to have a large normative reach, which necessarily extends as far as the important aspects of the social morality of the society in which it exists. Exactly how law regulates these matters (whether by enforcing them, protecting them, or repressing them) varies, as does its success in regulation. (N<sub>1</sub>) does not say that every legal system necessarily has moral merits; it says that there is a necessary relation between law's scope and the content of a

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<sup>40</sup> Hans Kelsen, "The Idea of Natural Law," in his *Essays in Legal and Moral Philosophy*, ed. O. Weinberger, trans. P. Heath (Dordrecht: Reidel, 1973), 34.

social morality. Like morality, law has a subject matter as well as a form, and its subject matter is the highest-stakes interests of the society in which it exists. This feature of law is one of the things that make it so important, and it explains why normative debates about law's legitimacy and authority have the significance they do.

*(N<sub>2</sub>) Necessarily, law makes moral claims of its subjects.*

Law tell us what we must do, not merely what it would be advantageous to do, and it requires us to act in the interests of other individuals or in the public interest generally, except when law itself permits otherwise. To require such things of people is to make moral demands of them. These demands do not exhaust morality: there are categorical demands that we attend to some of our own interests and there are non-categorical moral reasons to promote the interests of others. But categorical, other-regarding demands are one central part of morality and, as Kelsen says, a central part of law's business. Kelsen is wrong to think that the imposition of obligations is the "universal form" of law's claims; but every legal system contains obligation-imposing norms, and they present themselves to us as if they were moral demands. Law's demands may be misguided or unjustified; they may be made in a half-hearted or cynical spirit; but they must be the kind of thing that could be offered as, and possibly taken as, obligation-imposing.

For this reason neither a regime of "stark imperatives"<sup>41</sup> that simply bosses people around, nor a price system that structures their incentives while leaving them free to act as they please, would be a system of law. It is true that we can capture *something* about law by thinking of it as an incentivizer or as a brute commander. It may be true that we can represent much of the content of a legal system *as if* it were pure incentives or stark imperatives. (N<sub>2</sub>) says that these accounts are necessarily incomplete, and that they cannot represent the nature of law *without loss* (for example, loss of the distinction between being

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<sup>41</sup> For the contrary view, see Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Clarendon Press, 1999), 83-9.

obliged and having an obligation, or between a penalty and a tax on conduct).

While (N<sub>2</sub>) says that law necessarily has moral pretensions, it says nothing about their soundness. I'm inclined to think that some of law's pretensions are endemically unsound. Is there some kind of tension here? Can it be of the nature of an institution that it necessarily makes claims that are not valid, or that are typically invalid? It can. Assume that all theological propositions are false. This does nothing to undermine the fact that part of what it is to be Pope is to claim apostolic succession from St. Peter. Whether or not there really is a succession, a bishop who does not claim it is not the Pope. The nature of law is similarly shaped by the self-image it adopts and projects to its subjects.

Obviously, (N<sub>2</sub>) establishes only a very thin necessary connection with morality, for a necessary pretension is not a necessary achievement. It is an important measure of Hart's loyalty to the separability thesis, however, that he is willing to go very far to save that thesis from (N<sub>2</sub>). Indeed, he ends up flirting with the sanction theory of duty that his Lecture laboured to discredit<sup>42</sup> in order not to admit that law necessarily makes moral claims of its subjects.

*(N3) Necessarily, law is justice-apt.*

In view of the function of law in creating and enforcing obligations, it necessarily makes sense to ask *whether* law is just, and where it is found deficient to demand reform. Law is the kind of thing that is *apt for* inspection and appraisal in light of justice. Not all human practices are justice-apt. It makes no sense to ask whether a certain fugue is just, or to demand that it become so. The musical standards of fugal excellence are preeminently internal. A good fugue is a good example of its genre; it should be melodic, interesting, inventive etc.—and the further we get from these internal standards the less secure musical judgments about it become. While formalists often flirt with similar ideas about law, they are inconsistent with law's place amongst human practices.

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<sup>42</sup> H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 157-60; cf. Hart, *EJP*, 10.

Fuller's great contribution to legal philosophy was to offer the first fairly comprehensive analysis of the internal excellences of law—the virtues that inhere in its law-like character, its “inner” or “internal” morality; a morality, he claimed, that makes law possible. That there are such excellences is not open to doubt; the difficulty is in correctly explaining their relationship to the existence conditions for legal systems and in keeping their value in proper perspective. Thesis (N<sub>3</sub>) says they can never preclude or displace the assessment of law on independent criteria of justice. A fugue may be at its best when it has all the virtues of fugacity; but law is *not* at its best when it excels in legality. When a legal system maximally instantiates the inner morality of law it guarantees only that we have *law at its most legal*. It is of the nature of law that it must also be just (amongst other things).

Some think that the moral pretensions of law give rise to a further necessary connection between law and morals. Tony Honoré says that, by making moral claims, law is always vulnerable to having these claims contested in a given case, and thus that ideal morality is always and everywhere a source of law, albeit only a persuasive one.<sup>43</sup> What is a persuasive source? The fact that it is persuasive presumably means that it is not conclusive in their application. That does not distinguish morality from positive law: statutes, decisions and customs are often not conclusive. But these are (to some degree) binding on courts even if they are, on their merits and on balance, wrong (to some degree). It is a feature of moral considerations, however, that they are to be followed only to the extent that they are *correct*. No court should act on moral error. This asymmetry shows that it is mistaken to assimilate the operation of moral considerations in adjudication to a kind of “source,” persuasive or otherwise. Morality is not a source; it is not source-based; and it is present of its own force in adjudication: it does not take anyone's decision or practice to *make* morality relevant to a judicial decision. Nor is it correct to say that it is law's moral *claims*, (N<sub>2</sub>), that open the door to moral reasons in judicial decisions. An institution that makes no claims at all, such as a price system, is no less exposed to assessment on

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<sup>43</sup> Tony Honoré, “The Necessary Connection between Law and Morality,” 22 *Oxford Journal of Legal Studies* 489 (2002).

grounds of morality. Morality is relevant to adjudication because, as a high-stakes domain, law involves matters of moral substance: (*N<sub>1</sub>*). By the time things end up in court, these have become matters about who is to get what sort of treatment and these decisions about them are apt for appraisal as just or unjust, according to whether each has or has not got his due. But that is to say no more than (*N<sub>3</sub>*); it does not reveal a further source of law.<sup>44</sup>

(*N<sub>4</sub>*) *Necessarily, law is morally risky.*

It is a curious fact that almost all theories that insist on the essentially moral character of law take law's character to be essentially *good*. Fuller acknowledges that law can be morally deficient in two ways: its ends can be wrong, and its means can fail to live up to the inner morality of law. But the possibility that the essence of law might also have an inner *immorality* never occurred to him.<sup>45</sup> It has occurred to many others, including Grant Gilmore whose brilliant epigram is often cited: "In Heaven there will be no law, and the lion will lie down with the lamb. (...) In Hell there will be nothing but law, and due process will be rigorously observed."<sup>46</sup> This is actually a deep, and dark, truth about the hellish side of law.

Everyone knows that law can go wrong, but some believe that, in its uncorrupted essentials, legality is a shining jewel. E.P. Thompson shocked his fellow-Marxists when he wrote, "We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen

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<sup>44</sup> There are, however, *permissive* sources of law which have a very weak form of authority and which apply only in limited circumstances. In Scotland, for example, the institutional writers were traditionally a permissive source: customary practice of the courts gave their views a weight independent of their merits. This is not a "persuasive source" in Honoré's sense. I cannot explore the special features of permissive sources here.

<sup>45</sup> Füßer notes this possibility at 122, though he associates it with anarchism.

<sup>46</sup> Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), 110-11



from power's all-intrusive claims, seems to me to be an unqualified human good."<sup>47</sup>

Hart is sometimes suspected of sharing that sort of enthusiasm. He says that as societies become larger, more mobile, and more diverse, life under a wholly customary social order is liable to become uncertain, conservative, and inefficient. We can therefore think of law as if it were a response to those "defects." Stephen Guest imagines that this word is enough to expose Hart as a celebrant at the temple of legality, by

openly investing his central set of elements constituting law in terms with characteristics showing the moral superiority of a society which has adopted a set of rules which allow for progress (rules conferring public and private powers), for efficient handling of disputes (rules conferring powers of adjudication), and rules that create the possibility of publicly ascertainable—certain—criteria of what is to count as law.<sup>48</sup>

There are two mistakes here, and they are sufficiently common to be worth correcting. First, the fact that law necessarily brings gains does not show the moral superiority *of the society* whose law it is. Such a society might be inferior to one that opts not to have law and instead sticks with the social conditions that make possible governance by customary rules alone. Compare: one can hold that fuel-inefficient cars have a defect without thinking that a car-driving society is superior to one that relies on public transport. All we are committed to is that *if* we are to drive cars it is better if that they be efficient ones. Likewise, *if* we are to have large, mobile and anonymous societies, it is better that we have the forms of direct, deliberate guidance that law makes available. Whether those are the best sort of societies to live in is a further question. Aristotle and Rousseau certainly doubted it, favouring small, face-

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<sup>47</sup> E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), 266.

<sup>48</sup> Stephen Guest, "Two Strands in Hart's Concept of Law," in Stephen Guest, ed., *Positivism Today* (Aldershot: Dartmouth, 1996), 30.

to-face, societies that made law less necessary and made direct governance more possible.

The second error is the obverse of one we already encountered in exploring the derivative connections between law and morality. When we enter the world of legality, it is not without cost: there are gains *and losses*. “The gains are those of adaptability to change, certainty, and efficiency; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not.”<sup>49</sup> Importantly, this risk is one that *cannot* exist without law, and one that exists whenever and wherever there is law:

In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules. But where there is a union of primary and secondary rules, which is, as we have argued, the most fruitful way of regarding a legal system, the acceptance of rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone. In an extreme case the internal point of view with its characteristic normative use of language (‘This is a valid rule’) might be confined to the official world. In this more complex system, only officials might accept and use the system’s criteria of validity. The society in which this was so might be deplorably sheep like; the sheep might end in the slaughter-house.<sup>50</sup>

Whether things get that bad is a contingent matter—the sheep might, not must, end up in the slaughter-house. But where there is “a union of primary and secondary rules”—that is to say, *wherever*

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<sup>49</sup> Hart, *CL*, 202

<sup>50</sup> Hart, *CL*, 117.

*there is law*— new moral *risks* emerge as a matter of necessity. These include not only better organized and more efficient instruments of oppression; but also new *forms* of oppression: the alienation of community and value, the loss of transparency, the rise of a new hierarchy, domination by experts, and the possibility that some may be bought off by the goods that legal order brings (perhaps some of them goods that it necessarily brings). Law has necessary virtues; it also has necessary vices, and they mark a necessary connection between law and morality of a reverse kind. These are risks that law's subjects are guaranteed to run, and risks against which law itself provides no prophylactic.

### ***The Fallibility Thesis***

So the separability thesis is false, as shown by (possibly) trivial theses like (N<sub>α</sub>) to (N<sub>γ</sub>) and by non-trivial theses, like (N<sub>1</sub>) to (N<sub>4</sub>). Where does this leave Hart; and where does it leave legal positivism?

It is significant that Hart endorses both (N<sub>4</sub>) and the separability thesis with which (N<sub>4</sub>) is actually inconsistent. This strongly suggests that there is some more fundamental motivation underlying his loyalty to the separability thesis, something that was not at odds with (N<sub>4</sub>). One possibility is the sources thesis which, as we have seen, is independent of the separability thesis and which therefore survives its demise. We surely hear echoes of the sources thesis when Hart is adumbrating Bentham's views about positivism:

The most fundamental of these ideas is that law, good or bad, is a man-made artifact which men create and add to the world by the exercise of their will; not something they discover through the exercise of their reason to be already in the world. There are indeed good reasons for having laws, but

a reason for a law, even a good reason, is not a law,  
any more... than 'hunger is bread'.<sup>51</sup>

Were Hart speaking in his own voice here, there would be less talk of “will” and more emphasis on the varied ways by which the artifact of law is made. I think this passage is about as close as he comes to the sources thesis. But the fact remains that when he expressly considers that thesis he rejects it in favour of what he calls “soft” positivism. Hart’s only reason for rejecting the sources thesis is that various constitutions contain substantive moral provisions. On this basis he holds that the existence of law can therefore depend on its merits, provided that *the fact that* it depends on its merits does not depend on the *merits* of its depending on its merits. Hart is satisfied if the merit-dependence of law proves contingent. That is a poor argument. First, what he takes as evidence of the merit-dependence of law seems universal amongst legal systems: even where there is no express constitutional reference to moral principles, notions of fairness and reasonableness pervade ordinary adjudication. This cannot be denied; the only question is about its significance. Second, because of his willingness to countenance contextual necessities, Hart has no basis on which to deny that the constitutional and interpretative conventions that, on his view, make merits a test for law are *necessary* conventions. By his own lights, he needs to show not merely that it is *conceivable* that there could be a legal system in which morality is not a test for law, but that this is humanly possibly in view of the necessary structure and content of law. He never attempts that.

So the motivation for the separability thesis does not lie in an inchoate version of the sources thesis. The fact that Hart gives a powerful argument for (N4) and yet does not see (N4) as being at odds with the separability thesis suggests something else at work, something more important to him than the separability thesis itself. His briefest definition of positivism holds that it amounts to “the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact

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<sup>51</sup> H.L.A. Hart, “1776-1976: Law in the Perspective of Philosophy,” EJP, 146-7. I have elided the words “so Bentham thought”

they have often done so.”<sup>52</sup> We are to pay special attention to just how precarious is this relation of *satisfaction*: “there are laws which may have any degree of iniquity or stupidity and still be laws. And conversely there are rules that have every moral qualification to be laws and yet are not laws.”<sup>53</sup> Theses (N<sub>1</sub>) to (N<sub>4</sub>) are all compatible with these ideas about individual laws, and with the parallel theses at the systemic level. Even if legal systems must try to achieve moral ends, or must achieve them minimally, or must contain the germ of justice, or must be apt for justice, all that is “compatible with very great iniquity.”<sup>54</sup> That is to say, *law is morally fallible*.<sup>55</sup> Law should be just, but it may be ferociously unfair; it should promote the common good, but it may be alienating and divisive; it should advance human flourishing, but it may be thoroughly toxic.

The fallibility thesis is both correct and important. Positivism has no patent on it, however. Moral fallibility is a feature of law for which any competent theory must account.<sup>56</sup> Still, it would be a mistake to suppose that whenever two theories both assert that *p* it follows that there is no difference between them. That depends on the grounds for asserting *p* and on the place of *p* in the web of explanatory propositions within the theory. For Fuller, the fallibility of law has two sources: law can be used to promote the wrong ends, and it can promote its ends by the wrong means—it can be deficient in the virtues of legality. Law’s fallibility is, so to speak, something that infects law from the outside, as a result of human failure to adopt the aims or the means proper to law.

Hart agrees, of course, about the first sort of fallibility. Indeed, the perversion of law to *seriously* wrong ends is something he insists is compatible with the *fullest* realization of the inner

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<sup>52</sup> Hart, *CL*, 185-86

<sup>53</sup> Hart, *PSML/EJP*, p.84.

<sup>54</sup> Hart, *CL*, 207.

<sup>55</sup> See David Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1984) p.63; and Hart, *CL*, pp.185-6. Note that this is not Füller’s weaker “fallibility thesis” according to which “under certain counterfactual circumstances the law would not be morally valuable.”128.

<sup>56</sup> Lyons calls it a “regulating principle” but which he means that imposes a presumptive justificatory burden on those who deny it. My claim is stronger. No acceptable legal theory may deny it; explaining the moral fallibility of law is an adequacy condition of any successful theory of law.

morality of law. Fuller doesn't buy this at all, though he is well aware that he lacks any argument for denying it. ("I shall have to rest on the assertion of a belief that may seem naïve, namely, that coherence and goodness have more affinity than coherence and evil.")<sup>57</sup> On Hart's account, in contrast, the fallibility of law is not merely compatible with coherence (and with the other features of legality), it can even *result* from it. Law is an institutionalized normative system, sustained by a consensus among officials who apply rules whose existence are in that way set apart from the ordinary workings of reason and value. That is what establishes the reverse connection of (N<sub>4</sub>). For Hart, the fallibility of law is *connected with* law's nature; it is not merely a result of some kind of bad luck or external pollution.

This recalls a theme in Aristotle's constitutional theory as presented in Book 3 of the *Politics*. He identifies modes of degeneration native to specific forms of governance. Not only does the virtuous form of government known as kingship have a shadow version in tyranny, when kingships degenerate they turn *into* tyrannies: this is *kingship gone wrong*. Aristotle was not so pessimistic as to think that degeneration is necessary. That depends on the character of the king, his subjects, the political and economic context, and so forth. But when kingship goes wrong it does so in ways shaped by its nature. A bit like unstable isotopes, political institutions have distinctive patterns of decay, and these patterns are explained by nature of the thing that is decaying. That is why the degenerate form of kingship is tyranny, rather than oligarchy or a democracy.

*Kingship* is to *tyranny* as *legality* is to—what? It is a word not prominent in Fuller's vocabulary: *legalism*. This is a vice that is law's very own. It has various dimensions, including neglect of the virtues that law neither promotes nor presupposes, as well as the alienation of law from life. Without law, social order requires considerable buy-in from the population: they are regulated by norms that are more or less accepted or at least tolerated. With the emergence law, however, they are also regulated by norms that meet the system's criteria of validity, which criteria are largely in the hands of the official class and enforced by specialized agents.

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<sup>57</sup> Fuller, *PFL*, 636

Only in pathological cases does this alienation take extreme forms,<sup>58</sup> but it is a vice that only law makes possible, and, in the sort of complex societies that call for law, it is a vice that law always exhibits in some degree.

Underlying Hart's mistaken separability thesis is the correct fallibility thesis. Perhaps this is not surprising, as it is common ground amongst legal philosophers. But his distinctive spin on the fallibility thesis is that some of law's worst failures are necessarily connected to the nature of law itself. A positivist account of law as an institutionalized normative system explains just how deep the fallibility of law runs, and how law's fallibility is connected with its nature. Fuller is interested in the morality that makes law possible; Hart is also interested in the *immorality* that *law* makes possible.

At a time when the rule of law is once again under threat from official illegality and popular indifference, we are especially receptive to Fuller's concerns. They tend to make us wish for a more perfect and complete penetration of legality in political life. Hart reminds us to be careful what we wish for.

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<sup>58</sup> Hart, *CL*, 117. For an important discussion of this passage, from which we draw somewhat different lessons, see Jeremy Waldron, "All We Like Sheep," 12 *Canadian Journal of Law and Jurisprudence* 169 (1999).