

DEVELOPING A FRAMEWORK: MORALITY'S ROLE IN THE LAW

DEVELOPING A FRAMEWORK: MORALITY'S ROLE IN THE LAW

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A Thesis

Submitted to the School of Graduate Studies

in Partial Fulfillment of the Requirements

for the Degree

Master of Philosophy (M.A.)

McMaster University

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MASTER OF ARTS (2002)
(Philosophy)

McMaster University
Hamilton, Ontario

TITLE: Developing a Framework: Morality's Role In The Law.

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SUPERVISOR: Professor W.J. Waluchow

NUMBER OF PAGES: v, 95

ABSTRACT

Far too often, theorists talk past one another making it difficult to compare and contrast the differing viewpoints. Described by what I term the ‘problem of clarity,’ much legal discourse has suffered at the hands of misunderstood views and lack of attention paid to focusing on arguing the truth or falsity of the same propositions. In this dissertation, I aim to develop a conceptual framework through which past, present and future debates may be understood. Focusing on morality’s role in the law, this thesis sets out to alleviate the problem of clarity as it affects discourse in jurisprudence. Distinguishing objects from theories, I proceed to outline various ‘levels’ at which we may understand morality as functioning in law. Morality’s role in law, I argue, can be understood as falling under one of three distinct levels: the ‘practice-level,’ the ‘theoretical-level,’ or the ‘meta-theoretical-level.’ In putting forth this framework, I hope to provide guidelines through which legal theorists will be able to focus concerns and debates. It is the aim of this thesis to help alleviate the difficulties arising out of the problem of clarity, for example, by providing a framework in which theorists will be able to work, specifically in matters concerning morality’s role in law.

ACKNOWLEDGEMENTS

I would like to thank the members of my committee, especially my supervisor and friend, Wil Waluchow, who has been the catalyst for my interest in both law and philosophy as a whole. Unbeknownst to him, his friendship and trust kept me motivated at even the darkest of times. I would also like to thank Sami Najm, who was one of the first to introduce me to the world of philosophy. His first year class inspired me to branch out beyond science and pursue philosophy, regardless of the fact that I had little previous experience.

My thanks are also extended to McMaster University for providing me with the opportunity to pursue this degree in philosophy.

I wish to thank my family for their continued support throughout the project. Their timely words, often of encouragement, have helped me to maintain my focus on this project. Also, special mention and thanks go out to Andrea for her unyielding encouragement and assistance throughout the development of this thesis. Finally, to my friends, especially Kent and Mike, I also owe a large deal of gratitude. Mike's guidance and patience throughout the course of this endeavor has gone beyond the demands anyone could ask of a friend. An individual who will undoubtedly make large waves in legal philosophy; it has been an honour to have him as a colleague over the last two years. Lastly, I would like to thank Kent who made nearly every minute of every day of my philosophical experience more enjoyable than I could have imagined – here's to being "us."

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Chapter 1: An Overview

I. Questions of Law

Though arguably a relatively recent branch of philosophical inquiry, philosophy of law lays claim to a rich and somewhat ominous history. Any attempt to capture and summarize the whole of its chronicles would be to say the least a daunting task.

Questions concerning ‘What the law is?’ and ‘What role criminal intent plays with respect to the law?’ are examples of the vast range of topics in which legal philosophy is interested. It is such questions in combination with others, such as ‘What legitimates legal directives authority?’ or ‘What role does society play in creation of the law?,’ which have guided the earliest of discussions. Not surprisingly, these are the same sorts of inquiries that drive today’s jurisprudential debates.

The term *jurisprudence* - whose roots are in the Latin *juris*, meaning right or law, and *prudential*, meaning foreseeing or knowledge – is often applied in an effort to encompass the diversity of interests falling under the philosophy of law umbrella. Generally, questions concerning such notions as crime, punishment, responsibility, authority, rules, validity, and numerous others, have occupied the efforts of those engaging in jurisprudential inquiry. Concerned with investigating the central concepts, principles and ideas of legal thought, those involved in the philosophy of law find themselves engaged in exploring a vast array of issues. Adding further to the list of topics addressed by legal philosophers, as of late, there has been much debate by some

theorists concerning the very manner in which the more traditional concerns of jurisprudence ought to be approached. Accordingly, given the diversity of subject areas within legal philosophy, any analysis or attempt to contribute to the field must begin with a substantial narrowing of the focus of the project to specific and defined aspects of legal philosophy. Prior to any project we must first ask ourselves what it is that we are going to address in our jurisprudential project, a legitimate and fundamental beginning point to any enterprise in philosophy of law.

II. Morality, Law and Legal Theory

One issue of long-standing debate within the philosophy of law, and of special interest to this thesis, is the relationship between law, morality and legal theory. Any review of the literature concerned with this topic will lead readers to find that careful reflection about this relationship requires a variety of approaches. Does morality figure into deliberation concerning the law's requirements? If so, to what extent? What factors fix the truth or validity of legal propositions? In what sense can we speak of the 'value' of legal systems? How does morality figure into this 'value?' Again, to what extent? Intuitively one may be drawn to the idea that law and morality are intertwined given that many laws appear to be rooted in moral standards. To be sure, it seems strange to ask why is murder wrong? Surely, statutes dictating the necessity for the prosecution and punishment of murderers must be created out of, or rooted in, moral principles. And, might not other statutes arise from the same pedagogy? There are many laws whose

existence seems embedded in the most basic of moral norms. Echoes of ‘thou shalt not kill’ or ‘thou shalt not steal’ ring out in legal dictates condemning murder and stealing. Thus, it is no surprise that there is a certain draw to the idea that our notions of morality are echoed in law. Inclinations to presume that morality and the law are coupled, perhaps for the reason that laws follow from divine commands or are representations of certain objective moral principles, are held in good company. Some very prominent legal theorists have presented accounts of law based on these types of notions. While their theories may differ in various ways, natural law theorists such as St. Aquinas, St. Augustine, Finnis and Locke, maintain a common commitment to the importance and necessity of the connection between morality and law. What the law *is*, they claim, is directly related to what the law *ought* to be.

2.1 Natural Law Theory

Questions of how and where the rules of law are found lead us in a direction that aids in our understanding of the natural law position. Law, Aquinas writes, “is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”¹ A law, according to Aquinas, is something that is arrived at through reason. Akin to the discovery of objective rules that exist to benefit the common good, natural law theorists argue that the legal system is comprised of a set of human laws that mirror objective moral principles already in existence. Thus, the

¹ St. Thomas Aquinas, Summa Theologica, The Basic Writings of Saint Thomas Aquinas. (New York: Random House, Inc., 1945), Question 90, Article 4.

natural law position is often characterized as maintaining that all laws are part of a natural law system. Under Aquinas's conception, human laws mirror a natural order consisting of objective principles that humans capture through the process of reasoning. If we were to examine human rights from an Aquinian view, for instance, we would make the claim that though they appear grounded in some sort of social construction, such rights truly exist independently of any social institution. They exist, in fact, as *natural* human rights. As a result, a natural lawyer would argue that any violation of a human right is not simply a violation of a socially constructed rule of law, but rather a violation of the natural law. For natural lawyers, the validity of human law is grounded in their being supported by natural, objective moral principles and rules. It follows from this view that any laws that fail to conform to the natural order are in fact not law. As Aquinas writes, quoting Augustine, "if in any point it [law] deflects from the law of nature, it is no longer a law but a perversion of law."² Aquinas argues that a law is said to be just only if it accords with the rules of reason, keeping in mind that "the first rule of reason is the law of nature."³ The connection between natural law and human law is all too evident in Aquinas's writings. Consequently, so too is morality's relationship to human law.

In Aquinas's words, "that which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice."⁴ The natural law consists in part

² Ibid., Question 95, Article 2.

³ Ibid.

⁴ Ibid.

in the sum of existent objective moral principles whose essence resides in the nature of the universe. As we will later see, this conception of law differs from that put forth by legal positivists who claim that law is ultimately a matter of human construction. Thus, contra the legal positivists, law is not a function of human choices in so far as natural law theorists contend that the legality and legitimacy of a human directive lies in its ability to conform to natural laws, discernible via pure reason. Under the natural law conception, what the law *is* and what the law *ought* to be, are one in the same. In *Salmond on Jurisprudence*, Salmond summarizes the central tenet of natural law theory nicely:

[T]he central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles.⁵

For natural lawyers, the role of morality in the law is, by definition, one of necessity. To speak of an unjust law is tantamount to speaking of a square circle, or a truthful lie. Human laws mirror the natural law. As such, it is thought by the natural lawyers that if something is a law it necessarily satisfies all relevant conditions of morality. Law and morality go hand in hand. All legal theories, they argue, must therefore account for the close relationship between law and morality. Given that natural law theorists make no distinction between analytic and normative issues in law, any attempt to provide a legal theory must incorporate and answer both questions of what the law ought to be and

⁵ Sir J.W. Salmond, *Salmond on Jurisprudence*. 12th ed. (London: Sweet & Maxwell, 1966).

questions of what the law is. Nevertheless, despite its plausibility and appeal to intuition, natural law theory has come under much criticism.

2.2 Legal Positivism

Some have found the inferences that follow from natural law theory most troubling. For example, if laws are only those norms that mirror objective moral principles, what are we to make of laws that are clearly in violation of such principles? How can we account for the laws imposed under the Nazi regime? Specifically, theorists hesitant to accept the natural law account of legal systems question whether the account provided by natural lawyers adequately captures such situations. Many philosophers have argued directly against the supposition of the connection between law and morality that natural lawyers so emphatically espouse. Simply put, legal positivists deny the necessary connection between law and morality, which natural law theorists affirm. Some of the first legal positivists to deal with this relationship made the affirmation that if there was to be any discussions of morality's role in the law, a partitioning of two distinct legal questions must first be recognized. As a necessity, prior to the development of any legal theories, legal theorists must distinguish between questions concerning law as it *is* and law as it *ought* to be.

In *The Province of Jurisprudence Determined*, Austin introduces us to what later became known as the Separation Thesis,⁶ a central tenet of legal positivism, when he writes, “the existence of law is one thing; its merit or demerit is another.”⁷ Throughout the development of his legal theory, Austin differentiates what he views as two significantly different aspects of jurisprudence: the analytic *versus* the normative. For Austin, this distinction marks a key difference between himself and the likes of Aquinas and other natural lawyers who held the normative and analytic questions as necessarily linked. Austin, and legal positivists in general, do not hold Aquinas’s view concerning this necessary connection and, moreover, avoid any such conflation of these two different objects of philosophical inquiry. Jurisprudence, Austin argues, needs to be divided into two separate investigations. And, in the positivist tradition, Austin identifies the proper object of legal philosophy and legal theory as focusing on that area which he terms analytic jurisprudence, an explanatory account of legal systems focusing on what the law is. This differs from the second aspect of philosophical inquiry, the normative enterprise, which, for example, may concern itself with morally charged attempts to justify legal

⁶ The Separation Thesis is one of the central tenets to which legal positivism is committed. This thesis, in combination with the Social Facts Thesis, is often cited in characterizing the legal positivist position. Despite the varieties of legal positivism found in contemporary jurisprudence, legal positivism as a school of legal theory is often differentiated from other legal theories by virtue of their common commitments. And, as mentioned, these commonalities rest in the positivist commitment to the separation thesis and the social facts thesis, both of which will be discussed latter on in the paper.

⁷ John Austin, *The Province of Jurisprudence Determined*, in Keith Culver’s, Readings in the Philosophy of Law. (Peterborough: Broadview Press Ltd., 1999), 110. Hereafter, references to selections of Austin taken from Culver’s book will forego reference to the source, Readings in the Philosophy of Law, and will assume that to be the source, unless otherwise noted.

systems, answering ‘*ought*’ questions. In espousing his own legal theory, Austin emphasizes that these different inquiries must be kept separate to develop a successful theory of law. This, he claims, is where natural law theories have continually fallen short. The natural law theorist conflates these two types of legal philosophic investigation, mixing questions of what the law is with questions of what the law ought to be. Austin writes:

[t]he matter [proper object] of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*.⁸

Under this conception of law, the law exists independently of any non-positive law (e.g. Divine Law, Natural Law). Mentioned earlier, legal positivists argue that law is solely a matter of human construction. Laws properly so-called are positive. Contra Aquinas, the validity and content of a law are matters of social fact.⁹ The claim that both, the law and laws are essentially matters of human construction is fundamental to legal positivism and is one of its central tenets, the Social Fact Thesis. Directly challenging the natural lawyer’s position that a law’s validity exists solely in virtue of it mirroring objective

⁸ *Ibid.*, 96.

⁹ Here stated is the Social Facts Thesis, a second tenet of legal positivism. Discussed earlier, the Social Fact Thesis in combination with the Separation Thesis is often used to characterize the legal positivist position and differentiate it from other schools of legal theory.

moral principles found in the natural law, the positivist's Social Fact Thesis maintains that a law's validity rests in its having the proper social pedigree. Following from the Social Fact Thesis, X can lay claim to be law if and only if it meets the appropriate social criteria of validity.¹⁰ Generally, it is the combination of the Social Fact Thesis with the Separation Thesis that differentiates the legal positivist's position from that of the natural lawyer. Positivists view the law as a self-creating social institution that is self-regulating. And, while positivists are willing to accept that laws often seem to reflect accepted moral principles, such phenomena, whether actual or not, can inevitably be traced to grounding in social fact.¹¹

For positivists, like Austin, a legal system is understood as a set of rules enacted in various ways by humans for humans. Positivists contend that laws are valid if they

¹⁰ For Austin, a law was only a law if and only if it was a command backed by sanction given to the populace by a sovereign. A sovereign was identifiable as the one who was habitually obeyed and who was not in the habit of obeying one identifiable human source.

¹¹ Noteworthy is the division within the legal positivist camp itself. Centering on disagreement as to whether legal validity can ever depend on whether a putative law reflects a moral principle, exclusive legal positivists argue that the validity of laws is independent of any moral principles. Arguing that the validity of a law is solely dependent on its satisfaction of the proper criteria of legal validity and its having the proper social pedigree, exclusive positivists contend that such criteria can never include conformity with principles of morality. For this account see J. Raz, "Authority, Law and Morality." The Monist. Vol. 68, No. 3 (1985), pp. 295-324, and M. Giudice, "Unconstitutionality, Invalidity, and Charter Challenges." The Canadian Journal of Law and Jurisprudence. Vol. XV, No. 1 (2002) pp. 69-83. Opposite to exclusive positivism, inclusive legal positivism contends that legal validity can sometimes depend on whether a law reflects a moral principle. Inclusive positivists argue that laws may be valid in virtue of their reflecting moral principles, assuming that such moral principles are included in that society's criteria of legal validity. For this account see H.L.A. Hart, The Concept of Law. 2nd Edition. (Oxford: University Press, 1994), and W.J. Waluchow, Inclusive Legal Positivism. (Oxford: Clarendon Press, 1994).

satisfy the requirements set out by social criteria of validity, invalid if they do not, and are in no way to be understood as mirrors of any objective natural law. The origin, and strength, of positive law lies in its social pedigree and its validity rests upon human constructs. Whereas morality and the law were intimately connected in the account of legal systems supported by natural law theorists, by definition of the positivist's separation thesis there is no necessary connection between law and morality. Contra natural lawyers, positivists are committed to the view that what the law is, is distinct from what the law ought to be. Consequently, any full theory of law must begin by first distinguishing between these two separate questions. Nevertheless, as is the case with natural law theory, this account of our legal systems has also met with various criticisms, most notably those by Ronald Dworkin.

2.3 Law as Integrity

Similar to natural law theory, Dworkin maintains a necessary connection between law and morality.¹² Roughly, Dworkin claims that an adequate legal theory must

¹² Ronald Dworkin has been classified by some as a natural law theorist; however, this label has not come without criticism. Generally, Dworkin is viewed as presenting a theory of "law as integrity" as opposed to a natural law theory. Regardless, there are some similarities between Dworkin and natural lawyers that do warrant the reference to natural law theories when discussing Dworkin's theory. While it is not my intention to enter into a debate concerning a classification of Dworkin's theory, in this thesis I sometimes refer to him as a contemporary natural lawyer. For those new to the field it may help to classify Dworkin's theory in this light, leading perhaps to a better general understanding of his theory in the context of a natural law theory. I believe there to be nothing lost in claiming Dworkin to be a type of natural lawyer. Reference to Dworkin's theory as a natural law theory draws attention to his theory's similarities with the natural

necessarily incorporate both analytic and normative aspects of jurisprudence.¹³ In attempting to develop a full legal theory, Dworkin argues, legal theorists must impute a point or purpose to the law; the value of the law must be recognized and accounted for. Only in virtue of trying to capture the various underlying principles in the law can we hope to provide an adequate theory of law. In Law's Empire, Dworkin writes, “[g]eneral theories of law, like general theories of courtesy and justice, must be abstract because they aim to interpret the main point and structure of legal practice.”¹⁴ The process of developing a legal theory entails that the theory not only fulfill certain descriptive requirements, what Dworkin terms dimensions of fit, but also that the theory puts law in its best moral light, satisfying what Dworkin terms dimensions of value. Legal theories, he goes on to say, are “constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between [the analytic aspect of] legal practice as they find it and the best [normative] justification of that practice.”¹⁵ The

law position. Both natural lawyers and Dworkin contend that in developing a legal theory there is no distinction between normative and analytic jurisprudence; what the law is, and what it ought to be are co-dependent.

¹³ Dworkin’s criticisms of positivism and the resulting theory he sets out are mentioned only in passing at this point. The details of his position will be clearly explicated in the following sections. Using Dworkin’s theory of law as a springboard to illustrate the various levels at which the morality – law debate may occur, this thesis continually refers to both Dworkin’s criticisms of legal positivism and his own legal theory.

¹⁴ Ronald Dworkin, Law's Empire. (Cambridge: Harvard University Press, 1986), 90.

¹⁵ *Ibid.*, 90. Noted by many theorists, Dworkin’s view of law as integrity is often understood as a theory of law arising out of a theory of adjudication. This is important to mention since it explains why Dworkin’s theory is both a competitor with other theories

scope of Dworkin's commitment to combining what the law is and what it ought to be is captured when he states,

[a] full political theory of law, then, includes at least two main parts: it speaks both to the grounds of law – circumstances in which particular propositions of law should be taken to be sound or true – and to the force of law – the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance. These two parts must be mutually supportive.¹⁶

In a similar fashion to the natural law position outlined earlier, Dworkin argues that there exists a necessary relationship between morality and law. A full theory of law, Dworkin maintains, necessarily incorporates law's point or purpose – for Dworkin, the purpose of the law is to justify coercion – in addition to providing an account that is descriptively accurate. Therefore, legal theories must satisfy requirements of value in addition to requirements of fit. In Dworkin's view, morality and the law are intimately connected in a way that legal positivists deny.

2.4 Situating The Project

Herein the debate lies. The theories of Dworkin and traditional natural lawyers, through which there is a roughly shared commitment to maintaining that there exists a

of law like legal positivism and other judicial methods such as the plain-fact approach. See, W.J. Waluchow, Inclusive Legal Positivism.

¹⁶ Ronald Dworkin, Law's Empire, 93.

necessary relationship between morality and the law, stand in contrast to the position of legal positivists who deny the necessity of this very connection that the others so adamantly affirm. In approaching the issue of morality in law, all sides of the debate have largely focused on presenting various constructive contributions by way of arguments thought to lend strength to their respective positions. As Dworkin, natural lawyers, and legal positivists each contribute to the debate, they do so by putting forth the merits of their own positions while often arguing directly against their opponents. This thesis, while concentrating on the role of morality in law, abstains from presenting an argued opinion on the dispute in the traditional sense.¹⁷ Rather, it is the aim of this thesis to contribute to the ongoing discussions by means of offering clarification to the debates as they currently stand.

The motivation behind this project is simple. A recurrent and compounding problem found throughout much philosophical discourse is the tendency of theorists to purchase comprehensiveness and novelty at the price of clarity, precision, and ultimately understanding.¹⁸ What I term the ‘problem of clarity,’ this matter has been noted by various theorists within philosophy. The issue is one where theorists seem to be enraptured in putting forth their own unique theories and subsequently overlook such

¹⁷ As will become evident throughout this thesis, I do not believe the issue of morality in law can be characterized as one debate. It will be my contention that there are different “levels” of debate that are at play. Hence, offering an argued opinion on the matter as understood in terms of its being one specific debate is problematic in so far as there is more than one issue at the heart of the discussions.

¹⁸ W.J. Waluchow, Inclusive Legal Positivism, 4.

virtues as clarity, precision and completeness.¹⁹ The problem of clarity, thus understood, often summarizes the root cause for theorists who shuffle aside, ignore, or misunderstand their opponents's positions. Whether unintentional, or worse, deliberate, the problem of clarity is quickly becoming an issue of importance within the philosophical field.

Prevalent enough to merit address, this thesis is motivated in an effort to alleviate and minimize the effect this may have with respect to legal discourse concerning morality's role in law. Set as its primary task, this thesis undertakes the project of providing a partial solution to the problem of clarity in discourse concerning morality in law by identifying and developing a conceptual framework that may be used to provide a means to better understand, compare and analyze various positions and arguments. Further, such a framework can serve as a guide for legal theorists in presenting their own theories.

Imagine two competing couples at a dance competition. The first couple takes to the floor and performs what could be considered a well-danced Salsa. When it is time for their performance, the second couple takes the floor and performs an hour-long interpretive dance. Here is a situation in which both parties were engaged in dancing, but where the evaluation and comparison of the two may be difficult if not impossible. For

¹⁹ A problem for philosophy in general, this dilemma has been noted by legal theorists as well. For example, in criticizing Blackstone, Bentham writes, "If something in point of sense were said, were that something false, one might sit down seriously and quietly to examine: but the great vexation is to find nothing said in so many words and to find that vexation occurring at every step: so that the greatest part of what is said is just so much worse than nothing. It is curious that a writer who is so eager to have men punished for being at variance with him in their discourses, can scarce ever keep clear from being at variance with himself for two pages together; . . . His nomenclature [is] like a weathercock: you never meet with the same term twice together in the same place." R. Harrison, *Introduction*, in Jeremy Bentham, *A Fragment on Government*, ed. by J.H. Burns and H.L.A. Hart, (Cambridge: University Press, 1988), Appendix B, 125. *See also*, W.J. Waluchow, *Inclusive Legal Positivism*. *Esp. pp.* 4-6.

there to be some semblance of progress in choosing the better dance pair, it is evident that the judges require some guidelines directing them in their evaluations of each performance. Perhaps we could restrict certain officials to judge only those couples who dance Salsa, while other judges are assigned the task of evaluating the various interpretive dances. In this, we may ease the burden on judges who previously would have been charged with the task of comparing Salsa and interpretive dance. Further, what if the competition was either divided into different categories, or restricted to one particular genre. For instance, restricting the dance competition to Salsa also negates the difficulties inherent in trying to compare Salsa and an interpretive dance. It is in this vein that this thesis progresses. This project provides distinct levels at which issues concerning morality and law may coincide, subsequently imparting defined limits to the various arguments in much the same way that one may want to achieve some sort of evaluation guidelines by assessing dance couples on the basis of set criteria. That such a task is of importance to legal philosophy I hope to demonstrate throughout. Drawing on various debates and theories raised by different legal theorists, this thesis endeavors to part out three distinct *levels* at which morality may figure in law: the *practice-level*, the *theoretical-level* and the *meta-theoretical-level*.²⁰ Explicating and illustrating these different levels serves to provide a clearly defined framework in which matters of morality in law may be approached and analyzed. This thesis provides the proper

²⁰ Though I distinguish three different levels, the majority of this thesis's attention will be paid to an analysis of the theoretical and meta-theoretical levels, for reasons I will make clear later on.

framing for discourse and study of issues concerning morality in law, deepening our understanding of the matter as a whole.

Michael Bayles, in *What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law?*, wrote that it is the purpose of the philosophy of law to provide theories.²¹ However, recent failings to distinguish the particular ideas, notions or subjects at issue, he argues, have muddled the debate between the different theories. Some theories concentrate on the idea of the legal, others focus on the idea of a legal system, while others still concern themselves with the idea of law generally. In each case, the objects of the theories differ and until this distinction is recognized confusion amongst the various theories will remain. Turning to an analysis of analytic legal philosophy, Bayles argues that progress requires recognition of the different projects that are being undertaken. In this vein, Bayles has touched upon the central thesis of this project. To his view I give my full support. Grounded in the idea that there are different sorts of theories each with their own focus, this thesis moves to providing a conceptual framework through which the distinguishing of the various issues concerning morality in law may be made.

III. Morality in Law: The Project and What Lies Ahead

²¹ Michael Bayles, "What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law?" Philosophical Topics (Vol. 18, No. 1, Spring 1990), 23.

In examining the relationship between morality and law, legal philosophers often ask: what is the relationship between morality and law? Are there necessary connections involving the two as natural law theorists contend? Or, are positivists correct in asserting that there are no such necessary relationships? Although Hart himself often focused on this line of inquiry, he was nonetheless aware of the breadth of these kinds of questions, and the multitude of answers that could follow. Wary of limiting the focus of the debate to a one-dimensional line of discourse, in The Concept of Law Hart cautions, “[t]here are many different types of relation between law and morals.”²² He further states,

[I]t cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.²³

If we correctly acknowledge, as Hart does, that morality always bears some relation to the law, whether in its development or practice, then “it is important to distinguish some of the many different things which may be meant by the assertion or denial that law and morals are related.”²⁴ Following from this particular Hartian insight, this thesis purports to draw out three distinct ways in which morality may enter into legal practice and

²² H.L.A. Hart, The Concept of Law, 185.

²³ *Ibid.*, 185.

²⁴ *Ibid.*, 185.

jurisprudence in general. I contend that an understanding of morality's role in law by virtue of this framework serves to frame past, present and future debates.

Drawing on contemporary contributions in legal philosophy, this thesis focuses on explaining and illustrating three conceptual levels at which debates about morality's role in law may be framed. Commencing in chapter two with an examination of the distinction between objects and theories, the differentiation of these two concepts sets important groundwork for later chapters. Understanding theories as constructions employed to capture objects of various kinds, chapter one serves to illustrate how theories are distinct from objects by way of examining their inter-relationship. Additionally, this endeavor sets the stage for the subsequent project by drawing cursory attention to the various levels of analysis that arise out of an understanding of the theory / object relationship. So, it is from this starting point that the second chapter delves into parting out the three distinct levels. Building on the developed understanding of the theory / object relationship, chapter three focuses on providing a full account of each level at which projects may incorporate issues concerning morality in law. Exploring the different levels that comprise the framework for morality's involvement in legal theory, each of the practice-level, theoretical-level and meta-theoretical-level, will be explicated in turn.

The first section of chapter three revisits the motivation behind the thesis outlined above, examining the 'problem of clarity' with specific reference to discourse concerning morality's role in law. Following this, chapter three focuses on parting out the framework – undertaking an elaboration of the practice-level, theoretical-level and meta-

theoretical-level as each relates to morality's function in law. By way of various illustrations, each level is fleshed out and a full account provided. Beginning with the practice-level, I explore what it is to speak of morality as part of the practice-level. But, in so doing, I caution that by definition our discussion of the practice-level involves us in discussing morality at the theoretical-level. So, having touched upon the practice-level briefly, I immediately move to explicating the theoretical level.

Specifically, I examine three ways in which morality may be involved at the theoretical-level of legal discourse: (i) theories *of* morality, (ii) theories *about* morality's use in legal practice, and (iii) theories that use morality *as a theoretical tool*, whether it be as an explanatory tool or justificatory tool. It is the latter two I argue to be of greatest import with respect to our overall project of understanding debates concerning morality's role in law. Subsequently, attention is largely paid to understanding theoretical-level discourse *about* morality's use in legal practice and theories that use morality *as a theoretical tool*.

Drawing on the criticisms raised by Ronald Dworkin in *Model of Rules I* and Wil Waluchow's positivist rejoinders in *Inclusive Legal Positivism*, this contemporary debate in legal philosophy serves as a specific illustration and characterization of debates that focus on theories *about* the use of morality in legal practice. Moral principles, Dworkin argues, are constantly used in legal practice, yet legal positivists are unable to adequately account for their role in the law. These criticisms coupled with Waluchow's positivist defense, I contend, illustrate the theoretical-level debate surrounding questions of morality's relationship with law. Though not exclusive, a closer examination of

Dworkin's charges and Waluchow's responses provides us with an understanding of the type of discourse that is to be identified and understood as existing at this particular level. Officials, some positivists contend, may look to moral principles in their identification of propositions as valid law. However, the primary concern for legal theorists responding to Dworkin's challenge centers on understanding how moral principles are to be accounted for given their role in legal practice. To be sure, officials use moral principles in practice and as such theorists are concerned with morality as a phenomenon in the law. To this, Waluchow's account of a society in which an inclusive rule of recognition exists, is a response purporting to address Dworkin's claim that positivists are unable to account for the role of moral principles in legal practice. Central to recognizing this debate as falling under the theoretical-level heading, is an understanding that the focus of the theorists's attention is on explaining morality in legal practice.²⁵ Given the focus of Dworkin's criticism on the phenomenon of morality in the law, Waluchow provides an example of a response that is properly framed in its concentration, answering Dworkin's theoretical-level challenge with a theoretical-level response. Using cases in which challenges are brought forth against the Canadian Charter of Rights and Freedoms to illustrate the role moral principles seem to play in a legal system, Waluchow's examples of charter challenges serve to show how principles of morality may be captured by legal positivism at the theoretical-level of jurisprudence. An inclusive rule of recognition finds its merit in its descriptive accuracy, and it is this conceptual possibility of an inclusive rule of

²⁵ An "inclusive rule of recognition" differs from an "exclusive rule of recognition" in that the former accepts the possibility of moral principles as functioning as criteria of legal validity.

recognition that in turn accommodates the possibility of moral principles functioning as criteria of legal validity that provides a theoretical-level response to Dworkin's theoretical-level criticism of positivism.

Analysis of theories that incorporate morality as theoretical tools is furthered through an examination of Jules Coleman's recent work. In The Practice of Principle Coleman puts forth a descriptive conceptual analysis of tort law. The core of tort law, Coleman argues, is best understood in light of a moral principle of corrective justice. Such a principle serves to illuminate and deepen our understanding of the relationships between the central concepts of the practice of torts. In putting forth a theory of tort law that calls for the practice to be understood in virtue of a moral principle, Coleman provides an illustration of how morality may function as a theoretical tool.

Having explicated and illustrated the various projects that fall under the theoretical-level classification, I elaborate another level of debate, that which I term the meta-theoretical-level. Once again, the explication is furthered by drawing upon contemporary work in legal philosophy as an illustration in an effort to flesh out the meta-theoretical-level aspect of the framework. Contra Dworkin's fully normative account of our social institutions of law, some positivists have responded to Dworkin by arguing that they can impute a point or purpose to the law, regardless of its being a moral principle, in a purely descriptive manner without sacrificing any central positivist commitments, that is, independently of offering a morally committed theory. Moral principles can be incorporated into a legal theory without any conflict with central positivist tenets. One recent response to Dworkin's demand for evaluative, in addition to

descriptive, theories has run the argument that moral principles can be used as conceptual tools at a theoretical-level. Returning once more to Jules Coleman's recently written book, The Practice of Principle, we find an example of a meta-theoretical response that provides an illustration as to how questions concerning moral principles may function at the *meta-theoretical-level*. Coleman's take on the role of morality in the law is a novel departure from Hart's stronger position in which Hart argued a point or purpose to law need not be provided in legal theory. Coleman accommodates more of Dworkin's meta-theoretical claims by moving one step closer to his view while still maintaining positivist commitments to the separation thesis and the social sources thesis. In his book, Coleman uses tort law as an example of a legal practice in which his pragmatic methodology may be employed to demonstrate how a moral principle may be incorporated into, and central to, the explanation of an aspect of law without conflict with positivism as a whole. He terms this an "explanation by embodiment" approach to legal theory.²⁶ This pragmatic approach to legal theory construction imports a point or purpose to tort law, in accord with Dworkin's demand, but does so in a non-morally committed fashion. It follows from Coleman's work that a legal theory can incorporate the point or purpose of the law while continuing to be a purely descriptive enterprise. The debate between Dworkin's constructive interpretive approach and Coleman's pragmatic approach to legal theory, and the role morality plays in the respective methodologies, serves as a good illustration of issues concerning morality's role in law at the meta-theoretical-level.

²⁶ See, Jules Coleman, The Practice of Principle: In Defense of A Pragmatist Approach to Legal Theory. (Oxford: University Press, 2001), chapters 1-5. Henceforth known as The Practice of Principle.

In writing about the influence of morality on law, Hart said, “[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals.”²⁷ This paper takes as its task to discern three distinct conceptual points at which morality may be argued to come into contact with law and our legal theories, focusing largely on two: the theoretical-level and the meta-theoretical-level. Morality, many legal theorists argue, can figure in the law in a variety of different ways. However, if we are to progress in the debate we must first identify the boundaries of the different discussions. It is in light of the different levels developed in this thesis that we can guide our discussions in matters of morality’s role in law so as to ensure that progress is made.

²⁷ H.L.A. Hart, The Concept of Law, 203-04.

Chapter 2: Distinguishing Theories from Objects

I. Theories and Objects

1.1 An Overview

This chapter has two aims. First, it undertakes to deepen the understanding of our conceptions of theory and object, drawing specific attention to the ways in which theories are recognized as distinct from their objects. Rather than focusing on each notion separately, this chapter examines theories and objects by concentrating its efforts on exploring the inter-relationship between the two. Beginning with a rough depiction of theories as constructions employed to capture objects of various kinds, in this chapter I proceed to flesh out the central elements of this understanding, and to draw attention to the distinction between a theory and its object. It will be argued that a theory is best understood as that which is about an object. Drawing on the connection between theory and object, it is the inter-dependence that these two categories share that this thesis uses as the basis for discerning the one from the other. Thus, this first section of the chapter focuses on drawing out this general account of theories so that we may lay the appropriate groundwork for developing the three-level framework at which morality in the law may be discussed. The second aim of this chapter takes us one step closer to delving into these different levels by investigating the various sorts of objects subject to

theoretical analysis. Stemming from our general understanding of theories presented in the first part of the chapter, in the second part, attention is turned to further elaboration between theories and objects. Discerning objects from theories, the second aim of this chapter is to distinguish between the various types of objects which theories are about. Theories are about objects of various kinds and an understanding of the sorts of objects that a theory can be about provides the initial step in differentiating two of the conceptual levels. Distinguishing between first-order theories and second-order theories is the first step in distinguishing between the theoretical-level and meta-theoretical-level outlined in the preceding chapters.

I wish to impart a word of caution before we continue. To be sure, what is to follow is a general exploration into our notions of theory and object. However, this analysis is undertaken only in an effort to further the overall objective of this thesis, that being the presentation of a three-level conceptual framework at which morality in the law may be discussed. That being said, I caution that in no place do I wish to claim that what follows is a definitive account or an authoritative definition of what a theory *is*, or what an object *is*. Rather, in focusing on these terms at this early point I hope to provide the reader with an insight into how it is that these terms are taken to be understood in the context of this thesis. Despite the fact that the task this chapter sets out to fulfill seems outwardly simplistic, distinguishing between these terms can prove far more challenging than intuition first suggests. It is from these words of caution that I proceed in my explication of the terms crucial to this thesis, specifically that of differentiating theory from object.

What is a legal theory? Prior to answering this we must first pose more basic questions, such as what is a theory in general? What is it that theories of evolution, relativity, or John F. Kennedy's assassination, have in common so that they all bear the label 'theory?' Why is it that we ascribe the title of theory to the claim that there was some sort of C.I.A. conspiracy behind the presidential assassination, whereas the murder itself is not so labeled and seems to be considered something of a different sort? What is it that differentiates the murder in such a way as to avoid referring to it as a theory? Perhaps, on the face of it, what a theory is appears clear and even trivial. To be sure, when discussions about theories arise it seems as though we intuitively have an understanding of what it is that we are referring to. Nevertheless, if confronted with the task of explaining what a theory in itself is, after some thought, many might agree that we are left in a difficult predicament. We use theories, we develop theories, and when someone speaks of theories about θ , we understand what they are claiming – in at least a basic sense we know what is being attempted to accomplish by theories of θ . If we wish to continue to employ or analyze various theories, it would seem reasonable to suggest that we ought to have an understanding of what theories are, or what they do. Yet, despite this apparent need, in explicating what a theory is we are left with a difficult task. Unlike discussions about apples and soccer balls, theories are not the kinds of things that we are able to ostensibly identify. As such, there is something distinct in our employment and analysis of theories from that of more traditional things. Nevertheless, as sure as we are willing to accept that apples and soccer balls are things, so are we willing to likewise accept theories. So, what then, is a theory?

In the following section, a rough understanding of theories as constructions employed to capture objects of various kinds is explored. Providing a general account of ‘theory,’ the following section draws on common characterizations of theories as a whole in order to further our understanding of the concept and eventually shed light on the inter-relationship that theories share with objects.

1.2 Deepening Our Understanding

More than a semantic difference, much work has been done in the traditional sense to distinguish theory from object.¹ Hence, that theories differ from objects is generally clear. However, a common fault of much literature on the matter has been the failure to pay particular attention to one particular aspect that is able to shed much light on the nature of theories and objects. Traditionally considered separately, examination of

¹ Though the literature is extensive, one comprehensive argument in support of the claim that theories differ from their objects has been given by Nicholas Lobkowitz, who in his book Theory and Practice: History of a Concept from Aristotle to Marx sets out on a task of examining the Marxist notion of revolutionary practice beginning with an account of the origins and history of practice as it relates to theory, saying a few words on the genesis of the distinction and adding some historical background. Despite his exclusive focus on distinguishing theory from practices of various kinds, the work of Lobkowitz is further transferable to situations in which the theory is not about practices in the traditional sense – much will be said about this in the following chapter. Nevertheless, as Lobkowitz noted, “it [the current way in which we view the distinction between theory and practice] is a last relic of several categories in terms of which the Greeks tried to tackle a question highly characteristic of their culture, namely, which is the best and most desirable of lives.” [Nicholas Lobkowitz, Theory and Practice: History of a Concept from Aristotle to Marx. (London: University of Notre Dame Press, 1967), 3, hereafter *TP*] Thus, it is in the annals of Ancient Greek philosophy that Lobkowitz begins his historical look at the distinction between theory and practice.

the *relationship* between theory and object has been left wanting and consequently much has been left to fill-in in terms of understanding these concepts at a deeper level. Critical to grasping an understanding of theory and object, yet often overlooked, is an understanding of the inter-relationship between the two. It is with this in mind that I now proceed to flesh out a rough conception of theories, while maintaining focus on emphasizing the distinction between theory and object.

II. Theories and Objects: Examining a Relationship

We begin with the rough characterization of theories as constructions employed to capture objects of various kinds. I hope it will become apparent that understanding theories in this way goes a long way towards accommodating the diversity of purposes for which theories are employed as well as accounting for the variety of disciplines of which theories are a part. Whether it is a scientific theory of motion, or a religious theory about the beginning of the universe, there are general features of a theory that are common throughout. It is these commonalities that make up the central elements of our rough and ready definition of a theory, and it is these characteristics that need to be further fleshed out. Developing a deeper understanding of our conception of a theory as it relates to its object draws our attention to the all-important distinction between the two categories.

There are three main elements that need to be expanded on with respect to our working understanding of a theory.² First, what do we mean when we refer to a theory as a construction? Second, what is entailed in speaking of theories as ‘capturing’ objects? An initially vague notion, if we are to talk of a theory being that which ‘captures’ an object, we must proceed to try and understand what is meant by such terminology. Third, the objects of the theories must be examined. Claiming that theories are about objects of various kinds leaves open the question of what these objects are comprised, to which we must dedicate some attention.

2.1 Theory ‘Construction’

A theory is an assemblage of rules, principles, concepts, and ideas applied in an effort to increase our understanding of a particular object. In this, theories are ‘constructions,’ put forth by theorists trying to account for various phenomena. Unlike

² Though this chapter proceeds to explicate theories by examining each of the characteristics in turn, the concept of theory is what can be termed a ‘cluster concept.’ Consequently, it is often difficult to explicate its nature in a linear, step-by-step fashion. That being said, in discussing each of the different aspects of our characterization of a theory, at times, references may be made to characteristics or ideas that have yet to be discussed. Crucial to understanding the manner in which the concept of theory and object is understood in this thesis, is a holistic approach requiring that the whole of this section be read together, rather than as standing independent of one another. For example, to fully understand what it is for a theory to be a type of construction, it is necessary that the idea of a theory capturing an object also be understood. For an account of ‘cluster concepts,’ *see*, Hilary Putnam, “The Analytic and The Synthetic.” (c1962) in Mind, Language, and Reality: Philosophical Papers. Volume II. (Cambridge: University Press, 1975), pp. 33-69.

objects that are not necessarily agent constructed, a theory is.³ Created to capture objects, theories arise out of the objects of their focus in so far as the theory would not exist were the object to be of no concern to the theorist. Generally, objects pre-exist the theories that are developed to explain them. This is not to say that objects exist independently of theory. Almost no one will, these days, say that objects to be accounted for by theories are ‘given,’ and theories created out of them. Almost no one will say that there is such a thing as ‘theory-neutral’ data to be captured by a theory.⁴ The distinction here is that of recognizing a theory as *arising out of* our need to further our understanding of an object, but *created out of* principles, ideas, concepts, and the like. Though we may recognize the objects of interest as, in some manner, preceding the development of the theory, I caution the reader to avoid inferring the claim that a theory arises out of its focal object. Rather, a theory arises out of our need to understand rather than the object. We must steer clear of reference to objects as ‘given’ things, in so far as they are thought to be completely theory-independent. Take as an example a legal theorist wishing to focus on the practice of tort law. In an effort to deepen the understanding of this practice, the theorist proposes an economic theory that he believes not all too implausibly captures tort law.⁵

³ This is not to claim that objects are not ‘agent-constructed.’ Rather, the distinction is rooted in the idea that objects generally precede the theory. In this sense, the theories are constructed, after the object, in an effort to further our understanding of the object.

⁴ See the exposition of Pierre Duhem in Donald Gillies’s book, Philosophy of Science in the Twentieth Century: Four Central Themes. (Cambridge: Blackwell Publishers, 1993), esp. Ch. 7, “Is Observation Theory-Laden?” and, Henry Bauer, Scientific Literacy and the Myth of the Scientific Method. (Chicago: University of Illinois Press, 1992).

Identifying as among the key elements of tort law the concepts that are central to it – concepts such as action, duty, breach, causation, and harm – the theorist’s economic analysis seeks to explain tort law by reducing its concepts to terms that reflect the function of producing economically efficient outcomes. Two items are worthy of mention. First, it is the theorist who engages in deliberating as to what concepts are central, or of relevance, to the practice. Again, we take note that though distinct from theories, objects are not theory-neutral. Second, the theory is a construction of the theorists in a manner that the object is not. The economic analysis of tort law is an assemblage of principles and ideas that the theorist employs to capture the general object of inquiry. The object is that of tort law, and it is out of a desire to further our understanding of this phenomenon that our theorist puts forth an assemblage of principles, ideas and concepts associated with the notion of ‘cost-justified precautions’ in an attempt to capture the enterprise of tort law.

Understanding a theory as something constructed by theorists has paved the way for much discussion concerning the construction itself - another glimpse into the idea of theories as creations. It is easy to find a variety of doctrines, each claiming either authority or pertinent advice with regard to how theories are to be constructed. In discussing what he terms “meta-theoretical-evaluative considerations,” Wil Waluchow is

⁵ Jules Coleman provides an extensive examination of the economic analysis of tort law in the first part of his book, The Practice of Principle. Using it as the foil against which he engages in presenting an account of tort law that employs the principle of corrective justice, Coleman scrutinizes the economic account of tort practices in a variety of manners. See, Jules Coleman, The Practice of Principle. For an overall economic account of law via an economic analysis, see, Richard Posner, Economic Analysis of Law, 4th edition. (Boston: Little Brown, 1992).

one example of a theorist who deliberates about criteria that must be taken into consideration when constructing a theory. Considerations like simplicity, comprehensiveness, coherence, and the like top their lists as they set out regulations for both evaluation and theory construction.⁶

Theories are constructions in so far as they are constellations of ideas, principles, rules, and laws, put forth by theorists in an effort to capture objects of various kinds. But what is it that these constructions do? What is their purpose or function? Reference has been made to theories as furthering our understanding and being about objects of various kinds. To understand what is entailed in speaking of a theory's function in this manner, we need to turn to a closer examination of what it means to speak of a theory's ability to capture phenomena.

2.2 'Capturing' an Object

To be sure, theories are diverse in origin, nature and purpose. It is this diversity that is to be denoted in using the term 'capture' as a generalization of what a theory does. Exploring the nature of this diversity aids in firming up our understanding of referring to theories as capturing objects.

A scholar who constructs a theory does so in an effort to further our understanding of a phenomenon. How this is achieved, or what type of theory is employed to arrive at this deeper understanding, varies. Perhaps depending on the

⁶ See, W.J. Waluchow, Inclusive Legal Positivism, Ch. 2.

theorist's specific aims or on the discipline from which the theory is framed, a theory may be put forth that describes, explains, justifies or even offers predictions about various phenomena.⁷ Regardless, all theories share in a common characteristic. Though used in a variety of ways by an equally diverse array of theorists from an assortment of disciplines, all theories serve to further our understanding – albeit in different ways. An explanatory theory offers a descriptive account of an object, directly advancing our understanding of what the object is through its identification; whereas, a theory offering justification of an object or practice fosters understanding in a different way. Act Utilitarianism, for example, systematizes and organizes our moral reasons and arguments, imputing a practical value to our actions. A person who is able to offer reasons as to why they should or should not follow a practice, for example, is more informed about the practice than one who could not. In contrast to the person lacking theoretical justification, the person equipped with a justification of the phenomenon has more reasons for going about the practice and by definition has a deeper understanding of it. Whether it is an explanatory or justificatory theory, be it scientific, historic, literary, sociological or philosophical, all theories can be characterized as functioning to increase our understanding about objects. By structuring, organizing, examining, deliberating, reflecting upon, and such, theorists construct theories that capture objects.

Using a variety of conceptual tools in its attempt to describe patterns of behaviour, explain various phenomena, or justify different observations, theorists strive

⁷ This is not to say that I am limiting a theory's role to one of description, explanation, prediction, or justification. There are many diverse purposes of theories and those presented here are but a few examples.

to present theories that capture various phenomena. The measure of success being highly dependent upon the type of theory, the disciplinary origin, and the evaluative criteria generally accepted by those in positions to evaluate the theory, the general aim of all theories is to further our understanding a particular object. A theory purports to accomplish this task by capturing the phenomena, which can be done in numerous ways. Drawing on examples from different fields engaged in accounting for different objects, the common goal of theories to 'capture' various objects can be illustrated. Thus furthering our understanding of theories in general.

(a) Scientific Theories:

In 1915 Einstein developed the general theory of relativity in which he considered objects accelerated with respect to one another. He developed this theory to explain apparent conflicts between the laws of relativity and the law of gravity. To resolve these conflicts he developed an entirely new approach to the concept of gravity, based on the principle of equivalence.

Einstein's earlier theory of space and time, Special Relativity, proposed that distance and time are not absolute. The ticking rate of a clock depends on the motion of the observer watching the clock. With his theory of General Relativity, Einstein further postulated that gravity, as well as motion, can affect the intervals of time and space. This theory focused on the principle of equivalence - a postulate that gravitational fields are equivalent to accelerations of the frame of reference. For example, people in a moving elevator cannot, in principle, decide whether the force that acts on them is caused by gravitation or by a constant acceleration of the elevator. Einstein's claim is that forces

produced by gravity are in every way equivalent to forces produced by acceleration, so that it is theoretically impossible to distinguish between gravitational and acceleration forces by experiment. If gravity is equivalent to acceleration, and if motion affects measurements of time and space (as shown in Special Relativity), then it follows that gravity does so as well. In particular, the gravity of any mass, such as our sun, has the effect of warping the space-time around it. For example, the angles of a triangle no longer add up to 180 degrees and clocks tick more slowly the closer they are to a gravitational mass like the sun.

On the basis of the general theory of relativity, Einstein accounted for the previously unexplained variations in the orbital motion of the planets and predicted the bending of starlight in the vicinity of a massive body such as the sun. Einstein's general theory of relativity is a construction, consisting of concepts, ideas, and rules, that captures or further deepens our understanding of various phenomena.

(b) Philosophical Theories:

Philosophy is another of the many disciplines that has a long-standing tradition of concerning itself with attempting to discern various phenomena by way of theoretical explanation. Again, philosophers as far back as the Ancient Greeks have employed theories with a similar general aim as other theorists, that of illuminating our understanding. Throughout his writings, Aristotle offers various theories that endeavour to capture a wide variety of objects. Concepts of potentiality and actuality (i.e. a theory)

are offered as explanations of what we understand by being and change (i.e. the objects).⁸ Sense perception (i.e. the object) is described via an account of different senses of causes and their relation to different sorts of knowing (i.e. a theory).⁹ Focusing on the cosmos itself (i.e. the object), Aristotle makes an attempt at offering an explanation of its nature and origin via a complex, and now well-known, argument for the presence of an “unmoved mover,” (i.e. a theory).¹⁰ Each of these various theories is an Aristotelian attempt to make sense of different phenomena by putting forth theories that capture the object and subsequently increase our understanding of it.

Looking no further than Aristotle’s teacher, one of Plato’s most renowned contributions to philosophy is another example wherein a theory is employed in an effort to capture an object of interest. Mentioned earlier, the objects that theories are about can vary a great deal from something immediate and observable, to that which may be considered more abstract. It was this latter sort of object that the Platonic theory of forms was introduced to capture.¹¹ Plato was interested in explaining why it is, for instance, that when people talk they can rely upon a multitude of general terms and still others are

⁸ On ‘being’ see Aristotle’s discussions on ‘substance’ and ‘essence,’ e.g. Aristotle, *Parts of Animals*, in *Aristotle: Introductory Readings*. Trans. and with an introduction by, Terence Irwin and Gail Fine, (Indianapolis: Hackett, 1996), 640a18, hereafter *AIR*; and *Metaphysica*, in *AIR*, 983a27. Regarding “change,” refer to Aristotle’s writings on ‘motion,’ e.g. *Physica*, in *AIR*, 218b20, 225a34–b3, 226a35, 229a30–2.

⁹ See, e.g. *De Anima*, in *AIR*, II-III.

¹⁰ See, e.g. *Metaphysics*, in *AIR*, XII 6 1071b4-22.

¹¹ The Platonic theory of forms can be found in various places throughout Plato’s works. For one of the more complete accounts of Platonic Forms, see, e.g., Plato, *Republic*. Ed. and trans. G.M.A. Grube, (Indianapolis: Hackett, 1992).

able to know to what the speaker refers. Suppose I were to draw in the sand several closed three-sided figures. What is it about each of these drawings that makes them all triangles? Or, suppose I were to draw the same figure on a sheet of paper. Again, we would refer to this sketch as a triangle. Yet, does my sketch on the paper not differ from the drawing in the sand? So then, what is it that is shared by these depictions that we refer to them all as triangles? Such was the sort of dilemma or object that was the focus of Plato's theory of forms. Plato reasoned that despite the differences, there is one true triangle in which each of these depictions takes part. Roughly, we are able to refer to each of these drawings as a triangle because each of these drawings takes part in the form of trianguleness. Plato believed that there were two worlds: the world of becoming and the world of being. The world of becoming is that of ordinary existence. It is where we spend the majority of our time and it is where our crude representations of the forms are found. The world of being, however, is a world of pure forms. It is an eternal world that Plato considered to be the world that is the most real. The relationship between the worlds, as illustrated most notably in the allegory of the cave, is such that the things that exist in the world of becoming take part in the various forms; however, these are not the real things in themselves.¹² We recognize the drawings as triangles because they all take part in the form of triangle. In much the same way we are able to recognize triangles, because the objects of this world take part in the forms which we know, we are able to talk about many sorts of things, such as the beauty of an individual, without there being total confusion as to what beauty means. Plato provides us with a theory, the theory of

¹² Plato, Republic, Book VII.

Platonic forms, that explains a certain object, namely why it is that we are able to speak in general terms or recognize different things as the same sort.

A theory, whether developed by a philosopher, scientist, historian, or sociologist, always is an attempt to further our understanding of an object. Independently of the diversity of purposes that the theory may serve, be it explanatory, descriptive or perhaps justificatory, its general aim is to put forth an account that advances our understanding of the object in question. It is this characteristic that we refer to when we refer to a theory as capturing an object.

2.3 Objects of Various Kinds

To this point, the focus has been on fleshing out the idea that a theory is a ‘construction’ of sorts and that a theory is best understood as that which ‘captures’ an object. Our working account of a theory depicts theories as constructions employed to capture objects of various kinds. Having dealt with the first two elements of this portrayal, I now turn attention to the third – that of examining what these objects are that theories are about.

Theories are about objects. Further, based on the preceding analysis, it may be inferred that theories are distinct, or at a minimum discernible, from their objects. Evident is the assertion that all theories, regardless of their specificities, have something as their object. Subsequently, what should be equally evident is the fact that these objects differ depending on the theoretical focus. The object of a theory can range in its level of

abstractness as well as its complexity. In the examples touched upon earlier, the theories ranged in focus from capturing the choices and decisions of humans, to offering an account of planetary motions and the beginning of the universe. That a theory may be created with a focus on explaining the panting of dogs, or perhaps to offer an explanation of the process by which humans developed, is an indication that the objects of our theories are innumerable and wide sweeping. Nevertheless, distinctions can be made with respect to the types of objects that are investigated. This distinction between the different types of objects leads to a distinguishing between two different types of theories. It is this division that I now wish to explore.

Theories about dogs, cats and legal practice can be referred to as first-order theories. Engaged in capturing ‘normal objects,’ this category of theory encompasses, for the most part, what we traditionally hold as theories.¹³ Our theories of evolution, infinity, and God all fall under the first-order theory classification. The distinction resulting in a second type of theory results from special cases when the object of theories are theories themselves. This latter type of theory is a second-order theory, namely, a theory about theories. Addressing issues concerning how one ought to go about theory construction, and exploring the nature of a theory itself, the objects of interest in each case are theories.¹⁴ Knowing what first-order theories would be like, having explored various

¹³ The term ‘normal object’ I take to refer to any discernible object other than a theory.

¹⁴ One may claim that the majority of this chapter is concerned with presenting a second-order theory. Having spent much time analyzing the notion of a theory, this chapter has focused on exploring the nature of theories themselves. As such, I have engaged in putting forth this special case of theory - a second-order theory about theories.

examples earlier, we may ask the question, ‘What would an example of a second-order theory be like?’ Again, I must caution that the specifics of various second-order theories, as with first-order theories, may differ considerably; however, there is a general characterization of all theories of this sort. Namely, second-order theories are theories about theories.¹⁵ Thus, returning to the field of philosophy, we can explore an illustration of second-order theoretical work as a representation of such theories in general.

Both Aristotle and Plato employed theories to further our understanding. Though distinct in their specific focus and methodology, all of these theories were about normal objects (as differentiated from special objects, which refer specifically to theories as objects). Explaining, describing, justifying, etc., objects of various kinds, each theory was put forth in an effort to capture its subject. Both Aristotle’s and Plato’s works provide us with an insight into the underlying relationship between theories and objects. By looking to these philosophers, and focusing attention on their theories, we come to realize a fundamental motivating aspect of theories and objects that must drive any understanding we are to have. Theories, as our philosophical theory illustrations have shown, are always about objects. However, far from being confined to these couple of examples, some philosophers have picked up on this relationship between theories and objects and have taken as their project that of outlining what philosophical theories ought to be. In *Concepts and Categories: Philosophical Essays*, Isaiah Berlin sets out to sketch

¹⁵ One could imagine, presumably, theories that have second-order theories as their objects. These would be theories about theories that are about theories. Though not implausible, it would be difficult to discern what such ‘third-order’ theories would be like. Perhaps one may engage in theorizing about the motivation of a scholar putting forth a second-order theory. Nevertheless, such rare situations need not concern us for the purposes of this thesis.

what he views to be the proper focus of philosophical pursuits. Philosophy, in Berlin's view, is an exercise in theory construction and as such requires direction in terms of understanding what its proper objects of inquiry are to be. In so doing, Berlin believes he is setting out to uncover the very 'heart of philosophy' by better understanding what it is that philosophy engages in its theoretical pursuits. Berlin's project, in a sense, is one of offering a theory about philosophical theories. Berlin hopes to capture philosophy in general by offering a prescriptive theory, another manner in which theories may be employed, about what it ought to be to engage in philosophy,

Berlin starts his task with the observation that despite the vast number of different questions that we are able to pose in the name of philosophical inquiry, the questions seem prone to a categorization based upon the manner in which their answers are sought. If, for example, one was asked where their coat may be, in pursuit of an answer we may be inclined to actively search in various physical or observable places for the object, whether it be in a closet or on the back of a chair. Regardless, in answering questions of this nature we know how to proceed, namely that the question demands an empirical approach. Similarly, if we were to seek the correct proof of Fermat's Theorem, again we know in what ways we ought to proceed to arrive at a solution – even if the solution is not immediately forthcoming. However, notwithstanding the similarities, Berlin observes that this latter type of question differs from the first in that it demands a very different sort of approach to its solution. Contrary to the first type of question, surely we do not expect to find the proof of Fermat's Theorem in a closet or on the back of a chair, so we turn to different methods that we know will be relevant to the answer. Though drastically

oversimplified, there seems to be a dichotomy between these two sources of human knowledge:

The history of systematic human thought is largely a sustained effort to formulate all the questions that occur to mankind in such a way that the answers to them will fall into one or other of two great baskets: the empirical, i.e. questions whose answers depend, in the end, on the data of observation; and the formal, i.e. questions whose answers depend on pure calculation, untrammelled by factual knowledge.¹⁶

This being said, Berlin is quick, and correct, to point out that there are certain questions that do not seem to easily fit into either classification. This “intermediate basket”¹⁷ encapsulates a variety of inquiries ranging from questions of value to questions concerning matters of principle. It is to these queries that Berlin claims people often tend to ascribe the label of that of the philosophical domain. For Berlin, philosophy is not simply an empirical study, nor a kind of formal deduction; yet, it is something more refined than just an all-encompassing label of ‘everything else.’ The subject matter of philosophy “is to a large degree not the items of experience, but the ways in which they are viewed, the permanent or semi-permanent categories in terms of which experience is conceived and classified.”¹⁸ Philosophy is concerned with understanding the various

¹⁶ Isaiah Berlin, “The Purpose of Philosophy” in Concepts and Categories: Philosophical Essays. ed. Henry Hardy; with an introduction by Bernard Williams. London: Pimlico, 1999, 2.

¹⁷ *Ibid.*, 3.

¹⁸ *Ibid.*, 9.

phenomena of experience. We may be so bold as to claim that its motivation stems from a quest that demands of it theoretical explanations of the cosmos. Quoting Berlin at length:

The task of philosophy, often a difficult and painful one, is to extricate and bring to light the hidden categories and models in terms of which human beings think (that is, their use of words, images and other symbols), to reveal what is obscure or contradictory in them, to discern the conflicts between them that prevent the construction of more adequate ways of organizing and describing and explaining experience (for all description as well as explanation involves some model in terms of which the describing and explaining is done); and then, at a still 'higher' level. To examine the nature of this activity itself (epistemology, philosophical logic, linguistic analysis), and to bring to light the concealed models that operate in this second-order, philosophical, activity itself.¹⁹

Philosophy concerns itself with theoretical discourse. The task of the philosopher is to examine "whatever seems unsusceptible to the methods of the sciences or everyday observation, e.g. categories, concepts, models, ways of thinking or acting . . ." ²⁰ Berlin's view is of philosophical theory capturing the modalities that are employed in everyday life, modalities and categories that are not open to empirical or factual analysis. Philosophy attempts to offer some explanation of that which both empirical and formal methods of solution searching fail to explain. Berlin views as the task of philosophical theories the capturing of objects that are "insusceptible to the methods of sciences or

¹⁹ Ibid., 10.

²⁰ Ibid., 11.

everyday observation.”²¹ Berlin proposes that philosophy endeavor to further our understanding of *the ways in which items of experience, for example, are viewed*. His is a theory about philosophical theory.

III. Setting the Stage

This chapter has explored the nature of theories by employing a general characterization and fleshing out the various elements involved. First, theories are constructions. We create assemblages of concepts, ideas, principles, rules and so on, in the hope of furthering our understanding on various subject matters. To the end product, we assign the term theory. Second, it has been reiterated throughout this chapter, theories are the kinds of things that capture objects. In illustrating this point, I have made reference to the large number of ways in which theories may attempt to achieve this end. Theories may try to justify certain phenomena, as do ethical theories such as Act Utilitarianism, or purport to explain or postulate various things, such as theories about the origin of the universe. Or still, theories may simply try to offer descriptive accounts of objects, as do theories of descriptive jurisprudence. Regardless of the type of theory, by virtue of organizing, structuring, re-examining, and reflecting upon the subject matter, theories capture objects of various kinds through their explanations, justifications, and descriptions of the phenomena. Third, and lastly, the nature of the objects captured by theories was explored. To be sure, theories are about objects. However, there are a

²¹ Ibid., 11.

variety of objects on which the theory may be focused. The varieties of objects available for theoretical exploration are innumerable and can range from the simple to the complex. Nevertheless, there is a distinction between two different types of objects such that theories themselves can be classified into one or the other of two categories. For the most part, theories fall under the first-order categorization. These theories focus on capturing what I have termed, normal objects. That being said, there is a second type of theory that addresses a different type of object. In these special cases, the objects that theories are about are theories themselves. These second-order theories focus on addressing questions concerning theory construction and the nature of theory itself.

Theories are constructions, constellations of ideas, principles, concepts and rules, employed to capture, by way of furthering our understanding, objects of various kinds. These objects can range from dogs, to planetary motions, to human behaviour, to numbers, to legal practices. Nevertheless, these theories are always about their objects, and are attempts to explain, justify or predict various phenomena associated with those objects – i.e. their behaviour, properties, structures, relations, etc. Understanding theories in this manner, it becomes apparent that a theory is in some way distinguishable from its object. Even if objects are never entirely ‘theory-neutral,’ they are distinguishable from theories. Recognizing this, we further note that these objects can be of two sorts. In special cases, the objects of theories are theories themselves. Thus there is a distinction between normal objects and these special objects which theories attempt to capture. Distinguishing between first-order and second-order theories, we see that there are two possible levels of theoretical analysis. First, there is the construction, exploration, or

evaluation of theories about objects. Then there is the analysis of what it is to offer a construction, exploration, or evaluation of a theory. The latter is a theory about theories. In this special case, the objects of the theories are themselves first-order theories. It is with this distinction in mind that I proceed to elucidate the tripartite conceptual framework in which morality's role in the law may be discussed.

Chapter 3: The Tri-partition of Legal Theory

But how will you look for something when you don't in the least know what it is? How on earth are you going to set up something you don't know as the object of your search? To put it another way, even if you come right up against it, how will you know that what you have found is the thing you didn't know?

Plato, Meno, 80d-e

I. Alleviating A Problem

Much has been done in the way of argumentation theory and logic over the years. Various rules have been established that dictate which arguments are valid and which are not. Some rules of argumentation deal with the correct forms of arguments themselves – *modus ponens*, *modus tollens*, and hypothetical syllogisms are but three logical forms of arguments, each of which is accepted as valid. And, in addition to these types of formal rules, there are an equally important number of informal rules of argumentation, the violation of which leads to unsound arguments. Among the more traditional informal rules, such as the avoidance of straw man or *ad hominem* fallacies, is the requirement that arguers debate the truth or falsity of the same propositions. Engaging in a meaningful debate requires that the participants focus on the same topic of inquiry. However, as touched upon in discussing the problem of clarity, recently, many scholars have ignored

this latter condition.¹ In so doing, many debates have become muddled. Thankfully, this dilemma has not gone unnoticed, even in the field of legal philosophy.

Waluchow is but one theorist of late who in his writing draws attention to the pervasiveness of this problem in legal philosophy. In Inclusive Legal Positivism he writes, “much of the current confusion within general jurisprudence results from differences of opinion concerning (a) what it is exactly that one is supposed to be doing in offering a theory of law, and (b) what it is that one’s opponents are doing in articulating their theories of law.”² As evidenced in debate between two of the most important legal scholars of our time, Waluchow argues that even the most influential philosophers often fail to avoid this dilemma,

Here we seem to have two of the most important legal philosophers of our time radically at odds concerning what it is they are up to in offering a legal theory. We also have one of those disputants apparently mistaken about, or ignoring, what it is that the other is up to. Is it any wonder, then, that a certain degree of perplexity is encountered when one attempts to come to grips with the “Hart-Dworkin debate”?³

A rough sketch of the Dworkin – Hart debate serves to illustrate his point. Despite common opinion that these two scholars are engaged in meaningful discourse, Waluchow

¹ *Problem of Clarity*, as discussed on pages 13-14.

² W.J. Waluchow, Inclusive Legal Positivism, 4.

³ *Ibid.*, 5.

submits that upon closer examination we may be left to wonder if Dworkin and Hart are really on about two different things:

Hart...seems to want to offer a morally and politically detached, descriptive theory about the nature of all or at least most legal systems; Dworkin a fully committed, normative, or as he prefers to call it 'interpretive', theory of adjudication, or the adjudicative practices of 'our' legal systems.⁴

Waluchow continues, "One might begin to wonder at this stage whether there really are any useful points of comparison between Hart and Dworkin, and whether they really have been arguing at cross-purposes."⁵ Seeing these projects as different endeavors may explain some of the confusion often encountered in trying to come to terms with the dispute. Those previously struggling with understanding what it is that is at issue are provided with an explanation for their difficulty. The problem may lie with the debate's lack of focus.

This is not to claim futility in understanding and assessing jurisprudential disputes. Nor is it to give us an easy escape from having to labour through some of the more difficult debates. Rather, the purpose behind Waluchow's observation lies in its illuminating the importance of our exercising great caution in distinguishing the different kinds of interests that motivate discussions. Different purposes generate different kinds

⁴ Ibid., 6.

⁵ Ibid., 6.

of theories, which it is important to keep distinct.⁶ This thesis has taken as its central purpose that of alleviating the confusion often associated with assessing various positions in legal philosophy. Establishing different levels, through which projects concerning morality's role in law can be understood, alleviates some of the problem currently associated with much philosophical debate in legal philosophy. Putting forth a conceptual framework gives the reader a starting point from which the issues in question can be further investigated. Further, for those scholars interested in addressing some of the issues concerning morality in law, having an established conceptual framework serves to guide and constrain philosophers in their arguments, aiding them in maintaining focus. Working from within a framework alleviates some of the difficulties arising from theorists who try to combine different projects into one theory. A conceptual framework provides a means through which such theories can be separated out and addressed in turn.

II. Parting Out a Framework

In the first chapter, I argued that theories are distinct from their objects. Contra the existing literature on this matter, a deeper understanding of the two concepts was arrived at through an analysis of their inter-relationship. Employing a rough definition of theory – that of being a construction employed to capture objects of various kinds - a general understanding of our concept of theory was fleshed out and the distinction between theory and object made clear. If not completely distinct, I argued, a theory is at

⁶ Michael Bayles, "What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law?" *Philosophical Topics*. (Vol. 18, No. 1, Spring 1990), 23.

least in some way discernible or identifiable from its object. Having separated theories from objects, attention was then turned to a more comprehensive analysis of objects where it was noted that objects of a theory could be of two sorts. This led to a parting out of first-order theories from second-order theories. While the former attempt to capture ‘normal objects’ – those objects existing at the phenomenological or practical level and are not theories – the latter, it was argued, focus their efforts on deepening our understanding of theories themselves. This distinction is important for the work that is to proceed as it sets the stage for developing the three level conceptual framework.

In this chapter, I continue with the work begun in chapter 1, namely that of developing the three levels that comprise the proposed framework. Specifically, I focus on separating out and elaborating each of the different levels. At each level, an illustration from contemporary legal philosophy will be provided to enhance our understanding. And so, in the previous chapter having loosely identified, in some respect, each of the three levels at which morality’s role in law may be discussed, I now move to presenting fully the conceptual framework.

2.1 An Initial Analogy

Mathematics surrounds us. Taught to us at a young age, it is used in countless ways for an equally innumerable variety of purposes. Suppose we wish to engage in meaningful discussion with ‘math’ as the object. Almost immediately, a number of directions that such a discussion could take arise, given such a general starting point. For

example, we may want to discuss how math is used in society, whether it is by people in everyday situations or by theorists attempting to use math to explain various phenomena. Or, it is quite possible that we may simply wish to discuss the nature of math itself. Regardless, without direction we cannot know which direction our discussion is to take or where to begin. And so, with the commencement of any meaningful discourse we must first limit our scope of interest to outline boundaries and guidelines that can frame our discussion. We begin by identifying the type of discussion we wish to have, and further elaborating on the questions that we wish to investigate. Whether the object is 'math' or 'morality,' the same is true for all discussions and arguments. Focus is required if any meaningful discourse is to ensue. This requirement ensures that, whether we are discussing math or morality's role in law, within each debate that develops the disputants are engaged in discourse about the truth and falsity of the same propositions.⁷

One manner in which this may be accomplished is to distinguish between various types, or levels, of discussions that can arise about a given object. Distinguishing between, and developing an understanding of, different levels at which discourse may be framed serves to focus the debates, providing a framework through which discourse can proceed. Understanding in what manner you are addressing the subject, looking at what sorts of questions you wish to address and so on, alleviates problems such as answering different questions or contesting different propositions. In distinguishing amongst the

⁷ As has been alluded to, this is not to say that the tripartite conceptual framework being offered here is applicable only to issues of jurisprudence concerned with morality in law. I see no reason why this distinction may not be applied to various areas, whether sociological, literary, historical, scientific discourse, and so on. Nevertheless, the focus here is to present a three-leveled framework that applies to discourse in legal philosophy concerning morality's role in law.

various types or levels of discussions that may arise with respect to morality in law, I propose to distinguish three general levels.

2.2 The Practice-Level

To speak of the practice-level is to speak of the subject's use or employment in practice. The practice-level is that of the actual application of the subject of interest. In determining how much to tip a waitress, we use math. In determining how long it will take to drive 100 kilometres at 50 km/hr, we use math. In determining the winner of a golf tournament, math is used. Focusing on math's role in each case, we see that the common characteristic that applies to all is the use of math in practice. Math's role at the practice-level is one of direct use or employment. We speak of math's function in each example as involving math at the application or practice-level by virtue of the fact that its role in each case is one of application or use – central to the idea behind the practice-level distinction of our framework.

By analogy, this same understanding of the practice-level is applicable to morality's role in law. Though the object changes from math to morality in law, the general characterization of what it is to function at the practice-level remains the same. Similar to math, morality's functioning at the practice-level involves the actual employment or use of morality in legal practice. It is far from difficult to find examples of morality playing a role at the practice-level. We need only look to judges who use

moral principles in their decision-making to demonstrate how morality can be used in this way. Here, the 1889 case of *Riggs v. Palmer*,⁸ provides a good illustration.

In deciding whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so, the court in *Riggs* reasoned “that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.”⁹ The court continued,

All laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.¹⁰

Citing the moral principle ‘that no man shall profit from his own wrongdoing,’ the court ruled the murderer to have no claim to his grandfather’s inheritance and used morality to serve as the foundation of its decision.

In the same way as a judge in an abortion case may defend her pro-life decision by calling upon the principle of the sanctity of life, just as in *Riggs v. Palmer* the court

⁸ *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889).

⁹ *Ibid.*, at 509, 22 N.E. at 189.

¹⁰ *Ibid.*, at 511, 22 N.E. at 190.

made use of morality in arriving at its decision. Judges often apply principles of political morality when deliberating about a case. Further, these judges who cite and rely upon moral principles serve as examples of the type of practical application of morality in law. Yet, our understanding of the practice-level, as presented thus far, needs some qualification by way of caution, a caution, however, that also serves as segue to an examination of the next level.

To be sure, when morality is incorporated into a judge's decision-making process it is functioning at the practice-level. That being said, in discussing the role that morality plays in such instances, rather than being involved in the practical use of morality itself, we engage morality at the theoretical level. This distinction is closely related to the division between the different perspectives or points of view called upon by various legal theorists in their accounts of law. Returning again to the Dworkin – Hart debate, Dworkin's central objection in rejecting Hart's descriptive legal theory rests on the claim "that legal theory must take account of an internal perspective on the law which is the viewpoint of an insider or participant in a legal system, and no adequate account of this internal perspective can be provided by a descriptive theory whose viewpoint is not that of a participant but that of an external observer."¹¹ This distinction between participant and theorist or detached observer as found in Hart's account is one that, in addition to being picked up and employed by such theorists as Raz, Kelsen and Waluchow, illuminates the differences between the practice and theoretical-levels. The practice-level, as understood in the proposed framework, is analogous to that of the participant.

¹¹ H.L.A. Hart, The Concept of Law, 242.

At the practice-level morality functions in so far as the participant applies it. That being said, the theoretical-level is to be understood as distinct from the practice-level in much the same way as the detached observer is distinct from the participant. Here, the detached observer or theorist focuses on analyzing, assessing, or constructing theories about morality's use. Borrowing from Hart, an 'external observer' describes, observes and analyzes behaviour without actually participating in the object. With respect to morality in law, the external observer is one who observes and comments on the use of morality by the participants. In dealing with the role that morality plays in judicial decisions, for example, our role is one of an external observer or theorist. No longer functioning at the practice-level or as a participant, our interest shifts to theorizing. The practice-level only involves the use or application of moral principles by officials. Strictly speaking, the judges play the role of the participants in so far as they are actively applying principles of political morality. Any subsequent focus on the role of the judges with respect to their use of moral principles becomes the task of an external observer, or for the purposes of the proposed framework, or the task of the theoretical-level.

2.3 The Theoretical-Level

Earlier we acknowledged that discourse concerning morality in law may take a variety of forms and so a good starting point would be that of distinguishing some of the different levels, or ways, in which we may understand its various roles or functions. In the preceding section, I began this process with a look at morality's role at the practice-

level. Officials citing moral principles in their judicial opinions illustrate that moral principles can be applied in judicial decisions. This, I argued, is the role of moral principles functioning at the practice-level. What then, would we consider discourse at the theoretical-level to be like? If we are not directly using the object, then it is at some other level that the object's role is being played. By virtue of discussing the use of morality, for example, our interest has now moved to the theoretical-level. However, unlike the practice-level where morality's practical application in law was the sole constituent, the role which morality plays at the theoretical-level may be of various sorts. In what follows, I will examine three ways in which morality may be involved at the theoretical-level of legal discourse: (a) theories *of* morality, (b) theories *about* morality's use in legal practice, and (c) theories that use morality *as a theoretical tool*, whether it be as an explanatory or justificatory tool.

(a) Theories *of* Morality

Let us revisit our mathematics example. This first way in which math may function at the theoretical-level is by virtue of it being the primary object of interest – i.e. involving discussion about math in a way that a philosopher or mathematician would. Unlike the practice-level, math is not being used, but a theory of math is being developed, assessed, and so on.¹² Leading these types of discussions may be questions of the sort:

¹² Keep in mind the distinction between theories *of* objects and theories *about* objects. Though each will be dealt with in turn, it is important that a rough distinction between the two be sketched at this time. The general difference between the two types

Are numbers real? Are mathematical systems conventional? Or, what is a number? In discussing math in a theoretical manner, it becomes the central focus of the discourse. In developing a theory, or assessing various other theories of math, the project becomes one that is situated at the theoretical-level. To this end, this type of theoretical-level discussion, as it pertains to morality and its role in law, would entail that the participants focus on moral principles themselves – independent of law. Do moral principles exist? What constitutes a moral principle? and the like, are the focus of discussions about morality as it pertains to this first type of theoretical-level project.¹³

(b) Theories *About* Morality’s Use at the Practice Level

The second type of theoretical-level project involves theories *about* the object of interest - theories about mathematics, or about morality in law. The distinction between theories about objects and theories of objects rests on an understanding of theories about objects as being primarily concerned with talking about math as it is used in everyday life, for example. Here, we do not use math, nor do we concern ourselves with its nature,

of theoretical-level projects rests on the specifics of what it is each theory is trying to accomplish and subsequently what is its main focus. On my account, theories of objects focus on the nature of the object itself, while theories about object’s concentrate on the object’s use or practical application.

¹³ Though an interesting avenue through which to explore moral principles and morality as a whole, the focus on this thesis is centered on the role of morality in legal practice and legal theory. Thus, this sort of discourse that concentrates on investigating the nature of morality independent of law will be left for another day.

but rather attempt to explain, organize, elucidate, capture, etc., its every day practical uses.

In fleshing out the practice-level distinction in the preceding section, we necessarily engaged in speaking about how math can be and is used in every day life, noting, for example, that people use it for things like calculating how much to tip the waitress. Though necessary for its explication, in offering a practice-level account it is important to note that we were not engaged in the practice-level use of morality. We were not using math, but rather involved in discussion about its every day application. Contra using math to deal with a practical issue, we were, in a sense, offering a theory (perhaps a rudimentary sociological theory) about the use of math. In speaking about math's use in practical situations, our discourse focuses on math's use as the object of our theory. This is the second type of theoretical discourse that may arise with respect to math – theories *about* math.

Legal projects concerned with this type of theoretical-level endeavor to focus their attention on the use or application of the object of inquiry. So, with respect to the role of morality in law, theoretical-level projects of this sort concentrate on addressing the role of morality in legal practice. Does a theory adequately capture moral principles as they function at the practice-level? In what way, or ways, do moral principles play a part in legal practice? Or, perhaps the question may be asked whether moral principles are even involved at the practice-level? Any of these inquiries may drive the discussions that are of the theoretical-level. A good deal of work in contemporary legal philosophy occurs at this particular level and so it is easy to find recent debates that can further our

understanding of theoretical-level discourse. Let us turn to the well-known and long-running debate between Hart and Dworkin.

In *The Model of Rules I* Dworkin provides a wide-ranging critical analysis of legal positivism. Focusing on the practice of legal officials, Dworkin argues that Hart's explanation of what judges do when they apply the law and interpret legal rules is inaccurate and incomplete. Dworkin's major criticism of Hart's positivist account rests on the idea that it does not account for the fact that judges often employ principles of political morality, or non-rule standards, in their reasoning when deciding cases.

Dworkin characterizes the core commitments of Hart's legal positivism through three theses.¹⁴ The first, the 'pedigree' thesis, commits Hart to the idea that judges identify and distinguish valid legal rules from other rules (e.g. rules of etiquette or morality) by looking at where the rules come from. The pedigree thesis constrains positivists to accept as valid law only those norms that have satisfied the proper social requirements – they are derived from accepted sources such as statutes, custom, case law, and so forth. Valid legal rules have the right pedigree.

¹⁴ Dworkin sketches the positivist position in light of three theses: the 'pedigree' thesis, the 'discretion' thesis, and the 'obligation' thesis. The third thesis, not directly addressed in this paper, Dworkin presents as claiming:

*Someone has a 'legal obligation' when their case falls under a valid legal rule that requires him to do or to forbear from doing something... in the absence of such a valid legal rule there is no legal obligation; it follows that when the judge decides an issue by exercising his discretion, he is not enforcing a legal right as to that issue. (Ronald Dworkin, *Model of Rules I*, in Taking Rights Seriously, 17)*

This is to maintain that positivists contend that our legal duties arise from rules that are legally valid, rules that have non-optional qualities. In the absence of legal rules, no legal obligations exist.

In what have been called ‘easy’ cases, judges reach a decision by applying a clearly understood legal rule with an appropriate pedigree to the facts of the case. However, complications can arise which make the process of deliberation far more difficult. The law may be written in ambiguous terms, or the most clearly applicable legal rule may not exactly fit the set of facts to which it is to be applied, while in other cases, the facts of the case may even extend beyond the scope of the legal rule. In these ‘hard’ cases, Hart describes judges as employing discretion and making law. To the extent that judges make new law where previously none had existed, judicial discretion demands that judges step outside the boundaries of law.

The second thesis identified by Dworkin draws out this positivist position regarding hard cases. He writes,

The set of these valid legal rules is exhaustive of ‘the law’, so that if someone’s case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by ‘applying the law.’ It must be decided by some official, like a judge, ‘exercising his discretion,’ which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.¹⁵

But this does not mean that judges are simply making wild decisions guided by nothing more than their own personal tastes. Hart explains, “We can say laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social

¹⁵ Ronald Dworkin, *The Model of Rules I*, in Taking Rights Seriously, 17.

aims.”¹⁶ Judges assess the purpose or social aim of a legal rule, and in their decisions advance the spirit of the law even when the letter of the law does not clearly apply.

But this account of hard cases does not go far enough according to Dworkin. Arguing that it is possible to be more specific about the different factors weighing in on judicial decisions, Dworkin denies the Hartian account of judges reaching outside the law in arriving at their decisions. Rather, where legal rules fail to provide adequate guidance in adjudication, judges use ‘legal principles’ as a basis for decisions. Though distinct from legal rules, principles also function as a standard that guides judges’ reasoning when they try to reach decisions in cases.

One of Dworkin’s main criticisms of the Positivist enterprise is that, in virtue of their core commitments, they are unable to account for the role of moral principles in legal practice. The charge is one against the ability of legal positivism to explain adequately the observable practice of judge’s relying on moral principles in legal decisions.

That moral principles can and sometimes do figure in legal practice, positivists do not wish to deny. In Inclusive Legal Positivism, Wil Waluchow makes reference to Charter cases as immediate examples of instances where judicial deliberation often does involve taking into account moral principles. To be sure, he writes, Charter challenges, “typically involve substantive moral arguments purporting to undermine legal validity.”¹⁷ Recognizing the role of moral factors in legal practice, Waluchow explains,

¹⁶ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in J. Feinberg and H. Gross (eds.), Philosophy of Law (3rd edn.), 78.

Such challenges ... demonstrate either that pedigreed criteria for legal validity have not been satisfied, and that what seems to be valid law is in fact no law at all, or that a law must be understood or interpreted in such a way that it does not infringe upon a pedigreed moral right protected by the Charter. In the former instance, morality figures in arguments purporting to challenge the existence of valid law. In the latter case, it figures in arguments intended to establish the content of valid law, the law contained within the instruments (for example, the statutes or precedents) employed for its expression. If this view of charter challenges is correct, then it follows that the existence and content of law does sometimes depend on moral factors.¹⁸

The issue, it seems, becomes not one of whether morality figures in law, rather it is one of determining when moral principles play a role in legal practice and determining whether positivism can account for this given its commitments, specifically the separation thesis. For Dworkin, principles of political morality are invoked in all hard cases requiring the determination of the existence of valid law. Focusing on a distinction between a separation thesis and separability thesis inclusive positivists are able to account for the use of moral principles in practice without doctrinal conflict.¹⁹ Thus, Waluchow

¹⁷ W.J. Waluchow, Inclusive Legal Positivism, 142.

¹⁸ *Ibid.*, 142.

¹⁹ In differentiating between inclusive legal positivism and exclusive legal positivism, Waluchow draws a distinction between the separation thesis and the separability thesis. Waluchow characterizes each of these theses as follows. According to the separation thesis, as a matter of conceptual necessity, the legal validity of a norm can never be a function of its consistency with moral principles or values. Markedly different is the separability thesis that states that it is conceptually possible, but in no way necessary, that the legal validity of a norm might in some way be a function of its consistency with moral principles or values. Defenders of the inclusive positivist

argues, though principles of morality can be invoked in hard cases, it is neither necessary nor always the case.

The separation thesis, properly understood, is the claim that there is no *necessary* connection between morality and law. This is to say that the separation thesis does not exclude the possibility of there being a master rule of recognition that incorporates moral principles as criteria of legal validity. It is consistent with positivist commitments that law be “capable of expressing and affirming moral demands and rights: but it is not in its nature necessarily to do so.”²⁰ Relying on what he terms an ‘inclusive rule of recognition,’ Waluchow draws attention to the possibility that the guiding rule of recognition may include moral standards among its criteria of legal validity. By the positivist’s own commitments, it is the social pedigree of the norm that is tested by this rule of recognition. If certain moral principles satisfy the proper social pedigree (their pedigree rests in social custom for example) then they are capable of functioning as criteria for determinations of law. Summarizing his position, Waluchow writes,

A distinguishing feature of inclusive legal 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.²¹

position subscribe to the separability thesis, while those of the exclusivist camp hold fast to the separation thesis. See, W.J. Waluchow, “ELP v. ILP.” In the, Routledge Encyclopedia of Philosophy.

²⁰ W.J. Waluchow, Inclusive Legal Positivism, 80.

²¹ *Ibid.*, 2. (author’s notes omitted)

The separation of law and morals, though seemingly demanded by the separation thesis, does not entail that law and morality are completely unconnected in all instances.

Inclusive positivists, such as Waluchow, instead draw attention to the idea that there is no *necessary* connection between morality and law. “Any connections between law and morality are contingent only, dependent on whether, as a matter of fact, the right kinds of laws are created in the right kinds of ways.”²² Identified by Waluchow as adhering to a separability thesis, rather than a separation thesis, inclusive positivists readily accept that moral principles may figure in determinations of a norm’s legal validity.²³

This debate between Dworkin and Hart, with subsequent contributions by Waluchow and others, focuses on addressing the role moral principles play in legal practice. Questions of whether and how morality can be called upon by judges in deliberation are being addressed. In this, the debate is situated at the theoretical-level. Specifically, this debate is one that I have categorized as a discussion of theories *about* objects. Focusing on morality’s use by judges, the discourse that arises is centered

²² *Ibid.*, 81.

²³ Wil Waluchow, in the *Routledge Encyclopedia of Philosophy*, has identified the distinction between the Separation Thesis and the Separability Thesis. Coleman, on numerous occasions, refers to the separation thesis as the separability thesis, drawing emphasis to the fact that this thesis actually claims simply that morality is not necessarily a condition of legality, not that morality cannot be a condition of legality, as a contingent matter, *see*, Coleman, *The Practice of Principle*, 68 n. 4, 104, 125 n. 8, 151, and 152. Joseph Raz also draws on this distinction in an effort to distinguish exclusive positivism from the inclusive position. Raz identifies the exclusive positivist’s understanding of the separation thesis as strong and the inclusive as a weak understanding of the thesis. *See*, Raz, “Authority, Law and Morality” *The Monist* (Vol. 68, 1985, Issue 3).

around the application of moral principles in legal practice, in so far as it is neither a discussion about the nature of morality itself nor an account of how morality may be used as a theoretical tool – the next type of theoretical-level project we are going to look at.

(c) Objects as Theoretical Tools

To return to our initial analogy, there are times when math is not simply used to perform some simple practical task like tipping the waitress, but instead is used to explain some phenomenon. In this sense, math may be called upon in a theoretical explanation of the behaviour of sub-atomic particles, or perhaps in an effort to capture some sociological phenomenon.²⁴ Here, math is being employed in the development and assessment of a theory about something. To be sure, math is being used, but this is not to be mistaken with the use of math associated with the practice-level, for the context in which it is employed changes when the project is of the theoretical sort. Contra the practice-level where math's use was one of practical import in everyday situations, at the theoretical-level math can be used as a theoretical tool - its use is within a theory or theoretical context. Generally, math in this context is understood as being used to develop a theory about something else (e.g. rational behaviour, planetary motions, weather patterns, etc.)

²⁴ This is not to say that all projects of this sort involve the object of inquiry functioning as a theoretical tool in an explanatory power. To be sure, we may imagine instances where the object is employed as a theoretical justificatory tool as opposed to an explanatory tool. In each case, however, the general theme is the same in that the object is now a theoretical tool as opposed to being the object of theorizing.

Let us first turn to a couple of analogous examples before focusing on how morality figures in law in this manner.

In offering an account of what it is that judges do in satisfying the requirements of justice in rectification, Aristotle proposes that we understand their practice as attempts to restore unjust situations to equality. “When one is wounded and the other wounds him, or one kills and the other is killed, the action and the suffering are unequally divided [with profit for the offender and loss for the victim]; and the judge tries to restore the [profit and] loss to a position of equality, by subtraction from [the offender’s] profit.”²⁵ For Aristotle, the just in rectification is the intermediate between loss and profit and in describing the practice of a judge restoring equality, Aristotle calls upon a conception of the practice that is laden in geometry.

The judge restores equality, as though a line [AB] had been cut into unequal parts [AC and CB], and he removed from the larger part [AC] the amount [DC] by which it exceeds the half [AD] of the line [AB], and added this amount [DC] to the smaller part [CB]. And when the whole [AB] has been halved [into AD and DB], then they say that each person has what is properly his own, when he has got an equal share. The equal [in this case] is intermediate, by numerical proportion, between the larger [AC] and the smaller line [CB]. This is also why it is called just (*dikaion*), because it is a bisection (*dicha*), as though we said bisected (*dichaion*), and the judge (*dikastes*) is a bisector (*dichastes*).²⁶

²⁵ Aristotle, *Nicomachean Ethics*, ed. and trans. T. Irwin (Indianapolis: Hackett, 1999). All further references to the *Nicomachean Ethics* are to this translation and are abbreviated as *NE*.

²⁶ *Ibid.*, 1132a25-1132a35.

In explicating the process undertaken by judges in restoring equality, Aristotle presents a mathematical theory that employs geometric relations in an effort to capture the practice. Others have adopted such theoretical models in offering their accounts of justice. Thomas Hobbes, in Leviathan, writes of commutative justice as consisting in some adherence to proportionality.²⁷ Both Aristotle and Hobbes present theories that employ math as the central theoretical tool of their accounts in an effort to capture the practice of judicial action in arriving at justice.

Turning from math, imagine a group of friends out on a hike in the woods who stumble across two copulating rabbits. Not wishing to disturb them, the group continues on down the path until, once again, they find themselves intruding on more ‘bunny-love.’ Later that evening, at the campsite, the members of the group discuss the day’s events. Trying to offer an explanation for having come across so many instances of copulating rabbits, some members of the group reason that the mating behaviour of the rabbits is easily understood in virtue of the season. The fact that it is spring, they claim, accounts for the fact that there were so many of these encounters. However, others disagree, offering an alternative explanation that cites the favourable environment as reason for the day’s encounters. Given the moist, dense, coniferous forest, that they are in, some reason that it should be no surprise so many rabbits were encountered. The debate between the two groups is not over whether the bunnies were indeed engaged in sexual activity, presumably there is agreement on this matter, rather, the issue is over what best explains

²⁷ Thomas Hobbes, Leviathan. (Toronto: Penguin Books Canada Ltd., 1985), 208.

the behaviour. The explanatory power of the different theories is what is being drawn into question.

Both the Aristotle and Hobbes who wish to capture particular aspects of certain sorts of justice, and our group of hikers trying to explain the day's earlier run-ins, are involved in projects at the theoretical-level. Both cases involve different parties employing various theoretical tools in an effort to offer the best account. In so doing, disagreement can arise regarding the power of the tools. This can happen in legal philosophy as well, where principles of morality are used as theoretical tools to capture various phenomena. Just as the debate between scientists focused on math's role as an explanatory tool, morality's ability to function in this capacity can also be at issue. Turning to the recent works of Jules Coleman, we can offer an example wherein morality was used in this capacity – as an explanatory tool in developing a theory about aspects of law.

Coleman develops the claim that tort law is best understood in terms of a conception of corrective justice. Consider the basic structure of our tort institutions:

- (1) The plaintiff sues the person he alleges to have injured him, and not somebody else.
- (2) The plaintiff presents arguments and evidence to the effect that the defendant acted wrongfully towards him and that, as a result, he (the plaintiff) suffered harm.
- (3) The wrongfulness of the act, the fact of the harm, and the causal relation between the two are all pertinent to the outcome of the lawsuit.
- (4) The jury decides – in accordance with instruction by the judge as to what duties, if any, the defendant owed the plaintiff and the relevant standard of compliance with those duties – whether the plaintiff has made out the relevant case in the light of the evidence introduced.
- (5) If the plaintiff is found to have made

out this case successfully, he is awarded a claim against his injurer, who is in turn required to make good the victim's losses.²⁸

Characterizing the practice in this way, Coleman attempts to emphasize what he deems the central elements of the practice which any theory purporting to capture the practice must explain. The ideas of responsibility, duty of care, victim-injurer relationship, neglect, and harm are all central components that Coleman identifies as part of our tort institutions. That being said, Coleman argues that a principle of corrective justice understood as embodied throughout the practice of tort law provides a strong theoretical account of the practice.

In the absence of any explanatory theory, our intuition about this practice is that the victim is entitled to sue because he makes a claim that the injurer has wrongfully harmed him; that the victim must present evidence to support the charge because proof that there was wrongful harm is vital to the decision; and if the victim's claims are vindicated, he recovers against his damages, paid from the injurer, because the law recognizes the idea that individuals who are responsible for the wrongful losses of others have a duty to repair the losses – the principle of corrective justice. This moral principle is offered as an explanation in light of its ability to make clear the connection amongst the core ideas of tort law. “The relations among the central concepts of tort law – wrong, duty, responsibility, and repair – are best understood as expressing the fundamental normative significance of the victim-injurer relationship as it is expressed in the principle

²⁸ J. Coleman, The Practice of Principle, 20-21.

of corrective justice.”²⁹ Coleman’s conceptual explanation of tort law purports to explain tort law by identifying the principle that ties together its central concepts and explains the practical inferences they warrant. What the principle of corrective justice does is make transparent the relationships between the concepts of the practice. It is in this sense that the principle of corrective justice is embodied in tort law. In contrast to other analyses of tort law, such as the economic analysis which Coleman claims renders central concepts opaque, corrective justice makes those relationships transparent. Coleman employs morality as an explanatory tool in an effort to provide a theory of tort law that deepens our understanding of the practice.³⁰

But what are we to make of questions that probe the legitimacy or ability of moral principles, for example, to function in such a capacity? While it is one thing to incorporate morality as a theoretical tool in providing an account of some object, it is quite another to discuss whether morality can or ought to be used in such ways.

2.4 The Meta-Theoretical Level

Discourse concerning the ability of an object to serve as a theoretical tool is situated at the meta-theoretical level. Recall a distinction made in the previous chapter.

²⁹ Ibid., 20-21.

³⁰ It is worthwhile to once again draw the distinction between theories about morality’s use in legal practice, and those which employ moral principles as theoretical tools. Coleman’s project is different from the dispute between inclusive legal positivism and exclusive legal positivism, for example, which focuses on how to characterize the use of moral principles at the practice level. With respect to the corrective justice principle and tort law, Coleman is employing a moral principle as a theoretical explanatory tool.

It was argued that two types of objects could be distinguished, which leads to two types of theories, first-order theories and second-order theories. The former are concerned with ‘normal’ objects – any discernable object other than a theory – while the latter focused on capturing ‘special’ objects, namely theories themselves. These second-order theories that capture ‘special’ objects are theories about theories and it is rooted in such discourse about second-order theories that the meta-theoretical level is identified.

Projects situated at the meta-theoretical-level involve the analysis, evaluation and construction of theories about theories. Both Berlin and Bayles, two theorists who have been drawn on previously in this thesis, exemplify the sorts of concerns that may characterize meta-theoretical level undertakings.³¹ In The Purpose of Philosophy, Berlin sets as his project the exploration and development of what it is to engage in philosophy. Berlin’s concern is the elucidation of the central task of philosophy. In developing a philosophical theory, he asks, what is it that we ought to be doing? What questions should a philosophical theory be addressing? Dealing with the focal question of “What is the subject-matter of philosophy?”³² Berlin engages in an examination of the function of various theories. He arrives at the conclusion that “The task of philosophy, often a difficult and painful one, is to extricate and bring to light the hidden categories and

³¹ See, Michael Bayles, “What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law?” Philosophical Topics (Vol. 18, No. 1, Spring 1990); and Isaiah Berlin, “The Purpose of Philosophy” in Concepts and Categories: Philosophical Essays. ed. Henry Hardy; with an introduction by Bernard Williams. London: Pimlico, 1999.

³² Isaiah Berlin, “The Purpose of Philosophy” in Concepts and Categories: Philosophical Essays. ed. Henry Hardy; with an introduction by Bernard Williams. London: Pimlico, 1999, 1.

models in terms of which human beings think (that is, their use of words, images and other symbols), to reveal what is obscure . . .”³³ His is a project investigating the task of philosophy, asking what it is that a philosophical theory is concerned with. Berlin undertakes a theoretical investigation into the nature of philosophical theories themselves.

In a similar vein, Bayles undertakes to examine what jurisprudence is about in his paper What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law? Bayles argues, “philosophy of law or jurisprudence seeks to provide theories.”³⁴ Focusing on the purposes of theories and importance of objects, Bayles presents a view of legal philosophy as that which provides “theories of law, legal systems, validity, and so forth.”³⁵ Further, these theories are “best thought of as theory-construction rather than providing definitions, concepts, or conceptions.”³⁶ Bayles engages in theorizing about legal theories. His project is one that is identifiable as existing at the meta-theoretical level. Unlike theoretical-level endeavors that take the practice or application of the object as their focus, meta-theoretical level projects take the theoretical-level projects as their objects.

³³ Ibid., 10.

³⁴ Michael Bayles, “What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law?” Philosophical Topics (Vol. 18, No. 1, Spring 1990), 23.

³⁵ Ibid., 24.

³⁶ Ibid., 37.

With respect to projects involving morality's role in law, those situated at the meta-theoretical-level concern themselves with discourse as to whether moral principles can be used as theoretical tools and what this involves. How morality figures in providing an account of law is one question that has given rise to recent discussions. Asking the question, can moral principles be used in putting forth a legal theory, is one manner in which this debate has been situated and the arguments put forth by Jules Coleman, largely in response to the Dworkinian account, serve to illustrate the types of discourse that occur at the meta-theoretical-level.

As discussed earlier, in The Practice of Principle: In Defence of A Pragmatist Approach to Legal Theory Coleman embarks on developing an account of tort law that rests upon understanding the practice of torts as embodying a moral principle of corrective justice. And while Coleman argues that it is in virtue of the principle of corrective justice that we are able to best understand the core of tort law, Coleman's more general project is one of exploring what is to count as an explanation of a part of law.³⁷ Through examining the practice of torts, Coleman engages in theorizing about legal theory – a meta-theoretical endeavor. Distinguishing among different kinds of explanations one might offer Coleman arrives at putting forth a specific kind of conceptual explanation that “purports to explain tort law in a non-reductive way, by identifying the principle that ties together its central concepts and explains the practical inferences they warrant.”³⁸ A sort of ‘explanation by embodiment,’ Coleman calls upon

³⁷ J. Coleman, The Practice of Principle, xiv.

³⁸ *Ibid.*, xiv.

pragmatic considerations and methodology in proposing his account of tort law. Two main points to address arise in expounding Coleman's explanation by embodiment or pragmatic approach to legal theory.

(a) The Pragmatic Method

First, the methodology put forth by Coleman is pragmatic. The method is characterized by five basic commitments. (1) *semantic non-atomism* claims the application and meaning of a concept depend on at least some of the relations between that concept or word(s) and other concepts or words. The semantic non-atomist is one who denies that any single semantic element, e.g., a word or a proposition, has a determinate meaning independent from the whole of the system. The meanings of words and concepts are to be understood in relation to the contextualization given in the complete idea, "deny[ing] that any single semantic element has a determinate meaning independent of at least some of the other elements of the semantic system."³⁹ So, to understand a concept it is necessary to see how that concept fits in a web of related concepts. The meaning of a concept is dependent upon its relationship(s) with other concepts and propositions. These are usually inferential relations, leading to the second characteristic of Coleman's pragmatic method, (2) *inferential role semantics*. Here, the claim is that the content of a concept can be analyzed in terms of the inferential role it plays in a variety of other practices in which it figures. Drawing out central concepts of

³⁹ Ibid., 7

our practices, their relationships with one another and with the practice can be analyzed to provide insight into both, the “holistic (or semi-holistic) web of relations in which they stand to one another,”⁴⁰ and the determinate content of the concept itself. To illustrate this commitment, Coleman draws upon the inferences that are part of the concept of promise. Suppose I promise Ella that I would take her to the park tomorrow. To understand the concept of a promise, as inferential role semantics dictates, we would look to the various practical inferences which can be made by the promisor, such as a duty has now been created; the promisee, such as the justified expectation of going to the park tomorrow with me; and others, who could predict that I will meet with Ella tomorrow. Inherent in the concept of a promise, the promisee is justified in making a number of inferences. And, it is from these inferences that the concept of ‘promise’ is further illuminated. The third commitment of Coleman’s pragmatic method is termed (3) *explanation by embodiment*. This is the view that the inferential roles of concepts may be seen to hang together in a way that reflects a general principle and this itself is an acceptable form of philosophical explanation. Coleman argues that tort law is best understood as embodying a principle of corrective justice. In this, Coleman argues that the inferential roles of the main concepts of tort law seem to hang together in such a fashion as to make clear a general principle of corrective justice. This general principle, we say, is embodied in the practice, and plays a role in its explanation. Corrective justice identifies the normatively significant elements of the practice, making the main concepts of tort law transparent as well as the relationships and inferences they share. Corrective

⁴⁰ Ibid., 7.

justice, for example, explains the bilateral relationship between plaintiff and defendant observed in tort cases. The principle that “individuals who are responsible for the wrongful losses of others have a duty to repair the losses”⁴¹ can be seen as “embodied” in the very practice of tort law. Contrarily, explaining the relationship between plaintiff and defendant in light of other accounts, for example an economic account, renders the relationship mysterious at best. Understanding tort law as embodying a principle of corrective justice, however, explains in a more intelligible manner the practices of tort law. The fourth characteristic of Coleman’s pragmatic methodology is (4) *semantic holism*. As the principle of corrective justice is used to understand best the key concepts of tort law, and at the same time the principle gets some of its content from the concepts it explains, there is a unique relationship between the practice and the principle. Though seemingly circular, the principle explaining the practice but the practice being what gives the principle its content, Coleman’s method of pragmatism is committed to the belief that the practices in which our concepts are embedded must themselves be assessed holistically: that is, we must see them as acting together to articulate, realize, or make explicit the content of the concepts and principles they embody. To return to the earlier example of the concept of a promise, we can better understand its operation in law by looking at its operation in non-legal contexts, and vice-versa. Similarly, what counts as a duty of repair within the context of tort law can be understood in virtue of this concept’s function in other various non-legal contexts. Central to Coleman’s holistic tenet is that, “the meaning of a concept in any one practice influences its proper meaning in all the

⁴¹ Ibid., 15.

others.”⁴² The final commitment of his pragmatic approach is a (5) “commitment to the *in-principle revisability* of all beliefs, categories of thought, etc.”⁴³ Here Coleman contends that provided other related concepts are adjusted accordingly, all concepts are revisable. In contrast to the traditional view that some beliefs are unwaveringly true in virtue of their meaning, Coleman’s pragmatic approach opens the possibility that all concepts are, in principle, revisable. If I believe that it is noon, but look to a watch and find out it is actually five o’clock in the afternoon, then I have reason to revise my previous belief. Another example more closely connected to legal theory would be Alternate Dispute Resolution. Here our ordinary understanding of whether or not this is a form of legal dispute resolution may depend on a number of things, such as the complexity or nature of the issues under dispute, whether lawyers are consulted or in any other way involved, the nature or qualifications of the arbitrator or mediator, and the types of decisions reached.

Coleman’s pragmatic method to legal theory construction is one that provides theorists with the ability to construct adequate theories of law in a unique way such that our understanding of the practice is deepened. With respect to Coleman’s account of tort law, reflection upon the central concepts uncovers a principle of corrective justice that is embodied throughout, suggesting that we can view the principles of corrective justice as serving as a sort of ‘hermeneutic glue’ running all through the various aspects of tort law. The pragmatic approach leads to an understanding of tort law “by identifying the

⁴² Ibid., 8.

⁴³ Ibid., 6. Emphasis added.

principle that ties together its central concepts and [it] explains the practical inferences they warrant.”⁴⁴

(b) Value-Neutrality

Second, by virtue of the methodology adopted by Coleman in espousing his legal theory, Coleman is able to provide positivists with a manner in which principles of morality may be incorporated into their theoretical accounts while avoiding the justificatory aspect central to the Dworkinian approach and problematic to the core commitments of positivism.

At the outset of The Practice of Principle, Coleman posits the separability of ‘theoretical explanation’ from ‘theoretical justification.’⁴⁵ While both types of theory illuminate our understanding of the object or practice, “explanations do so by telling us what the nature of a thing is, or by telling us why things are as they are...”⁴⁶ while, “justifications seek to defend or legitimate certain kinds of things – for example, actions, rules, courses of conduct, practices, institutions, and the like.”⁴⁷ The distinction between

⁴⁴ Ibid., xiv.

⁴⁵ Waluchow draws attention to the seemingly ‘straight-forward’ division between explanations and justifications as being one that is highly controversial among many legal theorists who deny that one can determine the ‘nature’ of a social practice, like law, without engaging in issues about its moral justification. See, W.J. Waluchow, “In Pursuit of Pragmatic Legal Theory: The Practice of Principle by Jules Coleman.” The Canadian Journal of Law and Jurisprudence. Vol. XV, No. 1 (2002), 127.

⁴⁶ J. Coleman, The Practice of Principle, 3.

the two types of theories lies in the fact that explanations are governed and evaluated by norms of descriptive and/or predictive accuracy; whereas, justifications are regulated by the appropriate moral norms, such as justice, virtue, goodness, fairness, and others. On Dworkin's view, a full legal theory necessarily both explains and justifies law – it necessarily puts law in its 'best moral light.' The necessity of incorporating moral consideration and moral arguments in offering theories regarding social practices is what Coleman's methodology purports to avoid. Rather than accept theoretical explanations as necessarily 'moralistic,' the pragmatic approach offers a means through which a theoretical explanation of law can be presented while maintaining a demarcation from any theoretical justificatory endeavor.

Illustrating the distinction between explanations and justifications, Coleman notes the difference between the following two claims: (1) "Our concept of X depends on what *that concept* ought to be"; and (2) "Our concept of X depends on what X ought to be."⁴⁸ In the case of law, the first type of claim implies that our concept of law must answer to certain norms of concept-formation and theory-construction. If, for example, one of our norms of concept-formation or theory-construction for the concept of law is that the concept ought to reflect or explain our ordinary understanding of the law, then, for example, if we were to say that law typically exists we can subsequently reject Austin's command theory of law. Maintaining that law or laws are best understood as orders backed by threat of sanction made by a sovereign who is in the habit of being obeyed but

⁴⁷ Ibid., 3.

⁴⁸ Ibid., 3.

obeys no one, fails to account for our ordinary understanding of, among other things, law-makers who are bound by the very rules they make or by customary laws. Thus it is a theory that must be rejected. The second claim implies that the concept of law must answer to certain substantive moral or political norms of what the law ought to be. On this account we may wish to claim that law is best understood as furthering the equality of the citizens it governs and protecting their individual rights, since these are typical moral and political principles which the law ought to embody. A theorist claiming that law is best explained by the principle of protected expectations, given that this principle is accepted as the politically or morally desirable value or principle which law ought to embody, would be conforming to the type of claim that our concept of X depends on what X ought to be.

Coleman argues his account of law, and the proper object of explanatory theories of law, as concerned with the first type of claim. He writes, “[o]ur concept of law certainly depends in part on what *our concept* of law ought to be; but our concept of law does not, in any theoretically interesting way, depend on what *the law* ought to be.”⁴⁹ For Coleman, the strength of any explanatory theory purporting to capture a social practice is to be measured in light of its ability to explain the object or practice. It is a mistake to think that the arguments in support of a theory rest on the moral attractiveness of its composite. Coleman seems to be identifying Dworkin’s project with mention of this problem. Regarding his own theory of tort law, Coleman writes, “[t]he defensibility of corrective justice as a moral ideal is thus independent of its role in explaining tort law;

⁴⁹ Ibid., 4-5.

and in arguing that tort law is best explained by corrective justice I do not mean to be defending tort law thereby.”⁵⁰ Explanations are distinct enterprises from justificatory projects and it is a theoretical explanation of law that Coleman argues he is presenting. Distinct from offering a justificatory account of tort law, Coleman engages in a type of value free jurisprudence that aims solely to describe the practice apart from rendering any moral claim as to its merits.⁵¹ Restated, the explanatory project is norm governed; its evaluation is a normative affair.

In offering his theory that tort law is best understood as embodying the principle of corrective justice, Coleman relies on the acceptance that invoking moral values in the course of theory development and assessment does not necessarily imply that the theorist has engaged in a process of constructive interpretation. Contra Dworkin’s model, Coleman argues one can invoke moral values and principles without using them to place the object or practice in its best moral light. So, in presenting his explanation of tort law, the merit or strength of Coleman’s claim that the moral principle of corrective justice explains tort law is in no way dependent upon the value of the claim.

The argument ... develops the claim that tort law is best understood in terms of a conception of corrective justice. The mistake would be to think that the argument for this claim rests on

⁵⁰ Ibid., 5.

⁵¹ In referring to a “value free jurisprudence,” it is important to note that this refers to a “morally non-committal jurisprudence.” In fact, his legal theory is norm-governed. Regulated by a range of formal norms that govern all theories – norms like simplicity, coherence, elegance, and consilience – Coleman’s project is value free only in so far as it is not subject to moral norms such as justice, virtue, goodness, fairness, and so on. See, J. Coleman, The Practice of Principle, 3.

the moral attractiveness of corrective justice. It does not. The considerations that support the account are epistemic or theoretical, not moral or political. The defensibility of corrective justice as a moral ideal is thus independent of its role in explaining tort law; and in arguing that tort law is best explained by corrective justice I do not mean to be defending tort law thereby.⁵²

Coleman is able to put forth a value-free account of tort law by virtue of the pragmatic methodology he adopts. Explicated previously, it is in light of the commitments of this methodology that Coleman is able to argue that moral principles may function as theoretical tools independent of any value or justification. Moral principles that make transparent the concepts embedded in the practice and the schemes of practical reasoning in which the concepts figure can be employed in offering a theoretical account.⁵³ This pragmatically oriented approach to understanding law is a further attempt by Coleman to distance his explanatory project from the ‘constructive interpretive’ sorts of projects offered by other theorists. What he calls “exercise[s] in first-order moral and political theory,”⁵⁴ Coleman characterizes the constructive interpretation methodology as proceeding in a top-down fashion. Beginning with a preconceived set of moral-political principles that are believed to have a special claim on us, such theories subsequently attempt to fit the objects or practices under investigation into their preconceived umbrella of explanatory principles. In this respect, constructive interpretations proceed from the

⁵² Ibid., 4-5.

⁵³ W.J. Waluchow, “In Pursuit of Pragmatic Legal Theory: The Practice of Principle by Jules Coleman”. The Canadian Journal of Law and Jurisprudence. Vol. XV, No. 1 (2002), 128.

⁵⁴ J. Coleman, The Practice of Principle, xx.

abstract principles to the practical, often becoming so engrossed in trying to fit the object or practice under the respective preconceived principles that the object or practice itself becomes distorted in the process. This method of political philosophy clearly “proceeds, as it were, deductively, from a set of political-moral principles that are believed to have a claim on us, to a set of justified institutional structures.”⁵⁵ Consequently, “the practical standards that issue from such accounts are generally at a level of abstraction that hovers above, and is consistent with, a broad range of different and non-compossible legal institutions.”⁵⁶ As such, Coleman’s type of theoretical explanation adopts the pragmatic approach of beginning not at the top, but in the middle, “by asking what principles, if any, are embodied in the legal practices we are presently engaged in.”⁵⁷ Contra the constructive interpretation method, this form of inquiry does not ask how our existing legal practice might be derived from justified principles. The discoveries of principles used in deepening our understanding of the object or practice are prior to any justificatory concerns that may arise:

Having once identified those principles and understood them not only in the abstract, but also in light of their concrete embodiment in practice, we are then in a position to ask not only to what extent they are embodied, but also how attractive the principles themselves are. The key point is that the moral or justificatory questions are not prior to the explanatory ones, but can grow out of

⁵⁵ *Ibid.*, 5.

⁵⁶ *Ibid.*, 5.

⁵⁷ *Ibid.*, 5.

the explanatory project as it reveals the abstract principles in greater specificity and concreteness.⁵⁸

This is a central characteristic and a necessary component of offering a theoretical conceptual explanatory account of the nature of law and of tort law. That being said, according to Coleman, conceptual explanation is best engaged by way of a pragmatic method, and it is this kind of philosophical attitude that Coleman adopts throughout his look at the nature of law, specifically the practice of tort law.

Coleman's look at the practice of tort law and subsequent conclusion that the core of tort law is best understood as embodying the principle of corrective justice is but only a part of the general focus of his project. It is the more general question of what is to count as an explanation of a part of the law – in this case tort law – that lies at the root of the endeavor. Exploring questions concerned with the methodology of developing legal theories, Coleman touched upon issues as to whether morality can be used as a theoretical tool and in what ways. Adopting a pragmatic approach to legal theory construction, Coleman illustrated how such a methodology could allow for moral principles to function as theoretical tools. In contrast to Dworkin, Coleman argued that morality could form part of a theory without any subsequent justificatory commitments, “the defensibility of corrective justice as a moral ideal is thus independent of its role in explaining tort law; and in arguing that tort law is best explained by corrective justice I do not mean to be defending tort law thereby.”⁵⁹ Concerned with morality's role at the theoretical-level,

⁵⁸ Ibid., 6.

Coleman undertakes a meta-theoretical-level project where the object of the theory being developed is a theory itself.

⁵⁹ Ibid., 5.

Conclusion

If there is any philosophical progress, it is also due to the introduction of new distinctions, and, in their wake, conceptual clarification.

Klaus Füber, 119

Let us assess what has come to pass in this thesis. A recurrent and compounding problem found throughout much philosophical discourse is that theorists often purchase comprehensiveness and novelty at the price of clarity, precision, and ultimately understanding. I termed this phenomenon the ‘problem of clarity.’ The end results of this problem range from mischaracterizations of opposing views and wayward arguments that do not seem to address the topic at hand, to a general sense of confusion amongst those scholars trying to come to an understanding of the arguments at hand. One manner in which the problem of clarity can be assuaged is through the development and understanding of guidelines that can serve to focus discourse and keep those involved in argument debating the truth and falsity of the same propositions. I have put forth this thesis in an effort to offer an initial step towards alleviating this ongoing problem. By virtue of providing a framework through which arguments in legal philosophy concerning morality can be understood, it is my hope that I have presented a means by which the construction, analysis and evaluation of past, present and future debates can be furthered while minimizing the potential for problems arising out of the problem of clarity.

One need only look to the various illustrations used in this thesis to recognize that the issues falling under the umbrella of legal philosophy are as diverse and numerous as the opinions and accounts offered. Though contemporary philosophers of law share many assumptions about the nature of philosophy and the nature of social practices, the ways in which they have gone about capturing the practice of law has varied considerably - noted by the three general schools of legal philosophy outlined at the outset of chapter one. Subsequently, legal philosophers, grounded in different sets of central tenets and core commitments, approach the various issues in legal philosophy in a different ways. This too can compound the problem of clarity. With such different starting points – by way of different initial commitments – it is often difficult for legal philosophers to engage in a head-on debate about the truth or falsity of a specific proposition, for example. This thesis has made a step forward by providing a framework through which theorists may begin to classify, focus, and understand their projects, with a specific concern for those projects that incorporate morality in some manner.

In chapter two I set the groundwork for the tripartite framework to follow by examining the relationship between theory and object. Exploring our notions of theory and object, a rough understanding of their relationship – theories as that which are constructions employed to capture objects of various kinds – led us to recognizing that at the very least objects are discernible from their theories. That theories were distinct from objects was the central starting point from which the conceptual framework was developed. Once it was recognized that objects are distinct from the theories that capture them, two levels at which morality may function immediately became obvious – the

practice-level and the theoretical-level. And further exploration of the kinds of objects, or what we meant by ‘objects of various kinds,’ that theories can capture led to uncovering a third level of the framework. In special circumstances, it was argued, the objects of theories are theories themselves. In these instances, the theory being constructed, analyzed or evaluated is a kind of second-order theory, a theory about theories; a third level at which morality may function, the meta-theoretical level.

Chapter three set out to expand upon and explicate each of these three levels in turn. Drawing on various contemporary debates in legal philosophy, I illustrated the sorts of discourse that are to be classified at each of the levels respectively. Beginning with the practice-level, through an exploration of what it is for morality to be involved at the practice-level I claimed that a moral principle being used by a judge to make a practical legal decision is one example. But, in so doing, I cautioned that by definition our discussion of the practice-level involves us in discussing morality at the theoretical-level. So, having touched upon the practice-level briefly, I immediately moved to explicating the theoretical-level. I argued that there are three distinct ways in which morality may be involved at the theoretical-level of legal discourse: (i) theories *of* morality, (ii) theories *about* morality’s use in legal practice - the legal theorist is involved in describing and / or explaining the use of moral principles by judges when they make their practical, legal decisions, and (iii) theories that use morality *as a theoretical tool*, whether it be as an explanatory tool or justificatory tool – in offering a theory about the practice of law, a legal theorist may rely on a principle of political morality as an explanatory or justificatory tool of the practice.

Having explicated and illustrated the various projects that fall under the theoretical-level classification I elaborated on the meta-theoretical-level. The example drawn upon in the illustration of the meta-theoretical-level focused on questions concerning the use of moral principles as theoretical tools, specifically, whether a theorist could incorporate moral principles as a theoretical tool in his account of legal practice without offering a value-laden theory. At the meta-theoretical-level, theorists engage in discourse about the use of moral principles in legal theory.

This project provides the means through which arguments can be focused and meaningful discourse furthered. Returning once more to Dworkin, we find an example as to how this project may be profitably used by theorists. Re-examining Dworkin's view of law as integrity, an account of law that melds both analytic and normative questions together, rebuffs any distinction between descriptive and prescriptive projects, and claims to do so as a matter of necessity, this framework may provide a means through which the various aspects of Dworkin's project may be parted out.¹ Focusing analysis of Dworkin's project in light of this framework may lead theorists to distinguishing between various questions or points of contention. Dworkin's insistence that a legal theory is both prescriptive as well as descriptive, for example, is a meta-theoretical-level issue, distinct from discussions about whether moral principles used in adjudication can be accounted

¹ Positivists have long argued that Dworkin's view of law as integrity conflates distinct theories. For example, Waluchow charges Dworkin with collapsing three different kinds of legal theories: theories of law, theories of adjudication, and theories of compliance. See, W.J. Waluchow, Inclusive Legal Positivism, chps. 2 and 3. That being said, this is not to say that such a division of Dworkin's account would go without argument, for it is Dworkin himself who begins his account with the claim that, "Jurisprudence is the general part of adjudication, silent prologue to any decision at law." (Law's Empire, 90)

for by a positivist account – a theoretical-level debate. In this fashion, Dworkin’s view of law as integrity may be approached by theorists in such a way that allows them to focus their efforts, addressing certain elements of the theory while avoiding having to deal with others.

Berlin asked the question “What is the subject-matter of philosophy?”² And fittingly, he concluded “its subject-matter is to a large degree not the items of experience, but the ways in which they are viewed . . .”³ In finding a starting point from which my project could begin, I looked to Berlin and subsequently to philosophy. Berlin outlined philosophy’s task as that of investigating “whatever seems insusceptible to the methods of the sciences or everyday observation, e.g. categories, concepts, models, ways of thinking or acting, and particularly ways in which they clash with one another, with a view to constructing other, less internally contradictory, and . . . less pervertible metaphors, images, symbols and systems of categories.”⁴ To be sure, this thesis has been an exercise in philosophy. But unlike ordinary theories presented in the name of philosophy this project has been an exercise in higher-order philosophy – a meta-philosophical look into philosophy of law. By undertaking this project, I hope to have taken us one step closer to alleviating some of the ongoing difficulties present in today’s jurisprudential discourse, namely the problem of clarity. I remain hopeful that the

² Isaiah Berlin, “The Purpose of Philosophy” in Concepts and Categories: Philosophical Essays. ed. Henry Hardy; with an introduction by Bernard Williams. London: Pimlico, 1999, 1.

³ *Ibid.*, 9.

⁴ *Ibid.*, 11.

framework presented in this thesis can serve to structure our construction, analysis and evaluation of theories and debates within philosophy of law. Klaus Füber once wrote of his work, “I can only hope that I have not merely piled another, even if critical, stone on the huge pile of meta-theoretical work in jurisprudence, but also contributed some helpful distinctions for specific projects that may be worth while pursuing.”⁵ It is with a similar attitude that I have presented this conceptual framework.

⁵ Klaus Füber, “Farewell to ‘Legal Positivism’: The Separation Thesis Unravelling,” 152.

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