

The Inseparability of Law and Morality

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Most law students in the Anglo-American world first learn to use “legal positivism” as a term of abuse. To call a style of reasoning “positivist” is to accuse it proceeding as if the law were always clear, as if legal analysis were a matter of dictionaries and deductions, and as if morality were slippery, dangerous and to be kept well away from legal practice. A positivist judgment is one that is literal, stilted, mechanical, conservative—or just plain stupid. Sometimes these ideas combine with a political thesis about authority. Positivists are also supposed to think that judges should always apply the law and subjects obey it, no matter what. Even after a couple of centuries of positivist *criticism* of these ideas—Jeremy Bentham rejected all of them—such law-school “positivism” is the only positivism many students ever meet.

Those who turn even a few pages of modern jurisprudence learn to use the term in an entirely different way. For the student of legal philosophy, positivism is not a theory of how lawyers should reason, judges should decide, or citizens should act. It is a theory of the nature of law, which insists, in the title of H.L.A. Hart’s seminal 1958 article, on “the separation of law and morals.”¹ Properly understood, legal positivism involves no more than “the contention that there is no necessary connection between law and morals or law as it is and law as it ought to be,”² or in a slightly more guarded formulation, that “there is no important necessary or conceptual connection between law and morality.”(*CL*, 259)³ Thus, when Hart settles on a single idea to capture the core of positivist legal thought, it is “the simple contention that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.” (*CL*, 185-86) Many philosophers follow him, identifying legal positivism with what Jules Coleman baptized the “separability thesis,” “the denial of a necessary or constitutive relationship between law and morality.”⁴

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¹ “Positivism and the Separation of Law and Morals,” in Hart, *Essays In Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), cited as *EJP*. [First published in 71 *Harvard Law Review* (1958) 593]

² “Positivism and the Separation of Law and Morals,” in Hart, *Essays In Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), p. 57. n.25. Hereafter cited as *EJP*.

³ H.L.A. Hart, *The Concept of Law, 2nd Edition*, eds. P.A. Bulloch and J. Raz (Oxford: Clarendon Press, 1994). Cited in the text as (*CL*).

⁴ Jules Coleman, “Negative and Positive Positivism,” in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984), p. 29.

Is this thesis correct, and how is it related to the tradition of positivist thought that includes Bentham, Austin, Kelsen and Hart? Coleman considers it undeniable, but also that “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.”⁵ John Gardner, on the other hand, thinks it “absurd...no legal philosopher of note has ever endorsed it.”⁶ In light of such wildly differing reactions, one might be drawn to Klaus Füßer’s diagnosis: the separability thesis is “hopelessly ambiguous” and the surrounding debates “entirely pointless.”⁷ In fact, the thesis is neither ambiguous nor undeniable nor absurd. And, although it is false, it is motivated by a thought that is correct and that casts important light on positivist theories of the nature of law.

1. *What the Separability Thesis is Not*

While there has no doubt been equivocation and confusion in the literature, the separability thesis itself is utterly unambiguous. It maintains that there are no necessary connections between law and morality. Do not mistake the breathtaking sweep of this claim for ambiguity. The thesis applies to different things (to laws, to legal systems, to positive morality, to valid morality); it embraces different sorts of connections (causal, formal, normative); it denies different kinds of necessities (conceptual, linguistic). But what it plainly says is that among all the permutations and combinations, you will not come up with any necessary connections *at all*. As Hart’s eclectic survey of a half dozen different relations between law and morality shows, the thesis applies and is intended to apply to all of them. It is the scope of the thesis that allows the contrasting reactions of Gardner and Coleman: Gardner takes it literally and pronounces it absurd; Coleman pares it down and declares it obvious.

Coleman thinks that “properly understood” the separability thesis is only a claim about “the *content* of the membership criteria for law.” But no one thinks that these *criteria* have to be moral; not even a Thomist like John Finnis, who acknowledges that “human law is artefact and artifice, and not a conclusion from moral premises...”⁸ The only thesis of interest to Coleman bears on the grounds, or “existence conditions,” of the not-necessarily-moral criteria. Positivists are said to maintain, while others deny, that these grounds are

⁵ Jules Coleman, *The Practice of Principle* (Oxford: Clarendon Press, 2001), p. 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 for Dworkin, who denies that there are any criteria of legality *at all*, and thus satisfies Coleman’s thesis vacuously.

⁶ John Gardner, “Legal Positivism: 5 ½ Myths,” 46 *American Journal of Jurisprudence* (2001), p.223.

⁷ Klaus Füßer, “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), p. 120.

⁸ John Finnis, “The Truth in Legal Positivism,” in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996), p.205.

determined by social facts and are thus conventional.⁹ Now that thesis is certainly worth discussing; but it is not the separability thesis. For all the social fact thesis shows, these conventions may necessarily have moral value. Moreover, it is too soon to forget Hart's admonition: "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." (CL, 185)

For similar reasons, the separability thesis is not to be identified with the claim that the existence of law depends on its sources and not on its merits.¹⁰ This *sources thesis*, inspired by Austin's tag "the existence of law is one thing; its merit or demerit is another," is more stringent than the familiar version due to Joseph Raz, which says only that the existence of law does not depend on morality. The merits of a law are any considerations that properly go to its justification. Unless we use "moral" so broadly that it encompasses all other law-justifying merits, such as efficiency, we should allow for variation in what Austin calls "the text by which we regulate our approbation and disapprobation." Even so, the dependence relationship is still only one of the things we need to consider. The separability thesis denies that there are any necessary connections between law and morality; the sources thesis says only that the *existence* of law may not *depend* on morality. But Hart actually spends much more time on relations between morality and the content, form, and functions of law than he does on the relations between morality and law's existence conditions. When he says "*no necessary connection*," he really means it.

Finally, the separability thesis concerns the object-level domain of jurisprudence, that is to say, law (including laws and legal systems). It is thus a part of what Stephen Perry helpfully calls "substantive" as opposed to "methodological" positivism.¹¹ Whether or not the latter is a version of legal positivism, it is not a version of the separability thesis. Positivists do sometimes make methodological claims about the relationship between jurisprudence and moralizing. Kelsen says that "the function of the science of law is not the evaluation of its subject, but its value-free description,"¹² and Hart at single, though much cited, point describes his work as "descriptive sociology" (CL, p.v) and he often insists that one may do general jurisprudence without endorsing or criticizing the law. A sound jurisprudential methodology had better be up to detecting necessary moral relations where they exist. But does it take a fat cowherd to drive fat kine? Hart denies it: "Suppose I was mistaken in just that way [*viz.*, mistaken in thinking there is no necessary connection between law and morals] this would only call for a better and more sensitive description from

⁹ *Ibid.*, 152, 153. In some familiar senses of "conventional" they are not conventional. I cannot discuss this issue here; see Leslie Green, "Positivism and Conventionalism," 12 *Canadian Journal of Law and Jurisprudence* (1999), pp.35-52.

¹⁰ This is Gardner's version: "Legal Positivism: 5 ½ Myths," pp.199,224.

¹¹ Stephen R. Perry, "The Varieties of Legal Positivism," 9 *Canadian Journal of Law and Jurisprudence* (1996), p.361.

¹² Hans Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1967), p. 68

the legal theorist....”¹³ Whether or not that methodological stance is sound, it is independent of the question whether law has any necessary relations to morality.

Hart is sometimes charged with muddling substance and method in his appeal to moral and pragmatic considerations that favour, he thinks, a broad concept of law that includes in its extension unjust legal systems over a narrow one that excludes them. We want clear moral thought, the capacity to test law’s pretensions, and the ability to recognize moral conflicts for what they really are. It is open to doubt how telling these considerations are, but it is a serious mistake to think they fix Hart’s analysis of the concept of law. His famous discussion of Nazi legality is not his proof of the separability thesis. The proof rests wholly on his destructive arguments against the various interpretations of the necessary connection thesis. These are meant to conclude the point. When we reach the issue of Nazi law, we are addressing a conceptual revisionist who invites us to *exchange* our concept of law for a narrower one that excludes wicked legal systems. His is a “plea... made for the revision of the distinction between law and morals.”¹⁴ The only possible response to a revisionist plea is a pragmatic one, for “though an invitation cannot be refuted, it may be refused....”¹⁵ Contrary to what some suppose, there is in Hart no hint of the confused view that the concept of law has the shape that it would be morally good for it to have. On the contrary, he thinks that the concept of law is sufficiently determinate that we are left with no choice about whether it has moral elements: it has none.

2. *Moralities and Necessities*

So that is what the separability thesis is *not*: it is not the social fact thesis, it is not the sources thesis, and it is not the methodological neutrality thesis. To get a clearer fix on what it *is*, we need to focus on three key terms.

The separability thesis is about “connections.” This is not a technical notion; a connection is any sort of relation. Connections matter because we do not fully understand law until we understand how it is related to other things including especially power, custom, and morality. This is a site of genuine and deep dispute. The bizarre notion that Hart’s positivism only allows for conceptual controversy resulting from penumbral vagueness is without foundation; he knows well that “what may be called the borderline aspect of things is too common to account for the long debate about law.” (*CL*, 4) What is difficult is getting a theoretically satisfying account of the pluriform relations among law and its contrasting and neighbouring phenomena.

The term “morality” is more complex. It embraces *valid* (or correct) morality as well as *positive* (or practised) morality. The most important disputes about the nature of law involve its relation to valid morality, but the separability thesis applies no less to positive morality. One sort of positive morality is *social*

¹³ H.L.A. Hart, “Comment” [on Dworkin’s “Legal Theory and the Problem of Sense”], in Ruth Gavison, ed., *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1987), p. 38.

¹⁴ Hart, *EJP*, p.75

¹⁵ *Ibid.*, p.72.

morality, the morality that has broad roots in a society or among a majority or dominant minority thereof. Law and social morality are both matters of fact and they exert mutual, though contingent, influence. The best explanation for the content of a society's legal system makes reference to its social morality: A society that thinks homosexual conduct immoral may well express this hostility in its family law. And a partial explanation of social morality will make reference to law: a society with legal copyright may come to think that copying books and music is actually immoral. This much we learn from Hart. But there is more. In addition to social morality, there are also the moralities prescribed and practiced by special institutions irrespective of any broader social roots. This is *institutional morality*, and it is of particular interest to the student of legal systems. Legal philosophers know that social morality can uncontroversially be part of the law for it is a matter of social fact; and they are unlikely to make a spurious inference from the role of social morality in to the role of valid morality. But one does sometimes encounter the hasty assumption that if law refers to moral principles not found in social morality, then these must be valid principles. Many of them are in fact institutional morality and their existence depends only on the fact that they are practiced and endorsed by the relevant institutions. All three forms of morality are subject to the separability thesis, but only the relationship between law and valid morality bears on the familiar debates between positivists and natural lawyers.

Now for "necessity." In all its formulations—separable if not separate, not a necessary truth, no necessary connection, etc.—the separability thesis puts us on notice that it rejects only one family of law-morality relations. Of course law *should* conform to morality; of course law *normally has* moral value; of course the *best explanation* for the content of the law includes reference to moral ideals; and perhaps a legal system *could not flourish* unless it is seen to be, and thus in some measure actually is, just. But all of these truths are counted by the separability thesis as contingent only: they are neither impossible nor necessary. As Hart works through these points in *The Concept of Law* the final step in each argument is always the assertion that *if* this is what some claim about the connection between law and morals intends we may accept it, but it is not a *necessary* connection.

Let us back up a bit. Why should we even care about what is *necessarily* true of law? Rousseau says, "laws are invariably useful to those who own property and harmful to those who do not."¹⁶ Suppose then that every actual and historical legal system, and every legal system that we could get by reform of such a legal system, were a vehicle for the domination of the poor by the rich. Why would it matter if this secure and invariable historical truth were not strictly necessary in some sense or other? Here are two bad answers. The analytic philosopher's bad answer is that what isn't a necessary truth isn't really an important truth. Unfortunately, Hart sometimes evinces this attitude, for example, when he calls our need for food and shelter in conditions of relative scarcity "merely contingent."(*CL*, 198) Small wonder historians and social

¹⁶ Jean-Jacques Rousseau, *The Social Contract*, I, 9

scientists are by turns baffled and contemptuous when confronted by conceptual analysis. Not all non-necessary truths are “mere” contingencies. Many of them—including Rousseau’s, if it is a truth—are of the first moment, and many necessary truths about law are utterly trivial. What’s more, we would have no reason to search out any necessary truths unless there were also important contingent truths explaining law’s role and importance in human life. The second bad answer is the postmodernists’. They think we should scope out the necessary because it marks the boundary of our freedom. If, as Foucault and Unger urge, the alleged necessities are phony, then we are freer than we have been led to believe. Alas, this is not the freedom that matters. Social freedom depends, not on the absence of conceptual necessities—anyway an unintelligible thought—but on our capacity to manipulate and control the contingencies of life.

The reason to search for necessary truths about law has nothing to do with any of this; it has to do with concept formation. To have the concept of *X* is to know what is necessarily true of *X*. Other sorts of *X*-truths are made true not just by the nature of *X*, but the way *X* interacts with other things, including *their* natures. Understanding the conceptual structure of the social world matters because it is an indispensable part of self-understanding. On this account, the concept of *X* is not the same as a typical *X*, a stereotypical *X*, or even a paradigmatic *X*. The *concept of X* is determined by the features that something has to have to be *X* at all, and one’s ability to deploy the concept is correlated with one’s grasp of those features. On the other hand, a *typical X* is determined by the features that most *X*’s in fact exhibit, a *stereotypical X* by the features that *most people think* most *X*’s exhibit, and a *paradigmatic X* by the features of a perfectly adequate *X*, or an exemplary, best-case, *X*. Thus, if we are interested in the concepts “mammal,” “bird” or “polis” we would do well to stay away from reflection about the platypus, the penguin, and Athens, even though the egg-laying platypus is a fully-paid-up mammal, the flightless penguin a genuine bird, and empire-building Athens a proper city-state. For other purposes, necessities matter less. If you want to know about the ideal legal system, then by all means head straight for the paradigm case of law, as Finnis does. If you want to know about real legal institutions, antinomian warts and all, go hunting for typical specimens, in the company of legal realists. And if you are eager to deconstruct people’s images and illusions about law, follow the Critical Legal Scholars into our stereotypes of its majestic objectivity. But if you want to know about the concept of law, and through it to understand the role law plays in our lives and our culture, you will also need to figure out what is necessarily true of law as such; as Hobbes says, “not to shew what is Law here, and there; but what is Law....”¹⁷

When we turn to the relationship between necessary and contingent truths about law we need to complicate this picture. “Necessary” and “contingent” are not contradictories, and they are exhaustive and exclusive only over the domain of true propositions. For example, from the denial that there are necessary moral tests for the existence of law, it does not follow that there are contingent

¹⁷ Thomas Hobbes, *Leviathan* ed. C.B. Macpherson (Harmondsworth: Penguin, 1968), chap. XXVI, p.312

moral tests. There may be none at all. Moreover, there are acceptable uses of “necessary” and “contingent” that render them compatible. Hart sometimes writes as if the only necessities that count are those that cannot without contradiction be denied, “definitions” as he sometimes says, in contrast to those contingent empirical truths that lie outwith the province of philosophy. But he also has in play another notion involving the ordinary sense of “contingent,” according to which A is contingent on B if A *depends on* B. In this sense, there are necessary truths about law that are *also* contingent, for there are contextual necessities, things that are necessarily true when other things are also true. The aim of survival, for instance, is not merely a familiar, common or typical human wish; it is “reflected in whole structures of our thought and language.” (CL, 192, 200) To call something that has such a deep, categorial character a mere contingency is surely misleading for, in a phrase Hart uses in another context, the fact that our outlook is structured by that aim is “no accident.” (CL, 172) These contextual necessities, or as Hart calls them “natural necessities,” are not locked into the fabric of the universe: human nature may change. On the other hand, the fact that it would *take* a change in human nature to alter their place in the framework of our thought, consciousness and language, suggests that along the spectrum of contingencies, they are nearer to the death end than to the taxes end.

3. Law’s Necessary Connections to Morality

That is enough to allow a fair appraisal of the separability thesis; it is also enough to see why it is false. There are a great many necessary connections between law and morality, including these ones: Necessarily, law and morality contain norms. Necessarily, what is subject to legal appraisal is subject to moral appraisal. I said above that we should not confuse necessary truths with significant truths, and one might complain the just-mentioned ones are not very interesting. Perhaps a glimmer of their existence led Hart to his narrower formulation in the *Postscript*: “there is no *important* necessary or conceptual connection between law and morality.” (CL, 259, emphasis added). So let us ignore the numberless trivial necessities connecting law and morality. We still have to contend with some very important ones.

(a) Derivative Connections

As we saw, the sources thesis (which I take to be correct) rules out the possibility that satisfaction of moral principles is a necessary *condition for* the existence of law; it does so by ruling them out as possible conditions. But this says nothing about the reverse relationship that *derives* moral value *from* the existence of law. As far as the sources thesis goes, law as fully determined by social facts may necessarily have such value:

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. But even if they do not, it is still an open question whether, given human nature and the general

conditions of human society, every legal system which is in fact the effective law of some society does of necessity conform to some moral values and ideals.¹⁸

Different sorts of arguments may be offered to these conclusions. There are Hobbesian, Benthamite and Kantian arguments for a necessary connection between effective law and justice. There is Aquinas' argument that positive law establishes necessary "determinations" of otherwise indeterminate moral principles. There is a Hegelian argument that the emergence of law constitutes a valuable moment in the self-consciousness of society. Although many renditions of these arguments are overblown there is an element of truth in each of them. Of course, these derivative arguments are also consistent with every possible legal system having only trivial merits, with law necessarily bringing great evils, and with law restricting its benefits to a small clique of the privileged. But that source-determined law necessarily has at least some small moral merit for at least some people is perfectly plausible.

(b) Non-Derivative Connections

We may not think that the derivative connections matter much either. They establish only a modest necessary connection between law and morals and, running as they do through the effectiveness of law, they do not reach defunct legal systems or model legal systems. So maybe they are not too revealing about the nature of law as such. But there are also necessary, non-derivative, connections between law and morality. Here are four:

(N1) Necessarily, law deals with moral matters.

Kelsen writes, "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*."¹⁹ This is a matter of the both the form and the content of all legal systems. Where there is law there is also morality, and they regulate the same matters by analogous techniques. This is broader than Hart's "minimum content" thesis according to which any possible legal system must contain basic rules governing violence, property, fidelity, and kinship if it aims at the survival of social creatures like ourselves. (CL, 193-200) But even a society that prefers national glory or the worship of gods to survival will charge its legal system with the same tasks its morality pursues, so the necessary content of law is not dependent, as Hart thought it was, on the contextual necessity of survival. He failed to notice that if human nature and life were different, then morality would be too, and if law had any role in that world, it would inevitably deal with morality's subject matter. If we encountered a society in which law-like forms of order regulated only the trivial pastimes, but

¹⁸ Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), pp. 38-39; and *Practical Reason and Norms* (Princeton: Princeton University Press, 1979), pp.165-70

¹⁹ Hans Kelsen, "The Idea of Natural Law," in his *Essays in Legal and Moral Philosophy*, ed. O. Weinberger, trans. P. Heath (Dordrecht: Reidel, 1973), p.34

not the vital interests, of its members, we would not think that it had a legal system. This does not depend on a purely formal view of morality, as if morality were simply whatever categorical imperatives or universal prescriptions we happen to endorse. Morality has a subject matter as well as a form; on this point Warnock and Foot are surer guides than Ayer or Hare. But its subject matter is human well-being, and that notion is both vague and abstract enough to apply to lives that are fairly indifferent to personal or communal survival. Unlike the rules of a health club, law has broad scope and reaches to the most vital aspects of people's well-being, whatever they may be. Our most urgent political worries about law and its claims flow its bearing on our vital interests, and its wide reach must figure in any argument about its legitimacy and its claim to obedience.

(N2) Necessarily, law makes moral claims of its subjects.

The law tells us what we *must* do, not merely what it would be virtuous or advantageous to do, and it requires us to act without the otherwise permissible regard for our individual self-interest. Indeed, it requires us to act in the interests of other individuals, or in the public interest generally (except when law itself permits otherwise). That is to say, law purports to obligate us. But to make categorical demands that people should act in the interests of others is to make moral demands on them. These demands may be misguided or unjustified; they may be made in a spirit that is cynical or half-hearted; but they must be the kind of thing that could be offered as, and therefore possibly taken as, obligation-imposing. For this reason neither a regime of "stark imperatives"²⁰ that simply bosses people around while remaining indifferent to their responses, nor a price system that structures their incentives while leaving them free to respond as they please, would be a system of law.

It is interesting that, according to some plausible moral arguments, these necessary moral pretensions of law are unfounded. Law purports to create moral obligations wherever it commands, but no credible theory of political obligation validates all of law's claims, not even *prima facie*, and not even in a reasonably just state. Is this paradoxical?²¹ Not in the least. As with many other social institutions, the claims of law determine its character independent of their truth or validity. Popes, for example, claim apostolic succession from St. Peter. The fact that they claim this partly determines what it is to be a Pope, even if the succession is a fiction, even the Pope himself doubts its truth, and even if his appeals to it are cynical. Nonetheless, to stop claiming it is to stop claiming to be Pope. The nature of law is similarly shaped by the self-image it adopts and projects to its subjects. To make moral demands on their compliance is to stake out a certain territory, to invite certain kinds of support and, possibly, opposition. It is precisely because law makes these claims that doctrines of legitimacy and political obligation take the shape and importance that they do.

²⁰ For the contrary view, see Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Clarendon Press, 1999), pp.83-9.

²¹ For the claim that it is unacceptably paradoxical, see Philip Soper, *Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge University Press, 2002).

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

In view of the normative function of law in creating and enforcing obligations and rights, it always makes sense to ask *whether* law is just, and where it is found deficient to demand reform. Legal systems are therefore the kind of thing that is *apt for* appraisal as just or unjust. This is a very significant feature of law. 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 evaluative judgments about it become. While formalists sometimes flirt with similar ideas about law, this is in fact inconsistent with law’s place amongst human practices. Even if law has internal standards of merit—virtues uniquely its own that inhere in its law-like character—these cannot preclude or displace its assessment on independent criteria of justice. A fugue may be at its best when it has all the virtues of fugacity; but law is *not* best when it excels in legality; law must also be just. A society may therefore suffer not only from too little of the rule of law, but also from too much of it. This does not presuppose that justice is the only, or even the first, virtue of a legal system. It means that our concern for its justice as one of its virtues cannot be sidelined by any claim of the sort that law’s purpose is to be law, to its most excellent degree. Law stands continuously exposed to demands for justification, and that too shapes its nature and role in our lives and culture.

Law is necessarily justice-apt in a second way. A legal system is an environment apt for *doing* justice. Hart writes, “though 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.” (CL, 206; cf. 160). Now it is false that administrative justice is always a moral good. The steadfast, full-steam-ahead, impartial administration of evil rules does nothing to mitigate and may exacerbate the evil of the rules. The wrong target is better missed, and a target well missed is best not even aimed at. But I do not think that we are meant to regard a *germ* of justice as a *kind* of justice.²² Note that the claim links justice only to rules of a certain sort, i.e. general *legal* rules, having the content that law necessarily has (NI), and note also that its relation is *germinal* only. The business of law-identification and law-application requires attention to reasons, sensitivity to what is relevant, consistency in judgment, and especially,

²² Hart comes nearer the latter claim in ‘Positivism and the Separation of Law and Morals,’ but even there the argument does not go directly from treating like cases alike to natural justice; it goes through independent moral principles that, he thinks, make it possible to effectuate this principle: “Natural procedural justice consists therefore in those principles of objectivity and impartiality in the administration of the law *which implement just this aspect of law* and which 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.” *EJP*, p.81, emphasis added. This avoids some of David Lyons’s objections in, “On Formal Justice,” 58 *Cornell Law Review* (1973) 833; and some of Gardner’s in “Legal Positivism, 5 ½ Myths.”

comparisons between people. This is the sort of practice that plants the seeds of justice. If they fall on soil fertile in value and irrigated by wisdom and good faith, justice may ultimately bloom. Positive law is something like one necessary condition for justice, though it may be the sort of necessary condition that, in the absence of other conditions, is also a possibility condition for horrific injustice. Thus, although the existence of law does not guarantee justice—not even one kind of justice—in complex societies, that is, in the sort of societies that have legal institutions in the first place, it does something weaker but nonetheless important: the existence of law makes justice possible.

(N4) *Necessarily, law is morally risky.*

The final necessary connection I want to explore is the reverse one. It is a curious fact about anti-positivist theories that, while they all insist on the essentially moral character of law, without exception they take that to be something *good*. The idea that law might *of its very nature* be morally hazardous seems not to have occurred to them.²³ Yet it certainly occurred to Hart, who argues that the characteristic forms of legal governance come with standing risks against which law itself provides no prophylactic. A prelegal society also has social order and a form of governance, but it is one dominated by custom, those primary rules of obligation that exist only if they are actually effective in the life of the community. But 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 think of law as a response to those defects. Does that mean law is necessarily a good thing? Stephen Guest's misreading suggests that Hart commits himself to that "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."²⁴

Well, not exactly. The important part of the argument begins where Guest's rendition of it stops. The enumerated benefits of law are wholly *contextual*: for smaller and simpler societies the rule of custom is just fine, and that is why they are less likely to have legal systems in the first place. More important, even in societies that do stand to benefit from it, law brings both gains *and costs*: "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." (CL: 202) *And this is no accident*; it is a deep feature of the sort of institutional normative system that law is. The key passage deserves citation in full:

²³ Fűßer notes the possibility, p.122, but associates it with anarchism.

²⁴ Stephen Guest, "Two Strands in Hart's Concept of Law," in Stephen Guest, ed., *Positivism Today* (Aldershot: Dartmouth, 1996), p. 30.

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. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.(CL, 117)

Readers of Weber readily notice methodological parallels in Hart's hermeneutic attention to social meanings and the "internal point of view." There is in this passage another Weberian theme that is less noticed but equally important: the identification of law with an institutionalized, even bureaucratized, form of social order whose special forms of rationality can become alienated from value and can, in extreme cases, be an iron cage. For Hart, law is an institutionalized normative system resting ultimately on a consensus of thought and action among elites. The necessary moral hazards of law thus include not just 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 hierarchy, domination by experts, and the docility of those who are bought off by the goods that legal order brings. As Jeremy Waldron puts it in his discussion of this point, we should therefore be concerned "not simply that law *may* turn out to be unjust and we need to be ready for that possibility, but that law—for all its advantages—*may well* turn out to be unjust."²⁵ It is not merely contingent that law's connection to value can run in reverse. The existence of a legal system provides not only for the special virtues of the rule of law, but also the special vices of the misrule of law.

4. Separability and Fallibility

If there are this many non-trivial necessary connections between law and morality what remains of "the contention that there is no necessary connection between law and morals or law as it is and law as it ought to be?"²⁶ There is but one possible conclusion: it is false. Where then does that leave positivism, and Hart? Perhaps Hart did not really mean what he said—this is Gardner's diagnosis: no one could possibly have meant this absurd claim literally, so Hart's repeated endorsements of it must be read as "bungled preliminary attempts to formulate and defend [the sources thesis]."²⁷ Or perhaps Hart did

²⁵ Jeremy Waldron, "All We Like Sheep," *12 Canadian Journal of Law and Jurisprudence* (1999), p.186.

²⁶ Hart, *EJP*, p.57.

²⁷ Gardner, 'Legal Positivism: 5 ½ Myths,' p.223

mean what he said, but couldn't really stomach it, so he contradicted himself, and his inability to sustain a coherent view about the separability of law and morals signals a deeper instability in positivism itself.

It is an embarrassment to both these readings that Hart insists time and again that there are *no* necessary connections between law and morals, even in his very last writings. When he objects to Raz's argument for a conclusion very like (N2), he does not fail to notice that it chafes against the separability thesis. To avoid that friction Hart is willing to retreat very far indeed, all the way to a baffling endorsement of the sanction theory of duty he had earlier refuted.²⁸ This is not the move of someone who does not mean the thesis seriously. Nor can it really be a bungled attempt at the sources thesis for, as everyone knows, when given the option Hart explicitly rejects it in favour of inclusive positivism. Admittedly, some wiggle-room is available. The moral content thesis (N1) is among the contextual necessities. Human nature could be different and with it all the structures of thought and language in the context of which (N1) is necessary. And the justice-aptitude thesis (N3) allows for the possibility that germ of justice may fall on stony ground, so a necessary potentiality may not become an actuality. How important one finds that wiggle-room depends on how confident one is that there are high-grade necessities about law with which to contrast them and to motivate the thesis-saving suggestion that at least these connections are not *strictly* necessary. Be that as it may, we should not struggle to make a false thesis true; but we should try better to understand why Hart was attracted to it. Rather than exploit the wiggle room or suppose that he must have missed some obvious counter-arguments, we should read the separability thesis *in light of* the necessary connections to morality that Hart concedes—the minimum moral content and the germ of justice—as well as the further ones I've sketched here. Only with that in place should we approach “the simple contention that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.” (CL, 185-86).

What this does is refocus our attention on the idea that law does not necessarily *reproduce or satisfy* the demands of morality, and in particular, the demands of valid morality. 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.”²⁹ None of the connections (N1)-(N4) confute this. Nor do they confute the parallel thesis at the systemic level: even if legal systems must meet the moral minimum and must be apt for justice, that is unfortunately “compatible with very great iniquity.”(CL, 207). To deny that law necessarily satisfies the demands of morality is to assert that it is fallible: law does not necessarily satisfy the standards by which it is properly assessed.³⁰ Law should be just, but it may be

²⁸ H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), pp.157-60.

²⁹ *EJP*, p.84.

³⁰ I owe the formulation to David Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1984) p.63; cf. Hart, *CL*, pp.185-6. Note that this is *not*

ferociously unfair; it should promote the common good, but it may utterly fail; it should advance human flourishing, but it may be thoroughly toxic. According to the fallibility thesis, the certification of a congeries of institutions as a legal system, or the certification of a norm as one of its laws, does not preclude the most adverse overall moral judgment about it. *This* is what Hart wants us to remember. It is what animates his whole discussion of the separability of law and morality. And the fact that the fallibility thesis survives the *inseparability* of law and morality is what permits him to openly acknowledge the points at which law and morality are necessarily connected.

This way of looking at things encourages us to attend more closely to certain contingencies than to others. As a result it puts a rather different spin on inclusive legal positivism. Coleman writes, “Clauses like the equal protection clause of the 14th Amendment to the United States constitution or similar provisions in the Canadian Charter are, arguably, instances of rules of recognition that treat certain features of the morality of a norm as a necessary condition of its legality.”³¹ But these clauses needn’t be in a constitution, so the moral tests for law are contingent only and the separability thesis is still secure. There is to my mind both a jurisprudential error and a moral error in this way of looking at things. The jurisprudential error is that constitutional provisions of this sort are not rules of recognition. They are positive law, certified as such *by* the rules of recognition in their respective systems.³² The moral error is that this is not the contingency that matters. What matters is that the institutional morality of the law may be invalid. In some cases it is fundamentally repugnant. Abolitionists held the unreconstructed U.S. constitution to be a “pact with the devil;” that it referred to moral values is neither here nor there. Judges who reason in terms of the referred-to values naturally claim their decisions are correct in terms of those values, but that is not the same as them being correct values.³³ And all constitutions select *which* moral principles they make reference to. The present U.S. constitution invalidates punishments that are cruel and unusual, but not punishments that are brutalizing and disproportionate; it guarantees equal protection of the laws, but not equal benefit of the laws. Even if these were part of the moral test for tolerable laws, it would not follow that the Constitution is getting things partly right. Cyclopic reference to some

Füßer’s “fallibility thesis” which holds that “under certain counterfactual circumstances the law would not be morally valuable.” p.128.

³¹ Coleman, *Practice of Principle*, p.126. Cf. W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

³² Not every validity-defining rule is part of the rule of recognition, only the ultimate ones are, and the rule of recognition is not positive law but a customary social rule of the officials.

³³ Robert Alexy confuses these points when he writes of a judge who has to apply a constitution incorporating repugnant principles, “The necessary connection between law and correct morality is established in that the claim to correctness includes a claim to moral correctness that also applies to the principles on which the decision is based.” Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. S.L. Paulson and B.L. Paulson (Oxford: Clarendon Press, 2002), p. 78.

rather than all relevant values may be worse than reference to none. No doubt this depends on the nature of the issue, the political culture of the country and the traditions and habits of the judiciary. My only point is this: if we see the separability thesis in the light I suggest, what is of moral moment is not that constitutions only contingently refer to values, it is that the values to which they refer are only contingently valid.

The fallibility thesis is correct and important. But it is not the exclusive property of legal positivism. Unlike the separability thesis, the fallibility thesis really is undeniable: Aquinas accepts it, Fuller accepts it, Finnis accepts it, and Dworkin accepts it. Nor is it even a discovery of legal theory, it is part of the concept of law for which any competent theory must account.³⁴ What marks legal positivism is the *way* the fallibility thesis fits into its account of the nature of law. If law were the genius of the people, or an ordinance of reason for the common good, or an empire of principle, it could still be fallible. Law is created and administered by people who through ignorance and ill-will may fail to realize its potential or hijack it to malign ends. But on these accounts the nature and occasions of law's vices are not importantly shaped by the concept of law itself. According legal positivism, on the other hand, law is an institutionalized normative system, sustained by a consensus of elites who apply rules whose existence is product of that consensus and are set apart from the ordinary workings of reason and value. This affects why and how law is morally risky. In a nice analogy due to Waldron, the concept of law is therefore more like the concept of an *army* than it is like the concept of a *library*.³⁵ Both are institutions whose existence and activities can be identified without recourse to moral argument; both have a capacity for good or ill. But a library perverted really would be a weird contingency, hard to anticipate, and disconnected from the nature of libraries. On the other hand, when an army turns bad, the familiar forms evil are structured by its essential features: the chain of command, the duty of obedience, the use of lethal force, and the orientation to victory. If I tell you that the New York Public Library has run amok, you know that what I say is possible, but you need a lot more to make it intelligible. If I tell you that a company of the 11th Brigade has run amok, you only fear the gruesome details.

After acknowledging the reasons for admitting necessary connections between law and morals, Hart points out that a legal system satisfying these might nonetheless have laws that are "hideously oppressive," denying to "rightless slaves" the minimum benefits of a legal system, but with all the "pedantic impartiality" of the rule of law. "The stink of such society is, after all, still in our nostrils...."³⁶ Hart is referring to the United States. We need not deny that this legal system had some merits, some of which were necessary features of the kind of institution that law is, even as it provided for slavery and then

³⁴ 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.

³⁵ Waldron, "All We Like Sheep," p. 182. I am elaborating the analogy in ways Waldron might resist.

³⁶ Hart, *EJP*, p. 81.

another century of Jim Crow. But neither should we deny that the U.S. had a legal system before 1965, and even before 1870. The existence of law depends on its sources, not on its merits. But its demerits—including these horrific ones—are also shaped by its nature.

Anthony Quinton lampoons the naïve optimism of liberals when he warns of the inherent tendency of human affairs to go badly.³⁷ Perhaps there is something of this view in the fallibility thesis. What we need, though, is not conservative pessimism but watchful realism. This is the real engine of the separability thesis. There are necessary connections between law and morality, for law and morality necessarily share aspects of form and content. But morality is not a condition for the existence of law, and there is no guarantee that law will satisfy the demands of morality. To set up a legal system, or to extend its reach into further areas of life, is to embark on an enterprise that can bring real benefits, even necessarily; it is also to live under a regime that can go badly wrong, and wrong in ways that are familiar and sometimes predictable. Legal positivism is not the only theory compatible with a critical view of law; but it is the one that most clearly explains how some of the dreadful moral contingencies are related to the nature of law. That is the truth in the separability thesis.

³⁷ Anthony Quinton, *The Politics of Imperfection* (London: Faber and Faber, 1978).