PHILOSOPHICAL ASSUMPTIONS IN LEGAL PHILOSOPHY

PHILOSOPHICAL ASSUMPTIONS IN LEGAL PHILOSOPHY: A CRITIQUE OF CONTEMPORARY PHILOSOPHY OF LAW

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A Thesis

Submitted to the School of Graduate Studies

in Partial Fulfilment of the Requirments

for the Degree

Doctor of Philosophy

McMaster University

DOCTOR OF PHILOSOPHY (1998)
(Philosophy)

McMaster University
Hamilton, Ontario

TITLE: Philosophical Assumptions in Legal Philosophy: A Critique of Contemporary Philosophy of Law.

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SUPERVISOR: Professor W.J. Waluchow

NUMBER OF PAGES: vii, 209

ABSTRACT

In this dissertation, I argue that the debate between contemporary legal positivism and contemporary natural law philosophy must be understood in terms of underlying assumptions about the nature of philosophy. Despite differing conclusions about the nature of law and legal theory, contemporary legal theorists generally approach the study of law in a similar way. Generally speaking, contemporary legal theorists attempt to provide general accounts of law which are theoretically valuable. They believe that a general and theoretically valuable account of law can be achieved by bracketing-off metaphysical questions and focusing on the analysis of concepts. However, it is ultimately because contemporary legal theorists share assumptions about the nature of philosophy that they share similar problems. Because of these share assumptions, contemporary philosophers of law must choose between two alternatives which have limited theoretical value, namely, an overly formal account of law or a relativistic account of law. Thus, this dissertation is not only a critique of specific contemporary legal theories (those of Dworkin, Hart, Raz and Finnis), but also a more general critique of contemporary legal philosophy as a whole. Only by challenging the basic assumptions which underlie contemporary legal philosophy can we hope to provide accounts of law which are both general and theoretically valuable.

ACKNOWLEDGEMENTS

I would like to thank the members of my committee. Many thanks to my supervisor Wil Waluchow. With his encouragement, I decided to pursue my interest in philosophy of law. With his guidance, my questions and research gradually became a dissertation. Thanks to Sami Najm and Elisabeth Boetzkes whose insightful comments helped to clarify many rough ideas. Finally, I would like to thank Richard Bronaugh for consenting to be my external reader.

I would like to thank McMaster University, SSRCH and OGS for their support throughout the years of my research.

I would also like to thank my family and friends for their encouragement. In particular, I want to thank my father for his support and for his help in organizing my research. I want to thank my brother John for listening and commenting on various arguments in this dissertation. I want to thank Joseph Boyle for his suggestions about further reading. I want to thank Stephan Miles-Board for his help in preparing the dissertation for submission. And I would like to thank my son Alex, whose timely arrival encouraged me to finish promptly.

Finally, I want to thank Anthony Jenkins. His comments and questions helped me to clarify my ideas and arguments. His sacrifice gave me the time to finish this dissertation. His love gave me the strength to finish. Many thanks, my love.

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Introduction

The traditional debate between natural law and legal positivism is relatively easy to understand. It is easy to understand because the contrast between the two sides was sharp. Traditional natural law philosophers were Thomists in the full sense of the word. They accepted not only Aquinas' position on natural law, but also the metaphysics and epistemology which, they thought, were presupposed in his account of law. Traditional legal positivists were followers of Bentham, and they accepted not just his proposal for the separation of law and morality, but also his reasons for this separation. Traditional legal positivists shared Bentham's distaste for metaphysics and for the pretentions of an ethics grounded in metaphysics and religion. So, the traditional debate between natural law philosophers and legal positivists was a more fundamental debate about the nature of morality and the place of metaphysics in philosophy of law.

I will show in this dissertation that the nature of the debate changed with the publication of Hart's The Concept of Law in 1961. The debate changed because Hart's influence was felt not just among legal positivists, but also among contemporary natural law philosophers like Finnis and Dworkin. Those who influenced Hart (like Austin, Ryle and the later Wittgenstein) became at least indirect influences on both contemporary legal positivists and natural law philosophers. As a result, both sides of the contemporary debate share many assumptions about how philosophy should be done. They both agree that the work of philosophers involves, primarily, the analysis of concepts. Questions of metaphysics and even morality are, at least at the start, bracketed-off or put aside. Instead

philosophers of law focus their attention on deciding what concepts are central to an understanding of law, analyzing those key concepts, and showing what follows from this analysis. Because of these shared assumptions about the nature of philosophy of law, the line between natural law and legal positivism becomes unclear. Just what the point or points at issue are between them becomes a significant question in contemporary philosophy of law.

In this introduction, I will show that there is a problem deciding what is the point at issue between contemporary philosophers of law (and whether, indeed, there is a significant point of dispute between them) by considering some common ways of understanding the contemporary debate between natural law and legal positivism. I will show why it even becomes a problem deciding who is a natural law philosopher and who is a legal positivist. By the end of this introduction, I will do more than show that there are problems in contemporary philosophy of law; I will also indicate what direction should be taken in order to resolve these problems.

1. The meaning and significance of the credo that an unjust law is not a law.

There are three ways in which the debate between contemporary natural law theorists and contemporary legal positivists has been commonly understood. First, the debate is typically characterized in terms of the natural law credo *lex iniusta non est lex* or an unjust law is not a law.[1] While legal positivists maintain a distinction between the

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[1] For a brief discussion of the sources of this credo (as well as an interpretation of its meaning) see Norman Kretzmann's article "Lex Iniusta non est Lex: Law on Trial in Aquinas' Court of Conscience" originally published in American Journal of Jurisprudence 33 (1988), 99-122.

existence of a law (or the fact of law) and its moral evaluation, it is thought that natural law theorists collapse this distinction by denying the legality of immoral laws. In other words, by denying the legality of unjust laws, natural law philosophers (unlike legal positivists are said to) seem to equate moral and legal criteria for the existence and character of law. This has led legal positivists such as Kelsen and Raz to claim that natural law theorists have no specific notion of legal validity apart from moral validity.[2] This has also led legal positivists like Hart to make the following criticism of natural law theories: "the assertion that 'an unjust law is not a law' has the same ring of exaggeration and paradox, if not falsity, as 'statutes are not laws' or 'constitutional law is not law'."[3]

Certainly, on the surface, it seems contradictory to call something an unjust **law** and yet to deny that it is a **law**. This statement can only avoid an obvious contradiction if two senses of the word 'law' are to be understood. And, very briefly, I will argue that even traditional natural law theorists like Aquinas, as well as contemporary natural law theorists like Finnis, have two senses of the word 'law' in mind when they make this statement. Let me first consider a passage in which Aquinas writes about unjust laws. In the Summa Theologica I-II, Q. 93. Art. 3, Aquinas considers the second objection, which states that not all law can be derived from eternal law since some laws are unjust. He responds by stating that although human law has the nature of law to the extent that it partakes of right reason (and thus unjust laws do not have the nature of law but have the nature of violence), "nevertheless, even an unjust law, in so far as it retains some appearance of law, through being framed by one who is in power, is derived from the

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[2] Joseph Raz, "Kelsen's Theory of the Basic Norm." American Journal of Jurisprudence (Vol. 19, 1975), 100.

[3] H.L.A. Hart, The Concept of Law. (Oxford: Clarendon Press, 1961), 8. Henceforth known as CL 1961.

eternal law..."[4] I think that it is clear from this quotation that Aquinas has two senses of the word 'law' in mind when he discusses unjust laws: first, 'laws' in the full sense of the word are those which are in accordance with right reason (i.e. just laws); and, second, 'laws' in a more limited sense of the word (i.e. unjust laws) which have only the appearance of 'law' in the full sense of the word. Unjust laws are still laws in a limited sense since they have some characteristics of law (for example, they were framed by those in power), yet lack other important characteristics of law (namely, they are not in accordance with right reason or they lack justice). Thus, the credo that an unjust law is not a law means that an unjust law (which has some characteristics of law in the full sense) is not a law in the full sense of the word (which must also include justice).[5]

Finnis provides another way of understanding the credo *lex iniusta non est lex* which appeals to the different stances a speaker can take in using the word 'law'.[6] A speaker can make a statement regarding the law as one who is critical of the law (in Finnis' terms, one can assert what is justified or required by practical reasonableness *simpliciter*), or a speaker can make a statement regarding the law from an expository or sociological/historical viewpoint (i.e. as one who neither endorses nor criticizes the practice

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[4] St. Thomas Aquinas, Introduction to Saint Thomas Aquinas. Edited by Anton C. Pegis (New York: Random House, 1948), 632-633.

[5] Norman Kretzmann expands on this point by enumerating the various morally evaluative criteria and non-evaluative criteria or formal criteria for the existence of human law implicit in the texts of Aquinas. He also compares the statement that an unjust law is not a law to the statement that an imprecise archaeologist is not an archaeologist. In each case, some important evaluative criteria are lacking in one sense of the word which should be present in the full sense of the word.

Whether or not Aquinas has purely formal or procedural criteria for the existence of law (distinct from morally evaluative criteria) is debatable. However, for our present purposes, we only need to see that Aquinas does distinguish between two senses of the word 'law' in his discussion of unjust laws.

[6] John Finnis, Natural Law and Natural Rights. (Oxford: Clarendon Press, 1980), 365. Henceforth known as NL.

of law). Thus, when someone says that an unjust law is not a law, the speaker is asserting that an unjust law (where law is understood from an expository or sociological/historical viewpoint) is not a law (where law is understood from the standpoint of practical reasonableness).

If Finnis is correct, then natural law theorists need not deny such a thing as a limited, legal validity as distinct from moral validity; they need not deny the presence of formal or procedural criteria for the existence of law which can be and are to be distinguished from the justice of law so identified. Thus, an interpretation of the natural law credo which would deny that there are two senses of the word 'law' not only mischaracterizes traditional and contemporary natural law, but also fails to get to the heart of the traditional or contemporary dispute between natural law theorists and legal positivists. Neither side really denies the existence or legal validity (although a limited form of existence and validity for natural law theorists) of unjust laws. It seems more important to consider whether or not morality is needed in a 'full' account of law.

2. Understanding the debate in terms of the connection between law and morality.

Thus, a second common way to construe the contemporary debate between natural law and legal positivism is in terms of the connection between law and morality.[7] Natural

[7] The debate is described commonly in terms of the connection between law and morality. As we shall soon see, such a general statement of the difference between natural law and different versions of legal positivism fails to take account of some of the ambiguities in the words 'law' and 'morality'. For example, the distinction between a 'full' sense of the word law and a more limited sense are sometimes not distinguished. Later I will examine some of the problems with this general formulation of the debate between natural law and legal positivism. But, for now, let me simply present how the debate between natural law and legal positivism is commonly understood in terms of the connection between law and morality.

law theorists, according to this account, argue that there is a necessary connection between law and morality, while legal positivists assert that there is only a contingent connection (if any) between law and morality.[8] This way of characterizing the debate has the benefit of accounting for different versions of both natural law theory and legal positivism. First, it accounts for both traditional forms of natural law theory like Aquinas' account and for the less traditional forms of natural law theory found in contemporary debates. The latter typically do not hold that moral laws or principles are universal or immutable (for example, Ronald Dworkin's account in Law's Empire), and are not based on or accompanied by Aquinas' teleological assumptions about nature (for example, Dworkin's, Lon Fuller's and even John Finnis' respective versions of natural law). Second, it accounts for different forms of legal positivism, including versions given by both 'inclusive' or 'soft' legal positivists like Hart and Waluchow, and versions given by 'exclusive' or 'hard' legal positivists like Joseph Raz. In his book, Inclusive Legal Positivism, Waluchow describes clearly the distinction between these two kinds of legal positivist theories. He states,

> a distinguishing feature of inclusive positivism is its claim that standards of political morality, that is, the morality we use to evaluate, justify, and criticize social institutions and their activities and products, e.g. laws, can and do in various ways figure in attempts to determine the existence, content and meaning of valid laws.[9]

In other words, inclusive legal positivists like Hart and Waluchow hold that law and morality are contingently connected.[10] An exclusive legal positivist, on the other hand,

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[8] For example, W.J. Waluchow on page 80 of his Inclusive Legal Positivism (Oxford: Clarendon Press, 1994), characterizes the difference between natural law and legal positivism in terms of the necessary or contingent connection between law and morality.

[9] *Ibid.*, 2.

[10] Before the postscript to the Concept of Law was written, there was some dispute among philosophers as to whether or not Hart espoused a version of inclusive or exclusive

"excludes morality from the logically or conceptually possible grounds for determining the existence and content of valid law...."[11] So, for an exclusive legal positivist like Raz, there is not even a contingent connection between the existence and content of law and morality. Both versions of legal positivism share the denial that there is a necessary connection between law and morality. Thus, this way of characterizing the difference between natural law and legal positivism seems to capture a belief widely shared by natural law theorists (that there is a necessary connection between law and morality) which contrasts sharply with a belief widely shared by legal positivists (that there is no necessary connection between law and morality). Such an account of the debate seems to indicate a definite point of dispute between natural law philosophers and legal positivists about the very concept of law.

3. Are contemporary natural law philosophers and contemporary legal positivists actually arguing at cross-purposes?

Despite the apparent contradiction in the statements made by natural law theorists and legal positivists about the connection between law and morality, some philosophers have argued that there is no real contradiction or conflict between them. For instance, in the introduction to his book Definition and Rule in Legal Theory, Robert Moles describes

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legal positivism. For instance, David Dyzenhaus, in his book Hard Cases in Wicked Legal Systems (Oxford: Clarendon Press, 1991), believed that Hart rejected inclusive legal positivism and stood with Raz against this 'offshoot of his theory'. (*Ibid.*, 24) But from the postscript to The Concept of Law written in 1994, I think it is clear that Hart is an inclusive legal positivist. In the postscript, Hart states, "that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values..." (CL 1994, 250).

[11] W.J. Waluchow, Inclusive Legal Positivism, 3.

and criticizes H.L.A. Hart's account of the natural law and legal positivist debate.[12] According to Moles, Hart describes the debate in terms of the connection between law and morality. But Moles states, "of course, what Hart fails to appreciate is the further point made by Collingwood - that statements cannot be contradictory unless they are answers to the same question."[13] He adds, "because Hart fails to appreciate the relationship between propositions and the questions they answer, he does not find it necessary to reconstruct, or make explicit, the questions which Austin and Aquinas were dealing with."[14] Moles is suggesting that if legal positivists and natural law theorists are dealing with different questions, then the statements they make need not be contradictory. Other legal theorists such as Brink argue that legal positivism and natural law theory are not only compatible but also complementary theories which state important truths.[15]

Thus, a final way to characterize the debate between natural law theorists and legal positivists is to argue that the debate has been nothing but a quibble over words since there is no substantial point of dispute. Neither natural law theorists nor legal positivists deny that there is law as it is and law as it ought to be, yet each is concerned with a different problem or task. While the legal positivist is concerned with providing an adequate description of law and/or legal practice, the natural law theorist is concerned with evaluating law and legal practice. Thus, it should not be a surprise that a natural law theorist states that there is a necessary connection between law and morality when that theorist is primarily concerned with law as it ought to be. And, further, the legal

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[12] Robert Moles, Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition. (Oxford: Basil Blackwell, 1987).

[13] *Ibid.*, 4.

[14] *Ibid.*, 4.

[15] David O. Brink. "Legal Positivism and Natural Law Reconsidered." The Monist (Vol. 68, No. 3, July 1985), 134.

positivist's claim that morality is not necessarily connected with law does not contradict the natural law theorist's claim since the positivist is simply describing law as it is in fact independently of the evaluation of law. This view seems to be supported by the way in which a natural law theorist would provide a consistent interpretation of the credo that an unjust law is not a law. By appealing to two senses of the word 'law', the natural law theorists seem to acknowledge the distinction between law as it is and law as it ought to be; and this seems to open the door for a separation of tasks into a descriptive task and an evaluative one.

The fact that contemporary legal positivism and contemporary natural law philosophers are arguing at cross purposes could be also based on the fact that they are focusing on different areas of law. For example, Brink argues that legal positivism is concerned with providing a theory of legal validity while natural law theory should be understood as providing a theory of adjudication.[16] Or, Perry argues that legal positivism is grounded in one area of law (criminal law), while natural law philosophy is grounded in another area of law (civil law).[17] In any case, the basic idea is that contemporary legal positivism and contemporary natural law philosophy, despite appearances, may not be opposing theories of law, but rather complementary theories.

I think that Moles is right in saying that we should not assume that Aquinas and Hart are dealing with the same questions. In fact, given the very different historical and

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[16] Ibid., 134.

[17] See Stephen Perry's article, "Judicial Obligation, Precedent and the Common Law" in the Oxford Journal of Legal Studies (Vol. 7, No. 2, Summer 1987). In this article, Perry argues that contemporary legal postivists like Hart and Raz 'ground' their theories in criminal law, while contemporary non-traditional natural law philosophers like Dworkin and Fuller 'found' their accounts on civil law. He argues that "if it is true that two sorts of theories can be looked upon in this way as founding themselves on quite different areas of law and legal process, then it by no means obvious that they cannot be reconciled under the umbrella of a single unifying theory." (*Ibid.*, 217)

philosophical contexts in which their works are situated, we have good reasons for thinking that Aquinas and Hart are dealing with different questions. But it is a much harder case to show that contemporary legal positivists and contemporary natural law philosophers, despite what they say they are doing, are actually dealing with different questions. There does appear to be a difference of opinion about the connection between law and morality, and contemporary philosophers of law say they disagree with other philosophers on this point. In order to see whether there really is a significant point of dispute between contemporary legal philosophers, we need to consider more closely what it means to say that there is a necessary connection between law and morality and what it means to deny this necessary connection.

4. Ambiguities in statements about the connection between law and morality.

As I said earlier, understanding the debate in terms of the connection between law and morality seems to provide a clear way of differentiating natural law philosophers and legal positivists. But, I will show, a closer examination reveals more ambiguity than one might initially expect. In fact, on closer examination, it becomes unclear just who is a natural law philosopher and who is a legal positivist. I will show that these ambiguities reveal the need to consider some more fundamental questions about the nature of philosophy and even the nature of morality.

Consider what it means to say law is connected to morality. In so doing does one make a claim about actual laws and legal systems or about the definition of law itself?[18] In

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[18] In The Concept of Law, Hart explicitly acknowledges that that there are ambiguities in the statement that there is a necessary connection between law and morality. He states that "there are many possible interpretations of the key terms 'necessary' and

the first case, an "object-level" contention about the moral qualities of particular laws or legal systems would be made. Questions about the neutrality of legal practitioners may be at issue. For example, do or must judges appeal to moral principles in their interpretations or applications of law? Questions about the criteria that legal practitioners use for identifying, interpreting and applying the law may be relevant here. Questions about whether there is or is not an "internal morality" necessarily found in every legal system may also be at issue. In the second case, a "meta-level" issue about the nature, concept or definition of law is involved.[19] In this case, questions about the neutrality of legal philosophers, and not legal practitioners, may be at issue. For example, the question might be whether philosophers appeal or should appeal to morality in providing an analysis of the nature of law. In both

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'morality' and these have not always been distinguished and separately considered by either advocates or critics." (CL 1961, 152) However, he doesn't explicitly acknowledge here that the term 'law' is equally problematic. In his essay, "Positivism and the Separation of Law and Morality", he does describe some different ways that word 'law' can be taken when arguing for the connection or separation of law and morals. He states that "when Bentham and Austin insisted on the distinction between law as it is and law as it ought to be, they had in mind *particular* laws, the meanings of which were clear and so not in dispute,..." (Essays in Jurisprudence and Philosophy. Oxford: Clarendon Press, 1983, 56) Hart argues that one should not only consider particular laws that are unclear, but also a legal system in general. Thus, when theorists are arguing for or against the connection between law and morality, they should be clear whether they mean particular laws or legal systems in general. As we shall see in this paragraph, understanding 'law' in terms of particular laws or even legal systems in general is making an 'object-level' statement about laws and legal systems which can be contrasted with 'meta-level' statements about theories, concepts or definitions of law. Hart seems to be implicitly aware of this distinction in the introduction to Essays in Jurisprudence and Philosophy when he acknowledges that he "failed to discuss adequately different forms of the claim that there is a conceptual connection between law and morality which are compatible with the distinction between law as it is and law as it ought to be." (*Ibid.*, 8) As we shall see shortly, a meta-level statement about the necessary connection between law (in the sense of a concept, theory or definition of law) and morality is compatible with an object level claim about the contingent connection between law (in the sense of either particular laws or legal systems in general) and morality.

[19] Klaus Fuber makes this important distinction between "object-level" contentions and "meta-level" issues. See "Farewell to Legal Positivism: The Separation Thesis Unravelling." in The Autonomy of law: Essays on Legal Positivism. Edited by Robert P. George. (Oxford: Clarendon Press, 1996), 119-162.

cases, there is a second ambiguity in the meaning of the phrase "appeal to".[20] Is the appeal made by a committed participant (one who accepts or endorses the principles appealed to and is appealing to the principles in order to justify his or her interpretation) or is the appeal made by an outside observer of the practice (who simply describes the principles without accepting or endorsing them)?

What is at stake in many of these issues is a question that is often neglected in contemporary philosophy of law; namely, what should we as philosophers of law be doing? Is it our job simply to represent how actual laws and legal practice work, and see whether particular laws 'connect' with morality or not? There are two problems with viewing the contemporary debate about the connection between law and morality as an object-level debate. First, if philosophy of law is primarily concerned with particular laws in existing legal systems, then philosophy of law is more narrowly descriptive than it purports to be. Although philosophers such as Hart argue that their account is descriptive and, to some extent, sociological, they also argue that their account is in some sense general and conceptually necessary. But if they are primarily concerned with making 'object-level' statements about actual laws, then it seems that their conclusions about the connection between law and morality would have the character of an inductive generalization instead of being conceptually necessary. But there is a second problem with viewing the contemporary debate about the connection between law and morality as an object-level debate. If I was right in suggesting that natural law philosophers do not deny the existence and legal validity of unjust laws, then it would seem that both contemporary

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[20] There is some dispute among scholars as to whether or not there is an ambiguity in the phrase "appeal to". Dworkin, for example, seems to imply that there are not two ways of understanding the appeal to principles. In the second chapter of this dissertation, I will consider this ambiguity in more detail.

legal positivists and natural law philosophers would have to conclude that there is, at most, only a contingent connection between particular laws and morality. So when a contemporary natural law philosopher is claiming that there is a necessary connection between law and morality, he or she must be making a meta-level contention about law. Thus, if there is an actual point of dispute between natural law philosophers and legal positivists then it must be a dispute involving meta-level contentions about the law.

We can understand the natural law distinction between a "limited" account and a "full" account of the word law in terms of "object-level" contentions about actual laws and legal practices and "meta-level" contentions about concepts or account of law. In a limited sense, laws can be understood in terms of "object-level" contentions about the moral qualities (and other formal characterisitics) that actual laws may have or lack. In this limited sense, it is obvious that some laws are just and some are not, and that their justice or lack thereof is a contingent matter. In a full sense, we are concerned not with actual laws but with our understanding of law. We are concerned with meta-level contentions about the moral qualities of our conception or account of law.

Thus, it may be the case that contemporary natural law philosophers and contemporary legal positivists are arguing at cross purposes, since one may be making a meta-level assertion about the connection between the concept of law and morality, while the other may be making an object-level contention about the connection between actual laws and morality. In other words, natural law philosophers may be arguing that morality is needed for a full understanding of the nature of law, while legal positivists may be arguing that morality is irrelevant (or only a contingent feature) for a limited account of the word 'law'. If this is the case, then there is no real point of dispute. But if there is a real point of dispute between contemporary natural law philosophers and legal positivists about

the connection between law and morality, then it must be a meta-level dispute about the concept of law. Only once we have considered in detail the positions of specific legal positivists like Hart and Raz, can we decide whether or not natural law philosophers and legal positivists are essentially arguing at cross purposes.

But if philosophers of law are making meta-level contentions about the law when they describe how law is connected to morality, then the nature of the philosopher's task becomes even more the focus. What exactly is the aim in providing an account or theory of law, and what standards do (or should) we appeal to in evaluating the adequacy of different accounts or theories of law? Whether or not the statements made about the connection between law and morality are meta-level and how we can decide between competing meta-level assertions about the connection between law and morality, depend on how the philosopher's task should be understood.

Finally, there is a third[21] ambiguity in the term 'morality'. What does one mean by 'morality'? Does it refer to what passes for moral in a given society, or does it refer to what is 'actually' moral (supposing there is a difference between what is actually moral and

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[21] Some philosophers have argued that there is also an ambiguity in the notion of a 'necessary connection' between law and morality. For instance, Greenawalt argues that the idea of a necessary connection is "obscure" because it can be taken in different ways: it can be taken as saying that something of moral value is found in every legal system or it can be taken as saying that principles of legality are aspects of justice, or it can be taken as saying that moral values are infused in the process of identifying, interpreting and applying laws. (Kent Greenawalt, "Too Thin and too Rich: Distinguishing Features of Legal Positivism." in The Autonomy of Law: Essays on Legal Positivism, 11-12) Fuber describes the ambiguity of a necessary connection by distinguishing three kinds of necessities: conceptual necessity, empirical necessity and natural necessity. Even if we focus our attention on conceptual necessity (which seems to be the most likely candidate), Fuber argues that it is not clear how conceptual necessity should be understood. He argues that attempts to understand conceptual necessity in terms of possible worlds brings in even more ambiguity and obscurity. (Klaus Fuber, "Farewell to Legal Positivism: The Separation Thesis Unravelling." in The Autonomy of Law: Essays on Legal Positivism, 125)

what passes for moral in a given society)? Whether or not law is considered to be connected to morality seems to depend on the nature of morality. Let me illustrate this point with two examples. Bentham, for instance, is considered to be a legal positivist, since he argued that law must be demystified by separating law from its moral garb. He argued that there are dire consequences (i.e. anarchy or conservatism) in conflating the description of law and the moral evaluation of law. However, if we consider the fact that what is actually moral for Bentham was utilitarian morality, his work on law can be seen as an attempt to provide a moral basis for law. Further, Dworkin can be considered to be a natural law thinker since he argues that law and morality are essentially connected because law cannot be interpreted or applied without morally evaluating the law. However, it can be argued that Dworkin only shows the connection between law and what passes for morality in a given society, since the morality used in identifying the law is the morality actually implicit in the law and not what is actually moral (if, indeed, there is such a thing). In other words, if there is a difference between morality and what passes for morality in a given society, then Dworkin may not be connecting morality and law at all. Thus, whether we can understand the debate in terms of the connection between law and morality depends on resolving at least some questions about the nature of morality. Contemporary philosophers of law often write as if they can resolve questions about the nature of law without having to take any stance on the nature of morality. What these ambiguities reveal is that the contemporary debate between natural law and legal positivism cannot even be understood without re-examining some assumptions about the nature of philosophy and the place of morality in doing philosophy of law.

There is in contemporary philosophy a debate about the debate between legal positivists and natural law thinkers. Is there a real point of disagreement between natural

law theories and legal positivist theories which can be characterized in terms of whether there is a necessary connection between the concept of law and morality? And, if there is a point of disagreement between them, is this disagreement significant? Greenawalt, for instance, argues that "despite rhetorical excesses that intimate differences with real significance, what actually divides a plausible modern legal positivism from plausible competing views has become too thin to have great importance."[22] Wright argues that "the debate over legal positivism turns out not to be distinctively related, logically or in any other interesting way, to much of genuine philosophical or practical significance."[23] Finally, Soper states that his book, A Theory of Law, "owes its existence to the conviction that the nature of law debate, as currently conducted, is largely meaningless."[24] Thus, we need to consider not only if there is a point of dispute between contemporary legal positivism and contemporary natural law, but we need to ask whether this point of debate is significant or important. But how should we measure significance or importance? What significance or importance should we demand from the work of philosophers of law, or of philosophers in general? Again, we are led to the conclusion that the underlying assumptions about the nature of the philosophical task in general and the nature of the legal theorist's task in particular seem crucial to understanding the contemporary debate in philosophy of law. But, more significantly, by focusing our attention on these underlying assumptions about philosophy and legal theory we should be able to provide a solution to the debate about the contemporary debate. In other words, we should be able to show

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[22] Kent Greenawalt, "Too Thin and too Rich: Distinguishing Features of Legal Positivism." in The Autonomy of Law: Essays on Legal Positivism, 1.

[23] George Wright, "Does Positivism Matter?" in The Autonomy of Law: Essays on Legal Positivism, 57.

[24] Philip Soper, A Theory of Law. (Cambridge: Harvard University Press, 1984), vii.

whether or not there is a significant point of dispute between natural law theorists and legal positivists by examining underlying assumptions about the nature of philosophy and legal theory.

5. Conclusion.

In this dissertation, I will accomplish four things. First, I will characterize contemporary philosophy of law in terms of some shared, underlying assumptions about the nature of philosophy and legal theory. It will be shown that contemporary philosophers of law assume that a philosophical account of law should be general (and thus they aim to produce general accounts of law). It will also be shown that they assume (and in some cases argue) that a theory of law must take adequate account of the normativity of law. They also generally assume that their own philosophical activities are governed by norms, although they may disagree about what norms do or should govern legal philosophy. Finally, contemporary legal theorists assume that a philosophical understanding of law can best be achieved by attempting to bracket-off metaphysical issues and focusing instead on the analysis of concepts.

Second, I will show that because of these shared assumptions about the nature of philosophy, the accounts of law given by contemporary legal philosophers can be assessed in a similar way. As will be shown, contemporary accounts of law can be assessed internally (by showing whether their conclusions do, in fact, follow from their analyses of concepts) and externally (by showing whether their accounts of law are valuable in furthering theoretical inquiry and moral deliberation).

Third, I will illustrate these two points by examining and assessing accounts of law given by some contemporary legal philosophers. What emerges from this examination and assessment of particular contemporary legal philosophers is a more elaborate account of the assumptions which underlie contemporary legal philosophy (in particular, two additional assumptions about the nature of conceptual analysis emerge) and, with this, a more general critique of contemporary philosophy of law in general. It will be shown that because of some shared assumptions about the nature of conceptual analysis (and thus some shared ideas about how accounts of law should be assessed), contemporary philosophers of law cannot achieve what they aim to do; that is, they cannot produce general accounts of law which are theoretically valuable.

Fourth, and finally, I will show that there are alternatives to the way in which philosophy of law is currently done. In the final chapter, I will examine two alternatives which are based on challenges to some of the main assumptions which underlie contemporary philosophy of law. I will show that only one of these alternatives holds promise for providing a general account of law which is theoretically valuable.

To accomplish these aims, this dissertation will have three main parts. In the first part (consisting of the first two chapters), I will examine the nature of contemporary philosophical study of law. I will show that, despite their varying conclusions, most contemporary legal theorists share many assumptions about the nature of the philosophical study of law. In the first chapter, I will look at one contemporary philosopher of law who seems, at first blush, to have a very different account of the nature of legal philosophy. Ronald Dworkin concludes that legal theorists must appeal to the same moral principles that legal practitioners appeal to in order to morally justify their accounts of law. I will show, first, that this conclusion does not follow from his account of interpretation, and, second,

that despite this conclusion, Dworkin's approach to philosophy of law is remarkably similar to the approach of contemporary legal positivists. Thus, even Dworkin shares many of the same underlying assumptions about the nature of philosophy of law as his positivist opponents. In the second chapter, I will focus on Hart's book The Concept of Law, in order to characterize the general approach to philosophy of law undertaken by contemporary legal positivists. After overcoming an initial tension in Hart's approach to philosophy of law, I will show what features characterize Hart's approach to law. Ultimately, it will be shown that contemporary philosophers of law should be understood as aiming to provide a general account of law which is not just descriptively accurate, but also theoretically valuable.

In the second part of the dissertation, I will put what I have said in theory into practice. In other words, I will examine and assess accounts of law given by some key contemporary philosophers of law by seeing whether their conclusions do in fact follow from their analyses of concepts and, if their accounts are internally adequate, seeing whether their accounts of law are theoretically valuable. I will begin by examining the contemporary legal positivist account of law by focusing on the works of Hart and Raz. I will argue that they both aim to distinguish law from both coercion and morality. Hart uses the distinction between internal and external statements to characterize legal obligation so that it is distinguished from both coercion (being obliged) and moral obligation. Raz argues that the law's essence is to claim authority, and, as such, it is distinguished from both coercion and moral judgement. There are two main questions: first, can they accomplish what they aim to do by finding a firm place between coercion and morality, and, second, if they do accomplish their aims, what is the theoretical value in this account of law? I will argue that Raz does not accomplish what he sets out to do; in other words,

his conclusion about the nature of law (i.e. exclusive legal positivism) does not follow from his analysis of the concept of authority. And, I will argue that, although Hart does succeed in distinguishing law from both coercion and morality, his concept of law has limited theoretical value.

Then, I will consider the work of John Finnis, a contemporary natural law philosopher. Finnis is aware of some of the shortcomings of contemporary legal positivism; he knows that an account of law must deal with the grounds of normativity in order to be theoretically valuable. However, because he shares many of the same assumptions about the nature of philosophy, some of the same problems that legal positivists faced in providing a sound and theoretically valuable account of law are encountered by Finnis in his attempt to provide a sound, moral foundation for his account of law. Thus, what emerges from this section of my dissertation is not only a clearer understanding of the kinds of assumptions which underlie contemporary philosophy of law, but also the recognition that some of the problems facing contemporary legal philosophers are due to these shared assumptions about the nature of philosophy.

In the third and concluding part of this dissertation, I will look at two alternatives, not just to specific contemporary accounts of law, but to the contemporary **approach** to law in general. These alternatives arise from a general critique of contemporary philosophy of law. Thus, in order to see why these two alternatives are genuine alternatives, a clear understanding of the problem with contemporary philosophy of law is needed. In this concluding chapter, I will summarize the main assumptions about the nature of philosophy which guide contemporary philosophy of law. I will show that a clearer understanding of conceptual analysis has emerged from the examination and assessment of particular accounts of philosophy of law. Two further assumptions about the nature of conceptual

analysis, together with the main aims of contemporary philosophy of law, lead contemporary philosophy of law to produce very formal accounts of law with limited theoretical value. By challenging aspects of these two assumptions, two alternative approaches to philosophy of law emerge. However, it will be shown that only one of these alternative approaches holds the promise of a general account of law which is theoretically valuable.

Chapter 1: Dworkin's Approach to Philosophy of Law.

Ronald Dworkin is a contemporary philosopher of law who seems to present a sharp contrast to many other contemporary philosophers of law. Unlike the majority of contemporary legal theorists, Dworkin's account of law does not involve a sharp distinction between what law is and its moral justification. He believes that both the legal theorist and the legal practitioner must morally justify the law by appealing to principles of political morality in their interpretations of law. But, more significantly, Dworkin seems to have a very different view of the task of the philosopher. He emphasizes the difference in approaches by calling the opposing positivistic theories of law "semantic theories of law,"[1] while calling his own approach "interpretive." According to Dworkin, semantic theories are concerned primarily with the meaning of words or the rules/criteria governing the use of words. Dworkin's approach involves taking an "interpretive attitude" which has two components: 1. the acknowledgment that rules and social practices are not just facts but have value (i.e. they serve some interest or purpose or some principle), and 2. the assumption that such rules/practices must be understood, applied, extended, qualified, etc. in light of the point that they serve.[2] In Dworkin's words, this means that people with the interpretive attitude "try to impose meaning on the institution - to see it in its best light - and then to restructure it in the light of that meaning."[3] Thus, Dworkin seems to present a

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[1] Ronald Dworkin, Law's Empire. (Cambridge: Harvard University Press, 1986), 31. Henceforth known as LE.

[2] *Ibid.*, 47.

[3] *Ibid.*, 47.

sharp contrast to contemporary legal positivists both in his view of the philosopher's task and in his final position about the nature of law and legal theory.

In this chapter, I will argue that, despite appearances, Dworkin's actual approach to philosophy of law is similar to the contemporary positivist's approach to legal theory. Although the claims about law and legal theory that he is attempting to justify are opposed to legal positivism, his approach in justifying or arguing for these claims is not. This chapter will have three parts. First, I will outline Dworkin's main argument in support of his claims about law and legal theory. Because he presents his clearest and most sustained argument for his position in his book Law's Empire, I will, for the most part, focus on the arguments found in this book. Second, I will show that even if we accept some of Dworkin's main assumptions, his conclusions about legal theory and legal practice do not follow. Ultimately, Dworkin can not show that the descriptive and morally normative elements of legal theory and legal practice are inextricable connected. Third, I will show that Dworkin's actual approach to philosophy of law does not differ significantly from the approaches of legal positivists like Hart and Raz.

1. Putting *Law's Empire* in its best light.

Law, for Dworkin, is an interpretive concept. This means that laws and legal practice are the product of interpretation (by legal practitioners and legal theorists) and require interpretation in order to apply and understand them. In Law's Empire, he states that "if law is an interpretive concept, any jurisprudence worth having must be built on some view of what interpretation is, and the analysis of interpretation I construct and

defend in this chapter [chapter 2] is the foundation for the rest of the book."[4] Interpretation is not foundational in the sense that it is, itself, some fact or given in our experience, beyond interpretation; Dworkin explicitly states that he is offering an interpretation of the practice of interpretation.[5] However, he does claim that his account of interpretation is foundational in the sense that his discussions and arguments about the nature of legal practice and legal theory presuppose the view of interpretation presented in this early chapter. Thus, it would seem that acceptance of his interpretation of the practice of interpretation is crucial to the acceptance of his interpretation of law. In this first section of the chapter, I will examine Dworkin's account of interpretation and show in what sense his account provides a relatively accurate account of the practice of interpretation. Then I will state what claims about legal theory and legal practice Dworkin believes follow from his account of interpretation. As I indicated earlier, I will, in the second section of this chapter, show that many of Dworkin's claims about legal theory and legal practice do not follow from his account of interpretation, taken in its best light.

Dworkin presents his account of interpretation in two main steps. First, he notes that the interpretation of social practices is similar to the interpretation of artistic and literary works, since "both aim to interpret something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation."[6] Both forms of interpretation can be called "creative interpretation." Second, he considers whether creative interpretation is a form of

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[4] *Ibid.*,50.

[5] *Ibid.*, 49. The practice of interpertation is, for Dworkin, a social practice, taking place within enterprises of interpreters. As we shall see, each enterprise determines, to a large extent, the form of intepretation by providing the standards or principles of 'good' interpretations for that discipline.

[6] *Ibid.*, 50.

conversational interpretation. In other words, when a painting, literary text or social practice is interpreted, does this involve 'discovering' or 'retrieving' the intention of the artist or participants? Dworkin states that creative interpretation is "constructive" not conversational; although creative interpretation is concerned with the purposes of works of art and social practices, it is not concerned with the purposes of the artist or participants but with the purposes of the interpreter.[7] He states, "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[8]

Dworkin describes the way in which creative interpretation is constructive in his three-part argument showing that creative interpretation is constructive and not conversational.[9] First, he shows that in attempting to discover the author's (for example) intention, the interpreter necessarily invokes standards of what makes a good novel. Dworkin's argument involves an appeal to the impracticality (and perhaps impossibility) of retrieving a psychological state of an author who may be long dead. Because a work is constructed with a "purposive" intention and the author's psychological state is beyond direct access of an interpreter, the purposive intention of the work must be constructed by the interpreter. A novel is purposive in the sense that the author must have appealed to certain standards of novel-making and certain aesthetic principles to write the novel. In order for another to interpret that work one must engage in "purposive construction of what the author intended."[10] This means that the interpreter must appeal to standards of good novel-making and aesthetic principles in order to reconstruct the intention of the author.

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[7] *Ibid.*, 52.
[8] *Ibid.*, 52.
[9] *Ibid.*, 54.
[10] *Ibid.*, 57.

Thus, even if creative interpretation involved discerning the author's intention, it still has the character of constructive interpretation.

Second, Dworkin shows that the debate about author's intention or literal meaning or imposing purpose in interpretation is a debate about which interpretation of the interpretation of novels (for example) puts the object (in this case, the practice of interpreting novels) in its best light.[11] He argues that this second-order interpretation necessarily involves the appeal to standards of aesthetic value, and thus is constructive. As an example, Dworkin states that the proponent of the author's intention view of interpreting novels will argue that because the value of art lies in the process of artistic creation, a reader of the novel should attempt to discover the intention that was involved in the creative process.[12] By appealing to aesthetic principles, the proponent of the author's intention view is constructively interpreting the practice of interpreting novels. However, as Dworkin points out, here he is " ... not arguing that author's intention theory of artistic interpretation is wrong (or right), but that whether it is wrong or right and what this means... must turn on the plausibility of some more fundamental assumptions about why works of art have the value their presentation presupposes."[13] Thus, this second part in Dworkin's argument alludes to the persuasiveness of constructive interpretation since it shows that constructive interpretation, ironically, occurs in the arguments against constructive interpretation. It is important to note that Dworkin is only making a claim about a second-order interpretation. It is possible that while the second-order interpretation

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[11] *Ibid.*, 60-61.
[12] *Ibid.*, 60.
[13] *Ibid.*, 61.

(i.e. the interpretation of the practice of interpreting novels) is constructive, the first-order interpretation (i.e. the interpretation of novels) is not constructive.[14]

The third and final part to his argument that creative interpretation is constructive rather than conversational relates specifically to interpretations of social practice. He argues that social practice is of such a nature that it " ...creates and assumes a crucial distinction between interpreting the acts and thoughts of participants one by one, in that way, and interpreting the practice itself, that is, interpreting what they do collectively."[15] He seems to be suggesting that because the practice is social, the 'intention' or meaning of the practice is usually distinct from the normally varying intentions of participants. He adds that the distinction would be "unimportant for practical purposes if the participants in a practice always agreed about the best interpretation of it."[16] This argument seems to be a variation of the first argument. The complications of discovering or retrieving the practice's 'intention' are multiplied by the number of participants in a social practice. Not only is it a problem to discover or retrieve people's intentions, but it is also a problem deciding what *the* interpretation of the practice is when people's intentions vary.[17] Thus, constructive interpretation seems even more appropriate in the case of social practices than in the interpretation of literary and artistic works.

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[14] A proponent of the author's intention view may argue that there are different forms of interpretation depending on the kind of object to be interpreted. For instance, when interpreting literary and artistic works, one should discover the author's intention. In the case of social practices without a specifiable author, one should provide a constructve interpretation of the practice. Thus, the social practice of interpreting novels would be constructively interpretive, while novels themselves would be interpreted by discovering the author's intention.

[15] LE, 63.

[16] *Ibid.*, 63.

[17] Although Dworkin does not explicitly make this argument in Law's Empire, he does present this argument in the second chapter of an earlier work, A Matter of Priniciple (Cambridge: Harvard University Press, 1985)

Although Dworkin's account of constructive interpretation is offered as analysis of creative interpretation alone, he notes that it could be extended to take account of both conversational interpretation and scientific interpretation.[18] It will help in understanding the nature of constructive interpretation to see how this extension could occur. Dworkin suggests that in all three forms of interpretation there is an appeal to standards of value relevant to the different enterprises engaged in. When a literary text is interpreted, we appeal to standards of aesthetic value in order to put the text in its best light. When we interpret a speaker's words, we appeal to standards of good conversation by applying a principle of charity to his or her words. When scientific data is interpreted, we appeal to standards of what makes a good scientific theory (for example, standards of simplicity, comprehensiveness and elegance) in order to make the scientific object the best that it can be. In all three cases, an interpreter is imposing value (moral, aesthetic or otherwise) or purpose on what is interpreted by appealing to the interests, goals, or principles that the practice or object can be taken to serve or express.

But what does it mean for an interpreter to put the object of interpretation in its best or most attractive light? What does it mean for an interpreter to make the object or practice the best that it can be? Because Dworkin often describes constructive interpretation in these terms, two criticisms arise.[19] First, he seems to be suggesting that an interpreter should always view the object of interpretation with rose-coloured glasses. Why must an interpreter necessarily view the object of interpretation in this fashion? Is not this a dangerous way to view social practices, especially legal practices? Second, he states that through interpretation the object is made the best that it can be. But when a book or

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[18] LE, 53.

[19] W.J. Waluchow makes both these criticisms in Chapter 2 of this book Inclusive Legal Positivism.

scientific data or a person's words are interpreted, such objects of interpretation remain exactly what they are independent of any interpretation. How can the object of interpretation be made better or worse? Would it not be more accurate to say the interpretation is made the best that it can be instead of saying that the object of interpretation is made better. When Dworkin's account of interpretation is seen in its best light, the force of both these criticisms is lessened. However, by presenting plausible answers to these objections, problems arise for his claims about legal theory and legal practice (as we shall see in part two of this chapter).

Let me deal with the latter question first, whether the object of interpretation or the interpretation itself is made the best that it can be. At the heart of this question is another question: is the object of interpretation independent of interpretation? At some points, Dworkin suggests that the object is independent of interpretation. When he speaks of the "raw behavioural data of a practice" which is "underdetermined with respect to the "ascription of value," or when he describes the object constraining available interpretations,[20] it seems that the object must be independent of interpretation in order to act as a constraint on interpretations or to determine (or underdetermine) the value that can be ascribed to it through interpretation. However, at other points, Dworkin suggests that the object depends on interpretation. For instance, he states, "interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the process is interpretive of what the last achieved."[21] The 'object' of interpretation seems to be a result of interpretive judgments which can be altered through different interpretations. But if the object of

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[20] LE, 52.
[21] *Ibid.*, 48.

interpretation is part of the interpretation, then how can it act as a constraint on the interpretation? Would not such a constraint beg the question, so to speak?

Fortunately, in an earlier book, A Matter of Principle, Dworkin deals with this apparent dilemma. He states that all parts of interpretation, including the object of interpretation, are interpretive. Thus, the object of interpretation (like a text, for instance) is not a brute fact that has the power to constrain interpretation; rather it is itself a product of interpretive judgment.[22] Dworkin sees an analogy between his account of the interpretation of texts and contemporary theories of scientific interpretation. He states, "it is a familiar thesis in that discipline that none of the beliefs we have, about the world and what is in it, is forced upon us by a theory-independent recalcitrant reality ..."[23] What constitutes an object for interpretation within a given enterprise is a matter of interpretation.

Imagine a physicist and an artist looking at a tin can on a table. The object of interpretation for the physicist is a physical object composed of atomic and subatomic particles. The object of interpretation for the artist may be splashes of colour in a mundane, cylindrical form. What constitutes each object is determined by the enterprise that each interpreter is engaged in.[24] Each object is considered to be an object because it acts as a

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[22] Ronald Dworkin, A Matter of Principle, 168-169.

[23] *Ibid.*, 169.

[24] Dworkin need not make such a srong statement. All he needs to say is that the object of interpretation is partly constituted by interpretive judgements. Such an object can act as a constraint on interpretation and change with different interpretations. However, if he claims that 'part' of the object is not interpretive in some sense, then some of his critic's remarks have more force. For instance, in his book Doing What Comes Naturally (Oxford: Clarendon Press, 1989), Stanley Fish accuses Dworkin of contradicting himself by sneaking in 'objectivity' when he explicitly denies that this is what he is doing. Dworkin refers to this criticism when he says that despite his disclaimers, a reader thought that he was committed to "a silly metaphysical theory of interpretation, according to which meanings are 'just there' in the universe, literary genres are 'self-announcing', texts act as a 'self-executing constraint' on any interpretation, and interpretation is therefore the discovery of brute, noninterpretive, and recalcitrant facts." (A Matter of Principle, 167) He responds to Fish by saying all parts of interpretation are theory-dependent.

constraint on the interpretations within the discipline. The object consists of some ideas uncontroversially employed in all interpretations in the discipline.[25] Even if there is a brute fact of the matter, it is not this which acts as a constraint on interpretation; rather it would be certain agreed ways of interpreting this 'brute fact' that act as the constraint. So, a brute fact, independent of interpretation, is not the object of interpretation (in the sense of constraining interpretation); only an object that is itself a product of interpretation can be an object of interpretation in this sense.

Thus, Dworkin's claim that through interpretation, the object of interpretation is made the best that it can be (instead of simply making the interpretation of the object better) has some, although limited, plausiblity. Because the object of interpretation is itself a product of interpretation, an interpretation of this object which becomes accepted in the given enterprise changes the object. In this sense, an object is made the best that it can be through interpretation. But Dworkin overstates his case when he says that all objects are made the best that they can be through interpretation, since not all interpretation will alter the object by becoming widely accepted in the discipline. What Dworkin should say is that all interpretations aim to make the object the best that it can be (in the sense, that all interpreters aim to make their interpretations accepted in their discipline), although not all interpretation will in fact change the object.

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[25] Dworkin's distinction between concept and conception seems to parallel the distinction between the 'object' of interpretation (for example, some level of agreement about a novel) and how controversial elements of the object are resolved (a specific interpretation of the novel, for example). Dworkin describes the distinction between concept and conception as a contrast between two levels of abstraction. At one level, the level of concept x, there is an agreement within a community about certain basic ideas. At the other level, the controversy implicit in x is taken up. Thus, there are disputes about conceptions of the concept x (LE, 71). In this case, what acts as a constraint on interpretation is the concept (which is itself a result of interpretation).

But what about the second objection? Why must we aim to make the object of interpretation the best that it can be? Doesn't this mean that we must view the objects of interpretation through rose-colored glasses? Whether or not Dworkin has a plausible answer to this objection depends on how he understands what it means to make an object the "best that it can be." As I shall show, there is a sense of making an object the best that it can be that is relatively uncontroversial and plausible. This can be illustrated by the example of the interpretation of texts. However, there are other ways to put an object in its best light which are not so uncontroversial; and, when we turn to examine legal theory and legal practice, I will show that this sense of making an object the best that it can be is not only controversial but also unjustified. Let me briefly consider the example of a literary text, before turning to legal theory and legal practice.

Dworkin describes two dimensions of constructive interpretation, the dimensions of fit and justification.[26] According to the dimension of fit, an interpreter " ... cannot adopt any interpretation, however complex, if he believes that no single author who set out to write a novel with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text he has been given."[27] This means that the interpreter cannot just make up any interpretation; rather, the interpreter must provide an interpretation which, in Dworkin's words, "flows throughout the text" and has "general explanatory power," incorporating the major structural aspects of the text.[28] The interpreter will appeal to certain principles or standards for good explanations (such as simplicity and comprehensiveness) and must impose a point or purpose expressed by the

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[26] Dworkin describes these two dimensions in many of his works including Law's Empire (230-232), A Matter of Principle (143-145) and Taking Rights Seriously (300).

[27] LE, 230.

[28] *Ibid.*, 230.

work. In the first dimension, the interpreter is making the object the best that it can be by showing that the text is capable of a coherent and consistent interpretation. This involves applying a principle of charity to the work and assuming that the author is a rational and competent writer. Of course, the interpreter might conclude that the work is incoherent and the author is incompetent, but this doesn't mean that the interpreter should not apply a principle of charity when first approaching the work.

The second dimension, according to Dworkin, requires the interpreter to judge from among the interpretations that fit the text which interpretation shows the work in its best light. This involves more substantive issues and argumentation, since the interpreter must not only interpret the work in relation to a given point or purpose expressed by the work, but also assess and justify this point or purpose by appealing to aesthetic principles and standards relevant to the literary enterprise. This requires the interpreter to become a participant in the literary process, since the interpreter must appeal to aesthetic principles similar to those that the author would appeal to in writing the work. An interpretation puts a literary work in a better light if the purpose or point expressed in the work is better justified according to such aesthetic principles.

It is important to note that, according to Dworkin, these two dimensions are not distinct since "one may show the work in a better light because it fits more of the text or provides a more interesting integration of style and content."[29] Further, the interpreter often appeals to substantive principles in the first dimension when constructing the purposive intention of the work. Thus, there are different senses to the phrase 'putting an object in its best possible light', depending on the dimension and depending on the kinds of principles or standards that are appealed to. It is not controversial to say that an interpreter

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[29] *Ibid.*, 231.

should put the text in its best light by applying a principle of charity to the work. This is, in fact, what I am doing to Dworkin's own work, and it is a guiding ideal in the analysis of philosophical and other works. Further, it would only be controversial for me to appeal to aesthetic standards in an interpretation of a literary work, if this is done without regard to the dimension of fit. Thus, I would argue that on the face of it there is nothing wrong with making the object the best that it can be in this sense. However, as we shall see, problems arise when we turn to Dworkin's claims about law and legal theory.

With the example of a literary text in mind, Dworkin makes the following claims about legal theory. Because a legal theorist's interpretation of the institution of law is a constructive interpretation, his or her interpretation must have the two dimensions of fit and justification. Thus, the legal theorist must impose a purpose or point on the institution of law and provide an interpretation which 'flows' through the institution, taking account of most of its features. The legal theorist must appeal to values like comprehensiveness and simplicity, and apply a principle of charity (assuming the participants are relatively rational and consistent) in order to make the interpretation the best that it can be. But the legal theorist cannot stop here. Since there may be competing interpretations which 'fit' the object (and Dworkin argues that there are such competing interpretations), the legal theorist must join in the practice of law by appealing to the same standards and principles that legal practitioners appeal to in order to justify their interpretations. This involves appealing to more substantive principles of political morality (like justice, fairness and 'integrity'). Thus, the legal theorist cannot simply describe the institution of law, but he or she must also morally justify the interpretation (and, as a result, morally justify the law). This will mean that a general and purely descriptive account of law (as opposed to the description of

a body of law within a particular legal system) is most likely impossible, given that different legal institutions may appeal to different moral principles.

Of course, these claims about the legal theorist presuppose certain claims about legal participants; namely, that legal participants (like judges or lawyers) must constructively interpret the law, and thus they must put the object (the law) in its best light. This involves appealing to the same substantive principles that the lawmakers appeal to (for example, justice, fairness, due process and integrity). Dworkin argues that judges, for instance, must always morally justify their interpretations of the law even in deciding easy cases. Whenever judges interpret the law, they strive for consistency in principle, and thus appeal to the distinct political virtue of integrity.[30] Finally, his account of the interpretation of legal practitioners (like judges and lawyers) presupposes an account of the practice of lawmakers (assuming that they make constructive interpretations and appeal to politically moral principles like justice, fairness, due process and integrity).

2. Why Dworkin's claims about legal theory and legal practice do not follow from his account of interpretation.

Dworkin ends up making many strong claims about legal theory and legal practice. However, I will show that these strong claims are unjustified; that is, these strong claims simply do not follow from his account of interpretation. Weaker claims about legal theory

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[30] Dworkin argues that integrity is a distinct political virtue by showing that integrity (understood as consistency in principle) can conflict with other political virtues (like justice and fairness). He uses the example of checkerboard solutions which are rejected not on grounds of justice or fairness, but because they fail to serve our political ideal of integrity (i.e. consistency in principle) See LE, 179-184.

and legal practice do follow from his account of constructive interpretation, however these weaker claims would hardly be disputed by most contemporary legal positivists.

Let me look, first, at the claims Dworkin makes about legal practice, focusing especially on the practice of judges. What certainly follows from his account of interpretation as constructive is that judges must appeal to certain standards or principles in order to interpret the laws. What also seems to follow is that a judge, at least on some occasions, must reconstruct the intentions of legislators and so appeal to standards and principles similar to those to which legislators appeal. As we shall see later, these two claims would not be disputed by contemporary positivists. But Dworkin's claim that judges must, in all of their interpretations of law, be morally justifying the law, does not follow from his account of interpretation. There are two main reasons why this claim does not follow. The first concerns the status of integrity as a distinct, politically moral ideal. Dworkin's claim that judges must be morally justifying the law in all cases depends on whether or not the appeal to integrity is an appeal to a distinct politically moral virtue. However, it seems to be that integrity, as Dworkin characterizes it, is a feature of all constructive interpretations, and not just an ideal of the interpretation of a social practice. When interpreting a text, a reader imposes value or purpose on the text. A reader interprets passages in the text in light of a 'point' that the text can be said to express or exemplify. Readers appeal to a principle of integrity when they strive for consistency of 'point', purpose or principle when interpreting a text. However, a reader who appeals to integrity in this way would not be said to be necessarily morally justifying the text, because the reader may be appealing to an immoral or even an amoral point, purpose or principle. Thus, in any constructive interpretation, an appeal to integrity would seem to be involved, and yet we would hardly say that all interpreters are morally justifying their object. But

these reflections point to a deeper problem with integrity. Integrity doesn't have the same character as other principles of political morality. Integrity is, according to Dworkin, consistency in principle. Thus, unlike other political principles, integrity essentially involves reference to another political principle, such that its moral worth (or any other kind of worth) depends on the value of the principle. While integrity of a principle of justice would be morally praiseworthy, integrity of a principle of racial inequality can hardly be morally valuable. Could it really be argued that a consistent white supremacist is morally more praiseworthy than an inconsistent white supremacist? Further, in what sense would consistency in principle be moral at all if the principle is something like simplicity or comprehensiveness? In this sense, integrity would determine what makes a good explanation or interpretation, instead of deciding what makes an explanation or interpretation morally justified. Because integrity takes on the character of the principle it refers to, it cannot be a distinct moral ideal.

The second reason why the claim (that judges must always be morally justifying what they interpret) does not follow from his account of interpretation is because he fails to distinguish two meanings of the words "appeal to".[31] When judges construct interpretations of the law, there are two ways in which principles can be appealed to. Judges can appeal to principles in order to morally justify their interpretation. This implies that the judges accept the principles when they 'appeal' to them. But judges can also appeal to principles which they do not accept. For instance, a judge under apartheid might appeal to principles of racial inequality in order to understand the motivations of legislators and thus in order to interpret the law created by those legislators. But then it would be an open

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[31] As we shall see shortly, Hart and Raz make use of a version of this distinction in their own accounts of law and in their responses to positions such as Dworkin's.

question whether the judge believes those principles are morally acceptable. There is no reason why judges must always accept the principles that they appeal to. If this is so, then there is no reason why judges must always be seeking to morally justify the law. It is possible that in hard cases, where there are two or more interpretations which 'fit' the law, judges appeal to principles in order to justify their interpretation morally. But no contemporary legal positivist would deny this.

Let me now consider Dworkin's claims about legal theory. Dworkin claims that legal theorists must appeal to the same principles that legal practitioners appeal to in order morally to justify their interpretations of legal practice. In some respects, it is obvious that legal theorists appeal to different standards than judges. Obviously, judges are constrained in their interpretation by institutional constraints (like the weight of precedents, local priority, and the principle of due process).[32] Although legal theorists might describe these constraints, it is hard to see how legal theorists would themselves be so constrained when they construct an interpretation of law. But perhaps Dworkin is referring to some of the principles that judges and other practitioners appeal to, like justice and fairness. Must legal theorists appeal to principles of justice and fairness in order to justify morally their interpretations? There are a number of different reasons for believing that this claim does not follow from his account of interpretation.

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[32] Richard L. Schwartz makes a similar point in his article "Internal and External Method in the Study of Law," Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy. (Volume 11, 1992), 179- 199. He argues that because the legal theorist and the legal practitioner pursue different goals (the legal theorist has theoretical goals, while the legal practitioner has practical goals), this means that the legal theorist should take a stance which is not "circumscribed by the imperatives (to reach closure or consensus, and undertake action, for example) which dominate discussions with practical purposes." (*Ibid.*, 196)

First, one might again appeal to the equivocation in the phrase 'appeal to'. Although legal theorists might appeal to the same principles that judges appeal to in order to understand judicial practice, this does not mean that the legal theorists accept these principles. In other words, legal theorists can appeal to principles in constructing an interpretation without using those same principles to justify the interpretation morally. Raz makes a similar point with a different emphasis when he distinguishes between a normative statement which is committed and a normative statement which is detached.[33] In both cases, principles are 'appealed to', but only in the first case (when the normative statement is committed) are the principles accepted or endorsed, while in the second case the principles are appealed to from the detached perspective of one not necessarily accepting or rejecting the principles.[34] Hart believes that this distinction is a "valuable supplementation" to his own account of external and internal statements.[35] And Hart shows in his "Postscript" to The Concept of Law how this supplementation would work when he states that "Of course, a descriptive legal theorist does not as such himself share the participants' acceptance of the law in these ways, but he can and should describe such

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[33] See Joseph Raz's The Authority of Law (Oxford: Clarendon Press, 1979), 153-157, and his Practical Reason and Norms (London: Hutchinson and Co. Ltd, 1975), 123-129.

[34] A similar criticism was often made about Searle's attempt to derive an 'ought' from an 'is'. He began with the fact that Jones uttered the words "I hereby promise to pay you, Smith, five dollars," and derived the statement "Jones ought to pay Smith five dollars." Searle was criticized for failing to see the distinction between committed normative statements (to use Raz's terminology) and detached normative statements, or, to use Anthony Flew's terms, "between the employment of a term like promise in a detached anthropological description of a social practice; and the use of the same term, without reservation, by a committed participant." The Is/Ought Question W.D. Hudson Ed. (London: MacMillan and Co., Ltd., 1969), 142.

[35] H.L.A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory. (Oxford: Clarendon Press, 1982), 153-154.

acceptance, as indeed I have attempted to do in this book."[36] He adds that "... in this limited sense he [the legal theorist] must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the insider's internal point of view or in any other way to surrender his descriptive stance."[37]

A second way to show that Dworkin's claim about legal theory does not follow from his account of interpretation involves appealing to Dworkin's two dimensions of interpretation. Why is it the case that legal theorists cannot appeal to principles relevant to fit (like comprehensiveness and simplicity) and seek to justify their interpretations in terms of those principles alone? Although legal theorists would still be seeking to justify their interpretation, they would not be morally justifying their interpretation. There is no necessity that legal theorists must take the step to the second dimension of justification and appeal to more substantive issues of morality in order to morally justify their interpretations (although they certainly could do this if they wanted to). Waluchow makes a similar response to Dworkin when he states that Dworkin does have a descriptive element in his account of law, "...namely by stating that interpretation must 'fit' the practice as it exists."[38] Although the dimension of fit involves justifying the interpretation by appealing to what Waluchow calls "meta-theoretical-evaluative criteria" (which are non-moral evaluative criteria like the principle of charity, and principles like simplicity and comprehensiveness), this does not mean that the interpretation is or must be morally justified.

A third way to show that his claims about legal theory do not follow from his account of interpretation involves appealing to Dworkin's account of constructive

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[36] CL 1994, 242.
[37] *Ibid.*, 242.
[38] W.J. Waluchow, Inclusive Legal Positivism, 15.

interpretation in different areas like science and literature. In those areas, there is no necessity that the interpreters must morally justify their interpretation (although they are certainly justifying their interpretations on other grounds). Why couldn't a legal theorist take a 'scientific' approach to the study of law, in the sense that principles such as comprehensiveness, simplicity, etc., govern their interpretations and not principles of political morality? One possible response that Dworkin might make is to suggest that since law necessarily involves coercion which is claimed to be justified, then law, unlike science and literature, is morally loaded. But because this response involves the appeal to a claim to be justified and not the actual fact of being justified, the question remains: why can't a legal theorist take a scientific approach to the study of law and describe the claims of law in an equally scientific way? In fact, Dworkin himself indicates this possibility in a footnote in Law's Empire. He states,

> I do not mean that every kind of activity we call interpretation aims to make the best of what it interprets - a 'scientific' interpretation of the Holocaust would not try to show Hitler's motives in the most attractive light, nor would someone trying to show the sexist effects of a comic strip strain to find a nonsexist reading - but only that this is so in the normal or paradigm cases of creative interpretation.[39]

Because Dworkin grants the possiblity of taking such a 'scientific' stance toward different objects, it is hard to see why legal theorists must necessarily be 'unscientific' and morally justify the law.

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[39] LE, 421. In this quotation, Dworkin is using the phrase 'to make the best of' in a restricted sense meaning to make the morally best of. Throughout Dworkin's work there is an ambiguity in this phrase. At times, he uses it in this restricted sense. At other times, he uses it in a wider, more plausible sense where putting an object in its best light means providing the best interpretation of the object given the standards of the enterprise the interpreter is engaged in.

At the heart of all these objections to Dworkin's conclusions are two distinctions which he cannot disregard. First, he cannot disregard the fact that what legal theorists are doing (and the principles and standards that govern the activity of the legal theorist) is signficantly different from what legal practitioners are doing (and the principles and standards that govern their activities). Dworkin acknowledges that there can be different standards for interpretation in different disciplines, and, empirically, legal practice and legal theory are two different enterprises of interpretation with different standards for evaluating their respective interpretations. Nothing but confusion results from attempting to collapse this distinction. Second, Dworkin cannot overlook equivocation in the phrase 'appeal to'. Interpreters can appeal to moral principles (which they accept) in order to morally justify their interpretations. But interpreters can also appeal to moral principles which are accepted by a person or group of people without themselves accepting the principles or standards (and thus without themselves morally justifying what they are interpreting). In a similar way, I can appeal to the reasons Dworkin provides for his conclusions (or he can appeal to the reasons legal positivists give for their conclusions) without accepting those same reasons. If these two distinctions are unavoidable, then Dworkin's conclusions about legal theory and legal practice do not follow from his account of interpretation.

Dworkin's interpretation of law is based on his account of interpretation. He wants to show that the legal theorist must become a participant in the practice of law in order to construct an interpretation of law. He wants to show that an interpretation of law must put the practice of law in its best, politically moral, light. He wants to show that a judge always appeals to principles of political morality in deciding cases. However, as I have shown, when his account of interpretation is examined in some detail, it fails to provide

support for these claims. We can accept the fact that all interpretation is constructive. We can accept that an interpreter always imposes value or purpose on an object. We can accept that this means that the interpreter must appeal to standards and principles in constructing his or her interpretation. We can even accept that a judge must appeal to principles of political morality in deciding between equally well-fitting interpretations. This does not necessarily mean that a judge must always decide cases by appealing to principles of political morality to justify law. This does not mean that a legal theorist must become a participant and justify his or her interpretation of legal practice according to principles of political morality. Despite the acceptance of Dworkin's constructive account of interpretation, the descriptive and morally normative elements of law and legal theory remain distinct.

3. Dworkin's approach to law and its relation to contemporary legal positivism.

Based on his account of interpretation as 'constructive', Dworkin argues that legal theorists and legal practitioners must appeal to substantive moral principles in order to justify morally their interpretations of the law. This conclusion is obviously in sharp contrast to the conclusions of contemporary legal positivists who argue their own descriptions of law are distinct from the moral justification of law and who argue that legal practitioners like judges are capable of applying the law without morally justifying it. Further, if legal theorists must appeal to the same principles to which legal practitioners appeal, and if different principles are appealed to in different legal systems, then it would seem to be impossible to produce a theory of law which is general or universal. Legal theories, for Dworkin, are relative to each legal system (or to relevantly similar legal

systems). This conclusion is also in sharp contrast to the statements of many contemporary legal positivsts like Hart who purport to provide theories of law which are general. Thus, it is certainly true that Dworkin's main conclusions about legal theory are in sharp contrast to how contemporary legal positivists view legal theory. It is for these reasons that Hart states that "Legal theory conceived in this [Hart's] manner as both descriptive and general is a radically different enterprise from Dworkin's conception of legal theory (or 'jurisprudence' as he often terms it) as in part evaluative and justificatory and as 'addressed to a particular legal culture'..."[40] Despite these disagreements about Dworkin's conclusions, his actual approach is remarkably similar to the approach by contemporary legal positivists and many of his main assumptions are even shared by them. In fact, Dworkin's initial account of the interpretative attitude would not be disputed by many contemporary positivists. The main difference between Dworkin and contemporary legal positivists is in the final conclusions that he reaches. And given that they do not follow from his general account of interpretation, it is not surprising that this difference arises.

As noted at the start of this chapter, Dworkin likes to distinguish his own "interpretive approach" from the "semantic" approach of legal positivists. According to Dworkin, legal positivists like Austin and Hart, provide semantic theories of law because they are concerned with the conditions for the use of the word "law". In the group of semantic theories, he includes these "use theories" (presumably Hart is an example), as well as the earlier "more candidly definitional" theories (presumably, he is thinking of Austin).[41] Legal positivists differ, according to Dworkin, only about which historical

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[40] CL 1994, 240.

[41] LE, 32-33. Although he doesn't explictly mention their names in this passage, he does discuss the theories of Austin and Hart as examples of semantic theories (*Ibid.*, 33-35). Dworkin does argue that versions of Natural law theory and legal realist theories can be taken as semantic theories, but that as such they are implausible (*Ibid.*, 35-37). Since it

facts or events determine the criteria for the truth of propositions of law.[42] This implies that lawyers and judges must be using the same factual criteria for determining the truth or falsity of propositions of law, and, as a result, any disagreement about the grounds of or the ultimate basis for law is only an illusion. Given this characterization of semantic theories, it is not suprising that Dworkin's main criticism of semantic theories is that they do not paint an accurate picture of the disagreements judges and lawyers have about the truth and falsity of legal propositions. One can only paint an accurate picture by adopting an interpretive attitude toward laws and legal practice.

The response to Dworkin's criticisms of legal positivism, especially his criticisms of Hart, has been fairly uniform. Legal theorists argue that Dworkin is mischaracterizing legal positivism in general and Hart's position in particular by calling them semantic theories. For instance, Bayles states that "as a criticism of Hart, this misses the mark. Hart does not maintain that there are agreed upon necessary and sufficient factual conditions for the use of 'law'."[43] Further, Waluchow criticizes Dworkin's characterization of the conceptual analysis of legal positivists solely in terms of the use of words. He writes, "Ronald Dworkin appears to characterize Hart's theory as a semantic theory in this sense. He then goes on to show that a philosophical theory of law must be much more than this, something with which Hart would have been in full agreement."[44]

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is more plausible to characterize legal positivist theories as semantic theories, I will focus my attention on them alone and not consider the semantic versions of Natural law and legal realist theories.

[42] *Ibid.*, 33.

[43] Michael Bayles, "Hart vs Dworkin." Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy. (Vol. 10, no. 4, November 1991), 360.

[44] W.J. Waluchow, "The Many Faces of Legal Positivism." University of Toronto Law Journal. (Vol. 48, 1998), 393.

Hart himself states that Dworkin is misrepresenting his form of positivism by describing it in terms of semantic theory. He writes,

> Though in the first chapter of *Law's Empire* I am classed with Austin as a semantic theorist and so as deriving a plain-fact positivist theory of law from the meaning of the word 'law', and suffering from the semantic sting, in fact nothing in my book or in anything else I have written supports such an account of my theory.[45]

Thus, legal positivists have responded to Dworkin's objections by arguing that he has mischaracterized the position of legal positivists like Hart by describing it in terms of semantic theory.

If contemporary legal positivists like Hart do not have a semantic approach to legal theory, what approach do they take towards legal philosophy? As we will see, the answer to this question properly requires a chapter unto itself.[46] However, for our purposes here, we can settle for the stated answer given by legal positivists. Many contemporary legal positivists describe their approach to the study of law in terms of the analysis of concepts and the description of legal phenomena. Is this approach to legal theory significantly different from the interpretive approach? An answer to these questions depends on how both conceptual analysis (and its descriptive aspect) and the interpretive approach are understood. Let us take another brief look at the interpretive approach and see if legal positivists would be in disagreement.

Dworkin's initial characterization of the interpretative attitude involves the assumption that the object of interpretation has value (i.e. serves some interest, point,

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[45] CL 1994, 246.

[46] In the next chapter, I will look at the legal positivist's approach to philosophy of law by focusing initially on Hart's view of legal theory.

purpose or principle) and that the object can only be understood (or in the case of laws, applied, extended, modified or qualified) by that point or interest or principle or purpose that it serves.[47] As we saw earlier, there is a way of understanding this interpretive attitude which is fairly uncontroversial. If, by constructive interpretation, it is meant that the object is normative (governed by principles, norms, etc.,) and that the interpretive act is itself a normative activity (also governed by principles, goals, etc.,), then, I will argue, this would not or need not be disputed by contemporary legal positivists.

Let me consider the first assumption of the interpretative attitude, namely, that the object of interpretation must be assumed to be normative. Contemporary legal positivists believe their object of study (law and legal practice) is normative. In other words, they do not believe that they are providing an account of something which is purely factual or without purpose or value. Further, they do not believe that law can simply be understood in terms of coercion or threats. Contemporary legal positivists recognize that an adequate account or theory of law must take proper account of its normativity.[48] One of the main objections that Hart makes against previous legal positivists like Austin and Bentham is that their imperative theories of law do not take adequate account of the normative nature of law. Social practices like law become distorted if they are described or treated as if they were not normative. Hart states that, "there is a need for a form of legal theory or jurisprudence that is descriptive and general in scope, the perspective of which ... is that of an external observer of a form of social institution with a normative aspect."[49] Just

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[47] LE, 47.

[48] As we shall see, just what is involved in taking adequate account of the normativity of law becomes the real point at issue between contemporary natural law philosophers and legal positivists. But for now it must be shown simply that the normativity of law is an assumption shared by contemporary legal philosophers.

[49] H.L.A. Hart, "Comment" in Issues in Contemporary Legal Philosophy. (Oxford: Clarendon Press, 1987), 36.

because Hart emphasizes 'description' does not mean that what is described must be purely factual; he states, "description may still be description even though what is described is still an evaluation."[50] Raz's account of law focuses on the notion of authority and how the authority of law changes the normative situation. Clearly, this involves the assumption that an interpretation or theory of law must give a proper account of its normativity. In his book, Practical Reason and Norms, Raz explicitly deals with the nature of norms and the normativity of institutions like legal systems. In Chapter 5, he explicitly seeks, "to explain what precisely is meant by saying that legal rules are norms (i.e. reasons for action) and what justifies the use of normative terms to describe the law."[51] Waluchow succinctly sums up this point when he states, "...positivists are fully aware that law is fundamentally a normative affair. Law is thought to create obligations and rights, and necessarily to involve its participants in processes of justification."[52] Thus, contemporary legal positivists agree with the first assumption of the interpretative attitude; namely, that the object of interpretation (that is, legal practice) is normative. Whether or not their accounts or interpretations of law succeed in adequately representing the normativity of law is a question that must be considered later.[53] All we need to know now is that this part of the interpretative attitude is not disputed by contemporary legal positivists.

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[50] CL 1994, 244.

[51] Joseph Raz, Practical Reason and Norms, 155.

[52] W.J. Walluchow, "The Many Faces of Legal Positivism," 405.

[53] Again, what it means to recognize the normativity of law is a matter of debate among contemporary legal theorists. For instance, Hart feels that he takes due account of the normative nature of law by focusing on the kinds of rules and how rules are followed by participants (although in the Postscript he does suggest that there is a place for principles in his account). Raz feels that he takes due account of the normative nature of law by focusing on the role of authority in legal practice. However, in his book, A Theory of Law, Soper describes modern positivism in terms of a futile search for normativity, since the basic approach to law by legal positivists conflicts with the normativity of law. According to Soper the positivists are caught in a dilemma: "the positivist's insistence on

Although contemporary legal positivists clearly assume that law and legal practice are normative, it is not always so clear what they think about the second characteristic of the interpretive attitude; that is, it is not so clear whether legal positivists would view their own 'descriptive' task as normative. For instance, Raz wrote a book on norms and practical reason, yet in this work he does not explicitly state whether descriptive philosophy is an activity governed by norms. He does acknowledge that practical philosophy in general involves both a " ... substantive or 'evaluative' part and a formal part concerned with conceptual analysis."[54] Obviously, the substantive or evaluative part of practical philosophy involves an appeal to some norms or values (or an appeal to some normative or value theory), since it includes evaluative arguments about norms, actions and values. However, in this work, he never explicitly states whether the formal part is governed by norms. Only in later works, does Raz become clear about the normativity of theories of law, but he is not always clear about the kinds of norms that do (or should) govern legal theories and the way in which these norms relate to legal theory. For instance, in "Authority, Law and Morality," he states a good theory of law "is based on evaluative considerations in that its success is in highlighting important social structures and processes, and every judgement of importance is evaluative."[55] This seems to suggest that legal theory is governed by "evaluative considerations" that need not be moral. However, in the same work, he states that evaluative judgement which involves appeal to the "moral

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maintaining his theory's purity forces him to say nothing about either the grounds for or the nature of normative judgement. Yet at the same time the positivist insists that the law is a normative system." (*Ibid.*, 30) At this time, we need not concern ourselves with who is right or not. The main point is that all legal theorists take as an assumption that the object of interpretation is normative.

[54] Joseph Raz, Practical Reason and Norms, 10.

[55] Joseph Raz, "Authority, Law and Morality," The Monist. Vol. 68, No. 3 (1985), 320. Henceforth known as ALM.

aspect" of law is "inescapable in trying to sort out what is central and significant in the common understanding of the concept of law."[56] Thus, Raz seems to suggest that moral judgments might be necessary in deciding what concepts to analyze. Exactly what sort of judgements are relevant in deciding which concepts are central or important is one issue, and what role these judgements should have in assessing competing theories of law is another issue with which Raz is unclear.[57]

In many of his works, like The Concept of Law, Hart is not clear or explicit about the normativity of description. For instance, in the Postscript, he states that his account is "... descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral grounds or any other grounds the forms and structures which appear in my general account of law..."[58] Certainly, Hart is saying that he is not attempting to justify the law and legal practice morally. So, he would argue that the philosopher of law should not appeal to moral principles in order to justify their 'descriptive' account of law. But what is not clear is whether he believes that his analysis or description of law must be justified by appealing to other, non-moral principles.

Only in Hart's "Comment" in Issues in Contemporary Legal Philosophy[59] does he explicitly acknowledge that descriptions may be guided by meta-theoretic values. He states, "it is also true that an analysis which allots a place to moral claims and beliefs as constituents of a social phenomenon must itself be guided, in focusing on those features rather than others, by some criteria of importance of which the chief will be the explanatory

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[56] *Ibid.*, 322.

[57] In chapter 5, I will focus on the role of morality and moral judgements in both Raz's and Finnis' accounts of law.

[58] CL 1994, 240.

[59] H.L.A. Hart, "Comment" in Contemporary Legal Philosophy, 35-42.

power of what his analysis picks out."[60] He adds that such analysis will be guided by controversial judgements which reflect "meta-theoretic values." But he ends this passage by stating "...there is nothing to show that this analysis is not descriptive but normative or justificatory."[61] Thus, Hart seems to be suggesting that descriptions of law are governed by meta-theoretic values and, yet, they are not normative.

There are two comments that I will make. First, if a practice is normative in the sense that it involves some process of justification or commendation (and this is, minimally, what normative means), then it is hard to see how philosophy in general (and philosophy of law, in particular) is not a normative practice. Although Hart says his account is descriptive in the sense that it has "no justificatiory aims", it is an overstatement. After all, he would agree that his account is commendable and justifiable because it offers a simple and comprehensive account or explanation of the practice of law. If so, then some norms must govern the practice of legal theorists. An account of law is not just a mirror that reflects reality. It is selective, pointing to features which give insight into legal practice as a whole. As such, a legal philosopher must present some reasons why his or her account would be preferable to other accounts which would emphasize different features of law and legal practice. It is hard to see how the presentation of these reasons or arguments could fail to involve either an explicit or implicit appeal to norms which would commend or justify an account of law. Thus, legal positivists should view their own practice as governed by norms.

But, a second point must be made. Even if legal positivists agree that their task is governed by norms, this does not mean that the distinction between describing the law and

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60 *Ibid.*, 39.
61 *Ibid.*, 39.

morally justifying the law has been collapsed (as Dworkin argues it is). In other words, the normative approach to philosophy of law is compatible with one of the central theses of legal positivism; namely, that the descriptive and morally evaluative tasks remain distinct. In fact, some legal positivists explicitly acknowledge that their descriptions or accounts of law are governed by norms. For instance, Waluchow is a Hartian legal positivist who is explicit about this point. He states, "one can allow non-moral value to influence, and indeed in some instances govern, theoretical description without courting the threat of moral and intellectual deception lurking in Dworkin's conceptions."[62] He argues that "meta-theoretical values like simplicity, comprehensiveness and coherence govern the development and assessment of descriptive accounts of a practice of law."[63] However, this does not mean that the description is not neutral with respect to moral or political values.[64] Although meta-theoretical values may be appealed to in order to justify an account of law, this does not mean that theorists must appeal to moral values in order to justify their accounts of law morally. Thus, the approach by legal positivists is not inconsistent with Dworkin's initial characterization of the interpretative approach. Only when Dworkin makes other inferences about the interpretative approach (namely, that it necessarily means that the legal theorist must morally justify the law) do profound differences emerge.

But even Dworkin's actual approach to philosophy of law in Law's Empire is remarkably similar to the approach by legal positivists. Generally, his argument is similar

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[62] W.J. Waluchow, Inclusive Legal Positivism, 19.

[63] W.J. Waluchow, "The Many Faces of Legal Positivism," 398-399.

[64].Waluchow claims that the normativity of legal theory is compatible with the "neutral description thesis" which states that "it is both possible, desirable and philosophically enlightening to describe (and explain) a legal system as it is without at the same time engaging in its moral evaluation." (*Ibid.*, 398) Waluchow claims that many legal positivists including Hart would hold this thesis.

to the conceptual analysis that goes on elsewhere. He begins with a concept which is deemed central to understanding the nature of law and legal theory (i.e. interpretation). He analyzes the concept of interpretation by appealing to different practices in which interpretation occurs and by appealing to language, to some extent. Then he argues that certain conclusions are implied by the nature of interpretation. Dworkin ends up making claims which are indeed general; since it would hold true of all accounts of legal theory and legal practice that the interpretation or description of law must involve the moral justification of law. Dworkin's actual approach to philosophy of law parallels the approach by many legal positivists. As an example, let us briefly consider Raz's general argument. He begins with a concept that is deemed central to understanding the nature of law and legal theory (i.e. authority). He analyzes the concept of authority by appealing to different practices in which authority occurs and by appealing to language, to some extent. Then he argues that certain conclusions are implied by the nature of authority and the fact that law essentially claims to be authoritative. Raz ends up making claims which are general; since exclusive legal positivism is argued to be the best account of law and legal practice in general. Thus, Dworkin's actual approach to philosophy of law is remarkably similar to the approach by legal positivists like Raz. The only difference is that Dworkin is attempting to make meta-theoretical claims about the approach of legal theorists; claims which are themselves 'neutral' and universal but which would imply that the claims of legal theorists are not (and can not be) universal or neutral with respect to morality.[65] Thus,

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[65] In his "General and Particular Jurisprudence: Three Chapters in a Story" In Positivism Today, Edited by Stephen Guest (Aldershot: Dartmouth Publishing Co., Ltd., 1996), William Twining makes the point that Dworkin's central ideas have "general, if not universal signficance" (138). Waluchow in "The Many Faces of Legal Positivism" comments on Twining's article and points out that "Dworkin's meta-theoretical claims

for Dworkin, the approach by legal theorists would be counter not only to the approach by legal positivists, but also to his own approach in Law's Empire.

Although Dworkin's actual approach to philosophy of law and his initial characterization of the interpretative approach is consistent with the approach of contemporary legal positivists, his conclusions about legal theory and legal practice are not. But, once again, we can note that it is not surprising that his conclusions would not be accepted by other legal theorists since they do not follow from his account of interpretation.

4. Conclusion.

In this dissertation, I am investigating and evaluating the current debate in philosophy of law. The main guiding principle in this investigation is the idea that the current debate and the positions of contemporary legal theorists can be best understood in terms of underlying assumptions about the nature of the philosophical task. In this chapter, I began by looking at what seemed to be a very different approach to philosophy of law, namely Dworkin's interpretative approach. I began by examining Dworkin's account of interpretation as 'constructive', and showed to what extent his account is plausible. I then examined the conclusions about law and legal theory that he wants to draw from this account of interpretation, showing that his main conclusions (namely, that the legal theorist must appeal to the same principles as the legal practitioner, and that both the legal theorist and the legal practitioner must morally justify the law in their respective interpretations of law) do not follow from a plausible account of constructive interpretation. Finally, I looked at some of the underlying assumptions about the nature of philosophy, and found

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about how legal theory must be done are universal; but the claims of a legal theory are not." (405).

that there is a surprising similarity in approaches between Dworkin and other contemporary legal theorists. Both Dworkin and contemporary legal theorists emphasize the normativity of law. Further, contemporary legal positivists need not disagree with Dworkin's claims about the normativity of the philosophical task. Legal positivists can retain their neutrality with respect to morality, and still hold that their approach to the study of law is governed by norms. Even Dworkin's approach to philosophy of law in Law's Empire is very similar to the standard approach by legal positivists. Both Dworkin and contemporary legal positivists focus on the analysis of concepts which are deemed (or argued to be) central to law or legal practice, and draw general conclusions about law (or, in Dworkin's case, law and legal theory) based on the analysis of these key concepts. The fact that Dworkin draws the wrong conclusions does not change the fact that his actual approach to philosophy of law is in keeping with the approaches by contemporary legal positivists.

Although we can say generally that contemporary legal theorists approach the study of law through description and the analysis of concepts, what this actually means and how we can assess competing accounts of law is unclear. In the next chapter, I will focus on the nature of conceptual analysis as understood by contemporary legal theorists. Because The Concept of Law has been so influential in this regard, I will focus my attention on Hart's account of law and its underlying assumptions about the nature of philosophy. After clearing up an ambiguity in Hart's approach to philosophy of law, I will show how Hart understands conceptual analysis, and I will explain what implications this understanding has for the evaluation of competing accounts of law. Other contemporary legal theorists share many of the same assumptions about philosophy's role in the study of law. In order to show that they share Hart's overall approach to philosophy of law and to his standards for evaluating competing accounts of law, I will focus, in the second part of

this dissertation, on specific philosophers (Hart, Raz and Finnis). Hart's approach to philosophy of law not only provides a foundation for the evaluation of accounts of law given by other contemporary legal theorists, but it also indicates some of the shortcomings of this approach to law (which I will consider in the concluding chapter of this dissertation).

Chapter 2: The Contemporary View of Philosophy of Law.

In the first chapter, I argued that even Dworkin shares some assumptions about the nature of philosophy of law with contemporary legal positivists. Generally speaking, contemporary philosophers of law work with the assumption that law is normative and legal practice is a norm-governed activity. So, it is important (if not essential) for legal theorists to explain the normativity of law in their accounts of law. Contemporary philosophers of law also seem to recognize that their own activities are, in some sense, governed by norms. It would make little sense to talk about the relative adequacy of competing accounts of law if legal theory were not governed by some kinds of norms. What norms govern philosophy of law depends on how the activity of legal theory is understood and practiced. Finally, despite his conclusions about the nature of legal theory, Dworkin's actual approach to philosophy of law is in keeping with the approach of contemporary legal positivists. Like contemporary legal positivists, Dworkin analyzes concepts in order to make general claims about the nature of law and legal theory. As we shall see, contemporary philosophers of law aim to produce accounts of law which are general not in the sense that they must take account of every possible variation in legal systems and legal practices, but they are general in the sense that they must accurately explain the core or paradigm cases of all legal systems and legal practices.[1]

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[1] Contemporary philosophers of law largely follow Hart's critique of definitions of law which purport to provide a clear boundary between legal practice and non-legal practice. Hart argues that such definitions are impossible and distortive of law and legal practice. The best that can be achieved is an account of law which accurately explains the paradigm cases of law and legal practice in general. Thus, as we shall see, Hart's account

In this chapter, I will continue to argue that there is a common understanding of the nature of philosophy of law among contemporary legal theorists, by focusing on Hart's account of legal philosophy. By examining Hart's account of legal philosophy, a clearer picture emerges of the contemporary understanding of conceptual analysis and the way in which competing accounts of law should be evaluated. But before we examine the nature of conceptual analysis, one further way in which contemporary philosophy of law is distinguished from traditional philosophy of law must be examined; namely, the place of metaphysics in the philosophical study of law.

1. Conceptual Analysis and the Place of Metaphysics in Contemporary Philosophy of Law.

One obvious way in which the contemporary debate in philosophy of law differs from traditional forms of the debate is in the attempt to avoid metaphysical issues. Generally, contemporary legal theorists try to bracket-off or put aside metaphysical or ontological disputes, and focus instead on the analysis of language or concepts. It is hoped that an adequate account of law and its relation to morality can be provided through the analysis of concepts alone without getting caught in seemingly unending metaphysical or

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of law is not refuted because it does not accurately explain primitive law or international law because his account of law explicitly only explains 'normal' cases of law. This does not mean that primitive law and international law are not legal systems; rather, they are properly understood as borderline cases of law and legal systems. Similarly, Finnis argues that his account of law does not imply that unjust law and unjust legal systems are not law or legal systems; rather, unjust legal systems are properly understood as borderline cases of the paradigm case of legal systems. For both Hart and Finnis, it is the understanding of the paradigm case of law and legal system which is general in the sense that it is not relative to a particular society or a particular historical period.

ontological disputes. Hart explicitly describes his work in the The Concept of Law as one "concerned with the clarification of the general framework of legal thought."[2] He adds that at many points this involves questions about the "meaning of words."[3] Thus, much of Hart's work concerns the analysis of concepts like 'obligation' (concentrating on the difference between 'being obliged' and 'having an obligation'), 'imperatives' (exploring the differences between requests, pleas, warnings, orders and commands), 'sovereignty' (contrasting his account with Austin's oversimplified view of sovereignty) and 'rules' (distinguishing primary and secondary rules). And the rest of Hart's work is concerned with the implications of his conceptual analysis of these terms. When metaphysical storms do threaten (for example, in the chapter "Law and Morals" where he considers traditional theories of natural law), Hart responds by endeavouring "to disentangle [traditional natural law theories] from their metaphysical setting and restate [them] ... in simpler terms."[4] He suggests that the metaphysical perspective of traditional natural law theories, which focuses on a teleological view of nature, is alien to modern minds and the subject of much disagreement among philosophers. But instead of dismissing the theory of natural law, Hart attempts to restate the theory in simpler and allegedly nonmetaphysical terms like survival.

The work of Joseph Raz is also explicitly concerned with the analysis of concepts. In The Authority of Law, Raz states that the first part of his book supplies a "philosophical analysis of the concept of legitimate authority."[5] Much of the rest of the book is concerned with implications of this initial analysis. If we look at the presuppositions of Raz's account

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[2] CL 1961, v.

[3] *Ibid.*, v.

[4] *Ibid.*, 184.

[5] Joseph Raz, The Authority of Law: Essays on Law and Morality. (Oxford: Clarendon Press, 1979), vi. Henceforth known as AL.

of authority, namely, his account of norms in Practical Reasons and Norms, we see that he also approaches the subject by putting aside metaphysical and epistemological disputes and by attempting to focus on conceptual analysis alone.[6]

The fact that contemporary legal positivists wish to put aside metaphysical concerns should not be surprising given the history of positivism and legal positivism in particular. However, what is, perhaps, a little more surprising is that the contemporary debate between legal positivists and natural law theorists appears to have nothing to do with metaphysics, since contemporary natural law theorists also attempt to put aside metaphysical issues and presuppositions, and focus on conceptual analysis.

Contemporary natural law theorists like Dworkin and Finnis do not begin with metaphysical assumptions about morality or norms. As shown in the first chapter, despite Dworkin's criticisms of 'semantic' philosophy of law, he begins his account in Law's Empire with an in-depth analysis of the concept of 'interpretation'. He attempts to base his theory of law and its implications on this analysis of the concept of interpretation. But even a more traditional natural law philosopher like Finnis attempts to base his account of law, not on a teleological view of nature or with the presupposition of the immanence of values, but with an account of the basic goods of human life including 'practical reasonableness'. He argues that his account of basic goods (just like Aquinas' account of good, according to Finnis) is not analyzed and fixed in metaphysics before being applied to morals. He states,

> they are not inferred from speculative principles. They are not inferred from facts. They are not inferred from

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[6] In Practical Reason and Norms, Raz states that "the present study is primarily an essay in conceptual analysis." (10) Further, Raz avoids some of the more difficult epistemological (and, I would add, metaphysical) problems by focusing on the relative justification of practical statements instead of being concerned with establishing the justification of ultimate values. (12)

> metaphysical propositions about human nature, or about the function of a human being, nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate).[7]

Finnis understands goods and basic goods in terms of reasons for action. He focuses on one basic good, practical reasonableness, and its requirements, and his account of law is ultimately based on his analysis of these concepts. It is only at the last chapter of his book that Finnis considers questions about nature, God and existence. Finnis' account, as well as any other contemporary legal theorist's account, may end up having implications for metaphysical disputes, however such metaphysical concerns are, at the beginning, put aside in favor of conceptual analysis.

2. What is Conceptual Analysis?

We have seen that contemporary legal theorists share a number of assumptions about the nature of philosophy of law. Generally, they believe that the object of study is a normative practice and that their accounts must adequately capture the normativity of law. They also generally believe that their own activities are norm-governed. Finally, contemporary legal theorists attempt to bracket-off metaphysical issues and focus instead on the analysis of concepts. Through the analysis of key concepts of law, contemporary philosophers of law produce general accounts of law. But how do contemporary legal theorists understand conceptual analysis? And how does this understanding affect the way in which competing accounts of law are assessed?

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[7] NL, 33-34.

Since contemporary legal philosophy has been influenced to a large extent by Hart's The Concept of Law, let us turn to this work for an initial understanding of the task of legal philosophy and conceptual analysis. In the preface, Hart explains how he understands his work in The Concept of Law. He states that his work concerns "the clarification of the general framework of legal thought."[8] He adds that this involves raising questions which, "may well be said to be about the meaning of words."[9] In another work, Hart describes the fact that he was influenced by the linguistic philosophy of J.L. Austin and Ludwig Wittgenstein.[10] The influence of linguistic philosophy was shown in his conviction that

> longstanding philosophical perplexities could often be resolved not by the deployment of some general theory but by the sensitive piecemeal discrimination and characterization of the different ways, some reflecting different forms of human life, in which human language is used.[11]

Hart adds that "it seems to me (and still seems) that attention to the diverse and complex ways in which words work in conjunction with legal rules of different types would serve to dispel confusion...."[12] Thus, Hart sees his own task as one influenced by linguistic philosophy and focusing on the use or 'work' of words.

But this does not mean that Hart's account is subject to Dworkin's criticisms of "semantic theories". In the first chapter of this dissertation, we saw that Dworkin described Hart's account of law as a semantic theory in the sense that it purported to supply necessary and sufficient conditions for the use of the word "law". We also saw in the first chapter that Hart denied that he ever provided such an account of law. Now we can

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[8] CL 1961, v.
[9] *Ibid.*, v.
[10] H.L.A. Hart, Essays in Jurisprudence and Philosophy, 2.
[11] *Ibid.*, 2.
[12] *Ibid.*, 3.

consider why Hart makes this denial and the consequences of this denial for our understanding of conceptual analysis. Hart has two responses to Dworkin's charge that his account suffers from the semantic sting. First, Hart argues that his work is concerned with the meaning of a concept and not with the criteria for the word's application.[13] Thus, for him, the meaning of a concept and conceptual analysis in general are different from identifying the criteria or conditions for how words are used. Second, Hart argues that conceptual analysis, though it may raise questions about the use of words, does more than this. He states, "notwithstanding its concern with analysis the book [The Concept of Law] may also be regarded as an essay in descriptive sociology."[14] And, in the Postscript to The Concept of Law, Hart describes his aim in this book as providing, "a theory of what

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[13] CL 1961, 246. Hart does make some potentially misleading comments in other works about his view of conceptual analysis. For instance, in his Essays on Bentham and his Essays in Jurisprudence and Philosophy he makes some possibly misleading comments about definition and meaning when he adopts part of Bentham's three-step methodology (of phraseoloplerosis, paraphrasis, and archetypation) for dealing with words like obligation, rights and law which do not have a straightforward correspondence with reality. Basically, Bentham argued that these words should not be understood in isolation, but rather they should be understood in the context of the statements in which they appear (phraseoloplersosis). Then, these statements should be paraphrased or translated into other statements (often in factual terms) without the word in question (paraphrasis). Finally, confusions found in the use of these expressions are made more explicit (archetypation). Hart agrees that it is more profitable to deal with the statements in which words like rights, obligations, etc., appear instead of focusing on these words in isolation. But he argues that instead of giving a factual paraphrase of the statements, Bentham often specifies (and should specify) the conditions under which these statements are true and the manner in which they are used. Hart argues that this is a profitable way of dealing with these words. For example, on page 35 of "Definition and Theory in Jurisprudence" in Essays in Jurisprudence and Philosophy, Hart explains the meaning of the phrase 'X has a right" and statements with corporations by "specifying the conditions under which such statements are true and the manner in which they are used." (*Ibid.*, 40) Thus, by emphasizing the importance of "specifying conditions" and the "manner in which they are used," Hart does provide some reason for Dworkin's misinterpretation. But, because Dworkin neglects other aspects of Hart's account and because he puts more emphasis on this aspect than is warranted, he ends up with a distorted and oversimplified view of Hart's account of conceptual analysis.

[14] CL 1961, v.

law is that is both general and descriptive."[15] Thus, although philosophy of law is concerned with words and their meanings, it is also descriptive of legal practice and actual laws.

If conceptual analysis is 'descriptive', does this mean that an account of law (which involves analyses of concepts) can be assessed by seeing whether it adequately describes law and legal practice? In one sense, this is a misleading account of Hart and a misleading account of legal theory. In ordinary speech, a description of something is a representation of this something through words.[16] Of course, the paradigm example of this pictorial account of description is the description of particular empirical objects. One can easily assess the adequacy of empirical descriptions by simply looking to see if the description 'fits'. But this ordinary account of description becomes more problematic when other kinds of objects, besides particular empirical objects, are described. What can one look at to assess the descriptions of general terms and evaluative terms? Is there really anything corresponding to terms like 'law', 'legal practice' and 'obligation'? Can we assess competing theories of law by seeing which theory better represents legal practice, as a whole? This is a misleading way to look at both Hart's account of philosophy of law and the general approach of contemporary legal theorists for a number of reasons. Let us first consider Hart's view of philosophy of law.

It is misleading to think of legal theories as simply representing law and legal practice, because it seems to imply that there is some object corresponding to the word 'law'. Hart follows Bentham, not in calling terms like 'law', 'obligation' and 'rights'

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15 *Ibid.*, 239.

16 For an example of a common way of talking about description, see W.G. Runciman's "Describing" in Mind: A Quarterly Review of Psychology and Philosophy. (Vol. LXXXI, 1972), 372-388.

fictions, but in agreeing that there is not a direct or straightforward correspondence between these words and reality.[17] It is for this reason that Hart thinks definitions of law are distortive. A definition "locates for us the kind of thing to which the word is used to refer, by indicating the features which it shares in common with a wider family of things and those which mark it off from others of that same family."[18] But descriptions, conceived of in the ordinary sense as representations, do the same thing as a definition. An adequate description would enable us to 'see' that which the description represents. As a result, it seems that a description of law can be assessed by simply looking to see if it corresponds to its object. But Hart must (and does) mean something more by a 'description' of law than simply representing law and legal practice, because some of the same problems accompanying definitions of law would accompany such a description. For instance, cases like international law and primitive law show that any attempt to represent law will be problematic, because no one definition or description can take account of these cases equally well. A description of law which seeks to picture or represent law through words will necessarily distort some of these borderline cases by attempting to emphasize similarities that all kinds of law have.

But to conceive of theories of law as descriptive in the ordinary sense is also distortive of the general approach of contemporary legal theorists. If we look very briefly at the general accounts of law given by contemporary legal theorists like Hart, Raz, Dworkin and Finnis, we can see that they are more concerned with explaining law and legal

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[17] See H.L.A. Hart's Essays on Bentham. on page 129 where Hart describes Bentham's account of fictional objects. See also "Definition and Theory in Jurisprudence" in Essays in Jurisprudence and Philosophy where Hart acknowledges that questions such as "What is law?" and "What is a right?" are ambiguous and require a method like Bentham's approach in order to deal with them.

[18] CL 1961, 14.

practice than with representing law and legal practice. It is for this reason that issues about the importance of concepts for understanding the law are relevant in disputes between different contemporary legal theorists, instead of issues dealing only with the comprehensiveness of their theories. Finnis states that "the differences in description derive from differences of opinion, among the descriptive theories, about what is important and significant in the field of data and experience with which they are all equally and thoroughly familiar."[19] As we saw earlier, Raz makes the same point when he states that a good theory of law "... is based on evaluative considerations in that its success is in highlighting important social structures and processes, and every judgement of importance is evaluative."[20] In contemporary philosophy of law there is a focus on the importance of concepts not because these concepts enable us to picture or represent law, but because these concepts enable us to explain the nature of law and legal practice.

For example, Hart focuses on the nature of rules (in particular, the distinction between primary and secondary rules) and he argues that they are the key to understanding the normativity of legal practice. Raz, on the other hand, argues that the notion of authority (or claiming authority) is the key to explaining the nature of law. It is the authoritative nature of law which distinguishes law from both coercion and morality. Thus, Raz analyzes the concept of authority and the implications of the law's claim to authority. The focus in their respective accounts of law is not on representing law but rather on explaining its nature and function. And, if we consider contemporary natural law philosophers like Dworkin and Finnis, the importance of different concepts for explaining law and legal practice becomes even more the issue. Dworkin focuses on the nature of interpretation and

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[19] NL, 9.
[20] ALM, 320.

the implications of this nature on how legal theory and legal practice should be understood. Finnis argues that the normativity of law must be understood from the perspective of the person with practical reasonableness. Thus, Finnis focuses on the concepts of basic goods in general and the concept of the particular basic good of practical reasonableness and its requirements. Contemporary philosophers of law are concerned about the importance of different concepts for explaining and understanding the law.

If the aim of conceptual analysis is explanation instead of representation, does this mean Hart is wrong in calling his account 'descriptive'? Hart's account is still descriptive, but not in the straightforward sense that we have just examined. Hart connects his concerns for conceptual analysis and descriptive sociology by stating that,

> many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated.[21]

Thus, the analysis of words, which involves the "examination of the standard uses of relevant expressions," does not simply tell us about how words are used by legal practitioners. It also tells us about the context in which those words are used (in this case, law and legal practice). In other words, conceptual analysis is 'descriptive' in the sense that it describes not simply how words are used by legal practitioners but also the actual role these concepts have in the practices and institutions in which those words are situated.[22]

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[21] CL 1961, v.

[22] In the next section and the next chapter, it will be shown in more detail what this means. As we will see, this understanding of conceptual analysis is, to a large extent, influenced by the work of the Wittgensteinian Peter Winch.

If we look at Hart's comments on the results of his conceptual analysis, a more complex picture emerges. We see that more is involved in the assessment of the adequacy of analyses of concepts than simply 'looking' to see whether they adequately describe law and legal practice. Hart states that the union of primary and secondary rules is the "key to the science of jurisprudence" and that these two rules have a central place in his account of law, "because of their explanatory power in elucidating the concepts that constitute the framework of legal thought."[23] Hart believes that with this conceptual framework, certain problems and misconceptions in the legal theory and legal practice can be resolved. If this is the goal, then the adequacy of Hart's account and other accounts of law can be assessed in terms of their theoretical value; i.e. their usefulness in elucidating concepts and resolving theoretical problems arising in the practice and study of law. Hart expands on this point when he states that

> if we are to make a reasoned choice between these concepts [offered by Natural law theorists and legal positivists], it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance or clarify our moral deliberations, or both.[24]

Thus, if an account of law and legal practice clears up confusions within philosophy of law or even confusions found among practitioners of law (or among citizens' views of law), then such an account is more adequate than one that does not; it is certainly more adequate than one that causes confusion. It is for this reason that Hart thinks that the union of primary and secondary rules is the "key to jurisprudence": it clears up theoretical confusions and misconceptions in legal philosophy, especially, but not exclusively, those confusions due to theories such as Austin's.

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[23] CL 1961, 79.
[24] *Ibid.*, 204-205.

But Hart thinks that his account of law has even more value than this. An adequate account of law and legal practice is often conceived of as a prerequisite for clear-headed moral deliberations about the law. After all, how can we answer questions about the morality of laws or legal systems unless we are clear about what law is? Hart suggests that an adequate account of law should not cause confusion or misconceptions in our moral deliberations about law, whether such deliberations are theoretical or even practical. In fact, an adequate account of law should actually provide some assistance in our moral deliberations about law. Thus, Hart argues that his account of law is adequate (and preferable to alternative accounts) because it is more useful in clearing up confusions and misconceptions in our theoretical discussions about law and in our moral deliberations about law.

What emerges from Hart's view of conceptual analysis is a more pragmatic account than one might first expect of how competing accounts of law should be assessed. He suggests that theoretical value, not simply empirical adequacy, should guide philosophy of law.

3. Conceptual Analysis and Theoretical Value.

In this chapter, a general picture about how contemporary legal theorists view their own philosophical task has emerged. We have seen that contemporary legal theorists like Hart describe their philosophical task in terms of the analysis of concepts relevant to explaining the normative practice of law. We have also seen how an ambiguity about the descriptive nature of conceptual analysis should be resolved by viewing the assessment of competing accounts of law in terms of their value in assisting theoretical inquiry about law

and morality. But before we consider exactly how this assessment works by assessing and comparing some contemporary legal theories in detail, a few preliminary questions must be discussed.

First, if it is true that conceptual analysis must be understood in terms of the usefulness or value of analyses for theoretical and moral discussion, then are we left with a purely pragmatic account of legal theory? In other words, does this mean that legal theories should be assessed in terms of their 'cash' value in clearing up confusions and furthering discussion? If this is a pragmatic account of legal theory, then it is pragmatic in a much broader sense than it is normally understood. Pragmatism is often understood as a consequentialist account of meaning and truth, with an emphasis on the practical consequences of beliefs. The pragmatic meaning of a word or concept is determined by the difference that word or concept makes in practice. Thus, it is often thought that there was not only an anti-metaphysical bent to pragmatism, but also an anti-theoretical bent. Narrowly construed, pragmatism argues that meaning and truth are determined by practical consequences alone. Pragmatism, so narrowly understood, does not have much to do with Hart's vision of how legal philosophy should be done and assessed. But, let me briefly show, that a broader understanding of pragmatism is compatible with Hart's account of legal theory.

Broadly speaking, pragmatism can be understood in terms of its opposition to one way of theorizing which William James called "vicious abstractionism." James describes the process of vicious abstractionism in the following way:

> we conceive of a concrete situation by singling out some salient or important feature in it, and classing it under that; then, instead of adding to its previous characters all the positive consequences which the new way of conceiving it may bring, we proceed to use our concept privately; reducing

> the originally rich phenomenon to the naked suggestions of the name abstractly taken, treating it as a case of 'nothing but' that concept, and acting as if all the other characters from out of which the concept is abstracted were expunged.[25]

In other words, theorists make the mistake of "vicious abstractionism" when they take a concept or idea which has its roots in experience and practice, and end up treating that concept as if it had no relation to experience and practice. James wanted to emphasize that concepts must be understood in the context of the experiences and practices that shaped them. If we take this insight as central to a broader understanding of pragmatism, then a pragmatic understanding of conceptual analysis is not so different from Hart's understanding of it. A pragmatic understanding of conceptual analysis would emphasize the practices and experiences which shaped the concepts (and are, in turn, shaped by those concepts). Mainly because of Wittgensteinian influence via Peter Winch, Hart describes his own account of conceptual analysis in remarkably similar terms. As I mentioned above, Hart describes the importance of making distinctions and analyzing concepts with an eye to "...the different ways, some reflecting different forms of human life, in which human language is used."[26] Understanding concepts in terms of the 'work' they do in different practices or forms of life is in keeping with a broad understanding of pragmatism. And certainly the later Wittgenstein and pragmatists like William James share beliefs about the confusions resulting from isolating concepts from the practices (or forms of life) in which they are situated. But this does not mean that pragmatism (or the later Wittgenstein), so understood, is anti-theoretical; such a broad understanding of pragmatism may be against the kind of theory which would deny the practical context of concepts, but it would

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[25] William James, "Abstractionism and 'Relativismus'" in Pragmatism and The Meaning of Truth. (Cambridge: Harvard University Press, 1975): 301.

[26] H.L.A. Hart, Essays in Jurisprudence and Philosophy, 2.

not be against the theoretical inquiry into the meaning of concepts which attempts to situate concepts within their practical and social contexts (or forms of life, to use Wittgenstein's terms). Thus, Hart's account of conceptual analysis is pragmatic only to the extent that the meaning of concepts of law must be understood by the 'work' they do in practice.

Second, if legal theory is understood in this broad pragmatic way does this mean that accounts of law in general are determined by their theoretical value, regardless of whether or not they 'fit' or correspond with legal reality? In other words, if legal theory is assessed in terms of its value in furthering theoretical and moral discussion, what happens to the descriptive aim of philosophy of law? This brings in an issue that contemporary legal theorists would like to put aside, since it seems like an old-fashioned metaphysical issue; namely, how does our theoretical understanding of reality relate to reality itself? Must there be a choice between the theoretical value of our ideas and their correspondence with reality? There are two ways one could deal with this question. First, one could argue that because of the Wittgensteinian influence on contemporary philosophers of law like Hart, questions about whether our concepts or ideas correspond to reality would be considered illegitimate. To treat reality as something distinct from our understanding of it, is to isolate the concept of reality from its place in forms of life and practices. This, as I argued earlier, is an instance of vicious abstractionism and is the cause of many confusions found within philosophy. Thus, this question not only is not an issue among contemporary philosophers of law, but it should not be one. But this may not be a satisfying answer to those who do not share this post-Tractatus Wittgensteinian philosophical outlook. So one might attempt to deal with the question in a second way. At this point we might not need to choose between theoretical value and a truth that corresponds to reality. For it would seem that an analysis of concepts which is

theoretically valuable (in that it removes confusions in legal theory and practice, as well as in our moral deliberations) should 'fit' reality (in the correct sense of the word, whatever it is), unless we bring in some evil genius deceiving us from above. In other words, if a certain way of conceiving of things clears up confusions in our deliberations about law and morality, then don't we have a prima facie reason for thinking that law and legal practice (or what the words or concepts refer to) correspond to these concepts? I think we have a prima facie reason for believing that a legal theory 'fits' legal reality if that legal theory is valuable in clarifying and assisting our theoretical and moral discussions about law. And this would give us a more concrete way (putting aside those everlasting metaphysical issues about the nature of reality) of determining which theories better 'fit' legal reality. Thus, although we may be assessing competing accounts of law in terms of their value in furthering theoretical inquiry and moral discussion, this form of assessment need not be opposed to descriptions of reality.

A third question arises if analyses of concepts are assessed in terms of theoretical value, namely, would not this imply that we can make words mean what we want them to mean as long as good consequences result? In other words, is not the logic or necessity that is often attributed to the implications of conceptual analysis undermined by assessing the analysis of concepts by its useful consequences? Does this mean that the consistency of accounts of law is irrelevant for their assessment? Not at all. Again, if a pragmatic understanding of conceptual analysis is understood in a broader sense as simply arguing that concepts must be analyzed in terms of the different practices or forms of life from which they arose, then this rampant subjectivism and irrationality does not arise. To argue that we can make words mean whatever we want is to understand words or concepts in isolation from the practices in which they were formed; it would mean treating words and

concepts as if they have meaning in isolation from other words and concepts. This is not the case for a pragmatist in the broad sense of the word, and it would not be the case for Hart. In fact, the theoretical and even practical value would be undermined by changing the meaning of words any way we want; words and concepts have meaning and value because of their, in some cases necessary, relation to other concepts and because of their place in certain forms of life. Thus, we can assess accounts of law internally by seeing whether conclusions do in fact follow from the analyses of concepts. This should be the first way in which one should criticially examine an account of law. But the appeal to internal consistency may not be enough to decide between competing accounts of law (for instance, those accounts offered by contemporary legal positivists and those offered by contemporary natural law philosophers).[27] Thus, the appeal to the theoretical value of accounts of law is relevant for assessing competing accounts of law which are internally consistent.

A fourth question arises if accounts of law are assessed in terms of their value for moral deliberations; would this mean that we must re-examine the debate between natural law theorists and legal positivists about the political and social consequences of adopting each position? Is Bentham right when he argues that the acceptance of natural law theory will lead to anarchy or conservatism?[28] Is Radbruch right when he says that the adoption of legal positivism led to and will lead to the kind of complicity found among judges and

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[27] And, as we saw, Hart believes that the only way to choose between the concepts offered by contemporary legal positivists and contemporary natural law philosophers is by appealing to their respective value in furthering theoretical inquiry and moral deliberation.

[28] Hart presents a good historical overview of the reasons Bentham and Austin give for the separation of law and morality in his article, "Positivism and the Separation of Law and Morals." originally published in 1958 in The Harvard Law Review, and later published in Philosophy of Law. Edited by Feinberg and Gross. (California: Wadsworth Publishing Company, 1991), 63-81.

lawyers during Nazi Germany?[29] We can even turn to more contemporary legal theorists. Is Dyzenhaus right when he argues that the acceptance of legal positivism has bad moral consequences evidenced by the excessive compliance of courts in Apartheid South Africa?[30] Or is Frederick Schauer right when he argues that the adoption of legal positivism is a potential solution to the excessive compliance of courts in unjust legal systems?[31] If legal theories are themselves assessed in terms of their value for assisting moral deliberation, doesn't this mean that the focus of the debate should be on the moral consequences of adopting a particular theory of law?

This way of talking about the debate between legal positivism and natural law gets at the emotional heart of the debate. The abuses of power by legislators and the compliance of judges and lawyers in unjust regimes like Nazi Germany and Apartheid South Africa seem to be so contrary to the spirit and intentions of law that it is hard not to call these situations perversions of law (and, indeed, perversions of our shared humanity). We want to know why these perversions of law happened, and how to prevent them from happening again.

Some legal positivists and natural law philosophers suggest that if only judges and lawyers in Nazi Germany or Apartheid South Africa thought about the law in a different way then, maybe, they would not have complied. Or, more generally, they argue that if people thought about law in a certain way, then abuses of law could better be avoided. How can both legal positivists and natural law philosophers make the same claim?

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[29] See, for example, Gustav Radbruch's "Five Minutes of Legal Philosophy" in Philosophy of Law, 103-104.

[30] David Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy.

[31] Frederick Schauer, "Positivism as Pariah" in The Autonomy of Law: Essays on Legal Positivism.

Basically, a legal positivist argues that only through the separation of law and morality can one think clearly about the law and avoid two dangers:

> the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.[32]

If the law and its authority are "dissolved in man's conceptions of what law ought to be", then citizens will follow only the laws that they individually think are right and this will lead to anarchy. If the existing law "supplants morality", then this will lead to the conservatism of people accepting the law because it is law. Further, if we consider a judges' duty to apply the law in conjunction with natural law, then we have the twin dangers of a judge's renegade behavior and a judge's excessive compliance with the law (and, perhaps, the oppressive morality of his society). Only by separating law from morality can we avoid each danger.

But some natural law philosophers argue that it is precisely this separation between law and morality that was the problem in Nazi Germany and Apartheid South Africa. It was this separation between law and morality that legitimized the excessive compliance by judges and lawyers. Radbruch writes,

> This view of the nature of a law and its validity (we call it the positivistic theory) has rendered the jurist as well as the people defenseless against laws, however arbitrary, cruel, or criminal they may be. In the end, the positivistic theory equates the law with power; there is law only where there is power.[33]

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[32] H.L.A. Hart, "Positivism and the Separation of Law and Morals" in Philosophy of Law, 65.

[33] Gustav Radbruch, "Five Minutes of Legal Philosophy" in Philosophy of Law, 103.

It was a judge's duty to apply the law, and if law is determined independently of morality, then it was a judge's duty to apply even unjust laws. Thus, judges in unjust regimes can legitimize their compliance with unjust laws by appealing to their duty as judges and a positivistic conception of law. There is a passage in a book about South Africa called Cry, the Beloved Country which illustrates this view of judges. After describing how a judge is called Honourable because of his or her high office and serious duties, the author writes,

> The Judge does not make the Law. It is the People that make the Law. Therefore if a Law is unjust, and if the Judge judges according to the Law, that is justice, even if it is not just.
>
> It is the duty of a Judge to do justice, but it is only the People that can be just. Therefore if justice be not just, that is not laid at the door of the Judge, but at the door of the People, which means at the door of the White People that make the law.[34]

Thus, some natural law philosophers argue that with a positivistic conception of law, the excessive compliance of judges in unjust regimes is not only legitimized, but considered honorable because it is in keeping with their duties as judges.

There are two factors which complicate the debate. First, the question of whether or not there are (or were) bad consequences of accepting a given understanding of law has different answers depending on whom we are talking about. Are we referring to the general acceptance of a theory of law by citizens or by legal practitioners like judges?[35]

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[34] Alan Paton, Cry, the Beloved Country. (New York: Charles Scribner's Sons, 1948): 158.

[35] In his article, "Choosing a Legal Theory on Moral Grounds" Social Philosophy and Policy. (Vol.4, 1986, Issue 1), Soper distinguishes two forms of the debate. First, he deals with MacCormick's moral arguments in favour of legal positivism which focus on the practical consequences for citizens (and not legal officials). Second, he deals with the Hart/Fuller debate which focuses "not on the connection between legal theory and individual moral responsibility, but on the connection between legal theory and the ability of those bent on doing evil within a legal system to achieve their ends." (*Ibid.*, 37) The focus, in the second case, is on legal officials like judges working within a legal system.

Some of the criticisms of legal positivism, for instance, only involve legal officials and the consequences of their acceptance of legal positivism. For example, Schauer responds to the criticism that "...legal positivism is either the cause of or the appropriate name for the overwillingness of legal officials to suspend bad laws (or to apply and enforce laws badly) just because they are law."[36] . He responds by focusing primarily on the consequences of a citizen's acceptance of legal positivism, and only at the end of the article does he turn to consider too briefly the consequences of a legal official's acceptance of legal positivism. But obviously the duties of a citizen with respect to the law differ significantly from the duties of a judge or other legal practitioners. And it is the duty of a judge to apply the law that, in conjunction with a positivistic view of law, allegedly leads to this overwillingness to apply bad laws. Further, it is harder to argue that the apathetic response by citizens in Nazi Germany or Apartheid South Africa to unjust laws was due to the acceptance of legal positivism, since they are not as uniformly educated about the law as legal practitioners and many other factors come into play when we consider everyday people's motives. Thus, it is more profitable, I think, to focus attention on the consequences attending to judicial acceptance of legal positivism or natural law and not a citizen's acceptance of legal positivism or natural law philosophy.

But there is a second factor that complicates this issue. What complicates this whole debate is that neither account of law (i.e. neither legal positivism nor natural law) by itself should have these consequences. As I have argued earlier, contemporary natural law

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In both cases, Soper argues that the issue cannot be decided by appeal to the practical consequences. But the important point, for our purposes here, is to note that there is a difference in the kind of argument depending on whether the focus is on citizens or on legal officials.

[36] Frederick Schauer, "Positivism as Pariah" in The Autonomy of Law: Essays on Legal Positivism, 32.

philosophy does not deny that there are unjust laws or that there is such a thing as a limited, legal validity as distinct from the full, moral validity of law. And if the moral validity of law is determined by what is actually moral (as opposed to what may pass for moral in a given society), then there is no reason why a judge should be confused in the way Hart and Bentham argue that they would be. Only if a judge mistakenly conflates moral and the narrow legal validity of law (and thus misunderstands natural law philosophy) or if the judge mistakenly conflates morality with what passes for morality in a given society will an oppressive conservatism or an irresponsible and immoral subjectivism result. Thus, the acceptance of natural law, by itself, should not have these bad consequences; only a misunderstanding of natural law or a mistaken view of morality has bad social consequences.

Similarly, legal positivism, by itself, does not lead to the excessive complicity of judges in unjust regimes. The theories of law by contemporary legal positivists like Hart and Raz are theories of law, and not theories of adjudication. In other words, their accounts of law are attempts to explain the nature of law, and not explain how judges ought to decide cases.[37] Although legal positivism proposes that law should be understood

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[37] Even some natural law philosophers like Robert P. George seem to separate issues about the nature of law and issues about how judges ought to decide cases. In "Natural law and Positive Law" (The Autonomy of Law: Essays on Legal Positivism), George argues that whether or not a judge should have an expansive role (appealing to moral principles in applying and creating law as Dworkin suggests) or a very limited role (simply applying the law without making moral judgements as Judge Bork argues for) cannot be decided by appeal to natural law principles. He states, "while the role of the judge as a law-creator reasonably varies from jurisdiction to jurisdiction according to each jurisdiction's own authoritative *determinationes* - that is to say, each jurisdiction's positive law - Judge Bork's idea of a body of law that is properly and fully (or almost fully) analyzable in technical terms is fully compatible with classical understandings of natural law theory." (*Ibid.*, 331) Thus, the issue between Dworkin and Judge Bork becomes, according to George, the question of what degree of law-creating power *our* law places in the hands of judges. And this question is properly conceived of as an issue of positive law not natural law. (*Ibid.*, 332)

independently of morality, this does not mean that moral considerations should not be part of the duty or obligation of a judge. In fact, nothing about what judges ought to do is implied by a positivistic account of law.[38] Only if a judge has the mistaken view that an understanding of law as separate from morality implies that a judge ought not consider morality, then the excessive conservatism of judges in Nazi Germany or in Apartheid South Africa would result.

Now it could be the case that given certain social conditions, the acceptance of natural law or legal positivism would tend to have bad social consequences. It may be the case that certain kinds of misunderstandings are more likely given other prevailing beliefs in a given society. But what role should these practical considerations have in deciding which account is valuable in furthering theoretical inquiry and moral discussion? Dyzenhaus states that we should "adopt the view of law that gives us the best results in practice."[39] This is a pragmatic conception of law in the narrow sense of the word. If we

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[38] Dyzenhaus is aware of this criticism of his project. He states, "Hart and Raz claim that their theory does not include a political doctrine of judicial responsibility - one which tells judges how they ought to go about the morally charged business of deciding hard cases. Rather judges have a discretionary power to make law in hard cases." (Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy, 209) He responds to this criticism by proposing a more indirect relation between legal positivism and the excessive compliance of judges in South Africa. He argues that an allegiance to an authoritarian ideal of political responsibility (which leaves no room for discretion) is a central tenet of contemporary legal positivism and, because of this, legal positivism encourages judges to take a "plain fact" interpretive approach to the law, and this, in turn, leads to an excessive conservatism in judges in unjust regimes.

What this shows is the need to connect legal positivism and a theory of adjudication in order to argue that legal positivism leads to bad consequences in judicial practice. What may have motivated Bentham and other legal positivists in forming their account of law may have been an attempt to check the powers of judges and place power in the more democratic (or authoritarian) hands of legislators, but motives can not automatically be interchanged with implications. And a positivistic account of law does not necessarily imply a theory of adjudication.

[39] David Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy, 269.

are primarily interested in social reform or change, then such considerations are central. But social reform can be achieved at the cost of theoretical illumination. After all, noble lies and myths might effect change better than the truth. In his book, Inclusive Legal Positivism, Waluchow examines the validity of these "causal/moral arguments." [40] He argues that the truth or philosophical value of a theory is independent of the consequences of adopting the theory or its possible misapplication.[41] He points to the fact that people have argued that scientific advances (like the Copernican revolution) would have detrimental effects on the morality of society; but these criticisms do not address the truth or empirical adequacy of these scientific theories. The recurring and central question in assessing the validity of causal/moral arguments, according to Waluchow, is "what is the goal in offering such a theory and for what purposes is it employed?" [42] Again, if we are primarily interested in effecting social change among the masses, then a more narrowly pragmatic approach which addresses motives and feeling would seem to be more effective in producing results than an account which addresses reason.[43] But Hart and many contemporary legal philosophers are primarily interested in theoretical illumination; they want to understand the nature of law and legal institutions and the nature of morality. They would not (and do not) accept this narrowly pragmatic account of philosophy of law, and, thus, they should not appeal to this narrow pragmatic criterion for assessing their work. Whether or not Hart is right in his view of philosophy of law is not the issue now. At this point, we are interested in determining what is Hart's account of philosophy of law. So, for now, we can put aside questions about whether adopting legal positivism or natural law

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[40] W.J. Waluchow, Inclusive Legal Positivism, 88-94.

[41] *Ibid.*, 88.

[42] *Ibid.*, 93.

[43] As, unfortunately, the success of various forms of propaganda at different points in history have shown.

has good or bad results in practice, and focus on the value each theory has in furthering theoretical inquiry and moral discussion.

5. Conclusion.

By considering a few preliminary questions about Hart's view of philosophy of law and how competing accounts of law should be assessed, a number of points about Hart's understanding of conceptual analysis have been clarified. Philosophy of law involves focusing on concepts which are central to an understanding of law. Words are understood and concepts are analyzed in terms of the practices which shaped them. Based on an analysis of key concepts of law, general conclusions can be made explaining the nature of law. Thus, contemporary accounts of law can be assessed in two ways. First, they can be examined and assessed in terms of their internal consistency. Do the conclusions in fact follow from their analysis of key concepts of law? As we saw in Chapter 1, Dworkin's conclusions about law and legal practice did not follow from his analysis of the concept of interpretation. But providing an internally consistent account of law may not be enough to decide between competing, consistent accounts of law. Thus, a second way in which contemporary accounts of law are assessed is in terms of their value in furthering theoretical inquiry and moral discussion. We have see that this should not be understood in a narrow, pragmatic way. Competing accounts should not be assessed by considering which accounts, when adopted by legal practitioners, will have the best results in practice. The emphasis in Hart's approach is on theoretical illumination, not (at least directly) on social reform.

But in order to fully understand how different accounts of law can be assessed in terms of both their internal consistency and their value in furthering theoretical inquiry and improving moral discussion, we must put these ideas into practice. In the next three chapters, I will consider some main figures in contemporary philosophy of law. First, I will examine contemporary legal positivism by focusing on the works of Hart and Raz. I will show how they, generally, aim to distinguish law from both coercion and morality. In Chapter 3, I will examine Hart's attempt to characterize law in a way that distinguishes law from both coercion and morality. I will argue that although Hart manages to accomplish his main aim, the theoretical value of his account is limited. Although Hart has succeeded in narrowing and clarifying the scope of a positivistic account of the nature of law, it is precisely this narrowing that is the reason for its lack of significance for other areas of thought. In Chapter 4, I will examine Raz's attempt to achieve an even more extreme separation of law from morality. He argues that if the authoritative nature of law is properly understood, then the existence and content of law are independent of all moral judgements. I will show that Raz's account of authority fails to support exclusive legal positivism. At best, his account of authority supplements inclusive legal positivism.

Second, I will examine Finnis' natural law theory. I will show that Finnis' account of law and his approach to the philosophical study of law has much in common with contemporary legal positivism. It is for this reason that Finnis' natural law theory is palatable to contemporary philosophers of law. However, I will also show that it is for this same reason that many of Finnis' main claims about morality remain unsupported. Thus, ultimately the same problems that plague contemporary legal positivists in providing an account of law occur again when Finnis attempts to provide a moral basis for law.

In the third and final section of the dissertation, the shortcomings of the contemporary approach to philosophy of law will be made evident. And it is here that we shall find two alternative approaches which hold more promise for producing accounts of law which are both general and theoretically valuable.

Chapter 3: The Influence of Hart's Concept of Law: Finding Room between a Rock and a Hard Place.

Hart's work in The Concept of Law was, and continues to be, so influential because it offers an alternative to traditional positivistic accounts of law, and yet maintains the central insight of traditional positivism, namely, that law is separate from morality. As opposed to traditional positivistic accounts of law, Hart believes that law should not be understood in terms of coercive orders or commands. He argues that such a command theory cannot account for the normativity of law. Yet this does not mean that, in accounting for its normativity, law must be conceived of as essentially moral or as necessarily connected with morality. In effect, what Hart attempts to do in The Concept of Law is to distinguish law from both coercion and morality. He ends up concluding that law is normative (and, thus, must be understood in terms of the combination of primary and secondary rules) and is only contingently connected to morality.

The central ideas in Hart's approach have influenced later contemporary legal positivists like Raz. Raz also attempts to distinguish law from both coercion and morality, but he takes things further than Hart. By appealing to the concept of authority and by arguing that the essence of law is the claim to authority, Raz distinguishes law from coercion or power, on the one hand, and from all moral judgments, on the other. He concludes that law, with a proper understanding of its normativity, has not even a contingent connection with morality.

Thus, due to the influence of Hart, we can understand the main aim of contemporary legal positivism as attempting to find room between a rock and a hard place. Legal positivists want to distinguish law from the rock of coercion and the hard place of morality. With the aim so conceived, two issues emerge. First, can legal positivists like Hart and Raz characterize law so that it is distinguished from both coercion and morality? In other words, do their conclusions follow from their analyses of concepts? Second, if they can accomplish what they set out to do, then are their theories of law theoretically valuable?

In this chapter and the next, I will examine the works of both Hart and Raz with these two issues in mind. In the first section of this chapter, it will be shown that Hart's main aim in The Concept of Law is to distinguish law from both coercion and morality. In the second section, it will be shown how Hart incorporates Wittgensteinian ideas about rules and rule-following (and the accompanying idea of the internal point of view) in order to accomplish this aim. In the third section, Hart's account of law will be assessed in terms of its theoretical value. Although Hart does manage to distinguish law from both morality and coercion, he ends up with an account of law which has limited theoretical value. It is this conclusion that will lead us to consider alternative accounts within contemporary philosophy of law in which morality has a more prominent role.[1] In the next chapter, Raz's attempt to make a more extreme separation between law and morality will be examined.

1. Hart's main aim in The Concept of Law: Distinguishing law from both coercion and morality.

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[1] I will look at Finnis' theory of natural law in Chapter 5 of this dissertation.

Hart begins The Concept of Law by showing that the persistence of the question "What is Law?" is due to three issues that keep recurring. First, how do law and legal obligation differ from and how are they related to, orders backed by threats?[2] Second, is law a branch of morality or Justice, and how is legal obligation related to moral obligation?[3] Third, "what are rules and to what extent is law an affair of rules?"[4] The first two issues are long-standing issues in philosophy of law and political philosophy in general.[5] The battle in The Republic between Thrasymachus and Socrates about the state is, in philosophy of law, transposed to law. Is law simply a coercive system where "might makes [legally] right". In other words, is the law best understood in terms of power? If we distinguish law and power, does this mean that we must appeal to some ideal or to the form of the Good in order to characterize it as an authority? In the past, there have been two tendencies in philosophy of law: to reduce the nature of law to either coercive power (for example, the command theories of legal positivists like Bentham or Austin) or to reduce it to a moral authority (for example, the natural law philosophy of Aquinas). These attempts to reduce law either to coercion or to morality often took the form of a definition which, according to Hart, ends up distorting actual legal practice. Hart argues that in order to do justice to the wide range of legal phenomena, we should not begin with a stipulative definition, but rather we should begin by considering the actual attempts to reduce law to either coercion or morality. By seeing the defects in such attempts, Hart argues that a

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2 CL 1961, 7 and 13.

3 *Ibid.*, 7 and 13.

4 *Ibid.*, 13.

5 As we shall see, the third issue arises because of Hart's attempt to distinguish law from both coercive orders and moral obligation. Hart finds this middle ground by conceiving of law as essentially rule-governed, and explaining the normativity of such a rule-governed activity in terms of the internal point of view.

middle position can be maintained which would account for the normativity of law and yet distinguish law from morality.

Thus, Hart sees his work in The Concept of Law as attempting to deal with these recurring issues about the relation between law and both coercion and morality. Moreover, he believes that law can be situated between these two extremes. He states,

> it is often said that a legal system must rest on a sense of moral obligation or on the conviction of the moral value of the system, since it does not and cannot rest on mere power of man over man ... But the dichotomy of 'law based merely on power' and 'law which is accepted as morally binding' is not exhaustive.[6]

In other words, just because it is possible to distinguish law from coercion, does not mean that law cannot be distinguished from morality. In fact, the structure of Hart's book takes the form of, first, distinguishing law from Austinian commands, and, then, distinguishing his law from morality. After setting up the main issues in the first chapter, Hart spends the next three chapters characterizing an Austinian[7] command theory of law and criticizing this theory. In the next three chapters (V-VII), Hart attempts to overcome some of the defects in the command theory of law by explaining law in terms of two kinds of rules and by

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[6] CL 1961, 198.

[7] The position that Hart describes and criticizes is not Austin's theory per se, but "a position which is, in substance, the same as Austin's doctrine but probably diverges from it at certain points." He adds, "For our principal concern is not with Austin but with the credentials of a certain type of theory which has perennial attractions whatever its defects may be." (*Ibid.*, 18) It is this qualification by Hart that makes Mole's criticisms of Hart in Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition (Oxford: Basil Blackwell, 1987) limited. Moles attempts to show that Hart's account of Austin is inaccurate, and that Hart's view is compatible with both Austin's view and even Aquinas' view. Moles may be right that Hart did not get Austin right, but this, as Hart says here, is not his main aim. The fact is that some traditional legal positivists did hold a theory like the one that Hart describes and that the analysis of this defective account enables one to see certain characteristics of law which sometime go unnoticed.

dealing with some potential criticisms of his approach.[8] Finally, in chapters VIII and IX, Hart distinguishes his account from natural law theories and shows that there is, nonetheless, a minimum content shared by legal systems and morality. Thus, even the form of the book exemplifies his main aim to distinguish law from both coercion and morality. Given that the main aim of Hart's work in The Concept of Law is to distinguish law from both coercion and morality, how does he find room between these two extremes?

2. Hart's Concept of Law: Rules, Rule-following and The Internal Point of View.

Although Hart argues that it is the combination of primary and secondary rules that is the 'key to the science of jurisprudence', I will argue that it is his incorporation of some Wittgensteinian ideas of rules and rule-following, and its accompanying account of the internal point of view, that enable him to characterize the normativity of law without collapsing (or essentially connecting) law and morality. And since Hart's main aim in providing a theory of law is to distinguish law from both coercion and morality, it is the nature of rules and rule-following generally that really are the key to his concept of law.

Hart acknowledges that his philosophy of law is influenced by Wittgenstein's Philosophical Investigations, and the work of later Wittgensteinians like F. Waismann and Peter Winch.[9] Because I am primarily interested in Hart's incorporation of Wittgensteinian

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[8] In Chapter VII, Hart deals with different versions of rule-scepticism and criticisms about the supposed formalism of positivistic accounts of law.

[9] In the notes at the back of The Concept of Law, Hart notes that Wittgenstein and later Wittgensteinians influenced his account of rules, rule-following and open texture. His account of open texture was influenced by Waismann and his account of rules and rule-following (and the internal point of view) was influenced by Winch's The Idea of a Social Science and its Relation to Philosophy (London: Routledge, 1958) See also pages 274-275 in Essays in Jurisprudence and Philosophy where Hart describes the relevance of some Wittgensteinian ideas for philosophy of law. He refers to the fact that Wittgenstein (as well

ideas about rule-following and the internal point of view, I will focus on his use of Winch's The Idea of a Social Science and its Relation to Philosophy and the understanding of Wittgenstein that Hart received through this work. I will argue that it is this understanding of Wittgenstein's ideas about rule-following and the internal point of view that Hart received through Winch's work that enabled him to distinguish law from both morality and coercion.[10]

In The Idea of a Social Science and its Relation to Philosophy, Winch is interested in the nature of philosophy and how it relates to the social sciences. As a result, he attempts to characterize both philosophy and social practices. He argues that philosophy has a positive role and not simply the negative role attributed to it by philosophers like Ryle of clearing up linguistic or conceptual confusions. According to Winch, philosophy in general is concerned with questions regarding the nature and intelligibility of reality.[11] Philosophy seeks to explain the nature of intelligibility; that is, it attempts to explain what it

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as Austin) influenced his understanding of general concepts and the nature of rules. He specifically refers to Waismann's "Verifiability" in The Proceedings of the Aristotelian Society Supplement (Vol. 19, 1949) and how this work influenced his account of the open texture of language.

[10] One only needs a cursory glance at the scholarship on Wittgenstein to know that there is a wide range of interpretations of the Philosophical Investigations. It is this wide range of interpretations which makes it problematic to argue that Hart's position is either in keeping with Wittgenstein or opposed to him. For instance, John Hurd argues in his article "Wittgenstein versus Hart: Two Models of Rules for Social and Legal Theory" that Hart's account of rules and rule-following is opposed to Wittgenstein's position in the Philosophical Investigations. But Hurd can only maintain this opposition between Hart and Wittgenstein by arguing that Wittgenstein makes no distinction between rules and habits, and, in fact, Wittgenstein defines rules in terms of habits. (See "Wittgenstein versus Hart: Two Models of Rules for Social and Legal Theory," Philosophy of the Social Sciences. Vol. 21, No. 1, March 1991, 73). This is a controversial interpretation of Wittgenstein, and certainly Winch's account of Wittgenstein is contrary to Hurd's account. Because of the seemingly unending controversy about how to interpret Wittgenstein's account of rule and rule-following, it is more productive for our purposes to focus on a relatively clear exponent of Wittgenstein (like Winch) we know influenced Hart's account of rules and rule-following.

[11] Peter Winch, The Idea of a Social Science and its Relation to Philosophy, 18.

means to understand something. The philosopher dealing with a particular social practice is concerned with "the kind of understanding sought and conveyed by the practitioners [of the particular social practice]"[12] For instance, a philosopher of law is concerned with the kind of understanding which is sought and conveyed by legal practitioners like judges and lawyers. But this does not mean that the philosopher of law simply has the negative aim of clearing up conceptual confusions found within both the practice and past philosophical attempts to understand this practice; rather, philosophy of law, for example, also has the positive role "... of increasing philosophical understanding of what is involved in the concept of intelligibility."[13] Thus, while the specific aim of different branches of philosophy (like philosophy of law) is to attempt to elucidate the kind of understanding found within a specific social practice, the more general aim of philosophers is to explain the concept of intelligibility. But for the philosopher to take the right approach to social practices, a certain understanding of the nature of social practices is needed. Thus, Winch also characterizes social practices in general, and it is in his characterization of social practices that his understanding of rule-following and the internal point of view emerges.

Winch makes it clear that when a philosopher or sociologist[14] studies a social practice like science, religion or law, he or she is not concerned with behaviour as such, but with meaningful behaviour. The philosopher is concerned with distinguishing different

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12 *Ibid.*, 19.

13 *Ibid.*, 20.

14 Because Winch considers sociology a branch of philosophy (see page 43), his remarks about the sociological study of social practices in general are relevant to the philosophical study of different social practices. This may be what Hart was thinking of when he described his work in The Concept of Law as an essay in descriptive sociology (see CL 1961, v). If sociology is understood in Winch's way then the central problem in sociology (giving an account of the nature of social phenomena in general) belongs to philosophy as well, and the general methods and aims of philosophy serve to address this problem in sociology.

types of meaningful behaviour and differentiating meaningful behaviour from behaviour that is not meaningful. The philosopher of law, for example, is concerned with distinguishing legal practice from other kinds of social practices (like, for instance, science, religion, etc.) as well as determining what distinguishes meaningful behaviour like legal practice from behaviour which is not meaningful. Winch illustrates these points when he considers the example of voting:

> what he [the voter] does is not simply to make a mark on a piece of paper; he is casting a vote. And what I want to ask is, what gives his action this sense, rather than, say, that of being a move in a game or part of a religious ritual? More generally, by what criteria do we distinguish acts which have a sense from those which do not?[15]

What makes behaviour meaningful? Winch argues that a behaviour is meaningful if it is governed by rules (in the Wittgensteinian sense that he explains). Further, because the existence of rules presupposes a social setting, the implication is that all meaningful behaviour is social.[16]

Given this understanding of meaningful behaviour, what implications does this have for philosophical or sociological study of a social practice? Winch argues that an explanation or description of meaningful behaviour which ignores the fact that people act for reasons (for example, an explanation of human action solely in terms of habit or 'outward' behaviour) is to treat human behaviour in the same way as the 'behaviour' of scientific objects like planets; and this distorts the nature of human activity. Generally, Winch is trying to argue that the central concepts of social life are incompatible with the

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15 Peter Winch, The Idea of a Social Science and its Relation to Philosophy, 49.
16 *Ibid.*, 116.

central concepts of the natural sciences.[17] Not only is this sharp division between the study of social practices and the study of nature due to the incompatibility of their central concepts, but this division is also due to the fact that "... the former conceptions [the concepts in the study of social practices] enter into social life itself and not merely into the observer's description of it."[18] The fact that the concepts used in understanding a social practice "enter into" the social practice means that the participant's conceptions are relevant to the sociologist or the philosopher; and, moreover, it is the job of the philosopher of law, for example, to understand concepts as they are situated within legal practice.[19] According to Winch, this implies that the philosopher or sociologist must take a kind of internal point of view and "...understand the considerations which govern the lives of its participants."[20] The fact that a philosopher or sociologist must take this kind of internal perspective does not mean that he or she must stop at the unreflective understanding that the participant possesses, but that "... any more reflective understanding must necessarily presuppose, if it is to count as genuine understanding at all, the participant's unreflective understanding."[21] Thus, the philosopher or sociologist must take an internal point of view in order to ultimately arrive at a more reflective understanding, grounded in the unreflective understanding that the participants possess, of the practice.

Winch is quick to add that the fact that the philosopher of law, for instance, must consider the conceptions of legal participants or situate concepts within legal practice does not mean that the philosopher is no longer uncommitted. In other words, the fact that the

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17 *Ibid.*, 94.

18 *Ibid.*, 95.

19 This also means, according to Winch, that the empirical methods of the natural sciences are unsuited to the task of the philosopher or sociologist.

20 *Ibid.*, 88.

21 *Ibid.*, 89.

philosopher must take an internal point of view of the practice, does not mean that the philosopher of law must approve of or accept legal practice as a whole. He states,

> to take an uncommitted view of such competing conceptions [found in different and 'competing' social practices like law, science or religion] is peculiarly the task of philosopher; it is not its business to award prizes to science, religion or anything else. It is not its business to advocate any *Weltanschauung*... In Wittgenstein's words, 'Philosophy leaves everything as it was'.[22]

Thus, Winch believes that a philosopher or sociologist should take an internal point of view to ground a reflective understanding of a social practice in the often unreflective understanding of its participants; and yet such an internal perspective still can mean that philosophy (or sociology) remains uncommitted.

How does Hart incorporate some of these Wittgensteinian ideas in order to distinguish law from both coercion and morality? Let us first consider how he distinguishes law from coercion. Hart begins by constructing an Austinian theory of law in which law is understood in terms of habits and commands.[23] Essentially, the 'command' theory understands laws as general coercive orders issued by a sovereign (a person or body of persons internally supreme and externally independent). The laws are generally obeyed and the sanctions are generally believed to follow from disobedience.[24] Then, Hart

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[22] *Ibid.*, 103.

[23] Hart makes it clear that Austin mistakenly refers to coercive orders as "commands." Hart argues that the word "command" is often used in military contexts (with a hierarchical organization) and the concept of 'command' presupposes the authority of one who issues commands and not the power to inflict harm. (See CL 1961, 20) As we shall see when we consider Raz's approach to philosophy of law, it is this notion of authority (as distinguished from both power and moral judgement) that will be central to his account of law.

[24] CL 1961, 25.

presents three kinds of criticisms of this command theory of law. First, he criticizes the Austinian notion of laws as coercive orders. He argues that such an understanding of law in terms of orders backed by threats is descriptively inadequate and even distortive because it does not account for the different types of laws (specifically, laws which confer both private and public power), and different ways in which laws originate (for example, customary law). Even with respect to criminal law (where the command theory seems most adequate) it does not account for the fact that such laws apply equally to those who enacted them. Second, Hart criticizes the Austinian notion of subject in terms of habits of obedience. He argues that an understanding of subjects solely in terms of habits of obedience fails to account for the continuity of legal authority and the persistence of laws through the passage of different law-makers. In order to account for the continuity of legal authority and the persistence of laws, the notion of a rule is needed. Third, Hart criticizes the Austinian notion of sovereign as internally supreme and externally independent. Basically, Hart argues that the notion of a law-maker requires the concept of power-conferring rules. Different attempts to characterize a sovereign as supreme and yet not limited by laws are unconvincing and descriptively inadequate. Hart ends up concluding that "the root cause of failure is that the elements out of which the theory was constructed, viz. the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law."[25]

Within these criticisms of the command theory of law, the need for distinguishing primary and secondary rules emerges. But more significantly, the need to conceive of a legal system as essentially rule-governed in a Wittgensteinian sense emerges. The need for

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[25] *Ibid.*, 78.

a Wittgensteinian conception of rules emerges because of the need to account for the normativity of law. There are two features of the Austinian account of laws which Hart uses as springboards for introducing the fact that law must be understood in terms of rules. First, problems understanding legal subjects in terms of habits of obedience lead Hart to explain the difference between habits and rules.[26] What the appeal to habits of obedience fails to account for in a legal system is what Hart calls "the internal aspect" of rules and rule-following.[27] To describe the behaviour of citizens with respect to law by reference to habits of behaviour is to describe only the "observable behaviour" alone. It is to neglect altogether the ways citizens view their own actions and the law. Hart states,

> When a habit is general in a social group, this generality is merely a fact about the observable behaviour of most of the group. In order that there should be such a habit no members of the group need in any way think of the general behaviour, or even know that the behaviour in question is general; still less need they strive to teach or intend to maintain it.[28]

To describe human behaviour solely in terms of observable behaviour is to treat activities which have meaning and intentionality as if they were meaningless and as if they had no reason. It is to treat human activity in the same way as the behaviour of planets. It is the same as describing a process like voting solely in terms of making marks on paper. An essential aspect of the activity is missing, namely the "internal aspect". The internal aspect does not refer to some subjective feeling that citizens must possess; Hart states that "such

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[26] *Ibid.*, 54.
[27] *Ibid.*, 55.
[28] *Ibid.*, 55.

feelings are neither necessary nor sufficient for the existence of 'binding' rules."[29] Rather, the existence of rules (with their internal, as well as external, aspect) is shown by the

> critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which we find in their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.[30]

Hart's main point is the same point that Winch is trying to make. In the case of law and any other social practice, we are dealing with the activities of human beings and not the behaviour of mere things. Practitioners have a certain reflective or often unreflective understanding of their own activity, and this understanding should be the basis for a philosophical (or sociological) understanding of that activity. The fact that legal officials like judges and legislators use a normative vocabulary and criticize the behaviour of people with reference to the law must be relevant to our understanding of the law. It is this critical attitude and normative terminology which shows that law is a normative activity, and, as such, it is governed by rules.

There is a second way that the importance of understanding law in terms of rules emerges from the defects in an Austinian theory of law. Hart argues that to conceive of law in terms of coercive orders completely distorts the obligatory character of law. Hart emphasizes the conceptual difference between being obliged and having an obligation.[31] He argues that Austin's command theory provides an account of why a person is obliged to

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29 *Ibid.*, 56.
30 *Ibid.*, 56.
31 *Ibid.*, 80.

obey the law, but not why a person has an obligation to obey the law.[32] But what makes us think that citizens are "having an obligation" rather than "being obliged"? Again, Hart refers to the fact that legal officials express the attitude that laws are standards of conduct, and that they use a normative vocabulary including 'obligation' and 'duty'. But this, according to Hart, is not sufficient for understanding the notion of obligation. The fact that someone has an obligation presupposes the existence rules, but there can be rules without accompanying obligations (for example, rules of etiquette or correct speech).[33] Hart lists three characteristics that rules must have in order to conceive of them as implying obligations for those following the rules. First, "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great."[34] Second, "the rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it."[35] Finally, "it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do."[36] In other words, rules are thought of as imposing obligations if there is serious

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32 Tim Dare makes a similar point on pages 11-13 of his article "Raz, Exclusionary Reasons, and Legal Positivism." (Eidos VIII, I, June 1989). He states "Crudely put, Hart accuses Austin of confusing power with authority. The command-backed-by-sanction theory tells me why I am obliged to obey the law, but not why I have an obligation to do so." (*Ibid.*, 15.)

33 CL 1961, 83. Note that although the internal point of view of legal officials is not sufficient for understanding the notion of obligation, it is sufficient for understanding the normativity of law; and, in conjunction with the union of primary and secondary rules, this more restricted appeal to the internal point of view of legal officials is necessary and sufficient for characterizing the existence of a legal system (and distinguishing legal rules from other kinds of rules like rules of etiquette or correct speech).

34 *Ibid.*, 84.

35 *Ibid.*, 85.

36 *Ibid.*, 85.

social pressure to conform to the rules (even if they conflict with individual wishes), because the rules are thought to be important. Again, Hart is appealing to how participants view their own practice to determine whether or not law is normative and to determine in what sense law is obligatory.

Thus, Hart distinguishes law from coercion by appealing to the participant's own understanding of their activity.[37] Due to the critical reflective attitude of legal officials and to the normative vocabulary used, we can see that law is governed by rules which are norms. But, moreover, because serious social pressure is insisted upon and because participants think that there should be such pressure because these rules are thought to be important, we know that law cannot be understood simply in terms of being obliged, but rather must be understood in terms of having an obligation. Hart ends up with a view of law as essentially rule-governed, normative, and obligatory, and thus he successfully distinguishes law from mere coercion or power.[38] But does this mean that law is also

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[37] Legal participants include legal officials like judges, legislators and lawyers and private citizens. As we saw, although the internal point of view of citizens is needed to understand what it means to have an obligation (rather than being obliged), it is the internal point of view of legal officials alone which is needed to characterize a legal system as normative (and thus distinguish law from coercion and from morality). When Hart describes the necessary and sufficient conditions for the existence of a legal system, he requires only general obedience (regardless of their view of the law) on the part of citizens and the acceptance of primary rules as standards for behaviour by legal officials. (See *Ibid.*, 113) In order to characterize a legal system in a way that distinguishes it from coercion (and, as we shall see, in a way that also distinguishes it from morality), only the internal point of view of legal officials needs to be considered. In the third section, I will consider the rationale for and implications of this restriction of the internal point of view.

[38] It is important to note that Hart is not denying that law involves sanctions and social pressure; in fact, recognizing that there are sanctions and social pressure is an essential part in understanding the obligatory nature of law - but it is only a part. As we have seen, Hart argues that an understanding law solely in terms of sanctions and social pressure distorts the obligatory nature of law. What is needed, in addition to the recognition of sanctions and social pressure, is the recognition that legal practitioners *insist* upon these sanctions because legal rules are *thought* to be important. In other words, what is needed to characterize the obligatory nature of legal rules (which is their true, undistorted nature) is the internal point of view of participants.

essentially moral or necessarily connected with morality? Let us now consider how Hart distinguishes law from morality.

Hart acknowledges that there are two major problems that philosophers face when they try to determine the relation between law and morality. First, 'morality' is a general term, and, like all general terms, it has a considerable area of vagueness or open texture.[39] In other words, there is some disagreement about what principles are moral and what are not. Second, and more significantly, "even where there is agreement on this point and certain rules or principles are accepted as indisputably belonging to morality, there may still be great philosophical disagreement as to their status or relation to the rest of human knowledge and experience."[40] In other words, there are disputes about the very nature of morality (for example, disputes about whether morality is objective). If philosophers want to argue that law is or is not connected with morality, it seems that there must be some agreement about what is moral and the nature and status of morality.

Hart deals with these problems by attempting to evade them. He evades issues about the nature of morality by, instead, dealing with four cardinal features which are " ... constantly found together in those principles, rules and standards of conduct which are most commonly accounted 'moral'" [41] In other words, Hart describes four features found in principles which people commonly call 'moral'. Then he attempts to show that morality (understood in terms of these four principles) is distinguished from law and other social practices. He believes that such an approach will enable him to distinguish law from morality, and yet be neutral with respect to different accounts of the nature of morality.

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39 CL 1961, 164.
40 *Ibid.*, 164.
41 *Ibid.*, 164.

The four features which are characteristic of principles, rules, etc., which people commonly account as moral are: 1. importance (moral rules and principles are regarded as important), 2. immunity from deliberate change (moral rules and principles cannot be brought into being or changed by deliberate enactment), 3. voluntary character of moral offenses (the attribution of moral blame and responsibility requires that the action was done intentionally and by someone who could have done otherwise), and 4. forms of moral pressure (moral pressure is not exerted by threats or appeals to fear or interest, but instead there is an appeal to the respect for moral rules or the demands of morality). So characterized, morality can be fairly straightforwardly distinguished from laws and legal systems.

Hart is aware that some might criticize his account by saying that it is too wide and formal. It would include practices which are not only irrational but barbarous. Hart responds by saying that he has taken this wider account of morality,

> not merely because the weight of usage of the word 'moral' favours this broader meaning, but because to take the narrower restricted view [for instance, that would require that all moral principles are rational], which would exclude these [so-called irrational and barbarous practices of some societies], would force us to divide in a very unrealistic manner elements in a social structure which function in an identical manner, in the lives of these who live by it.[42]

Thus, Hart describes moral principles in terms of the function they perform in a society and in terms of how people view these principles. As a result, principles of racial inequality are just as 'moral' as principles of the equality of all people, as long as they are 'believed to be' important, immune from deliberate change, supported by an appeal to the demands of

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[42] *Ibid.*, 177.

morality and based on the notion that moral responsibility requires intention and the ability to do otherwise.

It is clear that Hart is describing what passes for moral in society, and not what is morally right. Very few natural law philosophers (with the possible exception of Dworkin) would argue that there is or should be a necessary connection between law and what passes for morality in a given society. In fact, traditional natural law philosophers (and many other philosophers) would recoil at the suggestion that the principles governing the Nazi movement in Germany or the Apartheid movement in South Africa were in any sense morally right. Thus, any account of morality that would include irrational and barbarous actions as morally right actions seems prima facie suspect, as well as irrelevant to the debate between legal positivism and natural law. But, further, it is not at all clear that there is value in such a general account of morality, because it is far from clear whether such an account is in fact as neutral as Hart suggests it is. The emphasis in Hart's account of morality is on the function the rules perform in a given society (the assumption is that morally right rules can be identified by their function, independently of their content) and how people view these rules (the assumption is that morally right rules can be identified by reference to people's beliefs about morality instead of the nature of morality). To emphasize these features as the identifying features of moral rightness would distort some views about the nature of morality and not others. For instance, these four features of morality adequately describe a culturally relativistic (and, indeed, a sociological) account of morality. But any view of moral rightness as objective (and thus independent of how people view morality) would be distorted because Hart makes it seem as if morally right rules can be identified by how people view them and not with reference to what moral rightness objectively consists in. Similarly, Hart's account may include 'rationalistic'

accounts of morality, but it also distorts the nature of these accounts by viewing rationality as incidental to the identification of them as morally right. Thus, although Hart provides an account of what passes for moral that is general in the sense that it includes anything that passes for moral in society, it is not neutral about the nature of morality itself.[43]

In Chapter IX of The Concept of Law, Hart provides other reasons why law should not be conceived of as necessarily connected to morality, even though they might share a minimum content. But, at this point, we are more interested in whether Hart's concept of law is separate from morality (and not, at this point, whether a concept of law should be conceived of as necessarily connected with the concept of morality). Thus, we can deal with the connection between law and morality in Hart's account by focusing on *his* concept of law and showing in what sense it is or is not connected with morality. Hart argues that law is essentially rule-governed, normative and a source of obligations. Does this mean that law must be conceived as necessarily related to morality? In two different senses, Hart can say no.

First, if we consider the connection between actual laws and actual legal systems and morality, it is obvious that Hart's account of law only implies a contingent connection between laws or legal systems and morality. Because he describes the normativity of law and its obligatory character in terms of the way legal participants treat or view the law, it is clear that as long as participants generally think that laws are important and use laws as

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[43] In CL 1961 (see pages 178 and page 201), Hart does distinguish the accepted morality from the critical morality (i.e. that morality we use to criticize the accepted morality). According to Hart, implicit in criticism of the accepted morality, are two requirements that principles ought to have: rationality and generality. But, again, Hart seems, at times, to presuppose a relativistic account of the nature of morality by arguing that critical morality and the accepted morality may differ only about the "radically different ideal conceptions of society" and about the weight or emphasis placed on "different moral values." (*Ibid.*, 179)

standards for criticism, then the law is normative and obligatory. Whether the laws are in fact important or whether or not the laws should be used as standards for criticism are irrelevant for the purposes of characterizing the 'internal' aspect of rule-following. Because Hart characterizes law by appealing to this internal aspect of rules, the fact that some rules are just and important, and others are not, is a contingent feature of laws and legal systems in general. Hart has also shown by appealing to the internal point of view that laws and legal systems are not necessarily connected to what passes for moral in a given society. Basically, because people view and use laws in a different way than they view and use moral principles, law and morality are different social practices. Since social practices are differentiated by different rules and the different way rules are viewed and used by participants, morality, conceived of in this Wittgensteinian way, is a different social practice from law. Thus, Hart's attempt to distinguish law from morality by characterizing morality in terms of the four cardinal features has the limited value of showing that if social practices are conceived of in a Wittgensteinian fashion (in terms of rules and the internal point of view), then the social practice of morality can be distinguished from the social practice of law.

Second, if we ask the meta-level question whether Hart's account of law (or his concept of law) is itself connected with the concept of morality, we can say no. As we saw with Winch, a philosopher can characterize a social practice like law with an appeal to the 'internal' point of view of the participants and still remain uncommitted. Philosophers of law need not (and should not) praise or critically evaluate the law when their aim is to characterize the understanding which is sought and conveyed by legal practitioners. But does Hart understand the appeal to the internal point of view in the same way as Winch?

There has been some debate about how Hart understands the appeal to the internal point of view in The Concept of Law because of an ambiguity about the distinction between internal and external. Neil MacCormick describes the ambiguity in the appendix to Legal Reasoning and Legal Theory.[44] He asks whether the distinction between internal and external is a distinction between levels of understanding or a distinction between degrees of volitional commitment?[45] Understood as a distinction between levels of understanding, taking account of the 'external' point of view involves a theorist describing simply the overt behaviour of people (like Winch's example of making marks on a paper)[46], while taking account of the 'internal' point of view involves a theorist considering the intentions and purposes of participants in a description of a practice (like Winch's example of voting). Understood as a distinction between levels of volitional commitment, an 'external' point of view is the view of the theorist who appeals to the norms and principles which guide

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[44] Neil MacCormick, "Appendix On The 'Internal Aspect' of Norms" in Legal Reasoning and Legal Theory (Oxford: Clarendon Press, 1978), 275-292.

[45] *Ibid.*, 291.

[46] MacCormick appeals to a passage from Gulliver's Travels to illustrate this external point of view. He states that the externality of the Lilliputian commissioner's report was "external in the sense that it revealed a failure to understand Gulliver's conduct except in its overt behavioural manifestations." (*Ibid.*, 291.) However, the passage MacCormick cites is not completely external in this sense. The first part of the passage is indeed an 'external' description of a watch; that is, a description of the outward appearance and movements of the watch without any appeal to the purpose for which it was constructed. However, the last part of the passage consists of a conjecture about the purpose of the object. The last part of the passage states, "And we conjecture that it is either some unknown Animal, or the God that he worships; but we are more inclined to the Latter Opinion, because he assured us (if we understood him right, for he expressed himself very imperfectly) that he seldom did anything without consulting it. He called it his Oracle, and said it pointed out the time for every Action of his life." (*Ibid.*, 275.) This is still an appeal to the internal point of view of Gulliver, even if the Lilliputans are wrong about the actual use or purpose of the object for Gulliver. In fact, this passage is satirical because although the purpose they ascribe to the object is technically wrong, it has grains of truth which illuminate for us the way time actually functions in our lives. It is important to see that we take account of the internal point of view by ascribing purpose and intentionality to artefacts and actions, even if we may be wrong about the actual purpose and intention.

participants' behaviour without being committed to those norms and principles (in other words, the theorist is making 'detached' statements); an 'internal' point of view is the view of the theorist who appeals to norms and principles which guide participants' behaviour and is himself (or herself) committed to those norms and principles (in other words, the theorist is making 'committed' statements).[47] MacCormick argues that "There are, it is submitted, two very important distinctions there; yet it seems to be the case that Hart has to some extent at least conflated them."[48] Postema also argues that Hart distinguished 'detached' and 'committed' points of view only after The Concept of Law was published[49] Although, Hart did not explicitly make this distinction between detached and committed statements (or between levels of volitional commitment), implicitly in many passages he reveals the fact that he is appealing to the internal point of view of participants in a 'detached' way.[50] For instance, his detached stance is revealed in his characterization of

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[47] See also the introduction of this dissertation for Raz's account of the distinction between detached and committed statements.

[48] Neil MacCormick, "Appendix On The 'Internal Aspect' of Norms" in Legal Reasoning and Legal Theory (Oxford: Clarendon Press, 1978), 291.

[49] Gerald Postema, "The Normativity of Law" in Issues in Contemporary Legal Philosophy, 83.

[50] It is probably Hart's failure to make explicit that his account of the internal point of view includes both 'detached' and 'committed' statements of acceptance that has misled philosophers like G. Randoph Mayes ("The Internal Aspect of Law: Rethinking Hart's Contribution to Legal Positivism" Social Theory and Practice. Vol. 15, No. 2, Summer 1989) to characterize the internal point of view in terms of individuals who are committed to the law and the external point of view in terms of those who exhibit a variety of attitudes towards the law including " a purely self-interested compliance in which one obeys the rules for his part only." (*Ibid.*, 234) In other words, Mayes mistakenly contrasts the internal point of view and the external point of view by referring to a difference in those committed to the law and those that manifest a more detached acceptance of the law. It is for this reason (and because Mayes thinks that such a committed acceptance of the law involves a moral commitment which is relative) that Mayes argues that "a theory of law developed entirely from an internal perspective would not have any universality." (*Ibid.*, 154) As we saw, the internal point of view, according to Hart, includes people that 'accept' the law (appeal to law as a standard for criticism) for whatever reason (i.e. because

morality. The fact that Hart concedes that the practice of 'morality' can include irrational and barbarous actions shows that the internal point of view does not necessarily imply that the philosopher or sociologist must approve of (or be committed to) what they describe (or only include under the name of 'morality' those actions which they themselves accept as morally right). Similarly, when Hart describes the normativity of law by appealing to the way judges 'treat' the law and the way people 'view' the law, his agnosticism about their reasons for treating and viewing the law reveals his 'detached' stance. Thus, Hart's account of the appeal to the internal point of view, like Winch's, is compatible with (and in fact involves) making detached statements about the law. The Wittgenstein saying that "Philosophy leaves everything as it was" is not just a guide for doing philosophy, but an implication of a Wittgensteinian approach to social practices. What is essential for both Winch and Hart is that a reflective, philosophical understanding of law, based on the sometimes unreflective understanding possessed by participants, is achieved.

Thus, Hart does manage to characterize law in such a way that it is distinguished from both morality and coercion. The question remains whether it is theoretically valuable to conceive of law in this way. In the third section of this chapter, I will show that despite some of the advantages of his account (in promoting a clarity of sorts), these advantages are bought at the price of theoretical value.

3. The theoretical value of Hart's account of law.

As we saw, Hart successfully distinguishes law from both coercion and morality. Legal practice, he argues, is normative, and its normativity is evident from the language

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they think the law is moral or valid, or because they think that it is in their own self-interest to treat the law as such, etc.).

used by legal officials and by the critical reflective attitude that is exhibited by their words and behaviour. It is this account of the normativity of law which distinguishes law from mere coercion and morality. But, moreover, the obligatory nature of legal rules can also be seen by considering how legal participants view their own practice. By taking account of the internal point of view of legal officials and legal participants in general, Hart can show that law is not only normative, but law also imposes obligations. Hart argues that previous legal positivists distort both the normativity and obligatory nature of law by characterizing law solely in terms of coercion and power. Thus, the practice of law must be understood as a system of rules which has a certain character (consisting of both primary and secondary rules) and has a certain function in people's lives (the system of rules is viewed as a standard for criticism by legal officials and it is viewed as important by legal participants in general).

Further, because the normativity and obligatory nature of law is understood in terms of how participants view law and legal practice, there is no necessity that laws and legal systems are actually moral or even the same as what passes for moral. What is actually morally right may be objective and thus independent of how people may view law and morality (Hart wants to allow for this possibility). Similarly, because people view moral rules in a different way than they view legal rules (and because moral rules have a different function in the lives of people than do legal rules), law is distinguished from what passes for moral in a given society. Finally, despite the fact that Hart's account of law involves reference to legal participants' understanding of the practice of law, his concept of law itself does not involve a judgment about the moral worth of laws in particular or law in general. His philosophy of law has left legal practice as it was.

But just because Hart can distinguish law from both coercion and morality does not necessarily mean that this conception of law is theoretically valuable. In this section, I will argue that Hart's concept of law has limited theoretical value. The limited theoretical value of Hart's account of law will be shown in two related parts. First, I will consider the value of his distinction between primary and secondary rules. Second, I will consider the value of conceiving of the normativity of law in the way that he does.

Let us first consider why Hart thinks that the union of primary and secondary rules is the "key to the science of jurisprudence". One reason that Hart's recognition of the distinction between primary and secondary rules is of value is because it corrects an oversimplification in Austinian command theory. To conceive of legal rules in terms of commands and 'being obliged' is to characterize all legal rules in a uniform manner. Hart is right to say that not all laws function the same way in a legal system. Not all laws simply tell people what to do, some laws also give people the power to create, change and abolish laws and other laws give people 'private' powers to make contracts, for instance.[51] Austin distorted the nature of law by failing to take account of the different functions laws perform in a legal system. Thus, Hart's recognition of the distinction between primary and secondary rules has value because it corrects an oversimplification found in some positivistic accounts of law.

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51 Ever since The Concept of Law was published, there have been a number of criticisms about how the distinction between primary and secondary rules should be drawn. Even commentators sympathetic to Hart's position (commentators like Neil MacCormick and W.J. Waluchow) have suggested ways in which Hart's distinction between primary and secondary rules should be modified. The exact nature of the controversy is not important for our purposes, since the main insight of Hart (that legal theorists, in providing an adequate account of law, must take account of the different functions that legal rules perform) is still considered to be a significant advance by contemporary philosophers of law.

But a central feature of Hart's account of primary rules is the rule of recognition. What is the theoretical value of Hart's contribution of the rule of recognition in understanding the nature of law? The significance of the rule of recognition is that it enables Hart to conceive of validity in terms of rules; that is, it enables him to understand validity without appealing to a source of validity outside the context of legal rules. According to the Austinian command theory, a sovereign, 'outside' the law, is the source of legal rules. According to some natural law theories, God, morality or rationality is the 'external' source of valid legal rules. The validity of rules for Austin and some natural law theories is due to a source distinct from and external to rules. By positing a rule of recognition, Hart can trace the source of the validity of rules to a fundamental rule, the rule of recognition. Thus, Hart's conception of law is truly an affair of rules which does not need to posit anything outside itself to explain how laws are created or abolished or recognized as valid. His account of law has a theoretical attractiveness because it conceives of law as a self-contained and self-generating system of rules. In this way, Hart's concept of law justifies the philosophical focus on law as a social practice distinct from other social practices.

But is it accurate to think of law as a self-contained and a self-generating system of rules? In the preface to the second edition of The Idea of a Social Science and its Relation to Philosophy, Winch describes some things he would say differently if he had the chance to write the book again.[52] He regrets his claim that all meaningful behaviour is *ipso facto* rule-governed.[53] One reason he regrets making this claim is that it gives the wrong impression of "social practices, traditions, institutions etc. as more or less self-contained

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[52] Peter Winch, The Idea of a Social Science and its Relation to Philosophy, ix.
[53] *Ibid.*, xiv.

and each going its own, fairly autonomous, way."[54] Social practices, according to Winch, do not merely overlap, but "they are frequently internally related in such a way that one cannot even be intelligibly conceived as existing in islolation from others."[55] Thus, it is possible that in characterizing law as a self-contained and self-generating system of rules Hart has distorted the nature of law. Is legal practice one of those 'infrequent' cases of a social practice that can be conceived in isolation from other social practices, or does such a concept of law distort the nature of law by characterizing it as 'going on in its own, fairly autonomous way'? Is it theoretically valuable to conceive of law as a self-contained and self-generating system of rules? Because the normativity of law is so central to Hart's concept of law, it is important to see if the normativity of law can be adequately explained if law is viewed as an isolated social practice. If Hart's account of the normativity of law (which is influenced by his account of law as a self-contained and self-generating system of rules) has limited theoretical value, then so does his appeal to the rule of recognition.

As we saw, Hart distinguishes law from both coercion and morality by arguing that law is a normative practice. Further, he characterizes the normativity of law by appealing to the internal point of view of legal officials (i.e. he refers to the fact that legal officials 'treat' the law as a standard for criticism). There are a number of criticisms of various aspects of Hart's account of law, but I will focus on three criticisms dealing with Hart's account of normativity and his use of the internal point of view of legal officials. These

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[54] *Ibid.*, xv. There is a passage in Wittgenstein's Philosophical Investigations which also seems to question the possiblity of characterizing a social practice as a self-contained and self-generating system of rules. In Part I, section 84, Wittgenstein writes, "I said that the application of a work is not everywhere bounded by rules. But what does a game look like that is everywhere bounded by rules? whose rules never let a doubt creep in, but stop up all the cracks where it might? - Can't we imagine a rule determining the application of a rule, and a doubt which it removes - and so on?" (39[e])

[55] *Ibid.*, xv-xvi.

criticisms will help shed light on why Hart separates questions about the existence (and normativity) of law from questions about the function of law in general and the grounds of the normativity of law.

Let me consider three criticisms which, although coming from very different points of view, ultimately challenge the theoretical value of Hart's account of the normativity of law. In an article entitled "Positive Law and Systematic Legitimacy: A Comment on Hart and Habermas", Orts' qualification to Hart's positivistic account of law is also a criticism of the limited theoretical value of Hart's concept of law.[56] Hart argues that the legal theorist needs to consider only the internal point of view of legal officials like judges and legislators in order to characterize the existence of a legal system. And it is this restriction of the internal point of view to legal officials (and the detached stance Hart makes) which enables Hart to distinguish law from morality.[57] But Orts argues that by restricting the internal point of view to legal officials that 'treat' the law as valid and use it as a standard for criticizing behaviour, Hart ignores the internal perspectives of "the dispossessed" like black Africans in Apartheid South Africa.[58] Orts states that "a legal system may exist for

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[56] Eric W. Orts, "Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas" Ratio Juris (Vol. 6, No. 3, December 1993), 245-278. Orts states that "the exception - the requirement of systematic legitimacy - is better conceived as a major qualification, rather than a refutation, of Hart's theory of positive law." (*Ibid.*, 262) He argues that although this qualification adds a new dimension to Hart's account of law, the separation of law and morality (and law from coercion) still stands. But, nonetheless, Ort's qualification is still a criticism of Hart' s concept of law as it stands.

[57] Note that Hart does appeal to the internal point of view of legal participants in general (including citizens) in order to characterize the fact that people view the law as obligatory (in contrast to being obliged to obey the law). But it is the characterization of the law as normative (which involves only the appeal to the internal point of view of legal officials) which enables Hart to distinguish law from both coercion and morality and thus provides the minimum necessary and sufficent conditions for the existence of a legal system.

[58] Eric W. Orts, "Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas" Ratio Juris, 257.

the 'rulers' and true 'subjects' of these systems, but from the perspectives of those excluded, they are systems not of law, but of irrational coercion."[59] He adds that

> the internal perspective in this way suggests a critical legal principle mandating recognition of members of society with rational capacity... Societies marked by laws that defined classes of people as simply 'objects' without legal capacity cannot be called 'legal' from the point of view of the dispossessed. Such systems are only 'rational' from the perspectives of those empowered in the system.[60]

Thus, although Hart aims to distinguish the normativity of law from mere coercion, he succeeds at distinguishing law from coercion only by restricting the internal point of view to legal practitioners. But, with such a restriction, obviously coercive systems of law (coercive, perhaps, to a minority or a powerless majority) are considered as normative as any other system of law.[61] Thus, Hart succeeds at distinguishing law from both coercion and morality at the expense of covering over differences between those systems of law which are treated as 'normative' by legal practitioners and those systems of law which are sources of norms for all people. As a result, Hart neglects the chance to have the richer and more complex conception of law that Habermas has.[62] .

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[59] *Ibid.*, 257.

[60] *Ibid.*, 258.

[61] Although such an unjust system of law is normative in the sense that legal officials treat the law as standards of criticism, it is not clear whether Hart would say that such a legal system imposes obligations on citizens. His account of obligation involves citizens regarding the law as important and worthy of social pressure and sanction. It is not clear how many people must regard the law in this way in order to say that the law imposes obligations vs obliging or coercing people.

[62] *Ibid.*, 259. Orts argues that only by adding a dimension called "critical legality" to Hart's account of law can a concept of law take account of the special character of "lawless" regimes like that of Nazi Germany and Apartheid South Africa and what Orts calls Law's imperialism. (*Ibid.*, 270) He argues that Hart's distinction between positive morality (what passes for morality in a given group) and critical morality (the principles of rationality and generality used to criticize positive morality) can also be drawn between

Finnis provides a slightly different, though related criticism of Hart's account of normativity and the internal point of view. He argues that Hart's use of the internal point of view in his account of normativity is too general. In characterizing the normativity of law, Hart's appeal to the internal point of view of legal officials is too general because although judges, for instance, must have a critical reflective attitude in the sense that they must accept the law as standards of criticism, the reasons for this acceptance (or for this critical reflective attitude) are open. Hart states, "their [namely, those who accept the system voluntarily] allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."[63] Thus, Hart's account of the law is general in the sense that it includes, in the internal point of view, legal practitioners who 'accept' the law (in the sense that they refer to the law as standards of criticism) for whatever reasons they may have.

Finnis argues that the position of Hart (as well as that of Raz) is "unstable and unsatisfactory."[64] Hart's position is unsatisfactory because he includes in his account of the internal point of view people with considerations and attitudes (like those moved by self-interest, and those with an unreflecting inherited or traditional attitude) which are manifestly "... diluted or watered-down instances of the practical viewpoint that brings law

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positive law (as Hart describes it) and critical legality (which are those non-moral standards used to criticize positive morality). Critical legality includes such criteria as procedural rationality, equal rights of participation and universality. Thus, Hart can and should add a dimension (namely, critical legality) to his account of law and such an addition would still imply that law is separate from morality.

[63] CL 1961, 198. Thus, when Hart refers to legal participant's "accepting" the law, this includes participants making detached statements about the law (statements made from the point of view of one who regards the law as valid, yet the speaker is not committing himself or herself to this point of view), and those that are making committed statements about the law (statements made by those that actually accept the law as valid).

[64] NL, 13.

into being as a significantly differentiated type of social order and maintains it as such."[65] Hart admits that the transition from pre-legal to legal social order can be explained by the defects found in the pre-legal order (defects of uncertainty, the static character of rules, and the inefficiency of diffuse social pressure); in fact, the character of secondary rules is described in terms of their function (that is, their ability to remedy defects found in this pre-legal order). But Finnis argues that this function of secondary rules (and of legal systems in general) is treated as incidental to the characterization of the normativity of law (and the existence of a legal system). As a result, Hart's appeal to the internal point of view 'waters down' the practical perspective which would take account of the function of law. Finnis adds that Hart's account is also unstable because if "disinterested concern for others is detached from moral concern, as it is for Hart, then what it involves is unclear, and in the absence of clarification, it must be considered to have a relationship to law and legal concerns as uncertain and floating as its relationship (on this view) to moral concern."[66]

The conclusion Finnis reachesis that only a point of view, in which legal obligation is treated as presumptively a moral obligation, will constitute a central case of the legal point of view; "for only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description."[67] In other words, Finnis argues that Hart is not specific enough in characterizing the internal point of view with respect to normativity; a proper characterization of the internal point of view not only takes account of the fact that some people accept the law (or treat the law) as standards of criticism and behaviour, but it must also take account of the proper or right reasons for accepting the law or for treating

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[65] *Ibid.*, 14.
[66] *Ibid.*, 14.
[67] *Ibid.*, 15.

the law in this way. Only by restricting the internal point of view to those that are practically reasonable, can the function of law (and its distinctive character as a social order which seeks to address certain problems or defects found in pre-legal society) be adequately described.

Soper provides a third criticism of Hart's account of the normativity of law. In A Theory of Law, Soper describes contemporary legal positivism in terms of its search for normativity.[68] Unlike traditional legal positivists, contemporary legal positivists like Hart seek to describe law in such a way that its normative nature is adequately accounted for. But, because of some positivistic assumption about the nature of legal theory, the search for normativity becomes futile. Soper argues that "the positivist's insistence on maintaining his theory's purity forces him to say nothing about either the grounds for or the nature of normative judgement. Yet at the same time the positivist insists that the law is a normative system."[69] Hart accounts for the normativity of law by appealing to the internal point of view of judges and other legal practitioners. But because this internal perspective of judges involves those that appeal to the law as standards of criticism (for whatever reason), Hart has effectively disconnected the ground of normativity from his account of the normativity of law. In other words, Hart describes the law as normative only in the minimal sense that legal officials treat the law as standards of criticism (regardless of their reasons for doing so). And this anemic account of normativity, according to Soper, is one of the reasons that Hart's concept of law has little relevance to legal practitioners and philosophers alike.[70]

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[68] Philip Soper, A Theory of Law, 26.

[69] *Ibid.*, 30.

[70] It is because of the irrelevance of contemporary philosophy of law in general for both legal practice and philosophy that Soper argues that legal philosophy should be viewed as a branch of moral philosophy (*Ibid.*, 7).

These three criticisms have an essential point in common. They all are ultimately critical of Hart's use of the internal point of view in his characterization of the normativity of law. They all argue that because Hart's account of normativity involves a restricted appeal to the internal point of view of legal officials and because he characterizes their acceptance of the law independently of the reasons for their acceptance, Hart's account of law has limited theoretical value. It has limited theoretical value because it has effectively bracketed-off questions which are important both for the study and practice of law. What he has effectively done by characterizing normativity in this way is remove questions about the function and purpose of law in general from the characterization of law as law. Although Hart includes in his account of law the 'function' of laws as standards of criticism for legal practitioners, the reasons why these rules are treated as standards of criticism (and the ultimate purpose of laws and legal systems in general) are irrelevant for determining the existence of law. Thus, questions about the function and purpose of law need not be dealt with when one attempts to answer the question "what is law?"; all one needs to consider is the fairly empirical question whether legal practitioners treat the law as standards of criticism (and if people generally obey the law). Further, questions about the grounds of normativity are equally irrelevant to the characterization of law as such. All that needs to be considered is whether legal officials 'treat' the law as a norm, regardless of their reasons and regardless of the right reason for doing so. Hart's account of the existence and normativity of law has limited theoretical value because it brackets-off questions which are not only theoretically interesting, but also important.

But Hart may argue that it is more valuable to separate questions about the existence of law and questions about the function of law in general or questions about the grounds of the normativity of law because it minimizes confusion. Hart often argues that confusion is

minimized by distinguishing different questions, and dealing with them separately. For instance, questions about the existence of law (or its legal validity) should be separated from questions about the moral worth of law (or its moral validity). And, as we saw, even traditional natural law philosophers like Aquinas would not deny that there is a difference between legal validity and moral validity... But why should questions about the function and purpose of law in general or the grounds of the normativity of law be treated separately from questions about the nature of law? What value does this kind of separation have for theoretical inquiry? One possible answer that Hart might give is that an account of law that is neutral with respect to the different functions of law would include more practices which are treated as legal practices (including unjust and irrational legal systems). Thus, Hart's concept of law has the advantage of being general enough to include many social practices that people would commonly count as legal systems. And although some people (like Orts, for instance) might argue that because of its generality distinctions between different kinds of legal systems (just vs. unjust legal systems or rational vs. irrational legal systems) are disregarded, Hart would just respond that we could deal with these questions at a later date. He would suggest that although questions about the function and purpose of law in general (and, indeed, questions about the distinction between unjust and just legal systems) are philosophically interesting and important, these are different questions from the question "what is law?" and must be dealt with separately.

But just because we can deal with questions separately does not mean that we should. And, if we conceive of something (like law) separately from philosophically interesting and important questions, then the value of this conception, philosophically speaking, comes into question. In other words, with Hart's account of normativity (as constituted or shown by the legal practitioner's 'treatment' of the law as normative), Hart

presents a general account of the normativity of law. Yet this generality is bought at the price of triviality, because Hart's account leaves it inexplicable why officials do treat the law in this way and, perhaps more significantly, why they should treat the law in this way. And with such a superficial treatment of the normativity of law, what relevance could this account of law have for any inquiry into either the morality of law or the function or purpose of law? If Hart's concept of law is to have any positive value in furthering theoretical inquiry and moral deliberation, then it seems that Hart's concept of law should have some relevance to these philosophically interesting and important questions about the function and purpose of law. But he seems to explicitly characterize law in such a way that answers to these questions are irrelevant to the concept of law. Further, I cannot see what relevance Hart's concept of law would have for the moral evaluation of laws and legal systems, except the minimum value of including all social practices that people commonly refer to as legal. But if it is true (as even Hart admits) that most people (including, presumably philosophers) can recognize and cite examples of law and generally know about the standard case of a legal system,[71] then why is Hart's formal account of law really needed?

Although Hart would presumably agree with Winch that the aim in studying a social practice is to provide a reflective understanding based on the unreflective understanding of its participants, it seems that Hart has ended up by simply describing the unreflective understanding of its participants. And if philosophy of law is to have any value for theoretical inquiry, it must go beyond the unreflective understanding possessed by participants of law.

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[71] CL 1961, 4.

4. Conclusion.

Hart has successfully provided an account of law which is distinguished from both coercion and morality. Thus, questions about the nature of law are distinguished from questions about the moral worth of law. But Hart goes further than this. Because he conceives of the normativity of law in terms of the 'unreflective' acceptance of law by legal practitioners, questions about the function and purpose of law are also distinguished from questions about the existence of law. But once he has separated important philosophical questions from questions about the nature of law, he ends up with a very formal account of law which has limited theoretical value. Hart has sacrificed philosophical insight and relevance for generality and neutrality. And all the king's horses and all the king's men cannot make Hart's account of law relevant again.

In the next chapter, Raz's account of law will be examined. Raz attempts to make an even more extreme separation between law and morality. In order to do this, he focuses on the concept of authority. As we shall see, the purpose or purposes of the mediating function of authority is the central issue between inclusive and exclusive legal positivism. Should an account of law (and its authoritative nature) be neutral with respect to the purpose (or purposes) of law (and authority)? In the next chapter we shall see why Raz's appeal to the authoritative nature of law cannot support the strong conclusions he wants to draw about the separation between law and morality.

Chapter 4: The Authority of Law and the Place for Moral Judgment.

At one point in The Concept of Law, Hart criticizes Austin's use of the word "command." Hart argues that a coercive order should not be conceived of as a command, since commands presuppose the notion of authority and not power. He states, "to command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority."[1] Although Hart acknowledges that this account of command (based on the notion of authority) is much closer to the nature of law than Austin's account of law in terms of coercive orders, he states,

> A command is, however, too close to law for our purpose; for the element of authority involved in law has always been one of the obstacles in the path of any easy explanation of what law is. We cannot therefore profitably use, in the elucidation of law, the notion of a command which also involves it.[2]

Joseph Raz is a philosopher who has been influenced by Hart's approach to law. He agrees that law should be distinguished from positions like Austin's which identify law with power or coercion. He also agrees with Hart that the main insight of traditional positivists is that law should be separate from morality. But where Raz breaks new ground and diverges from Hart's approach to philosophy of law is by focusing on the notion of

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[1] CL 1961, 20.
[2] *Ibid.*, 20.

authority. Raz takes up the implicit challenge in Hart's words by attempting to remove this obstacle from the path of understanding what law is.

Unlike Hart, Raz believes that the concept of authority is essential to understanding not just how law differs from coercion and power, but to understanding how the existence and content of law is completely separate from moral judgment. In the concluding section of "Authority, Law and Morality", Raz describes the significance of the concept of authority:

> The significance of this feature is both in its distinctive character as a method of social organisation and in its distinctive moral aspect, which brings special considerations to bear on the determination of a correct moral attitude to authoritative institutions. This is a point missed both by those who regard the law as a gunman situation writ large, and by those who in pointing to the close connection between law and morality assume a linkage inconsistent with it.[3]

Raz argues that the concept of authority is essential for understanding the nature of law. He also argues that traditional legal positivism and natural law philosophy are inadequate because, by identifying law with coercion or by connecting law and morality, they fail to account for the authoritative nature of law. But even Hart's approach to law, which attempts to distinguish law from coercion and morality, fails to go far enough. Because Hart's account of law (and the accounts by other inclusive legal positivists) imply that there is a connection between law and morality (albeit a contingent connection between laws and legal systems and morality), even inclusive legal positivism cannot account for the authoritative nature of law. Raz argues that by understanding law in terms of its claim to

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[3] ALM, 322.

authority, we shall see not just that there is no necessary connection between law and morality, but that there is not even a contingent connection.

This chapter will examine Raz's concept of authority and its connection to his account of law. In the first section, it will be shown why Raz believes that an understanding of the authoritative nature of law implies that law is to be distinguished from both coercion and all moral judgment. In the second section, I will examine one of the objections to Raz's concept of authority in Waluchow's Inclusive Legal Positivism. It will be shown that Waluchow's objections get to the heart of the issue between inclusive and exclusive legal positivists. In the third section, I will consider one possible response to Waluchow's objections. Hannah Arendt describes a very traditional account of authority which has some features in common with Raz's concept of authority. With this traditional account of authority, Waluchow's objections miss the mark. However, in the fourth section, we shall see why Raz cannot accept this traditional account of authority. By seeing how Raz's account of authority differs from Arendt's traditional account, we shall see why Raz cannot support the strong conclusions he wants to make about the relation between law and morality by appealing to his account of authority.

2. Law's claim to authority.

Raz presents his clearest account of authority and its connection with the nature of law in "Authority, Law and Morality".[4] He distinguishes *de facto* or effective authority

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[4] ALM, 295-324. He also has some elements of his account of authority in AL and The Morality of Freedom (Oxford: Clarendon Press, 1986) and he clarifies some of his ideas and arguments in "Facing Up: A Reply" (The Southern California Law Review. Vol. 62, 1989, 1153-1235) But his clearest account of the relation between his concept of

from *de jure* or legitimate authority. According to Raz, an understanding of effective authority presupposes legitimate authority, since effective authority is understood partly in terms of its claim to be legitimate (or the belief that it is legitimate). Legitimate authority provides reasons for action (in the case of practical authority) or reasons for belief (in the case of theoretical authority), but not just any kind of reasons. Authoritative reasons are pre-emptive in the sense that they not only provide reasons for action (or belief) but also displace other reasons. In other words, authoritative directives are reasons for action, but other reasons (that is, the reasons on which the directive depended, i.e. "dependent reasons") are excluded as reasons for action.

Raz illustrates these points by constructing an analogy between legitimate authority and an arbitrator. The arbitrator's decision itself is a reason for action for the disputants; that is, "they ought to do as he says because he says so."[5] Moreover, "the arbitrator's decision is also meant to replace the reasons on which it depends." [6] The reason that the decision also replaces the dependent reasons is because, otherwise, the arbitrator's decision would not settle the dispute. People come before an arbitrator because they are in dispute about what reasons are applicable (or about what reasons have more weight). They come before an arbitrator to settle this dispute. The arbitrator can only settle this dispute if each side agrees to abide by the decision of the arbitrator. In other words, each side must agree to follow the arbitrator's judgment of the balance of reasons and not their own, because that is the point in having an arbitrator. Thus, the arbitrator's decision, in order to settle the

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authority and his exclusive legal positivism is found in the article "Authority, Law and Morality."

[5] ALM, 297.

[6] *Ibid.*, 297.

dispute, must be a reason for action for both sides, but must also replace "the reasons on the basis of which he was meant to decide".[7]

Legitimate authority is similar to the authority of the arbitrator. The directives of legitimate authorities are based on reasons which are applicable to the subjects of the directives. Raz calls this first characteristic of legitimate authority the "Dependence Thesis". The Dependence Thesis states that "all authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives."[8] But there is a second way in which legitimate authority is similar to the authority of an arbitrator; namely, in both cases, the fact that a directive is issued is itself a reason for action which excludes or replaces dependent reasons. Raz calls this second characteristic of legitimate authority the "Preemption Thesis." But there is also a third feature of legitimate authority which describes the type of argument which can be used to establish the legitimacy of authority . The "Normal Justification Thesis" states that

> the normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply directly to him.[9]

The Dependence Thesis and the Normal Justification thesis together constitute what Raz calls the "service" conception of authority, since they basically state that authority ought to serve the governed. Authority serves the governed by mediating between people and the

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[7] *Ibid.*, 298.
[8] *Ibid.*, 299.
[9] *Ibid.*, 299.

reasons which apply to them. Further, "the mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend."[10] Thus, just like in the arbitrator example, the point of being an authority is undermined if the directives are not treated as reasons for action which exclude the reasons upon which they are supposed to depend.

How is this concept of authority related to the nature of law? Raz begins with the assumption that "necessarily law, every legal system that is in force anywhere, has de facto authority."[11] The fact that law has *de facto* authority means that law is effective in imposing its will on people and, moreover, that law necessarily claims to be authoritative (or it is believed to be authoritative). The law's claims to be authoritative (and its status as a *de facto* authority as opposed to a mere source of power or coercion) are also evident from the language and opinions expressed by the institution of law.[12] Raz points to the fact that we call officials "authorities" and subjects act as if they ought to obey even bad laws while they are in force. Thus, like Hart, Raz appeals to the sometimes unreflective understanding of legal participants in order to support a more reflective understanding of law as distinguished from mere coercion.

If law is sincerely claiming to be authoritative, then it must be capable of being authoritative. This means that law must have **some** characteristics that legitimate authorities possess in order to be capable of being a legitimate authority (and thus capable of sincerely claiming to be authoritative). Raz states, "...one cannot sincerely claim that someone who is conceptually incapable of having authority has authority if one

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10 *Ibid.*, 299.
11 *Ibid.*, 300.
12 *Ibid.*, 300.

understands the nature of one's claim and of the person of whom it is made."[13] Similarly, a law or legal system cannot sincerely claim to be authoritative if it is conceptually incapable of having authority. For instance, law must be normative in order to be a source of authoritative directives. Thus, Raz appeals to the fact that the law claims to be authoritative to argue that law cannot be understood simply in terms of coercive orders. If law is identified with coercive orders, then it is not capable of being authoritative (and it is not capable of sincerely claiming to be authoritative). But since we know that law does claim to be authoritative, then a theory of law which equates law with coercion is inadequate.

But there are other characteristics that law must have in order to be capable of being authoritative. In order to determine what characteristics law must have, Raz considers two kinds of reasons for not having legitimate authority: one can lack the requisite moral or normative conditions, or one can lack non-moral or non-normative conditions (like the ability to communicate, for example). Raz states, "it is natural to hold that the non-moral, non-normative conditions for having authority are also the conditions for the ability to have authority."[14] The fact that non-moral conditions are often taken for granted in discussion about the legitimacy of governments shows that these conditions establish the capability of possessing authority. Thus, the fact that the law claims to be a legitimate authority implies that the law possesses all the non-moral and non-normative conditions for being a legitimate authority.

Two of these non-moral and non-normative conditions are relevant for establishing the truth of exclusive positivism (and distinguishing law from all moral judgments).

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[13] *Ibid.*, 302.
[14] *Ibid.*, 303.

> First, a directive can be authoritatively binding only if it is, or is at least presented as, someone's view of how its subjects ought to behave. Second, it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which the directive purports to adjudicate.[15]

To understand why these two conditions are necessary for the authoritative nature of law, we must focus on the purpose of authority in general. As we saw earlier, it is the purpose of authority to authoritatively settle disputes by mediating between people and the reasons which apply to them. If the directives were not presented as someone's judgment about how subjects ought to act, then the role or purpose of authoritative directives is undermined. How can an authority settle a dispute about how people ought to act if the authority's statement does not express a judgment about what people ought to do? The first condition is a conceptually necessary feature of the concept of authority.

Raz also argues that the second condition is closely tied to the mediating role of authority.[16] If the role of authority is to authoritatively settle disputes by mediating between people and the reasons which apply to them, and if people are in dispute about the reasons which may apply to them, then the directive must be identifiable without reference to those reasons in dispute; for, otherwise, the point of authority is undermined. In other words, people can benefit by an authority's decisions "... only if they can establish their [the decisions'] existence and content in ways which do not depend on raising the same issues which the authority is there to settle."[17] If an authoritative directive is to mediate

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15 *Ibid.*, 303.
16 *Ibid.*, 304.
17 *Ibid.*, 304.

between people and the reasons which apply to them, then the directive itself must be a reason for action which replaces the reasons upon which it depended.

What implications does this account of law have for the connection between law and morality? Briefly put, the existence and content of actual laws must be determined by factual conditions alone and not by reference to any moral judgment. Since it is precisely judgments about morality which are often in dispute and which law is meant to settle, then the existence and content of law (in order to settle these disputes about morality) must be able to be determined without making a moral judgment (and appealing to these points of dispute). This implies that traditional natural law philosophy (which is thought to equate moral and legal validity) cannot account for the authoritative nature of law. Even inclusive legal positivism cannot account for the authoritative nature of law since it argues that moral considerations and moral judgment are contingent possibilities in determining the existence and content of some laws. If the essence of law is the claim to authority, and if in order to sincerely make this claim the existence and content of law must be determined by appealing to social facts alone (without making moral judgments), then inclusive legal positivism mischaracterizes the nature of law.

2. An Objection to Raz's Argument from Authority.

In his book, Inclusive Legal Positivism, Waluchow presents a number of criticisms of this argument (and other arguments) that Raz gives in support of exclusive legal positivism.[18] One part of Waluchow's critique of "The Authority Argument" is particularly

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[18] W.J. Waluchow, Inclusive Legal Positivism. See chapter 4 entitled "Inclusive v. Exclusive Positivism" where he deals with a number of arguments in support of exclusive legal positivism. He distinguishes The Linguistic Argument (104), The

helpful in clarifying Raz's account of authority and its implications for understanding the nature of law. With due consideration of Waluchow's objections, the main point of dispute between inclusive and exclusive legal positivism comes into sharper focus.

Waluchow considers both theoretical and practical authorities in order to argue that although in some cases authoritative directives might pre-empt dependent reasons, there is no necessity that they must always do so. Waluchow considers the example of a theoretical authority like Einstein. If I do not know anything (or know very little) about physics, then Einstein's belief in *p* is and should be an exclusionary reason for my believing that *p*. But, Waluchow argues, if I am a reasonably competent physicist, then although Einstein's belief in *p* gives me one reason for believing in *p*, there is no reason why I should exclude the other reasons which are relevant to the truth or falsity of *p*. Because Einstein's expertise is great in the field, I might assign more weight to his belief than I would my own or other people's, "but accepting the authority of an expert's belief does not mean that I must treat myself as completely incompetent."[19] Waluchow argues that the same is true in the case of practical authorities. Why must we assume that if law is to be authoritative, then citizens must treat themselves as completely incompetent? Why can't citizens treat a legal directive as a reason (perhaps a weighty reason) which must be considered in the balance of reasons?

Argument from Bias (105-106), The Institutional Connection Argument (106-113), The Argument from Explanatory Power (113-117), The Argument from Function (117-123), and The Authority Argument (123-140). Raz does not himself advance all of these arguments (and, indeed, he thinks that some of these arguments, for example The Linguistic Argument, are weak), although he does refer to them. On pages 48-52 in AL, Raz provides two arguments which Waluchow calls The Argument from Explanatory Power and The Argument from Function. And, of course, Raz's argument from authority is found in his article "Authority, Law and Morality." I will be looking at some of the criticisms Waluchow makes against what he considers to be Raz's most powerful argument, namely "the Authority Argument".

[19] ALM, 131.

Raz would respond by saying that the role or function of authority (settling disputes by mediating between people and reasons) is undermined if the existence and content of authoritative directives cannot be determined independently of the dependent reasons. But, Waluchow responds, why should we assume that this is the only function of authority? Perhaps one purpose of practical authorities is to educate people about what reasons should apply in given cases.[20] If so, then there is no reason why the existence and content of legal directives must always be determined independently of their rationale.

At the heart of Waluchow's objections and Raz's response to these objections is an issue about the proper understanding of the mediating function of authority. If the sole function of law is to authoritatively settle disputes, then Raz's claim (that law can only mediate between people and reasons which may be in dispute by excluding these reasons from the determination of the existence and content of legal directives) has some credence. But if law has other functions (like the function of educating people about the reasons which apply to them), then why cannot law mediate by placing more weight on some reasons and letting people use their own judgment?

Stephen Perry 's objection to Raz's account of authority also reinforces Waluchow's point.[21] Perry ultimately challenges the exclusive role of exclusionary reasons in explaining all kinds of law. He describes exclusionary reasons as mediating between people and dependent reasons; he states that rules are exclusionary if they are directions to comply with the authority's judgment of what is right, rather than one's own judgment.[22] He argues that, generally, a second-order reason "... is a reason for treating a

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[20] *Ibid.*, 134.

[21] Stephen Perry, "Judicial Obligation, Precedent and the Common Law" Oxford Journal of Legal Studies.

[22] *Ibid.*, 220.

first-order reason as having greater or lesser weight than it would ordinarily receive, so that an exclusionary reason is simply the special case where one or more first-order reasons are treated as having zero weight."[23] In other words, Perry is arguing that there are other kinds of authoritative or second-order reasons besides exclusionary reasons (which is one extreme case of second-order reasons). Further, he argues that one cannot adequately represent some kinds of law like common law decisions by appealing to exclusionary reasons. Thus, Perry is arguing that law can mediate between people and reasons, not just by excluding dependent reasons but also by giving dependent reasons more weight than they would normally have. The challenge for Raz that Perry and Waluchow make is to explain why the mediating function of authority must always be understood in terms of exclusionary reasons (and not Perry's account of second-order reasons in general) and why authority cannot have other functions (like a pedagogical function) besides authoritatively settling disputes.

There is, I will argue, one account of authority which excludes reference to a pedagogical function and implies that authority mediates between people and dependent reasons by providing reasons for acting which replace dependent reasons. Hannah Arendt describes a traditional account of authority. As we shall see, although this account of traditional authority is not susceptible to Waluchow's and Perry's objections, it has other significant problems which effectively rule it out as an option for Raz.

3. One possible response to Waluchow's objections: Arendt's account of traditional authority.

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[23] *Ibid.*, 223.

In an essay entitled "What is Authority",[24] Hannah Arendt presents an account of authority which is similar to Raz's account in some important respects. But what she makes clear is one reason why authority must mediate between people and reasons that are applicable to them by providing exclusionary reasons for action, and why an objection like Waluchow's misses the mark. Thus, let us consider Arendt's account of traditional authority in order to see one possible response that can be given to Waluchow's objection. But as we shall see shortly, not only is Arendt's account of traditional authority unpalatable for Raz, but it also does not have a place in contemporary society (especially contemporary liberal society).

Arendt begins by providing a few remarks on what authority never was. She argues that because authority demands obedience, it is often mistaken for power or violence. But "authority precludes the use of external means of coercion; where force is used, authority itself has failed."[25] Thus, like Raz, Arendt distinguishes authority and coercion. Arendt adds, "authority, on the other hand, is incompatible with persuasion, which presupposes equality and works through a process of argumentation."[26] Thus, like Raz, Arendt conceives of authority as a replacement for judgment and argumentation on the part of citizens. The authority's judgment is the reason for action or belief which replaces all other reasons upon which the judgment depends. She concludes by saying "if authority is to be defined at all, then, it must be in contradistinction to both coercion by force and persuasion through arguments."[27] Thus, both Arendt and Raz argue that it is central to the

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[24] Hannah Arendt, "What Is Authority?" in Between Past and Future: Eight Exercises in Political Thought (New York: Penguin Books Ltd., 1993).

[25] *Ibid.*, 93.

[26] *Ibid.*, 93.

[27] *Ibid.*, 93.

notion of authority that it is to be distinguished from both coercion and argument or judgment.

But why must authority be opposed to persuasion through argument? According to Arendt, the concept of Authority has its clearest expression in the philosophy of Plato and Aristotle.[28] Let me consider Plato's philosopher king in The Republic as a clear example of an authority. At the end of book IX, Plato describes the relation between the philosopher-king and those that should be ruled. He describes the man who should be ruled as having "his best part naturally weak, so that it could not rule the brood within him...". Plato adds,

> Such a man ought to be ruled; and that he may have a ruler like the ruler of the best man, we say he ought to be the slave of the best man, who has the divine as ruler within himself. We do not believe, as Thrasymachus did about ruling subjects, that they should be ruled for his own hurt; we think it better for everyone to be ruled by the divine and wise, if possible having this as his own within himself, if not, imposed from without, in order that we may all be equal and friendly as far as possible, all having the same guide.[29]

The authority of the state is legitimate (and thus opposed to tyrannical rule) because it is the rule of reason. In other words, the rule of the philosopher king is legitimate because he possesses a knowledge that transcends the world of appearances. Further, the rule of the philosopher king is needed because there are people in the state that are ruled by their

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[28] *Ibid.*, 104. Arendt also argues that authority has been historically manifested in the Roman Empire and in the incorporation of the Roman concept of authority by the Roman Catholic Church. Although the Roman concept of authority, unlike the Platonic conception, is based on a foundation of tradition (rather than reason), it still has many of the same basic features found in the Platonic account of authority.

[29] Plato, Book IX of The Republic. (In Great Dialogues of Plato. Translated by W.H.D. Rouse. Edited by Eric Warmington and Philip Rouse. New York: Mentor Books., 1984), 392.

passions and appetites (and, indeed, 'naturally' possess weak reason). Thus, the function of the philosopher king is to mediate between the people and the right reason which applies to them. The philosopher king does not try to teach the people the right reasons because they are incapable of understanding them. And the authority of the state is not needed by those who are capable of such philosophical understanding, since they can be persuaded through argument.

Arendt refers to the different analogies Plato makes to describe the relation between ruler and those ruled.[30] The ruler and those ruled are compared to the shepherd and his sheep, the helmsman of the ship and the passengers, the physician and the patient, and the master and slave (as in the above quotation from The Republic). Arendt remarks that

> in all these instances either expert knowledge commands confidence so that neither force nor persuasion are necessary to obtain compliance, or the ruler and ruled belong to two altogether different categories of beings, one of which is already by implication subject to the other, as in the cases of the shepherd and his flock or the master and his slaves.[31]

In any case, the authority of the state is needed because there is an existing inequality between people. This inequality is due to the fact that some people are incapable (either through nature or circumstance) of knowing the truth. People who are incapable of understanding the truth, cannot be persuaded through argumentation; they must be persuaded through other means (i.e. by an appeal to authority). Thus, the philosopher king is needed to provide people with guidance; and the philosopher-king is an authority rather

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[30] Hannah Arendt, "What Is Authority?" in Between Past and Future: Eight Exercises in Political Thought, 108-109.

[31] *Ibid.*, 108.

than a tyrant because it is right that philosophers should rule over people who lack philosophical understanding.[32]

If authority is understood in this way, then Waluchow's (and Perry's) objections miss the mark. Waluchow appeals to theoretical experts like Einstein to argue that another person, competent in physics, need not disregard other reasons in treating Einstein as an authority. But what Waluchow effectively does is bring in an equality which is inconsistent with the concept of authority. Plato might use the example of physician and patient to describe the relation between ruler and those ruled, but an example of a specialist in cardiology, for example, and a general medical doctor cannot illustrate a relation between one in authority over the other (rather, it is a relation between colleagues who share expertise in the general field of medicine). Or to use Waluchow's example, the relation between an expert in relativity like Einstein and another physicist is a relation between two people who share an expertise in physics. Only if an equality is presupposed, can persuasion through argumentation have a place. But if persuasion through argumentation has a place, then authority (in the way Arendt conceives of it) does not. The examples that Waluchow uses do not illustrate the relation between an authority and those subject to this authority because they do not imply an essential inequality between them.

4. Arendt's account of traditional authority and Raz's account of authority.

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[32] The paradigm case of authority, according to Arendt, is the authority of the parent over the child. Young children cannot be persuaded through argumentation because they are not capable (yet) of understanding the reasons. The legitimate authority of the parent over the child is based on a real inequality between parent and child. Arendt argues that this paradigm case of authority forms the basis of the political notion of authority.

If Raz would embrace Arendt's account of traditional authority, then he could respond to Waluchow's objections; but there are many reasons why Raz (and many contemporary philosophers of law) would not embrace this account of traditional authority. To embrace Arendt's account of traditional authority would mean positing an inequality between rulers and those ruled grounded in some significant difference in knowledge. If Raz posited a fundamental inequality between rulers and those ruled, then he could argue that there is a conceptual necessity in the notion of authority that its primary role as authoritatively settling disputes by mediating between people and the reasons which are applicable to them must involve exclusionary reasons for acting.

But although this traditional account of authority can avoid objections like Waluchow's, this account of authority presents other, more significant problems for Raz's account of law. First, it introduces into law a kind of 'mystification' that Bentham warned against. It assumes that legal practitioners like judges and legislators have some special knowledge or capabilities that ordinary citizens do not posses, and this gives the illusion that their actions or decisions are beyond reproach. But, second, this account of authority, although possibly applicable to some kinds of social organizations at some points in history (for example, Roman society during the Roman Empire and religious authorities like the Roman Catholic Church in its heyday), is not applicable to contemporary society, especially contemporary liberal society. One of Arendt's main arguments is that authority, along with tradition and religion, has vanished from the modern world.[33] She describes the breakdown of traditional authority which has been cheered by liberals and lamented by conservatives. The basic presumptions of authority (inequality and a reference to some specialized or transcendent knowledge) are no longer accepted, especially in liberal

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[33] *Ibid.*, 91.

democracies. Thus, Raz can avoid objections like Waluchow's, but only by incorporating a traditional notion of authority which is antithetical to legal positivism and which no longer has a place in contemporary society.

If Raz denies that his account of authority is the same as Arendt's, he cannot avoid Waluchow's criticism; there is no necessity that authority cannot have other functions and aims besides settling disputes and there is no necessity that authority must mediate between people and dependent reasons by excluding dependent reasons. As Perry suggests, authority could also mediate between people and the reasons which apply to them by placing more weight on some reasons than they would normally have and, thus, by affecting people's judgments on the balance of reasons.

Raz could attempt to supplement his argument from authority with other arguments. For instance, suppose Raz emphasizes the fact that in a liberal democracy (with different conceptions of morality, and different ways of living) there is a need for an authority to co-ordinate activities by moderating between these different conceptions of the good. There are two kinds of responses that can be made to Raz's appeal to the co-ordinating function of law. First, if citizens are capable of the same kind of understanding that judges, lawyers, etc., possess, then why could not one of the functions of this 'authority' be to educate people about rationale for the laws which apply to them? Would not such an education help to ensure that people would better obey the law and that there would be less confusion about the meaning and justification for specific laws? There is nothing conceptually incompatible with arguing that one aim of 'liberal authority' is to teach people the 'rationale' for its decisions. Raz's account of authority cannot by itself preclude this

very real possibility.[34] But, second, it seems that the appeal to the co-ordinating function of law simply presents an argument about how law should be and not how law is. In other words, by appealing to the fact that law can only co-ordinate people's actions by providing exclusionary reasons for action, Raz is really saying that if law is to successfully co-ordinate people's actions, then law ought to be conceived in terms of exclusionary reasons for acting. And although we might agree that law should provide exclusionary reasons for acting if it wants to achieve this aim, this is not the same as saying that the nature of law must be understood in terms of exclusionary reasons for acting.

Raz could also supplement his argument from authority by arguing that because people have different conceptions of morality, determining the existence and content of law through the appeal to morality would introduce vagueness and confusion into law. This argument assumes that an essential function of law is to provide publicly ascertainable standards.[35] Even if the reference to morality does cause vagueness and confusion in a legal system,[36] why does this show that morality cannot ever be part of determining the existence and content of law? All this seems to show is that if we are trying only to minimize confusion, then we should try to avoid reference to morality. But why should we think that this is the only aim of law?

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[34] Raz could argue that authority qua authority has a co-ordinating function and not a pedagogical function; and it is authority qua authority which is essentially legal. Thus, judges in their "legal" and authoritative capacity have a co-ordinating function, while judges in their "non-legal" capacity can perform a pedgogical function. But this sort of response only pushes the same question back one step. Since, if authority is by definition connected with this co-ordinating function, then the question becomes why the essence of law must be associated with this authoritative function and not other functions.

[35] Raz gives this argument in AL, 48-52.

[36] It is not clear why we should assume that all references to morality will introduce vagueness and confusion into law. Perhaps in liberal societies it is more plausible to assume that there will be disagreement about how to view morality, but even in liberal societies it seems that some moral principles (for example, that it is morally wrong to kill the innocent) are fairly uncontroversial.

Similarly, Raz could argue that people do not have the time to make the kind of judgments needed in order to understand the rationale of judges; thus, the existence and content of law should be determined independently of these kinds of judgments.[37] But, again, it's hard to see why all moral judgments require a great deal of time, and why this would imply that this aim of law (that law is an expedient for people who do not have time to use their judgment) must be the only (and over-riding) aim of law.

No supplementation of Raz's argument from authority will work because the necessity for the complete separation between morality and the existence and content of law involved in exclusive legal positivism is undermined since the rationale (and conceptual necessity) of distinguishing authority from persuasion through argumentation is rejected. Thus, Raz's liberal account of authority cannot provide a reason in support of exclusive legal positivism over alternative accounts of law. At most, Raz's account of authority only illustrates one function of law (to attempt to settle disputes and moderate between different conceptions of life) which is found along with other functions (for example, a pedagogical function). And the only account of law which is relatively neutral with respect to these different functions of law is inclusive legal positivism.

4. Conclusion.

Raz attempted to distinguish law from both coercion and morality by appealing to the authoritative nature of law. Law is authoritative in the sense that it mediates between

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[37] Raz provides this supplementation to his account in "Facing Up: A Reply" The Southern California Law Review, 1180. He states, "One point where my account of justification of authority was at fault is in not emphasizing enough the value, to some people on some occasions, of not having to decide for themselves. The costs of decision in time, labour, mental energy and anxiety." (*Ibid.*, 1180)

people and dependent reasons. But there is no necessity that this mediation be understood in the extreme way that Raz understands it, in terms of settling disputes by supplying exclusionary reasons for action. Raz's account of authority cannot support his exclusive legal positivism, because there is no conceptual necessity that authority must preclude persuasion through argumentation or moral judgment. Thus, there is no necessity that the existence and content of law must be determined independently of morality. Does this mean that we are left with the generality and neutrality of inclusive legal positivism? If, as we saw in the last chapter, this generality and neutrality are bought at the price of theoretical value, does this mean that the best that we can hope for is a formal account of law with limited theoretical value?

In the next chapter, we shall look at an attempt to supply a more substantive account of law. Finnis's natural law philosophy is an attempt to provide an account of law which is descriptively adequate from the point of view of practical reasonableness. This involves a discussion of the moral grounds of the normativity of law and a discussion of the main function of law. Because the normative and descriptive elements are essentially connected for Finnis, an account of law can be both normative and descriptively adequate. In fact, as we shall see, conceptual analysis requires an appeal to evaluative considerations to justify the importance of the concepts focused on (and the irrelevance of other concepts). What emerges is a natural law philosophy with some very contemporary assumptions about the nature of philosophy and the nature of law. In fact, Finnis' account of law explicitly incorporates elements from Raz's account of the authoritative nature of law. However, it is these similarities with contemporary legal philosophy that make one ask in what sense Finnis' account of law is in the tradition of natural law philosophy and in what sense Finnis' theory of natural law differs from other normative accounts of law.

In this chapter, we have seen that many of Raz's supplementary arguments give reasons why legal directives should be constructed in a way that replaces moral judgment and supplies reasons for action. Thus, although Raz may not be able to argue that law must exclude moral judgment, he may be able to argue that law should be understood in this way. In The Morality of Freedom, Raz, in effect, provides a normative argument for his account of authority. And, because Raz and Finnis share so many assumptions about the nature of law and the nature of philosophy, a comparison of their respective normative arguments for the nature of law will help clarify in what sense Finnis' account of law is in the tradition of natural law philosophy (and in what sense it is not), and the reasons why Raz's normative arguments cannot support general conclusions about the nature of law.

Chapter 5: The State of Contemporary Natural Law Philosophy.

In the previous chapter, we saw that although legal positivists like Hart can consistently distinguish a concept of law from both coercion and morality, this does not mean that this concept of law is theoretically valuable. In fact, the attempt by legal positivists like Hart to characterize the normativity of law apart from morality results in a superficial account of the normativity of law which has little relevance to important philosophical and practical questions about law. Thus, it would seem that a different approach is needed in order to make inquiry into the nature of law philosophically and practically significant. One suggestion made by Soper is to conceive of philosophy of law as a branch of political and moral theory. This suggestion by Soper is not a new one; traditional natural law philosophy conceives of inquiry into the nature of law as a form of moral inquiry. But traditional natural law philosophy also seems to make inquiry into the nature of law a metaphysical and religious issue as well, and this way of conceiving of philosophy of law is antithetical to the contemporary approach not only to philosophy of law but also to moral and political philosophy. Thus, it seems that traditional natural law philosophy with its teleological account of nature is, to use Hart's words, too "alien to modern minds" to be useful for theoretical inquiry. But this is not the end of natural law philosophy. For, in recent years, natural law has made a come-back due to the efforts of philosophers like John Finnis and Germain Grisez. Although contemporary natural law philosophy conceives of law in moral terms, such an account of law, they argue, does not presuppose a teleological account of nature or a religious point of view. Further,

contemporary natural law philosophers proceed through the analysis of concepts and the consideration of the implications of this analysis. For these reasons, the contemporary natural law approach of Finnis and Grisez is in keeping with the contemporary approach to philosophy of law in general. Thus, unlike traditional natural law philosophy, contemporary natural law philosophy seems to have more promise because it is not so alien to modern minds; and, unlike contemporary legal positivism, it seems to be aware of the deficiencies in contemporary legal positivism because it attempts to deal with the moral grounds for the normativity of law.

In this chapter, I will examine contemporary natural law philosophy by focusing on Finnis' account of natural law. In the first section, I will briefly outline the basis for Finnis' account of law by focusing on his work Natural Law and Natural Rights. In the second section, I will examine Finnis' account of law. I will argue that such an account of law has many features in common with the accounts of contemporary legal positivists like Raz and Hart. It will be shown that what distinguishes Finnis' account from contemporary legal positivism is its reference to the common good. In the third and final section, I will show that although Finnis' moral theory has some features in common with traditional natural law philosophy, there are also significant differences. By comparing Finnis' account of natural law and Raz's normative account of law as given in The Morality of Freedom.[1], I will show in what sense Finnis' natural law theory differs from other normative accounts of law. But despite some general similarities with traditional natural law philosophy, the differences are significant because they ultimately undermine Finnis' moral philosophy. Because Finnis shares with contemporary legal positivists many of the

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[1] Joseph Raz, The Morality of Freedom, (Oxford: Clarendon Press, 1986). Henceforth known as MF.

same assumptions about how philosophy should approach social behaviour and action, the problems facing legal philosophers also become problems for moral philosophers.

1. The basis of Finnis' account of law.

Finnis begins his account of natural law with a discussion of the basic forms of good which he calls the "evaluative substratum of all moral judgements".[2] The discussion of the basic forms of good is considered a "substratum" of moral judgements because such a discussion neither consists of nor presupposes any moral judgements. In Finnis' words, the discussion of the basic forms of good "concern the acts of practical understanding in which we grasp the basic values of human existence and thus, too, the basic principles of all practical reasoning."[3] But it is not just the discussion of the basic goods (or how we come to understand the nature of basic goods and how we come to recognize which goods are basic forms of good) that is pre-moral. As we shall see the basic forms of good are also part of this evaluative substratum. Thus, the basic forms of good are not, for Finnis, moral goods, but rather the presuppositions of moral judgements about the good, right, etc., and, in fact, all practical judgments.

Finnis.contrasts two senses of the word 'good'. Good can refer to some particular objective or goal that one considers desirable. For instance, finishing this chapter is a good because it is a particular goal that I consider desirable. Finishing this chapter is a reason for my current activity of writing. But this reason is not my ultimate reason; it does not completely explain my actions. Ultimately, I write this chapter and this dissertation

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[2] NL, 59.
[3] *Ibid.*, 59.

because I want to know (for example). This implies that I consider knowledge to be intrinsically valuable (and not just valuable because of its utility). I regard knowledge as an aspect of my own flourishing. Further, I recognize that the good of knowledge can be realized or participated in in an indefinite number of ways. In these respects knowledge is not a good in the sense of a particular objective or goal that one considers desirable (that is, an end external to the means by which a person attempts to attain it), but it is a general form of good or "value" (that is, something that is participated in through the activity). To say that knowledge is a value or a basic form of good is to say that "reference to the pursuit of knowledge makes intelligible particular pursuits."[4] Knowledge is a basic value because it is an aspect of human flourishing. With respect to the basic good of knowledge, we can state a basic practical principle; for instance, "knowledge is a good to be pursued, and ignorance should be avoided." This expression of our understanding of the basic good of knowledge can provide a starting point or an orientation for our reasoning about what to do.[5]

Finnis argues that there are seven basic forms of good (Life, Knowledge, Play, Aesthetic experience, Sociability (Friendship), Practical Reasonableness and Religion), with corresponding basic practical principles. But how do we know that these are basic goods and basic practical principles? Finnis takes great pains to counter what he considers to be a common misunderstanding of natural law; namely that basic goods or basic practical principles are derived from a teleological account of nature (or that values are derived from facts).[6] He states,

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[4] *Ibid.*, 62.

[5] *Ibid.*, 63.

[6] Finnis and Grisez argue that this is also a misinterpretation of Aquinas. They argue that this misinterpretation of Aquinas and natural law is due more to Vasquez and Suarez than it does to Aquinas' own words. But not all interpreters of Aquinas agree with

> They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good or evil, or about 'the function of a human being', nor are they inferred from a teleological conception of nature or any other conception of nature. They are not inferred or derived from anything. They are underived (though not innate).[7]

Finnis argues that the basic forms of good are self-evident or obvious. He argues that they cannot (and need not) be demonstrated. This does not mean that everyone actually recognizes each value or that a value cannot be meaningfully denied or that there are no pre-conditions for recognizing the value. But what the self-evidence of the basic forms of good does mean is that "to someone who fixes his attention on the possibilities of attaining knowledge[or any other basic value] and on the character of the open-minded and wise man, the value of knowledge [or any other basic value] is obvious."[8] In other words, "while an awareness of certain 'factual' possibilities is a necessary condition for the reasonable judgement that truth [or any other basic value] is a value, still that judgement itself is derived from no other judgement whatsoever."[9]

Each of the basic values is basic in the sense that each is equally self-evidently a form of good or an aspect of human flourishing, none can be reduced to a mere aspect of another, and each can be reasonably regarded as the most important. There is no objective hierarchy among basic values. But it is important to note that although there is no objective

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them. See, for instance, Chapter 3 in Ethica Thomistica: The Moral Philosophy of Thomas Aquinas. (Washington, D.C.: The Catholic University of America Press, 1982) where Ralph McInerny explicitly criticizes Finnis' and Grisez's account of Aquinas.

[7] NL, 33-34.

[8] *Ibid.*, 71.

[9] *Ibid.*, 73.

hierarchy, each person has (and should have) a subjective order of priority among the basic values because of differences in upbringing, capacities, opportunities, and temperament.

So far, we have not mentioned morality. And, indeed, the discussion so far concerned the "evaluative substratum" of all practical (including moral) judgements. Reference to the basic values makes actions intelligible, but it does not, without qualification, make actions moral. Morality, according to Finnis, is the product of the requirements of practical reasonableness, one of the basic values. Thus, we must look closer at the basic value of practical reasonableness in order to understand the nature of morality.

Practical reasonableness is "the basic good of being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyle and shaping one's own character."[10] But this does not simply mean that one has the freedom of self-determination; rather, the good of practical reasonableness involves bringing one's intelligence and reason to bear on determining both 'inner' character, as well as actions and choices. Thus, practical reasonableness involves the freedom of self-determination according to reason. Another way of understanding the basic good of practical reasonableness is in terms of its relation to the other basic goods. The basic good of practical reasonableness has an essential reference to the other basic goods since, "one participates in the good of practical reasonableness by shaping one's participation in the other basic goods, by guiding one's commitments, one's selection of projects, and what one does in carrying them out."[11] The problem of practical reasonableness is the problem of deciding what basic goods one

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[10] *Ibid.*, 88.
[11] *Ibid.*, 100.

should focus on and deciding how the basic principles come to bear on definite actions and projects.

In order to be practically reasonable (or participate in the good of practical reasonableness), one must fulfill a number of interrelated requirements. These requirements are all expressions of the most general moral principle: "that one remain open to integral human fulfillment."[12] Further, ordinary moral principles about murder, stealing, etc., can be derived from one or more of these requirements. In this sense, the requirements of practical reasonableness are intermediate moral principles, intermediate between the most general moral principle and ordinary moral principles.

Finnis describes ten requirements of practical reasonableness.[13] I will very briefly state the ten requirements. First, one must have a coherent , harmonious or rational plan of life, which involves commitment to one or a few basic values. Second, there should be no arbitrary preference among values. According to Finnis, the assessment of which value or values one should concentrate on should be based on one's assessment of one's capabilities, circumstances and tastes, not a devaluation or exaggeration of a basic good or an overvaluation of an instrumental good. Third, one should recognize a fundamental impartiality among people, since the basic goods can be pursued by any human being. This means that one should not arbitrarily discount or exaggerate the goodness of another person's participation in the basic goods. Finnis describes this third requirement as criticism of selfishness, double-standards and indifference to the good of others. The fourth and fifth requirement of practical reasonableness are warnings to avoid two

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12 John Finnis, Fundamentals of Ethics (Oxford: Clarendon Press, 1983), 76.

13 See in NL, Chapter 5 entitled "The Basic Requirements of Practical Reasonableness" (100-127) where he describes nine requirements of practical reasonableness. See also Finnis' Fundamentals of Ethics, 74-78. In this book, he adds a tenth requirement that is not found in NL.

tendencies: the tendency towards fanaticism and the tendency toward laziness. The fourth requirement states that one should have a certain detachment from specific projects (that is, one should not attribute to a particular project the significance which only a basic good can claim), while the fifth requirement states that one should not treat one's commitments too lightly (that is, they should not be abandoned too lightly). Six, one should choose actions which are effective and useful for achieving our goals and one should consider the foreseeable consequences of one's actions, within reason. Finnis is making a nod to a truth of consequentialism and utilitarianism (namely, the truth that the consequences and the efficiency of actions are relevant to morality), but he maintains that this sixth requirement must be understood in light of the other requirements. The seventh requirement states that one should respect all the basic values in every act. Although one can focus or emphasize one basic value over others, one should never "damage or impede the realization or participation of any one or more of the basic forms of human good."[14] In other words, one ought not to choose an action which involves acting directly against a basic value. According to Finnis, it is this seventh requirement on which rests the inviolability of basic human rights. And it is this requirement that puts a serious qualification on the sixth requirement. Eight, one should favour and foster the good of one's communities. Nine, one should follow one's conscience. Finally, ten, one should never knowingly choose apparent goods, even if they bring desirable emotions, experiences or satisfactions.

According to Finnis, past philosophers have located the essence of morality in individual requirements of practical reasonableness. For instance, Kant focused on the seventh requirement, while utilitarians focused on the sixth requirement. But morality, properly conceived, involves the consideration of all the requirements of practical

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[14] NL, 118.

reasonableness, since such a consideration is needed in order to flourish as a person.[15] To fulfill the requirements of practical reasonableness (and participate in the basic good of practical reasonableness) is to be moral; and because of the variety of basic human goods and because of the different possible ways of participating in each good, a moral life has many different forms. But how does this account of morality and the basic forms of good relate to the nature of law? In the next section, I will consider Finnis' account of law and its relation to morality.

2. Finnis' account of law and its relation to morality.

Finnis describes the main features of legal order in two parts. First, he describes three characteristics of legal systems. He states that it is characteristic of legal systems that:

> (i) they claim authority to regulate all forms of human behaviour ... (ii) they claim to be the supreme authority for their respective community, and to regulate the conditions under which the members of that community can participate in any other normative system or association; (iii) they characteristically purport to 'adopt' rules and normative arrangements (e.g. contracts) from other associations within and without the complete community, thereby 'giving them legal force' for that community; they thus maintain the notion of completeness and supremacy without pretending to be either the only association to which their members may reasonably belong or the only complete community with whom their members may have dealings, and without striving to foresee and provide substantively for every activity and arrangement in which their members may wish to engage.[16]

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[15] Although not all ten requirements have a bearing on every moral judgment, some moral judgments, according to Finnis, do 'sum up' the nine requirements.

[16] *Ibid.*, 148-149.

These three characteristics are very similar to Raz's account of law, and this similarity is not coincidental. Finnis is quite explicitly acknowledging what he considers to be the truth in Raz's account of law. According to Finnis, Raz is correct in saying that a characteristic of all legal systems is that they claim to be authoritative. Further, Finnis accepts Raz's understanding of authority in terms of exclusionary reasons for acting.[17] The first two characteristics basically state that law involves a claim to authority which is both comprehensive and supreme. In The Authority of Law, Raz acknowledges that the law's claim to authority is comprehensive and supreme, and in fact these are some of the distinguishing features of law. The last characteristic would also be accepted by Raz, since it involves the fairly uncontroversial claim that laws purport to adopt rules from other normative associations (thus giving them legal force). The fact that the authority of law is compatible with the existence of other normative associations is important for understanding the meaning of the supremacy and comprehensiveness of law; it is the law's ability to confer legal force on rules and normative arrangements found in other associations which makes the law supreme and comprehensive. Finnis describes this third characteristic as the "absorptive or ratificatory capacity" of law.[18]

The only way in which these characteristics of law seem to differ from Raz's account is in the reference to a "complete community." For Finnis, the central case of law and legal system is the law and legal system of a complete community.[19] A complete community is "an all-round association in which would be co-ordinated the initiatives and activities of individuals, of families, and of the vast network of intermediate

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[17] *Ibid.*, 234.
[18] *Ibid.*, 267.
[19] *Ibid.*, 148.

associations."[20] The point of a complete community is to "secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each individual of his or her personal development."[21] Thus, the three characteristics of law (that law claims to be an authority which is both comprehensive and supreme, and law purports to adopt rules and normative arrangements from other associations) must be understood in the context of a complete community; that is, these defining features have their foundation "from the standpoint of practical reasonableness, in the requirement that activities of individuals, families and specialized associations be co-ordinated."[22]

That the function of law is to secure co-ordination, in itself, would not be debated by Raz. In fact, one of Raz's arguments for understanding authority in terms of exclusionary reasons for action is based on an appeal to the co-ordinating function of law. Raz states that "if authority is to be justified by the requirements of co-ordination we must regard authoritative utterances as exclusionary reasons. The proof is contained in the classical analysis of authority. Authority can secure co-ordination only if the individuals concerned defer to its judgement and do not act on the balance of reasons, but on the authority's instructions."[23] Thus, Raz is arguing that because it is the function of authority to secure co-ordination, then authority must be understood in terms of exclusionary reasons for action. Further, because the essential feature of law for Raz is law's claim to authority, then law also must be understood in terms of its function of securing co-ordination. Thus,

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[20] *Ibid.*, 147.
[21] *Ibid.*, 147.
[22] *Ibid.*, 149.
[23] Joseph Raz, Practical Reason and Norms, 64.

both Raz and Finnis understand law in terms of its function of securing co-ordination. But does this mean that they share the same view of the nature of law?

Finnis' account seems to go further than Raz's account of law for two reasons. First, Finnis argues that only by solving these interaction and co-ordination problems can law further the common good of the community. By "common good", Finnis means,

> a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.[24]

In other words, authority (conceived of in terms of exclusionary reasons for action and in terms of its function of solving co-ordination problems) is only justified if it furthers the common good. And because furthering the common good is a requirement of practical reasonableness, such an ultimate justification for authority is a moral justification. Thus, Finnis seems to differ from Raz because he provides a moral justification for authority.[25] Although Raz's appeal to the "normal justification thesis" is an appeal to morality in order to characterize legitimate authority, such a statement is detached since it is not made by a committed participant. The moral justification for authority that Finnis provides is one made by a committed participant (that is, the practically reasonable person). But there is a second reason why Finnis' account of law seems to go further than Raz's account of law. Although Finnis believes that the three characteristics listed above characterize all law and legal systems, he does not believe that they are sufficient to distinguish law from

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[24] NL, 155.

[25] The moral justification for authority that Finnis provides is one made by a committed participant. Raz's appeal to the "normal justification thesis" is an appeal to morality in order to justify legitimate authority, but it is a decidedly detached statement.

'the charismatic personal governance of a sovereign administering 'palm-tree justice' by ad hoc decrees."[26] Thus, there is a need for further characteristics of law. In the third section of Chapter 10, Finnis lists the five main features distinctive of legal order which are characteristically (though not inevitably) found together. As we shall see, these five features are fairly uncontroversial.

> Firstly, then, law brings definition, specificity, clarity, and thus predictability into human interactions, by way of a system of rules and institutions so interrelated that rules define, constitute, and regulate the institutions, while institutions create and administer the rules, and settle questions about their existence, scope, applicability, and operation.[27]

The first characteristic involves an aim of law which legal positivists have emphasized. Legal positivists have recognized that laws should be clear and specific in order to properly guide citizens. The fact that this aim of law is recognized is uncontroversial; what has been criticized is the tendency to make this aim the sole or overriding aim of law. This first characteristic also involves the notion of the legal 'circle' in which law can, in a sense, regulate its own creation. In another chapter Finnis shows why this apparent paradox (that an authoritative rule can be generated without prior authorization) can be avoided.[28] But the important thing to note for our purposes is that the fact that law regulates itself is one of the key insights that legal positivists since Hart have recognized.[29]

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[26] NL, 267.
[27] *Ibid.*, 268.
[28] See the second section in Chapter 9 of NL.
[29] One of the criticisms that Hart makes with respect to an Austinian account of authority is that it fails to properly account for the way in which laws regulate law-makers.

The second characteristic involves the primary legal method for showing that a rule is valid. Finnis states,

> The primary legal method of showing that a rule is valid is to show (i) that there was at some past time, t_1, an act (of a legislator, court, or other appropriate institution) which according to the rules in force at t_1 amounted to a valid and therefore operative act of rule-creation, and (ii) that since t_1 the rule thus created has not... ceased to be in force by virtue either of its own terms or of any act of repeal valid according to the rules of repeal in force at times t_2, t_3, ...[30]

In this second characteristic, Finnis is describing a very common way of understanding legal validity. Basically, he is saying that once a rule has been enacted by the proper institution, then the rule stays in force until repealed. No direct reference to morality or natural law is appealed to in Finnis' account of the validity of laws. Thus, there is nothing here that a contemporary legal positivist would disagree with.

The third main characteristic of law is that, in addition to regulating the creation, modification, etc., of rules, law also regulates "the conditions under which a private individual can modify the incidence or application of the rule (whether in relation to himself or to other individuals)."[31] In other words (using Hart's terminology), there are rules which confer not only public powers, but private powers on individuals (for example, the power to make a contract). Finnis is simply recognizing that there are different kinds of legal rules, and this recognition, of course, is what Hart thought was the key to the science of jurisprudence.

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30 NL, 268.
31 *Ibid.*, 268.

Fourth, law brings clarity and predictability to human actions by "treating of (usually datable) past acts (whether of enactment, adjudication, or any of the multitude of exercises of public and private 'powers') as giving, *now*, sufficient and exclusionary reason for acting in a way *then* 'provided for'."[32] Finnis is describing the role of precedent in law. The appeal to precedent provides a stable reference point for resolving disputes, as well as a framework for determining action in the future. Of course, the fact that judges appeal to the past in interpreting law and making decisions is uncontroversial.

The fifth and final main feature of law (which reinforces the fourth) is the working postulate that "every present practical question or co-ordination problem has, in every respect, been so 'provided for' by some such past juridical act or acts...."[33] Finnis argues that although this postulate is a fiction, it is still significant since it reinforces the other four characteristics of law and legal thought.

According to Finnis, these five features of law stand as a "sufficiently distinctive, self-contained, intelligible, and practically significant social arrangement which would have a completely adequate rationale in a world of saints."[34] The fact that we do not live in a world of saints means not only that certain formal features of legal order must be amplified (for instance, to prevent abuse of power), but also that law is also a coercive order. Now if Finnis' account of law ended here, it would be hard to see why his account of law is in the tradition of natural law philosophy. The first three characteristics of law are almost identical to Raz's account of the authoritative nature of law. The next five features of law are familiar and uncontroversial features of law. Finally, to say that law is also a coercive

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32 *Ibid.*, 269.
33 *Ibid.*, 269.
34 *Ibid.*, 269.

order is undeniable given the existence of prisons and other forms of punishment. What makes Finnis' account of law different from contemporary legal positivism?

What distinguishes his account from legal positivism is Finnis' insistence that these formal features of law are related to the requirements of practical reasonableness (specifically, the requirements of justice and the common good). Finnis argues that we can best see the relation between these features of law and morality by considering what it means for a legal system to "work well". The specific virtue of legal systems is called the "Rule of Law" and he briefly summarizes eight ways in which a legal system exemplifies the "Rule of Law."[35] Finnis argues that the fundamental point of these eight desiderata is to "secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation."[36] This is the value of predictability, clarity, etc. Thus, the rule of law is a requirement of justice or fairness. And because the requirements of justice are simply the "concrete implications of the basic requirement of practical reasonableness that one should favour and foster the common good of one's community",[37] ultimately the rule of law is justified because it contributes to the common good. It is this reference to the common good (and thus a reference to the requirements of practical reasonableness or morality) in Finnis' account of law that distinguishes his account of law from legal positivism. Thus, Finnis ends up with the following, multi-faceted definition of law with reference to the common good:

> The term 'law' has been used with a focal meaning so as to refer primarily to rules made, in accordance with regulative legal rules, by determinate and effective authority (itself

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35 *Ibid.*, 270. Finnis gets much of his account of the Rule of Law from Fuller's The Morality of Law and Raz's "The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195.

36 *Ibid.*, 273.

37 *Ibid.*, 164.

> identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.[38]

Reference to the common good justifies not only the main function of law (resolving co-ordination problems), but reference to the common good also justifies and explains the manner and form (indicated by the five main features of law) that the law characteristically takes. Thus, it is this complex reference to the common good in Finnis' account of law which distinguishes his account of law from contemporary legal positivism.

It is important to see why Finnis believes that this reference to the common good is not simply an added on normative element which is analytically separate from the description or analysis of law. Finnis agrees with contemporary legal positivists that the descriptive/explanatory study of social science is distinct from the justificatory/critical practical reasoning about the good and the right in particular social practices.[39] But he also believes that analytic jurisprudence (or a purely descriptive theory of law) can only escape methodological arbitrariness by presupposing evaluations in the selection or the formation of concepts.[40] With a description or analysis of law, some concepts must be focused on to

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[38] *Ibid.*, 276-277.

[39] John Finnis, "Introduction" in Natural Law. Vol. II. (Edited by John Finnis), xii.

[40] *Ibid.*, xi-xii.

the exclusion of others; some concepts are important for our understanding of the nature of law, and other concepts are not. In order to determine what concepts are important for understanding a social practice like law, there must be an appeal to some evaluations. Hart focuses on the concepts of a rule and rule-following (and the accompanying idea of the internal point of view), while Raz focuses on the concept of authority (and exclusionary reasons for action). According to Finnis, both Hart and Raz must presuppose evaluations in order to justify their choice of concepts. Finnis also focuses on the concepts of rules and authority, but unlike Hart and Raz, he makes explicit the reasons why these concepts are important for understanding the nature of law. Finnis states, "In short, Natural law theory tries to do openly, critically, and discussably what most other analytical and descriptive theorists do covertly and dogmatically."[41]

3. Finnis' theory of natural law, other normative accounts of law, and traditional natural law philosophy.

Finnis is proposing a conception of law which is in the tradition of natural law. He argues that, unlike positivistic accounts of law, a sound theory of natural law describes law from the point of view of the person who is practically reasonable. It is the distinction between what is practically reasonable and practically unreasonable which enables the legal theorist to distinguish the important from the unimportant for the purpose of understanding the nature of law. But, moreover, the project of understanding law in a way that is both descriptive and general is only justified if the conditions and principles of practical reasonableness (or good and proper order among people) can be identified. Finnis writes,

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41 *Ibid.*, xii.

> unless some such claim [to be able to identify conditions and principles of practical right-mindedness] is justified, analytic jurisprudence in particular and (at least the major part of) all the social sciences in general can have no critically justified criteria for the formation of general concepts, and must be content to be no more than manifestations of the various concepts peculiar to particular peoples and/or to the particular theorists who concern themselves with those people.[42]

Basically, Finnis is saying that unless an account of law or any other social science can be grounded in some non-relative distinction between right and wrong conduct (or between reasonable or unreasonable conduct), then the attempt to provide a general philosophical account of law or any other social science is doomed to failure. The most that can be hoped for is a sociological account of particular legal systems or particular social practices at particular historical periods.

But surely we can make general statements about law and legal practice without appealing to morality or to the rationality of people. For instance, Hart describes law and legal systems in terms of rules (including the distinction between primary and secondary rules) and rule-following (with reference to the internal point of view). Although he admits that there are some borderline cases of legal systems which do not quite fit this description of law (for example, primitive law and international law), an understanding of law in terms of rules and rule-following is both descriptive and general. Similarly, Raz's account of law is based on a conception of authority which is descriptive and general. Thus, both Hart

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42 NL, 18. Finnis makes a similar statement in inte introduction to the second volume of Natural Law. He states, "Natural law theory argues that the formation and selection of concepts for social descriptions and evaluations must - unless those descriptions and explanations are to remain entirely parochical - be guided by the evaluations which criticial reflection on the human situation shows to be critically justified." (*Ibid.*, xii)

and Raz seem to make general statements about law and legal practice without appealing to morality or to the objective rationality of people.

But we also saw in the last two chapters some problems with their respective accounts of law. Raz's appeal to authority can not support the strong conclusions he wants to make about the separation of law and morality. We also saw that although Hart manages to distinguish law from both coercion and morality by appealing to a Wittgensteinian account of rules and rule-following (and the internal point of view), the resulting account of law is one that is very formal. In order to describe general features of law and legal systems that are found in different countries and in different times with different 'moralities', Hart must restrict his description to very formal claims about law.[43] Thus, his main insight is the recognition of the distinction between primary and secondary rules, and the role of the rule of recognition; a legal system is conceived as a self-contained and self-generating system of rules. However, the theoretical value of conceiving of a legal system in this way can only be assessed when his account of the normativity of law is examined. When Hart attempts to characterize the normativity of law, he ends with an equally formal and unilluminating account. Basically, the normativity of law can be understood simply in terms of how legal officials 'treat' the law; that is, law is normative in the sense that legal

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43 Although he would deny that his account is formal, Hart does acknowledge that an account of law or morality which is formal can not be adequate. In fact, Hart's account of the minimum content of law that is shared with morality is an attempt to bring in more substantive issues into his account of law. He states, "the simple truisms we have discussed not only disclose the core of good sense in the doctrine of Natural Law. They are of vital importance for the understanding of law and morals, and they explain why the definition of the basic forms of these [law and morals] in purely formal terms, without reference to any specific content or social needs, has proved so inadequate." (CL, 194) However, the truisms he lists are based on the assumption that survival is one of the main aims of morality and law. But by construing morality in terms of the aim of survival, Hart has transformed morality into something that comes closer to resembling prudence than natural law morality. Hart seems to want to remain neutral about the nature of morality, but such an account of morality (in terms of an aim for survival) is hardly neutral.

officials treat the law as norms for criticism and behaviour and view the law as important. The fact that legal officials treat the law as norms or view the law as important is, again, fairly uncontroversial. But what Hart leaves inexplicable is why legal officials do treat or view the law in this way, and, perhaps more significantly, why they should. If an account of law is to be theoretically valuable something more needs to be said about the grounds for the normativity of law and the function of law in general. And if these grounds or if the function of law is not in some sense universal or general, then the project of providing a general account of law which is theoretically valuable becomes problematic. Thus, what Finnis should say is that without a non-relative distinction between right and wrong conduct, the project of providing an account of law which is both general and theoretically valuable is undermined.

But this does not mean that natural law philosophy is the only possible candidate for supplying a general and theoretically valuable account of law. It seems that other normative accounts of law might also produce general and theoretically valuable accounts of law. Two questions arise. First, what distinguishes natural law philosophy from other normative accounts of law? Second, why does the relativity of morality or rationality undermine the attempt to make general and theoretically valuable accounts of law? In order to answer these questions, I will briefly consider as an example, Raz's normative account of law presented in The Morality of Freedom.[44] Raz's normative account of law is

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[44] Although I will concentrate on this work, I will also consider Ethics in the Public Domain: Essays in the Morality of Law and Politics. (Oxford: Clarendon Press, 1994) where he clarifies some of his points and arguments in The Morality of Freedom.

Raz describes the The Morality of Freedom as a work in political morality of liberalism. According to Raz, political morality is concerned with the principles which should guide political action. It provides, "the principles on the basis of which the theory of institutions constructs arguments for having political institutions of this character rather than that." (MF, 3) In other words, The Morality of Freedom is not just an argument for the morality of liberalism, but it also presents the basis for justifying the character of

particularly interesting because of its similarities to Finnis' moral philosophy. By comparing Raz's normative account and Finnis' account of morality, not only will we see why a non-relative distinction between right and wrong is needed in order to justify a general and theoretically valuable account of law (and why Raz's normative arguments cannot support a general account of law), but also we shall see more clearly in what sense Finnis' account of law is in the tradition of natural law philosophy.

Finnis' account of law in Natural Law and Natural Rights is similar in many respects to Raz's account of law in The Morality of Freedom. They both argue that legal systems have *de facto* authority and claim to have legitimate authority. They both argue that this claim to be authoritative must be understood in terms of exclusionary reasons for action. They both argue that the function of legal authorities is to co-ordinate actions by authoritatively settling disputes. Thus, authority is not needed just because some people are stupid or wicked; authority would be needed even if everyone was intelligent and good. Ultimately, both Raz and Finnis agree that even if everyone were intelligent and good, there would be a need to co-ordinate the activities of people because of conflicting ways of being good (of different ways of living a good life). Let me elaborate on this point by first considering Raz's account of political morality, and then reviewing Finnis' position.

There are two related aspects of Raz's political morality: his moral pluralism and his account of well-being. Raz describes four conditions of personal well-being. First, "all but the biologically determined aspects of a person's well-being consist of the

successful pursuit of goals which he has or should have."[45] Our well-being can be promoted only by our freely accepting goals and pursuits. These goals form nested structures with more limited goals embedded in more comprehensive goals. Second, "people adopt and pursue goals because they believe in their independent value..."[46] In other words, we pursue goals not simply because they are our goals but because we believe they are worthwhile. The reason we pursue the goals we do is because of the value of the goals. Third, "barring a person's biologically determined needs and desires his well-being depends, at the deepest level, on his action reasons and his success in following them."[47] In Raz's account, there is an emphasis on success, and success in our most comprehensive goals is one of the most important aspects of our well-being. Fourth, "a person's well-being depends to a large extent on success in socially defined and determined pursuits and activities."[48] In other words, we inevitably derive our comprehensive goals from the stock of social forms available to us. But, Raz adds, that well-being also requires that these social forms are morally sound. Morality and individual well-being are not independent and mutually conflicting systems of values. Both morality and well-being involve values which depend on social forms; in both cases, values are drawn from the "communal pool". Thus, the source of value is the same from the point of view of morality and from the point

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institutions like law. In fact, he states that "the doctrine of freedom is part of a view of the foundations of legitimacy of political authorities." (*Ibid.*, 21) Thus, this work can also be seen as providing a normative argument for the authoritative nature of law.

[45] MF, 308.

[46] *Ibid.*, 308.

[47] *Ibid.*, 308.

[48] *Ibid.*, 309.

of view of individual well-being.[49] Although there may be occasional conflicts between morality and personal well-being, these conflicts are only occasional and accidental.

But Raz's political morality must also be understood in light of his moral pluralism. According to Raz, "moral pluralism asserts the existence of a multitude of incompatible but morally valuable forms of life."[50] Forms of life are incompatible if "given reasonable assumptions about human nature, they cannot normally be exemplified in the same life."[51] But moral pluralism asserts more than the fact that different forms of life are incompatible; it also states that different forms of life "display different virtues, each capable of being pursued for its own sake."[52] In other words, if I pursue the life of contemplation, for instance, there will be virtues that elude me (for instance, virtues of the life of action). Raz defines a weak moral pluralism in terms of maximal forms of life; "a form of life is maximal if, under normal circumstances, a person whose life is of that kind cannot improve

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[49] *Ibid.*, 318. At times, Raz seems to understand morality in terms of respect for the well-being of all people. He states that "morality is thought to be concerned with the advancement of the well-being of individuals." (*Ibid.*, 267) If so, then there is some plausibility to his claim that the grounds for personal well-being are also the grounds for morality. But, as some commentators have rightly noticed (See, for example, Christopher Morris' "Well-being, Reasons, and the Politics of Law" Ethics: An International Journal of Social, Political and Legal Philosophy, Vol. 106, No. 4, July 1996, 817-833), Raz sometimes characterizes morality even more broadly to mean 'evaluative'. For instance, he seems to use the terms moral pluralism and value pluralism interchangeably. Further, in Ethics in the Public Domain, Raz states that "morality, I think, must be part of those background considerations which we resort to in virtue of being rational animals, i.e. reasoning animals. Put in a different way: there are values and reasons which unconditionally govern our thought. We call some of these moral." (*Ibid.*, 313) This seems to suggest that at least some part of morality is universal and not derived from social forms. But because Raz says that only "some of these" are moral, it is hard to see what this means for our understanding of morality in general.

[50] MF, 131.

[51] *Ibid.*, 395. As an example, Raz states that being an ideal teacher and an ideal family person are compatible, while a person cannot normally live a life both of contemplation and of action, or one cannot possess all the virtues of both a nun and a mother.

[52] *Ibid.*, 396.

it by acquiring additional virtues, nor by enhancing the degree to which he possesses any virtue, without sacrificing another virtue he possesses or the degree to which it is present in his life."[53] A weak form of value pluralism is the belief that there are several maximal forms of life. Although Raz believes that his arguments support a stronger version of moral pluralism ,[54] he instead argues that valuing autonomy commits one to weak moral pluralism. Basically, he argues that because autonomy requires the exercise of choice, and moral choice requires genuinely different moral options, then there must be a difference between the reasons for the different moral options, i.e. weak moral pluralism.[55] He argues that moral pluralism is "naturally combined with the view that individuals should develop freely to find for themselves the form of the good which they wish to pursue in their life." [56]

Raz argues that "political morality is concerned primarily with protecting and promoting the well-being of people."[57] Because the well-being of people requires that people make their own choices (as much as possible) about their goals and pursuits, the state should allow, as much as possible, that people are free to do so. In fact, the state should actively create the conditions needed for the existence of viable options in society.[58]

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[53] *Ibid.*, 396.

[54] A strong moral pluralism that holds: first, that incompatible virtues are not completely ranked relative to each individual; second, that the incompatible virtues are not completely ranked by some impersonal criteria of moral worth; and third, the incompatible virtues exemplify diverse fundamental concerns. (*Ibid.*, 396-397).

[55] *Ibid.*, 398. And, in fact, Raz argues that there is a widespread belief in significant options (and comprehensive goals) which are, in addition to being significantly different, also incommensurable. (*Ibid.*, 321)

[56] *Ibid.*, 133.

[57] Joseph Raz, Ethics in the Public Domain, v.

[58] Exactly how active the state should be in promoting the well-being of people is not completely clear, because Raz does not provide concrete examples about state intervention and about the difference between good social forms and bad social forms. In his article "Perfectionism with a Liberal Face? Nervous Liberals and Raz's Political Theory" (Social Theory and Practice. Vol. 20, No. 1, Spring 1994), Patrick Neal

Further, because there is a pluralism of value and, in fact, a pluralism of moral value, there are many ways in which people can live a morally good life. Thus, just because the state positively acts to ensure that people can live morally valuable ways of life, this does not mean that the state is enforcing one standard of good on people. The state serves people best by simply creating opportunities for people to make their own choices about what kind of valuable life they will lead.

Now, how does all this relate to the authoritative nature of law? Basically, for Raz, law (and authority) is justified ultimately because it promotes and protects the well-being of people. Authority, understood through an analogy with an arbitrator, has two related features, dependence and pre-emptiveness. The dependence thesis states that authorities should always act for dependent reasons (i.e. the authority's decision should be based on reasons which would apply independently to subjects).[59] The pre-emptive thesis states that the decision of an authority not only is a reason for acting but it also replaces the reasons on which it depends.[60] The dependence thesis is a moral thesis because it states how authorities ought to use their powers. The dependence thesis is related to the normal justification thesis which describes the normal way to establish that a person has authority over another ("by showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly."[61]) The dependence

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criticizes the fact that Raz does not provide concrete examples or illustrations. He ends up concluding that Raz's account is "a purely formal perfectionism, a perfectionism without an account of perfection." (*Ibid.*, 54). And this criticism is somewhat warranted given Raz's formal account of moral values and their place in the political morality of liberalism.

[59] MF, 47.

[60] *Ibid.*, 46.

[61] *Ibid.*, 53.

thesis and the normal justification thesis are mutually reinforcing and together constitute what Raz calls "the service conception of the function of authorities"; that is, that the function of authority is to serve the governed.[62] The service conception of authority describes what authorities should do, and they should serve the governed by promoting and protecting the well-being of people. Further, the pre-emptive thesis specifically addresses the pluralistic state of affairs, because it proves a way of dealing with incompatible, and sometimes incomparable, values which govern people's lives. Because an authority's decision is a reason for action which replaces dependent reasons, authority can coordinate action among people who have very different values and goals. As Raz puts it, the practice of authority allows for the creation of a pluralistic culture because "it enables people to unite in support of some 'low or medium level' generalization despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc."[63] In other words, because people can pursue different valuable goals and because the pursuit of these goals (and their free choice of which goals to pursue) contributes to the well-being of people, there is a need to co-ordinate activities in such a way that disputed ideas about the good life or about morality are not involved in the identification of directives. Thus, for Raz, authority is justified because it serves the governed by promoting and protecting the well-being of people in society.

Finnis argues that the authority of law is ultimately justified because it contributes (both in form and in content) to the common good. It is worth repeating Finnis' account of the common good. By "common good", he means,

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62 *Ibid.*, 55-56.
63 *Ibid.*, 58.

> a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.[64]

It is hard not to see similarities between Finnis' account of the common good and Raz's account of what the state should do. Both agree that the state should, in some sense, enable people to make their own choices about their goals and objectives. Both agree that in order for people to achieve their goals, there is a need for collaboration and a need to coordinate this collaboration. And both believe that an authority whose decisions are reasons for action which replace other dependent reasons can best solve problems of co-ordination. Although Raz appeals to the "well-being" of people, Finnis in a similar way appeals to "human flourishing". Both understand "well-being" or "human flourishing" in terms of goods or values. Both agree that "well-being" or "human flourishing" takes many forms. As we saw before, Finnis argues that there are seven basic forms of human good (or seven basic values) which are objectively equal in value. To act morally, one must fulfill the requirements of practical reasonableness (one of the basic values). But this does not mean that there is only one way of being moral. The requirements of practical reasonableness provide a proper orientation to the basic values; but because of differences in temperaments, capabilities, upbringing and opportunity, people will emphasize different basic values. For instance, I may focus more on knowledge, while Michael Jordan might focus more on play. As long as Michael and I respect all the other basic goods and follow the other requirements of practical reasonableness, we both can live moral lives. Moral lives may have very different forms because of differences in the subjective hierarchy of the

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[64] NL, 155.

basic values. But also, because we can participate in a basic value in an indefinitely many ways, the lives of two people that emphasize knowledge may vary considerably. Thus the state in promoting or protecting the "well-being" of people or the common good is not enforcing one conception of the good on people. Thus, both Finnis and Raz end up justifying a liberal conception of the state, in slightly different ways.

What is the difference, then, between Finnis' natural law philosophy and Raz's normative justification of law and liberalism? There are two main differences between Finnis' and Raz's accounts. First, Finnis describes seven basic values which are self-evident and not relative to a given place or a historical period. Although Raz does talk about comprehensive goals which are viewed as intrinsically valuable, he provides no reason for thinking that there is a set number of comprehensive goals (or comprehensive values) which are self-evident and not relative. And although Raz is considered to be a realist with respect to values[65], much of what he says about values and goals seems to imply that they are relative to a given society at a given historical period. He argues that comprehensive goals may be based on a social form by being an instance of it (for

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65 For a good overview of Raz's political morality, see Christopher W. Morris' "Well-Being, Reasons, and Politics" Ethics: An International Journal of Social, Political, and Legal Philosophy, 817-833. He describes Raz's realism with respect to values or morality in the following way: "Raz is some sort of moral realist or naturalist. That is, he rejects accounts of ethics which deny truth values to moral judgments or propositions, and he rejects accounts of practical reason as merely instrumental." (*Ibid.*, 829-839) Moral realism and naturalism seem to be very different beasts, but "realism" is a notoriously ambiguous term (and some would argue that "naturalism" is as well). If by "realism", Raz means that moral judgements have truth value, then perhaps he is more accurately called a cognitivist with respect to morality. Since there are realist and anti-realist conceptions of truth, an account of the realism of moral judgments with reference to truth is misleading unless more is said about the nature of truth. As for the relation between realism and viewing practical reason as merely instrumental, as Morris notes, one can deny that moral judgements have truth value without accepting instrumentalism about reason. Thus, Raz's 'realism' with respect to morality seems vague. And, in The Morality of Freedom, Raz describes values and morality without reference to realism or truth.

example, a conventional marriage) or by slightly deviating from a conventional social form (for example, an open marriage) but also combining elements from other social forms (for example, a sexual pursuit free of emotional involvement).[66] By social forms, Raz means "the public perception of common social forms of action, each of which has the internal richness and complexity which makes it into a possible comprehensive personal goal."[67] According to Raz, he is not putting forward a conventionalist position; he is not saying that because a practice is socially approved, it is for this reason that it is valuable. Rather, he is arguing that a comprehensive goal can only be valuable if it can be his goal, and it can only be a goal if it is founded in social forms. Thus, social forms present in a society at a given time put a limit on what comprehensive forms can be valuable. What this seems to suggest is that I do not make things valuable and society does not make things valuable, but perhaps value belongs to an intersubjective realm. But this still means that value is still relative to a given time and place, and this is a different sense of value from what Finnis has in mind.

But because Raz's account of value is different from Finnis', his account of political morality (and thus the scope of his normative account of law) also differs. Raz states "the principles of political morality themselves grow out of the concrete experience of a particular society with its own institutions. Their validity is limited by their background."[68] Political morality, for Raz, is always a case of preaching to the converted. Because values depend so much on social forms of a particular society, moral values do as well. Thus, Raz's moral justification of law is only valid in the context of contemporary liberal societies. This is one reason that Raz' normative justification of authority cannot

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66 MF, 309.
67 *Ibid.*, 310.
68 *Ibid.*, 3.

support a general claim about the nature of law as such. Finnis' account of law, on the other hand, (and the morality presupposed in it) is universal and, thus, applicable in all places at all times. He states that principles of natural law

> would hold good, as principles, however extensively they were overlooked, misapplied, or defined in practical thinking, and however little they were recognized by those who reflectively theorize about human thinking. That is to say, they would 'hold good' just as the mathematical principles of accounting 'hold good' even when, as in the medieval banking community, they are unknown or misunderstood.[69]

Thus, unlike Raz, Finnis' normative account of law 'holds good' in all human societies and at all times. So Finnis can make claims about the normative grounds of law which are general, while Raz can not.

Finnis' account of law is in the tradition of natural law philosophy in the sense that it emphasizes basic human goods which are universal. But Finnis' account differs from Aquinas' natural law philosophy in three significant and interrelated respects. First, Finnis emphasizes that his natural law philosophy is not based on a teleological account of nature, but it not at all clear that Aquinas' natural law philosophy is not based on a teleological account of nature in general and an account of human nature in particular.[70] One of the

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[69] NL, 24.

[70] Ralph McInerny, in Ethica Thomistica: The Moral Philosophy of Thomas Aquinas, argues that Finnis and Grisez fail to see that the is-ought problem is not applicable to Aquinas' philosophy because of differences in his account of what 'is'. See Chapter 3 of this book. Finnis and Grisez do respond to McInerny in "The Basic Principles of Natural Law: A Reply to Ralph McInerny," The American Journal of Jurisprudence, Vol. 26 (1981) pp. 21-31. But they respond by distancing their position from Aquinas'.

Henry Veatch and Joseph Rautenberg also argue that one of the ways in which Aquinas' natural law philosophy differs from the moral philosophy of Grisez, Finnis and Boyle is in their accounts of ethical knowledge. For Aquinas (and Aristotle) "ethical knowledge is unquestionably based on a knowledge of nature, and more

driving forces of Finnis' account of natural law is his insistence that one should not derive an ought from an is. It is Finnis' belief in a gap between fact and value which motivates his claim that natural law is not derived from an account of nature or human nature. But there are two problems with Finnis' use of the is-ought distinction with respect to natural law philosophy. First, it is true that, given how facts are often construed, it is illegitimate to derive an evaluation from purely factual statements. But given a teleological conception of nature, it is not clearly illegitimate to derive 'oughts' from how things are. According to a teleological understanding of nature, natural things 'move' or 'change' in a direction that is perfective of their nature. The acorn is potentially a tree, and given proper conditions an acorn will become a tree. And, even in the case of an acorn, there is a sense in which an acorn 'should' become a tree, and if it does not become a tree then something has gone wrong.[71] But human beings also have potentialities; they also move and change in a direction which is perfective of their nature. All humans desire to perfect themselves; that is, all humans desire happiness. Humans fail to perfect themselves because of

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specifically on an understanding of human nature, for a human being is an integral part of nature, and possibly of supernature as well." (Veatch and Rautenberg, "Does the Grisez-Finnis-Boyle Moral Philosophy Rest on a Mistake" Review of Metaphysics: A Philosophical Quarterly Vol. 44, June 1991, 820)

[71] Of course, moral 'oughts' apply only to beings capable of rationality (and beings capable of choosing otherwise than they do). Thus, because human beings can deliberate and choose actions which mean that their potentialities will not be fulfilled, they can be held morally responsible for their actions while plants cannot. But there is an important similarity between human beings and other living beings like plants. All living creatures are inclined toward an end dictated by their nature. Even human beings naturally are inclined toward an end appropriate to their nature (i.e. the perfection of their rational capacity). Even when human beings make the wrong choices, they make these choices because they desire happines (i.e. perfection of their nature). Thus, despite the difference in the kind of 'ought' applicable to human beings and the kind of ought applicable to non-rational living things, a general point can be made: because ends are implicit in a Thomistic account of nature, 'oughts' are also implicit in an account of human nature (or nature in general). Thus, normative statements can still be derived from nature if nature is construed as teleological.

circumstances and/or because they may not know what to do in order to be happy. If there is a sense in which people can perfect themselves by doing certain things and if all people desire to perfect themselves, then clearly they ought to perform actions which truly perfect themselves. Thus, the is-ought problem is not applicable to Aquinas because he is not deriving oughts from an 'is' which is purely factual.

But there is a second problem with Finnis' appeal to the is-ought gap in order to claim that natural law is not 'based' on an account of human nature. The second problem deals with an ambiguity in the notion of being 'based on'. A conception of the 'good' can be based on an account of human nature in the sense that human nature is prior to the notion of the 'good' Thus, we can view something as 'good' because it is desired, for instance. Certainly, Aquinas and Finnis would agree that the basic forms of good are not 'good' because they are desired; rather, the basic forms of good are desired because they are good. Thus the notion of 'good' is prior to desire and inclination. But this does not mean that we do not come to know what are basic goods by understanding human nature. Although basic goods are prior to desire in being or in nature, they may be posterior in knowledge (or in how we come to know them as good). In terms of an order of knowledge or learning, it is possible (and, indeed, likely) that we must first understand human nature and human desire before we can come to know what are basic goods and what is the nature of basic goods. In this sense, the nature and order of basic goods may be 'based on' human nature and a teleological account of nature in general. Thus, Aquinas 'bases' the order of natural law precepts on human nature. He states that

> Since, however, good has the nature of an end, and evil, the nature of the contrary, hence it is that all those things to which man has a natural inclination are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of

> avoidance. Therefore, the order of the precepts of natural law is according to the order of natural inclinations.[72]

Aquinas proceeds to describe inclinations which are shared by all living things, inclinations which are shared by all animals, and inclinations which are peculiar to human nature. The order of the precepts of law is based on the order of inclinations. Finnis' response to this passage is to say that Aquinas mistakenly injected metaphysical considerations into the reconstruction of practical discourse.[73] But it is only a mistake because Finnis fails to see that the is-ought gap is not applicable to a teleological account of nature and because he fails to distinguish different senses in which natural law can be 'based on' human nature and inclination.

But, because Finnis separates his account of natural law from an account of human nature, there is a second way in which Finnis' account of natural law differs from Aquinas' natural law philosophy. Because basic goods are, for Finnis, understood independently of any order in human desire and inclination, Finnis describes seven basic goods or ends for humans which are objectively equal; and, thus, people should respect all of the basic goods in their actions, regardless of which goods they may desire or feel inclined to prefer. This is very different from Aquinas' account of the ultimate good. Aquinas argues that the one ultimate end (i.e. an ultimate reason for seeking anything at all) is happiness. All human beings desire happiness because happiness is what is truly perfective of human nature. Because humans are by nature rational (this is the distinctive mark of our humanity), it is the perfection of our rational nature which is our highest perfection. Thus, the contemplative life is for Aquinas the most happy life. But this does not mean that

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[72] St. Thomas Aquinas, Summa Theologica, I-II, qq. 94, aa.2, 637.
[73] NL, 94-95.

everyone should spend all their time thinking. To say that the perfection of our rationality is the highest value is not to say that there are not other intrinsically valuable goods; but it does mean that all other goods (like life and companionship) must be understood as good of a rational being. The 'good' or end for human beings has a hierarchical structure because Aquinas bases the order of 'goods' with a complex, hierarchical account of human nature.

The difference in the account of 'good' and its relation to human nature (or a teleological account of nature) can be attributed to a third difference in the philosophical approaches by Finnis and Aquinas. Finnis emphasizes the analysis of the language of morals in his account of natural law, while Aquinas brings in metaphysical and empirical observations about human nature and action in his moral philosophy. Veatch and Rautenberg describe the consequence of this emphasis on the language of morals. Because Finnis emphasizes the language of morals, he comes up with a conclusion similar to one that Hare comes up with; if what is truly distinctive of the language of morals is its universalizability (that 'oughts' apply to all people), then emphasis on desires and inclinations is not relevant to morality.[74] As a result, Finnis describes goods primarily in terms of reasons for action and independently of desire or inclination. In this way, Finnis' account of 'good' has more in common with Kantian duties than with Thomistic goods.[75] Basic human goods, for Finnis, are to be respected even if they are not desired. Thus, I can ask of Finnis, why should I respect the good of knowledge when I have no desire or inclination for knowledge, while I cannot ask Aquinas why I should pursue knowledge (because, by Aquinas' account, we desire perfection of our nature, i.e. knowledge,

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74 Veatch and Rautenberg, "Does the Grisez-Finnis-Boyle Moral Philosophy Rest on a Mistake" Review of Metaphysics: A Philosophical Quarterly, 811.

75 *Ibid.*, 826.

whether we know it or not). Thus, not only is Finnis' theory of law in keeping with contemporary philosophy of law, but his approach to ethics is also much more in keeping with contemporary ethics than it is with the Thomistic approach to morality.

But because Finnis shares many assumptions with contemporary ethics, many of his main conclusions about morality will remain unconvincing. The strength of Aquinas' natural law philosophy is in its metaphysical ground. Not only was his moral philosophy consistent with his metaphysics, his moral philosophy was also reinforced by it. Without this metaphysical ground, Finnis must appeal to the self-evidence of basic goods. But even if I accept that the basic goods are self-evident (and this is certainly a controversial point), why must I accept that there is no objective hierarchy among goods? Finnis seems to think that an objective hierarchy is needed in order that everyone should respect all of the basic goods. But only if an objective hierarchy of goods implies that 'lower' goods are treated as purely instrumental will it follow that people should not respect all the basic goods.[76] Aquinas' hierarchical account of good is a counter-example to Finnis' argument. Thus, Finnis' rationale for believing that there is no objective hierarchy seems to be based on the mistaken belief that an objective hierarchy implies that 'lower' goods are purely instrumental. Finnis also seems to argue that the basic goods are objectively equal because they are not reducible to any one good. But, again, if we consider Aquinas' account that the perfection of our rational nature is the highest good, this does not mean that the preservation of life, for instance, is reducible to reason; it simply means that other goods

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[76] Ralph McInerny makes this point in Ethica Thomistica: The Moral Philosophy of Thomas Aquinas. He states, "whether the acceptance of an objective hierarchy among basic values deprives one of a basis for forbidding acting directly against a basic value is not evident. Only if the hierarchy reduced a basic good to merely instrumental status would this follow." (*Ibid.*, 58)

must come under the guidance of reason in order to be constituents of the human good.[77] If the rationale for believing that the basic goods are objectively equal is undermined, can Finnis appeal to self-evidence? Although it may be uncontroversial that people can desire each of the basic goods for its own sake and that you can find some person to 'treat' each good as the highest, it is by no means self-evident that they are all equally high. It is by no means self-evident, as Raz shows, that comprehensive or basic goods are even comparable. Is it really self-evident that play is as valuable as life? Is it really self-evident that any basic good is as valuable as practical reasonableness? Thus, it seems that Finnis cannot support his belief that the basic goods are objectively equal.

But there is another problem with the justification for Finnis' account of morality. He argues that his natural law philosophy is not based on a teleological account of nature or human nature by showing that the basic forms of good are not derived. But the basic forms of good are not morality as such. The basic forms of good are what makes actions intelligible, and not, without qualification, what makes actions moral. Morality (and moral oughts) is the product of the requirements of practical reasonableness since these requirements provide the proper orientation to the other basic goods. But what is the justification for the requirements of practical reasonableness? Why should we believe that the requirements of practical reasonableness are not culturally relative? Finnis implicitly seems to suggest that by following the requirements of practical reasonableness, one remains open to "integral human fulfillment". Thus, Finnis seems to justify the universality of the requirements of practical reasonableness by appealing to "integral human fulfillment". But what is lacking in his account of natural law is an explanation of the role

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[77] Ralph McInerny makes this point in Ethica Thomistica: The Moral Philosophy of Thomas Aquinas. See, in particular, pages 40-48.

of integral human fulfillment and how reference to it justifies the universality of the requirements of practical reasonableness. Further, it seems that reference to "integral human fulfillment" would imply an essential relation between moral oughts (the requirements of practical reasonableness) and a teleological account of human nature. Without more elaboration on the nature of "integral human fulfillment" and its role in justifying or explaining morality, Finnis' account of morality (and, in particular, the universality of the requirements of practical reasonableness) lacks both justification and explanation.

Finnis' account of function, form and manner of law is almost identical to the accounts given by contemporary legal positivists. The only difference between Finnis' account of law and the accounts given by contemporary legal positivists is reference to the common good. Finnis argues that this reference to the common good in his account of law is not some added-on feature of his account of law. Without an appeal to the common good, an account of the function, form and matter of law is arbitrary. But is it true that the accounts given by contemporary legal positivists are arbitrary in the way Finnis suggests? There are two possible responses contemporary legal positivists can give. First, they could argue that their choice of concepts like rules and authority is justified because of its value in furthering theoretical inquiry and moral deliberation. But, as we saw in the previous chapters, the accounts given by contemporary legal positivists have limited theoretical value because of their formal character. But, second, contemporary legal postivists could argue that there is an implicit justification for their formal accounts of law; namely, that an account of law in terms of rules and authority is theoretically valuable because it is neutral

with respect to different conceptions of morality.[78] The question becomes whether it is theoretically more valuable to present an account of law that is neutral with respect to different conceptions of morality or whether it is more valuable to present an account of law with reference to the 'right' morality. It seems that it is more valuable to present an account of law with reference to the right morality (since such an account could deal with both formal and substantive elements of law), if it can be shown to be the right morality. But, because Finnis' account of morality lacks justification (and, indeed, he cannot show that the requirements of practical reasonableness are universal), his project of providing a general account of law (involving a general account of the normative grounds of law) is undermined.

4. Conclusion.

Finnis correctly saw that an account of law, in order to be both general and theoretically valuable, must provide an account of the grounds of normativity of law and the function of law. He also saw that such a general and theoretically valuable account of law required a distinction between right and wrong conduct (or rational and irrational conduct) which is not relative to place and time. His natural law philosophy seemed to provide a theory of law which is in keeping with contemporary philosophy of law and yet dealt with more substantive issues about the grounds of the normativity of law.

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[78] Bentham's legal positivism probably does not have this implicit justification, since the ultimate justification for his account of law is is most likely based on utilitarian principles. But even this implicit justification given by contemporary legal positivists may be ultimately based on an appeal to the moral principle of tolerance characteristic of liberal morality.

But the problems that faced legal positivists in their accounts of law were encountered by Finnis in his ethics. Focus on the language of morals takes the ground out from under a moral theory which seeks to provide universal moral principles. Without a grounding in human nature and metaphysics, Finnis is left with a formal account of good with no relation to desire or inclination, or to human nature. He is also left with an appeal to self-evidence in order to justify not only the existence and nature of the basic goods, but also their objective equality. Further, his account of the requirements of practical reasonableness seem to be justified by reference to integral human fulfillment. Because Finnis wants to separate metaphysical issues from moral issues, his account of integral human fulfillment is empty and, thus, cannot justify the content or the universality of moral principles. And, if his account of morality (and its universality) lacks justification, so does his general claims about the nature of law.

Conclusion.

1. The significance of the preceding chapters.

Contemporary philosophers of law share many assumptions about the nature of philosophy and the nature of social practices. Contemporary legal philosophers assume that the aim in philosophically studying legal practice is to make general, explanatory claims about the nature of law. Even philosophers like Dworkin analyze concepts in order to make general claims about legal practice. Philosophers of law also assume that social practices, including their own philosophical practice, are normative practices. The fact that social practices like law are normative means that the philosopher must take account of the normativity of social practices in providing an adequate philosophical account of them. We have seen that what distinguishes contemporary legal positivism from more traditional forms of legal positivism is the attempt to characterize law as a normative practice and not as a merely coercive one. The fact that philosophy of law is itself a normative practice means that the adequacy of competing accounts of law must be assessed with reference to the norms that govern philosophical inquiry. But, as we have seen, what is often not explicitly discussed by contemporary legal theorists are the norms which govern philosophy of law.

In order to see what norms do govern the contemporary philosophical study of law (and how contemporary accounts of law should be evaluated), more needs to be understood about the way contemporary philosophers approach the study of law. In

Chapter 2, we have seen that contemporary theorists share assumptions about how they should approach the philosophical study of social practices like law. Generally speaking, philosophers try to bracket-off or put aside metaphysical or ontological disputes and focus instead on the analysis of language or concepts. They believe that a general account of law can be produced through the analysis of concepts and an examination of the implications of this analysis. As we saw, contemporary forms of natural law philosophy can be distinguished from more traditional forms by their insistence on separating metaphysical and ontological questions from ethical and political questions. Finnis often appeals to the Humean position that an 'ought' cannot be derived from an 'is' to argue that a natural law ethics cannot be based on metaphysical assumptions about nature or human nature. Thus, contemporary natural law philosophers share with contemporary legal positivists the assumption that an adequate understanding of law can be achieved without a discussion of metaphysical or ontological issues. A general and philosophical understanding of law can be achieved through the analysis of concepts.

But what do contemporary philosophers of law mean by conceptual analysis? In Chapter 2, we have seen what the analysis of concepts is not . First, the analysis of the concept of law does not simply involve supplying the necessary and sufficient conditions for the use of the word 'law'. The focus in analyzing the concept of law is not simply showing in what contexts the word 'law' is used, but in understanding and explaining the nature of law. Such a philosophical understanding may mean (and often would mean) that some legal participants are using the word 'law' incorrectly. Because legal participants like judges, lawyers and citizens can practice law without a more reflective understanding of their own practice (and, indeed, their use of the word 'law' is governed by sometimes very narrow practical concerns rather than theoretical concerns), their use of the word 'law'

cannot be the sole criterion for assessing a philosophical analysis of the concept of law. Although the analysis of concepts involves examining "the standard uses of relevant expressions"[1], it does not consist solely of an enumeration of these standard uses or an enumeration of the conditions for these standard uses. A philosophical understanding of the practice of law must presuppose the unreflective understanding that legal participants possess; but it must involve more than a description of the unreflective understanding in order to be philosophical.

Second, the analysis of the concept of law does not simply involve providing a representation of legal practice. Contemporary philosophers of law follow Hart and Bentham in criticizing as overly simplistic a straightforward correspondence between words like 'law' and reality. An analysis of the concept of law does not simply involve providing a linguistic picture of the practice of law which can be assessed by simply seeing whether the description 'fits' reality. In Chapter 2 we saw that to view contemporary philosophy of law in this way is to distort not only the way contemporary philosophers of law approach the study of law but also the way different accounts of law are assessed. Although analyses of concepts of law are descriptive in the sense that they must take account of the concrete practices in which these concepts arise and are situated, the aim of conceptual analysis is to explain and understand law rather than providing a linguistic reflection of legal practice.

In the previous chapters, we saw that the accounts of law given by contemporary legal philosophers consist of two parts, and, because of this, different accounts of law can be assessed in two ways. First, contemporary accounts of law involve the analysis of concepts. Conceptual analysis involves not only explaining or elucidating the meaning of

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[1] CL 1961, v.

concepts, but also explaining or elucidating the implications of this analysis. Thus, we can assess different accounts of law by seeing whether they are internally consistent (that is, whether the alleged implications do in fact follow from the concepts so analyzed), as well as whether or not they do justice to their subject-matter. Whether an analysis of a concept does justice to its subject-matter is, as we shall see, a problematic question. It is problematic because, as we have just noticed, conceptual analysis is not straightforwardly descriptive of either practices or linguistic usage. But we shall come back to this question in the next section. For now, let us briefly consider the internal consistency of different accounts of law. In three cases, I have argued that the conclusions which philosophers have attempted to justify through the analysis of concepts did not follow from their respective analyses. First, Dworkin argued that, based on a proper understanding of the concept of interpretation, both the judge and the legal theorist in their interpretations of the law must appeal to moral principles in order to morally justify the law. In Chapter 1, I have shown that Dworkin cannot support his conclusion that the descriptive and morally normative elements of legal theory and legal practice are inextricably connected by appealing to his understanding of interpretation as "constructive". In other words, I have argued that Dworkin's conclusions about law and legal theory do not follow from his analysis of the concept of interpretation. Second, one of Raz's strongest arguments in support of exclusive legal positivism is based on an appeal to the concept of authority. In Chapter 4, I have shown that Raz's exclusive legal positivism cannot be supported by his analysis of the concept of authority. Both Dworkin's and Raz's account of law were criticized because their strong conclusions about the relation between law and morality did not follow from their analyses of key concepts of law. Finally, in Chapter 5 we saw that Finnis' attempt to provide a general account of the normativity of law was undermined by

his analysis of the concepts of basic good and practical reasonableness. Because he could not show that the requirements of practical reasonableness (i.e. morality) are not culturally relative, his analysis of practical reasonableness could not support his general claims about the normativity of law. Thus, contemporary accounts of law can be assessed by appealing to a norm of consistency, and seeing whether conclusions can be supported by (or do indeed follow from) the analysis of concepts.

But there is a second part in understanding and evaluating contemporary accounts of law. Contemporary accounts of law must also involve some justification for the concepts chosen for analysis. As we saw in the preceding chapters, different philosophers of law focused on different concepts: Dworkin focused on the concept of interpretation, Hart focused on the concept of rule (and the related concept of rule-following), Raz focused on the concept of authority, and Finnis focused on the concept of practical rationality. Each philosopher believed that the concept that he analyzed was important for the task of understanding the nature of law. Explicitly or implicitly there must be some justification for focusing on the concepts that are analyzed. As we saw in Chapter 5, Finnis argues convincingly that analytic jurisprudence can only escape methodological arbitrariness by presupposing evaluations in the selection of concepts.[2] He argues that only contemporary natural law philosophers make explicit the reasons why they focus on the concepts they do; he states, "Natural law theory tries to do openly, critically, and discussably what most other analytical and descriptive theorists do covertly and

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[2] Finnis also argues that evaluations are presupposed in the formation of concepts. It is not clear what kind of evaluations Finnis thinks are presupposed in the formation of concepts. But what is clear is that this issue can only be decided if it can be determined what it means for an analysis of a concept to do justice to its subject-matter. I shall consider these issues in the next section.

dogmatically."[3] But, as we saw in Chapter 2, Hart does provide some justification for the concepts he chooses to analyze. He states,

> if we are to make a reasoned choice between these concepts [offered by Natural law theorists and legal positivists], it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance or clarify our moral deliberations, or both.[4]

Generally speaking, an account of law (and the importance of the concepts chosen for analysis) is evaluated by reference to its theoretical value, that is, its value in furthering theoretical inquiry and clarifying moral deliberations. Finnis would not find fault with this way of describing the importance or significance of concepts of law. Thus, we can assess competing accounts of law by seeing which account is useful in overcoming confusions and misconceptions in our theoretical discussions about law and in our moral deliberations about law.

In Chapter 3, I examined Hart's account of law. It was shown that although Hart's account of law does not suffer from the internal inconsistency that Dworkin's and Raz's accounts suffer from, he ends up with an account of law which has limited theoretical value. But in the process of assessing the theoretical value of Hart's account of law, two further assumptions about the nature of conceptual analysis emerge. These two assumptions, together with his general understanding of the nature of legal philosophy, force him to choose between a relativistic account of law and a general and formal account of law with limited theoretical value. In this conclusion, I will examine the two assumptions which emerge from the evaluation of Hart's account of law and show that they lead Hart to choose what is for him the lesser of two evils, namely, a formal account of law

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[3] John Finnis, "Introduction" in Natural Law, xii.

[4] CL, 204-205.

with limited theoretical value. But I will also generalize this criticism by arguing that these two further assumptions guide contemporary philosophy of law in general. Thus, because of some shared assumptions about the nature of philosophy, contemporary philosophy of law in general is led to choose between two alternatives which have limited philosophical value; they must choose between a relativistic account of law or an extremely formal account of law. Only by challenging the basic assumptions which guide contemporary philosophy of law, can a genuine alternative be found. In the final section of this dissertation, I will argue that there is a more promising way to do philosophy of law by showing how an alternative approach challenges some of the basic assumptions in contemporary philosophy of law.

2. The significance of two further guiding assumptions about the nature of philosophy.

Two further assumptions emerge from our examination and evaluation of Hart's account of law. The first assumption has its origin in a Wittgensteinian understanding of philosophy and social sciences[5] and it explains how concepts should be analyzed. Concepts in general should be understood and analyzed as situated within the practices in which they arise and occur. Concepts of law, for instance, should not be understood apart from the practice of law and the participants who use them. There are two reasons why the analysis of concepts should be understood in this way. First, because philosophy of law involves the philosophical study of a social practice, and social practices and human

[5] As we saw in Chapter 3, Hart received this Wittgensteinian understanding of philosophy and social sciences through Peter Winch. Of course, it is possible that Winch's understanding of Wittgenstein is not Wittgenstein's understanding of philosophy; but, for our purposes, all we need to know is the Wittgensteinian understanding of philosophy that Hart received from Winch.

behaviour have a meaning and intentionality that the behaviour of physical objects do not possess, the philosopher of law must take account of this 'internal aspect' in order to take adequate account of social practices. This means that the often unreflective understanding of their own activity that practitioners possess should provide the basis for a more reflective, philosophical understanding of the practice. But there is also a second reason why the analysis of concepts should be understood in this way. Wittgensteinians like Winch argue that where philosophy in general has gone wrong is when concepts are treated in isolation or abstracted from concrete practices. Plato's realm of forms and Descartes' ego may be dramatic examples of the isolation and reification of concepts, but they have a subtle and, for Wittgensteinians like Winch, a subversive influence on contemporary philosophical minds. In this way, Wittgensteinians share with William James an opposition to "vicious abstractionism" and argue that philosophy must understand concepts as they 'work' within concrete social practices.

As we saw, both in Chapters 2 and 3, Hart agrees that concepts should be analyzed and understood in the social contexts in which they are situated. He describes the importance of making distinctions and analyzing concepts with an eye to "... the different ways, some reflecting different forms of human life, in which language is used."[6] He also states that,

> many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated.[7]

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[6] H.L.A. Hart, Essays in Jurisprudence and Philosophy, 2.
[7] CL 1961, v.

Hart stresses the need to analyze concepts with reference to the concrete practices in which they are situated. But, moreover, Hart's account of the existence of rules and the normativity of law involves explicit reference to the way participants view their own practice and the language they use. He states that the existence of rules is shown by the

> critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity and in acknowledgments that such criticism and demands are justified, all of which we find in their characteristic expression in the normative terminology of 'ought', 'must' and 'should', 'right' and 'wrong'.[8]

Hart appeals to the internal point of view of legal officials in order to characterize the normativity and existence of a legal system; because legal officials treat laws as standards of criticism and use a normative vocabulary when taking about the law, laws are norms for judgment and behaviour. He takes account of the normativity of law by stressing the attitude and language of legal officials. The unreflective understanding which legal participants possess becomes the basis for Hart's account of law.

The second assumption which emerges from the examination and evaluation of Hart's account of law is perhaps one of the central assumptions of analytic philosophy; the idea that questions and issues which can be distinguished should be treated and understood separately. The underlying idea is that the whole can be best understood through a careful examination of the parts. A complex phenomenon like law can only be understood when aspects of this phenomenon are distinguished and understood separately. Questions about what is the case should be distinguished and treated separately from questions about what

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[8] *Ibid.*, 56.

ought to be. And with respect to what is the case, metaphysical questions about nature and human nature should be distinguished from empirical questions.

Distinguishing a 'descriptive' account of law from a morally justificatory account of law is the cornerstone of legal positivism, and Hart's contemporary version of legal positivism is no exception. Further, as we saw in Chapter 2, Hart attempts to put aside metaphysical issues (even when he characterizes traditional natural law philosophy) when he deals with questions about the existence or nature of law. But Hart goes further and attempts to distinguish more substantive questions from the question of the existence and nature of law. As we saw in Chapter 3, the significance of the rule of recognition is that it enables him to take account of legal validity without reference to a ground of validity which would transcend legal rules. The rule of recognition enables him to separate issues of legal validity from some possibly metaphysical and moral issues about some extra-legal grounds of the validity of laws. Further, his attempt to deal with the normativity of law involves separating a factual issue (that legal officials do in fact treat laws as norms) from a more substantive issue (the grounds for the normativity of law or the reasons why legal officials do or should treat laws as norms). Thus, it is clear from Chapter 2 that these two assumptions guide Hart's account of law.

It is the fact that these assumptions guide Hart's account of law that leads him to a formal account of law with limited theoretical value. The first assumption basically means that his understanding of law (and his analysis of concepts of law) must be based on the unreflective understanding of legal practitioners. Concepts must be understood in terms of the context in which they are situated. But how can a more reflective understanding of a practice (and a philosophical analysis of a concept) be achieved if the basis for this reflective understanding (and this philosophical analysis) is the unreflective understanding

which participants possess? In other words, if the analysis of the concept of law is based on how participants use the word and view the practice, how can we conclude anything more than how participants use the word and view the practice?

If Hart is to achieve a more reflective understanding of the practice of law then he must pose questions which participants may not have considered. But then it would be even more questionable to appeal to the way participants use words and view their own practice to answer questions which they themselves have never considered. Perhaps by examining the unreflective understanding of participants a philosopher could determine the seemingly more reflective understanding of how concepts 'work' within a social practice. But the fact that participants in different legal systems view their own practice in different ways means that the threat of relativism is very real for a philosopher who equates the meaning of concepts with the way in which concepts 'work' in concrete practices. The only plausible way to escape relativism with respect to the meaning of concepts of law is if meaning is grounded in some shared ways in which legal participants understand their own behaviour. Thus, Hart makes extremely formal claims about law in order to make his claims general and non-relative. His account of law focuses on the very general claim that law is normative (and not merely coercive) and its normativity can be understood in terms of rules. Further, his understanding of rules and rule-following is based on some fairly uncontroversial claims about the way legal officials view rules. Empirically speaking, legal participants in different legal systems and even in the same legal system may disagree about the grounds for the normativity of law, but they do not tend to disagree about the fact that legal officials treat the law as standards for criticism. Hart's account of the normativity of law is formal with respect to the grounds for the normativity of law. Thus, because Hart understands the meaning of concepts in terms of the work they do in concrete practices, he

can only escape relativism (and succeed in making general claims about the law) by putting aside more substantive issues and making formal claims about the law. But it is these more substantive issues which seem to distinguish a philosophically valuable understanding of law from the unreflective understanding which participants possess. Thus, the formal account of law which Hart ends up with may be more reflective because it is more general, but it lacks the substantive content needed if it is to be theoretically valuable.

The second assumption that guides Hart's account of law provides further support for his formal account of law. Basically the second assumption means that questions and issues which can be distinguished should be treated and understood separately. Thus, issues about the grounds for the normativity of law can be distinguished from the fact that laws are treated as norms by legal officials. Conceiving of law as a self-contained and self-generating system of rules is attractive because it enables us to distinguish questions of legal validity from possibly metaphysical and moral questions about the more ultimate grounds for this validity. But all this separating of questions means that more substantive questions (and often more traditional philosophical questions) are distinguished from less controversial and empirical claims about the way people tend to view the law. The result is an account of law which may be less controversial than traditional accounts, but has limited theoretical value because it has effectively put aside most questions of philosophical value.

But can this criticism of Hart be generalized to contemporary philosophy of law? Do these two assumptions guide contemporary philosophy of law in general? Because contemporary legal positivists are greatly influenced by Hart's work, it is fairly easy to see that they share these two assumptions. Obviously, contemporary legal positivists attempt to distinguish questions about the existence of law from the issue of its moral justification. Further, contemporary legal positivists tend to understand conceptual analysis as requiring

them to situate concepts within the practices in which they arise. As we saw in Chapter 4, Raz appeals to the way legal participants view their own practice and the way they use words in order to explain the meaning of concepts. For example, to argue that the law claims to be authoritative, he appeals to the fact that we call officials "authorities" and the fact that subjects act as if they ought to obey even bad laws while they are in force.[9] This indicates that the analysis of concepts (and the meaning of concepts) must be based, at least to some extent, on the unreflective understanding the participants possess. But does this mean that other contemporary legal positivists like Raz are faced with the same choice as Hart; that is, does the fact that these two assumptions underlie Raz's approach to philosophy of law mean that he is forced to choose between relativistic account of law and a formal account of law with limited theoretical value?

Consider Raz's account of the authority of law. Raz attempts to understand the authoritative nature of law by situating this concept within the concrete practices in which it arises. In other words, in order to give a proper analysis of the authoritative nature of law (which is not viciously abstract), such a concept must be understood as situated within concrete practices. But a problem emerges. Legal participants in different times and different places seem to have very different conceptions of authority and, especially, different conceptions of the grounds of authority. How can Raz provide a general account of the authoritative nature of law given the apparent relativity of the 'internal point of view' of participants? Basically, what Raz ends up doing is providing an extremely formal account of the authoritative nature of law. His account is formal in two respects. First, because he describes the authoritative nature of law in terms of its "claim" to be authoritative, Raz's account of the authoritative nature of law is formal with respect to

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[9] ALM, 300.

whether the law actually is or was authoritative or not. Thus, it is irrelevant for his account of law that for citizens of the Roman Empire, for example, the law was an authority, while many citizens in contemporary liberal societies may not even treat the law as an authority. It would even be irrelevant if citizens had at some time and place viewed the law and legal systems as evils to be avoided, as long as it makes sense generally to say that law "claims" to be authoritative. Because his account of the authoritative nature of law is formal with respect to whether or not the law and legal systems are or were authoritative, it is equally indifferent to historical changes in people's understanding (and possibly the nature) of authority. The fact of the Enlightenment, and the changes this movement made to our understanding of authority (and to the nature of specific kinds of authorities) is irrelevant to Raz's formal account of law.

But Raz's account of the authoritative nature of law is not only formal with respect to whether or not legal systems are (or have been) authoritative, it is also formal with respect to the grounds for the legitimacy of authority. In other words, Raz's account of the authoritative nature of law is independent of whether or not law should be treated as an authority (and equally agnostic about the possible grounds for treating the law as an authority). Raz is not unaware of the fact that people disagree (and have, at different times and places disagreed) about the grounds for legitimate authority. In fact, the grounds for the legitimacy of authority is the traditional subject matter of political philosophy. Raz can only have a general account of the authoritative nature of law which describes law as it is rather than describing law as it ought to be, if his account is formal with respect to the grounds for legitimate authority.

In order to have a general account of law, Raz must describe the authoritative nature of law in a general and formal way; but, as we saw in Chapter 4, it is because of the

formality of the concept of authority that his exclusive legal positivism could not be supported with reference to it. Such a formal account of the authoritative nature of law (and thus such a formal account of law) provides no reasons why the law's function as mediator must exclude other functions that law may perform; or, in other words, Raz's formal account of law cannot show why the law's claim to be authoritative is more essential to its nature than the law's claim to educate, for example. But as we saw in Chapter 4, if Raz attempts to beef up his account of the authoritative nature of law (in order to provide reasons why the claim to be authoritative necessarily excludes other functions of law), then Raz ends up with a traditional account of authority which is relative to some places and some times (with the paradigm place and time being the Roman Empire and the extremely problematic place and time being contemporary liberal societies).

Even in Chapter 5, we saw that Raz clearly situates concepts of morality within concrete social practices. He states, "the principles of political morality themselves grow out of the concrete experiences of a particular society with its own institutions."[10] It is for this reason that he concludes that "their validity is limited by their background."[11] In The Morality of Freedom, he clearly sees that because concepts of morality have their meaning in concrete social practices, his moral justification of law can only be valid in context of contemporary liberal society (and it is for this reason that the moral argument here cannot support his general claims about the authoritative nature of law). Thus, in Raz's writings, we can see not only the same two assumptions which guide Hart's work, but we can also see how these two assumptions can lead to two consequences (a relativistic account of the meaning of concepts, and a formal account with limited theoretical value).

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10 MF, 3.
11 *Ibid.*, 3.

Although it is fairly easy to see that contemporary natural law philosophers like Finnis share with contemporary legal positivists the same two assumptions, it is not so easy to see that these two assumptions have the same deleterious effects on their account of law. But I will show not only that these two assumptions do in fact guide Finnis' natural law philosophy, but also that similar problems arise for the account of ethics which grounds his theory of law. In Chapter 5, it was shown that contemporary natural law philosophers attempt to be more palatable to modern minds by arguing that their account of natural law is not based on a teleological account of nature (or any account of nature at all). Finnis argues that issues about what ought to be must be distinguished from issues about what is the case. In fact avoiding the supposedly illegitimate leap from is to ought is one of the distinguishing and guiding features of contemporary natural law philosophy. Further, Finnis and other contemporary natural law philosophers share with contemporary legal positivists the view that philosophy proceeds through the analysis of concepts. Both in his account of morality and in his account of the manner, form and function of law, Finnis appeals to the language used by people (and their unreflective understanding) as a basis for his natural law philosophy. Thus, it is clear that Finnis shares with contemporary legal positivism, at least to some extent, the same two assumptions about philosophy. But it is much harder to see what effect this has on Finnis' account of law, because these assumptions affect his account of law only indirectly by affecting his account of morality.

As we saw in Chapter 5, Finnis argues that natural law cannot be based on an account of nature because an ought cannot be derived from an is. But what Finnis effectively does is show that the evaluative substratum of all practical judgments or the basic forms of good are underived and self-evident (thus, they require explanation and elucidation but not justification or derivation). These basic forms of goods are ultimate

reasons for actions, and, as such, they rationally motivate us to choose actions which participate in these basic forms. Moreover, there is no hierarchy of basic goods since none can be reduced to an aspect of another. But it is important to see that these basic forms of good are not morality; reference to the basic values makes actions intelligible, but it does not, without qualification, make actions moral. The question of morality is what stance we should take to these basic goods in order to fully flourish as a human being. And it is the requirements of practical reasonableness which are our moral guides for our participation in the other basic goods. In Chapter 5, we saw that the only justification that Finnis seems to give for the requirements of practical reasonableness involves an implicit appeal to human flourishing or "integral human fulfillment".[12] But because he separates metaphysical or factual issues and moral issues, he fails to elaborate the nature and role of "integral human fulfillment." In Chapter 5, it was shown that Finnis ends up with an empty notion of integral human fulfillment which, as a result, cannot support his account of morality. Thus, Finnis faces the same problem in his account of morality that contemporary legal positivists face in providing an account of law. Because Finnis analyzes concepts (including moral concepts) by situating them within concrete practices and by separating questions about what is the case (factually and metaphysically) from questions about what ought to be the case, he can only avoid relativism and provide a general account of law (based on this non-relativistic account of morality) by providing an account of human

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[12] In a later work, Finnis acknowledges that one defect in Natural Law and Natural Rights is its failure to explain the role of integral human fulfillment. See comments in the selected bibliography on page 150 of "Practical Principles, Moral Truth, and Ultimate Ends" (The American Journal of Jurisprudence, Vol. 32, 1987, 99-151). As we saw in Chapter 5, the role of integral human fulfillment seems essential to explaining why the requirements mentioned are requirements of practical reasonableness.

goods which is as formal and empty as the account of integral human fulfillment upon which it is based.

3. An alternative to contemporary philosophy of law.

A promising approach to philosophy of law cannot be found within contemporary philosophy of law as it is understood in this dissertation, since the problem with contemporary accounts of law can be traced to assumptions underlying contemporary philosophy of law in general. If philosophers of law aim to provide general accounts of law by putting aside metaphysical (and sometimes moral and political questions) and by analyzing concepts as they are situated within concrete practices, then the threat of relativism is quite real. The fact of the matter is that if we are true to the idea of situating concepts within concrete practices and if we believe that the meaning of a concept is equal to the 'work' it does in concrete practices, then it is hard to ignore the fact that practices and concepts change. A practice like law is complex and dynamic, changing with time and varying with different social, economic and environmental conditions. The language people use to describe the law (and talk about concepts of law), as well as the unreflective understanding evidenced by the behaviour of legal participants, vary considerably over time and in different places. In order to provide accounts of law which are general and not relativistic, contemporary philosophers of law must focus on extremely general and formal concepts of law. Only formal accounts of law (for instance, in terms of rules) can account for the differences found in the unreflective understanding of legal participants in different times and places. But formal accounts of law effectively treat law and legal practices as static by attempting to make the meaning of concepts like 'authority' and 'law' general.

Such accounts are not only distortive, but also, as we have seen in this dissertation, they have limited theoretical value because they are formal with respect to philosophically interesting and substantive issues.

If we are sincere about the idea that concepts must be understood in the concrete practices in which they arise and are situated, then an alternative to this contemporary approach is to base our understanding of law and legal practice on concepts which are essentially understood as dynamic. Concepts are still analyzed in the sense that their meaning must be understood by the work they do in concrete practices. But this alternative approach is guided by the assumption that concepts do change and in understanding the reasons why they change we can gain a more reflective understanding of the nature of law and legal practice.

There are two examples of philosophers who approach the study of social practices in this way. The first example is Hannah Arendt's approach to understanding the concept of authority.[13] As we saw in Chapter 4, Arendt is not simply interested in providing a static understanding of the concept of authority which is found in all times and all places. Unlike Raz, Arendt is interested in the history of the concept of authority (its origin, development and, in this case, its decline). But she is not simply interested in stating the fact that the concept of authority has changed; she is also interested in the reasons why this concept has changed. In this sense, Arendt goes beyond the unreflective understanding of participants and provides a properly philosophical account. Further, because she can situate concepts within more concrete historical practices, she can include within the analysis of the concept more substantive issues (like the reasons for the legitimacy of

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[13] See Hannah Arendt's "What is Authority?" In Between Past and Future: Eight Exercises in Political Thought.

authority). Thus, Arendt's approach to philosophy seems to be more promising than the approach by contemporary legal positivists because it is truer to the idea of situating concepts within concrete practices and because it goes beyond the unreflective understanding of participants and deals with more substantive issues.

A second example of this approach to the philosophical study of social practices is Foucault's Discipline and Punish: The Birth of the Prison .[14] In this work, Foucault analyzes the concept of punishment. Like contemporary philosophers of law, Foucault analyzes concepts by situating them within the concrete practices in which they arise. But like Arendt, he works with the assumption that concepts are as essentially dynamic as the concrete practices in which they are situated. Foucault focuses, mainly, on the changes in how people view punishment (and the changes in the unreflective understanding evidenced by changes in behaviour and practices). But, again, he is not just doing a history of an idea in the sense that he simply states different ways in which an idea like punishment has changed. Foucault is primarily interested in the reasons why a concept like punishment has changed, and he ends up making some general claims about knowledge and power by focusing on how our understanding of punishment has changed over time. Again, by situating a concept like punishment within more concrete and dynamic practices, Foucault can deal with more substantive issues than contemporary philosophers of law can. But also Foucault's work is not reduced to the history of the idea of punishment because the reasons for the changes in our understanding of punishment can be generalized and support a philosophical account of knowledge and society.[15] Thus, this approach to philosophy

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[14] Michel Foucault. Discipline and Punish: The Birth of the Prison. Translated by Alan Sheridan. New York: Vintage Books, 1995.

[15] Foucault has often maintained what I would call the contradictory opinion that he is not presenting a positive philosophy or theory and that he is presenting a critique of society. But it seems that his critique of society must be based on some positive claims

seems to have more promise than the approach of contemporary legal philosophers, but it also does more justice to the aim of situating concepts in the practices in which they arise and are shaped.

But there is a problem with the approach of Arendt and Foucault for philosophers interested in providing a general account of law. Although Arendt and Foucault do make general claims about society and knowledge based on their analyses of dynamic concepts like authority and punishment, the value of these general claims for understanding law, in general, is questionable. Foucault, for example, ends up with the general thesis that knowledge is power. This statement has value as a criticism of institutions and some philosophical accounts of knowledge and practices, but as the basis for a positive philosophical account of an institution like law (or any other institution) its value is questionable. The question why one account of knowledge and social practices is preferable to another becomes a question why one power relation is preferable to another, and there is nothing which can be appealed to in order to justify why one power relation is preferable to another. Similarly, Arendt's analysis of the concept of authority certainly has theoretical value as a check on accounts of authority like Raz's which would neglect the origin and historical development of the concept of authority. Arendt's account of authority exposes the formalism of Raz's account of authority and, by implication, its limited theoretical value. But because 'authority' is a dynamic concept, it cannot provide a basis for a general account of law. And given that practices like law are viewed as essentially dynamic, it is hard to see how a general account of law is possible. Thus, although the

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about the nature of knowledge in order to have some force. Even maintaining that knowledge is power (which is the minimum that Foucault is claiming in a book like Discipline and Punish) is still a general and positive philosophical claim which is illustrated and implicitly argued for his analysis of the concept of punnishment.

approach by Arendt and Foucault is truer to the idea of situating concepts within practice, it is hard to see how a general and positive account of law is possible.

The second alternative way to do philosophy of law which I will argue has more promise than the approach by contemporary philosophers of law and the approach by philosophers like Arendt and Foucault is based on a challenge to the second assumption guiding contemporary philosophers of law. The second assumption states that if issues can be distinguished then they should be dealt with separately. This assumption led contemporary philosophers of law (even contemporary natural law philosophers) to distinguish metaphysical issues from both factual and moral issues. And, as we saw in the previous section, it is because of this insistence on separating metaphysical issues from factual issues and both metaphysical and factual issues from moral issues, that Finnis was led to neglect explaining the nature and role of integral human fulfillment in his account of morality. An explanation of the nature and role of integral human fulfillment will, no doubt, involve a metaphysical and factual discussion about human nature (and possibly nature in general). This need not mean that an account of morality is "derived" from an account of nature, but an account of morality may be based on an account of nature without being derived in this narrow sense. Further, as we saw in Chapter 5, an account of nature may not be factual in the narrow way that it is often conceived by analytic philosophers. Thus, an alternative way to do philosophy of law is to 'base' an account of law (and social practices in general) on a metaphysical account of nature or human nature. One obvious example of this approach to philosophy of law is Aquinas' natural law philosophy. As I have shown in Chapter 5, Aquinas's account of morality is 'based on' and reinforced by his teleological account of nature and human nature in general. As I have also shown in Chapter 5, this does not involve an illegitimate move from ought to is.

But, in general, this second alternative (the suggestion that metaphysics may provide a basis for a general account of law) is part of a more general alternative that philosophy of law should not be understood as an autonomous area of philosophy. Philosophy of law is indeed essentially connected with moral and political philosophy. Further, moral and political philosophy are not essentially unconnected with metaphysics or questions about human nature. It is the attempt to characterize law in a way that is distinct from other philosophical questions that has led to formal and theoretically unillluminating accounts of law.

The problem with this second alternative means that we must deal with disputes that seem to originate with Thales and with the beginning of philosophy itself. It means dealing with disputes and questions which Wittgenstein had banished from the arena of philosophy. And there is a question whether we can go back to our old dispensation. Can we regain our old faith in the possibility of an encompassing philosophical perspective and the intelligibility of the world? What I have tried to show in this thesis is that the possibility of a general and philosophical account of law means abandoning the Wittgensteinian assumptions which underlie contemporary philosophy of law (and, perhaps, contemporary philosophy in general). Although the alternative approach may involve more controversial and disputed questions than are found in contemporary philosophy of law, it also involves more substantive and fundamental questions. The search for answers will not be straightforward, but at least the search based on this alternative approach holds more of a promise for a general philosophical understanding of law which is theoretically valuable. And, in the end, it is this promise and faith in the promise of philosophical inquiry that must be our ultimate guiding assumption in philosophy.

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