PART B

Individual Theories About the Nature of Law

The heart of many jurisprudence courses is the discussion of the approaches to law of various well-known individual theorists. The following chapters offer an overview of five of the most highly-regarded legal theorists, locating some of the issues to which their theories were responses, and placing the theories within the context of larger movements in jurisprudence. **B–01**

Each of the five theorists offers a distinct, coherent, and comprehensive vision, not only of the nature of law but also of the nature of legal theory.

Chapter Three

H. L. A. Hart and Legal Positivism

AN OVERVIEW OF LEGAL POSITIVISM

Legal positivism[1] is based on the simple assertion that the proper description of law is a worthy objective, and a task that needs to be kept separate from moral judgments (regarding the value of the present law, and regarding how the law should be developed or changed).[2] In the more precise terms of theorising about law, it is the view that a descriptive, or at least morally neutral, theory of law is both possible and valuable. Early advocates of legal positivism included Jeremy Bentham (1748–1832) and John Austin (1790–1859). One could also dig deeper, and place the roots of modern legal positivism with earlier philosophers and political theorists, Thomas Hobbes[3] (1588–1679) and David Hume (1711–1776).[4] 3–01

In simple terms, legal positivism is built around the belief—or perhaps the assumption or the dogma—that the question of what is the law is separable from, and must be kept separate from, the question of what

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[1] The label derives from the term, "positive [human-created (posited)] law".

[2] While the above text reflects the generally accepted view, one can find other characterisations of legal positivism. One prominent theorist forcefully argued that legal positivism should be understood narrowly as a proposition about when a given norm is legally valid. See John Gardner, "Legal Positivism: 5½ Myths", 46 *American Journal of Jurisprudence* 199 (2001).

[3] See Sean Coyle, "Thomas Hobbes and the Intellectual Origins of Legal Positivism", 16 *Canadian Journal of Law and Jurisprudence* 243 (2003); Mark C. Murphy, "Was Hobbes a Legal Positivist?", 105 *Ethics* 846 (1995).

[4] John Finnis goes even further, and states that the groundwork for legal positivism (the establishment of human-posited law as a separate subject-matter) was laid by medieval writers, in particular, by Thomas Aquinas. John Finnis, "The Truth in Legal Positivism", in Robert P. George ed., *The Autonomy of Law* (Clarendon Press, Oxford, 1996), pp. 195–214. I discuss the connections and differences between Aquinas' view and modern legal positivism in Ch. 5. Antony Hatzistavrou finds traces of legal positivism in Plato. Antony Hatzistavrou, "Plato's Legal Positivism in the *Laws*", 9 *Jurisprudence* 209–235 (2018). For a different history-of-ideas grounding of legal positivism, see Gerald Postema, "Legal Positivism: Early Foundations", in Andrei Marmor ed., *The Routledge Companion to Philosophy of Law* (Routledge, London, 2012), pp. 31–47.

the law should be. The position can be summarised in the words of John Austin:

"The existence of law is one thing; its merit or demerit is another. Whether it be or be not 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."[5]

Legal positivism seeks from the study of law nothing more and nothing less than what is considered the foundation of modern social theory: that social institutions can be studied in an objective fashion, free from bias or ideology.[6] Such separation does not deny—in fact, theorists advocating legal positivism usually strenuously assert—that something identified as "a valid law" or "a valid legal system" may sometimes be sufficiently evil or unjust that it should not be obeyed.[7]

The notion that the description of a practice or an institution should be prior to and separate from its evaluation seems to modern audiences too obvious to need declaration, let alone justification.[8] However, the controversial nature of legal positivism becomes clearer when we keep in mind both the history of writing about law and the type of institution law is.

As to the first point: historically, much of the writing about law in general (as contrasted with writing about specific legal systems, e.g., discussions regarding which rules are in force in a particular country or should be in force) involved moral and political inquiries regarding under what conditions government was legitimate and (the apparently related question) under what conditions citizens have a moral obligation to obey the law. To some, *the point* of a morally neutral description of law

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[5] John Austin, *The Province of Jurisprudence Determined*, Lecture V (W. E. Rumble ed., Cambridge University Press, Cambridge, 1995) (first published in 1832), p. 157.

[6] This approach to social theory has been challenged in various ways, not least by those who believe that social practices can only be understood in a "hermeneutic" way. On the connection between legal positivism, hermeneutic theory, and the possibility of neutral social and legal theory, see Stephen R. Perry; "Interpretation and Methodology in Legal Theory", in Andrei Marmor ed., *Law and Interpretation* (Clarendon Press, Oxford, 1995), pp. 97–135; Brian H. Bix, "H. L. A. Hart and the Hermeneutic Turn in Legal Theory", 52 *SMU Law Review* 167 (1999).

[7] See, e.g. H. L. A. Hart, "Positivism and the Separation of Law and Morals", 71 *Harvard Law Review* 593 at 615–661 (1958).

[8] This is also the reason why I discuss legal positivism prior to natural law theory in this book. Though the latter has a longer history, to many people's way of thinking, legal positivism, separating description and evaluation, would seem the usual or default view, while natural law theory would seem the unusual position that needs to be explained or justified. As recently as the 19th century, exactly the opposite was the case.

was unclear, especially if the theorist had a moral or religious basis for criticism and prescription.[9]

As to the second point, law is a practice so infused with moral-sounding claims (e.g. that citizens "ought to do X", where "X" is some action required by the legal rules) and moral-sounding terminology (e.g. legal "rights" and "obligations") that a strictly descriptive theory of law seems either difficult or inappropriate, for the same reason that a "descriptive theory of morality" or a "descriptive theory of justice" sound strange, though one *can* find descriptive theories of both types.

Additionally, the process of determining which norms are part of the legal system ("legally valid") and which are not often seems to involve moral analysis: whether it is the moral justifications in creating new common law rules, the moral justifications that seem to underlie certain judicial interpretations of statutes, or the use of moral-sounding constitutional norms to invalidate statutes.[10] For these reasons, the ability to do description or analysis of law without recourse to moral evaluation is far from obvious.

This may be a good opportunity to note that a number of different formulations have been offered over the years to define legal positivism. Most of these do a good job of capturing the spirit of legal positivism, but almost all of them can be found to be incomplete, inaccurate or misleading in some way.[11] One can be sympathetic to Joseph Raz's response to the boundary-drawing exercise:

> "These reflections may help explain why I am referring not to 'legal positivism', but to theories in the positivist tradition. Theories belong to a tradition by their frame of reference, sense of what is problematic and what is not, and by similar historical features which do not presuppose that they all share a central credo."[12]

Andrei Marmor suggests that what is common to all versions of legal positivism is the view "that determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances."[13]

It is important to note that the idea of the separation of law and morals, the "separability thesis" associated with legal positivism, can

[9] See, e.g. Richard Dien Winfield, *Law in Civil Society* (University of Kansas Press, Lawrence, Kansas, 1995), pp. 1–3.

[10] Morality plays so many roles, both large and small, in legal practice that a too-narrow understanding of legal positivism's "separation thesis" would almost certainly be false. See Joseph Raz, *Beyond Authority and Interpretation* (Oxford University Press, Oxford, 2009), pp. 166–169; Joseph Raz, *The Authority of Law* (2nd ed., Oxford University Press, Oxford, 2009), pp. 314–319.

[11] See Joseph Raz, *The Authority of Law*, p. 319.

[12] Raz, *The Authority of Law*, p. 22.

[13] Andrei Marmor, *Positive Law and Objective Values* (Clarendon Press, Oxford, 2001), p. 71.

operate at one of three levels: (1) the question of whether the legal status (legal validity) of a rule or norm can be separated from a moral evaluation of its content[14]; (2) the question of whether the legal status of a rule or norm *system* can be separated from a moral evaluation of its content (a question often discussed in terms of whether the Nazi regime had law or not)[15]; and (3) the question of the role of moral standards in the construction of a theory of law. These three levels do overlap, but, initially at least, they raise distinct issues.[16]

One should not take too seriously the claim that there are "no necessary connections" between law and morality. Most legal positivists would concede that there are some necessary connections (e.g., it is necessarily the case that law can be characterised as "moral" or "immoral", in a way that trees and toasters cannot), just not the kind that are associated with natural law theory or other approaches critical of legal positivism.[17]

In contemporary writings, there are two main lines of thinking within the legal positivist tradition. The one associated with the work of H. L. A. Hart will be summarised in this chapter; the one associated with Hans Kelsen will be described in Ch. 4.

The attempt to place the study of law on a "scientific" foundation—objective and pure[18] of bias—led many of the early legal positivists to try to create a strictly empirical way of understanding legal actions and legal concepts, thus understanding law as a function of past, current or future facts. This search in legal theory for a purely factual grounding can be seen as deriving from the broader search for a "scientific"

[14] This is connected with the saying attributed to Natural Law theory, "*lex iniusta non est lex*" ("an unjust law is not a law"), discussed in Ch. 6. See also Gustav Radbruch's famous "formula" regarding the effect of injustice on legal validity: Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law", 26 *Oxford Journal of Legal Studies* 1 (2006) (trans. Bonnie L. Paulson and Stanley L. Paulson).

[15] See, e.g. Gardner, "Legal Positivism: 5½ Myths"; Leslie Green, "Positivism and the Inseparability of Law and Morals", 83 *New York University Law Review* 1035 (2008); Raz, *Beyond Authority and Interpretation*, pp. 166–169; Andrei Marmor, "What Is Law and What Counts as Law? The Separation Thesis in Context" (2017), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3011432*.

Andrew Halpin has argued that it is the focus on legal rules and legal systems as a whole, begun by John Austin and followed by most legal positivists, that makes the separation of law and morality a tenable position. Halpin's argument is that if the theorists' focus had included legal reasoning, it would have been harder to argue for a strict separation. Andrew Halpin, "Austin's Methodology? His Bequest to Jurisprudence", in Michael Freeman and Patricia Mindus (eds.), *The Legacy of John Austin's Jurisprudence* (Springer, Dordrecht, 2013), pp. 15–40.

[16] For an argument that the disagreement between legal positivism and natural law theory resides largely in the third form of separability, see Brian H. Bix, "On the Dividing Line Between Natural Law Theory and Legal Positivism", 75 *Notre Dame Law Review* 1613 (2000).

[17] See, e.g., Leslie Green, "Positivism and the Inseparability of Law and Morals".

[18] Hans Kelsen referred to his theory as "*reine Rechtslehre*", the "pure theory of law". His view is discussed in Ch. 4.

approach to the social sciences that could match the approach used in the "hard sciences" (e.g. physics and chemistry), whereby theories would be based only on "objective" observations of events that could be easily reproduced or confirmed by other theorists (in somewhat more technical language, the "normative" in law is reduced to the "empirical").[19] Thus, legal rules were analysed in terms of past tendencies to obey, the use by legislators of particular kinds of language, the future likelihood of the imposition of sanctions, predictions of what judges were likely to do, and so on.

H. L. A. Hart's significance comes in part from the way he moved legal positivism in a different direction. While he continued to insist on the importance of the conceptual separation of law from morality (the separation of describing what law is, from advocating how law should be), he criticised attempts to analyse law in strictly empirical terms.[20] In this, he was following a growing and influential view, that the social sciences require an approach distinctly different from that used in the hard sciences. The approach prescribed for the social sciences is one based on understanding not merely the actions that occur, but also the meaning those actions have to the participants in the practices or institutions being studied.[21]

SUMMARY OF HART'S POSITION

At the time that H. L. A. Hart (1907–1992) began forming his legal theory, an influential view within the legal theory literature was that law was best understood as the command of a sovereign to its subjects.[22] Hart's approach to legal theory can be seen as a reaction to this **3–02**

[19] This sort of "science envy" was also exemplified in the rise of "formalism" in legal education, in particular in the influential ideas of Harvard Law School Dean Christopher Columbus Langdell. See, e.g. Anthony T. Kronman, *The Lost Lawyer* (Harvard University Press, Cambridge, Mass., 1993), pp. 170–174. I discuss Langdell and legal formalism briefly at the beginning of Ch. 17.

[20] Though there remains a sense in which Hart, like Austin, could be said to still be trying to reduce law to facts—in Hart's case, social facts of behaviour, beliefs, and attitudes. Andrei Marmor, *The Language of Law* (Oxford University Press, Oxford, 2014), p. 3; Andrei Marmor, *Philosophy of Law* (Princeton University Press, Princeton, 2011), pp. 48–59.

[21] An important figure for the hermeneutic approach to social theory was Max Weber. See Max Weber, *Economy and Society* (G. Roth and C. Wittich eds., Bedminster Press, New York, 1968), vol. 1, pp. 4–24; Max Weber, "'Objectivity' in Social Science and Social Policy", in E. Shils and H. Finch (eds.), *The Methodology of the Social Sciences* (Free Press, New York, 1949), pp. 50–112. Hart's immediate influence was Peter Winch. See Peter Winch, *The Idea of a Social Science* (Routledge, London, 1958); Hart, *The Concept of Law*, pp. 289, 297.

[22] This position is ascribed by Hart, and by many others, to John Austin. See, e.g. Hart, *The Concept of Law*, pp. 18–25. Some have argued that this misstates Austin's

command theory, and he presented his theory in that way on a number of occasions.[23]

The command theory (identified primarily with Austin, though Bentham also put forward a version)[24] offered a picture of law as a matter of commands (orders backed by threats) by a sovereign (one who is habitually obeyed by others, but who does not habitually obey anyone else) to citizens. Hart found weaknesses at almost every point. First, it was hard to speak of there being a sovereign—a person or entity that is habitually obeyed, but has no habit of obedience to any other person or entity—in most modern governments, where even the highest governmental roles and institutions are subject to legal restraints. Additionally, the better understanding seems to be that law is not a mere product of sovereign action, but something that also helps to *constitute* (what counts as) sovereignty.[25]

Secondly, the concept of a sovereign creates difficulty in explaining the continuity of law: for when the old sovereign retires or dies and someone new takes over, the new sovereign has no history of being habitually obeyed. Thirdly, there is much that is significant within legal systems that is lost if one looks only to the commands backed by threats, or if one treats all aspects of the law as variations of commands backed by threats.

In summary, from Hart's perspective, the problem with Austin's approach to law, and, indeed, with most empirical approaches, was that such approaches are unable to distinguish pure power from institutions and rules accepted by the community, unable to distinguish the orders of gangsters or terrorists from a legal system.[26]

position, or at least that it misses many of the subtleties of Austin's argument. See, e.g. W. L. Morison, *John Austin* (Edward Arnold, London, 1982), pp. 178–205; Roger Cotterrell, *The Politics of Jurisprudence* (Butterworths, London, 1989), pp. 64–65, 74.

[23] Hart, "The Separation of Law and Morality", pp. 600–606; Hart, *The Concept of Law*, pp. 18–123. Hans Kelsen also, earlier, offered a detailed critique of Austin's command theory (one with some overlap with Hart's critique). See Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", 55 *Harvard Law Review* 44 at 54–70 (1941).

[24] Some legal commentators consider Bentham's legal theory superior to Austin's, but Austin's is better known because Bentham's theory was most fully elaborated in a text that did not appear in its full form until over a century after the author's death, and thus long after Austin's views were published. See Jeremy Bentham, *Of Laws in General* (H. L. A. Hart ed., Athlone, London, 1970); Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence* (Philip Schofield ed., Oxford University Press, Oxford, 2010), para. 30; H. L. A. Hart, *Essays on Bentham* (Clarendon Press, Oxford, 1982), pp. 105–126.

[25] On Austin and sovereignty, see Pavlos Eleftheriadis, "Austin and the Electors", 24 *Canadian Journal of Law and Jurisprudence* 441 (2010).

[26] "Law surely is not the gunmen situation writ large." Hart, "The Separation of Law and Morality", p. 603. This also recalls Augustine: "Justice removed, then, what are kingdoms but great bands of robbers? What are bands of robbers themselves but little kingdoms?" Augustine, *The City of God Against the Pagans* (R. W. Dyson, trans., Cambridge University Press, Cambridge, 1998), Book IV, Ch. 4, p. 147.

Hart's alternative view of law is grounded on his views of rules, in particular on a view of the difference between rules and habits.[27] To an outside observer, there may be no way to distinguish someone acting in a particular way out of habit from her acting the same way in compliance with a rule. I may watch a movie every Saturday, but that is not because I think that there is some legal, moral or social/conventional rule that states that I should. According to Hart, the difference between these two kinds of regularities of behaviour can be seen through the participants' attitudes. With habits, the statement of the behaviour is nothing more than a description: I watch movies every Saturday. With a rule, however, the statement can take on additional roles: as an explanation, a justification, and a basis for criticising deviation. The statement has a normative role.[28] Many people are not merely "in the habit" of obeying the authorities; they have internalised the rules as reasons for acting in certain ways, and for criticising others when they do not act as required.

Hart's theory is responding to the idea that when analysing social institutions or social practices a theory which takes into account, or helps to explain, the way participants understand those institutions or practices is, by that fact alone, significantly better than one that does not do so. Hart described his own work as "an essay in descriptive sociology",[29] in that he often relied on distinctions between concepts that were rooted in linguistic practices—linguistic practices that were, in turn, based on differences in behaviour and attitude.

As for seeing law as being orders backed by threats, that view seems to invite the confusion mentioned earlier, between imposed force and accepted norms. A legal system is something different from, and presumably something better than, the rule over a frightened populace by gangsters. Hart captured the core of this distinction in his discussion of the difference between feeling obliged and having an obligation.[30] We feel

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[27] Postema has argued that the originality of Hart's approach has been over-stated, that Hart's theory was a "systematic [. . .] articulat[ion]" of John Salmond's view, "with only the barest acknowledgement of Salmond." Gerald J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, Dordrecht, 2011), p. 4.

[28] Hart, *The Concept of Law*, pp. 9–10, 55–58. For a provocative rethinking of the nature of rules, with a discussion of implications for legal theory, see Scott J. Shapiro, "The Difference That Rules Make", in Brian H. Bix ed., *Analyzing Law* (Clarendon Press, Oxford, 1998), pp. 33–62.

[29] Hart, *The Concept of Law*, p. v.

[30] John Locke emphasised a similar distinction, though in the context of discussing the connection between natural law and positive law:

> "Certainly, positive civil laws are not binding by their own nature or force or in any other way than in virtue of the law of nature, which orders obedience to superiors and in keeping of public peace. Thus, without this law, the rules can perhaps by force and with the aid of arms compel the multitude to obedience, but put them under an obligation they cannot."

obliged to act in the way ordered by a gunman, because we fear the consequences if we do not act in that way. However, the moment the fear of possible consequences is removed, we see no reason to act as demanded. Having an obligation under some valid normative system (whether the rules of a game we are playing, the canons of one's religion, or society's legal rules) is psychologically more complex. One acts because one believes that one ought to do so, not because, or not *merely* because, one fears the consequences of acting in a contrary way.[31]

Against a view that reduced all legal rules to variations on some single type, as (one reading of) Austin's theory seemed to reduce all legal rules to commands, Hart emphasised the multiplicity of law. He contrasted rules that impose duties with those that confer powers (whether power conferred on officials within the legal system, or the delegation of certain legal powers to citizens, e.g., with contracts, wills, trusts, and so on), and he contrasted rules that apply directly to citizens ("primary rules") and rules that govern the operation of the rule-system itself (rules about rules—"secondary rules"). The secondary rules include rules of change, rules of adjudication, and the rule of recognition.[32] Rules of change are the rules which empower people to create new primary rules. This includes not only the authorisation of legislative bodies, but also the empowerment of individuals to create new rights and duties through contracts, wills, trusts, and the like.[33] Rules of adjudication "empower[...] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken."[34] The nature and significance of "rule(s) of recognition" will be discussed in the next section.[35] Hart argued that there were two necessary and sufficient conditions for the existence of a legal system: (1) that the valid rules of the system "must be generally obeyed"; and (2) that the criteria set forth in the system's rule of recognition "must be effec-

John Locke, *Essays on the Law of Nature* (W. von Leyden ed., Clarendon Press, Oxford, 1954), p. 119. (Natural law will be discussed in Ch. 5.)

31 Hart, *The Concept of Law*, pp. 82–86.

32 Hart, *The Concept of Law*, pp. 91–99.

33 Hart, *The Concept of Law*, pp. 95–96.

34 Hart, *The Concept of Law*, p. 97.

35 Later commentators have pointed out that Hart was probably mistaken in his further implication that the distinction between primary and secondary rules matches that between duty-conferring and power-imposing rules; additionally, there are questions regarding whether the rule of recognition is best understood as a duty-imposing or power-conferring rule (or neither). See, e.g. Joseph Raz, *The Concept of a Legal System* (2nd ed., Clarendon Press, Oxford, 1979), p. 199. However, for present purposes these are matters of detail as against the general point, that there is a variety of types of law, and that our understanding of this type of social system would be distorted by any attempt to analyse all of the law in terms of a single type of rule.

tively accepted as common public standards of official behaviour by its officials."[36]

There is no room here to discuss all aspects of Hart's legal theory in detail.[37] Instead, I will offer brief discussions of four topics in Hart's work that help to illuminate its central arguments and themes: the rule of recognition, the internal aspect of rules, the "open texture" of rules, and the "minimum content of natural law". Hart's views will also come up, by way of contrast, in the discussions of Hans Kelsen (Ch. 4), John Finnis (Ch. 5), Lon Fuller (Ch. 6), and Ronald Dworkin (Ch. 7).

THE RULE OF RECOGNITION

Central to Hart's theory is the concept of a rule of recognition: a set of criteria by which the officials determine which rules are, and which rules are not, part of the legal system. The standards applied are justifications for the actions of the officials, though to some extent the standards are also created by those actions. To explain: sometimes the standards applied are written down in an official text (e.g. a written constitution) or at least are clearly expressed in criteria that the officials state that they are following (e.g. "to become valid law, proposed legislation must be passed by a majority of each House of the Congress and then signed by the President"). At other times, the standards the officials follow can only be determined, after the fact, by reference to the decisions that they have made. **3–03**

A number of issues have been raised by later commentators regarding the rule of recognition, e.g. whether it is best understood as a duty-imposing or power-conferring rule; and whether there can be more than one rule of recognition within a given legal system.[38] However, one should focus primarily on what the concept of a rule of recognition indicates, i.e. what it stands for. The rule of recognition expresses, or symbolises, the basic tenet of legal positivism: that there are conventional criteria, agreed upon by officials, for determining which rules are and which are not part of the legal system. This in turn points to the separation of the identification of the law from its moral evaluation, and the separation of statements about what the law is from statements about what it should be. (The similarities and differences between Hart's rule of recognition and Kelsen's "Basic Norm" are discussed in Ch. 4.)

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36 Hart, *The Concept of Law*, p. 116.

37 The best sources for such an extended discussion are probably Neil MacCormick, *H. L. A. Hart* (2nd ed., Stanford University Press, Stanford, 2008); Michael Bayles, *Hart's Legal Philosophy: An Examination* (Kluwer Academic Publishers, Dordrecht, 1992); and Matthew Kramer, *H. L. A. Hart* (Polity Press, Cambridge, 2018).

38 Joseph Raz, *The Authority of Law* (2nd ed., Clarendon Press, Oxford, 2009), pp. 95–96.

THE INTERNAL ASPECT OF RULES (AND OF LAW)

3–04 The "internal aspect" of rules[39] is central to Hart's approach to law. It can best be understood within the context of (and it has repercussions for) certain general problems of constructing social theories—a subject touched upon in earlier chapters, and in an earlier section of this chapter. There are two related problems to consider: how must social theories be different from theories in other areas (e.g. in the physical sciences), and to what extent can a social theory be "scientific".[40]

One problem that comes from trying to construct a theory of a social process like law—a problem that does not trouble theories about atomic composition, chemical interaction, photosynthesis and the like—is that law is a human creation, meant to serve human purposes, and requiring human participation. Because of these facts, understanding any social process, including law, will be different in kind from understanding processes which are purely physical, chemical or biological.

This is the context for analysing Hart's concept of the internal aspect of rules. The idea is that one cannot understand a social system unless one understands how the people who created the system or who participate in the system perceive it. This "hermeneutic" approach—that is, giving priority to trying to understand how other people perceive their situation—is always in tension with those who want social theory to be more scientific.[41]

The "scientific" approach to social theory would rely only on data that was "objective", data on which different observers could always agree. The "scientific" approach to legal theory might be exemplified in various theorists' writings: for example, Christopher Columbus Langdell's view of legal theory as the search for the system of basic principles within the law,[42] and the American legal realists' view (to some extent reacting against Langdell's view)[43] emphasising what judges "actually do" as contrasted with what they are saying that they are doing. Hart also specifically mentioned the work of the Scandinavian legal realist Alf Ross, who (according to Hart) "claimed that the only method of representation of

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[39] See Hart, *The Concept of Law*, pp. 55–58, 82–91.

[40] Some of the themes in this section are explored at greater length in Brian H. Bix, "H. L. A. Hart and the Hermeneutic Turn in Legal Theory"; see also Thomas Morawetz, "Law as Experience: Theory and the Internal Aspect of Law", 52 *SMU Law Review* 27 (1999).

[41] As earlier noted, Hart's hermeneutic approach derived primarily from the works of Max Weber and Peter Winch.

[42] See William Twining, *Karl Llewellyn and the Realist Movement* (2nd ed., Cambridge University Press, Cambridge, 2012), pp. 10–12.

[43] See the discussion of American legal realism in Ch. 17.

the law fit to figure in a modern rational science of law was one which shared the structure and logic of statements of empirical science."[44]

Hart's argument is that whatever advantage a "scientific" approach might have, it simply is not adequate for a full understanding of law.[45] Law is a social institution set up to achieve certain human purposes, and also to give guidance to citizens. One can only understand purposive behaviour and normative (rule-following) behaviour if one leaves one's spectator's perspective and tries to understand the perceptions of the participants in the system, that is, the perceptions of the people who are following the rules, and who perceive themselves as doing so. In Hart's terms, to understand "any form of normative social structure", "the methodology of the empirical sciences is useless; what is needed is a 'hermeneutic' method which involves portraying rule-governed behaviour as it appears to its participants".[46]

The attack on a purely scientific approach can also be seen in Hart's distinction between habitual behaviour and rule-following, mentioned earlier.[47] As noted, Hart emphasised the difference between rules and habits, a difference that resided primarily in the participants' perceptions of what they were doing, and in their reactions to and attitudes towards actions. When an action was done "as a rule" rather than "as a habit", the rule is given as a justification of the action, and the rule is also the basis for any criticisms (including self-criticism) for divergence from the prescribed actions.[48] By contrast, we tend to have no justifications at hand (and sometimes we are lacking for explanations of any kind) for our habits, and we certainly do not criticise or expect criticisms when there are deviations from those habits. Because a scientific, purely "external" approach to law would conflate habitual actions and rule-following, according to Hart it would inevitably miss some matters which are at the essence of law.

However, to say that one is going to take the perspective of a participant in the social practice is at best a first step. After all, most social

[44] Hart, *Essays in Jurisprudence and Philosophy*, p. 13. Scandinavian legal realism will be discussed, briefly, in Ch. 22.

[45] For an excellent discussion of the problems of methodology in jurisprudence, with particular attention to Hart's work, see Perry, "Interpretation and Methodology in Legal Theory".

[46] Hart, *Essays in Jurisprudence and Philosophy*, p. 13.

[47] Similarly, to a "scientific" observer, someone who obeyed the law merely out of fear of sanctions would look the same as someone who obeyed the law because he or she believed that the legal system was legitimate, though a legal positivist (with that position's dogmatic separation of description and moral evaluation) might be foreclosed from referring to that conflation as a basis for rejecting a purely external viewpoint.

[48] For the suggestion that one needs to distinguish the "emotional" and "volitional" aspects of the internal point of view, see Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford, 1978), pp. 288–292; MacCormick, *H. L. A. Hart*, pp. 47–49.

practices have a large number of participants, all of whom do not share the same view of, or attitude towards, the practice. One prominent legal theorist, John Finnis (who is discussed at greater length in Ch. 5) argues that the perspective chosen should be that of a (hypothetical) practically reasonable person, who applies appropriate moral reasoning to conclude (if true) that the legal system creates binding (prima facie) moral obligations.[49] A second prominent legal theorist, Ronald Dworkin (the subject of Ch. 7), argues that one should theorise as if one were a participant in the social practice, offering an interpretation of that practice that makes it the (morally) best practice it can be.[50] Both of these perspectives are, from Hart's perspective, too extreme: he wants a legal theory that would be free from moral evaluations or moral commitments (unlike Finnis's approach), while remaining a descriptive theory of the practice rather than a participation in it (unlike Dworkin's approach).[51]

Hart was trying to maintain a difficult middle position.[52] He argued that a legal theory should be constructed around the perspective of someone who accepted the legal system, but the theory itself (or, to put the matter differently, the theorist herself) need not, and should not, endorse the system (as one which is generally just or which creates binding moral obligations). In other words, the theory simultaneously: (1) attempts to take into account the participant's perspective, and (2) manages to choose among possible participants' perspectives without having to make moral judgments, while (3) keeping sufficient distance from the participants' perspective to allow for moral criticism of the whole system/enterprise. The danger is of Hart's position sliding towards an Austin-like external observer's theory on one side, or a position closer to Finnis's or Dworkin's on the other.

To put the matter a different way, the question is how to take seriously the need to accept the perspective of a participant in a practice while still maintaining a sufficient distance to be able to criticise the practice (and the participants). In social theory (or perhaps, more accurately "social sciences meta-theory"), this has led to an ongoing debate regarding whether an attempt to "explain each culture or society in its own terms . . . rules out an account which shows them up as wrong, confused

[49] See Finnis, *Natural Law and Natural Rights*, pp. 3–18.

[50] See generally Dworkin, *Law's Empire*, pp. 45–113.

[51] See Hart, "Introduction", pp. 8–12; Hart, "Postscript", pp. 240–244; Hart, "Comment", in R. Gavison ed., *Issues in Contemporary Legal Philosophy* (Clarendon Press, Oxford, 1987), p. 39. As a matter of strict chronology, Hart's most important works were written prior to the works of Finnis and Dworkin; however, it is still accurate to say that Hart's position is a centrist position compared to the positions Hart rejected, but Finnis and Dworkin were later to defend.

[52] An analysis similar to what follows, though in greater detail, was offered in H. Hamner Hill, "H. L. A. Hart's Hermeneutic Positivism: On Some Methodological Difficulties in *The Concept of Law*", 3 *Canadian Journal of Law and Jurisprudence* 113 (January 1990).

or deluded."[53] Someone might argue: if you claim to understand the perspective of the believing participant of a particular practice, but you think the practice is irrational and cruel, then you have not really understood or properly incorporated the perspective of the believer, because that is not how it looks to her.[54] An additional complication, one whose implications are hard to tease out, is that in the social sciences one must consider the role of an internal point of view both in (1) the evaluation of data gathered, and in (2) the gathering of the data to be evaluated.[55] This additional point is unclear in its implications, because it ties into the debate on what it would mean to "gather evidence" for a general theory of law, and what kind of evidence one would want, a debate alluded to earlier in this book (in Ch. 2).

One attempt at a defensible middle position between external points of view and fully committed internal points of view was articulated by Joseph Raz, in a position called "statements from a point of view" or "detached normative statements".[56] These are statements which accept a particular normative position for the purpose of making a limited claim, but without endorsing that normative position. Thus, one can tell a vegetarian friend at a restaurant, "given your beliefs, you should not order that dish", even though the speaker is not a vegetarian. In a similar way, "[l]egal scholars—and this includes ordinary practising lawyers—can use normative language when describing the law and make legal statements without thereby endorsing the law's moral authority."[57] A lawyer can say to a client: if you accept the law as valid (as imposing moral obligations), then you should do X or should avoid doing Y. Whether Hart's analysis, with or without the help of Raz's addition, can maintain its precarious middle position is a difficult and important question.

A related problem for legal positivism (only partly connected with "internal aspects") is whether it is in fact possible to have a legal theory which is "purely descriptive" or, if "descriptive" is too strong a term, at least morally neutral. While legal positivism has always insisted that it aims to describe "law as it is" rather than "law as it ought to be", contemporary legal positivists have noted that the construction of theory inevitably involves elements of evaluation and selection, and is in that sense

[53] Charles Taylor, *Philosophy and the Human Sciences* (Cambridge University Press, Cambridge, 1985), p. 123. Taylor defends the view that one can have an "interpretive" or "*Verstehen*" approach while still retaining the ability to criticise that which is being explained.

[54] This position, derived from Peter Winch and Jürgen Habermas, is well summarised in Hill, "H. L. A. Hart's Hermeneutic Positivism", pp. 116–117.

[55] Hill, "H. L. A. Hart's Hermeneutic Positivism", pp. 123–125.

[56] See Raz, *The Authority of Law*, pp. 153–157, Joseph Raz, *Practical Reason and Norms* (2nd ed., Princeton University Press, Princeton, 1990), pp. 170–177; see also Hart, "Introduction", pp. 14–15.

[57] Raz, *The Authority of Law*, p. 156.

not purely "descriptive". However, legal positivists argue that the forms of selection and evaluation involved go to judgments of "importance" and not to moral evaluation.[58] The alternative argument, associated with Stephen Perry and Ronald Dworkin, is that constructing legal theories ineluctably involves moral evaluation, and the only question is whether the choices are made on the surface (and argued for) or are made tacitly (without express justification).[59]

OPEN TEXTURE

3–05 The problem of gaps in the law has been known for a long time. Aristotle wrote:

> "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known."[60]

There are a number of different ways in which legal rules might fail to cover (unusual) factual situations that arise. Hart introduced the idea of "open texture" to discuss one such way.[61] If the legislators introduce a rule to deal with a particular set of circumstances, how is a judge to apply the rule to an entirely different type of situation? Hart's example is the rule, "no vehicles in the park", introduced to remove automobiles from the area, but then asking whether that rule should apply to motorcycles or roller skates or other objects which may or may not be "vehicles".[62] Hart argued that with all general rules, there will be a "core of certainty"—central cases where the application is clear—and a "penumbra of doubt", where the application of the rule is uncertain.[63]

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[58] See, e.g. Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, Oxford, 2001).

[59] See, e.g. Stephen R. Perry, "Interpretation and Methodology in Legal Theory", in Andrei Marmor ed., *Law and Interpretation* (Clarendon Press, Oxford, 1995), pp. 97–135. Ronald Dworkin's work is discussed in Ch. 7.

[60] Aristotle, *Nicomachean Ethics*, Book V, 10: 1137b, in Jonathan Barnes ed., *The Complete Works of Aristotle* (Princeton University Press, Princeton, 1984), vol. 2, p. 1796.

[61] Hart, *The Concept of Law*, pp. 123–136. Hart's concept was related to and derived from an idea in Friedrich Waismann's philosophy of language. I discuss the connections and differences in greater detail in Brian H. Bix, *Law, Language, and Legal Determinacy* (Oxford University Press, Oxford, 1993), pp. 7–25.

[62] Compare *State v. Greene*, 338 P.2d 1132 (Or. App. 2016) (prosecution for driving while intoxicated turned on whether a motorized wheelchair is a "vehicle" for the purpose of the statute).

[63] Hart, *The Concept of Law*, p. 123. The idea and image of a core of certainty surrounded by a penumbra of doubt might trace back either to the American judge and legal commentator Oliver Wendell Holmes, see, e.g. Oliver Wendell Holmes, *The Common Law*

Part of the argument is that legislative purpose is incomplete or imprecise: the legislators have not considered all possible situations, so that legislative intent, even if clearly known, will not answer all possible problems in applying rules. Another part of the argument is that language is imprecise: there will be many occasions when it will be uncertain whether a general term (e.g. "vehicle") applies to the particular object in question (e.g. roller skates).

From these premises, Hart concluded that judges inevitably must use their discretion to make new law, on the occasions where the legal rules have "open texture". He also argued that judicial lawmaking at the margins was a good thing, giving needed flexibility to the application of legal rules.[64]

Upon reflection, it is not a surprising conclusion that language is generally clear but there are occasions when it is not. How to obey or comply with an order or request is usually obvious, but there are times when circumstances make the matter uncertain. A directive that may seem straightforward in one set of circumstances may seem confused or absurd when applied after a significant change of circumstances. There are aspects of the "open texture" debate that derive from the nature of language, aspects that derive from the nature of rules and rule-following, and aspects that derive from suggestions about the best way to construct a system for applying rules.[65]

Hart's discussion derives from concerns about the ability of rules to guide behaviour, and also about the need for, and advantages of, judicial law-making at the margins. The same set of considerations raises other problems that Hart did not consider in comparable length: for example, problems about the nature of legislative intention and how it can be discovered or derived, and problems about when it is legitimate for a judge to interpret a rule contrary to the rule's clear meaning or contrary to legislative intentions. For a variety of reasons, English jurisprudence (at least at the time Hart was writing) was not as focused on the legitimacy of judicial action as American jurisprudence has been.[66]

In many ways, Hart's discussion of "open texture" was preliminary: there is much work that still must be done in disentangling arguments

(M. D. Howe ed., Little Brown, Boston, 1963), p. 101; Thomas C. Grey, "Molecular Motions: The Holmesian Judge in Theory and Practice", 37 *William & Mary Law Review* 19 at 34 and n. 54 (1995); or to the British philosopher Bertrand Russell, see Bertrand Russell, "Vagueness", in John Slater ed., *Collected Papers of Bertrand Russell* (Unwin Hyman, London, 1988), vol. 9, pp. 147–154.

64 Hart, *The Concept of Law*, pp. 129–131.

65 See Bix, *Law, Language and Legal Determinacy*, pp. 22–25.

66 Among the factors that create this more intense focus in the U.S. is the ability and willingness of American courts to invalidate legislation (under federal and state constitutional provisions), the controversial nature of some of those decisions, and the tension between such decisions and the strong democratic ethos in American political thought.

based on the nature of language and arguments based on the nature of rules, and Hart is probably too quick to conclude immediately from the existence of "open texture" that judges do (or should) have discretion in deciding hard cases.[67] However, Hart's primary purpose in putting forward the notion of "open texture" was to counter arguments from two directions. First, Hart was responding to the American legal realists,[68] some of whom had argued that judicial legislation showed that legal rules never or rarely determined the outcome in legal cases, and that rules were of little or no importance in understanding the law. Secondly, Hart was responding to some natural law theorists,[69] who argued that the way judges decided difficult questions showed that there was, contrary to the legal positivists, no conceptual separation between law and morality.[70]

To the point that rules by themselves do not always determine the results of cases, Hart's response was that this is sometimes true (and is caused by "open texture"), but that this occurs in only a relatively small number of cases. To the argument that judicial legislation shows the conceptual connection between law and morality, Hart responded that this way of seeing the matter tended to cloud, not clarify, our understanding of law—judges' interstitial legislation may be based in part on moral standards, but it does not follow that those standards are then best seen as having been "in the legal rules" all along.[71] Additionally, much judicial legislation is based on promoting the purposes of legislation: purposes which can as easily be morally neutral or evil as virtuous.

THE MINIMUM CONTENT OF NATURAL LAW

3–06 Some commentators have made a great deal of Hart's discussion of "the minimum content of natural law",[72] seeing it as a great concession that undermines all that Hart had tried to claim earlier regarding the separation of law and morality. This view, I would argue, is a clear misunderstanding of Hart's discussion.

The text occurs in the context of a general discussion of the ways that law and morality can be said to overlap. For example, Hart notes that

[67] These matters are discussed in greater detail in Bix, *Law, Language and Legal Determinacy*, pp. 7–10, 17–35; and Frederick Schauer, "On the Open Texture of Law", 87 *Grazer Philosophische Studien* 197 (2013).

[68] See Hart, *The Concept of Law*, pp. 136–147. American legal realism is discussed in Ch. 17.

[69] Traditional natural law theory is discussed in Ch. 5; Fuller's natural law theory, more relevant to this critique of Hart's legal positivism, is discussed in Ch. 6.

[70] See, e.g. Hart, "Positivism and the Separation of Law and Morals", pp. 606–615; Anthony J. Sebok, "Finding Wittgenstein at the Core of the Rule of Recognition", 52 *SMU Law Review* 75 at 84–90 (1999).

[71] See Hart, "Positivism and the Separation of Law and Morals", pp. 614–615.

[72] Hart, *The Concept of Law*, pp. 195–200.

conventional moral beliefs obviously affect the way that the law develops, and ideas about how we want law and society to be affect how statutes are interpreted.[73] The "minimum content of natural law" is just one more exploration along this border—showing how law and morality often *do* overlap, without there being any *necessary* connection between the two (the borderline, in Hart's analysis, between legal positivism and natural law theory).

The particular argument of the minimum content of natural law is that there are certain contingent facts of the human situation in the present time (and all known history): that we are all mortal and vulnerable, that resources are limited, and that we are all dependent to some extent on other people. These facts are contingent, in that it is not impossible (however unlikely it may be) that future scientific developments might change these facts (for example, some series of discoveries might allow us to become physically invulnerable). Given our limitations, certain consequences are likely to follow. Among these, Hart speculated, is that any legal or moral[74] system that did not offer certain minimal protections (against murder, serious assault and theft) to at least a significant minority of the population would not—could not—survive for very long.

This is not a conceptual point, merely a prediction, and a reasonable one. Even if one were to take it as a concession to the natural law theorists, it is a trivial one. This "minimum content" test does not reflect the usual lines of disagreement between legal positivists and natural law theorists. Those who argue for a moral test for legal validity set a far higher standard, not just the Hobbesian moral minimum that Hart discussed.[75] They would declare as "not law" unjust legal systems, and unjust rules of legal systems, that would easily pass the minimal standards of Hart's discussion.

INCLUSIVE VERSUS EXCLUSIVE LEGAL POSITIVISM

In contemporary English-language legal positivism, much recent discussion has been on an internal debate between "inclusive legal positivism" (also sometimes called "soft" or "incorporationist" legal positivism) and "exclusive legal positivism" (also known as "hard" legal positivism). The debate between the two camps involves a difference in interpreting or elaborating one central point of legal positivism: that law, by its nature, does not set any "necessary" moral tests for legal validity. **3–07**

[73] Hart, *The Concept of Law*, pp. 203–212.

[74] Here, Hart meant "moral" in the sense of the conventional morality which is accepted within a society (or a sub-culture), restrains the actions of its members, and is enforced by social sanctions of various kinds.

[75] Hart, "The Separation of Law and Morality", p. 623.

Exclusive legal positivism interprets or elaborates this assertion to mean that moral criteria can be neither sufficient conditions nor necessary conditions for the legal status of a norm. In different terms: exclusive legal positivism states that "the existence and content of every law is fully determined by social sources."[76] Inclusive legal positivism, which has a number of prominent advocates,[77] interprets the separation of law and morality differently, arguing that while there is no *necessary* moral content to a legal rule, a particular legal system may, by conventional rule, make moral criteria necessary or sufficient for validity *in that system.*

The strongest argument for inclusive legal positivism seems to be its fit with the way both legal officials and legal texts talk about the law. Morality seems to be a *sufficient* ground for the legal status of a norm in many common law cases (and decisions in which legal principles play a large role[78]), where a legal norm is justified only or primarily on the basis that morality requires it.[79] The more familiar example for inclusive legal positivism is not about *sufficient* grounds for legal validity, but *necessary* grounds: when constitution-based judicial review of legislation (e.g. in the United States) requires or authorises the invalidation of legislation that runs afoul of moral standards codified in the constitution (e.g. regarding equality, due process, or humane punishment), this appears to make moral merit a necessary, but not sufficient, basis for legal validity.

Additionally, the inclusive view allows theorists to accept many of Dworkin's criticisms of legal positivism (see Ch. 7) without abandoning what these same theorists consider to be the core tenets of legal positivism (law's grounding in social facts and conventions). Inclusive legal positivism accepts that moral terms can be part of the necessary or sufficient criteria for legal validity in a legal system, but insists that the use of moral criteria is *contingent*—and derived from the choices or actions of particular legal officials rather than part of the nature of law (and thus present in *all* legal systems).

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76 Raz, *The Authority of Law*, p. 46.

77 Early advocates of inclusive legal positivism include Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute", 75 *Michigan Law Review* 473 (1977); Jules L. Coleman, *Market, Morals and the Law* (Cambridge University Press, Cambridge, 1988), pp. 3–27; David Lyons, *Ethics and the Rule of Law* (Cambridge University Press, Cambridge, 1984); MacCormick, *Legal Reasoning and Legal Theory*. Hart later seemed to adopt or affirm inclusive legal positivism as the best reading of his own position. See Hart, "Postscript", pp. 250–254. Other important works include W. J. Waluchow, *Inclusive Legal Positivism* (Clarendon Press, Oxford, 1994); and Jules L. Coleman, *The Practice of Principle* (Oxford University Press, Oxford, 2001).

78 *Compare* Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass., 1977), pp. 14–45.

79 See also Tony Honoré, "The Necessary Connection Between Law and Morality", 22 *Oxford Journal of Legal Studies* 489 at 494 (2002) ("[T]he positive law of societies with legal systems . . . makes arguments addressed to critical morality admissible in the interpretation and application of law").

The most prominent argument for exclusive legal positivism is offered by Joseph Raz, and is based on an asserted connection between law and authority.[80] Raz's approach to law is not easily summarised in a few sentences (or even a few dozen pages), but a short outline will be attempted. First, Raz offers the "social thesis" as the core of legal positivism: that "what is law and what is not is a matter of social fact".[81] Raz himself favours a strong version of the social thesis that he dubs the "sources thesis", that the existence and content of every law are fully determined by social sources.[82] This restatement of the legal positivist's separation between law and morality is tied to, and supported by, a distinction between deliberation as part of the process of coming to a decision, and the execution of a decision once made.[83] When judges are merely applying decisions already reached (by the legislature or by prior court decisions), they are applying existing law (after determining what the law *is*); when judges consider moral factors in creating a new rule, or in considering possible changes to an existing rule, that entails determining what the law *should be*. This view takes no position on whether it is a good thing or a bad thing that judges legislate, or whether they should do so more often or less often than they currently do. The point rather is that it is both analytically clearer, and in line with the way we usually think and talk about the law, to maintain a distinction between applying the law and making new law, between execution and deliberation. This approach allows Raz to say that moral reasoning has no part in stating "what the law is", but it often does (and probably should) have a part in saying how judges should decide cases "according to law".[84]

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[80] Some have viewed Raz's work on this, and related topics, as greatly altering Hart's approach to legal positivism in particular, and legal philosophy in general. See Leslie Green, "Three Themes from Raz", 25 *Oxford Journal of Legal Studies* 503 at 503 (2005).

[81] Raz, *The Authority of Law*, p. 37.

[82] See Raz, *The Authority of Law*, pp. 37–52; see also Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, Oxford, 2009), pp. 382–390; cf. Michael Sevel, "The Constitution of Authority", 5 *Jurisprudence* 430 (2014) (offering a novel reading of Raz's service conception of authority in the context of reviewing Raz, *Between Authority and Interpretation*).

[83] See Raz, *Ethics in the Public Domain*, pp. 190–192. While some commentators have interpreted the "sources thesis" and similar views as being about certainty and predictability in the content of law, Raz himself insists: "The pursuit of certainty is no part of the sources thesis. Finality is." Joseph Raz, *Beyond Authority and Interpretation*, p. 387. And by "finality", Raz did not mean "nonrevisability", but only that law should be seen as having settled (at least for the moment) issues on which it speaks. Raz, *Beyond Authority and Interpretation*, pp. 386–387 and n. 31.

[84] See Raz, *Beyond Authority and Interpretation*, pp. 376–379. Raz points out, by way of example, that judges have recourse to moral reasoning when they decide, often tacitly, that an existing legal rule is *not* so unjust that it should be overturned. Obviously, when judges decide, expressly, that the legal rule *is* so unjust that it should be overturned, the role of morality in reaching this legal decision is clearer. See Raz, *Beyond Authority and Interpretation*, p. 377.

Secondly, Raz argues, it is in the nature of law that it (the legal system) claims legitimate authority.[85] This means that legal rules purport to be "exclusionary reasons": "reasons to exclude a consideration from being the ground for a[ ] decision".[86] Raz's analysis ties together law, authority and practical reasoning. For Raz, the connection between authority and practical reasoning is a general one: authorities and authoritative reasons affect our moral deliberations; where there is an authority (which we recognise as such), our decision is based at least in part on what the authority (whether that authority is the law, a sacred text, a religious leader, an army commander, etc.) states we should do; we incorporate the authority's weighing of the relevant factors rather than simply weighing all the relevant considerations for ourselves. In Raz's terms:

> "The authority's directives become our reasons. While the acceptance of the authority is based on belief that its directives are well-founded in reason, they are understood to yield the benefits they are meant to bring only if we do rely on them rather than on our own independent judgment of the merits of each case to which they apply."[87]

For Raz, those subject to an authority "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle."[88] In the context of law, this means that with legal rules, which are meant to make authoritative decisions on matters on which citizens would otherwise be subject to various moral (and prudential) reasons for action, we must be able to ascertain their content without recourse to further moral evaluation. Following this analysis, inclusive legal positivism must fail, it is argued, because it is inconsistent with a core aspect of law, the legal system's purporting to be a justified practical authority.[89]

[85] See Raz, *Ethics in the Public Domain*, pp. 194–221. On the question of whether it makes sense to speak of law "claiming", see John Gardner, "How Law Claims, What Law Claims," in Matthias Klatt ed., *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012), pp. 29–44.

[86] Joseph Raz, "Facing Up", 62 *Southern California Law Review* 1153 at 1158 (1989).

[87] Joseph Raz, *Practical Reason and Norms* (2nd ed., Princeton University Press, Princeton, 1990), p. 193. The phrase "the benefits they are meant to bring" refers to the argument that one treats a source as authoritative, if in following the directives of that source, one is more likely to get things right than if one deliberated and decided for oneself. See Raz, *Practical Reason and Norms*, p. 193. Raz's view of authority is controversial; for criticisms, see, e.g. Stephen Lukes, "Perspectives on Authority", in Joseph Raz ed., *Authority* (New York University Press, New York, 1990), pp. 203–217; Ronald Dworkin, *Justice in Robes* (Harvard University Press, Cambridge, Mass., 2006), pp. 198–211.

[88] Raz, *Ethics in the Public Domain*, p. 219.

[89] Another argument that has been offered for exclusive legal positivism derives from a claim about the nature of rules. Scott Shapiro has emphasised that it is in the nature of rules, including legal rules, that they make a difference in our practical reasoning, and that inclusive rules of recognition would fail to make a difference in this way, as they

The debate between inclusive and exclusive legal positivism remains hotly disputed, as does the argument over whether either offers a position fully defensible against contemporary critics of legal positivism.[90] The contrast of inclusive and exclusive legal positivism in some ways parallels the contrast between the two types of approaches to rights discussed in Ch. 2: in that one approach (inclusive legal positivism) better fits our perceptions while the other approach (exclusive legal positivism) offers a more distinctive picture, and thus (perhaps) greater insight into the practice.

OTHER APPROACHES

Neil MacCormick developed an institutional theory of law, which emphasises the social-fact basis of law. Though this theory was initially put forward as a form of legal positivism, the author characterised a later elaboration as "post-positivism", arguing that "[e]xtremes of injustice are incompatible with law."[91] 3–08

Tom Campbell, through his theory of "ethical positivism", has argued that a strong separation thesis (like Raz's sources thesis) should be adopted, not as a philosophical analysis of the nature of law, of the way law always is, but rather as a prescription for how judicial decisions specifically and governments more generally *ought* to operate.[92]

In his book *Norm and Nature*,[93] Roger Shiner argues that legal positivism inevitably develops, as it becomes more sophisticated and responds to criticisms, towards positions close to those of natural law theory (he also argued that, in turn, natural law theory, in its more sophisticated forms, develops in the direction of legal positivism). The basis of that argument can be seen in outline from issues discussed above. For example, Hart's theory (in Shiner's terms, an example of "sophisticated positivism"), with its use of an "internal point of view", approaches natural law theory, in that the line seems quite thin between viewing law through the

would merely point us towards moral evaluations already applicable to our choices. Scott J. Shapiro, "On Hart's Way Out", 4 *Legal Theory* 469 (1998).

[90] For a detailed discussion of the debates within legal positivism, and methodological issues, see Jules Coleman ed., *Hart's Postscript* (Oxford University Press, Oxford, 2001); see also, Dworkin, "Thirty Years On" (raising sharp criticisms of both inclusive and exclusive legal positivism). In Brian H. Bix, "Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate", 12 *Canadian Journal of Law & Jurisprudence* 17 (1999), I give a moderately sceptical overview of some of the debates within legal positivism.

[91] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, Oxford, 2007), p. v; see generally Maksymilian Del Mar and Zenon Bankowski eds., *Law as Institutional Normative Order* (Ashgate, Surrey, 2009).

[92] Tom D. Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, Dartmouth, 1996).

[93] Roger Shiner, *Norm and Nature* (Clarendon Press, Oxford, 1992).

perspective of citizens who accept the law as creating (prima facie moral) obligations, and constructing one's theory around the conditions when law *in fact* imposes valid (prima facie) moral obligations.

In a review of *Norm and Nature*,[94] Frederick Schauer offers an empirical, non-hermeneutic version of legal positivism, arguing that in relation to the Hartian version of legal positivism, his alternative was as tenable, but without the dangers of sliding into natural law theory. In other words, Schauer is offering a kind of "return to Austin".[95] Schauer's basic argument is that one can construct a version of the "internal point of view", where citizens' actions in conformity with the law, and officials' enforcement of the law, are all explained adequately on prudential terms (for example, the citizens fearing legal sanctions, and the officials fearing reprimand or removal from office, and hoping for appointment to a higher office).[96] The point of this transformed "internal point of view" is that the aspect of "normativity" (the fact that citizens or officials accept the law as creating moral obligations, as offering reasons to act in compliance with what the law prescribes) is removed, and that it is the aspect of sophisticated legal positivism that sends it sliding towards natural law theory.[97]

We are then returned to Hart (and his many and various followers) to discover why a theory based on such a "bad man's view of the law"[98] would be considered inadequate. Hart's answer would appear to be: because it fails to take into account the perspective of people who accept the law, those who follow its prescriptions for non-prudential reasons.[99] One argument is that this is the "central" or "focal" sense of law, which any theory should try to explain, while obeying the law for fear or favour is a "lesser" or "attenuated" sense of law.[100] Schauer's response is that focusing one's theory on citizens or officials who believe that law imposes moral obligations is dubious, when theorists themselves are far from united on law's moral status, with a number of legal positivists like Joseph Raz arguing strongly against the proposition that law creates prima facie moral obligations (see Ch. 16). The better approach, Schauer argues,

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94 Frederick Schauer, "Critical Notice" (reviewing R. Shiner, *Norm and Nature* (1992)), 24 *Canadian Journal of Philosophy* 495 (1994).

95 See Frederick Schauer, "Positivism Through Thick and Thin", in Brian H. Bix ed., *Analyzing Law* (Clarendon Press, Oxford, 1988).

96 Schauer, "Critical Notice", pp. 500–501.

97 Schauer, "Critical Notice", pp. 498–501.

98 See Oliver Wendell Holmes, "The Path of the Law", 10 *Harvard Law Review* 457 at 460–461 (1897).

99 Hart was not entirely clear on whether prudential interests could be a sufficient basis for an "internal point of view". See Hart, *The Concept of Law*, p. 203 (including within an internal view those who accept the law because of "calculations of long-term interest").

100 See Finnis, *Natural Law and Natural Rights*, pp. 6–18. One could also argue that those who accept the law (on non-prudential grounds) constitute a majority (or at least a significant minority) of the population. This, however, is an empirical claim, with little evidence available either in support or in opposition. See Schauer, "Critical Notice", p. 502.

is to leave the question completely open at the definitional level, and argue the issue out in the open.[101] As against the conventional view that Hart's use of a (quasi-) hermeneutic approach in legal theory constituted a significant advance in legal positivism in particular and legal theory in general, Schauer's analysis may provide a radical challenge.

Scott Shapiro advocates a "planning theory of law", under which a legal system in general, and legal norms in particular, are seen as plans or plan-like norms.[102] Shapiro's approach purports to improve on the earlier theories of Austin, Hart, and Dworkin, in showing how law can be grounded in facts, yet give us reasons for action.[103]

We should also note the general challenge of "legal pluralism."[104] The starting point of legal pluralism is that people are often subject to more than one set of legal (or law-like) systems. This observation has been true throughout history. For example, in medieval England, a person might be subject to some combination of the rules set down by county courts,[105] manorial courts, the King's Courts, and the Court of Exchequer, as well as canon law and the law merchant.[106] In contemporary times, legal pluralism might describe the way the occupier law interacts with indigenous law in a colonised country, and how national law interacts with transnational law, on one hand, and, on the other hand, with the guidelines and expectations that are known as "soft law" and "social norms".

Some legal pluralists argue that legal theory should not focus exclusively or predominately on state law. One response is that a theory, like legal positivism, which focuses on the nature of (state) law may be compatible with the need for a less state-focused political theory and even with the need for a separate theory about the nature of other kinds of law. Others have argued that legal pluralism requires a more systematic

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[101] Schauer, "Critical Notice", p. 503; Schauer, "Positivism Through Thick and Thin", pp. 73–78; see generally Frederick Schauer, *The Force of Law* (Harvard University Press, Cambridge, Mass., 2015).

[102] Scott J. Shapiro, *Legality* (Harvard University Press, Cambridge, Mass., 2011); see also Scott Shapiro, "The Planning Theory of Law" (2017), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937990.*

[103] Critical responses to Shapiro's work include John Gardner and Timothy Macklem, Book Review, *Notre Dame Philosophical Reviews, http://ndpr.nd.edu/news/27609-legality/* (2011); Brian H. Bix, Book Review, 122 *Ethics* 444 (2012); Connie S. Rosati, "Normativity and the Planning Theory of Law", 7 *Jurisprudence* 307 (2016); Kenneth M. Ehrenberg, "Law as Plan and Artefact", 7 *Jurisprudence* 325 (2016).

[104] See, e.g. William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, Cambridge, 2009); Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", 30 *Sydney Law Review* 375 (2008).

[105] See, e.g., Robert C. Palmer, *The County Courts of Medieval England, 1150-1350* (Princeton University Press, Princeton, 1982).

[106] While Emily Kadens casts doubt on the conventional idea of a historical uniform law merchant, she accepts that there were often courts associated with particular guilds and trade fairs. Emily Kadens, "The Medieval Law Merchant: The Tyranny of a Construct", 7 *Journal of Legal Analysis* 251 (2015).

rethinking of theories of the nature of law in particular, and legal philosophy in general.[107]

Suggested Further Reading

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[107] See, e.g., Wibren van der Burg, "Conceptual Theories of Law and the Challenges of Global Legal Pluralism: A Legal Interactionist Approach" (2018), in Paul Schiff Berman ed., *The Oxford Handbook on Global Legal Pluralism* (Oxford University Press, Oxford, forthcoming), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3288451*.

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