

The Contemporary Relevance of Legal Positivism

BRIAN Z TAMANAHA⁺

Most legal philosophers agree that legal positivism is the dominant theory of law today. An eruption of books and articles on legal positivism has occurred in the past decade.¹ Many contemporary legal philosophers, ranging from well established to just starting out, have committed significant efforts to working out legal positivist theory. It has been justifiably asserted that 'legal positivists today form by far the biggest camp within legal theory.'²

Notwithstanding these signs of triumph, however, it is undeniable that something is amiss with the theory. Consider the titles of several recent essays on the subject: 'Does Positivism Matter?',³ 'On the Incoherence of Legal Positivism',⁴ 'Positivism's Stagnant Research Programme'.⁵ Legal

⁺ Professor of Law at St John's University Law School, New York. About three years ago, I received critical comments from William Twining, Brian Bix, Kenneth Himma, and Brian Leiter on an earlier version of this article. All of them disagreed with aspects of the argument, but all were helpful nonetheless. An anonymous reviewer for the Australian Journal of Legal Philosophy also offered detailed feedback. I thank all of them for their help.

¹ The list of recent articles on legal positivism is too lengthy to recite, though a start can be found after Campbell's Introduction in the collection listed below. The following is a sampling of books published in the past decade on legal positivism, in random order. Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (1994); Tom D Campbell (ed), *Legal Positivism* (1999); H L A Hart, *The Concept of Law* (2nd ed, 1994); Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001); Wilfred Waluchow, *Inclusive Legal Positivism* (1994); Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (1999); Anthony Sebok, *Legal Positivism in American Jurisprudence* (1998).

² David Dyzenhaus, 'Positivism's Stagnant Research Programme' (2000) 20 *Oxford Journal of Legal Studies* 703, 719.

³ R George Wright, 'Does Legal Positivism Matter?' in Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (1994) 57-78.

⁴ John Finnis, 'On the Incoherence of Legal Positivism' (2000) 75 *Notre Dame Law Review* 1597.

⁵ Dyzenhaus, above n 2.

positivism, some have said, is suffering from a 'malaise'.⁶ Legal positivist theorists have splintered into two opposing schools and are consumed in an internecine dispute over which is the better version of positivism, while they less frequently engage competing legal theories and turn their backs on real world matters.

A growing number of prominent theorists sympathetic to legal positivism have voiced concern about its current orientation. Jeremy Waldron observed that 'these analytical discussions tend to be flat and repetitive in consequence, revolving in smaller and smaller circles among a diminishing band of acolytes.'⁷ William Twining described debates among positivists as 'repetitious, trivial, and almost entirely pointless.'⁸ Frederick Schauer noted that 'large numbers' of American law professors believe 'that analytic jurisprudence in general, and the debates about legal positivism in particular, are the largely irrelevant preoccupation of a small group of socially unaware but philosophically obsessed pedants'.⁹

Three factors contribute to the problematic state of current legal positivist theory. One factor is that legal positivism is a victim of its own success. For much of its existence, the primary foil for legal positivism has been natural law theory. But natural law theory no longer has the primacy it once did. Moreover, as will be explained, although differences remain, an accommodation has been reached between these traditional opponents, leaving little of substance to dispute. Hence legal positivism appears to have lost an important reason for being. As one theorist observed, 'legal positivism is orthodoxy in desperate need of dissent.'¹⁰

Another factor is the dominance in the field of H L A Hart, in particular of his extraordinary book *The Concept of Law* (1961). It overstates matters to assert that legal positivist works today are mere footnotes to Hart's canonical

⁶ Ibid 719.

⁷ Jeremy Waldron, 'Legal and Political Philosophy' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 381.

⁸ William Twining, 'Imagining Bentham: A Celebration' in M D A Freeman (ed), *Current Legal Problems 1998: Legal Theory at the End of the Millennium* (1998) 1, 21.

⁹ Frederick Schauer, 'Positivism Through Thick and Thin' in Brian Bix (ed), *Analyzing Law: New Essays in Legal Theory* (1998) 65, 69.

¹⁰ Brian Bix, 'The Past and Future of Legal Positivism' (speech delivered for the ascension to the Frederick W Thomas Associate Professor for the Interdisciplinary Study of Law and Language, University of Minnesota, April 2002) 28. This speech was reprinted in modified form as 'Legal Positivism' in Martin Golding and William Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 29.

text, but there is no question that he established the parameters of the current understanding of legal positivism. Legal positivism today remains trapped within Hart's paradigm, consigned to working out its implications, whether by way of refinement, partial repudiation, clarification or extension. Hart's lengthy intellectual dominance, continuing through two generations of scholars with no sign of diminishment, should not be interpreted in negative terms. Hart got a lot right. Consequently, on several fundamental issues there is agreement among legal positivist theorists, leaving details to be explored.

The most important factor, I will argue, is that a wrong turn was taken in the modern development of the theory. Throughout its existence legal positivism has consisted of two distinct streams: 1) an insistence that what law *is* and what law *ought* to be are separate matters (the separation thesis); and 2) the goal to construct a legal science or a philosophically sophisticated theory of law. Historically the second stream has been supportive of the first—producing a philosophically sound account of law was thought to be the best means to make evident that what law is and what it ought to be are two separate matters. For reasons that will be elaborated upon in the course of this paper, currently the second stream dominates at the expense of the first.

Many contemporary legal positivists insist that their task is all about legal *philosophy*, about getting matters conceptually or analytically correct. They relegate to secondary importance considerations of relevance, interest and moral value. Against this view I will press three linked arguments: that according priority to the first theme is consistent with the primary original thrust underlying the legal positivist tradition; that this priority is appropriate and necessary for moral reasons; and that legal positivism must regain this priority if it is to serve as a theory of law with contemporary relevance. It is also my position—which will be demonstrated in the course of this essay rather than argued for as a meta-theoretical matter—that construing legal positivism in these terms is no less 'philosophical', but merely follows different philosophical tracks.

The argument will begin by articulating the primary inspiration that lies at the heart of legal positivism: the separation thesis. Laid out in Part One, this account will be situated in the context of the debate between legal positivism and natural law theory, a debate which gave the separation thesis its initial urgency. This discussion will be followed up in Part Two with a more detailed description of the aforementioned two streams that coexist within the legal positivist tradition. Part Three will introduce Islamic law, using it to juxtapose legal positivism and natural law theory in a surprising new light. With this background, the essay will address current legal positivist theory. Part Four will elaborate on Dworkin's criticisms of Hart, and on the two schools of legal positivism that arose in response. Part Five will indicate how both schools, in different ways, have eviscerated the separation thesis. Part

Six will propose an alternative understanding of the separation thesis. This simple and commonsensical alternative, if accepted, will point legal positivism in a direction with contemporary relevance and reconnect it with its original inspiration.

Part One: Two Disputes Between Legal Positivism and Natural Law

A. The Conceptual Dispute Over Validity and Obligation

Legal positivism initially developed around one core idea: law can be bad. Or as John Austin put it (in the acknowledged *locus classicus* of legal positivism):

The existence of law is one thing: its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.¹¹

What law *is* and what law *ought* to be are separate questions. Though law can be consistent with morality, that is not necessarily the case.¹² A law or set of legal rules, or an entire legal system, which is immoral in content or effect, can nonetheless be valid law.

Stated in this bald fashion, this proposition seems obvious and without need of argument or support, certainly not requiring a complex theoretical apparatus. Plentiful examples of immoral law can be offered. The list regularly cited in legal positivist literature includes slavery and segregation laws in the United States, apartheid laws in South Africa, and the routine instances of evil, retroactive, or secret laws of Nazi Germany.

Controversy originally arose, however, because leading natural law theorists have asserted, for more than two millennia, that immoral or bad laws are not valid 'law', captured in the Latin phrase *lex iniusta non est lex*. Cicero suggested that unjust laws are 'anything but laws.'¹³ 'In a community a law of

¹¹ John Austin, *The Province of Jurisprudence Determined* (W E Rumble ed, first published 1832, 1994 ed) 157.

¹² Most attention is focused on the point that law is not necessarily moral. A correlative point made by legal positivists, which has gone unchallenged, is that moral norms do not necessarily have the status of law.

¹³ Cicero, *The Republic and The Laws* (Niall Rudd trans, 1998 ed) 125.

just any kind will not be a law ... [L]aw means drawing a distinction between just and unjust, formulated in accordance with that most ancient and most important of all things—nature.’¹⁴ St Thomas Aquinas stated, in *Summa Theologica*, ‘[a]nd laws of this sort ... are acts of violence rather than laws, as Augustine says ... “A law that is unjust seems not to be a law.”’¹⁵ ‘Hence every human positive law has the nature of law to the extent that it is derived from the Natural law. If, however, in some point it conflicts with the law of nature it will no longer be law but a perversion of law.’¹⁶ Blackstone reiterated this claim in his *Commentaries*: ‘[N]o human laws are of any validity, if contrary to this [law of nature]; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.’¹⁷ More recently, Lon Fuller insisted that there is a certain minimum moral element to law, without which it is ‘not simply bad law, but not law at all.’¹⁸

Natural law theorists appear to assert in these statements that as a condition of acquiring the status of ‘law’ the law must conform to the dictates of natural law. John Austin’s response to this position was scathing: ‘Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and continually are enforced as laws by judicial tribunals.’¹⁹ He pointed out that a condemned man around whose neck a noose is fastened pursuant to a judicial order will not be heard to protest that the evil law is not law.

The ensuing dispute has been nasty at times, which overshadows the fact that natural law theorists and legal positivists are bound by a shared overarching commitment: both have a deep concern about the ever-present possibility of immoral laws and both have emphasized the need to challenge them. Consistent with this common commitment, both sides hold that there is no moral obligation to follow (grossly) immoral laws; that there is a moral obligation to follow moral laws; and hence that the ultimate determinant of a moral obligation to abide by the law rests in morality, not with law alone.²⁰

¹⁴ Ibid 126.

¹⁵ St Thomas Aquinas, *Summa Theologica* (R J Henle trans, 1993 ed) 95.2.

¹⁶ Ibid.

¹⁷ Blackstone, quoted in Daniel Boorstin, *The Mysterious Science of Law* (first published 1941, 1996 ed) 49.

¹⁸ Lon L Fuller, *The Morality of Law* (1969) 197.

¹⁹ Austin, above n 11, 158.

²⁰ See H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593, 617–21; Frederick Schauer, ‘Positivism as Pariah’ in Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (1994) 31 (legal positivists traditionally have ‘been among the

'No legal positivist argues that the *systemic validity* of law establishes its *moral validity*, ie that it should be obeyed by subjects or applied by judges.'²¹ Another position they share is that legal positivists, like Bentham,²² and natural lawyers, like Aquinas,²³ have argued that owing to general benefits conferred by a system of law—enhancing predictability for citizens or maintaining social order—under some circumstances there may be an obligation to obey even immoral laws (at least when not too egregious), although they should be criticized as such.

Emphasizing their disagreements rather than their commonalities, these longstanding antagonists come at this set of issues in different ways. Many natural lawyers (though not all) collapsed validity and obligation into a single question by asserting that law must pass a moral test to qualify as laws (setting aside the multitude of laws with no moral import, like traffic laws). A law properly so called automatically carries a moral obligation because it has already passed a threshold moral test. In contrast, legal positivists maintain that legal validity and moral obligation are distinct questions. First one must ask whether law is valid (according to that legal system's criteria of validity), then one may ask whether it is moral and therefore gives rise to an obligation.²⁴

Working backwards from the overarching view they share, the dispute between these two schools of thought quickly dissolves. Natural law theorists, most contemporary ones anyway, readily grant that immoral laws can possess legal status from the standpoint of the legal system, according to its own criteria of validity, and that real consequences may follow within the legal system from this status, regardless of its immorality.²⁵ Recognition of that point, in the end, is the essence of the legal positivist position. John Finnis, the leading contemporary natural law theorist, has argued that Aquinas never meant to deny this; to the contrary, he claims, Aquinas was 'the first' to propose that a state legal system be seen as 'positive law' with its own criteria

leading proponents of the view that there is *no* moral obligation to obey the law': at 37).

²¹ Leslie Green, 'Legal Positivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2003) <<http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>> at 15 February 2007 (emphasis in original).

²² See David Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24 *Oxford Journal of Legal Studies* 39, 42.

²³ See Norman Kretzmann, 'Lex Non Iniusta Non Est Lext' (1988) *American Journal of Jurisprudence* 99, 116–21.

²⁴ Mark C Murphy, 'Natural Law Jurisprudence' (2003) 9 *Legal Theory* 241, 252.

²⁵ See John Finnis, 'The Truth in Legal Positivism' in Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (1994) 195.

of validity.²⁶ Natural lawyers continue to assert that it is in the nature of law to be moral, so the immoral positive law or legal system is not entitled to—is not worthy of—the label ‘law’; it is a perversion of law²⁷ that gives rise to no obligation when measured against the dictates of natural law.²⁸

Legal positivists readily acknowledge that law routinely *claims* to be moral, that it often is seen by people in moral terms, that it often incorporates and overlaps with morality, that it *should* be evaluated against moral standards, and that an immoral law is not necessarily obligatory—points which natural lawyers share. Legal positivists insist only upon maintaining that legal systems have their own criteria of validity, which need not in any particular instance necessarily conform to standards of morality. As indicated, modern natural lawyers concede this last point.

Given these clarifications, the conceptual dispute is all but over. A legal positivist may without contradiction believe in natural law—may believe in the existence of objective laws of moral rectitude against which positive legal systems should be measured. Although one key difference remains—natural lawyers see law as by its nature moral,²⁹ legal positivists do not—few theorists continue to actively debate these points today.³⁰

B. The Empirical Dispute About Resisting Evil Law

It is wrong to conclude from this easy reconciliation of positions that their bitter antagonism was really about nothing, or that happy coexistence reigns. The enmity between these traditions runs deep. A different dispute emerged following World War II that centred on which view of law is more likely to engender resistance to an evil legal system. This was the centrepiece of the renowned Hart-Fuller debate,³¹ which gave fresh impetus to modern legal positivist theory. After the war, German jurisprudence scholar Gustav Radbruch, a repentant former legal positivist, blamed legal positivist views of law for the widespread complicity of the German legal establishment in Nazi abuses committed under the aegis of law. Radbruch wrote: ‘Legal positivism, with its principle that “a law is a law”, has in fact rendered the German legal

²⁶ John Finnis, ‘Propter Honoris Respectum: On the Incoherence of Legal Positivism’ (2000) 75 *Notre Dame Law Review* 1597, 1601, 1606; also, *ibid.*

²⁷ See Kretzmann, above n 23.

²⁸ See Brian Bix, ‘On the Dividing Line Between Natural Law and Legal Positivism’ (2000) 75 *Notre Dame Law Review* 1613.

²⁹ Murphy, above n 24.

³⁰ See Neil MacCormick, ‘Natural Law and the Separation of Law and Morals’ in Robert George (ed), *Natural Law Theory: Contemporary Essays* (1992).

³¹ See Hart, above n 20; Lon L Fuller, ‘Positivism and Fidelity to Law—A Response to Professor Hart’ (1958) 71 *Harvard Law Review* 630.

profession defenseless against statutes that are arbitrary and criminal.’³² According to Fuller, characterizing law in inherently moral terms is more effective in preventing the enactment and enforcement of immoral laws or the use of law for immoral purposes.

In response, Hart observed that legal positivism removes any automatic moral stamp from the law, which facilitates challenges to evil law:

So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.³³

Reminding everyone of the separation between law and morality, according to this view, should enable citizens and legal officials to recognize, resist, and disavow evil law.³⁴ As Hart put it: ‘Surely the truly liberal answer to any sinister uses of the slogan “law is law” or of the distinction between law and morals is, “Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.”’³⁵ Hart insisted that the failure of the German legal establishment to take this critical further step was not the fault of legal positivism, but rather was the product of other attitudes and beliefs circulating within German society. He observed that similar positivist views about law prevailed in other societies that did not produce comparable abuses of law.³⁶

This debate has never been resolved. The latest research throws doubt on Fuller’s causal argument, pointing out that the leading German legal positivist theorists of the time—a number of whom, like Hans Kelsen, were prominent Jews—were anti-Nazi, and that most judges were supporters of the Nazis who departed from the dictates of statutory law when necessary to further the goals of the regime (thus not acting as if ‘law is law’ and must be

³² Translated and quoted in Stanley L Paulson, ‘Lon L Fuller, Gustav Radbruch, and the “Positivist” Thesis’ (1994) 13 *Law and Philosophy* 259, 331.

³³ Hart, above n 1, 205–6.

³⁴ See Schauer, above n 20, 31, 31–55, developing this argument.

³⁵ Hart, above n 20, 618.

³⁶ *Ibid* 617–8.

followed).³⁷ After the war some of these judges cast blame upon legal positivism in a self-serving attempt to explain their compliance with unjust laws³⁸ (although this argument would find no support in legal positivist theory, which suggests that an immoral law need not be obeyed).

This is not a conceptual debate that can be resolved by philosophers. It is an argument over the social consequences of beliefs about law that raises complex empirical questions, questions which social scientists are unlikely to definitively answer with respect to any particular context. Arguably, neither view contributes much to generating resistance to immoral law,³⁹ or perhaps both do so equally well. Considering what is at stake—human pain, death and oppression—and the uncertainty that surrounds the issue, a common sense resolution would be that both views, deployed in different moments or contexts, understood in the different senses of reference as clarified above, can be potent allies in the battle to resist iniquitous law whenever it appears.

In his ‘Letter from Birmingham Jail’,⁴⁰ Martin Luther King enlisted both positions without a hitch. Confronted with the everyday reality of segregation laws, police abuse, and blatantly unfair judicial decisions, King explicitly recognized the legal positivist points that there can be an ‘unjust law’ and also a ‘law just on its face and unjust in its application.’⁴¹ Citing Aquinas and St Augustine, King recited the natural law position that ‘an unjust law is no law at all.’⁴² Then he asserted what many on both sides agree with: ‘one has a moral responsibility to disobey unjust laws.’⁴³ Finally, acknowledging and providing a solution to the potential invitation to anarchy in this assertion, King urged that:

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law.⁴⁴

³⁷ See Paulson, above n 32, 342–56.

³⁸ Ibid 358–9.

³⁹ See Philip Soper, ‘Choosing a Legal Theory on Moral Grounds’ (1986) 4 *Social Philosophy and Policy* 31.

⁴⁰ See Martin Luther King, ‘Letter From Birmingham Jail’, 16 April 1963, reprinted in Joel Fineberg and Hyman Gross (eds), *Philosophy of Law* (5th ed, 1995) 113–21.

⁴¹ Ibid 116.

⁴² Ibid 115.

⁴³ Ibid.

⁴⁴ Ibid 116.

A wilful violation of the law combined with acceptance of the punishment at once acknowledges the legal system's criteria of validity while rejecting on moral grounds its claim to be authoritative or obligatory. King wrote this letter a few years after the Hart-Fuller debate. Demonstrating a mastery of the theory and its real world application in a manner that is exemplary for academic theorists, King seamlessly wove both positions into his argument and came up with a prescription that neither side could find objectionable, forming one of the pillars of the civil rights movement.

Legal positivists have accused natural lawyers of perpetuating confusion, while natural lawyers have accused legal positivists of promoting immorality in law. At least with respect to today, both charges are inapt. The theoretical clarifications have had the commendable effect of ending what in hindsight appears to have been a mostly pseudo debate. But resolution of this longstanding dispute has severed legal positivism from its initial mooring, freeing it to drift.

Part Two: Two Streams of Legal Positivism

Hart asserted that legal positivism has consisted of three distinct and separable doctrines: 1) the 'insistence on the separation of law and morals'; 2) 'a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law'; and 3) the 'imperative theory of law.'⁴⁵ By all accounts, Hart demolished the third doctrine, pointing out various ways in which the idea that the law is a command of the sovereign is unsatisfactory.⁴⁶ That left the other two doctrines. Hart allowed no doubt about the primacy of the first. His seminal essay was entitled 'Positivism and the Separation of Law and Morals'. At the very outset he presented legal positivism as 'the history of an idea', which is: 'the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be.'⁴⁷ 'This theme haunts their [Bentham's and Austin's] work, and they condemned the natural law thinkers precisely because they had blurred this apparently simple but vital

⁴⁵ Hart, above n 20, 601.

⁴⁶ The basic arguments are that Austin's definition of the sovereign fails, and his characterization of law as a 'command' is too narrow, for the following reasons. The 'sovereign', according to Austin and Bentham, is the person or institution that all others in society are in the habit of obeying, yet who obeys no-one—an 'uncommanded commander'. In modern liberal democracies, however, the sovereign can be seen as the citizenry, who both commands and is subject to law, so there is no uncommanded commander. On the second issue, law is more than a 'command', as many laws are facilitative (like contracts), power conferring (authority granting), and performative (accomplishing things, like creating a marriage), none of which can be understood in terms of an order or dictate.

⁴⁷ Hart, above n 20, 594.

distinction.⁴⁸ Hart made clear that the value of conceptual clarification—the analytical stream—is that it would enhance recognition of the distinction between law and morality.

Hart insisted on another important point, evident in the indented quotation above: recognizing the separation between law and morality is necessary for a consummately moral reason—to facilitate the moral critique of law. ‘Both thinkers’ [Bentham and Austin] *prime reason* for this insistence [on recognizing the separation between law and morality] was to enable men to see steadily the precise issues posed by the existence of morally bad laws.⁴⁹ Hart, as well as many other positivists, has ‘expressed positivism’s central tenet as the claim that there is a difference between the way the law is and the way it ought to be.’⁵⁰ The legal positivist concentration on this ‘central tenet’ is motivated by moral concerns.

When Jeremy Bentham insisted on seeing law and morality in separate terms, his point was not an abstract one. He excoriated the common law as a system of extortion utilized by lawyers to extract money from hapless citizens.⁵¹ Convinced of the evil consequences of the existing legal system and committed to changing it, ‘Bentham’s life work was law reform.’⁵² ‘So Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned,’ wrote Hart, ‘but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws.’⁵³ A century ago philosopher John Dewey characterized Austin as ‘a moralist’. ‘Austin, in spite of the legal form which his main work took, was, like Bentham, pre-eminently interested in social reform and progress. Law, as such, was to him a means to realize this reform.’⁵⁴ As Frederick Schauer points out, ‘traditional legal positivists have been leaders of law-reform movements, even quite radical ones.’⁵⁵

It bears repeating—because so much confusion exists on what legal positivism stands for, because the legal positivist insistence on the separation of law and morality has been accused of being immoral—that legal positivism has been justified by many of its most important theorists in unabashedly

⁴⁸ Ibid.

⁴⁹ Ibid 597 (emphasis added).

⁵⁰ Jules Coleman and Brian Leiter, ‘Legal Positivism’ in Dennis Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (1996) 241, 243.

⁵¹ See Jeremy Bentham, *Fragment on Government* (1988); Gerald Postema, *Bentham and the Common Law* (1986).

⁵² Roscoe Pound, *The Ideal Element in Law* (2002) 207.

⁵³ Hart, above n 20, 596.

⁵⁴ John Dewey, ‘Austin’s Theory of Sovereignty’ (1894) 9 *Political Science Quarterly* 31, 33.

⁵⁵ Schauer, above n 20, 37.

moral terms.⁵⁶ Entirely apart from whatever other benefits may obtain from conceptual clarification in legal theory, important legal positivists, from Bentham to Hart, to Frederick Schauer and Neil MacCormick,⁵⁷ have argued that we should adopt legal positivism as a theory of law because morally beneficial consequences will follow therefrom. The claim pressed here is not that every legal positivist has been moved by this moral motivation when adopting or developing the theory,⁵⁸ but that this has been a primary motivation for the tradition throughout its existence. Hart acknowledged that choices must be made when constructing theoretical concepts and saw no inconsistency in the combining of moral and theoretical considerations: 'If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.'⁵⁹

According to primacy to the separation stream does not diminish the significance of the second stream, which promotes analytical and conceptual clarification for independent epistemic reasons (knowledge for its own sake), and for the benefits that attend to clear thinking and more acute understanding. Early legal positivists, particularly Austin, urged that legal theory should be a science, while recent legal positivists want it to be more philosophically sophisticated. More than any other twentieth century theorist, Hart is responsible for injecting philosophical concepts and rigour into jurisprudence.⁶⁰ This stream of legal positivism has extended beyond conceptual clarification to the formulation of claims about law as such, about the nature and essential attributes of law,⁶¹ claims applicable to law in all societies, known within legal positivism as the pursuit of a 'general jurisprudence'.⁶² As prominent legal positivist Joseph Raz put it: 'Legal philosophy seeks to understand the nature of law, and that involves improving our understanding of the concept of law.'⁶³

⁵⁶ See *ibid.*

⁵⁷ See Schauer, above n 9; Neil MacCormick, 'A Moralistic Case for A-Moralistic Law?' (1985) 20 *Valparaiso University Law Review* 1.

⁵⁸ My argument focuses on the separation thesis. Liam Murphy makes a similar argument that the social sources thesis should be understood in legal positivist terms for moral reasons. See Liam Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) chapter 11.

⁵⁹ Hart, above n 1, 204–5.

⁶⁰ Frederick Schauer, '(Re)Taking Hart' (2006) 119 *Harvard Law Review* 852.

⁶¹ See Brian Bix, 'Raz On Necessity' (2003) 22 *Law and Philosophy* 537.

⁶² See Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (2001) preface.

⁶³ Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 37.

Although the two streams of legal positivism have long maintained a balance in which both were given their due, an unmistakable shift has occurred in the orientation of the discussion, concomitant with a change in the background and interests of the theorists involved. Legal theorists in the past predominantly were lawyers, judges, and law professors with a strong philosophical interest but limited formal philosophical education. By contrast, today many legal positivist theorists are trained philosophers, some lacking training or experience in law. These scholars bring a vocabulary, base of knowledge, and set of interests and concerns to the theoretical study of law that are foreign to most lawyers and law professors. These scholars, who are wont to use the label ‘analytical jurisprudence’ for legal positivism—implicitly demeaning other schools of jurisprudence as ‘un-analytical’—are more inclined to value conceptual clarification for its own sake, without immediate concern for sociological, practical, political, or moral relevance.⁶⁴ Legal positivist discussions now overflow with conceptual, meta-theoretical, or methodological issues. Working out an abstract concept of law has become *the* project of legal positivist theorists, independent of and pre-eminent over the goal of facilitating the moral critique of law.

A striking indication of this flip in emphasis, signalling the demotion of the separation thesis from its former position as a matter of central concern, is the recent claim by John Gardner, the current occupant of Hart’s former Chair of Jurisprudence at Oxford, that the separation thesis—‘there is no necessary connection between law and morality’—‘is *absurd* and no legal philosopher of note has ever endorsed it as it stands.’⁶⁵ Perhaps not in those exact words, but Hart did say this: ‘It is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.’⁶⁶ Or as legal philosopher Jeremy Waldron put it—using precisely the phrase Gardner suggested is absurd—

⁶⁴ Jules Coleman and Joseph Raz would be on everyone’s short list of leading legal positivists, and both have insisted that conceptual analysis is to some extent autonomous from empirical concerns. Coleman remarked: ‘Whether or not moral criteria are capable of functioning as a part of an actual legal system in this or that society is really not a question of any philosophical interest (though of course it is of considerable sociological interest).’ Jules Coleman, ‘Constraints on the Criteria of Legality’ (2000) 6 *Legal Theory* 171, 182. Joseph Raz has declared that ‘it would be wrong to conclude ... that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness.’ Joseph Raz, *Ethics in the Public Domain* (1994) 221.

⁶⁵ John Gardner, ‘Legal Positivism: 5 ½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199, 222–3.

⁶⁶ Hart, above n 1, 185–6.

‘[l]egal positivism is commonly held to consist in a purely conceptual thesis—viz that there is no necessary connection between law and morality’.⁶⁷

Gardner’s (qualified) repudiation of the separation thesis is not out of line with the general views of many legal positivist theorists. Although it continues to hold a place in the theory, the once pivotal separation thesis is no longer much discussed by legal positivists. In a recent collection addressing Hart’s Postscript to the second edition of *The Concept of Law*, representing the foremost thought in the field, with entries from the acknowledged honour roll of leading contemporary legal positivist theorists, only one of the twelve essays mentioned the separation thesis in more than a passing fashion,⁶⁸ and most did not mention it at all.

The details of this abandonment of the separation thesis and its detrimental consequences for legal positivism will be elaborated on shortly. But first a brief mention of Islamic law will be interjected, to provide a concrete referent for the ensuing theoretical discussion.

Part Three: The Implications of Islamic Law

A. The Shari’a

Amina Lawal, a peasant woman in Nigeria, was sentenced to death by stoning for adultery, to be carried out in a public square. Her sentence was imposed under the Islamic Code, Shari’a, which was enacted in a northern Nigerian state in 1999. Here are excerpts from an article that describes the situation:

‘The best deterrent is the death sentence for people to see what happens to a fornicator,’ said Grand Khadi Aminu Ibrahim Katsina, the judge. ‘They watch you be stoned to death. They wouldn’t want it to happen to them. So it definitely would be a deterrent.[’]

....

As unkind as death by stoning might seem, the grand khadi said, such a punishment is necessary to uphold the sanctity of marriage. Under God’s law, he said, marriage was created for a reason: to produce children one can call one’s own.

⁶⁷ Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (2001) 411.

⁶⁸ See Kenneth Einar Himma, ‘Law’s Claim of Legitimate Authority’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (2001).

‘Islamic law prescribes that adultery and fornication are offenses that carry punishment,’ he explained. ‘If this girl were a spinster, if she had never married, they would never sentence her to death. They would sentence her to 100 lashes of the cane.’

Why?

‘Only Allah knows,’ he said at first. Then: ‘If she has never married, she doesn’t know whether this is sweet, nice, bitter. If this woman was married before, she knows.’

Allow such an act to go unpunished, he went on, and it will happen again and again. ‘Someone will walk into my house and force my wife and do it with her,’ he said. ‘We shouldn’t allow it to spread.’⁶⁹

Lawal’s death sentence was subsequently overturned on technical grounds, but that does not diminish the fact that others are in similar jeopardy. A revival of the Shari’a is occurring in many parts of the globe.⁷⁰ It was in place under Taliban rule in Afghanistan, where similar executions occurred and limbs were severed for criminal offences.⁷¹ It is in effect, in part or in full, most prominently in Iran, Sudan, Pakistan, Egypt, Saudi Arabia, and Indonesia; and it may be implemented to varying degrees in other countries, from the Middle East, to northern Africa, to former Republics of the Soviet Union, to East Asia, if the Islamic revival continues.⁷² Hundreds of millions of people already live at least partially under the Shari’a, with more locations poised to follow.

The Shari’a is different in crucial respects from Western law. It is understood as divine law, not the product of human legislation. ‘Since Islamization schemes purport to rest on divinely ordained blueprints and to embody definitive schemes of Islamic law, they cannot be subject to alteration

⁶⁹ Somini Sengupta, ‘As Stoning Case Proceeds, Nigeria Stands Trial’, *New York Times* (New York), 26 January 2003, A-3.

⁷⁰ An overview, albeit a bit dated, of the revival of Islamic law, can be found in Ann Elizabeth Mayer, ‘Law and Religion in the Muslim Middle East’ (1985) 35 *American Journal of Comparative Law* 127.

⁷¹ See *Afghanistan: Public Executions and Amputations on Increase* (1998) Amnesty International
<<http://web.amnesty.org/library/Index/ENGASA110051998?open&of=ENG-2S4>> at 15 February 2007.

⁷² See Samuel Huntington, *The Clash of Civilizations: Remaking of World Order* (1997) 109–20.

by human wishes.⁷³ The Shari'a is 'God's will or law.'⁷⁴ Bernard Lewis explains:

In the Muslim perception, there is no human legislative power, and there is only one law for the believers—the Holy Law of God promulgated by revelation. This law could be amplified and interpreted by tradition and reasoning. It could not be changed, and no Muslim ruler could, in theory, either add or subtract a single rule. In fact of course they frequently did both, but their action in so doing was always suitably disguised.⁷⁵

Notwithstanding its purportedly divine origins, like any body of law, the Shari'a is open to various interpretations and it must accommodate change. Interpretations of the Shari'a are known as *fiqh*; although the Shari'a is infallible, *fiqh* is a human product that can go astray. There is a long tradition in Islam of competing schools of jurisprudence that seek to 'ascertain, interpret, and apply God's will or guidance (Sharia) as found in the Quran to all aspects of life.'⁷⁶ These competing schools of jurisprudence have varying influence, and follow different rules of interpretation and accept different sources of law (primarily the Quran, the example of Muhammad's life, custom, analogical reasoning, the consensus of the community).⁷⁷ '[T]he rich shari'a legacy provides an ample store of diverse and potentially relevant legal doctrines from which inferences can be drawn to construct briefs by advocates of either side of ... basic ideological disputes.'⁷⁸ These disputes, however, always take place on terms set within the Shari'a. In Islamic countries the ongoing debate between traditionalists and modernists is not over whether the Shari'a must be followed—that is unquestionable—but over whether it requires a revival of old understandings or can be interpreted anew to address modern situations.

Criticism of the law takes place in Islamic societies, but along lines that do not challenge the Shari'a itself. For example, a prominent dissident cleric in Iran, Grand Ayatollah Hosein-Ali Montazeri, sharply criticized the judiciary (comprised of clerics): 'The so-called political trials and verdicts have no basis in Sharia. The revolutionary court and special clerical court are misused as a scarecrow ... If we want our country to be preserved and not to

⁷³ Ibid 162.

⁷⁴ John L Esposito, *Islam: The Straight Path* (3rd ed, 1998) 78.

⁷⁵ Bernard Lewis, *What Went Wrong? The Clash Between Islam and Modernity in the Middle East* (2003) 101–2.

⁷⁶ Esposito, above n 74, 78; see also Mayer, above n 70, 130–5.

⁷⁷ See Esposito, above n 74, 78–85.

⁷⁸ Ibid 166.

be condemned in the world, our judicial system has to be revised.’⁷⁹ The cleric-run Guardian Council in Iran that oversees the Constitution has rejected various proposed reforms on the grounds that they are against the Shari’a;⁸⁰ the Council has also invalidated as ‘un-Islamic’ three drafts of a bill banning the use of torture to extract confessions from prisoners.⁸¹ Critics charge that these actions are based upon incorrect interpretations of the Shari’a.

Another difference with Western understandings of law is that in theory nothing lies outside the scope of this divine law.

There is only a single law, the shari’a, accepted by Muslims as of divine origin and regulating all aspects of human life: civil, commercial, criminal, constitutional, as well as matters more specifically concerned with religion in the limited, Christian sense of that word.⁸²

As a result of this combination, jurists and theologians ‘are branches of the same profession.’⁸³ In the present regime in Iran, for example, the judges are clerics, most of them religious hard-liners. Under a system of this kind, there is no separation of church and state.

The reality, once again, is somewhat different from the theory. Most Islamic countries have, either through prior colonial imposition or by voluntary adoption, borrowed substantial bodies of laws and legal institutions from Western legal systems, and have had to create new law to deal with changes in modern society. Many such countries have dual systems operating side by side with jurisdictions over different subject matters. As currently instituted among states with an Islamic influence, there is a range of combinations, from those operating wholly under the Shari’a, run by clerics, to those run by secular legal officials that incorporate limited aspects of the Shari’a (usually family law and criminal law), which are applied in ordinary courts by secular judges who take testimony or advice from religious authorities in a given case, to various mixtures thereof.⁸⁴

⁷⁹ Najmeh Bozorgmehr, ‘Iranian Dissident Attacks Political Trials’, *Financial Times* (London), 1 February 2003, A-3; Elaine Sciolino, ‘Freed Ayatollah Again Makes Voice Heard’, *New York Times* (New York), 1 February 2003, A-3.

⁸⁰ See Bozorgmehr, above n 79.

⁸¹ Elaine Sciolino, ‘A Lifelong Dissident Defies Iran’s Rulers on Torture’, *New York Times* (New York), 22 February 2003, A-3.

⁸² Lewis, above n 75, 100.

⁸³ *Ibid* 102.

⁸⁴ See Esposito, above n 74.

B. The Shari'a Challenge to Legal Positivism

Consideration of Islamic law has not factored into the theoretical arguments by legal positivists in any way. Yet legal positivism claims to produce a philosophical or scientific theory that applies to law generally. With more than a billion adherents of Islam around the world, Islamic law is not a marginal phenomenon.

More to the point, Islamic law possesses a characteristic that renders it uniquely problematic for legal positivism. Understood by believers to be the product of God, Islamic law is inherently moral. There is no space here for separating law and morality. The Shari'a *is* law *is* moral. 'Law is essentially religious, the concrete expression of God's guidance (sharia, path or way) for humanity ... The Sharia has been a source of law and moral guidance, the basis for both law and ethics.'⁸⁵ Within its own self-understanding, it is nonsensical, as well as blasphemous, to assert that the Shari'a is immoral; for the Shari'a is itself the very standard of morality, or, rather, it is morality. Even discussing the matter in this way may be wrong, as this inept phrasing reveals, though it must somehow be said. Compared to the distinctions Aquinas made among eternal law (God's intellect or providence over everything), divine law (biblical scripture), natural law (principles applying to human action based upon God's reason), and positive law,⁸⁶ the Shari'a embodies them all as one. To put it in the terms of a Western example, the Shari'a is as if natural law principles—think of the Ten Commandments (though remember that the Shari'a is far more encompassing)—were enacted as the positive law of a state.

The challenge Shari'a poses to legal positivism is this: how does the thesis of the separation of law and morality apply to a system of law that sees the two as one and the same? From the standpoint of the traditional motivation of legal positivism of facilitating the moral critique of law—and remembering the plight of Amina Lawal—legal positivists should insist that it has application to Islamic law, and should construct the theory in a manner that is relevant to such situations. To avoid confusion or misinterpretation, it is important to emphasize that the argument pressed here is emphatically *not* that there is anything uniquely bad or immoral about the Shari'a that merits legal positivist scrutiny. The Shari'a is a legal tradition with much that is highly commendable. The theoretical implications of this analysis turn a similarly critical eye on Western legal views and practices. The crucial point here is that the Shari'a fusion of law and morality makes moral critique all the harder to conceive and assert, and hence a legal positivist understanding of law all the more necessary.

⁸⁵ Ibid 74–5.

⁸⁶ Aquinas, above n 15, 91, a.1–5.

As will be explained shortly, however, a large group of legal positivist theorists have rendered the separation thesis inapplicable to any actually existing legal system. For the moment it will merely be asserted that under the reorientation of legal positivism proposed in this essay: *even when law and morality are explicitly fused, the thesis of the separation between law and morality still applies*. This apparently paradoxical assertion, which has major implications for legal positivist theory, applies not only to the Shari'a but also to the many Western legal systems that explicitly incorporate moral standards and principles into the law, including bills of rights and human rights.

C. Unsettling Implications of the Shari'a for Natural Lawyers

Natural law theorists have a different set of reasons to be unsettled by the example of Islamic law. Many natural law theorists no doubt would be alarmed by some of the judicial applications of the Shari'a recited earlier. They would presumably want to argue to the effect that, although the Shari'a is a law that claims to be moral, it would be immoral to stone Amina Lawal to death for her actions. They will urge that it is important to recognize that law can be immoral even when it explicitly relies upon or incorporates moral standards, or indeed by its own terms *is* the very standard of morality.

Significantly, this stance *places natural law theorists in the position of articulating the core legal positivist position—the separation thesis*. In one sense there is nothing new in this. Natural lawyers have always criticized particular legal systems as immoral. What lends particular significance to this situation is the specific claim of the Shari'a to be inseparably law/morality, that is, to characterize itself in ways that sound a lot like natural law.

The parallels are striking. Both have religious origins. The natural law tradition in the West developed within and was substantially influenced by the Catholic religion, especially the work of the 'paradigmatic natural law theorist',⁸⁷ Saint Thomas Aquinas. John Finnis builds his account upon Aquinas.⁸⁸ Although modern philosophers, beginning with Grotius, have argued that natural law would exist even if God does not—usually devising arguments from self-evidence, practical reason, universally shared customs or beliefs, human nature, or inherent justness—for much of its history natural law was (and still is) thought by many to be the product of divine will. This divine origin was the ultimate source of its authority, entirely apart from its substantive rightness (and ignoring classic disputes over whether it was right

⁸⁷ Murphy, above n 24, 241.

⁸⁸ The most powerful modern attempt to establish natural law without a grounding in divine will is John Finnis, *Natural Law and Natural Rights* (1980).

just because God willed it, or God willed it because it was right). After detaching from its theological sources, natural law maintained the claim to embody objectively correct, true principles of moral law. Also similar to the Shari'a, there are competing schools of natural law thought, promoting different versions of what natural law entails. The parallels with Shari'a extend to substantive content. Aquinas' first principle of natural law—do good and avoid evil—is also a principle of the Shari'a.

Historical connections suggest that these similarities are not entirely coincidental. Islamic scholars, most famously Avicenna (Ibn Sina) and Averroes (Ibn Rushd), preserved, translated, and extensively commented upon Aristotle's work. When Aquinas synthesized Aristotle's thought with Church doctrine in his own combination of reason and faith he was influenced by these commentaries, adopting certain of their positions and setting out his own view in contrast to theirs. A definitive work on Aquinas characterized the influence in strong terms: 'Without going so far as to say that he [Aquinas] and his master, Albert "silently plundered" their philosophico-theological arguments, it is important to be aware of what they owe to these [Islamic] predecessors.'⁸⁹ Thus it can be said that the religious and intellectual milieu out of which modern natural law theory emerged is directly connected to the one out of which modern views of the Shari'a emerged, although they have taken divergent paths since those origins, the former secularizing and the latter remaining religious.

This situation is exceedingly sticky for natural law theorists, for within it lies the potential for a reflexive sting. Owing to the parallels and historical connections between natural law and Islamic law just identified, the Shari'a can aptly be understood as a competing version of natural law thought (or natural law thought as parallel to the Shari'a, but shorn of religious clothes). Hence if legal actions committed in the name of the Shari'a should be subject to moral scrutiny, for precisely the same reasons legal actions committed in the name of natural law should also be subject to moral scrutiny. Put in more concrete terms, if a Western legal system were to explicitly adopt natural law principles (say the Ten Commandments, human rights norms, or individual rights), then it must still be asked whether those laws as identified are moral in content or application. Regardless of the express incorporation of natural law, regardless of the claim to be or to reflect or to constitute the very standard of morality, to draw out the broader point: what the law *is* and what the law *ought* to be are still separate questions.

⁸⁹

Jean-Pierre Torrell, *Saint Thomas Aquinas – Volume 1: The Person and his Work* (Robert Royal trans, 1996 ed) 49 [trans of: *Initiation à saint Thomas d'Aquinas*].

Natural lawyers may respond that there is of course a fundamental distinction: their natural law principles are the *true* objective moral principles, and thus provide the correct standard of evaluation, whereas the offending provisions in the name of the Shari'a are false or wrong. One obvious retort is that believers in the Shari'a would direct the same charge against the natural law principles that presume to condemn their own true law. The natural lawyer will remain unmoved, for that is not itself a refutation, though it does again confirm that the positions assume parallel stances. An additional retort against the natural lawyer is that there are competing versions of natural law within the Western tradition and therefore uncertainty reigns even amongst devotees over which principles are in fact the true ones. Again the natural lawyer will be unconvinced, for such disagreement is not evidence that there is no correct set of principles, even if it cannot be conclusively established which is correct (and natural lawyers must also concede the possibility that, as yet, *the* correct view might not actually have been explicitly articulated, and might *never* be articulated by humans).

This superficial exchange highlights what even the most steadfast believer in natural law must admit: it is impossible to be certain whether what has been positively recognized as law by legal officials is ever consistent with natural law (assuming natural law exists in the objectively correct sense understood by adherents), owing to inherent human fallibility and to epistemological barriers to the demonstration of objective moral truths, as testified to by a rich history of failed attempts. But the problem does not end there. Even if we were to assume that the objectively correct natural law principles have been enacted, the openness of interpretation, the movement from general principle to specific application, and the possibility of conflict between two principles (eg the right to life and the right to privacy in relation to abortion) once again inject uncertainty. The moment of application provides an ineradicable opening for the natural principles cum positive laws to be turned immoral in substance or effect.

A natural lawyer may agree with these assertions, and yet continue to deny that they have any adverse implications for natural law theory. Finnis made a distinction between natural law as a theory that has no history and natural law as it has come into human affairs.⁹⁰ No natural lawyer can deny the historical fact that legal systems have done bad things in the name of natural law and natural rights.⁹¹ It ought not be forgotten that Aquinas defended the burning of heretics and believed in the inferiority of women.⁹²

⁹⁰ Finnis, above n 88, 24.

⁹¹ See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (1979).

⁹² See Janet Coleman, *A History of Political Thought: From the Middle Ages to the Renaissance* (2000) 83.

The conservative judges who Bentham scorned claimed that their rulings, and the common law generally, reflected natural principles. Roscoe Pound observed the marked tendency of philosophical jurists—including common law judges—to idealize their own law as representative of natural law.⁹³ Hans Kelsen argued that natural law ideas are historically correlated with and have an affinity with absolutist governments: ‘if one believes in the existence of the absolute, and consequently in absolute values, in the absolute good ... is it not meaningless to let a majority vote decide what is politically good?’⁹⁴ Modern human rights have also been attacked: ‘there are a number of countries that regard human rights instruments as forms of cultural imperialism of the West.’⁹⁵ The cherished right of privacy of the West, and individual rights as a group, are viewed by some critics as anti-community in import, the reflection of a selfish immoral society, anything but universal.⁹⁶

As indicated, a natural lawyer can accept all of the above and remain untroubled, invoking Finnis’ assertion that the theory of natural law is untouched by the actual history of natural law (by things done in its name). That retort is correct, assuming one accepts the notion that natural law exists outside of history, but it also concedes that natural law within the history of human affairs—including when incorporated by legal systems—should be subjected to moral evaluation, for it can be false.

In three respects, the argument in this Part has transformed the well-worn terrain of the legal positivist/natural law engagement. First, it is significant that natural lawyers find themselves in the position of echoing the legal positivist separation thesis in relation to a fused version of law and morality, at least with respect to the Shari’a. Although these adversaries have mostly achieved a theoretical reconciliation, it is not a true rapprochement, for natural lawyers continue to evince deep-seated animosity toward the legal positivist position. Now they can experience what it feels like to want to assert the legal positivist position, perhaps allowing empathy to dispel some of the enmity.

Second, this argument should have demonstrated to natural law critics of legal positivism, who have focused much of their formidable intellectual effort on attacking the separation thesis from every angle possible, that they ought to begin looking at matters in a new light. Legal positivists never

⁹³ Pound, above n 52, 76, 190.

⁹⁴ Hans Kelsen, ‘Absolutism and Relativism in Philosophy and Politics’ (1948) 42 *American Political Science Review* 906, 913.

⁹⁵ Ratna Kapur, ‘Neutrality and Universality in Human Rights Law’ in Norman Dorsen and Prosser Gifford (eds), *Democracy and the Rule of Law* (2001) 390.

⁹⁶ Huntington, above n 72, 225.

denied that law can in fact be moral and can have connections with morality, only that this ought not be taken for granted with respect to any particular legal provision or action, or to any given legal system. What the example of the Shari'a should bring home to natural lawyers is that, for reasons dear to them, they should now direct serious critical attention at invocations of natural law-type positions within legal systems. Arguments about inherent connections between law and morality—religious law and natural law arguments in all of their varieties—can be utilized in harmful ways when taken over by (or when they take over) state legal systems. The perhaps startling suggestion here is that natural lawyers ought to become allies of legal positivists in scrutinizing all natural law or natural law-sounding claims made by legal systems.

Finally, to make the core conceptual point, this example should have demonstrated to legal positivists and natural lawyers that (paradoxically) the legal positivist separation thesis applies to fused versions of law and morality. The separation thesis applies even when moral considerations are explicitly incorporated into the law and when the law explicitly requires that moral decisions be made. Now I will proceed to demonstrate how this proposition makes sense, building on a critique of current legal positivist constructions of the separation thesis.

Part Four: Two Schools of Contemporary Legal Positivism

Contemporary legal positivist theory adopts two basic theses: 1) what law *is* and what law *ought* to be are separate questions (the separation thesis); and 2) what qualifies as law in any given society is determined by social facts (the social sources thesis).⁹⁷ Both of these theses are linked to the idea that law can be bad. The separation thesis is a formal statement of this idea. It entails that law is a product of the legal system that need not be consistent with morality. The social sources thesis specifies the form of this existence by indicating that law is 'something that must be *posited* through some social act or activity, either by enactment, decision, or practice.'⁹⁸ '[T]he existence and content of law is determined by some range of facts about human beings in a social setting—facts about their behavior, history, institutions, beliefs, and attitudes.'⁹⁹ In less technical terms, this means that positive law is produced by and through the coordinated activities of legal officials and citizens.

⁹⁷ Coleman and Leiter, above n 50, 241.

⁹⁸ Scott Shapiro, 'Law, Morality, and the Guidance of Conduct' (2000) 6 *Legal Theory* 127, 127.

⁹⁹ David Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (1993) 77.

Contrasting interpretations of the requirements of these two theses are what differentiate the two main competing camps of legal positivism, known as 'inclusive legal positivism' and 'exclusive legal positivism'. The details of these various positions have been substantially shaped in the course of the defensive reaction of legal positivists to the critique mounted against Hart by his leading interlocutor, Ronald Dworkin.

Hart set out his theory in contradistinction to Austin's command theory of law.¹⁰⁰ According to Hart, Austin's theory fails because law consists of more than just commands, and Austin's notion of habits of obedience fails to capture the normative aspect characteristic of law. Law, Hart insisted, is not a 'gunman writ-large.' It carries a sense of obligation. Hart suggested instead that law consists of two sets of rules. 'Primary rules' are those that apply to society at large; 'secondary rules' empower and direct legal officials on how to recognize, apply, and change primary rules. The 'rule of recognition' is the master (secondary) rule in this arrangement, for it specifies what has the status of law.

According to Hart, a legal system *exists* whenever there is a union of primary and secondary rules, and two further conditions are met. First, the populace must generally obey (but need not normatively accept) the primary rules; and second, the legal officials must in large part accept the secondary rules, in the sense that they feel a sense of obligation to comply with them (although this acceptance can be very thin, and need not be a full endorsement of the rules). In Hart's account it is not essential to the existence of a legal system that either the populace or the legal officials be normatively committed to the primary rules—the rules that govern society—though a healthy system would exhibit such commitment. A functioning legal system exists as long as the public generally follows the primary rules and legal officials are generally committed to the secondary rules in their identification and application of the primary rules. Hart's primary and secondary rules provide a pared down account of state legal institutions: legal officials (legislators, judges, enforcers) follow a set of rules to establish and effectuate a set of rules that apply to the populace. It was a powerful reduction that appeared to capture the essential elements of state law.

Dworkin attacked this model by insisting that law involves more than just rules; it includes moral and political principles as well.¹⁰¹ These principles have legal standing owing to their status as true principles immanent within the political and legal order. These principles—like the notion that

¹⁰⁰ This summary is taken from Hart, above n 1.

¹⁰¹ Dworkin's most piercing critique is set out in Ronald Dworkin, 'The Model of Rules I' and 'The Model of Rules II' in Ronald Dworkin, *Taking Rights Seriously* (1977).

people cannot profit from their own wrongs—are not necessarily stated among the corpus of declared legal rules, but they are nonetheless an integrated aspect of the law and are utilized by courts when making decisions (especially in hard cases). The legal positivist ‘rule model’ of law is therefore inadequate, according to Dworkin.

This analysis challenges legal positivism in several critical respects. Dworkin denied that Hart’s notion of primary rules captures the entirety of law governing citizens insofar as it fails to account for these moral cum legal principles. He denied that the rule of recognition is the ultimate rule for determining what has the status of law since certain moral principles have the status of law solely because they are morally right. By insisting that certain fundamental moral principles are an inseparable aspect of the law, Dworkin denied the separation of law and morality thesis. He denied the social sources thesis as well because these moral principles are a part of the law not owing to the conventional activities of legal officials but because they are true or correct principles (determined in relation to the community’s background moral and political principles). It was a wholesale assault on Hart’s scheme and on legal positivism generally, challenging the reduction of law to primary and secondary rules as well as the separation thesis and the social sources thesis.

Dworkin’s critique placed legal positivists immediately on the defensive. It is undeniable that in Anglo-American systems judges occasionally refer in their decisions to moral principles that were not previously recognized as valid law by legislators or judges.¹⁰² Moreover, there are manifold legal provisions that expressly or implicitly incorporate moral notions—take the equal protection, due process, and cruel and unusual punishment clauses in the *United States Constitution*, and the right of individual privacy found in the penumbra of the Bill of Rights, as well as legal standards like fairness, reasonableness and unjust enrichment. These kinds of provisions appear to require that judges engage in moral reasoning and make moral judgments.

Theorists have observed that *the* characteristic change in US law in the twentieth century is that judges increasingly render moral judgments in the course of their legal decisions.¹⁰³ Almost a decade before the Hart-Fuller debate, Roscoe Pound observed:

A great and increasing part of the administration of justice is achieved through legal standards. These

¹⁰² A summary of Dworkin’s critique and the positivist response can be found in Coleman, above n 64.

¹⁰³ See Brian Z Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997) chapter 8; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) chapters 5 and 6.

standards begin to come into the law in the state of infusion of morals through theories of natural law. They [due care, fair competition, fair conduct, good faith, fairness, and reasonableness] have to do with conduct and have a large moral element ... They are applied according to the circumstances of each case, and within wide limits are applied through an intuition of what is just and fair, involving a moral judgment upon the particular item of conduct in question.¹⁰⁴

Pound commented further that '[a]nalytical jurists continue to insist vigorously on this separation between law and morals, even after the law has definitely passed into a new stage of development.'¹⁰⁵

After insisting that positivists never asserted that law only consists of rules to the exclusion of principles (and at the very outset Hart explicitly allowed that 'moral principles might at different points be brought into a legal system'¹⁰⁶), the initial retort of legal positivists to Dworkin was that, even under his own account, not 'every principle of morality is a principle of law just because it is a principle of morality.'¹⁰⁷ Therefore, there must be some way to distinguish which moral principles qualify as 'legal' from those that lack this status. If conventionally observed rules of recognition are applied to determine the subset of moral principles that are included within the body of law, the social sources thesis is saved.

At this point legal positivists divide into two camps that apprehend the separation thesis and the social sources thesis differently. Legal philosopher Brian Leiter set out a compact summary of what separates these two schools:

Soft [inclusive] positivists interpret the Separation Thesis as involving only a modal, existential generalization of the following form: it is (conceptually) *possible* that there exists *at least one* rule of recognition, and thus one legal system, in which morality is not a criterion of legal validity. Hard [exclusive] positivists, by contrast, interpret the Separation Thesis as requiring a universal generalization of the form: for all rules of recognition, hence for all legal systems, it is not the case that morality is a criterion of legality, *unless* some content-

¹⁰⁴ Pound, above n 52, 86–7.

¹⁰⁵ Ibid 74.

¹⁰⁶ Hart, above n 20, 599.

¹⁰⁷ Jules Coleman, 'On the Relationship Between Law and Morality' (1989) 2 *Ratio Juris* 66, 74; see also Andrei Marmor, 'The Separation Thesis and the Limits of Interpretation' (1999) 12 *Canadian Journal of Law and Jurisprudence* 135, 148.

neutral criterion makes it so. Soft Positivists interpret the Social Thesis as saying only that a society's rule of recognition is constituted by the social facts about how officials actually decide disputes; thus, for example, if it is the 'practice' or 'convention' of officials to decide disputes by reference to morality, then morality, in that society, is a criterion of legality. Hard Positivists, by contrast, interpret the Social Thesis as a constraint on the *content* of the Rule of Recognition, not simply on its existence conditions. Thus, for Hard Positivists the Social Thesis says not only that a rule of recognition is constituted by social facts (eg facts about the conventional practice among officials in resolving disputes) but also that the criteria of legal validity set out by any society's rule of recognition must *consist* in social facts (eg facts about pedigree or sources).¹⁰⁸

The basic difference, to restate it in simpler terms, is that inclusive positivists, led by Jules Coleman, embrace the merger of law and morality—as long as the rule of recognition, as a matter of actual social practice in a given system, incorporates moral principles—and they transform the separation thesis into an abstract possibility, insisting only that it is *imaginable* that a legal system could exist in which this merger does not take place. Whereas exclusive legal positivists, led by Joseph Raz, hold to a strict understanding of the separation thesis, denying the label 'law' to any norms or systems which require determinations of truth or moral judgments to establish their legal status, and interpreting the social sources thesis in the restrictive sense of conventional activities alone. Before he died, Hart endorsed the inclusive version without explanation.¹⁰⁹

Each school asserts that its account is truer to the nature or essence or concept of law (according to its own understanding of what this entails). The inclusive position claims the virtue of being a better descriptive fit for how moral principles are actually incorporated into law. The exclusive position insists that it is more consistent with law being able to satisfy its function of guiding conduct (because content-based moral criteria would be too uncertain to give notice of what law requires, and because such decisions would be made on moral grounds not found in the law itself), and with law's

¹⁰⁸ Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001), 356–7. More detailed accounts of each position can be found in Andrei Marmor, 'Exclusive Legal Positivism', and Kenneth Einar Himma, 'Inclusive Legal Positivism', in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002).

¹⁰⁹ Hart, above n 1.

characteristic claim of possessing legitimate authority (because content-based criteria would mean law is a product of judgments about moral principle, not the interpretation of legal rules or principles).¹¹⁰ Both approaches, it must be emphasized, are developed almost entirely upon conceptual assertions and analysis.

The foregoing recitation of what occupies and divides current legal positivists has been kept to the basics. Beyond this there are luxuriant layers of nuance in their discussion, to a degree that is unprecedented in legal theory. If one were to ask (impertinently), ‘what’s the point of it all?’, their unapologetic response is that this is legal philosophy—conceptual, semantic and analytical clarification—an enterprise which need have no other point. As legal theorist Brian Bix put it, ‘[i]f legal positivism is not about the importance of the separate and “scientific” study of law, or at least not about that *today*, one might wonder what its purpose and meaning is.’¹¹¹

Part Five: The Emasculation of the Separation Thesis

Each branch in its own way has formulated the separation thesis in a manner that fatally compromises what I have argued has been the primary inspiration behind the legal positivist tradition. Inclusive legal positivists transformed the separation thesis into an abstraction, and reversed its import; exclusive legal positivists interpret it in a manner that fails to encompass the way morality comes into law and unduly circumscribes its application.

The emasculation of the separation thesis by inclusive legal positivists can be observed by tracking a series of subtle—though in hindsight large—shifts in formulations of the thesis. The first formulation is the straightforward observation that ‘what law *is* and what law *ought* to be are separate matters’. This is the plain reminder that law as it actually exists in a given system can be bad, without respect to (with no mention of) whether that law, on its own terms, is purportedly connected to morality in some way, whether by derivation, incorporation, association or conformity.

Then came Hart’s carefully drawn *restatement* that ‘[i]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.’¹¹² The crucial phrase is the combination *necessary truth*. The pregnant implication of the term ‘necessary’—when read together with Hart’s observation that law reflects at ‘a thousand points the influence of both the

¹¹⁰ See Leiter, above n 108; Coleman and Leiter, above n 50.

¹¹¹ Bix, ‘Legal Positivism’, above n 10, 31.

¹¹² Hart, above n 1, 185–6.

accepted social morality and wider moral ideas'¹¹³—is that there can indeed be, and often is, a connection between law and morality, though it is not required. Appending the word 'truth' to 'necessary' construes the separation thesis as a *conceptual* claim, for only concepts can be said to have 'necessary truths'.¹¹⁴ This formulation, superficially consistent with earlier articulations, in effect accomplished an unnoticed major shift. The first version above is not an abstract conceptual claim, and it does not appear that Bentham and Austin conceived of the separation thesis in such a way. But it has been taken that way ever since Hart's reformulation.

The transformation of the separation thesis into an abstraction was completed with a vengeance in the latest version promoted by inclusive legal positivists, which reads: '*Separability Thesis*: There is some possible legal system where the legality of a norm does not depend on any of its moral properties.'¹¹⁵ The separation thesis—with the telling new label 'separability' thesis—now asserts that 'there exists a conceptually possible legal system in which the legal validity of a norm does not depend on its moral merits.'¹¹⁶ No longer about actually existing legal systems, the separability thesis is a purely abstract proposition about the nature of a legal system. Inclusive legal positivists claim by this thesis nothing more than that they can '*imagine* a legal system in which being a principle of morality is not a condition of legality for any norm.'¹¹⁷ As Schauer explains:

Only if the inclusion of morality within legal decisionmaking is a necessary feature of all possible legal systems in all possible worlds can positivism be false, so the observation that morality is a contingent feature of legal decisionmaking in one, several, or even all actual legal systems says nothing about the basic claims of legal positivism.¹¹⁸

This way of understanding the separation thesis 'makes no statement whatever about what is true about law everywhere ... Rather, it merely denies the truth of an alternative theory: to wit, that legality requires morality.'¹¹⁹

Under the latest version the pregnant implication of Hart's formulation has taken over to render a connection between law and morality as the standard case. In the progression through the three formulations—which are

¹¹³ Ibid 203–4.

¹¹⁴ See Bix, above n 61.

¹¹⁵ Shapiro, above n 98, 127.

¹¹⁶ Himma, above n 108, 1235–6.

¹¹⁷ Jules Coleman, 'Negative and Positive Positivism' (1982) 11 *Journal of Legal Studies* 139.

¹¹⁸ Schauer, above n 60, 874.

¹¹⁹ Coleman, above n 107, 67.

arguably logically consistent—the semantic thrust of the separation thesis is reversed, from a warning that we should not assume law is moral just because it is law, to a confirmation that law and morality are usually *not* separate, holding out from conceding the complete merger of the two by insisting only that it is possible to abstractly conceive of a legal system in which this combination does not hold. The separation thesis has thus been turned on its head, now standing virtually in opposition to the spirit of the original idea.

Inclusive theorists have in this manner obscured the original positivist point to be vigilant because law can be bad even when it claims to be good. This is an affirmative, cautionary reminder that makes good sense everywhere, at all times, and is applicable to all actually existing legal systems. It has been supplanted by a purely abstract negative assertion: that Dworkin and natural lawyers cannot show that it is impossible to imagine a legal system that does not incorporate morality. A nice rhetorical move (shifting the burden of the argument to the opponent) it might be, but secured at the cost of jettisoning the critical import and everyday relevance of the separation thesis. It is a pyrrhic victory, which natural lawyers can shrug off by conceding that in the imagination anything is possible.

Exclusive positivists also construe the separation thesis, in combination with the social sources thesis, in a way that is costly to legal positivism. Exclusive theorists, as indicated, deny the label ‘law’ to any decision that hinges on a determination of moral truth or correctness or a policy judgment. Exclusive positivists insist that ‘all law is [conventionally identified] source based, and anything which is not source based is not law.’¹²⁰ So stringent a test will have the effect of disqualifying the label ‘law’ from manifold instances of what are considered to be ‘law’ by the people involved.

Consider the Shari’a. Although the situation differs widely, and granting that pedigree tests (like what is stated in the Quran) are also utilized in the Shari’a, there appears to be substantial room for content-based determinations in the identification of law in these systems, ranging from content-based judgments about what is consistent with God’s will to what is in the best interest of the community. These content-contingent decisions are moral/legal decisions in a way that is inseverable, at least for the participants, with the same moral/legal status that attaches to pedigree-based law; yet exclusive legal positivism would divide up this totality of Islamic law and categorize its components in fundamentally distinct ways, with some of it entitled to legal status and some not. Or consider systems of substantive justice, what Max Weber labelled this Khadi justice, in which the decision is made on an ad hoc basis, focused on outcome (eg do what is right, effectuate policy, or come to a conclusion that achieves a consensus in the

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Marmor, above n 108, 104.

community).¹²¹ These kinds of systems decide cases in a way that best achieves a given objective rather than through strict application of rules.¹²² Exclusive legal positivists would object that these are not ‘legal’ systems at all.

Inclusive legal positivism has the virtue of recognizing and incorporating this great variety of moral, political, or social considerations in the decisions and actions of legal institutions (as long as a conventionally recognized rule of recognition within the system so permits). Indeed, a valid legal system can, in the inclusive legal positivist understanding, consist of a single legal rule: do what is morally right. A substantive justice system essentially comes down to this rule. However, this fails the exclusive positivist’s separation and social sources theses, which do not allow content-based moral decisions to serve as criteria for legality. Since these judgments are not determined by resort to conventions of legal actors (the social sources thesis), they are *not* ‘law’,¹²³ at least not until they are recognized as such in some content neutral conventional way by legal actors. Consequently, in these situations, exclusive legal positivists cannot issue the classic warning that this ‘law’ is bad, but instead are diverted to making a statement that denies it legal status. An exclusive legal positivist can still condemn it, of course, but not as examples of immoral or bad *law*. Instead, the exclusive positivist will offer the tangential and impotent (at least for the people involved) insight that ‘this is *not* a legal system’ or ‘those are not legal norms’. Ironically, in this respect the exclusive legal positivist echoes the natural law position that Austin objected to.¹²⁴ Rather than making a real point about the ever-present capacity of law to do evil, exclusive legal positivist ending up making conceptual-based claims about what does and does not qualify as ‘law’.

Part Six: A Simple Alternative, and Why it is Superior

¹²¹ See Max Weber, *Max Weber On Law in Economy and Society* (Edward Shils and Max Rheinstein trans, 1954 ed) 228–9.

¹²² Roberto Unger suggests that Western legal systems have become more like this (though not completely), especially with the expansion of administrative law, which is oriented toward achieving policy goals. Roberto Unger, *Knowledge and Politics* (1975) 89.

¹²³ Cf Ronald Dworkin, ‘Thirty Years On’ (2002) 115 *Harvard Law Review* 1655, 1673.

¹²⁴ Theorists have pointed out that Raz’s argument about the necessary legal claim to authority pushes legal positivism in the direction of natural law by establishing a minimum normative condition for the existence of law. Murphy, above n 24, 260–2. The argument pressed here demonstrates this same point from an entirely different direction—in the end the exclusive positivist, like the natural lawyer Austin chastised, will be denying that something is ‘law’ even though those in the system see it as such.

The Separation Thesis: what law *is* and what law *ought* to be are separate matters, regardless of actual or possible connections of law and morality. This is a cautionary reminder that law can be bad even when it claims to be good. It applies to all manifestations of law no matter what their purported relationship with morality, including those which expressly derive from, refer to, require decisions about, or incorporate, moral norms, including those—like the Shari'a, natural law principles, human rights, bills of rights, standards of reasonableness or fairness or justice, etc—that are understood to constitute or consist of morality itself.

The Social Sources Thesis: law is the product of the complex of social practices that generate actions in the name of law. That is, law is whatever in any given society or social arena is recognized as law based upon the coordinated activities and conventional practices of legal actors. Law *is* what legal officials in a given system declare or do in the name of 'law'.¹²⁵

These two planks turn away from the abstract orientation of inclusive and exclusive accounts and return in spirit to the traditional thrust of legal positivism, making it directly relevant to the contemporary situation.¹²⁶ The crucial theoretical implication of the separation thesis so formulated is that it alters how the *is/ought* distinction is understood within legal positivism.

Legal positivists scrambled defensively when Dworkin correctly pointed out that judges often resort to moral principles and make moral judgments in the course of rendering legal decisions. '[W]hen moral considerations and arguments figure in legal reasoning, the conclusion is necessarily not about what the law is, but what it ought to be.'¹²⁷ The separation thesis appears to be inapplicable to such legal systems—wherein 'the existence of law is not one thing, its merit or demerit another thing entirely'¹²⁸—because a merit-based decision determines what the law is. Owing to the use of a moral test, it seems undeniable that in these (apparently ubiquitous) situations, law *is* what it *ought* to be. Legal positivists conceded that

Dworkin *could be* correct about the falsity of legal positivism as a descriptive claim about certain legal

¹²⁵ This formulation is generally consistent with the core legal positivist 'claim that the law simply is what judges and lawyers think that it is.' Marmor, above n 108, 110. It is also consistent with the view taken by the Legal Realists that 'law' is what legal officials do in fact.

¹²⁶ These two propositions have been worked out in much greater detail in Tamanaha, above n 62.

¹²⁷ Dyzenhaus, above n 22, 44 (explaining the exclusive positivist view of the *is/ought* distinction).

¹²⁸ Waluchow, above n 1, 154–5.

systems ... Thus a society that chose to incorporate a moral test into its test for legality would not be considered a positivist one in a descriptive sense.¹²⁹

While this logic appears compelling, an unnecessary and fateful concession was entailed in this response made by legal positivists to Dworkin's attack. Legal positivist theorists accepted this as a falsification of the positivist separation thesis, at least as applied in those contexts, for two reasons. First, they construed the separation thesis as a proposition that can be falsified or found inapplicable to a given system (whereupon inclusive positivists saved the thesis as a general proposition by rendering it an abstract conceptual claim). Second, legal positivists treat the assertion that moral principles admitted into the law following a judgment of moral correctness to truth as *conclusive* on the question of whether law in a given instance is merged with morality.

Both positions, which box legal positivists into a corner, should be rejected. The separation thesis proposed here is not a descriptive claim that can be refuted. Rather, it is a cautionary reminder which is always in order. Throughout history officials have justified legal decisions and actions on moral grounds, often invoking moral tests and citing moral principles in support. Throughout history there have been prudent reasons to be sceptical or suspicious of this claim. They might be cynically using moral justifications to conceal self-serving or immoral purposes. But even when legal officials sincerely engage in moral reasoning aimed at identifying true moral principles, and base their legal decisions thereon, they might be *wrong*. The content or consequences of even sincere moral reasoning can nonetheless be immoral or evil. This could be so for any number of reasons: owing to erroneous reasoning, or to improper selection and weighting from among various applicable moral principles, or to having unanticipated consequences arise or result when moving from principle to application, or it could be that the moral principles identified are mistaken (when judged from an alternative moral standpoint, or in hindsight). People are fallible, sometimes disingenuous, and moral principles suffer from an irrepressible epistemological uncertainty.

These observations also weigh against the second proposition identified above: that the express incorporation of morality appears to logically entail that law *is* what it *ought* to be, as Dworkin and many legal positivists have assumed. To unravel this false apparent necessity one must recognize that in this context *ought* has two different references, or moments. No legal positivist or natural lawyer would accept that a particular judge's determination of what justice requires in a given case is necessarily conclusive on the merits of that moral issue. All moral judgments called for by law and

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Schauer, above n 20, 36.

made by judges (or other legal actors) can be challenged as incorrect on moral terms, as can all moral judgments made by moral philosophers, religious leaders, or indeed by anyone. With this in mind, it makes perfect sense to assert that the judge's *ought*-based determination—the judge's judgment about what morality requires—does not eliminate the need to scrutinize whether law so determined is what it *ought* to be. The first 'ought' inquiry refers to the fact that the law asks the judge to make a moral decision, while the second 'ought' inquiry reminds us that the moral decision that is made might nonetheless be immoral or wrong in content or effect. My proposed rendering of the separation thesis, which centres upon the second 'ought' inquiry, makes this point. Understood in these terms, the earlier assertion that *even when law and morality are explicitly fused, the thesis of the separation between law and morality still applies* is not a paradox or contradiction. When a judge makes a moral judgment pursuant to law (the first 'ought' inquiry), those actions become what the law *is*; it is what the complex of legal actors effectuate as law, but nonetheless we should still examine whether the law is what it *ought* to be (the second 'ought' inquiry).

Legal positivists who conclude that when the law requires the making of moral judgments the separation thesis is descriptively refuted unnecessarily limit their analysis to the first 'ought' inquiry. If the core point made by the separation thesis is that law can be bad even when it claims to be good, which was the original idea, the second 'ought' inquiry is the key. Allowing the first 'ought' to be conclusive on the separation thesis harbours the potential to make immoral instances of law harder to perceive or expose. Moral scrutiny should be heightened in all instances when moral tests are utilized to determine the content of law precisely because the moral overlay gives law an enhanced claim to legitimacy.

Under the understanding proposed here, the legal positivist response to Dworkin is this: judges do sometimes refer to moral principles and make moral judgments in the course of rendering legal decisions, but the separation thesis still applies to these situations because judges' decisions—those exercises of legal authority and their social consequences—can nonetheless be immoral. Hence the separation thesis still holds when natural law, or human rights, or religious principles are expressly incorporated or relied upon in decisions or declarations of law; it still holds when the law says: 'do justice' or 'be fair' or 'make the right decision'. Dworkin's argument is thus absorbed without touching the core legal positivist insight. The legal positivist cautionary reminder that law can be bad is *always* applicable and appropriate with respect to any exercise of power in the name of law, regardless of whether the law expressly consults morality or claims to represent the very standard of morality.

When understood in terms of the two theses proposed herein, legal positivism applies to legal systems based upon the Shari'a, or Khadi justice, or reaching a political consensus, or to any legal system of any kind, no matter how it construes the relationship between morality and law, no matter to what extent decisions might include moral or political factors. It applies to anything done in the name of 'law'. This allows the broadest possible application of the core legal positivist insight.

It is not my contention that Austin, Bentham or Hart understood these two theses in this way. They each had their own conceptual underpinnings tied to understandings and concerns of their day. Bentham's position is the most immediately amenable to the separation thesis I proffer. He urged that the morality of legal 'rights' be evaluated against the utilitarian standard, thus applying the separation thesis to laws that Blackstone and common law judges claimed to represent or embody natural principles.

My argument is that the proposed formulations of the two legal positivist theses better realize the overarching objectives of legal positivism in the contemporary period. The two theses are formulated in a manner that encompasses all actually existing (as well as historical) legal systems of any kind, without regard to the purported or actual interaction between law and morality. This meets the ambition of legal positivism to be a theory of general or universal application.¹³⁰ Moreover, the separation thesis is adapted to what is perhaps the most important ongoing trend in law in the West—the increasing application by judges of open-ended standards that require moral and political judgments¹³¹—and it is adapted to a trend around the world involving the revival of positive natural law (individual rights and human rights norms aggressively interpreted by judges) and of religious natural law (fundamentalist Christians in the US injecting religion into law, Shari'a in Islamic countries). In all of these situations, notwithstanding the incorporation of and frequent reference to moral standards, we must always ask whether the law is what it ought to be.

Conclusion

In his latest review of contemporary legal positivist theory, Dworkin took for granted that legal positivism is on its last legs. Exclusive legal positivism, he observed, 'deploys artificial conceptions of law and authority whose only point seems to be to keep positivism alive at any cost. Inclusive legal positivism is worse: it is not positivism at all'.¹³² 'The political influence of

¹³⁰ See Tamanaha, above n 62.

¹³¹ See Pound, above n 52, chapter III. See also Tamanaha, *On the Rule of Law*, above n 103, chapter 8.

¹³² Dworkin, above n 123, 1656.

legal positivism has sharply declined in the last several decades ... and it is no longer an important force either in legal practice or in legal education.’¹³³ John Finnis was similarly dismissive in concluding that the dispute between exclusive and inclusive legal positivists is ‘little more than a squabble about the words “law” or “legal system.”’¹³⁴ Both of these prominent theorists wrote as if delivering a long overdue eulogy for legal positivism, devoid of even a pretence of respect for the deceased.

In their turn legal positivists are just as dismissive of natural lawyers. Dworkin’s and Finnis’s comments, in their minds, are the empty bravado of vanquished opponents who no longer merit serious attention, leaving legal positivists to engage in an intramural contest over who is more correct amongst the victors.

It is heresy for a committed legal positivist to admit that Dworkin and Finnis are right in their assessments of the increasingly obscure nook to which legal positivist theory has absented itself. But that is where the theory stands, largely ignored, even as it claims to have decisively won the battle with natural law. Consider the lament of a theorist sympathetic to legal positivism:

[T]oo much of the debate about legal positivism has become almost scholastic. One reads about Kramer on Raz on Perry on Hart or about Dyzenhaus on Dworkin on Fuller on Hobbes or about Waluchow on Coleman on, well, whatever ... [M]ore and more effort is expended on labels and categorization. To the non-aficionado, even to the non-legal positivist jurisprude, the important issues at stake can often seem obscured by the insularity of the terms of the debate.¹³⁵

¹³³ Ibid 1677.

¹³⁴ Finnis, above n 4, 1603.

¹³⁵ James Allan, ‘A Modest Proposal’ (2003) 23 *Oxford Journal of Legal Studies* 197, 209. Allan politely noted that his account was a ‘caricature’, but one ‘not unrecognizably related to reality.’ Ibid 209. A characteristic of recent legal positivist work, which reflects this splintering and alignment with contrasting schools, is that an inordinate number of pieces are pitched in terms personal to individual theorists, contrasting one theorist with another. This is not an uncommon practice in philosophy. For example, see Kenneth Einar Himma, ‘Waluchow’s Defense of Inclusive Legal Positivism’ (1999) 5 *Legal Theory* 101; Michael E Bratman, ‘Shapiro on Legal Positivism and Jointly Intentional Activity’ (2002) 8 *Legal Theory* 511; Leighton Moore, ‘Description and Analysis in The Concept of Law: A Response to Stephen Perry’ (2002) 8 *Legal Theory* 91; Joseph Raz, ‘Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment’ (1998) 4 *Legal Theory* 1; Brian Bix, ‘Jules Coleman, Legal Positivism, and Legal Authority’ (1996) 16 *Quinnipiac Law Review* 241.

After wading through this kind of exchange, Allan noted, ‘any interest the reader had has long since dissipated.’¹³⁶ Over a century ago John Gray wrote that the value of Bentham’s and Austin’s analytical jurisprudence was primarily negative: ‘There is no better means for the puncture of wind-bags.’¹³⁷ Now it is the analytical jurists who can benefit from some deflation, allowing legal positivism to once again engage with worldly concerns.

In his 1917 essay on ‘The Need for a Recovery of Philosophy’, John Dewey wrote: ‘Philosophy recovers itself when it ceases to be a device for dealing with the problems of philosophers and becomes a method, cultivated by philosophers, for dealing with the problems of men.’¹³⁸ The legal philosophers who now dominate legal positivism should take heed. Jeremy Waldron offered a forceful statement of why the separation thesis at the heart of legal positivism is critical:

It is not just a matter of semantic scruple to deny that law is necessarily moral. And it’s not just a pragmatic issue either: a matter of keeping one’s conceptual ammunition dry. It is a matter of normative sociology: considering what positive law actually is, its existence in a society raises a real and serious prospect that it will be used to facilitate injustice and to confuse and mystify many of those who are subject to that injustice and who have no choice but to live their lives under its auspices.¹³⁹

Legal positivism will be required as long as there are theories or views or defences of law that insist that law comports with morality, whether inherently or contingently. Any assertion that law *is* moral must be followed immediately by a reminder that law is a form of concentrated social power that *claims* to be moral, which does not automatically make it so. Natural lawyers are correct that this core idea underlying legal positivism is exceedingly thin. But in this dangerous world, given the fearsome power that law often wields, this thin idea is no less an essential one. Until recently no group of theorists has been more committed to making this point than legal positivists.

The obsession with distinguishing among competing approaches is raised in Brian Bix, ‘Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate’ (1999) 12 *Canadian Journal of Law and Jurisprudence* 17.

¹³⁶ Allan, above n 135, 209.

¹³⁷ John Gray, ‘Some Definitions and Questions in Jurisprudence’ (1892–3) 6 *Harvard Law Review* 21, 23.

¹³⁸ John Dewey, ‘The Need for a Recovery of Philosophy’ in John Dewey, *The Middle Works: 1899–1924* (Jo Ann Boydston ed, 1976–83) vol 10, 46.

¹³⁹ Jeremy Waldron, ‘All We Like Sheep’ (1999) 12 *Canadian Journal of Law & Jurisprudence* 169, 181.

I have read enough legal positivist literature to anticipate that few self-described analytical jurists will be persuaded by this piece. For them, the analytical stream of legal positivism is what counts, and the arguments pressed herein will not shake their conviction. Recognizing this reality, I propose a bifurcation of sorts. Inclusive and exclusive legal positivists should label their endeavours and their field ‘analytical jurisprudence’, as they already do. They (and their natural law opponents) regularly invoke ‘analytical jurisprudence’ and ‘legal positivism’ as interchangeable labels. I ask that they explicitly free legal positivism, both the notion and the tradition, by acknowledging that legal positivism is a broad complex of ideas which need not be understood in the terms articulated within analytical jurisprudence. Many legal theorists, sociological researchers, and even lawyers hold (often implicitly) to some basic version of the separation thesis and social sources thesis, which qualifies them as legal positivists, yet they are being pushed away because their views bear no resemblance to the abstract work done in analytical jurisprudence. Those who believe, as I do, that the notion that valid law can be morally bad is a critically important, timeless and universally applicable insight, should be able to identify with and draw upon the resources offered by the legal positivist tradition. Furthermore, the critiques of Dworkin and Finnis, while styled as criticisms of ‘legal positivism’, are more correctly framed as criticisms of the abstract versions of legal positivism elaborated within analytical jurisprudence, for their critiques do not touch the more common understanding of legal positivism sketched here.

The future of legal positivism as a vital way to understand law—versus the exclusive home for extraordinarily sophisticated constructions by brilliant legal philosophers—hinges on whether it speaks to the problems of the day. As legal systems around the world become more powerful and efficient in their capacity to apply coercion against their populace, as well as more savvy about couching their claims to authority in the name of morality or religion, the need to remind people that law can be bad even when it claims to be moral is greater than ever.