**Demanding Philosophy from Legal Positivism:
An Investigation into the Argumentative Support for the Separation Thesis**

by

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**A thesis submitted to the Faculty of Graduate and Postdoctoral affairs
in partial fulfillment of the requirements for the degree of**

M.A. Legal Studies

**Carleton University
Ottawa, Ontario**

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Your file Votre référence
ISBN: 978-0-494-81624-0
Our file Notre référence
ISBN: 978-0-494-81624-0

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Abstract

Analytic legal positivism holds that the concept of law is not by necessity a moral concept. An assertion of this kind requires philosophical support inasmuch as it presumes to describe the character of the law across all possible experience. But in H. L. A. Hart's account of legal positivism, little in the way of philosophical argument is advanced to secure his belief that law and morals are essentially separable. The purpose of this thesis is to draw these arguments out from Hart's analytic project and to reveal their incompleteness. Moreover, I indicate that where these arguments fail, the opposite claim, that morality is an essential component of the law, is made that much stronger.

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Introduction

“The content of the law can be anything whatsoever.”¹ This claim follows from the legal positivist idea that the law is brought into existence, and sustained as existing, by way of its being posited by humans seeking to employ the law for human purposes. Where the law is the product of human activity alone, and is not constrained by any principle existing beyond that activity, there is nothing to limit the content of the law. And if the content of the law is unlimited, we must not expect that it will answer to any moral expectations we may hold with reference to it, namely that it be just or that it oppose injustice. We must instead recognize the possibility of amorality as an essential aspect of the concept of law. The claim that the law is conceptually separable from morality is called the Separation Thesis.²

H.L.A. Hart holds that the Separation Thesis is central to the school of legal positivism; in discussing the relationship between law and morality he goes so far as to

¹ Hans Kelsen *Pure Theory of Law*, 2nd edition, translated by Max Knight (Berkeley and Los Angeles: University of California Press, 1967), section 34, page 198. Not all positivists are willing to go quite this far; H.L.A. Hart does not allow that the law can have any content whatsoever, as he requires that it accord with what he calls the minimum content of the law (*The Concept of Law*, 2nd ed. [Oxford, Oxford University Press, 1994], pages 193-200), that is, it must prohibit murder, theft, and deception in instances where these things threaten our survival. Also he identifies a connection between the principle of formal justice that states ‘treat like cases alike’ and his idea of a law as a general rule, such that we may require that the law be subject to certain requirements of formal justice (pages 158-161). But he instructs us not to make too much of these moral constraints on the content of the law, since even with these constraints in place, lawmakers are able to construct laws that are immoral (page 161 and pages 200-201). Thus, though Hart holds that the content and the form of the law are constrained by moral requirements, these requirements are not strong enough to *meaningfully* constrain that content or form, at least not where the concept of law is concerned.

² Hart articulates his Separation Thesis as “the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so” (*The Concept of Law*, pages 185-186). Alternatively, the Separation Thesis is “the contention that there is no necessary connection between law and morals or law as it is and ought to be (“Legal Positivism and the Separation of Law and Morals,” [1958] 71:4 Harvard Law Review, page 601, note 25).

equate legal positivism with the Separation Thesis.³ Given the scope of Hart's contribution to the school of legal positivism, and the popularity of legal positivism in contemporary legal philosophy, the question of the validity of the Separation Thesis is an especially significant one. But despite this significance, Hart nowhere constructs a proof for the Separation Thesis, not explicitly. This is somewhat amazing, for surely that which Hart takes to be legal positivism's central claim requires justification. And it is not enough that the truth of the Separation Thesis is suggested by the idea of the law as posited, the idea that man-made law is not meaningfully constrained by morality. Certainly, this idea points to the Separation Thesis, but it does not secure its truth.⁴

There are at least three arguments made in favour of the Separation Thesis to be found buried in Hart's account of legal positivism. Over the course of this thesis I will explore each in turn. The first suggests that the validity of the Separation Thesis is to be discovered in the very concept of law. The second finds this validity in the political benefits that follow from adopting the Separation Thesis. The third argues that where we understand the law as governed by the Separation Thesis, our understanding of the law is in this way improved, and asserts that we ought to adopt the Separation Thesis for that reason. In all three, it is emphasized that we arrive at a clearer picture of the law when we set the matter of its morality aside, and focus entirely on its alleged amoral character.

³ "Here [in the context of his chapter on the subject of law and morals] we shall take Legal Positivism to mean the [Separation Thesis]" (*The Concept of Law*, page 185).

⁴ As Joseph Raz argues in *The Authority of Law* (Oxford: Clarendon Press, 1979), pages 38-9: "The claim that what is law and what is not is purely a matter of social fact still leaves it an open question whether or not those social facts by which we identify that law or determine its existence do or do not endow it with moral merit. If they do, it has of necessity a moral character. But even if they do not, it is still an open question whether, given human nature and the general conditions of human society, every legal system which is in fact the effective law of some society does of necessity conform to some moral values and ideals." In short, it may happen that the institutions with which we posit law are themselves essentially moral, or that the needs of human society require moral law. Hart's own beliefs on these matters are clear: he does not think there is anything essentially moral about legal institutions, nor that the needs of human society are substantial enough to prevent the law from being immoral. But his justification for these claims relies, at least in part, on the Separation Thesis, so, until the Separation Thesis is proven, Raz' doubts stand.

But before we can enjoy the simplicity of the law understood in a moral vacuum, we must show that any one of these arguments is sound. Proving this much requires that we dip deep into a difficult metaphysics, as it is only there that we can properly distinguish a law's formal existence from its moral function. But none of the arguments I will analyze is presented with sufficient philosophical detail in order to secure the validity of the Separation Thesis. They do not confront with the metaphysics of this distinction of Is from Ought in a meaningful way, and it is in this more than anything that we find the cause of their respective failures. Moreover, in this neglect for philosophical rigour, and especially in a pretension to common sense, there lies hidden a peculiar metaphysics of positivism's own. This metaphysics, having been left unsupervised, is itself an obstacle to our legal understanding both in that it distorts our understanding of the law, and in that it does so furtively, obscured by positivism's disingenuous claim to legal-metaphysical atheism. There is something of a reverse Icarus in this: legal positivism seeks to articulate the law too sensibly, too down to earth. It promises an accessible, common sense conception of the law, and it might have followed through on this promise were it not committed to the substantial metaphysical presumptions latent in the Separation Thesis. The more positivism digs into our ordinary understanding of the law, the more it constructs a metaphysical conception of the ordinary, and in this way careens out into the most inscrutable reaches of philosophy.

It is true that positivism is somewhat justified in its resistance to metaphysics; a lot of the natural law practiced in the time of Jeremy Bentham really did approach 'nonsense upon stilts,' in that it drew upon especially speculative metaphysics. And legal positivists do not explicitly deny that a metaphysical conception of the law may be

reasonable. They even leave open the matter of whether or not we can rationally settle moral arguments about the law: the Separation Thesis does not imply non-cognitivism, the position that there do not exist moral facts, proofs, or the basis for reasoned moral debate.⁵ Moreover, legal positivism recognizes that this debate, or indeed a religious or otherwise metaphysical debate, can and will find a central place in legal systems in many cases, and thinks it silly to say otherwise. Positivists want to make the weaker and so seemingly reasonable claim that we settle moral argument apart from legal argument. It is readily acknowledged that morality often and profitably intersects with the law, and the study of the law via morality or metaphysics is not overtly discouraged; the Separation Thesis only situates this study as contributing to a contingent, rather than essential, understanding of the law.⁶

But we must not allow ourselves to be fooled with these instances of philosophical humility. Legal positivism is not so modest as it appears. Though it may allow us many opportunities to bring morality to bear on the law, it jealously claims the very concept of law as its own. And it is in this assertion that the Separation Thesis is to be discovered as an analytic principle intrinsic to the concept of law that legal positivism is most in need of argument. The purpose of this thesis is to demonstrate that no such

⁵ As explained in section 6 of “Legal Positivism and the Separation of Laws and Morals.”

⁶ In keeping with this acknowledgement of certain instances of positivist humility, I should mention that the use of the term ‘Separation Thesis’ has been charged with the following criticism: it implies that a law’s existence is distinct from its morality in every instance, even in societies in which legal institutions define their law with reference to morality. Legal positivism does not make this claim; it allows that morality is a constitutive element of the law in those societies that design their laws with morality in mind. Rather, legal positivism makes the much humbler claim that the law *need* not be constituted such that morality plays a necessary role. In light of this fact, it has been suggested that we use the term ‘Separability Thesis’ following Jules Coleman in his “Negative and Positive Positivism” in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) rather than ‘Separation Thesis,’ as it better captures this meaning. But the purpose of this paper is to show that this principle is in fact far from humble. It requires substantial philosophical justification. For this reason, I prefer the term Separation Thesis; it indicates exactly what must be proven, which is that the essential form of the law exists separate from its morality.

argument will present itself without sufficient attention to philosophical, indeed metaphysical detail. Where the metaphysics of law is insufficiently treated upon, the Separation Thesis is only an as yet unproven hypothesis.

Hart's Analytic Legal Positivism

When I speak of legal positivism, I mean H.L.A Hart's analytic legal positivism. But while Hart is obviously a leader in that school of jurisprudence, there are many legal positivists that conceive of their project as fundamentally different from Hart's, and can avoid the charges I lay against Hart here. There is, for instance, a sizable branch of legal positivism that does not identify itself with any kind of conceptual, analytic, or descriptive project. They argue for legal positivism on entirely political and moral grounds, and never make the claim that they are describing the law in itself, except to the extent that the concept of law is to be determined from those grounds.⁷ Meanwhile, several legal positivists expressly disapprove of the Separation Thesis.⁸ Others do not rely to any significant degree upon the Separation Thesis.⁹ Also, some analytic legal

⁷ The beginnings of legal positivism in Thomas Hobbes and Jeremy Bentham is political; it claims that we ought to ground the authority of the law in the extent to which it brings about political stability, whether so as to avoid the hazards of a state of nature, or to realize maximal utility. David Dyzenhaus' "The Genealogy of Legal Positivism" (Oxford Journal of Legal Studies, Vol. 24, No. 1 [2004]) describes the political nature of these beginnings, and calls legal positivists that are true to that political nature as neo-Benthamites, while also chastising analytic legal positivism for failing to acknowledge its own genealogical history in moral and political philosophy.

⁸ Leslie Green thinks it is false for a number of reasons elucidated in "Positivism and the Inseparability of Law and Morality" 83 New York University Law Review [2008], pages 9-19. John Gardner goes further, calling it absurd in "Legal Positivism: 5 ½ Myths" (46 American Journal of Jurisprudence [2001], page 233).

⁹ I am thinking here of Joseph Raz, who focuses on his Source Thesis rather than the Separation Thesis. The Source Thesis states that the law can always be determined by drawing upon its social and factual sources, and does not require reference to morality (*The Authority of Law*, page 47). The Source Thesis is very similar to the Separation Thesis, but there are important differences that are not considered as I evaluate Hart's arguments, so, while I suspect many of my charges may apply just as readily to the Source Thesis as they do to the Separation Thesis, I do not show that this is the case. Jules Coleman is another example of a legal positivist who does not rely on the Separation Thesis, as he takes it, on his especially frugal reading, to be trivially true (*The Practice of Principle* [Oxford: Clarendon Press, 2001], page 152).

positivists do pay sufficient attention to philosophical detail, for instance, Hans Kelsen,¹⁰ Certain of the criticisms I direct toward legal positivism throughout this thesis may apply to these legal positivists, but my principal criticism, that analytic legal positivism is not sufficiently philosophical, does not.

Jurisprudential analytic theory is a species of legal theory that is distinguished by its being descriptive rather than evaluative. Hart claims that his theory is analytic because it is descriptive in this sense: “My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or comment on moral or other grounds the forms and structures which appear in my general account of law.”¹¹ Hart is committed to this understanding of his project as descriptive. This is because, should his project be discovered to be evaluative rather than descriptive, his Separation Thesis will in this way be invalidated. The Separation Thesis takes the possibility of amorality to be immanent in the concept of law; if we arrive at this conclusion via moral

¹⁰ I make this claim with reference to the fact that Kelsen identifies the source of his analytic claims: he arrives at them by way of his idea of the basic norm, which is itself reached with the help of Kantian transcendental argumentation. Transcendental argumentation does constitute a sufficient confrontation with the metaphysics of law in order to construct analytic legal claims. This is not to suggest that Kelsen’s views are necessarily correct, but only that he does not commit the error that I address here in Hart.

¹¹ *The Concept of Law*, page 240, emphasis his. Whether or not Hart’s legal positivism is descriptive in this sense, and does successfully engage in analytic theorizing, is unclear. Ronald Dworkin believes that Hart is mistaken in understanding his legal positivism as a purely analytic project (“Hart’s Postscript and the Character of Political Philosophy” *Oxford Journal of Legal Studies*, Vol. 24, No. 1 [2004]). Dworkin accuses Hart of archimedeanism, which is to say that he claims to describe a given practice from an elevated perspective such that he can accurately record that practice without engaging in it. Dworkin believes that a legal theory must not separate itself from legal practices in this way, though it will, for philosophical reasons, abstract from legal detail. Thus, Dworkin makes sense of Hart’s legal positivism by recasting it as an evaluative project. While, I am sympathetic to Dworkin’s criticism of Hart’s analytic legal theory, I do not agree that legal theory must give up its ‘second-order’ analytic quality in order to accurately document legal phenomena. His charge is that Hart does not sufficiently articulate the political and moral views at the heart of his theory, while my charge is that Hart does not sufficiently articulate the metaphysical views at the heart of his theory. So, while in many cases our criticisms are formally similar, they are substantively different.

Also, throughout this thesis I will describe Hart’s legal positivism as analytic. What I mean is that Hart *takes* his legal positivism as analytic; I leave open the possibility that Dworkin is right in describing Hart’s analytic theory as a moral/political theory in disguise.

rather than analytic reasoning, then the concept of law is morally determined, which leads us to a contradiction, for no amoral concept of law can be constituted by morality.

This descriptive analysis of the concept of law begins with the idea of law as a system of rules. Because the Separation Thesis asserts that the concept of law is not by necessity connected to any moral object, the law in its barest essence is itself amoral. Thus the rules that comprise a law are not essentially moral either; they are only authoritative principles that guide behaviour. But some rules, such as semantic or logical rules, are irrelevant to the concept of the law, so Hart focuses on the set of rules that are distinctive in that they govern the social relationships of groups of individuals. These are social rules, the essential character of which is to be found in every law.

Hart makes sense of this essential character by distinguishing social rules from social habits. This distinction is instantiated in three places: first, deviation from a rule is socially understood to amount to an error; second, understanding such deviation to amount to an error is accepted as a correct or legitimate understanding both by those who criticize and, for the most part, by the deviant as well; third, social rules are recognized with reference to a special perspective that takes social rules to comprise general standards that ought to be followed. Hart calls this special perspective the internal aspect of rules.¹²

The internal aspect of rules requires that social rules be conceived by way of a critical reflective attitude. The empirical manifestation of this attitude is evidenced by the use of normative language, such as ought-statements, to describe one's obligation to

¹² *The Concept of Law*, pages 55-56.

follow social rules.¹³ The internal aspect is juxtaposed against the external aspect of rules, which is simply the observation of patterns of behaviour without any concern for the reasons governing those patterns. An observer adopting an attitude that captures only this external perspective will discover in the law a simple causality, such that at the presence of a given experiential input, such as a murder, a particular output is likely, such as a trial and incarceration in prison. In order to access the reasoning that relates the incarceration to the murder, and that justifies the use of state power so as to imprison murderers, the internal aspect is necessary, though the external observer may recognize that this reasoning exists.¹⁴

The distinction between the external and internal aspects of rules may be drawn by comparing the notion of being obliged to behave a particular way to being obligated to behave that way.¹⁵ We are obliged to behave a particular way when failure to behave in this way results in our being subjected to a punishment we take to be undesirable. We are obligated to behave a particular way if a rule we take to be binding instructs us to act in

¹³ *Ibid.*, page 57. What exactly Hart meant by the words critical and reflective is unclear. Interestingly, he addresses this attitude by subtly different names: first 'reflective critical attitude,' and second 'critical reflective attitude.' Probably, this is unimportant, but it may indicate that Hart did not give the name as much thought as he might have done. Neil MacCormick provides an explanation as to what exactly criticalness and reflectivity add to this attitude in *H.L.A. Hart* (London: Edward Arnold (Publishers) Ltd, 1981). Reflectivity implies, according to MacCormick, an element of cognition such that the critical reflective attitude is able to identify patterns of behaviour, and to measure perceived behaviour against these patterns. Criticalness covers an element of willing that perceived behaviour match the patterns of behaviour outlined by the relevant social rules (page 33). While MacCormick tells us considerably more than Hart, it is difficult to see how he arrived at this reading; there is no suggestion of it in *The Concept of Law*, and MacCormick does not provide any proof that this is the meaning appropriate to Hart's legal positivism. It seems just as plausible to hold that this attitude is critical simply because it requires that we evaluate perceived behaviour against the behaviour required by social rules, and reflective in that this evaluation must be reflected on ourselves as readily as on anyone else.

¹⁴ *The Concept of Law*, page 89. Harts says there of the external observer: "the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view... Such an observer is content merely to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met" (emphasis his).

¹⁵ *Ibid.*, pages 82-84. Alternatively, the distinction between the external and the internal perspective of the law may be cast as a distinction between social habits and social rules (pages 51-8).

that way. Hart provides some examples: where we are mugged at gunpoint, we are only obliged to hand over our money. But where we are taxed in keeping with social rules we take to be legitimate, we are obligated to hand over our money. We would do so even if there were the possibility of holding onto our money while avoiding punishment; we do so for the sake of the rule, and not because of the disincentives attached to deviance. Hart claims that any characterization of the law that does not describe this sense of obligation, but rather reduces all law to being obliged, is deficient.¹⁶

Another important distinction at work in Hart's legal positivism is his conceptual separation of duty-imposing from power-conferring rules.¹⁷ Duty-imposing rules establish patterns of conduct that are to be observed in every case where the relevant context obtains, no matter what the inclinations of those involved. For the most part, rules of this type are attached to rules that channel state power to punish those who fail to act in accordance with these patterns. Power-conferring rules, on the other hand, pay attention to the inclinations of those involved, in that they only prescribe specific patterns of conduct to those who are looking to achieve a particular end, such as writing a will or being married.¹⁸

¹⁶ He says "At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence" (*Ibid.*, pages 90-91). Thus, he criticizes the legal positivism of John Austin for attempting exactly this reduction of all law to being obliged, inasmuch as his command theory takes all law to be the commands of a sovereign who controls the power to punish those who disobey.

¹⁷ *Ibid.*, pages 27-42. Over the course of these pages, Hart continues to scold his legal positivist predecessors, this time for attempting to reduce all law to commands that threaten punishment at disobedience, and in this way distorting the character of power-conferring rules.

¹⁸ MacCormick establishes this distinction by drawing on the Kantian idea of categorical and hypothetical imperatives: he labels duty-imposing rules categorical because they apply irrespective to our volitional attitudes, and power-conferring rules hypothetical because they only apply as a response to a particular volitional attitude (*H.L.A. Hart*, page 62).

In keeping with this distinction between duty-imposing and power-conferring rules, Hart separates all law into two broad orders of social rules, the primary and the secondary. Primary rules are laws that create social obligations, while secondary rules are laws that relate to those social obligations:

Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.¹⁹

Just as every society is governed by basic primary rules focused upon ensuring survival, such as a law against murder, distinctly legal societies will always adopt specific secondary rules as well, such as a rule of change that explains how old laws are to be abandoned and replaced with new ones, a rule of adjudication with reference to which judges may resolve disputes as to whether or not a law has been broken, and a rule of recognition.²⁰

This rule of recognition occupies a significant place in Hart's legal positivism, for it is the rule with which we identify the law. Though the form of the rule of recognition

¹⁹ *The Concept of Law*, page 81.

²⁰ This picture of the legal society as host to these secondary rules in addition to primary rules is presented by way of a kind of historical sketch of a pre-legal society evolving into something like the legal societies we live in today. This pre-legal society is faced with three defects: uncertainty as to what is law, stasis inasmuch as there is no means with which it may change the law, and inefficiency in that there is no authoritative means with which to settle disagreement about the law. So long as this society is small and homogeneous, these defects do not present a serious problem. But as a society grows, and in this way becomes increasingly heterogeneous, these defects threaten instability. Thus, this society adopts the secondary rules of recognition, change and adjudication so as to address these defects (*Ibid.*, pages 91-98). Two points to be made about this idea of the pre-legal society: first, Hart never claims that he is explaining a pattern of legal history. This idea is merely a heuristic, the purpose of which is to demonstrate the function of certain rules. Second, Hart never claims that a society benefits from adopting secondary rules, except inasmuch as these rules address the defects of a large and heterogeneous society. He does not want to suggest that the small pre-legal society is somehow worse than the large legal society, only that their rules operate in fundamentally different ways. Secondary Rules are not an inherently good thing; Jeremy Waldron believes they may well be inherently bad since they may alienate ordinary individuals from the function of social rules ("Are we like Sheep" *Canadian Journal of Law and Jurisprudence* Vol. XII, No.1 [1999])

will vary from state to state, its role in determining the law in this way remains the same. A constitution that empowers a group of officials with legislative power is an example of a rule of recognition; where this constitution is endorsed, we may determine whether a given rule is law with reference to the actions of these legislating officials. If these officials had legislated the rule as law, it is law, and if not, it is not. Thus, the rule of recognition acts as, or at least directs us to, the existence condition of the law.

Because a society is host to many rules that are not legal, the rule of recognition is necessary to locate the set of distinctly legal rules. The rule of recognition is itself discovered empirically; it is evident in the social practices of the subject society, and is in this way available to sociological inquiry. Sociologically understood, it is given as a social fact and nothing more; it does not require a metaphysical or moral characterization. Therefore, the rule of recognition is compatible with the Separation Thesis, as its role in determining the law is morally neutral.

Apart from Hart's descriptive project of designating the concept of law as posited by a rule of recognition, he has a moral project, and the one is attached to the other. This project focuses on the moral repercussions of the Separation Thesis by indicating that a society that is subject to secondary rules like the rule of recognition need not emphatically support its own laws. It is true that Hart requires social acceptance as an existence condition of social rules: "if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole."²¹ This means that a social rule can only exist where some recognize its internal aspect. But the key word is 'some':

²¹ *The Concept of Law*, page 56

In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike: the sheep might end in the slaughter-house.²²

This is why the Separation Thesis is morally important; it reminds us that the rules endorsed by our legal officials may be in no way related to the general standards with which we structure our own lives. Where this happens, we cannot expect the law to accord with our morality, and must ask ourselves whether we are willing to obey the law, or whether to resist it on moral grounds.²³

Hart's advice would seem to be that where we come upon legal rules, we leave to the side whether or not we accept these rules from an internal perspective, and instead

²² *Ibid.*, page 117.

²³ On the legal positivist view, the question of whether we resist the law on moral grounds is not an immediately legal matter, but rather a moral matter that is brought to bear on the law. This is the nerve of the Hart-Dworkin debate that centers on how judges reason with reference to the law. As Hart has it, a judge who exercises her moral sensibilities in deciding cases is acting extra-legally; she is not in fact deciding the case in a legal capacity, but is rather exercising her official power to bring about a change in the law in law with what she deems to be a just solution to the matter before her. The legal positivist designates this bringing of extra-legal elements into play as the judge's discretion. Hart does not reprimand this judge for moving beyond the letter of the law. As it happens, he encourages her to go beyond the law in deciding certain cases, specifically where she is dealing with law that is unjust (*Ibid.*, chapters 7 and 9). Still, in acting in this way, she undermines the rule of law inasmuch as her moral sensibilities are nowhere formally promulgated. Even Hart acknowledges that undermining the rule of law is a serious thing (*Ibid.*, pages 160-161, Hart does not mention the rule of law, but his idea of the application of the law is very similar). Meanwhile, Dworkin thinks it absurd to describe judges who engage in moral reasoning as engaging in an extra-legal discretion. For one, judges are not free to decide a case any way they choose, or even in keeping with their own private morality. Rather, their decisions are determined by principles immanent in their legal culture (*Taking Rights Seriously* [Cambridge, Massachusetts: Harvard University Press, 1977], chapter 1). And second, judges are constantly engaged in moral reasoning. A legal theory that takes these judges to be acting outside of the law and beyond the scope of legal inquiry fails to describe the law as it is practiced. And a theory that does not describe the law as practiced is open to the charge that it does not describe the law at all (I take this to be the thrust of Dworkin's semantic sting argument from *Law's Empire* [Cambridge, Massachusetts: The Belknap Press, 1986], pages 43-46).

It should be noted that Dworkin seems to allow that a judge decide a case extra-legally if it happens that she is confronted with wicked law (in *Ibid.*, pages 101-108, Dworkin prescribes that a judge working under something like a Nazi regime is entitled to lie about the law for the sake of justice). Hart takes this to mean that Dworkin unknowingly accepts the legal positivist picture of judicial discretion (see "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream" in *Essays in Jurisprudence and Philosophy* (USA: Oxford University Press, 1984).

consider these rules from a purely external standpoint.²⁴ From this perspective, we are better able to assess whether the law in question is just, since we will not be predisposed to affirm the morality of rules we already, perhaps inertly, accept. Ideally, at Hart's instruction a citizen of apartheid South Africa who had up to this point passively accepted the validity of his society's legal rules will endorse an external perspective, and from that perspective recognize the racial injustice of these rules and will cease to accept them. If this citizen is a judge, or at any rate has access to democratic power, he may bring about change such that these legal rules are abandoned.²⁵

The Separation Thesis is essential in taking this step back from the law and evaluating it from an external perspective. If it were not the case that the law is by necessity separate from its morality, but rather that the two were connected, the external perspective would fail to adequately capture the law, as it would gloss over this connection. But Hart's moral project is nonetheless a separate entity from his analytic project. Certainly, the moral project depends on certain principles outlined in the analytic project, such as the Separation Thesis, but this dependence is not reciprocated. In fact, according to the British philosophical tradition of which Hart is a part, no analytic claim

²⁴ This seems to be the moral consequence of the Separation Thesis but frustratingly, Hart does not explicitly mark out the external perspective as the morally best perspective from which to view the law. MacCormick suggests that it is: "If there is any point of view which seems to capture that which the Hartian legal theorist as such must hold, it is surely this non-extreme external point of view" (*H.L.A. Hart*, page 37). By non-extreme, MacCormick simply means the external perspective that is able to make sense of how others might accept the rule in question. An extreme external perspective is the kind adopted by "those who reject [a group's] rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation" [*The Concept of Law*, page 88]).

²⁵ This idea of criticism from an external perspective is mirrored in Hart's liberalist belief that positive morality, that is morality that has no claim to validity but is practiced only conventionally, ought not to find its way into the law. We come across this liberalism most clearly in his debate with Patrick Devlin on the question of whether it is justifiable to enforce positive morality, such as the condemnation of bigamy, with the law for the sake of something like social uniformity.

can be adduced from moral principles.²⁶ Thus, in critiquing Hart's analytic project, we are free to ignore his moral project.

The School of Anti-positivism – Fuller, Radbruch, Dworkin

There are those who do not separate analytic legal philosophy from moral legal philosophy. They are the natural law theorists and anti-positivists against which Hart's legal positivism is opposed. As Hart introduced his legal positivism to the jurisprudential world with his "Legal Positivism and the Separation of Law and Morals" he began a sparring match with American anti-positivist Lon. L Fuller. According to Fuller, legal positivism is in the wrong inasmuch as it neglects the formal morality of the law.²⁷ This formal morality can be characterized as a set of virtues, all of them distinctly legal.²⁸ Fuller holds these virtues to be moral rather than merely legal because, in catering to these virtues, the law can effectively structure our social life so that we are better

²⁶ This follows from the principle that no Is may proceed from an Ought, and vice versa. This principle is derived from David Hume's *Treatise of Human Nature* (Oxford: Oxford University Press, 2000), page 302. There, Hume describes his experience of discovering in the arguments of his peers an unexplained move from statements about the nature of the world ('is' and 'is not' statements) to moral statements ('ought' and 'ought not'). All that Hume identifies in this passage is something like a fallacy of relevance, inasmuch as claims of one kind are related to claims of another kind without any effort made to relate the two. This in itself does not state that no Is may proceed from Ought, but rather that if an Is is to proceed from an Ought, some identifying principle must be introduced to mediate them. Whether or not it was Hume's intention, many philosophers have adopted the notion that no Is may ever follow from an Ought. At any rate, if Hart intended that his moral project supply a proof for his analytic project, he does not introduce the necessary identifying principle so as to relate the two, and thus the proof falls apart. I will return to this point as we consider a political argument in favour of the Separation Thesis.

²⁷ I refer to the Kenneth I. Winston's introduction to Fuller's *The Principles of Social Order* (Duke University Press, Durham, 1981) for a summary of Fuller's legal philosophy. Fuller himself never published a text that covered the entirety of his theory.

²⁸ Fuller enumerates some of these virtues as follows: the form of the law is virtuous if it is general, public, clear, constant over time, if it is nowhere retroactive, and nowhere demands logically impossible (that is, contradictory) or empirically impossible (that is, beyond the average person's ability) action of its subject, and if its declared content matches its administered content. These virtues are focused on the law from the perspective of the legislator; Fuller constructs this list with reference to a thought experiment in which a legislator who fails to exhibit these virtues attempts to construct laws, but fails to do so because his legislative power lacks these virtues (*The Morality of the Law* [Yale University Press, New Haven, 1964], pages 33-8. He makes no indication that this list is comprehensive, nor that the perspective of the legislator is the only perspective from which to construct such a list, so it is likely that there exist formal legal virtues beyond these ones.

organized to solve our day-to-day problems as we interact with one another, in this way securing a means to legitimize official action, mediate disagreement, make impartial decisions, and the like. The legal virtues then are a requirement for the survival of an effective social order, and they for this reason contribute to our ability to live well and pursue our conception of the good life.

Taken together, Fuller takes these virtues to constitute what he calls the internal morality of the law. Where a law does not sufficiently demonstrate these virtues, its claim to legal validity is in this way rendered suspect. Once a threshold of legal vice is passed the law is invalidated altogether, since these virtues must be present, at least to some degree, so as to maintain the formal legality of the law in question.²⁹ Between this threshold and the supremely virtuous law there is an expanse in which a law remains effective enough to satisfy the formal requirements of legality, though it falls short of our expectations and is vulnerable to criticism in this respect.³⁰

In asserting that a law is only invalidated once it passes a threshold of immorality, Fuller is in agreement with German legal philosopher Gustav Radbruch. Radbruch states that:

The positive law, secured by legislation and power, takes precedence even when its content is unjust and inexpedient, unless the conflict between statute and

²⁹ Fuller shows that this much is true for the virtue of a law's being prospective rather than retroactive in what follows: "we have only to imagine a country in which *all* laws are retroactive in order to see that retroactivity presents a real problem for the internal morality of law. If we suppose an absolute monarch who allows his realm to exist in a constant state of anarchy, we would hardly say that he could create a regime of law simply by enacting a curative statute conferring legality on everything that had happened up to its date and by announcing an intention to enact similar statutes every six months in the future.

A general increase in the resort to statutes curative of past legal irregularities represents a deterioration in that form of legal morality without which law itself cannot exist. The threat of such statutes hangs over the whole legal system, and robs every law on the books of some of its significance" (Lon L. Fuller, "Positivism and Fidelity to Law - A Reply to Professor Hart" 71 *Harvard Law Review* [1958] pages 650-1).

³⁰ The nature of this criticism is rooted in Fuller's idea of the morality of aspiration, which demands that we strive toward moral perfection via the virtue ethics of Plato and Aristotle (see *The Morality of the Law*).

justice reaches such an intolerable degree that the statute, as ‘lawless law’, must yield to justice.³¹

Understood this way, neither Fuller nor Radbruch assert that morality is an essential component of the law since a law may be immoral but yet fall below this threshold, and thus they do not immediately oppose the Separation Thesis. But because they claim that a law is invalidated when it passes into extreme immorality, they must hold that it is implicit in the existence conditions of the law that some moral standard obtain, namely, the standard of at the very least non-extreme injustice. So long as we are dealing with only mild injustice, these anti-positivists allow some credibility to the legal positivist idea that an immoral law may exist. But once we pass into extreme injustice, the legal positivist model is abandoned, and something like natural law theory kicks in; they modify the Augustinian ‘unjust law is not law’ so as to read ‘extremely unjust law is not law.’ This means that ultimately they oppose the Separation Thesis, since this possibility of invalidation due to extreme immorality must inhere in every law.

But there is an important principle upon which Fuller and Radbruch diverge, which is the extent to which this essential moral component of the law is bound up in substantive justice. For Fuller, this component is only formal, and does not touch upon the content of the law, though Fuller holds to the optimistic belief that where we have the one, the other is likely to follow.³² Radbruch, on the other hand, does have moral content

³¹ *Collected Works*, ed. Arthur Kaufmann (Heidelberg: C.F. Müller 1987), page 89.

³² As evidenced in this passage from “Positivism and Fidelity to Law,” page 636: “Professor Hart seems to assume that evil aims may have as much coherence and inner logic as good ones. I, for one, refuse to accept that assumption. I realize that I am here raising, or perhaps dodging, questions that lead into the most difficult problems of the epistemology of ethics. Even if I were competent to undertake an excursus in that direction, this is not the place for it. I shall have to rest on the assertion of a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil. Accepting this belief, I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are.”

in mind when he sets out his threshold conception of an essential connection between law and morality. Thus, he holds that, no matter the virtue of its application, an extremely unjust law is not law.³³

But Fuller was not Hart's only opponent; after Fuller, Hart began a debate with Ronald Dworkin. Dworkin's position is unique in that he resists the very notion of an analytic theory of law.³⁴ He holds that no account of judicial reasoning can leave out an account of the moral principles with which judges decide cases. While he attacks legal positivism for neglecting these moral principles, he is especially critical of the analytic character of Hart's legal positivism, inasmuch as it claims to be free from any responsibility to account for judicial practice. He takes moral, and particularly political, philosophy to be key to valid legal philosophy, and is staunchly opposed to any picture of jurisprudence that says otherwise. Thus, it is difficult to say which aspect of the Separation Thesis is subject to the greater portion of his disapproval; on the one hand, he thinks it wrong to claim that the law could ever be an amoral concept, and on the other, he thinks it wrong to claim that the law, in some abstract sense, is subsumed under an analytic principle.

For Dworkin, there is no need to invoke a threshold approach to the essential connection between morality and the law. He allows that in certain circumstances, it is

³³ For an update on Radbruch's anti-positivism, see Robert Alexy's *The Argument from Injustice: A Reply to Legal Positivism*, translated by Bonnie Litschewski Paulson and Stanley L. Paulson (Clarendon Press: Oxford, 2002).

³⁴ In chapter 2 of *Law's Empire*, Dworkin presents his idea of the law as an interpretive concept, that is, as a concept that we construct both out of the facts of our legal culture, and the values with which we organize those facts. The idea of the law as an interpretive concept antagonizes the analytic idea of the law as something context- and subject-independent. Later, Dworkin would dismiss analytic jurisprudence as amounting to archimedeanism (see note 11 above). This is not to suggest that Dworkin denies that any general account of the law is impossible; he believes that a philosophy of law must be general in a way that ordinary legal inquiry is not. But he nonetheless asserts that legal philosophy cannot be thought to occupy some kind of second-order perspective such that it need not answer to the facts of legal practice (see "Hart's Postscript and the Character of Political Philosophy"). I should note that there is no indication that Fuller is especially keen on analytic legal theory either.

best to allow that positive law is valid law, but he holds that these circumstances depend on moral criteria. For instance, he is willing to reconstruct legal positivism such that the interpretive concept of law that is adopted under such a theory will turn on amoral ideas like the rule of recognition, but he holds that this interpretive concept is derived from moral/political values.³⁵

As I evaluate arguments for the Separation Thesis, I will often expose lines of reasoning hidden in these arguments that are better suited to any of these anti-positivist positions than to Hart's legal positivism. But to the extent that I draw on anti-positivism so as to criticize these arguments, I do not draw on any one of these philosophers in particular. Certainly, as I consider these arguments, I do not subscribe to Dworkin's dismissal of analytic jurisprudence, since this would shut down any discussion too soon. Meanwhile, I see no need in most circumstances to only invoke an essential connection between morality and the law once a threshold of extremeness is crossed as, within the context of refuting the Separation Thesis, the difference between a threshold connection and a constant connection is minimal.

Now, with the picture of analytic legal positivism and its opponent, the school of anti-positivism, in place, I turn to the three arguments I have extrapolated from Hart's philosophy in support of his Separation Thesis. In the next section, I will introduce each of these arguments as well as the structure of the subsequent chapters.

³⁵Dworkin considers the merits of legal positivism as an interpretive legal theory in *Law's Empire*, chapter 4, and "Hart's Postscript and the Character of Political Philosophy," pages 27-29 and 31-35. He clearly doubts that such a theory can amount to much, however.

Three Arguments for the Separation Thesis

In the following three chapters, I will outline and evaluate three arguments for the Separation Thesis that are implicit in Hart's account of legal positivism. These three arguments in their own distinct ways attempt to show that the Separation Thesis is correct in its contention that the concept of law is separate from its morality. They can be separated according to the philosophical domain to which they correspond: first, ontology, then moral pragmatism, and finally epistemology. These domains are to be characterized as metaphysical because they make claims about the world that go beyond what we might discover in ordinary experience. Over the course of these chapters, I will demonstrate how each argument fails to present their respective metaphysical claims with sufficiently philosophical reasoning. It is in this failure that the three arguments share the following mistake: they are philosophical arguments that try to forget that they are philosophical. It is possible that they might have found some success had they been articulated with reference to their philosophical foundations, but given as they are, they amount only to question-begging and incomplete thinking.

The legal positivist is tempted by the idea that she can make sense of these philosophical foundations without recourse to metaphysics, but rather by way of that elusive thing, common sense. Thus, common sense, in its many diverse forms, lies at the heart of these three arguments for the separation thesis. And while Hart first attributes this breach of common sense to other positivists such as Austin and Kelsen, along with a few legal realists and skeptics, it is clear that he thinks the greatest offense against a clear and simple reasoning is made by those who would oppose the Separation Thesis, the

natural law theorists and other anti-positivists. The claims of these anti-positivists are comparable, Hart claims, in their paradoxical nature to those made by the most extreme legal realists or skeptics, but while the realists and skeptics exhibit at least some value, in that they illuminate certain aspects of the law and in this way forward our study of it, those who assert a necessary connection between law and morals confuse one form of imperative with another, which can only stifle our understanding of the law.³⁶

So, these arguments are given from a perspective predisposed to reject their own philosophy, a feeling that metaphysics is an obstacle to legal inquiry, and that it is a willingness to adopt metaphysical views, such as the view that morality constitutes an essential component of the law, that makes anti-positivism unattractive. But no argument that antagonizes its own foundations can succeed. And, as we will see over the course of this thesis, these arguments, with some slight modifications, are by and large better suited to anti-positivist positions that are willing and able to accommodate the metaphysics that makes them work.³⁷

What follows is a brief summary of each argument. Afterward I contribute a chapter to each. These chapters will open with an account of their argument's basic structure, that is, the means by which the argument proposes to secure the validity of its conclusion. Then I will attempt to construct the argument in a table of premises leading

³⁶ *Ibid.*, page 7-8. Hart does acknowledge a kernel of truth in natural law inasmuch as it provides the scaffolding for a minimum content of law, without which no society could reasonably be expected to survive (see Chapter 9 of *The Concept of Law*).

³⁷ My characterization of Hart as antagonistic to metaphysics may be surprising inasmuch as it was one of his principal aims in taking the Chair of Jurisprudence at Oxford to reintroduce philosophy to legal academia (to my knowledge, Hart did not declare this aim, but there is substantial evidence that this was an aim of his in Nicola Lacey's biography *A life of H.L.A. Hart: the Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004), chapter 7). But Hart's idea of philosophy was profoundly influenced by the work of his peers. These were J.L. Austin, whose ordinary language philosophy required the analysis of ordinary language, and resisted metaphysical philosophy for this reason, and A. J. Ayer, who introduced logical positivism, a school that was profoundly anti-metaphysics, to the English, among others. So, while Hart is a champion of philosophy, he is nonetheless opposed to metaphysics.

to a conclusion so as to present it as clearly as is possible. The evaluation follows. I will, wherever possible, employ the strongest reasons I can manage for the positivist cause. But inevitably I must acknowledge the strength of the alternatives and close the chapter with an account of how the argument may better serve anti-positivist views.

The Existence Argument

I call the first argument the existence argument. Taken superficially, this argument is simply the positivist habit to beg the question, to establish the Is of law as distinct from its Ought by the ‘fact’ of a law’s existence being distinct from its aims. Despite this obvious flaw, there is something compelling in this line of reasoning, either in that it just seems so obvious to certain sensibilities, or that it follows from ordinary ideas concerning ontology. But this obviousness and these ordinary ideas are misleading in this case; they only serve to obscure the fact that no argument composed of reasons designed to justify a conclusion is presented here. All the same, while it is true that the existence argument is merely a restatement of its conclusion, it deserves our interest to the extent that positivists had taken it to be a revelatory restatement, convincing for its apparent self-evidence or as Hart has it, its being ‘a revealing tautology.’³⁸

Sadly, for those who are not predisposed to this understanding of the law, the existence argument’s self-evidence must be somewhat mysterious. Of course, it would be hugely convenient to find the law so discrete and unitary, so that we might evaluate it as a single experience. We might for this reason be sympathetic to the project of characterizing the law as a simple existence. But the fact remains that wherever it is not intrinsic, or ‘common sense,’ to one’s idea of a law existing that it can be considered

³⁸ “Legal Positivism and the Separation of Law and Morals”, page 600.

apart from its morality, the existence argument falls flat. In analyzing it, we do not dwell on its argumentative persuasiveness, for there is little there. Rather, we make note of its insistence on the obvious, as though the Separation Thesis were some self-validating axiom or legal cogito. This way we can map the positivist's thinking, and thereby uncover the ontological principles lying unarticulated beneath the Separation Thesis. It is perhaps best understood as an argument set out to rally those already predisposed toward it rather than to persuade anti-positivists of the Separation Thesis' validity. And it is in this rallying that we find the metaphysics, or better, anti-metaphysics, driving the positivist project.

The Political Argument

While the existence argument is merely polarizing and not at all convincing, there is in the utilitarianism that shares its history with legal positivism a moral argument for the Separation Thesis that is accessible, at least in theory, to everyone. The argument, which I call the political argument, suggests that the individual is legally empowered wherever she considers the law's existence as apart from its moral goodness. This enables her to conceive of a law-making apparatus as not beholden to matters of justice or other moral virtues, and this in turn prepares her to recognize moral ambivalence or wickedness in the law. What follows is that she will never mistake a legal imperative for a moral imperative, so that she can reasonably ask whether it is legal to act morally, or whether it is moral to act legally. In keeping with Bentham's politics, such that citizens

who obey the law ought to be equipped so as to meaningfully censure the legal institutions governing them, we may hold this individual to be better off.³⁹

While the existence argument sought to derive the Separation Thesis from the concept of law itself, the political argument only indicates the benefits we might enjoy as a consequence of adopting the Separation Thesis. It is therefore a pragmatic argument rather than a descriptive argument. But it is a sound strategy to take leave of legal ontology and look instead to pragmatism in this way because, while it may be the case that a positivist can give no argument for the factual truth of the Separation Thesis, the anti-positivist finds himself in the same position; he has no uncontroversial argument demonstrating that morality is necessarily connected to the law. Given that no argument from conceptual or analytic truth is offered on either side, we might leave such truth behind and select a conception of the law on pragmatic grounds.

But there are two weaknesses to this line of reasoning. The first is that, where legal positivism adopts a pragmatic foundation for the Separation Thesis, it must allow anti-positivism the same opportunity. That is, the anti-positivist must be allowed to respond to a pragmatic argument with a pragmatic argument of his own. So while it may be that separating the law's existence from its morality empowers the legal citizen so she is better able to discover immorality in the law, the anti-positivist may argue that bringing our moral perspectives to bear on legal matters empowers her as well.

What follows is the kind of 'endless' moral debate that legal positivism is designed to avoid. And this brings us to the second weakness: the Separation Thesis cannot operate on purely pragmatic grounds. If the legal positivist justifies her belief in

³⁹ Bentham is Hart's primary influence in making this argument ("Legal Positivism and the Separation of Law and Morals," pages 597-598).

the Separation Thesis by way of a moral pragmatic argument, she has not in this way demonstrated that the Separation Thesis inheres in the concept of law. She has only shown that, given a particular political situation, the adoption of the Separation Thesis is attractive. And if we allow that a pragmatic argument can determine the conceptual nature of an object like law, this would mean that the law is conceptually determinable by moral arguments. But if we grant that this much is true, we undermine the Separation Thesis. So, the political argument, by its very pragmatic structure, is of no use in securing the Separation Thesis as an analytic principle inhering in the concept of law.

The Explanatory Power Argument

Having failed with reference both to ontology and political morality, legal positivism turns to a pragmatic argument of a different character. This pragmatism relies on the principle that, in the absence of a determinate ontology of law, we are entitled to trust in the concept of law that best fits with our understanding of legal phenomena. That is, though we may not know the law, but might cognize in its stead only a subjective image of how the law appears to us, we may construct a pragmatic argument stating that we ought to adopt beliefs matching with that image, and treat them as beliefs that apply, for our purposes, to the law itself. If we can show that the Separation Thesis has an epistemological merit such that it matches with our understanding of legal phenomena, we may allow it a pragmatic validity inasmuch as we take the objects of our understanding to mirror objects as they really are. Of course, this epistemological merit says nothing about the law in itself, but deals only in our ability to make sense of the law as we, as finite human thinkers, understand it. This epistemological merit is to be

measured in terms of explanatory power, in terms of the extent to which a theory explains the law to us. I call this argument the explanatory power argument.

Whichever legal theory provides the greatest explanatory power is valid according to this line of reasoning. Legal positivism suggests that considerable explanatory power is housed within the Separation Thesis inasmuch as it situates the law in a moral vacuum where we can consider the character of the law on its own, irrespective of its consequences or pursuits in morality or politics. Hart makes case for the virtue of candour as following from the Separation Thesis along these lines.⁴⁰ By entwining our moral arguments with the law, he argues, we risk obscuring unfortunate legal truths for the sake of emphasizing urgent moral concerns. If we follow Hart by recognizing in the law the possibility that it may fall short of our moral standards, our assessment of the law need not be distorted by our efforts to understand all legal phenomena through the lens of a right morality.

The pragmatism at work in this argument bears a different character than that found in the political argument. It argues that we ought to adopt a belief insofar as it improves our understanding of the law. But what this means is that legal positivism, according to this argument, improves our *beliefs* with reference to their object, as opposed to, as is argued in the political argument, improving our political situation. This is exactly what a fact accomplishes; where we recognize a fact of the law, we recast our beliefs to include it, and in this way improve our knowledge of the law. Of course this only means that this kind of pragmatism has the same *effect* on our beliefs as a fact; it does not mean that the conclusions of the explanatory power argument indicate a direct factual path to the concept of law. But there is a factual basis for the explanatory power

⁴⁰ In "Legal Positivism and the Separation of Law and Morals," pages 618-621.

argument to the extent that it draws on facts about how we understand the law, about the appearance of the law to us. In line with a pragmatic interest to determine the metaphysics of law to the extent available to us, we allow the explanatory power a kind of quasi-factual power that we could not find in the pragmatism of the political argument.

But this argument fails along with the rest because it never properly explains how it happens that legal positivism delivers greater explanatory power than its opponents. As before, where the pragmatic arena for argument is established, anti-positivism will arrive with arguments of its own, and there is nothing in the explanatory power argument that can show which of the two is the stronger. To settle this matter, I draw on Immanuel Kant's epistemological theory so as to develop an objective standard that may act as arbiter between the positivist and anti-positivist camps. Kant does provide a means of justifying legal positivism's analytic project to the extent that he awards validity to concepts, such as the concept of law, that guide us through legal phenomena by unifying them into a single comprehensible whole. But he also opens the door for just such an analytic project from anti-positivism. And anti-positivism, in its synthesizing the law's existence with its morality, unifies our legal experiences more completely than legal positivism can. This suggests that it is anti-positivism that better serves our understanding of the law.

Apart from these three arguments, I am at a loss to discover a reason to adopt the Separation Thesis. And in the light of their failures, we find ourselves with *no* reason to adopt legal positivism. Of course, this on its own does not defeat legal positivism; there are those that will be drawn to it because they see in it the potential for additional argument. But until that potential is realized, legal positivists will find themselves unable

to persuade others to their cause, or even to justify their own positivistic beliefs. This, though admittedly not altogether damning, does not bode especially well for them.

CHAPTER 1

The Existence Argument

We begin with the existence argument. I look to it first because it serves as a general introduction to the legal positivist's metaphysics. The argument itself is weak, but the fact that it is made so vehemently and despite its apparent weakness reveals much about how advocates of the Separation Thesis are committed to its component parts, for instance the idea of a 'common sense' reality, the discreteness of individual beings, and the supposed analytic simplicity of existing things. They take the existence of a thing to be a concept onto itself, cognizable in isolation. Were this the case for the law, the Separation Thesis would obviously be valid because the law could be treated in a conceptual vacuum, entirely divided from its morality. But these ontological beliefs require exactly the same proof as the Separation Thesis, for they come to the same thing. We cannot argue that the law is separable from its morality on the ground that the law is a discrete being the likes of which we can isolate from our moral pursuits and concerns, for this clearly amounts to question-begging.

However, the true philosophical weakness of analytic legal positivism does not lie in the question-begging of the existence argument, but in the assumption that its notions of existence are anything more than the very metaphysical fictions positivism claims to avoid. For these notions are nowhere explained or justified, but are rather expressed indirectly and without argument in the positivist idea of the law as a clear, unified, formal existence distinct from its morality. While it is perhaps the case that these ontological notions deserve some respect inasmuch as they are of vital importance to our

philosophical history, we simply cannot accept them as axioms, self-evident truths, or ‘common sense’ items not needing argument.

The Basic Structure from the Alleged Discreteness of Being

The existence argument makes a purely descriptive claim; it asserts that an analysis of the concept of law will turn up the Separation Thesis. Its aim is to put the law in the same ontological space as ordinary objects, so as to emphasize that the law is not a divine command or similarly mysterious thing. This argument says plainly that the law is the law, and morality is morality, and suggests that it is unnecessary to tie these things together in complex relationships. The existence argument maintains that they exist discreetly, separate from one another.

But in arguing in this way, the existence argument depends on the idea of the discreteness of being, and this idea does not apply in every case. Consider some examples from set theory: set A is distinct from set B if they do not share any members, and set C and set D are not essentially connected if they only share some but not all members. If set E’s members are all housed within set F, and set F contains no additional members, then set F is synonymous with set E; the one cannot exist without the other, and they are not distinct. But if set G’s members are all housed within set H, and set H does contain members that set G does not, then set G cannot exist unless set H also exists even though the two are distinct. I oversimplify here to make a point: it is possible that the law is something like set G and morality is something like set H.

Now, I’ll grant that it is strange to suggest that the law is a subset of morality. But I mean only to indicate that, though we may be inclined to grant that the law is the

law and morality is morality, this does not necessarily demonstrate that the one is distinct from the other.

The Existence Argument from Austin

In his “Legal Positivism and the Separation of Law and Morals,” Hart begins his account of the Separation Thesis with Austin, and it is there that the existence argument is stated most plainly:

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. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.⁴¹

It is clear that there is an argument there, but it is difficult to know exactly how Austin wanted it structured. With some charity, and substantial speculation, this is likely it:

Premise – The existence of the law is ontologically/epistemologically/obviously distinguishable from its morality.

Conclusion – The Separation Thesis is valid.

The premise of the argument can be cast in three separate ways, one in keeping solely with the ontology of law, another with our epistemological access to that ontology, and the third from obvious ‘common sense.’ Austin hops between these separate ways throughout this passage as though the one were equivalent to the other. In many ways they are, for they follow from the same ontological beliefs given without argument, and lead to the same thing, namely, a restatement of the Separation Thesis. But it is

⁴¹ John Austin, *The Province of Jurisprudence Determined* (Library of Ideas Ed., 1954) pages 184-5.

profitable to explore each in turn so as to understand three separate philosophical dimensions through which the Separation Thesis may be restated. I will tackle first the ontological path that follows from the bald declaration of the law's existence as a fact discretely removed from our attitudes, evaluative and otherwise, toward it. Then I will consider Austin's claim that our inquiry into this existence is to be undertaken apart from our inquiry into its conformity to our moral standards. Finally, I will look to the claim that the Separation Thesis is 'so simple and glaring' that its validity ought to be obvious to anyone thinking sensibly on the subject.

The Existence Argument as a Bald Ontological Fact

Austin begins with the statement that the law's existence is one thing, its merit or demerit another. Clearly, if this were true, the Separation Thesis would hold. But separating the Is of a thing from its Ought is a foray into metaphysics that touches on two especially cryptic philosophical provinces: the ontology of the thing in question, that is, what it is that constitutes its existence or being, and its teleology, which is an ontological attribute that relates the existence of a thing to its pursuits or ends. Neither is explored to any significant degree in this case.⁴² Without an account of exactly how we are to

⁴² Hart does provide a sketch of ancient Greek teleology as the genealogical source of natural law theory (*The Concept of Law*, pages 188-91). While he is right in recognizing this connection, he does not demonstrate a sufficient understanding of Greek teleology and as such, he dismisses the idea far too quickly. He has 'the notion that a stone on falling to the ground is realizing some appropriate 'end' or returning to its 'proper place', like a horse galloping home to a stable, is now somewhat comic' (pages 189-90). But this oversimplifies the matter, for the ancient Greek teleologist had in mind the whole of being, rather than a single falling stone. Once we understand that falling stone as moving in accordance with gravitational laws that direct an expanding universe, the teleological picture begins to take shape.

Alternatively, we may adopt a teleology of the kind Immanuel Kant championed in his later work. This teleology states that we are only conceptually able to structure our experiences of the world if we can posit some purpose onto it. This idea suggests that we must take the stone to have fallen according to its 'end' as it is only in this way that we can make sense of its doing so, and go on to construct physical theories explaining why it is that stones fall. Both of these variants of teleology demonstrate significant philosophical sophistication, and for this reason I cannot give them the summary they deserve here. But

understand the positivist's ontological conception of the law, and how we are to dispute a teleological conception of the law, the existence argument is mysterious.

What makes the metaphysics especially complex in this instance is that we are dealing with an abstract object, one not given to empirical inquiry. This means we cannot fall back on our most familiar ideas about reality, which generally play on the firmness of sensory experience. There is a concern that wherever we take leave of this familiarity and attempt to determine the ontology of abstract objects, we risk veering into irresolvable metaphysical debate, or worse, obscuring the matter at hand with distant and peculiar theories of being. Hart is quite good at illustrating just how frustrating these debates and theories can be; he says 'the disputants on one side seem to say to those on the other, 'You are blind if you cannot see this' only to receive in reply, 'You have been dreaming.''⁴³ But our leaving behind our comfortable ideas about reality does not mean that no meaningful philosophical work can be done, only that the work will be difficult.

This unwillingness to grapple with the complexity of legal ontology is not unexpected. It is worth reflecting on the fact that legal positivism was conceived in a philosophical environment that was frustrated with the constant controversy of metaphysics, especially where it was made to compete with the latest successes of the sciences. That environment had developed out of Hume's attack on metaphysics as a doubtful source of knowledge, and it would infuse the spirit of British philosophy until the present day, emphasizing a down-to-earth reasonableness, at times juxtaposed starkly

that more on the matter deserves to be said, and that Hart merely brushed the surface before subsequently losing interest, is clear.

⁴³ Hart, *The Concept of Law*, page 182. Hart describes 'the proposition that the ways in which men ought to behave may be discovered by human reason' as giving rise to this kind of argumentative futility. But he must be made to realize that while moral argumentation encounters this difficulty as a matter of course, analytic jurisprudence suffers from a similar problem. Whenever Hart makes statements such as these, it is implied that positivism can somehow escape, or does not deserve, philosophical controversy. But this is not the case; it must confront the controversy and attempt to resolve it.

against the radical metaphysics taught on the continent. In this spirit, British philosophers emphasize a common sense conception of reality, primarily so that we can access the truths of the world unclouded by bizarre metaphysical abstraction and skepticism. I believe that the existence argument springs from this British philosophical sensibility, and it takes the shape it does because it wishes to reinforce this emphasis on common sense.

This sensibility has brought about much successful philosophical work, specifically in reining in the most egregious metaphysical theories. As an example, consider G. E. Moore's 'here is a hand' argument, with which he disputes real world skepticism, that is, the position holding that any objective knowledge of the world is impossible because our experiences of that world are mediated by a subjective cognitive apparatus that is easily fooled.⁴⁴ Put simply, this real world skeptic advances the claim that all reality is a dream appearing to a consciousness that mistakes the dream for the real thing. She is able to do so because we cannot prove that the world is not a dream; our every attempt relies on evidence that may also be the product of a dream. From there, she may suggest that my hand is merely a fantasy of that dream. The common sense thinker, on the other hand, is allowed to move in the opposite direction; Moore can begin with the fact that we cannot show that his hand does not exist, and conclude from that fact that reality is no dream, since the hand within it really exists. Both arguments, from a purely logical standpoint, are equally reasonable, as they start from premises that are both true: that we cannot be completely certain that we are not dreaming, and that we cannot be completely certain that our hands are not really here in front of us. Of course,

⁴⁴ This variant of the argument is given in an article entitled, quite significantly, "A Defense of Common Sense" in *Contemporary British Philosophy* 2nd series [1925]).

this does not mean that we are free to choose one line of reasoning over the other; the philosopher must side with Moore and hold that our hands are objects that really exist. For how can philosophy justify traipsing down the path of abstraction, as if merely for the sake of saying something unusual, when we might have chosen to speak in ordinary, common sense terms? In keeping with this sentiment in Moore, the British philosophical attitude will advance a common sense conception of reality over metaphysical speculation or skepticism wherever possible.

Of course, legal positivism does not hold that the Separation Thesis is empirically discoverable in legal phenomena, or not to the degree that the existence of my hand is discoverable in my direct observation of it. But Hart does draw upon a remarkably similar reasoning in his account of our obligation to recognize the potential of evil in the law:

If with the utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. So perhaps the most important single lesson to be learned from this form of the denial of the Utilitarian distinction is the one that the Utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.⁴⁵

Though he does not here speak of the law's fundamental ontology, he does presume that the Separation Thesis is immanent at least in our 'plain speech.' This passage articulates the existence argument as following from common sense, in keeping, I think, with the British philosophical tradition I have described.

⁴⁵ "Legal Positivism and the Separation of Law and Morals," (1958) 71:4 Harvard Law Review, page 621.

But can we say this much of the law's existence, that it is a common sense fact that the legal Is is distinct from its Ought and that the claim of morality as a necessary component of the law is a mere philosopher's chimera? If the law were a physical object accessible to our perceptual experience, we could fully endorse this British attitude, since we could look to the testimony of that experience just as Moore looked to his hand raised before him. But the law is complex, our experiences of it severely mediated, and susceptible to confusion. Devising a proof from 'plain speech' is a peculiar strategy to begin with, for is it ever the case that our legal language is plain? It may be that in light of the brave new world of the language philosophy of his time, Hart thought the evidences of language would demonstrate the same firmness and predictability we find in physical experience. But this is not the case, for even if he is right that the Separation Thesis speaks to our ordinary conception of the law, that is, our simple conception, taken apart from philosophical debate and sophistry, this does not necessarily direct us to the fundamental concept of law, at least, not in the sense that our experiences of physical phenomena directs us to truths about the empirical world. This is because our ordinary language can be wrong in a way that our ordinary experiences cannot. Otherwise, how could Hart explain the language practices of Aquinas' era, where ordinary talk of the law typically dwelled on morality's role within it?⁴⁶

⁴⁶ I will grant that the issue is much more complex than I treat it here. But an excursion into the language philosophy of Ayer, J. L. Austin, Russell, and Moore, particularly to the extent that they derive an empiricism from logical positivism, is far beyond the scope of this thesis. All the same, we might reasonably accuse Hart of failing to make clear the relationship he took to exist between legal language and a determination of the law in itself. His opening the *The Concept of Law* with a line from J. L. Austin ("a sharpened awareness of words to sharpen our perception of the phenomena," page vi) suggests quite a lot, but does not explicitly tell us anything about this relationship.

Some Additional Objections to the Existence Argument as a Bald Ontological Fact

It is enough to disprove the existence argument conceived as a bald ontological fact by drawing attention to its question-begging. But there is more to be criticized in this argument. Suppose we grant the legal positivist this ontological fact. We know then that it exists, and that it is potentially amoral. But otherwise, what is it? From an ontological perspective, legal positivists seem to have neglected this question. And there is danger in this neglect, for the characterization of the law as a bald and glaring Is without a thought to its ontological content can inspire Kafkaesque monsters of bureaucratic fatalism. Where this Is is left empty, laws will be enforced without understanding, indeed, without identity. What is the legal subject to make of such a law? Obedience for moral reasons is already off the table where positivism is concerned, but if the law is left undetermined, can we even make sense of obedience for legal reasons, for positivism's minimal aims of stability and survival? Or would we find ourselves like Joseph K., having to answer to charges about which we know nothing, and appear before courts that make no sense? Perhaps it is this failure to determine the positivist legal Is that inspires the common sentiment that the law is a faceless and removed institution, disconnected from any relatable social aims or purposes. But if we were to side with anti-positivism, and define the legal Is by way of its Ought, in this way fleshing out what we mean by legal ontology, we would eliminate this problem.⁴⁷

⁴⁷ Of course, it is Hart's point that the law can be this faceless and removed institution, disconnected from any relatable social aims or purposes. This is why he prescribes that we adopt the Separation Thesis so we do not expect it to be relatable in this way (See Jeremy Waldron "All We Like Sheep" and Leslie Green "Positivism and the Inseparability of Law and Morals; for a response see Michael A. Wilkinson "Is Law Morally Risky? Alienation, Acceptance and Hart's Concept of Law" Oxford Journal of Legal Studies, Vol. 30, No. 3 [2010]). But my point is that legal positivism seems to bring about the very opposite: it causes us to expect *immorality* from the law, and this is just as likely to distort our understanding of the law as the expectation of morality (though as Waldron suggests, and Green declares, Hart intends that we expect immorality from the law).

Consider Radbruch's complaint that legal positivists can define the law via the proclamation 'law as law' as though this were some eternal truth standing incontrovertible over our inscrutable moral concerns. It is possible that this attitude contributed to the German legal culture that allowed Nazism to do its work 'within' German law.⁴⁸ Admittedly, this is only a moral concern; the positivist may respond that it is not her project to prevent immorality at the hand of the law, but rather to record all legal phenomena, whether they lead to good or to bad. But Radbruch's criticism not only suggests that legal positivism can lead to enormous immorality. As Fuller points out, Radbruch also reported that the Nazi regime was able to enact 'secret statutes' within the German legal culture of the time.⁴⁹ Surely secret statutes pervert Hart's rule of recognition, in this way undermining even the positivistic notion of amoral law. If 'law as law' made possible the legal attitude that could admit these statutes as law, then it follows that legal positivism contributes to the erosion of its own concept of legality. That is, in failing to ask for a determinate legal Is, positivism brings about such legal apathy that we not only waive the requirement that laws be moral, but also the requirement that they be formally promulgated.

So, the Separation Thesis is of no use to us, and is perhaps a danger to us, if the meaning of the law's existence, its Is, is left empty. If this variant of the existence

⁴⁸ As reported by Hart in "Legal Positivism and the Separation of Laws and Morals", on page 617. Hart's reply to this complaint dwells on the fact that in Britain, utilitarian legal positivism went hand in hand with liberalism, while in Germany it has been associated with fascism, so he takes the fault to lie with German politics rather than with positivism itself (page 618). We may grant that which political ethos we find implicit in legal positivism falls to the attitude we bring to the question of the law's existence. But if positivism does not properly determine this existence, then it leaves open the conceptual space for something as sinister as Nazism to take root. We can hold a theory accountable for this reason, that is, for not explicitly denying Nazism a place.

⁴⁹ In "Positivism and Fidelity to Law: a Reply to Professor Hart," page 651. Fuller's treatment of Radbruch's account of law in and after Nazi Germany (pages 648-57) is perhaps more faithful to the facts than is Hart's (in "Legal Positivism and the Separation of Laws and Morals," pages 617-22).

argument is to accomplish anything, it must say more than ‘the existence of the law is one thing; its merit or demerit another.’ It must tell us exactly what this existence is. This means that we can only argue for the Is of the law as distinct from its Ought alongside a companion theory describing how it is we are to discover and understand the law’s existence. Positivism has a few companion theories up this task: there is Austin’s command theory, whereby the Is of the law is determined by the sovereign’s command. There is also Hart’s rule of recognition, with which any society may determine their law with the help of a test of their own devising, such as through a constitution or law-making parliament. Both are designed to direct us to the down-to-earth appearances of the law as an existing thing, beyond a mere ‘law as law.’ The command theory is undoubtedly the weaker of the two; it threatens metaphysical abstraction inasmuch as it requires a readily identifiable sovereign in order to determine the Is of the law. In certain societies, such as contemporary democracies, no such sovereign is to be found. In these cases, Austin asks that we posit the existence of a habitually obeyed sovereign onto the electorate, but as Hart himself demonstrates in his exposition of the command theory, to do so would only complicate the source of the law, in this way undermining the intended simplicity of the positivist project.⁵⁰

Notwithstanding the failings of the command theory, both it and Hart’s positivism modeled on the rule of recognition share the goal of depicting how it is possible to understand the law as an Is, and they do so with a relative clarity and disambiguity, so that legal theorists following them can be said to be unburdened of the uncertainty and never-ending debate of moral reasoning and metaphysics. It should be noted that because the Is of law is an empty vessel without these companion theories, Hart is wrong in his

⁵⁰ *The Concept of Law*, pages 71-8.

belief that opponents of Austinian positivism were confused when they took a critique of his command theory to amount to a critique of the Separation Thesis itself.⁵¹ In fact, their strategy was sound; as the command theory was the primary means by which the Is of the law was animated under the positivism of their time, their attack on the command theory, if successful, would deny the Separation Thesis its companion theory, which leads us back to the issue of the undetermined legal Is. In this way, legal positivism depends on a companion theory, and should it happen that that companion theory is defeated, legal positivism must die with it unless another companion theory is found.

But the fact that we need a companion theory to determine the legal Is only more completely condemns the existence argument as question-begging, since this would mean that not only does an argument for the Separation Thesis following from the ontology of the law largely presuppose the Separation Thesis, but it must also presuppose the companion agreement with which the Is of the law is made meaningful. This reliance on a companion theory is particularly damning because where the companion theory is unstated, we are left with a mysterious legal Is. But where it *is* stated, our argumentative work is doubled, for we have to prove both that the companion theory is valid and that the existence argument is valid. Moreover, the existence argument articulated this way must *begin* by proving its companion theory valid, before it can move to the Separation Thesis. This subordinates the one to the other such that the centre of legal positivism is shifted away from the Separation Thesis toward some companion theory or other. If this

⁵¹ “Legal Positivism and the Separation of Law and Morals,” page 601. Hart has “It is possible to endorse the separation between law and morals ... and yet think it wrong to conceive of law as essentially a command.” While this is true, it is only possible to do so when one has on hand a theory with which to replace command theory. Of course, Hart has just such a theory in his rule of recognition, but Austin’s critics did not.

were the case, we could not say that Hart and Austin are engaged in the same positivist project because they diverge in their determination of the legal Is.

So much, then, for this strategy of proving the Separation Thesis by holding it to be immanent to the law's ontology; we need more than the bald declaration that this is so, even if this declaration evinces common sense or plain speech. But as yet we have assumed that the existence argument must prove that amorality is an essential part of the law's existence, that it is discoverable in the concept of law. The Separation Thesis does not require that amorality appear in this essential capacity; it only requires the possibility that the law be separate from its morality. This means that the existence arguments needs only to demonstrate the *possibility* of the law's Is as distinct from its Ought. If we can establish that it is logically possible for the law to exist distinct from its morality, then we need not determine its specific ontology, but rather we must only designate that the law has, as a quality immanent to its being, this possibility of amorality.

The Existence Argument from the Logical Possibility of Amoral Law

“Whether [the law] be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” This assertion admits of a few meanings; on the surface, Austin seems to be saying that, given an academic division of labour, one group of scholars must *specialize in the question of whether or not the law exists*, and another group must deal in the conformity of law to morality. But it is far more interesting to read Austin such that he speaks of the character of the law that might give rise to such a division of labour. That is, he means to say that this pattern of specialization is not merely the product of some arbitrary academic convention, but it is

rather a reflection of the structure of the law itself, as we epistemically access it.

Because this possibility of a realizable amoral law is not committed to any specific ontological content, meaning that it does not specify the law's Is, proceeding in this way distances the existence argument from substantive ontology. The positivist that takes up this line of reasoning needs only state that we can cognize the law as having no moral content, that there is no logical impossibility in it. We need not know exactly what the law is in order to accomplish this, for we can cognitively remove morality from the idea of law even if that idea is empty, just as I can make sense of the statement that some number X is not five, though I do not know what X actually is. This brings us to the existence argument presented as an epistemological argument stating that it is one inquiry to ask if the law exists, and a separate one whether or not it is moral. It is still ontological in spirit, since we are proceeding from a quality we take to be immanent in the law, namely the possibility of amorality.

We may say provisionally that Austin is right; one *can* investigate the law's existence apart from its morality, and this is true because we seem to be cognitively able to separate the one from the other. But the weakness in this line of reasoning is apparent: its premise is insufficient to prove its conclusion. Consider that we can just as easily conceive of the sun failing to rise tomorrow, but we do not take this to mean that we ought to doubt cosmological theories that deny this will happen. Those theories are only disproved if it actually happens that the sun fails to rise. Likewise, the possibility of amorality is not enough; if we are to deny anti-positivism, this possibility must be actualized, that is, the amoral law must actually exist at one point or another. But analytic jurisprudence cannot show that this amoral law exists, for such an existence

cannot be shown to follow from the concept of law. So all this argument can tell us is that there is no logical contradiction preventing us from adopting the Separation Thesis as a belief. Of course, we will grant that the concept of law as an essentially amoral object may not be some unthinkable idea, like a square circle, but that this is so does not make positivism any more attractive. We are not shown that this belief would be right.

On top of that, it is worth doubting whether we can truly separate the one from the other even cognitively. Perhaps this doubt seems silly, since our being able to think the one separate from the other is proven in our merely thinking a simple thought, just as Hart's fantasy of securely-armoured crab-individuals demonstrates that laws prohibiting violence are not necessary components of every legal system, but are rather contingent upon our human capability to do harm to one another.⁵² But it can happen that we fail to know that which we think; we cannot allow our subjective experience even of our own thinking to be accepted as trustworthy testimony. Consider Fuller's response to the Separation Thesis:

We must remember that those distinctions which seem too obvious to require analysis are often precisely those which will not stand analysis. Common sense tells me that there is a clear distinction between a thing's being a steam engine and its being a good steam engine. Yet if I have a dubious assemblage of wheels, gears, and pistons before me and I ask, "Is this a steam engine?" it is clear that this inquiry overlaps mightily with the question: "Is this a good steam engine?" In the field of purposive human activity, which includes both steam engines and the law, value and being are not two different things, but two aspects of an integral reality.⁵³

⁵² "Legal Positivism and the Separation of Law and Morals," page 623. Hart explores this fantasy in order to establish that non-maleficence is not a necessary component of a legal system, since these crab-individuals would not require that the law protect them from harm. Non-maleficent laws, such as those that forbid violence, depend on the fact that humans are constituted in such a way that they cannot defend themselves against each other, so that they are dependent on laws that account for this vulnerability.

⁵³ Lon L. Fuller, *Law in Quest of Itself* (Union, The Lawbook Exchange, Ltd., 1999) page 11.

In my thinking of a steam engine, there is the presupposition of its being good according to its purpose, and in the absence of this presupposition I am left only with the gibberish of a raw experience: wheels, gears, pistons; alternatively lawyers, constitutions, prisons. And with this in mind, we come to the following question: how is it that I might make sense of something so complex as the law without orienting my thinking with regard to its purposes? It may be that it is only by way of these purposes that I can navigate my legal experiences so that I can perceive the law as a sensible object. Dworkin's answer to this question, as it happens, is especially similar to Fuller's suggestion here, in that he argues that we are led by our interpretation of the law to assess it under its 'best light', so that, again, our cognition of the law requires a moral component from which a 'best light' can be produced.⁵⁴

A move in this direction would amount to accepting what I call a teleological epistemology with regard to the law. A teleological epistemology states that there are certain objects that, because of their complexity, are only knowable as existing with reference to their design, purposes, or ends. It does not state that knowledge of *every* object requires an assessment of its purpose, for Fuller does recognize the engine's wheels, gears, and pistons as sensible objects even where their use is unclear. Additionally, it does not follow from a teleological epistemology that the *ontology* of an object requires reference to its end, only that our own cognitively accessing that ontology requires this reference. According to teleological epistemology, it is our human

⁵⁴ The name Dworkin gives to this cognition of the law as under a 'best light' is constructive interpretation. He holds that we do not access the law as an observable and ready-made fact, but rather we construct our idea of the law by orienting its historical facts under some conditioning value, such as justice or fairness. It is this conditioning value that provides the 'best light' under which the law comes into view. So, for Dworkin as well, the Is of the law is discovered only by way of its Ought. (Chapter 2 of Dworkin, *Law's Empire*).

experiences of the law, mediated as they are from this Is by a finite mind, that require a teleological element. So even if the positivist is right in her suspicion that an object such as the law exists as a discrete unity apart from morality, teleological epistemology may yet hold, since it may happen that our cognitive path to that unity involves moral reasoning. I emphasize what little is implied by teleology in epistemology so that we see that it does not antagonize our comfortable, 'common sense' notions of reality to the degree to which it may seem. It is not some fossil from ancient Greece, but rather a legitimate option for legal theorists.⁵⁵ Legal positivism is of course positioned against this line of reasoning; the falsity of teleological epistemology is one of its unarticulated metaphysical presumptions.

Legal positivists may protest that a teleological epistemology of law is not always to be found in our ordinary experiences of legal phenomena. For instance, our ordinary thinking is likely to allow that a dubious assemblage of wheels, gears and pistons is a genuine steam engine if it happens that we see it wheeled out of a steam engine factory. The conventional appearance of law is often enough to convince us that we have before us the real thing. And if this is the case, how can we claim that we are driven by the purposes immanent in our legal understanding to a moral conception of the law? Perhaps it is better to characterize our legal understanding as answerable to social practices, and especially to the authority of legal experts, rather than to the pursuits we might find for the law.⁵⁶

⁵⁵ I follow Hart in his discovering a teleological notion of the law at the root of the natural law tradition opposed to the Separation Thesis (*The Concept of Law*, pages 183-7). While this might come as something of a surprise to the adherents of that tradition, it seems to be the only available way that the existence of a law can be constantly fastened to its moral success.

⁵⁶ And what is worse, if we assume a teleological epistemology of the law, we may for this reason come to expect that posited law mirrors objective morality. Again, Jeremy Waldron, and especially Leslie Green, suggest that Hart's goal in advancing the Separation Thesis is simply to reinforce his warning that the law

The teleological epistemologist would reply that our ordinary thinking is simply confused; just as we must not assume that positive law brings about a just legal order, so too would we not assume that positive law amounts to valid law. The fact that I might mistake a gas-powered engine for a steam engine does not undermine the fact that our determination of a steam engine begins with the question ‘is it a good steam engine?’ At any rate, it is reasonable to allow teleological epistemology this wriggle room since it is concerned with a legal understanding that is fallible.

And as to the success of legal positivism in speaking to our ordinary legal thinking, it is possible to attribute legal positivism’s popularity amongst both laymen and academics to its historical influence over the past several centuries. Because it was championed by Britain at the peak of its empire, it spread easily. Such was the gravity of British power in the key moments of many societies’ legal development that it was able to eclipse even the natural inclinations of our legal understanding.⁵⁷ And this is only the most readily apparent effect British rule brought to the legal world. There is a subtler effect that might also be the source of a propensity to endorse the Separation Thesis: legal

is “unfortunately compatible with very great iniquity” (*The Concept of Law*, page 207) in their papers “All we like Sheep” and “Positivism and the Inseparability of Law and Morals.” In his paper, Green suggests that the Separation Thesis should not be read as an analytic claim, but must rather only be read in this cautionary capacity; it suggests the amorality of the law so that we never assume that our laws are just, so that we are constantly prepared to discover immorality in our law. If this is the case, then I not only miss the point of Hart’s legal positivism, but also risk advancing a line of reasoning that obscures this very warning. I think though, that I am in the clear since a teleological understanding of the law requires that we find some valid purpose in the law in order to make sense of it. This requires that we actively evaluate the law; it does not allow that we become what legal positivists fear most, that is, passivists “who argue: ‘this is the law, therefore it is what it ought to be,’ and thus stifle criticism at its birth” (“Legal Positivism and the Separation of Law and Morals” page 598).

⁵⁷ This claim that legal positivism owes its popularity to imperialism is to be verified by sociological inquiry, the likes of which are far beyond the philosophical ambitions of this thesis. But I think it fair to say that this view plays a role in the common view that Hart’s idea of the pre-legal society paints a picture of a primitive state ready to adopt something like a British legal system. I know this view is common because legal positivists are especially keen on disputing it (see Leslie Green, “The Concept of Law Revisited” (1996) 94 Mich. L. Rev., pages 1698-1699, and Waldron’s “All we Like Sheep” at page 174, also to an extent MacCormick in *H.L.A. Hart*, page 108). While they are right that Hart did not intend for his idea of the pre-legal society to be read that way, the reason this mistake is so often made is that legal positivism is historically associated with imperialism.

positivism provides an easy means of making sense of an otherwise inscrutable bureaucracy. For when we are met with such bureaucracy, installed perhaps by some distant British colonial, and we see only wheels, gears and pistons, it is easier to assume that this bureaucracy is in place simply because some other bureaucracy put it in place, and on and on. It is significantly more difficult to develop the imagination required to discover some purpose behind these bureaucracies, to make sense of them teleologically, or by way of a Dworkinian constructive interpretation. But this is no excuse; it is in fact an especially cynical view to adopt with regard to social institutions.⁵⁸

Thus, the epistemological version of the existence argument fails along with the first. It takes the appearance of our thinking the law as distinct from its morality as amounting to proof of our capability to cognitively separate the two, but this appearance may yet be misleading. Teleological epistemology seems to be at least as reasonable a way to settle the issue of how we cognize the law, but it is denied by legal positivism without explicit argument.

The Existence Argument from Obviousness

Finally, the existence argument can be cast as following from its being obvious. There is very little to this line of reasoning, as it takes too much for granted. As Fuller puts it, the Separation Thesis “may serve as the legitimate end of [the positivist’s] activities; it cannot serve as its starting point.”⁵⁹ But it is here that we can see most

⁵⁸ This is my answer to those who might counter that British rule brought the Common Law tradition to the colonies, and that this tradition is often opposed to legal positivism. Certainly from the perspective of British legal philosophy, the Common Law tradition and legal positivism are at odds. But from the perspective of a colonized people, this fiction is not obvious; according to this perspective, both are alien institutions with cryptic purposes.

⁵⁹ Fuller, *Law in Quest for Itself*, page 7. It may be that Fuller intended in this passage to deny positivism the strategy of adopting the Separation Thesis as an axiom, that is as a posited starting point from which to

clearly the metaphysical vulnerability of positivism: the legal positivist is willing to assume a particular analytic claim, as well as to forego any meaningful argument in support of this claim, on the bogus ground that it is clearly or glaringly true. It is on the back of this argument from obviousness that we can explain the positivist's ambivalence toward presenting any metaphysical reasons for the adoption of the Separation Thesis. Metaphysics ought to have been the first place they looked for these reasons, as the Separation Thesis is a metaphysical principle dealing in both ontology and teleology.

Of course, there are dangers in the practice of metaphysics. But there is also danger in our flight from metaphysics; just as certain arguments or positions may deserve our suspicion for their being alien or counter to our common sense, such as the Cartesian skeptic who suspects all reality may be a dream, we must also be suspicious of that very common sense, of the ideas that appear intuitive or immediate to our comfortable notions of truth. Immanuel Kant says 'to appeal to common sense when insight and science fail, and no sooner – this is one of the subtle discoveries of modern times, by means of which the most superficial ranter can safely enter the lists with the most thorough thinker and hold his own.'⁶⁰ While I'm willing to grant that he exaggerates the issue, he exemplifies the metaphysicist confronted with a stubborn 'common sense.' The message he brings to our confrontation with common sense is that we must not let it loom over our reasoning like some immutable authority. And in keeping with this message, legal positivists cannot claim to be Moore asserting something so intuitively true as 'this is my hand, it is

demonstrate the truth of the overall positivist project. If this is the case, I quote him out of context, since I hold that positivism believes the Separation Thesis is *proven* from the start by way of its obviousness. This distinction is likely unimportant; in either case we demand of legal positivism that it ground the Separation Thesis in stronger arguments than we have yet seen.

⁶⁰ In his *Prolegomena to Any Future Metaphysics*, translation by James W. Ellington (Cambridge, Hackett Publishing Company, Inc., 1977), page 259.

clearly real' in the Separation Thesis. For one, Moore attacks a position, real world skepticism, that is obviously opposed to common sense. But we cannot say the same about a theory of law derived from something like teleological epistemology, for it in fact accords with a good deal of our legal thinking. And second, Moore deals with perceptual experience, not some ontologically complex object, such as the law.

So we must ask of legal positivism, what is this ontology they call 'common sense?' It is significantly more complex than a Moorean appeal to that which comes intuitively to our thinking. Consider Hart's claim that legal positivism does not entail non-cognitivism, that is, the position holding that moral reason, proof, or sensible argument are impossibilities.⁶¹ That Hart allows for the possibility of productive moral argument is well and good, but to what extent does he permit this argument a place in the law? It is implied in his positivism that he take morality to inhere only in the existence of explicitly moral objects, for instance justice or fairness; all other objects, and the law among them, do not touch on morality in their essential existence. These moral objects, it is implied though not articulated by the positivist ontology, establish morality's special province apart from the 'real world,' apart from the constitution of existing things. That is, though they may be said to really exist as moral truths, they do not figure into our non-moral world, but rather are apart from it, in some distant metaphysical dimension. As such, positivists can only allow moral objectivity an especially narrow conceptual space. We must be curious: where does this narrow space come from? What is it about moral objects that discreetly separates them from real world objects? How do we relate the moral object of justice to the non-moral object of positive law? Positivism does not tell us, and we can hardly blame them, for these questions present difficult philosophical

⁶¹ "Legal positivism and the Separation of Law and Morals," pages 626-9.

problems. Isn't it that much simpler to allow moral objects to exist in the 'real world' alongside ordinary objects? There is some added complexity in mixing the two together, but whatever complication this might introduce is dwarfed substantially by the difficulty of constructing from out of our philosophical thinking a distinctly moral realm, just so that we can hide justice there.⁶²

What's more, legal positivism does not even assure morality a place in legal philosophy. Hart must hold that whether or not a society involves morality in its law is a matter to be arbitrarily decided by its history, by the conventions that animate its social life. Perhaps this is not non-cognitivism, but it retains a non-cognitivist spirit: while non-cognitivism de-legitimizes moral argumentation entirely, legal positivism de-legitimizes its application beyond its own limited moral discourse, leaving us bewildered as to how we can relate it to the law. It is possible that Hart believes that our moral attitudes toward the law are so entrenched that legal theory does not need to facilitate them; they are a fact of our cultural understanding of legal institutions, and they will be there no matter what legal theory has to say about it. But what is implied by positivism is that this very culture is merely the product of some natural law befuddlement of some centuries ago, so that in time we will recognize the error in our ways and jettison morality from the law. Even Hart must agree this amounts to a bleak legal future.⁶³

⁶² The criticism outlined in this paragraph does not stem from the familiar misconception of legal positivism that holds that the Separation Thesis prescribes that legal policy be morally ambivalent wherever possible. I do not mean to support Fuller's famous accusation that Hart's legal theory is mere 'managerial direction' (Lon Fuller, *The Morality of Law* [Yale University: New Haven 1964] page 207-10). I recognize Hart's intentions as grounded in valid morality, but I mean to suggest that these intentions are not realized in his analytic theory; in fact they are obstructed.

⁶³ A couple points to add to this criticism: first, because the relationship between morality and law, where it exists, is only a matter of contingent history, and does not follow in any way from the essence of the law, according to Hart's moral project this contingent fact that morality happens to be socially connected to the law ought not to be employed in our moral evaluation of the law. That is, where this relationship exists, it does so because of a social rule. Hart's moral project prescribes that we ought not to accept social rules as

Conclusion

This means that opponents of legal positivism are better situated to answer metaphysical concerns than are positivists. The existence argument is serious disappointment for this reason; it has failed to put the Separation Thesis in the same metaphysical playing field as a teleological notion of the law, and other such theories that tie the law to its morality. Meanwhile, it suggests an empty characterization of the law, at least until some companion theory arrives to define exactly what the Separation Thesis means by the law's existence. Where we take some moral element such as justice to be essential to the ontology of the law, we avoid the problem of a mysterious legal Is, since justice determines this Is inasmuch as it is conceived as a moral/legal substance. And this move does not presuppose any particular anti-positivist companion theory, since we can make sense of justice as an ontological component of the law without requiring further elucidation from some theory or other. I grant that justice is a vague concept and it does not determine the ontology of law down to its last detail. But it is not an empty concept

we evaluate the law, since such an endorsement might contribute to our passively assuming that the law, with its background in social rules, is legitimate. This means that even if we find ourselves in a moral legal culture that provides us with effective democratic means with which to evaluate the law, the legal positivist must be suspicious of that culture. No matter how moral the social rules underpinning a society's law may be, the legal positivist must be ever vigilant. But surely there is some point where these rules are sufficiently moral such that we can trust them. Second, if we allow that these social rules only detail a positive morality, and that we can still fall back on a valid morality in our evaluation of the law, we must recognize that, under legal positivism, we can do this only from a moral perspective that an analytic legal perspective must resist. For instance, where we ascribe evaluative moral predicates to the law, we commit in the eyes of the analytic legal theorist something of a category mistake. From the analytic legal positivist perspective, we are only entitled to ascribe moral predicates to the law in situations where the background social rules state that we can. So, in evaluating the law from that perspective, we are only conceptually able to bring moral predicates into play that have the stamp of approval of these social rules, when they are housed within this society's positive morality. A valid morality that does not have this stamp of approval is not in any sensible way connected to the analytic legal positivist's picture of the law. Of course, this valid morality may continue to criticize the law from its distinctly moral dimension, but there is something peculiar in the fact that where we take leave of that dimension and put on our analytic hats, we must suddenly understand this distinctly moral criticism to be conceptually misguided.

and can for this reason do the conceptual work necessary to avoid the problem of a mysterious legal Is.

The following two arguments to be considered in this thesis are prudential; they do not account for the metaphysics of the law, but look instead to the uses we can find for it. As far as the Separation Thesis is concerned with the ontology of the law, the existence argument is all we get. Given that the Separation Thesis is an analytic claim, it is troubling that we must abandon this line of argument so soon. For how are we to find a means of proving that the Separation Thesis is intrinsic to the concept of law without making descriptive claims about legal ontology? How can a descriptive claim discovering the Separation Thesis in the concept of law be made via prudential reasoning? We consider these questions in what follows, but prospects are grim.

CHAPTER 2

The Political Argument

The existence argument attempted to argue for the Separation Thesis from the fact of what the law is, but inasmuch as the law in its fundamental ontology is an especially complex and perhaps inscrutable object, this argument came to nothing. In the light of this ontological difficulty, the political and explanatory power arguments set aside this line of reasoning. They do not seek to solve the mystery of the legal Is but look instead to what the law can accomplish; they consider how we might maximize our social benefits from legal institutions by taking up certain conceptual attitudes with reference to the law. They hold that the Separation Thesis is an essential component of the most choice-worthy legal attitude, the one that brings about the greatest social good. But before observing exactly how these two arguments work and whether they succeed, we must reflect on this shift in argumentative strategy. How does this move from the fact of the law's existence to the advantages we may enjoy as a result of taking up a positivist attitude affect the Separation Thesis?

The Basic Structure from Moral Pragmatism

If the political and explanatory power arguments are to succeed, we must place them in an epistemological space in which we may prove their conclusions on argumentative grounds that do not necessarily identify some truth of the world but rather demonstrate that in endorsing the Separation Thesis we further our own human purposes.

We may, following William James, call this epistemological space pragmatism.⁶⁴

According to pragmatism, the truth value of any claim is determined not by the correspondence of that claim to the world, but rather by whether or not that claim is beneficial to us as we live in the world. Pragmatism is a more sophisticated picture of epistemology than a simple empiricist notion of truth that only ascribes validity to claims that can be verified by way of direct observation. This is because pragmatism accounts for our human pursuits and specifically how those pursuits affect our accessing the world. Because in our observation of empirical phenomena we are prone only to take note of those things that are useful to us, pragmatism suggests that we situate truth in that very use, rather than in the phenomena themselves.

There are many different kinds of pragmatism; some pragmatists may claim that we need never consider the testimony of empirical observation as we seek the truth, but that we must only look to that which is immediately useful to us and determine truth from there. This is a radical position, however, as it takes us far from our ordinary notions of truth, in which empirical observation plays a large part. Moreover, there is considerable danger in neglecting the facts of the empirical world, for it can happen that some phenomenon or other will prove hazardous, and we, focused only on those phenomena that might be useful to us, may fail to notice this threat. Hart echoes this very sentiment in his criticism of anti-positivism:

The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that

⁶⁴ James' literature on pragmatism is somewhat intricate; it is not easily summarized in a short space. For a brief explanation of its basic tenets, I refer to his "The Will to Believe: An Address to the Philosophical Clubs of Yale and Brown Universities" published in *the New World*, June, 1896.

all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.⁶⁵

Likewise, we cannot allow pragmatism to keep us so absorbed in the matter of the usefulness of our beliefs that we fail to pay attention to the world itself.

Other versions of pragmatism recognize this danger, and react to it as follows: if investigation into the world, even into those places that are entirely ambivalent to our own wishes, allows us to keep watch over potential harms and to remain open to the possibility that what was once deemed useless may become useful in a different context, then this very investigation into the world has a pragmatic use of its own, and deserves our attention for this reason. Additionally, because empirical observation is accessible for everyone, we can use empirical facts so as to keep everyone on the same page, even where our other pragmatic purposes diverge. Understood this way, pragmatism is not the enemy of an empirical notion of reality; in fact, the two have been largely sympathetic to one another throughout our philosophical history. Because empirical inquiry into the world is of such use to us, it is granted pragmatic validity over all our other pragmatic wishes. It is only in those spaces where empirical observation is indeterminate that these other wishes takes the lead. There, where the truth of the matter is beyond empirical observation, we look instead to the potential benefits to be won and decide with them in mind.⁶⁶

⁶⁵ "Legal Positivism and the Separation of Law and Morals," page 620.

⁶⁶ This pragmatism that values empirical observation is a simplified version of James' own. He has 'Our passionate nature not only lawfully may, but must, decide an option between propositions, whenever it is a genuine option that cannot by its nature be decided on intellectual grounds' (*The Will to Believe*, section IV). So, it is only where these intellectual grounds cannot decide the issue for us that pragmatism takes practical effect (though again, James holds that our decision to grant these 'intellectual grounds' this primary status follows from our pragmatic desire to do so). By intellectual grounds he likely means the testimony of facts, and these are determined empirically ('Throughout the breadth of physical nature facts are what they are quite independently of us' [*The Will to Believe*, section VIII]).

We find ourselves in just this situation in our dealing with the Separation Thesis. We cannot check legal positivism against facts discovered by way of a dependable scientific inquiry, and determine its validity from there. We are rather dealing with a complex object that defies direct empirical investigation. Pragmatic reasoning can be helpful in navigating complex objects, for where our empirical information comes short we may look to the purposes we bring to that object so as to fill this gap.

The work pragmatism can accomplish in place of empirical experience is quite a lot like the work teleological epistemology can do with Fuller's steam engine. In both cases, the phenomena put before us is not sufficient to determine our object, and both pragmatism and teleological epistemology guide us to that object by drawing on its use. With this similarity in mind, two important points must be made. First, because ordinarily pragmatism can only come into play where empirical inquiry has failed, it would seem that the political and explanatory power arguments suffer from the following significant vulnerability: its opponents may dispute them on the basis of their not having shown that all empirical evidence is indeterminate. The anti-positivist might say that whether or not these two arguments succeed is irrelevant to the validity of the Separation Thesis because it has yet to be shown that we are forced into this pragmatic epistemological space when we deal with the law. It is true, this anti-positivist may reason, that legal positivism has failed to determine the law in this way, and this is why the existence argument failed. But legal positivism has not shown that anti-positivism faces the same difficulty. Anti-positivists may therefore reject pragmatism on this issue, and demand arguments derived from what the law is.

But because we have seen that anti-positivism implies teleology in some form or other, the anti-positivist cannot legitimately criticize positivism in this way. It is the nature of teleology that it must confront pragmatic and empirical arguments as having equal weight, as the teleologist derives the one from the other. It is for this reason that the political and explanatory power arguments, both pragmatic in their reasoning, are to be granted the same force as the existence argument.

Secondly, because teleological epistemology and pragmatism have so much in common, there is the suggestion that the positivist's use of pragmatic argumentation amounts to forsaking the spirit of the Separation Thesis. But though it is true that there is considerable conceptual overlap between the two positions, we must take care to recognize the differences between pragmatism and teleological epistemology. For instance, pragmatism is significantly more flexible than teleological epistemology; it is the case under teleological epistemology that objects knowable by way of their use are only and always knowable in this way. The teleologist takes this to be a kind of cognitive fact inhering in the object. Pragmatism, on the other hand, is far more concerned with our attitude toward the object than the object itself. So, it allows, depending on whatever purpose we bring to a claim, that we may at one time consider it valid for pragmatic reasons, and at another time consider it invalid for new pragmatic reasons. We may grant, for the time being at least, that this is enough to distinguish legal positivism in its pragmatic reasoning from anti-positivism in its teleological epistemology.

The Political Argument from Jeremy Bentham

The political argument is a pragmatic argument that draws on the political gains a society might enjoy should its legal institutions endorse legal positivism. Principally, these benefits follow from the way the Separation Thesis affects the attitudes of the citizenry toward the law. Legal positivism seeks to provide the ordinary individual with the conceptual means to separate the question of the law's application from its morality, so that that person might better situate herself with regard to legal authority, in this way advancing her political power. The political argument deduces from this power that we benefit from the Separation Thesis, and that it is therefore valid on pragmatic grounds.

Hart sketches this argument in paraphrasing Jeremy Bentham:

The time might come in any society when the law's commands were so evil that the question of resistance had to be faced, and it was then essential that the issues at stake at this point should neither be oversimplified nor obscured. Yet this was precisely what the confusion between laws and morals had done and Bentham found that the confusion had spread symmetrically in two different directions. On the one hand Bentham had in mind the anarchist who argues thus: 'This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it.' On the other hand he thought of the reactionary who argues: 'This is the law, therefore it is what it ought to be,' and thus stifles criticism at its birth.⁶⁷

Here we find Bentham concerned that individuals who do not operate under the Separation Thesis will be susceptible to error wherever they are confronted with a wicked law. If the Separation Thesis can prevent this error, then we have the basis for a pragmatic argument. But if the political argument is to succeed along this line of reasoning, we must determine exactly how those who conflate their morality with their law are confused with reference to wicked law and how they risk harm as a result of this confusion. Bentham suggests that it is in the twin arguments of the anarchist at one

⁶⁷ Hart, "Legal Positivism and the Separation of Law and Morals," pages 597-8. He refers to Bentham's *A Fragment on Government* and *Principles of Legislation* in this section.

extreme, and of the quietist at the other, that this harm is to be found; without the protection of the Separation Thesis, he reasons, the legal subject is vulnerable to the reasoning of these two arguments. But whether or not these arguments are in fact harmful is yet to be seen.

The clearest way that these arguments can be harmful is if they advise their listeners to make poor choices, the likes of which might undermine a person's political power or the stability of their society. But in anticipation of the explanatory power argument, we should also consider whether or not they are harmful by looking to the effect they might have on our reasoning. If they distort or manipulate this reasoning so that we are fooled into endorsing a certain view, we may say that these arguments are harmful even if they do not lead to any actual political harm. We recognize this manipulation as sophistry, and we may categorize sophistry as an evil in its own right.

So we sketch the political argument as follows:

Premise 1 – The anarchist and quietist arguments are harmful, whether this be because they limit legal power or stability, or are sophistic, or both.

Premise 2 – The Separation Thesis helps individuals to resist the anarchist and quietist arguments and does a better job of it than the anti-positivist alternatives.

Premise 3 – Following pragmatism, we may grant validity to the Separation Thesis if it is the case that the adoption of which leads to good (alternatively, prevents harm), so long as we do not in the process explicitly oppose trustworthy factual information.

Conclusion – The Separation Thesis is valid.

We have already granted, albeit only provisionally, the truth of premise 3 on the assumption that anti-positivism entails teleology in some form or other. Meanwhile, premises 1 and 2 need only be half right: if either the anarchist or quietist argument alone

can be shown to be harmful, and that this harm is prevented by the Separation Thesis, the political argument holds.

The Anarchist

In order to measure the strength of this argument, we must assess the validity of the first and second premises as they relate to both the anarchist and quietist arguments. We begin by considering the first premise with regard to the anarchist argument. A note must be made before we start: that we have titled this argument ‘anarchist’ does not mean that its believers are themselves anarchists. These believers may hold that anarchism is a destructive political theory. As it happens, this particular argument does not explicitly draw on anarchist philosophy. The belief that wicked law is not law and can therefore be freely disobeyed is compatible with the belief that society requires law, a central government, or any other traditionally anti-anarchist institution. The anarchist argument only undermines the authority of wicked law; it does not undermine the law in its entirety. Admittedly, the sentiment of anarchism is discoverable in the anarchist argument, and those already given to that ideology may be inclined to be sympathetic to the reasoning we investigate here. But the connection is weak, so that the evil of the one, should there be any, cannot entail the evil of the other.

Hart situates this argument toward wicked law such that it asserts ‘this ought not to be law, therefore it is not and I am free not merely to censure but to disregard it.’ The consequent of this claim carries two clauses, the first of which is merely ‘wicked law is not law.’ Of course, we cannot claim that this anti-positivist slogan is itself harmful, since to do so would invite charges of question-begging. So it must be that the harm that

follows from the anarchist argument is to be found in the second clause. Hence, we ask: do we hurt ourselves in the belief that we are free to disregard wicked law?

It is clear that wicked law can dole out punishment as effectively as moral law. But it is unlikely that the anarchist prescribes that we neglect the disincentives attached to disobeying authority, even authorities that merely pretend to be legal. Probably what she means is that if we are given the opportunity to disobey wicked law without fear of reprisal, then we ought to disobey according to our wishes and without another thought, because there is in that case no discoverable moral imperative to obey. Legal positivism must show that there is harm in even this disobedience.

The positivist might make the argument that disobeying even wicked laws will subvert general legal stability. The laws of a legal system may be organized in such a way that the disobedience of one law may contribute to the erosion of the power of other laws. But if the anarchist takes account of the threat of punishment, she might just as easily consider the risk of eroding moral laws wherever we disobey wicked laws. The same might be said about the worry that disregarding wicked laws may reduce the significance of the traditional means of censuring the law, that is, by way of exercising one's democratic power to encourage legal change; the anarchist might elect to obey a wicked law so as to protect the processes by which ordinary citizens can alter the law. We must allow the anarchist a prudential decision procedure with which to determine whether it is in her best interest to disregard a law if we are to provide the anarchist argument with a fair chance.

Still, the neglecting of a wicked law that occupies a significant position in a given legal system will always carry with it the risk of punishment, as well as the risk of

eroding the authority of other good laws, or the traditional processes by which democratic citizens are to formally censure the law. While Bentham identifies this line of reasoning with the anarchist, he likely had the revolutionary in mind; he is indicating the position that prescribes the disobedience of wicked laws even in the face of those risks. But while Bentham may have been thinking of the then contemporary revolution in France, with its destabilizing violence, as a sobering example of this ‘anarchism’ in practice, we do not have the same concerns. Our ‘revolutionaries’ are not Enlightenment liberalists seeking to replace their government by way of a brutal coup d’etat. The anarchist argument is no longer relevant in that sense; nowadays, its focus must be those peoples who have been robbed of the political powers to which they are entitled, whether by poverty or racial prejudice or some similar evil. These peoples have little to lose in the erosion of a legal system, or of the traditional means by which one might censure the law, as these have been of negligible use to them. Meanwhile, their political disenfranchisement may cause them such suffering that the risk of punishment is relatively insignificant.

French revolutionaries and their ilk did not face the difficulties afflicting these peoples. Those revolutionaries, one might argue, had the power to lobby for change, or else to force existing institutions to adjust to their needs, even without engaging in bloody revolt, and we may in retrospect wish that they had forcefully censured the law rather than violently disobeyed it. But where wicked laws affect a small, or relatively powerless, portion of the population, democratic channels may not be an effective means of realizing change. It is the wicked law itself that disempowers this group to the extent that they may not have the means to make use of democratic institutions, so that the only path available to overcome their politically subordinate status is to adopt the anarchist

argument and to disobey the law outright. Bentham's criticism of the anarchist argument seems to depend on the amazing assumption that the victims of wicked laws will have the power to censure them.

What makes the anarchist argument attractive to victims of wicked law lies not in its liberating them from legal authority, but rather in shifting their moral perspective with regard to that authority. For it happens that, should these victims choose to disobey the law that hurts them, not only do they risk punishment in the form of fines, incarceration or worse, but they must also suffer the humiliation of being called out as unlawful, and charged as vice-like for their failure to obey. These are the special punishments housed in the internal perspective of the law, to use Hart's terminology; they are punishments based on the feeling that one ought to conform to the law because obedience is in itself a virtue, and disobedience grounds for disapproval. The value of the anarchist argument is in its protecting the disobedient from these special punishments. Because they recognize the morality underlying the internal perspective of this wicked law as false, they are unaffected by its accusations. Of course, the punishments of the external perspective remain in place, and will continue to disincentivize disobedience. But there are cases where it is the internal perspective more than the external perspective that intimidates repressed peoples into passivity. It is in those cases that the anarchist argument is of use.

Given then that the anarchist argument can be a boon to the politically disenfranchised, it is difficult to see how the positivist could call it harmful. If there is any harm in a repressed individual's disobedience, we could only find it in the suffering of privileged citizens who are not hurt by the wicked law, but are hurt by its being disobeyed, whether inasmuch as such disobedience would produce legal instability or

because they benefited from the law in question. But those citizens who profit from wicked laws are deserving of this harm, for they were never entitled to whatever gains they enjoyed as a result of these laws in the first place. And those who are ambivalent to wicked laws are not themselves altogether innocent because they failed to come to the aid of their repressed neighbours. If the stability of a society depends on wicked law, then the fault is with the society, not with the repressed peoples that turn ‘anarchist.’

So, that settles the suggestion that the anarchist argument is harmful; now we consider whether it is sophistic. But if there is sophistry here it must be in what we have already warned against: the manipulative anarchist may confuse non-positivists into disobeying a law even in cases where the risk of punishment is significant, or where good laws or democratic practices are harmed in the process. The threat of sophistry, if it exists, lies in this: the anarchist argument states that we are free to disregard wicked laws, but it can only mean that we are morally free to do so, and even this is only true in the special case where no morally desirable laws or processes are harmed in this way. Moral freedom means freedom from the criticism of the internal perspective; there remain the punishments recognized by the external perspective, for a wicked legal authority, though false with regard to moral criteria, is still very real with regard to physical harm. But this sophistry is no real threat, for we are not likely to forget that wicked laws can hurt us. So, the anarchist as sophist is unlikely to confuse anyone.

The Quietist

Thus, the first premise of the political argument is invalid with reference to the anarchist argument. We turn now to consider its validity with reference to the quietist

argument. Again from Hart we have the quietist asserting ‘This is the law, therefore it is what it ought to be.’ But this echoes the anti-positivist principle that morality is a necessary component of the law; if we have the anti-positivist notion of law, then we must have morality as well because morality is a constitutive element of that notion. Naturally, if we follow anti-positivism, then wherever we come upon what we would call a law, we come upon its moral rightness as well, for this is exactly what anti-positivism requires. Again, the political argument cannot claim in a premise that anti-positivism is harmful and therefore pragmatically unsound. That is the very thing that is to be proven, so any argument that proceeds in this way can only beg the question.

But where we consider the quietist argument as sophistry, we find reason for Bentham’s concern. Anti-positivism acknowledges that there exist wicked ‘laws,’ that is, immoral commands that take on the guise of law. They also acknowledge that this guise may be so compelling as to confuse even them as to whether or not they are dealing with an authentic law. And it is in this that the quietist argument is harmful, for we must never say ‘This thing that appears to be the law is the law, therefore it is what it ought to be’ as otherwise it will happen that, whenever we are given something bearing the appearance of law, we assume that it is morally sound without verification. It would be prudent to say ‘is this the law? We must check whether it is as it ought to be’ instead. But the quietist as sophist may encourage a legal naiveté that takes the morality of legal authorities for granted, so that we fail to examine our laws critically.

The threat of this sophistry is significant. Not only should we worry about the person who deludes himself that he is not a victim of wicked law, that any mistreatment he suffers at the hand of an immoral legal authority is somehow deserved. But we must

also worry about the citizen who is not harmed by the wicked law, but who lives alongside those who are, and who perhaps gains from this inequality. When the victims complain, this citizen can abuse the quietist argument to secure his privileged legal position. In this way, he may fool these victims into believing that the wicked law is in fact an authentic law, or at the very least bully them into obedience by way of criticism derived from the internal perspective of the law. Meanwhile, he can just as easily fool himself by way of the quietist argument so as to avoid the guilt of subjecting certain peoples to legal inequality, or to congratulate himself for his own conformity.

The root of the sophistic use of the quietist argument lies in our confusing wicked laws with moral laws. Is it possible that we come to this confusion innocently; the language is, after all, clumsy, given that when we speak of wicked *laws* what we mean are commands that cannot claim to be law due to their being wicked. But for the most part this confusion is likely to follow from an error in moral judgment, such that we simply fail to recognize the immorality of our laws. Unfortunately, these errors are not the kind we might remedy easily. When we mistake a wicked law for a genuine law it is not the case that we can resolve our mistake through study or calculation. Rather, the bulk of these mistakes are made out of moral vice, such as hatred or complacency. That the law in apartheid South Africa was wicked is clear from the perspective of moral reasoning, and yet somehow the racist South African was able to convince himself that his law was morally valid. He is ready to condemn, perhaps by way of the quietist argument, those who would revolt against that law because he has already succumbed to a moral mistake of believing his law to be just.

This is an important observation. For if the quietist sophist can only prey on those who already display moral vice, we may regard the quietist argument as a mere symptom rather than the sickness itself. The South African that can ignore the obvious immorality of racism has a significant problem in this alone; being manipulated by quietist sophistry is a minor difficulty by comparison. I suggest then that the quietist argument is not the real villain here, and that wherever we see it succeeding in its manipulation of our legal attitudes, we must take this as a sign that there is a more important problem to be addressed, namely that the legal culture being manipulated lacks moral understanding. It is fair to suggest that sophistry plays a hand in developing the moral vices that drive this South African to conceive of his law in this way, but it is unlikely the sophistry could take root without taking advantage of a vice already in place.

All the same, we must grant that the first premise of the censure variant of the political argument is true with reference to the quietist argument as being sophistic, for that much is true even if we recognize that it is a tiny evil in the face of the immense wickedness it requires to succeed. So, we move now to consider the second premise. This second premise demands two things: first that the Separation Thesis thwarts the sophistic use of the quietist argument, and second that it does so more successfully than any anti-positivist alternative. That the Separation Thesis can dispel any sophistry following from the quietist argument is obvious inasmuch as the quietist argument itself cannot survive without the belief that morality is a constitutive component of the law. But that anti-positivism cannot also, and as effectively, deal with that sophistry is not so obvious.

It should be noted that analogues to the two sophistries we have considered could be derived from positivism itself. The anarchist as positivist may give up on law because she only respects moral imperatives, and will neglect any command given without explicit moral backing. She may hold that because the law, according to legal positivism, has no necessary moral element, it does not exhibit any moral value, and is therefore not worthy of obedience. This positivist anarchist is in many ways like the anti-positivist anarchist, but is truer to the spirit of anarchism, for she more completely subverts the authority of the law. Certainly, this anarchist is also more destabilizing to legal and political order than the other, for where the other waits until a law is found to be wicked before disobeying it, this positivist anarchist disobeys all law unless a morality can be found to support it. And while positivism has little to say against this line of reasoning, the anti-positivist can invoke obedience to the law as a moral virtue and in this way ensure that we always recognize our responsibilities toward the law as moral.

Similarly, the quietist may subscribe to the Separation Thesis so as to support his belief that any moral censuring of the law is illegitimate. By way of a sophistic exaggeration of legal positivism, he may hold that because positive law is, at a fundamental level, an amoral object, it is a mistake to ascribe to the law such predicates as moral or immoral. Rather, the law must be treated, this quietist maintains, as altogether distinct from all things moral, as though a logical divide keeps legal matters apart from our notions of right and wrong. So he believes that the law is merely a formalist bureaucracy that is entirely unaffected by moral concerns, whether they be good or bad, and therefore we need never evaluate the law, but only recognize its existence as a social

fact. Naturally, this is a severe misunderstanding of legal positivism, but such is the nature of the sophistry.

This positivist quietism retains the legal complacency of Bentham's anti-positivist quietist but they are different in that the former is derived from a conceptual confusion, while the latter is fueled by a moral error already in place. The positivist quietist presumes that if an object is fundamentally amoral, then it is to be treated as amoral at all levels, from its most abstract characterization all the way down to its instantiation in social practice. But objects simply do not act this way; if they are placed in a moral context then they will themselves take on a moral quality. We may, for example, construct a perfectly ambivalent bureaucracy, but wherever it manages public welfare, it will take on a moral dimension. So the positivist quietist relies on this easy mistake, that is, the confusing of an object's fundamental amorality with a necessary amorality. But it is also easy to see, after a moment's consideration, that the one need not involve the other, in this way correcting our mistake and defeating the positivist quietist. The sophistry following from Bentham's quietist, on the other hand, attempts to confuse us as to which laws are moral and which are not. We are only vulnerable to this confusion if we have already gotten morality wrong, and where we get morality wrong, our convictions may yet be so strong as to cause trouble for our grasping even the clearest moral truths.

I make this point so that we are led to ask which position better equips us to correct these particular moral mistakes. Legal positivism pushes morality to the side; perhaps it enables us to better situate the law with regard to morality, so that we can recognize its existence prior to assessing its value, but this move is designed to clarify our

legal thinking and our moral thinking apart from one another. By dividing the law from its morality, the positivist gets to look at the law in a moral vacuum, allowing her to concentrate her legal analysis and to leave until later her moral analysis. Meanwhile, anti-positivism includes both analyses in any discussion of the law, so that we are called to justify our moral beliefs along with our legal beliefs. Because morality is allowed to participate in these considerations directly, our moral reasoning is better exercised, and we are better able to catch moral error under anti-positivism. At the very least, the anti-positivist racist will face tremendous difficulty in defending his position, to the extent that he will have to either reassess his values or else find himself unable to contribute to legal discussion.

So I offer that anti-positivism is in fact better situated to correct Bentham's sophistic quietist than legal positivism. Were this sophistry to take advantage of a conceptual rather than a moral error, we might allow that the conceptual distinction provided by the Separation Thesis was enough to defeat it. But morality will answer to a moral theory long before it will answer to a conceptual distinction. And anyway, the Separation Thesis, if it any help, only works to prevent the sophistry itself; the moral error underlying this sophistry remains. Anti-positivism gives us the means to remove this moral error, to cut off the problem at its source rather than in its extremities.

I admit that my criticism of this aspect of the political argument is not absolute, for it remains possible that Bentham's quietist is such a danger that we would seek to disable his reasoning from the first rather than provide him with a moral arena in which he might plead his case. Still, I have shown that the political argument is not as strong as the positivist needs it to be. There are too many weaknesses in too many areas: first, it is

nowhere explained how Bentham's anarchist is a real threat. And then the case against the sophistic quietist is not properly distinguished from the honest quietist. Additionally, as we consider the sophistic quietist, we discover that anti-positivism is not altogether defenseless against him. Finally, it is never clearly argued that positivism can cut off more sophistry than it inspires. And as a last note, we must also pay attention to the possibility that simply allowing individuals to approach legal problems from their own moral perspective accomplishes quite a lot in preventing the success of any sophistry, anarchist, quietist or whatever. Our moral perspectives are our own; they are familiar and personal, and this means they are that much more resistant to philosophical confusion or manipulation.⁶⁸

A Digression: Empowering the Disenfranchised

Setting aside these specific concerns surrounding the anarchist and the quietist, let us look to whether legal positivism provides any special benefit to the social groups that are most in need of political empowerment. I am thinking of those groups that are repressed by legal institutions. An argument may be made on behalf of legal positivism on the grounds that anti-positivism is unsympathetic to these groups. Anti-positivism requires that extremely wicked law be characterized as non-law, so that the anti-positivist must tell these groups that that which represses them is not law. But to say this much is

⁶⁸ For instance, ask whether these sophistries are of any danger to Dworkin's legal theory. It is his view that individuals are legally empowered if they are allowed to bring their moral arguments to bear on the law. This empowerment alone is a strong defense against philosophical posturing and manipulative rhetoric, and this is so precisely because our moral perspectives give us a solid viewpoint onto the law, the likes of which are not easily confused by sophistry. This empowerment is enough to defeat Bentham's quietist. As for the anarchist, Dworkin might respond that his legal theory is to be adopted with an attitude of cooperation (consider his discussion of fraternity in chapter six of *Law's Empire*), such that one ought not to abandon a legal system wherever it does not reflect one's morality, but one must rather attempt to engage that legal system on one's own moral terms.

largely disappointing as it does very little to right this injustice. And in cases where these groups want to condemn the law itself, anti-positivism antagonizes them. It tells them that they misunderstand the law, that it is in fact a morally admirable institution. This shows a marked lack of sympathy.

Can we ask these legally disenfranchised groups to side with anti-positivism, such that they adopt the belief that they live in a society without law, and the institutions that claim to be legal only do so out of some mistake, or else to pay lip service to the rule of law? It is possible that these groups will be comfortable proclaiming ‘wicked law is not law,’ as this will liberate them from the guilt of being labeled ‘criminal’ by their society’s coercive powers. But anti-positivism loses sight of a more immediate, more visceral, perspective of the law, one that depicts the law as an ambivalent institution more concerned with stability, or some distant political agenda, than justice or a relatable morality. For, in the light of the injustice marginalizing repressed peoples, it will likely be difficult for those peoples to take up a moral perspective of the law, even one that highlights their society’s moral/legal shortcomings. It may seem natural for these groups to view the law as having forsaken morality altogether.

Surely this perspective is better captured by a down-to-earth and starkly realistic legal positivism. Austin states that:

the most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God ... the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.⁶⁹

⁶⁹ Austin, “The Province of Jurisprudence Determined,” page 185.

This is putting the notion of amoral law in especially strong terms, but there is sympathy here for the downtrodden, the likes of which, at least to the extent that it captures the attendant cynicism, we do not find in anti-positivism. And if the Separation Thesis naturally fits the thinking of these groups, this may indicate that it is pragmatically suited to their purposes.

So what can anti-positivism offer to match this? An answer is this: the slogan ‘wicked law is not law’ is a step toward legally empowering repressed groups, since it allows them to argue that where they are condemned unjustly, they are not condemned by law, but merely by an arbitrary and tyrannical rule. Armed with this slogan, they may make the arresting claim that their society has no law. While we may disagree as to what is right or wrong with regard to the law, we must all agree that a society needs law in order to function properly. So where a society is accused of lawlessness, its groups, repressed or otherwise, are bound to take notice. They will be driven either to defend their legal system as moral, work to repair it, or else adopt the path, which I take to be especially unattractive, of lawlessness. We cannot say the same for legal positivism, for if the Separation Thesis is right, those who are not hurt by the law, the bystanders, may yet find comfort in the fact that they operate under law. If legal positivism wants to drive these privileged groups toward change, it can only wait until the moment it behooves them to ask of their laws ‘this is legal, but is it moral?’

So repressed groups have something to gain from both legal positivism and anti-positivism; neither is the obvious choice. For if these groups side with positivism, they are allowed the perspective that the law is an amoral, uncaring institution, as opposed to the anti-positivist perspective that they are repressed by an extra-legal system that merely

appears to be law. This positivist perspective is significant because, when a system takes on all the vestiges of the legal, so that we come to expect legal virtue from it, there is a special disappointment in its failure to do justice. By asserting that wicked law is not law, we close the door on this special disappointment, and this in turn further hurts legally repressed groups because it limits the legitimate perspectives they can bring to wicked law.

But on the other hand, if we side with anti-positivism, we allow these groups the perspective that any law that treats them unjustly is not law at all, but is rather the machination of an arbitrary rule, as opposed to the position legal positivism would require of them that what hurts them is law, and ought to be treated as such, though on the understanding that it is immoral. This perspective is significant because it realizes our feeling that, where legal institutions fail to do justice, they operate improperly, are broken, and are not up to their social role. This way we ensure that they take on a suitably nefarious colouring, and grab the attention of all they affect, whether positively or negatively.

Ideally, we would have on hand a legal theory that would allow these groups to select either perspective according to their needs.⁷⁰ But as it stands, it is either the one or the other. This means that the testimony of legally repressed groups favours neither legal

⁷⁰ Dworkin may have such a legal theory inasmuch as he allows for flexibility in legal language: "It is perfectly true that the lawyer who says that Nazi law was no law might have put the very same point in the different way favored by positivists. He might have said that the Nazis had law, but very bad law that lacked the features of a minimally decent system. But that would have told us less of what he thinks, revealed less of his overall jurisprudential position, because it would not have signaled his view about the consequences of lacking those features. On the other hand, on some occasions this curtailment might be an advantage. It might be unnecessary and even diversionary -productive of argument irrelevant to his present purpose - for him to reveal more. In that case the alternative "positivist" formulation of his point would be preferable, and there is no reason why we should artificially limit our language to make context-sensitive choices of this kind impossible (*Law's Empire*, page 104)." Dworkin is able to realize this flexibility because he does not view his legal theory as committed to any analytic claim.

positivism nor anti-positivism. It is possible that further inquiry into the matter will reveal more, but what I have said is enough for our purposes. It is worth noting that, where we are dealing with the question of whether the law is essentially connected to morality, not much turns on the allegiance of repressed peoples. This is because neither legal positivism nor anti-positivism has much to offer. While this is disappointing, it is not altogether unexpected; analytic philosophy that makes sweeping claims about the nature of law is not the best conceptual tool with which to resolve particular political problems. Still, the matter of the legally disenfranchised remains an important terrain for discussion because it is there more than anywhere that justice is needed. With this emphasis on justice in mind, I am inclined to assert that anti-positivism is the horse upon which we ought to bet our scholastic dollars. It keeps justice constantly in mind and from the very start, while legal positivism only arrives at justice once it is satisfied that we have set the law aside.

Will Moral Pragmatism Work for Legal Positivism?

Before taking leave of the political argument, I'd like to consider its third premise. I had stated this premise as follows: in light of moral pragmatism, we may grant validity to principles the adoption of which leads to good (alternatively, prevents harm), so long as we do not in the process explicitly oppose trustworthy factual information. I have granted the validity of this premise thus far so as to provide the first two premises with a fair chance. Now it is time to consider this third premise on its own merits. It is true that anti-positivism, because of its latent teleological metaphysics, needs to grant this third premise some form of validity, and this is enough to keep anti-positivists interested

in arguments like the political argument. But we have yet to consider this third premise as it relates to positivism itself. The question we must ask is whether it is compatible with the spirit of the Separation Thesis, inasmuch as this third premise's pragmatism entails moral reasoning, while the Separation Thesis requires that we keep our legal theorizing apart from morality.

We must be careful here if we are to avoid category mistakes. Certainly, there is a moral reason at work in the political argument, for we would not be suspicious of the anarchist and quietist arguments if they did not risk undermining our political power. We take this power to be precious because it enables our living well, and is therefore dear to our moral aspirations. So, the pragmatism at work in the political argument falls squarely within moral boundaries. What I want to consider is whether or not an object's causing moral good makes that object moral. Outside of the context of the political argument, the answer is obviously no; we would not take Galileo's astronomical findings to be moral simply because they hand in undermining oppressive religious authorities. But within the context of the political argument, the matter of the moral status of the Separation Thesis becomes considerably more complex.

The political argument does more than merely attempt to show that moral good follows from legal positivism. It attempts to ground the validity of the Separation Thesis in moral reasoning itself. This means that we do not begin with an amoral object that causes moral good, but rather begin with a moral good and attempt to derive from that good a justification for an amoral object. We might ask whether this move makes sense, for if an object finds its justification in morality, does this not mean that this object is moral as well? If I can justify my lying with the help of moral reasoning, such that my lie

protected others from unjust treatment, then my lie becomes moral; I could justify the lie as ‘the right thing to do.’ But whether or not the effects of morality must be understood as themselves moral is perhaps too obscure a question to tackle here, as it is difficult to prove that *all* objects derived from morality are moral. But the fact that the political argument situates the Separation Thesis such that it is reliant on moral reasoning is enough to inspire doubt.

Consider Dworkin’s characterization of positivism as a conventionalism.⁷¹ Far from Hart’s legal positivism, this positivism as conventionalism prescribes that we conceive of the law as a social fact rather than a moral object on the grounds that where laws are presented as facts they are more easily accessed and agreed upon. It also implicitly holds that legal subjects are entitled to this accessibility and to the stability and calculability that follows from legal agreement; this means that the idea of the law conceived as a social fact is driven by moral values. But should the needs of this society shift such that its conventions, its laws as social facts, impede its ability to adjust to new and urgent concerns, this positivism as conventionalism will lose its pragmatic support; its underpinning moral values will have moved on. In order to pursue these values, this positivism as conventionalism will need to construct new conventions to meet with these new concerns. But in adjusting its laws to a changing society, the accessibility and calculability of the law conceived as a social fact will be destroyed. This positivism is self-defeating; it is designed in such a way that it will collapse wherever a society’s legal needs change.

The political argument casts the Separation Thesis in such a way that it mutates Hart’s positivism into this positivism as conventionalism. In deriving the Separation

⁷¹ In *Law’s Empire*, chapter four.

Thesis from moral reasoning, positivism becomes dependent on our moral needs. But quite a lot of these needs are in flux, so that depending on them robs the Separation Thesis of its pragmatic value. Perhaps in certain cases the Separation Thesis is best able to combat the threat of the anarchist and the quietist, but in other cases an anti-positivist answer is best. Claiming to have discovered the Separation Thesis in the very essence of the law does not help us combat the anarchist and the quietist; it only establishes an inflexibility within our conceptual understanding of the law. Pragmatically, speaking we are better off without analytic claims of this kind.

We might ask how Hart expected to derive analytic validity from a moral argument to begin with. It is not clear that he even supports the kind of pragmatic epistemology necessary for such a move.⁷² It is a shame that Hart is silent on this matter, as it is difficult to see how this move from pragmatic validity to analytic validity does not undermine the Separation Thesis. I have acknowledged that I cannot say for certain that an object justified on moral grounds is itself a moral object, but an analytic claim justified in this way is an entirely different matter. If we mean to assert that the Separation Thesis is intrinsic to the concept of law, and we show this to be the case via moral argumentation, then we must take the concept of law to be moral. Otherwise, how is it that moral argumentation can determine its essential content?

I have outlined three reasons to dispute the third premise of the political argument: first because we must be skeptical of the amoral status of a principle justified on moral grounds, second because situating the Separation Thesis in this moral context

⁷² In fact, it seems fitting to assume Hart advocates Hume's alleged separation of Is from Ought (see note 26 above) inasmuch as this idea is popular amongst English analytic philosophers, and other positivists, for instance Kelsen (see Lars Vinx *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* [Oxford University Press, USA, 2007]).

invites its being characterized as something like Dworkin's picture of positivism as conventionalism, and third because an analytic claim drawing upon moral principles establishes its object as moral. Thus, I think it fair to state that any attempt to ground the Separation Thesis understood as an analytic claim on moral pragmatic grounds is doomed to failure. If a pragmatic argument is to succeed where the Separation Thesis is concerned, it cannot draw on explicitly moral reasoning, not to the extent that the political argument relies on the benefits of political empowerment.

It is interesting to note that the discussion in this chapter of where and how the anarchist and quietist arguments are harmful, though it is of no use to analytic positivism itself for the reasons just stated, remains valuable to anti-positivists. That is, in constructing this political argument, legal positivists have unwittingly contributed to the opposite camp; they have expanded on an investigation of how we are to morally navigate the law. So, while Bentham's warning against the anarchist and quietist may not strengthen the case for an Is of the law apart from its Ought, it retains its worth in legal philosophy all the same.⁷³ Analytic legal positivism, by contrast, has no use for philosophy of this kind since it does not contribute to an essential determination of its picture of the law. But neglecting this philosophy means losing sight of its value. Surely, if we cut ourselves off from moral reasoning of this kind, and attempt to push it away into some separate inquiry, legal scholarship loses something significant.

⁷³ See David Dyzenhaus "The Genealogy of Legal Positivism."

CHAPTER 3

The Explanatory Power Argument

The explanatory power argument takes leave of both ontological metaphysics *and* morality, and consider instead a purely epistemological question: what is the best way to understand the law? Or to say the same thing, which epistemic perspective is most amenable to such an understanding? We are not asking whether the Is of the law is ontological connected to its Ought, or whether we ought to act as though the one is divisible from the other for the sake of some controversial morality. We look instead toward that which would best suit our understanding of the law in our various encounters with it.

We find the following in Hart with regard to his concept of law as a union of primary and secondary rules:

The main theme of this book is that so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule, that their union may be justly regarded as the ‘essence’ of law, though they may not always be found together wherever the word ‘law’ is correctly used. Our justification for assigning to the union of primary and secondary rules this central place is not that they will there do the work of a dictionary, but that they have *great explanatory power*.⁷⁴

⁷⁴ Hart, *The Concept of Law*, page 155, emphasis mine. We see the same on page 81: “we shall not indeed claim that wherever the word ‘law’ is ‘properly’ used this combination of primary and secondary rules is to be found; for it is clear that the diverse range of cases of which the word ‘law’ is used are not linked by any such simple uniformity, but by less direct relations - often of analogy of either form or content - to a central case. What we shall attempt to show, in this and the succeeding chapters, is that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if those two types of rule and the interplay between them are understood. We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought. The justification for the use of the word ‘law’ for a range of apparently heterogeneous cases is a secondary matter which can be undertaken when the central elements have been grasped.”

There is talk here of an essence of law, but not one that is ever-present in each instantiation of legal phenomena. Such an ever-present essence is the ontological notion of law; it is that which was promised but never delivered by the existence argument. The explanatory power argument does not need to uncover the ontological definition of the law, nor does it need to decide whether such a definition can be found. Hart only needs to show that his positivistic formulation of the law is most amenable to the way we experience the law, and this we measure by its explanatory power. If we discover that this formulation demonstrates significant explanatory power, we may grant it validity for that reason.⁷⁵

But in setting aside the difficulties of legal ontology, we are not in this way escaping the complexity of philosophical argument. While the reasoning employed by the previous two arguments drew upon speculative and controversial philosophy, their aims were clear enough: the existence argument stated that the possibility of moral ambivalence was immanent in the law, and the political argument stated that the Separation Thesis best serves our notion of good politics. The explanatory power argument, on the other hand, seeks to make an especially intricate point: that the Separation Thesis is valid for its being a good fit with our thinking about the law. Before we may proceed, certain questions must be answered. What exactly do we mean by our thinking about the law? What is explanatory power such that it can be used to assess

⁷⁵ Neil MacCormick recognizes the explanatory power argument briefly in his response to the criticism that Hart conducts armchair sociology in constructing his concept of law from social rules. There, MacCormick argues that Hart is to be forgiven for glossing over the concrete facts of legal sociology because in theorizing about those facts, he makes it possible for a greater understanding of them: “there is a task for legal and other normative theorizing which is not the same as the ... empirical inquiries of sociology. One aim of theorizing is to produce a clear systematic understanding of subject-matter... Systematic clarification of [rules governing social behaviour] requires that the *theorist* settle grounds for classifying rules into different types, and for ‘individuating’ rules... The theorist is in this way providing principles for mapping out the contents of positive morality and positive law” (*H.L.A. Hart*, page 78). He does not characterize the explanatory power argument as a reason for adopting the Separation Thesis however.

whether a principle fits with that thinking? What is it about the Separation Thesis that lends itself to this fit? In attempting to answer these questions, we find ourselves on somewhat treacherous epistemological ground. It does not help things that Hart does little to provide us with the equipment necessary to answer these questions. We have need of a guide, and I have elected to employ the epistemological philosophy of Immanuel Kant for that purpose.

On the surface, Kant is an awkward match with Hart. It is true that Kelsen engages in something like neo-Kantianism, but we cannot say the same for Hart; his philosophical sources are predominantly British. But Kant's critical philosophy maps out exactly how an argument from explanatory power might work. He describes a variant of reasoning following from our patterns of thinking. These patterns are derived from rules discoverable in our cognitive faculties. A theory that matches with these rules can be said to be valid for that reason, for its fit with how our cognitive faculties operate. In the section that follows, I will outline this basic structure for the explanatory power argument from Kant's critical philosophy. Afterward, I will bring this basic structure to bear on Hart's account of this argument, which plays on the epistemological virtue of candour.

As with the other arguments, Hart's account is insufficient. But it may be that Hart's own understanding of his explanatory power argument was not complete, or at any rate, that he failed to follow this line of reasoning as far as it could go. Thus, after exploring the deficiencies of Hart's explanatory power argument from candour, I will return to Kant's notion of explanatory power, and consider his idea that explanatory power is to be measured by the extent to which a theory unifies disparate phenomena under concepts. This leads to a much stronger notion of how explanatory power can

validate a legal theory than Hart's favoured virtue of candour. This stronger version, however, is better served by an anti-positivist legal theory than it is by legal positivism. This means that, as with ontological and moral reasoning, anti-positivism bests legal positivism on epistemological grounds.

The Basic Structure from Immanuel Kant's Critical Philosophy

The second section of Kant's *Critique of Pure Reason* seeks to determine the limits of human understanding as it attempts to know metaphysical objects such as God, freedom, and the immortality of the soul. Metaphysical objects, he argues, are beyond those limits; because our capacity to reason is finite, we can never pierce our subjectivity and come to know the metaphysical. But he does not suggest that, because we can never know them, we endorse total skepticism with regard to these objects. Rather, he details an alternative path to these objects, one where their specific determination is unnecessary.⁷⁶

This alternate path requires that we abandon any bid to know metaphysical objects directly. But even where direct knowledge of these objects is impossible, we may yet derive use from them in determining the ways that they affect us. So, though Kant denies that we can ever know God, he holds that we may nevertheless profitably make use of the concept of God so as to understand how we as human beings approach theological matters. Kant concludes that in tracing the concept of God back to our finite

⁷⁶ With regard to objects that are both metaphysical and religious, such as God, and the immortality of the soul, Kant's aim in limiting knowledge is to rediscover a mystical attachment to these objects, as indicated in his famous claim: "I had to suspend **knowledge** in order to make room for **belief**" (*Critique of Pure Reason*, translated by Marcus Weigelt [London, Penguin Group, 2007] page Bxxx, emphasis his [other translations have the term 'faith' in place of the term 'belief']). But apart from religious metaphysics, where mysticism, or a faith-based cognition is best, he also details a means of accessing metaphysics for theoretical and moral purposes in the appendix titled 'Of the Regulative Use of the Ideas of Pure Reason' (pages A642/B670-A668/B696).

cognition of it, we may discover in human thinking a propensity to understand all phenomena as comprehensible according to a supernatural design. And while he is quick to remind us that we must resist this propensity to the extent that it may delude us into believing that we can know a God as an object of certain knowledge, Kant recognizes that there is a value in this belief in design because it encourages us to perceive the world as consistent with reason.⁷⁷

Of course we are not here interested in Kant's idea of mankind as cognitively predisposed to view the world as organized by a God. But what is interesting is the way by which he arrives at this conclusion. He does not speculate into the nature of God, but rather delves into our thinking about God. This he takes to be a source of theological knowledge. This same strategy may be used so as to arrive at knowledge with regard to the law. Certainly, the law is not metaphysically mysterious in the way that God is metaphysically mysterious, for the law figures in our everyday social experiences, and is readily identifiable as such. But a conceptual determination of the law remains elusive for its own reasons. And though there is nothing to indicate that Hart thought an ontological determination of the law to be beyond the limits of our cognition, he would be attracted to a form of reasoning that set the matter of such a determination aside, and focused entirely on how the law appears to us.

The basis of this move from a direct determination of an object to a determination of its effect on our thinking depends on our allowing that our perception of an object can be a source of knowledge even where the 'truth' or the 'essence' of that object is yet hidden. This requires that we grant our experiences credibility even when they fail to

⁷⁷ In the chapter titled 'The Ideal of Pure reason' in *Critique of Pure Reason*, pages A567//B595-A642//B670.

recognize their object as it really is. To grant that this can happen is to adopt this equation from Kant:

Objective validity and necessary universal validity (for everybody) are equivalent concepts, and though we do not know the object in itself [inasmuch as we lack the capacity to know it], yet when we consider a judgment as universally valid, and hence necessary, we understand it thereby to have objective validity.⁷⁸

Permitting this identity between objective validity and necessary universal validity means that we can regard our experiences as true, as corresponding with phenomena, even where we remain confused as to the metaphysics that underlie them. This marks a kind of liberation from the demands of metaphysics. More importantly, it grants us a path beyond the existence argument, for where it is the case that the ontology of the law is entirely unfathomable, or else too controversial to be worth nailing down, we may still find useful things to say about our cognition of it, of our conceptual relationship with it.

The move from the object to our experience of that object is pragmatic. These experiences do not describe the world as it actually is, since they are filtered through our subjective faculties and in this way constrained by the limits of human understanding. We only grant them objective validity because it is useful to do so; we must confront with these objects whether we are able to access them directly or not, so we make do with the most convenient account of them we have at hand. But while there is a pragmatic strain to this element of Kant's critical philosophy, there is an important distinction to be made between Kant and the pragmatism of James and his peers. Those pragmatists emphasize that the truth or falsity of a belief is always contingent on our having a use for it. And they allow that while we may find our use moving in one direction at a given instant, we may find it moving in another direction at another, so that the truth of a belief is

⁷⁸ *Prolegomena to Any Future Metaphysics*, page 39.

temporally determined, and for that reason not immutable or universal. What is won from this perspective of pragmatism is epistemic flexibility, but what is lost is the primacy of the Is. We cannot according to this pragmatism speak profitably about the concept of law, but must instead speak about our purposes for the law. This means that the Is of the law is subordinated to its Ought and where this subordination exists, the Separation Thesis cannot survive.

But in Kant, our minds are guided according to immutable principles that apply irrespective of our purposes.⁷⁹ The consequence of this is the inverse of James' pragmatism. Our goals, the ends we would find for the law, are not borne from our whims, but are rather rooted in these principles. These principles themselves establish facts about how our mind works, and wherever we construct beliefs so as to solve a specific legal problem, this construction must answer to these facts. So, in Kant the Ought is subordinate to the Is, to the facts underlying our understanding of the law via reason, and this means that his pragmatism can support the Separation Thesis.

It is in this sense that Kant's critical philosophy is sympathetic to the basic structure of the explanatory power argument. He provides a pragmatism that allows legal positivism to sidestep the enigma of legal ontology while at the same time preserving the primacy of the law's existence over its use. This primacy of the Is is of special importance; as we have seen, Hart is not satisfied with merely demonstrating that the

⁷⁹ Kant attempts a list of the basic principles governing human thought in his table of pure concepts (in *Critique of Pure Reason*, pages A67//B92-A83//B109). But these concepts are applied only at the experiential level; they are not directly applied to abstract notions like the law (though they are mediately applied). Abstractions such as the law are the product of a non-empirical faculty of reason, which is, in Kant, governed by what he calls pure ideas. The distinction between pure concepts and pure ideas lies in the aim of these ideas for a universal, and therefore, absolute knowledge of the object considered. Because pure concepts supply the structure for experience alone, they can never arrive at universality. This follows from the fact that our experience of an object will always be subjective, that is, contingent upon ourselves, and thus not universal.

Separation Thesis suits certain pragmatic cases where legal and political matters have haphazardly fallen in place such that we favour positivism over the alternatives. He wants to make the stronger claim that the Separation Thesis fits with our understanding of the law by its very cognitive nature, so that we are in this way compelled to adopt it in every case. He is bound to this stronger claim because otherwise he must make a purely pragmatic argument that, as we saw in the last chapter, he cannot win.

With this in mind, we must recognize that the explanatory power argument is basically a pragmatic argument just like the political argument. It asks that we look to the gains we might enjoy, whether they are felt in legal scholarship or by the ordinary citizen in her cognition of legal authority, should we accept the Separation Thesis. While this much was true of the political argument, the distinction just outlined allows the explanatory power argument to plead its pragmatic case from a very different perspective: it argues that we ought to match our legal theory to the fact of how our mind accesses legal phenomena. As with all pragmatic reasoning, there is an Ought component, but unlike the political argument there is also a factual component to be found in the specific way we cognize the law. So, with the explanatory power argument we may pragmatically argue for an Is of the law, inasmuch as it is to be derived from that factual component.

Moreover, while typically pragmatic reasoning is always trumped by the facts, such that we cannot pragmatically validate a belief no matter how useful it may be if is contradicted by objects as they actually are, this manner of pragmatic argument may lay claim to a factual authority of its own. Suppose a legal community favoured the view that morality inhered in the law's very being and consequently endorsed a natural law

conception of legal phenomena. Now suppose the political argument had succeeded. This in itself would not by necessity forbid this community from retaining its natural law beliefs. For the legal officials of this society may hold that the character of the law is as yet undetermined; this character may be unveiled at some later date, only to reveal that their natural law instincts were right. There is nothing in the political argument that can deny that this will happen, for our political needs at one moment may shift in the next moment, and thus we cannot expect them to reflect the atemporal character of the concept of law. We may criticize this society for failing to adopt the most politically desirable conception of the law, but this would only be a political criticism, not an analytic criticism. Now, suppose the explanatory power argument is correct; if that were the case, could this community hold to its beliefs as before?

Where we make better sense of a legal phenomenon, we expect that we do so not merely through a greater understanding of how our minds make sense of the law, for this follows as a matter of course. We expect rather that in making better sense of this legal phenomenon, we have discovered important truths about the law itself. And if we discover that we are better able to organize our experience of the law by way of the Separation Thesis, we will come to doubt the suggestion that the law in its ontological essence is attached to morality for exactly this reason. Should the explanatory power argument prove valid, this hypothetical community that finds itself so entrenched in natural law theory will antagonize its own legal inquiry if it refuses to give over to positivism. In that situation, they must either shift their beliefs, or else operate in foolishness, asserting an ontology of law that runs counter to the facts of legal epistemology.

This community may counter, however, that all we have is a hunch; we cannot prove that an epistemically successful theory properly reports its phenomena as it actually is, we only have the suspicion that this is the case. While it can happen that the success of the Separation Thesis in legal scholarship or in political attitudes, if this success exists, indicates that it inheres in the law itself, it nonetheless remains possible that this success owes nothing to the way we cognize legal phenomena. This success may follow from the character of legal academia, from a specific political climate, or from a few brilliant positivist thinkers, or any number of other factors external to the law's immanent qualities.

But then we must ask: how does one invalidate such a hunch? Given our beliefs about how our thinking mirrors reality, it is especially difficult to dispute a theory that is epistemologically successful. For if our epistemology moves in one direction, we will come to distrust any ontological theories that lead us the opposite way. This is because our evaluation of ontological theories is always mediated by our cognition of them. We cannot but subject these theories to epistemological scrutiny; it is only in this way that we can differentiate a well-constructed ontology from a chimerical one.⁸⁰

⁸⁰ I have over the course of the past several paragraphs oversimplified Kant's critical philosophy for the sake of brevity. I will say however that it is inappropriate to claim that for Kant our thinking mirrors reality, and leave it at that. Rather, prior to our cognition of it, an object is not yet subsumed under the concepts of the understanding. Upon the instance of cognition, subsumption takes place. This means that the object as we perceive it is 'processed' by the concepts of the understanding. The pre-processed object is different from the processed object, so, in this sense, our thinking does not mirror reality. But it is not clear just how far we ought to take this distinction. On the one hand, it may be that processing via concepts does not distort the perceptual data itself. It only affects the significance we grant to that data. For instance, on this interpretation, Kant holds that the empirical world actually looks exactly as it looks to us, but our conceptual makeup causes us to look at it a specific way. That is, the world is a manifold of perceptual information, and it is only by ascribing special conceptual significance to this shadow, and to this colour, and so on, that objects emerge, that they are individuated from out of a background of raw experience. On the other hand, we may adopt a more extreme view with regard to the role of concepts in perception, such that we may not even speak of shadows and colours within the manifold. Understood this way, the pre-conceptual manifold is entirely unimaginable, and the consequence of this is that we are living in a world that we cannot even fathom. If the more conservative of these interpretations of Kant is right,

Consider a brief thought experiment: the basic substance of physical objects is imperceptible, meaning that any empirical determination of it is impossible. So we turn to theoretical, that is, non-empirical, physics to determine this substance. I will grant that I distort theoretical physics in calling it non-empirical, since the work of theoretical physicists is to document as best as is scientifically possible the phenomena of the empirical world. But for the sake of the thought experiment, let us grant this distortion; we can do so because, in its abstraction, theoretical physics is not immediately related to our everyday empirical experiences.

So, as we have left the empirical matter of this basic substance behind, and are dealing instead with a purely theoretical question, we have an option: we may side with Thales and posit this basic structure as fundamentally water, or we may follow Democritus, and assert that objects are fundamentally composed of particles. But how are we to choose between them? There is no ontological reason to champion one over the other because our ability to access this ontology is limited; this substance is beyond our experiential capabilities and for this reason neither theory is verifiable. But our scientific history has shown that the one has been substantially more useful to the explanation of our cognition of physical phenomena than the other; it has a theoretical value. According to this theoretical value, which we might just as easily call explanatory power, we select the theory that provides the greatest use for our own thinking. And where we select our theory in this way, according to epistemological rather than ontological criteria, it seems

then I think what I have said does not misrepresent him for, though our thinking does not mirror reality, it takes up a relationship with reality that amounts to the same thing. That is, concepts are answerable to perceptual information such that I cannot subsume that information under just any concept, but must rather wait until the proper combination of experiences presents itself. But if the other interpretation is right, then we are to appeal to Kant's characterization of 'faith' as a surrogate to knowledge. I cannot say for certain that our thinking is significantly related to reality, but I can take my 'hunch' that this relationship exists on faith. I must do so because otherwise I am left a helpless skeptic.

strange to say that our theory is only a hunch, that the basic structure of physical objects remains a mystery. Perhaps we have failed to determine this basic structure as it is *in itself*, but we have succeeded in determining what it is for us, that is, for human thinking. This is why Kant equates universal validity to objective validity.⁸¹ To put it another way, though the presence of epistemological virtues cannot act as evidence that a theory matches our legal thinking, we are not in need of evidence to begin with. We are predisposed to view an epistemologically successful theory as being true to the way that we think.

The Explanatory Power Argument from the Virtue of Candour

In Hart, the explanatory power argument is made most persistently with reference to the epistemological virtue of candour. He holds that legal positivism is an exemplar of this virtue relative to its opponents because it owns up to the fact that legal institutions may be deployed for evil purposes. The principle that only moral law can be law obscures this truth for the sake of the wish that the law reflect justice in every instance. Thus, anti-positivism must bring about a dishonest understanding of the law, which speaks only to our subjective desires, rather than to the law as it actually is:

The vice of [the] use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.

“All discord Harmony not understood
All Partial Evil Universal Good”

This is surely untrue and there is an insincerity in any formulation of our problem which allows us to describe the treatment of the dilemma as if it were the disposition of the ordinary case.⁸²

⁸¹ In note 65 above.

⁸² Hart, “Legal Positivism and the Separation of Law and Morals,” page 620.

Obviously, an honest theory has greater explanatory power than a dishonest theory. We cannot let our wish that legal institutions be just get in the way of our wish that we recognize legal phenomena as it actually is. These wishes are attached to two separate projects, the one our pursuit of accurate information and the other our pursuit of justice. And these two projects can oppose one another; impartial investigation will inevitably turn up cases of injustice, which may in turn present difficulty as we attempt to realize a moral conception of the law. In order to resolve this opposition we may with legal positivism separate the question of the law's phenomenological content from the question of its virtue.

Doing so not only suppresses the urge to twist the legal facts to our wishes, but it also better focuses the work of the legal scholar who wishes to work solely in the impartial study of legal phenomena. By setting the moral issue of the law aside, she can preserve her resources for the singular project of legal investigation. This means that her job is made simpler, for she need not delve into the complexities of moral philosophy. So, in candour we are to find the twin merits of philosophical simplicity and the purging of moral bias.

This cognitive virtue of candour may be all the explanatory power argument needs in order to show that legal positivism best serves legal epistemology. One virtue is enough so long as the alternatives to positivism do not have exclusive virtues of their own. But if it happens that each theory has its own set of epistemological virtues, we must decide which virtues are more valuable than others. Of course, this is not easy; quantifying the worth of many different legal virtues and measuring their relative value is difficult work. We cannot even say for certain that more of virtue x is better than a lesser

amount, because too great a degree of a certain virtue may tip us into overzealousness, just as Aristotle's virtues become vice when practiced immoderately. These are typical philosophical pitfalls, the kind that produce the many frustrating controversies that legal positivism wants to avoid. But in the absence of something like utilitarianism, there is no easy identity between values such that we can weigh the one against the other.

This means we must set out the explanatory power argument from candour in especially limiting terms:

Premise 1 – The Separation Thesis cultivates the epistemological virtue of candour.

Premise 2 – Any theory that cultivates candour has greater explanatory power than a theory that does not.

Premise 3 – But for the explanatory power won from candour in this way, legal positivism has explanatory power equal to or greater than alternative legal theories. That is, if an alternative legal theory is host to legal epistemological virtues x, y, and z, then it must be the case that legal positivism also houses virtues x, y, and z, as well as the virtue of candour. This way, the virtue of candour is the tipping point that puts legal positivism ahead of all others in terms of explanatory power.

Premise 4 – A theory with greater explanatory power than the alternatives is valid on pragmatic epistemological grounds.

Conclusion – The Separation Thesis is valid.

We must grant premise 4 for the reasons outlined in the basic structure of the explanatory power argument. We can also easily grant premise 2, since the merits of candour are obvious. If we are to find error with this argument, it must be in either premise 1 or 3.

We begin with premise 1.

That a case can be made for candour in legal positivism is uncontroversial, at least to the extent that Hart understands that virtue. But the significance of premise 1 depends on legal positivism exemplifying a candour that we do not see in other legal theories. But

we have reason to doubt this. Hart accuses anti-positivism of dishonesty, but the anti-positivism to which he refers is something of a straw man. Must anti-positivism accept the silly delusion that all legal institutions are just, and render itself blind to any evidence of institutional injustice? Or will anti-positivism be better able to spot these very injustices because it keeps matters of justice, matters which cover both moral and immoral law, constantly at the center of its legal inquiry? I suspect it is the latter; anti-positivism does not ignore injustice for the sake of the hope for a perfect legal system, but is rather trained upon it. It is injustice that causes the anti-positivist to take notice, and to say ‘this thing that claims to be law is false, and it deserves our attention so that we may remedy its defects.’⁸³

Meanwhile, inasmuch as legal positivism congratulates itself for avoiding the pitfalls and endless debate of moral philosophy, anti-positivism can complain that this amounts to a dishonesty of its own. As anti-positivism understands it, confronting with these pitfalls and this debate is essential to any inquiry into the law, whether evaluative or descriptive. We may wish to escape the complexity of that philosophy, but this is just a wish, it does not justify such an escape. Thus, the anti-positivist may argue that we must

⁸³ This counter-argument to Hart’s claim that anti-positivism contributes to complacency with reference to the law is suggested by Alexy in *The Argument from Injustice*. But there is this difference: Alexy agrees with Hart that an anti-positivist position that denies *all* immoral laws legality will bring about this manner of complacency. “The risk of uncritical legitimation would indeed exist if the non-positivistic connection thesis said that a norm is a legal norm only if its content corresponds to morality” (page 47). This is because “one who begins by including moral elements in the concept of law runs the risk of uncritically identifying legal with moral requirements” (page 46). But Alexy goes on to argue that if we draw upon Radbruch’s formula such that we deny legality only to norms demonstrating extreme immorality (while allowing that mildly immoral norms may be positive law) we do not encounter this problem. Radbruch’s formula “admits of a moral critique of the law and, in this respect, makes possible a critical stance vis-à-vis the law” (page 48). Radbruch must, after all, critically assess the law so as to determine whether or not it has passed the threshold of extreme injustice, and for this reason he can never be complacent with reference to the law. I have here adopted the wider (though I’ll grant more vulnerable) position that all anti-positivists, whether or not they deny legality only to extremely unjust norms or to all unjust norms, will constantly be critical of the law, as the moral evaluation with which they determine the legality of these norms requires a critical perspective. But if this position proves deficient, we may fall back on Alexy’s and in this way maintain this counter-argument to Hart’s argument from candour.

not let this wish obscure the true nature of the law, which is, according to this perspective, necessarily an object of morality. This means that the simplicity the positivist enjoys as the result of her 'candour,' is only won by way of the disingenuous wish that the law were simpler than it actually is.

So, which position do we trust? Both theories can accuse the other of dishonesty, and both can for this reason lay claim to the virtue of candour. And there is reason to believe that we will be faced with exactly this puzzle with every epistemological virtue; consider simplicity. Is it simpler to separate the question of the law's existence from the question of its morality? Legal positivism seems to think so, and perhaps this is so wherever we can organize a scholarly division of labour so as to take advantage of this separation. But the principle of parsimony tells a different story: we have only one legal dimension under anti-positivism because there the fact of the law lives alongside its value. Meanwhile, we have two dimensions under the Separation Thesis: legal existence on the one hand, and legal morality on the other. The investigation of two dimensions is considerably less simple than the investigation of one, and therefore, with Ockham on its side, anti-positivism may argue that it is the simpler of the two theories.⁸⁴

These difficulties with premise 1 will resurface when we come to premise 3. It is there that we have to determine how to measure a theory's explanatory power. Premise 1 must answer to this determination, as explanatory power is the unit with which we might measure the worth of the distinctively positivist understanding of candour, and hazard a

⁸⁴ Then again, if we are willing to embrace the complexity of moral philosophy, we might find a way to organize the relative values of these virtues such that we can determine, with reference to a given context, whether X amount of the one is better than Y amount of the other. Dworkin's project of developing political values with reference to a 'web of conviction,' such that they are arranged holistically according to our interpretive conceptions of them, and are thereby relationally determined, shows promise in solving problems of this kind ("Hart's Postscript and the Character of Political Philosophy," pages 17-18 and 23). Dworkin does acknowledge that this is an especially ambitious project, but there is nothing in this ambition that suggests it will not work.

guess at its relative value. But it is the concept of explanatory power that can deliver us from the problems just mentioned regarding epistemological virtues. For if we discover by way of this measurement that legal positivism is ahead of the competition in terms of raw explanatory power, this will be enough to prove the explanatory power argument valid, so that we will no longer need to make a case from candour. This is not to say that a consideration of epistemological virtues such as candour is of no use in evaluating legal theory. But these virtues are to be perceived as instantiations of explanatory power in specific circumstances, such that the positivist virtue of candour is merely the instantiation of its explanatory power where we are confronted with wicked law. Understood this way, an inquiry into a theory's explanatory power amounts to an inquiry into its epistemological virtues as well. It is perhaps simpler to approach these virtues from this perspective, rather than considering one virtue after another, as it ensures a wider perspective. So, I suggest that we abandon the explanatory power argument from the virtue of candour in favour of an explanatory power argument from a general conception of explanatory power.

Now, we need only a rudimentary means to measure explanatory power so that we can get a sense of how legal positivism fares. Should this account fail to present legal positivism in a favourable light, it may be that its brevity distorted our assessment, which leaves open the possibility that the explanatory power argument will do better when investigated in greater detail. But if this is so, we can only regret that Hart did not take care to expound what he took explanatory power to mean, since if he did, we would not need to construct this idea from the beginning. Our account of explanatory power must

be Kantian, as it is only via Kant that we arrive at the kind of pragmatism that can support the Separation Thesis, that is, a pragmatism that maintains the primacy of the Is.

The Concept of Explanatory Power

It is tempting to take the designation of explanatory power to be akin to what a pragmatist means when she claims a theory ‘works for us.’ But this comparison risks oversimplifying the matter, for we want to show that a given theory works for us not for just any pragmatic reason, but specifically according to that theory’s epistemic merits. It is possible that a theory may accommodate our thinking for reasons exterior to the theory itself, for instance by way of the brilliant writer or sympathetic academic climate. There is a pragmatic argument to be made for the acceptance of theories on this reasoning, but as we have seen, an argument of this type will not serve Hart’s positivism. So, we must take care to distinguish a theory’s working for us according to its fit with the facts of how we think of the law, and its working for us simply because it is convenient to some non-epistemic variable. Thus, we say that the explanatory power argument asserts that the Separation Thesis holds explanatory power, rather than that it ‘works for us.’ This way, we are reminded that the explanatory power argument succeeds only by demonstrating that the Separation Thesis directly improves our understanding of the law, rather than by merely showing that legal positivism carries with it certain comforts contingent on an academic or political culture.

Immanuel Kant provides an account of just this kind of argument from explanatory power.⁸⁵ He argues that reason alone, even without empirical support, can

⁸⁵ Again, this is to be found in ‘On the Regulative Use of the Ideas of Pure Reason,’ which is the first appendix of the Dialectic of Pure Reason in *Critique of Pure Reason*.

find ‘some objective validity’⁸⁶ by way of its use in organizing our phenomenological experience both so as to allow for the proper categorization of that experience and to provide a framework from which we can anticipate future experience. He understands this organizing as primarily a unifying; we construct objects borne solely from reason so as to unify our disparate experiences, and in this way classify them according to our needs. These objects of reason have ‘a most admirable and indispensably necessary regulative use, in directing the understanding to a certain aim, towards which the directional lines of all its rules converge in one point.’⁸⁷ It is with their help that we can render chaotic phenomena into something comprehensible, into one coherent point, rather than many discrete entities. Consider this example from Kant out of 18th century

Prussian chemistry:

We confess that **pure earth, pure water, pure air**, etc. are unlikely to be ever encountered. Nevertheless we require the concepts of them (which, as far as their perfect purity is concerned, have their origin only in reason) in order to be able to determine properly the share which belongs to each one of the natural causes in appearance.⁸⁸

In this same vein, a concept of law, itself nowhere discoverable in experience, can be used to bring our many legal experiences under one conceptual heading.

It is this urge to unify all phenomena under concepts that Kant identifies as a principle intrinsic to all human thinking. Perhaps he is wrong to believe that every person seeks to unify phenomena in this way; it is easy to find a person working to bring all her experiences into one coherent whole, but it is just as easy to find another who thinks such a whole impossible or unnecessary and leaves his many experiences scattered, and unrelated. But whether or not Kant was too ambitious in attributing the

⁸⁶ *Critique of Pure Reason*, page A664//B692.

⁸⁷ *Ibid.*, page A645//B673.

⁸⁸ *Ibid.*, page A646//B674.

urge to unification under concepts to everyone, he is clearly right to attribute it to analytic theory. Certainly it is fair to characterize analytic jurisprudence as the project of bringing all legal phenomena as cleanly as possible under a singular concept or set of concepts. It is the possibility of the satisfaction of this urge to unify that makes analytic theory attractive.

Let us say we have before us two laws. How do we relate them one to the other? How do we legitimize our use of the designator 'law' across the two of them? Of course they have similarities, but they also have differences. So, what makes the similarities more relevant than the differences? The phenomena itself does not relate the two laws, except in special situations where the one law explicitly refers to the other. But we do not expect the relationship from the phenomena; it is to come from the concepts we apply to them. Just as where we enter a warm room with a fireplace, even though there is nothing in the warmth and nothing in the fireplace that directs our experience of the one to the other, we construct their relationship ourselves by way of concepts constructed via our thinking. Likewise, we connect our two laws by way of a legal concept that we have built out of principles inherent in our cognition of them.

The unification of experiences is only the first step; we have yet to designate the specific concept we are to use to connect our legal experiences together. With sufficient creativity, any experience can be connected with any other experience via some concept or another, but we cannot settle on the first concatenation that comes to mind. We have no use for a theory that synthesizes our experience of one legal case to our experience of another simply because they shared the same stenographer in the courtroom. That connection is insignificant, and yet that these cases shared the same sentence is not. So

we must determine a means to differentiate the significant from the insignificant connections. The discovery of this differentiating concept follows from the facts of how we think about the law.

Kant details three kinds of synthesis through abstract concepts that we can use to define significant connections: first in identifying the common substance of the phenomena at hand, second the common source, and third the common perfection.⁸⁹ Each of these may be used to situate our conceptual connections with respect to one systematizing end. That is, we may choose to connect one legal phenomenon to another only according to concepts following from the basic substance of the law, and disregard all possible connections that do not touch upon this substance. If this substance is found to lie in sanctions and punishment, then connecting two cases according to their sentence is appropriate, while a connection stemming from common stenographers is not.

Any experience of the substance of the law is, as we have already seen in our account of the existence argument, out of our reach. But the explanatory power argument is able to posit in its place a substance that works to systematize our experiential faculties of the law alone, in this way providing a unity to our legal inquiry while respecting the inscrutability of legal ontology. Again, this is a fair move in Kant, for as he has it “I may have sufficient ground for assuming something relatively ... without having a right to assume it absolutely,”⁹⁰ meaning that we are justified in believing in something relative to

⁸⁹ As it happens, Kant believes that these are the only three kinds, that there is no other path synthesis via abstract concepts might take (*Critique of Pure Reason*, A337ff/B395ff). And yet that seems a strange claim, as there must be many ways to synthesize a given phenomena so as to produce a conceptual unity. Substance, cause, and perfection are only three ways of articulating this synthesis, and we might just as easily allow that semantic unity, and computational unity, among others, can achieve the same.

⁹⁰ *Ibid.*, A676/B704.

its place in a system of beliefs, though we may not carry with us an accurate belief of this thing in itself.

So legal positivism, without claiming to know the law in itself, can claim to know the law as it forms the nucleus of a system of legal beliefs. This formulation is particularly faithful to Hart's rendering of legal positivism, in that it explains his description of the concept of law as having explanatory power rather than being a dictionary definition; it is a concept of law only inasmuch as it orients our cognitive attitudes to legal phenomena, and does not actually define the law in itself. Additionally, it explains exactly how Hart can understand his project as being an essay in descriptive sociology. He does not mean by this that *The Concept of Law* is a sociological text derived from empirical data. Rather it is a system from out of which a sociology of law, or any other empirical study of the law, may proceed, for it provides the scaffolding upon which legal empirical data may be laid. This scaffolding, given in line with Kant's idea of objects of reason as unifying phenomena under a common source, is the rule of recognition; armed with that concept the legal sociologist is given a clue as to how she ought to categorize empirical data. Following Hart, she will begin her inquiry into a society's law with an account of that society's formal tests by which it distinguishes law from other social rules. Without this starting point, she lacks the foundation with which to build a coherent investigation into that society's law.⁹¹

With this idea of explanatory power from Kant in mind, we may return to the question of how exactly Hart understands his project to be analytic. We saw in the existence argument that Hart does not provide a meaningful ontological picture of the

⁹¹ Hart suggests exactly this interpretation of his claim that his analytic jurisprudence details a descriptive sociology in David Sugarman "Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman" 32 Issue 2 Journal of Law and Society (2005).

law. Given this inability to make a strictly descriptive analytic claim with reference to the law, we turned to pragmatic reasoning in the political argument. But we saw there that Hart does not connect his analytic project with his moral project, and is for this reason unable to cast his moral reasons for adopting legal positivism as analytic reasons.

I suggest that the explanatory power argument is a kind of Hegelian synthesis of the previous two arguments. Though it departs from the ontological claims of the existence argument, it borrows its analytic character, this time characterized by way of the universal, and therefore factual, theoretical urge to unify phenomena under concepts. Meanwhile, it justifies ascribing validity to a theory to the extent that it satisfies this urge for pragmatic reasons, that is, so as to expand our understanding of the law. Thus, the explanatory power argument provides a middle path between the preceding two arguments, and by way of this path, provides a means of rescuing Hart's analytic project from its dubious ontological claims, and cryptic relationship to morality.⁹²

⁹² In fact, this characterization of Hart's analytic jurisprudence with reference to its explanatory power is hinted at by Dworkin in "Hart's Postscript and the Character of Political Philosophy" *Oxford Journal of Legal Studies*, Vol. 24, No 1 (2004). In this paper, Dworkin asks what Hart means in labeling his positivism 'descriptive.' Dworkin provides three suggestions as to what this might mean. The first two are as follows: descriptive in that it documents semantic meaning, descriptive in that it identifies its subject's essence (the existence argument drew on this meaning of 'descriptive' in its attempt to describe the law as governed at an essential level by the Separation Thesis). The third is actually two separate meanings, and it is unclear why Dworkin lumps them together. His account of this third path is that it is a "search for an impressive statistical generalization of some kind – perhaps an ambitious one that depends on the discovery of some law about human nature or behaviour" (page 9). A statistical generalization tells us something very different from a claim that depends on the discovery of some law about human nature. That is, a statistical generalization draws its conclusions from a significant quantity of empirical data. But if we knew of some law about human nature that validated a particular claim, we would have no need for statistics to back up that same claim. The explanatory power argument framed according to this urge to unify phenomena under concepts, and inasmuch as it claims validity to the extent that it fits with our human understanding, that is, with the laws of our nature, is an example of description from a law of human nature. But it does not deal in statistics.

In that same section, Dworkin criticizes each meaning of 'descriptive' that he suggests. But when he comes to the third meaning (pages 11-12), he provides criticism only for statistical analysis, and does not touch on the matter of description from laws of human nature.

A Criticism: the Threat of Ideology

This determination of explanatory power from the extent to which a theory unifies many otherwise disconnected experiences under broad concepts is to be the engine for the explanatory power argument. But before we may proceed, we must consider whether this urge to unify may in certain circumstances work against explanatory power. It can happen, after all, that a theory, though it seeks to unify its phenomena under concepts, fails to touch on the empirical, but rather exhausts its explanatory power in the navigation of its own principles. A theory that suffers from this problem will look something like astrology: extremely complex and nuanced, requiring many years of study, but with no tangible connection to the world outside itself. For our purposes, I will call theory of this type ideology. By this I mean a set of beliefs that claim to improve our understanding of empirical phenomena, when in fact they are not meaningfully related with the real world. If we are fooled by this claim to greater understanding, our analysis of phenomena is thereby prejudiced, and our understanding diminished.

Because we can spot theories of this kind fairly easily, they pose little threat. But even a theory that touches on empirical experience in places may utterly disregard it elsewhere. For there is the risk that, in bringing all phenomena under a unifying concept, we might distort certain phenomena at the fringes. Where this happens, we are given a clear view only of the empirical data lying within a theory's comfortable domain, while all that which lies outside this domain is muddled. That which is particularly dangerous about this distortion is that we are liable to forget it exists. The students of this theory, unaware of its theoretical blind spots, may make the mistake of treating this distorted empirical information as accurate.

Hart touches on this risk of distortion in his account of core and penumbral cases.⁹³ He has at the core of the law all legal phenomena that follows clearly from a legal system's rule of recognition, and at the penumbra all phenomena that is not directly, or perhaps not at all, indicated by that rule. The fact of penumbral legal phenomena weakens the explanatory power won from our unifying all legal phenomena with reference to their shared source in the rule of recognition. But given the variety of legal phenomena we may encounter, we cannot expect to construct a theory that will fit with them all; it will happen with any concept of law that some legal phenomena will be better recognized than others, and penumbral phenomena must be forced despite its empirical qualities to fall under a given concept, if it is to be fitted into legal theory at all. We must allow that such distortion can be forgiven so long as our understanding of the law comes ahead in the end.

However, there is a threshold that a theory passes once it reaches too high a level of distortion.⁹⁴ Passing this threshold invalidates a theory's explanatory power. So, we must determine a level of distortion under which a theory can be tolerated, and above which it is to be condemned as ideological. Hart suggests that we remain under this threshold where we situate ourselves between two extremes in legal theory: rule-skepticism and formalism.⁹⁵ To put it simply, formalism falls in line with a concept-driven philosophy, such that no phenomena may be called law unless it is fitted neatly

⁹³ "Legal Positivism and the Separation of Law and Morals." Pages 607-8.

⁹⁴ Hart confronts with a similar idea in his consideration of whether Kelsen can justify his reducing power-conferring rules to duty-imposing rules by an appeal to conceptual unity (in the section titled *Distortion as the price of uniformity* in *The Concept of Law*, pages 38-42). Hart says "It is sometimes urged in favour of theories like the one under consideration that, by recasting the law in a form of a direction to apply sanctions, an advance in *clarity* is made, since this form makes plain all that the 'bad man' wants to know about the law" (page 40, emphasis mine). But he goes on to reject this appeal because it obscures the diverse ways that the law guides social behaviour (in writing wills, and being married, etc.).

⁹⁵ In chapter seven of *The Concept of Law*.

under a legal concept. Hart believes it to be one of the positions mistakenly attributed to analytical legal theories like legal positivism. He describes it as “the contention that a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards.”⁹⁶ Organizing legal data as though it comprised a closed logical system would certainly simplify things, but it would also violently distort legal phenomena for the sake of that simplicity.

Rule-skepticism, on the other hand, is concept-denying, for it asserts that a given phenomenon is legal even before legal concepts like rules come into play. It is discoverable in the school of American legal realism Hart discusses at the opening of *The Concept of Law*. Rule-skepticists are sympathetic to the claim that where we discuss legal theory we are merely predicting the actions judges will take; we are not identifying rules immanent to any given law, but are articulating legal trends. This position can quickly adjust to new data since it is not beholden to the clunky principles of concept-driven legal theory. But at the same time, it sacrifices substantial explanatory power for the sake of this flexibility because it invalidates the use of those principles so as to organize our legal experiences. Hart wants to situate legal positivism between these two positions, so that we can enjoy the explanatory power of a unifying concept of law while at the same time not holding inflexibly to that concept at all times.

Of course Hart is right that it would be ideal to retain the virtues of these two positions without in so doing adopting their vices, but this tells us very little as to how a legal theory is to navigate penumbral cases. If anything, it adds an additional complexity: before we determine a penumbral case, we must determine our relative proximity to both

⁹⁶ In note 27 of “Legal Positivism and the Separation of Law and Morals.”

formalism and rule-skepticism with regard to that case. It is a serious problem that Hart does not provide us with more effective guidance in determining legal phenomena that falls outside of a rule of recognition. Without this guidance, his legal positivism is vulnerable to dissolution into ideology.

Ideologies are to be avoided wherever possible for the following two reasons: for one, a legal ideology substantially increases the number of penumbral cases, since it can treat as core only those cases that fall within its particular metaphysics. This metaphysics can be especially narrow; a religious ideology that adopts the Augustinian credo that only moral law can be law, for instance, likely does so under the authority of an especially rigid, and perhaps bizarre, morality. Meanwhile, ideologies, because they attach great significance to their metaphysics, may more violently distort penumbral cases so as to meet their metaphysical notion of the legal. Thus, a catholic society may be less able to impartially consider the legality of a late-term abortion than a liberal society that separates church and state.

The other danger of legal ideologies is that they provide a fresh arena for disagreement. For where one group may adopt an ideology holding that divine law is the unifying concept of legal phenomena, another may adopt an ideology holding the command theory as this unifying centre. And unlike the arena for truth, where arguments may be resolved with reference to reason or empirical data, this arena provides no easy means to determine which positions succeed and which fail. So the two groups will disagree with one another without any clear means of resolving their ideological difference. Depending on the metaphysical significance attached to the ideologies involved, the fact of this disagreement can cause ill will and frustration. But even where

these two groups can live peaceably despite their disagreement, there is the chance that disagreement with regard to something so socially important as the law will undermine feelings of community and solidarity between social groups.

Because ideology undermines our capacity to accurately understand phenomena, a resistance to ideology is an indicator of explanatory power. So, if we can demonstrate that Hart's positivism can defend against ideology, this may contribute to the explanatory power argument. But we must also show that legal positivism is not ideological from the start. Dworkin accuses Hart's analytic jurisprudence of parochialism, and this in turn suggests that it may be ideological.⁹⁷ If legal positivism only amounts to constituting the ideological attitude of a specific school of legal scholarship, and does not in any epistemological sense improve that school's understanding of legal phenomena, it is of no use to legal inquiry. In fact, it constitutes a potential harm for the two reasons just mentioned. This condemnation of parochialism levied against positivism is especially plausible when held up against Dworkin's observation that judges generally *do* draw substantially on morality in deciding cases.⁹⁸ It must seem strange to condemn legal positivism in this way, given that its historical aim alongside utilitarianism was to cut

⁹⁷ In Ronald Dworkin, "Thirty Years On" 115 *Harvard Law Review* 1679 (2002), page 1678. There, Dworkin accuses legal positivism of being relevant only to its adherents and having no bearing on how lawyers, judges, politicians, and other legal officials make sense of the law.

⁹⁸ In Dworkin's essay "Hard Cases" as published in *Taking Rights Seriously*. Hart is aware of this habit of judges to decide cases with reference to morality. In fact, he constructs his idea of the internal and external perspectives of the law to capture this very habit: 'There is a constant pull towards an analysis of [legislation, jurisdiction, validity, and, generally, of legal powers, private and public] in terms of ordinary or 'scientific', fact-stating or predictive discourse. But this can only reproduce their external aspect: to do justice to their distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers, and other 'acts-in-the-law' are related to secondary rules' (*Concept of Law*, page 99). It would seem here that Hart is making an effort to expand positivism's scope so that it encompasses as much legal data as possible. While this does indicate the kind of explanatory power I've derived from Kant, it is not enough as it only returns to the puzzle of how he can articulate the internal perspective of law through the Separation Thesis. If most judges adjudicate with reference to moral principles, it is misleading to maintain that they do so only extra-legally, or else in a way that is not fundamental to their law.

through ideology. Ironical thought it may be, it is a criticism to which legal positivism must answer.

We will return to Dworkin's charge of parochialism in the next section. For the moment, let us articulate a means of measuring explanatory power inasmuch as a theory resists ideology. This measurement must be more sophisticated than Hart's advising that legal scholarship find a path between formalism and rule-skepticism. Once again, an answer is to be found in Kant; it is his strategy to demand that theory adopt a reciprocal attitude to empirical data, such that the one is allowed to determine the other. On the one hand, it is the job of theory to synthesize our empirical experiences into a unified whole, in this way allowing us to better organize and classify our experiences of the law. But on the other hand, theory must recast itself with respect to whatever empirical evidence we turn up; while its formal aims remain the same whatever phenomena we uncover, the conceptual manifestation of these aims adjust to the new phenomena. For example, a legal theory that unifies all legal experience according to its common cause in the rule of recognition will retain this bid to identify a common source inherent in the law across all possible legal experience. But the substantive realization of this source as the rule of recognition may change as new legal data turns up, meaning that, though we continue in every case to classify legal phenomena with regard to a rule of recognition, that legal phenomena may lead us to redraft our idea of what the rule of recognition requires, so that a rule of recognition grounded in a law-making elite may shift into a constitutional rule of recognition, and so on. In this way, we ensure that the theory is contingent upon the testimony of legal data, while at the same time maintaining a conceptual center with which to make sense of that testimony.

Thus, a theory, if it is to avoid dissolution into ideology, must devote its constant attention to the future case. And, the future case, because it is not yet conceptually determined, is itself a penumbral case. We may allow a theory to neglect certain penumbral cases for the sake of a greater explanatory power, but only so long as that power is directed toward new penumbral cases as they turn up. This way, we never allow the theory to take on a life of its own, as it is constantly answerable to our future empirical experiences.⁹⁹

This approach is somewhat analogous to W.V.O. Quine's holistic pragmatism. Just as Quine holds that we will adjust our system of beliefs so as to accommodate new empirical evidence, Kant holds that a product of reason must be cast off the moment it fails to meet with the testimony of experience. But there is this difference: where Quine has as the consequence of this pragmatism the assertion that no belief is sacred, but is rather constantly dependent for its validity on whatever empirical data turns up, Kant takes certain beliefs to apply across all possible experience. Included among these beliefs are basic concepts used to connect objects at the experiential level, like causality and quantity. But in addition to these basic concepts, he holds as an immutable belief across all possible cognition that human beings are driven by their faculty of reason to seek out a unification of experiences for explanatory purposes, especially so as to realize universal

⁹⁹ That this must be so is evident in Kant's assertion that all knowledge begins with experience (*Critique of Pure Reason*, page B1). This is why he subordinates the faculty of reason to the faculty of the understanding, which is the cognitive faculty that, along with the human perceptual apparatus, produces experiences: 'if the understanding is a faculty for producing unity of appearances according to rules, then reason is the faculty for producing unity of the rules of the understanding under principles' (A302//B360). The abstractions developed by reason do not touch upon experience directly, for no abstract object can be given in experience. But they are directed to experiences insofar as they must arrange them according to their needs, and in this way produce a unity that brings about explanatory power.

I should note that when I refer to future cases, I do not mean only those cases that are temporally situated in the future. Rather, the future case is simply the case not yet considered, and for this reason phenomenologically indeterminate. So, for example, a long forgotten case may be taken to be a future penumbral case to the extent that it is not determined until the future moment when we attempt to unify it with other legal phenomena under concepts.

knowledge, that is, the urge to unify under concepts mentioned in the last section. There is no room in Quine's pragmatism to assert that we are cognitively motivated in this way.

But while Quine's pragmatism enjoys greater flexibility inasmuch as it need not adopt any belief as universal, it runs into difficulties for exactly that reason. Kant's emphasis on universality requires that we have constant beliefs, such as the belief that all law shares a common source. We need these beliefs to be constant because it is only where we can depend on these beliefs in *every* instance that they can be properly used for explanatory purposes. For instance, it is the constancy of these beliefs that allows them to be used to measure new experience. They better orient our test of whether a theory's explanatory power anticipates future experience, since they provide a familiar ground from which we can turn to unfamiliar data. That is, without these beliefs, we would not have the theoretical apparatus in place even to distinguish our new experiences from our old ones; in adopting Quine's model, we may fail to recognize the significance of new data, as we confusedly lump that new data in with the old. Also, a pragmatic model that takes no belief to be universal must allow that one's entire system of beliefs may be invalidated by future evidence. If one's entire system is contingent in this way, we cannot rely on it to predict future experiences, as even these predictions may be thrown out with the beliefs that produce them as they are invalidated by new data. Thus, Quine's model produces a kind of theoretical quicksand, completely malleable but also altogether unstable. Theory needs a core of permanent beliefs in order to guarantee a reliable platform from which to provide its explanatory power.

The Explanatory Power Argument Revisited

So with what we have said about the measurement of a theory's explanatory power from the unification of phenomena under concepts, and from a resistance to ideology, we can reconstruct the explanatory power argument as follows:

Premise 1 – A theory that unifies diverse experiences under concepts, so as to enable the systematization of those experiences and the anticipation of future experiences, exhibits explanatory power to the degree that this synthesis takes place.

Premise 2 – A theory that guards against ideology by focusing on the testimony of future experiences exhibits explanatory power according to the strength of that guard.

Premise 3 – A theory propounding the Separation Thesis both synthesizes diverse experiences under unifying concepts, and guards against ideology.

Premise 4 – Because such a theory synthesizes diverse experiences under unifying concepts, and guards against ideology, it is host to significant explanatory power.

Premise 5 – No other legal theory can compare in terms of explanatory power.

Premise 6 – A theory with greater explanatory power than the alternatives is valid on pragmatic epistemological grounds.

Conclusion – The Separation Thesis is valid.

This is a convergent argument; it is not necessary that both premise 1 and 2 are true, since either on its own is enough to demonstrate that legal positivism has explanatory power. But if both are true, the argument is made that much stronger as it moves along to premise 5. Of course, there remains much to be said about explanatory power, and it may be that a detailed analysis will come to invalidate, or render unnecessary, premises 1 and 2, but for the sake of argument, let us grant them a speculative truth. We have seen that premise 3 is true with regard to the synthesizing of experiences under concepts, as the rule of recognition operates as a universal source for a given society's law. It is also easy to argue that is true with reference to guards against

ideology, if only because Hart makes an effort to accommodate penumbral cases. He says: “it is worth considering how far the reductionist legal theories ... obscure the diverse functions which different types of legal rules have in the system of social activity of which they form part.”¹⁰⁰ We can see from this that he attempts to restrain legal positivism by paying detailed attention to the variety of legal data we encounter.

On the other hand, this does not demonstrate an emphasis on phenomena yet to be discovered, on the future case. So we must ask, what predictions does Hart’s positivism make with regard to legal phenomena. He does assert that all core instances of the law, at least, will be discoverable by way of a rule of recognition. But the rule of recognition is the basis for the unification of legal phenomena inasmuch as they follow from a common source; it is with this unifying concept in mind that we can identify new legal phenomena, but as it is employed in this identifying capacity, it cannot itself be used to predict the content of that phenomena. That is, it is the ground from which we recognize new phenomena as new *legal* phenomena, and it exhausts its explanatory power in this way. Beyond that ground, we have need of additional principles against which we might test new experiences.¹⁰¹

But this is where the Separation Thesis must come into play. The central assertion of Hart’s analytic jurisprudence is not a positive claim, but a negative one: morality is not

¹⁰⁰ Hart, *The Concept of Law*, page 285. As I mentioned in note 80 above, it is Hart’s wish to avoid a reductionism of this kind that leads him to advocate that legal theory encompass both the external and internal perspective of rules. This would seem to indicate a willingness to meet with data that resists legal positivism [there was no room for the internal perspective in Austin’s positivism], which we may take to amount to a guard against ideology.

¹⁰¹ I lump the model of rules and the defining aspects of the internal aspect in with the rule of recognition, as it is the principal orienting rule from which the model of rules is understood, and because it governs the attitudes of those working within the internal perspective of the law. Apart, from this body of theory following from the rule of recognition, Hart also anticipates what future instances of the law must be in his account of the minimal content of law (*The Concept of Law*, pages 193-200.). But he allows for this minimal content only as a concession to natural law theory, so it is of no use in determining whether or not legal positivism is properly responsive to future phenomena.

a necessary component of the law. We may ‘reverse the polarity’ of this assertion in the following way: the Separation Thesis makes the substantive claim that we will *not* encounter certain future experiences, namely legal experiences that involve morality by necessity.

In keeping with this characterization of Hart’s legal positivism, we may hold that its predictive capability deals in the failure of other theories, namely anti-positivist theories. The Separation Thesis is poised to predict that anti-positivism will err in its claim that morality must accompany the law. But it is only verified in this prediction if we can observe a flaw in anti-positivism’s own ability to predict future experiences, for instance, if we discovered that morality did not in practice play a necessary role in the law. But, as Dworkin has indicated, by and large judges do draw on morality in deciding cases, and they do so in such a way that morality is essential to their adjudicatory reasoning. If this were not so, we could be certain of the Separation Thesis’ epistemological merits. But as it stands, the predictions borne from Hart’s analytic jurisprudence have not come to pass.

Greater Explanatory Power in Anti-Positivism

This fact that judges draw on morality damns the explanatory power argument as I have constructed it here. How could we explain this fact if the Separation Thesis is the path to the greatest legal understanding? Can we say that those judges are wrong somehow, that they have been misled? Not without proof. Apart from an extreme case where judges have been somehow massively deceived, it is reasonable to assume that judges think rightly in what they do. But this means the explanatory power argument can

only proceed by proving that judges are massively deceived. How can we justify giving ourselves the extra work of constructing a proof of this deception, for surely doing so would amount to a wasteful expenditure in explanatory power?

Perhaps we could allow for this failure to predict how judges act if it happened that legal positivism exhibited tremendous explanatory power elsewhere. But if we follow Kant and find this power in the unifying of many phenomena under a single concept, it is difficult to put legal positivism ahead of anti-positivism, for anti-positivism is able to fit justice under the concept of law and in this way unify more legal phenomena than the Separation Thesis would allow. In fact, the explanatory power argument as I have constructed it would seem to bring about its own defeat: premise 1 better serves anti-positivism than positivism because a moral concept of law brings about a greater unification of experiences. Premise 2 better serves anti-positivism if only because anti-positivism does not predict that judges will act in a way they in fact do not. This means that premise 5 is clearly false; anti-positivism demonstrates greater explanatory power than does legal positivism.

And though it may be that there is considerably more to the epistemological evaluation of a theory than the degree to which it unifies experiences and its ability to anticipate phenomena, these two in some way or other must play a central role at least. For it is the unification of experiences under concepts that justifies a theory's abstraction. And while it is possible that Kant's advice that a theory emphasize the testimony of future experiences may not be the best guard against ideology, it is clear that some guard must be put in place to prevent a theory from distorting empirical information to suit its own purposes. We may allow that such distortion is allowed so long as it amounts to

predictive power, but we do so on the supposition that some distortion is inevitable, and that if it must happen, at the very least it should happen for the sake of accurately determining future penumbral cases. Without a guard such as this, our unifying theories will reach too far, and bring together distant experiences under a concept to which they are only faintly related. So, whatever formulation Hart may have intended for the explanatory power argument, we must have here landed on a portion of it. This means that if the explanatory power argument is to be rebuilt, it must indicate some aspect of explanatory power that I have missed, an aspect that is so significant, it forgives the deficiencies I've identified.

I must leave open the possibility that the explanatory power argument may be rebuilt, but this amounts to very little. We will not hold our breaths in anticipation of such an argument, but must rather regret that Hart did not do a better job of constructing this version. He simply did not give this argument the attention it deserves; like we saw in the existence argument, the Separation Thesis is here not treated at a sufficiently philosophical level, and for this reason we are left with the husk of an argument. I have attempted to flesh out the details, but in so doing I have constructed an argument better suited to anti-positivism. So the explanatory power argument fails with the rest.

Conclusion

So we have seen that the Separation Thesis is not bound up in the concept of law, that it does not follow from our pragmatic political interests and that it does not bring about the greatest explanatory power. If we cannot secure the validity of the Separation Thesis according to these three separate lines of reasoning, then I am at a loss as to how it can be proven at all. And without the Separation Thesis, what are we to make of analytic legal positivism?

Each argument failed due to an insufficient confrontation with the relevant philosophical issues. The existence argument refused to meet with the ontological character of its assertion that the Separation Thesis is discoverable in the very existence of the law. Without any exploration of that ontological character, the Is of the law is left open, so that we are left to wonder what this legal existence might be. The political argument did not explain what it took its epistemological basis to be. How are its moral claims to be related to its analytic conclusion? If we trace the one to the other by way of a pragmatic reasoning, then do we not undermine the Separation Thesis by allowing that the concept of law is morally determined? The explanatory power argument did not explain what it took explanatory power to mean. In order to navigate a pragmatic argument tailored to capture the extent to which a principle benefits our legal understanding, I had to appeal to Kant. But in so doing, I could not devise an argument in legal positivism's favour. In each case, Hart might have fitted in the missing piece – an ontological picture of the law's existence, the relationship of political benefits to

analytic claims, and a definition of explanatory power – but because he did not, these arguments could not succeed.

And always an anti-positivist solution was available. Morality can describe the law's essential ontology, can relate our political needs to the concept of the law, and explanatory power is far more sensible if it is defined in moral terms.¹⁰² This suggests that where a confrontation with deep philosophical issues such as the ontology and epistemology of law is concerned, anti-positivism comes out ahead. At the very least, these issues indicate a vulnerable point in legal positivism that anti-positivists can exploit. And with this in mind, we must think on the role analytic philosophy is to play in jurisprudence. It can determine the essence of law, and relate that essence to our moral and theoretical purposes, but it can also obscure the concept of law and sever our moral reasoning from our analytic reasoning. These past three chapters suggest that if analytic jurisprudence is to justify itself, if it is to defend itself against Dworkin's accusation of archimedian disconnection, legal positivism must be set aside, and a moral concept of law must be adopted in its place.

¹⁰² In fact, this may have been Kant's intention. His notion of the regulative use of reason may rely on his belief that we are predisposed to conceive of the world as designed by some morally perfect being (*Critique of Pure Reason*, in 'The Ideal of Pure Reason,' pages A567//B595-A642//B670)

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