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Legal Positivism

Tom Campbell

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Preface to the Second Series

The first series of the International Library of Essays in Law and Legal Theory has established itself as a major research resource with fifty-eight volumes of the most significant theoretical essays in contemporary legal studies. Each volume contains essays of central theoretical importance in its subject area and the series as a whole makes available an extensive range of valuable material of considerable interest to those involved in research, teaching and the study of law.

The rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given. It also affords the opportunity to extend the areas of law covered in the first series.

The new series follows the successful pattern of reproducing entire essays with the original page numbers as an aid to comprehensive research and accurate referencing. Editors have selected not only the most influential essays but also those which they consider to be of greatest continuing importance. The objective of the second series is to enlarge the scope of the library, include significant recent work and reflect a variety of editorial perspectives.

Each volume is edited by an expert in the specific area who makes the selection on the basis of the quality, influence and significance of the essays, taking care to include essays which are not readily available. Each volume contains a substantial introduction explaining the context and significance of the essays selected.

I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

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Introduction

Legal positivism is proving a remarkably enduring theory of law in the face of persistent critiques from such different perspectives as natural law, legal realism, critical legal philosophy and socio-legal studies. Its capacity for survival stems from a number of factors which serve as the organizing categories for this collection of essays.

The resilience of legal positivism derives, in the first place, from the fact that it represents a long and varied tradition which is broad enough to shrug off many lines of criticisms as relatively minor difficulties for particular versions of positivism. Indeed, many criticisms of legal positivism are directed at theses which are not part of any substantial positivist tradition and are largely directed at caricatures of legal positivism, which is defined in ways designed to make the proffered alternative theories look more attractive. No legal positivist will identify, for instance, with the composite view that all law is a matter of the successful use of coercion through the mechanical selection and application of acontextual and politically neutral rules within an entirely autonomous system of courts. The practice of heaping upon positivism the sins of past legal theory leads Schauer to describe it as a 'pariah theory' (Schauer, 1996).

Given the pervasiveness of negative persuasive definitions of the theory, any advocate of legal positivism must make clear precisely which variety of positivism is being defended and precisely what it involves. Part I of this collection approaches the task of identifying these varieties through the three themes which mark most contemporary versions of the theory: the claim that there is no necessary connection between law and morality (the 'separability thesis') (see Coleman, 1982); the contention that all law emanates from identifiable human sources (the 'sources thesis') (see Raz, 1979: 37–52); and the assumption that hard and fast specific rules are a central feature of legal systems (the 'model of rules') (Dworkin, 1977, chs 2 and 3).

Another reason for the resilience of legal positivism is associated with the second of these definitional themes – the sources thesis. There is a widely shared and powerful intuition amongst those who reflect on the nature of law that legal reasoning depends on the prior decisions of human authorities and powers in a way that moral reasoning does not (see Guest, 1996, Introduction). This, in turn, is often tied in with the idea of law as a system of mandatory rules which has authority in that it places normative constraints on our conduct other than those which flow directly from the normal moral considerations which bear on our judgements of right and wrong conduct. Part II of this collection takes up the analysis of such rules and follows the controversy over the alleged authority of legal rules which is held to be an essential ingredient of any theory of law.

A third reason for the resilience of legal positivism arises from the re-emergence of the moral and political considerations which underpin what has most often been regarded as a purely descriptive and explanatory theory of law (as, for instance, in Shiner, 1992 and Waluchow, 1994). Many of the empirical and sociological critiques of legal positivism fail to appreciate that there is more to legal positivism than a scientific approach to law and that most versions of the theory have a strong prescriptive element which remains intact even when its descriptive content is shown to be, in some ways, mistaken or incomplete. Part III deals with some of the

overtly prescriptive versions of legal positivism which are characteristic of some of its most recent manifestations (see Campbell, 1996).

One of the most prevalent critiques of legal positivism is that it purports to be a value-neutral analysis when it is in fact a covert ideology (thus, Hutchinson and Monohan, 1986). Many critics assume that unearthing a rationale or political justification for legal positivism undermines the whole approach by reducing it to a moral basis (thus, Detmold, 1984). However, prescriptive, normative or ethical positivists take the view that bringing out the evaluative roots of the approach gives life and meaning to a theory which uses the distinction between what law is and what it ought to be to commend a particular and desirable view of law and legal systems. A prime goal of this collection is to bring out the moral and political foundations of legal positivism and how these relate to its traditional analytical and explanatory goals as they are articulated in current legal philosophy.

The distinctive emphasis of this volume on prescriptive legal positivism is in fact a reversion to mainstream classical versions of the theory stemming from Hobbes, Bentham and Austin. Part IV contains a few of a recent crop of important historical studies of legal positivism, some of which deal directly with the prescriptive point of the classical theorists and the reasons why they have come to be interpreted in an erroneously conservative and generally misleading manner.

Selecting essays to include in this volume has not been an easy task. Despite a generally hostile press, there has been a significant resurgence of favourable interest in legal positivism over the last ten years which is manifest in a number of special editions of journals and collections of essays which are listed in the bibliography. In particular, this collection follows on, but does not presume, prior knowledge of *Legal Positivism*, edited by Mario Jori for the first series of the *International Library of Essays in Law and Legal Theory*. That volume, which was published in 1992, contrasts legal positivism with naturalism on the one hand and legal realism on the other. Drawing on continental European materials as well as the British and American positivist traditions, Jori's selection of articles focuses on legal systems, validity and legal revolutions, and the scientific study of what judges do, as well as issues of interpretation and rights. Many of these themes are taken up again in this volume utilizing more recently published material, but more emphasis is given to the body of work deriving from Joseph Raz's account of the role of rules and the extensive body of writing by Frederick Schauer, who gives more explicit recognition to the prescriptive aspects of legal positivism which are highlighted in this volume.

In general I have adopted as a principle of selection a preference for essays by those who are sympathetic towards legal positivism, although not uncritical of elements in the tradition. Anything else would have produced an unmanageably large collection. Thus, Ronald Dworkin's theory of integrity has not been included as a variety of legal positivism, partly because this respects Dworkin's own classification of this approach as 'interpretivist' rather than positivist (Dworkin, 1986). This seems correct, for, despite his acceptance of the sources of law identified by legal positivists, Dworkin subordinates the content of the law which emanates from these sources to scrutiny of principles which have irreducibly moral elements. Nor is there room to include anything of the extensive literature on whether Dworkin or Hart, for instance, provides the more accurate account of legal reasoning in common law jurisdictions. However, the shadow of Dworkin's work falls over much of the territory which is covered. His critique of Hart's 'model of rules' has been highly influential and set the scene for renewed interest in the

nature of rules and their relation to principles and goals. Moreover, his insight that legal positivism is more a theory with a mission than a detached scientific exercise is accepted by many legal positivists, although this does not mean that they go along with his alternative account of law which seems much too tailored to the role and history of the US Supreme Court to provide either a general theory of law, or a model for those who wish a more democratic polity than one in which judges are so deeply involved in the concretization of the fundamental rights of citizens.

Nor have I included examples of a recently common criticism of legal positivism to the effect that it is caught in the inconsistency of affirming the separation of law and morality while requiring the officials of a legal system to make a moral endorsement of the laws which they implement (Beyleveld and Brownsword, 1986; Goldsworthy, 1990). The issues raised by these critics are indirectly answered through the analysis of separability within the essays in Part I, the discussion of authority in Part II and the recognition, in the essays contained in Part III, that there are normative arguments for and against legal positivism. However the thesis that understanding and administering a rule is tantamount to endorsing it, or the system of which it is a part, in a way which requires administrators and judges to introduce their own values into the substance of their core activities, thus rendering law application an inherently moral activity, can be put to one side as a mistake which would, if left unchallenged, turn every action of a moral agent into a moral activity.

Separability, Sources and Rules

The essays in Part I explore the three distinguishing tenets of legal positivism:

1 the logical separation of law and morality – the separability thesis (Coleman, 1982);
2 the historical and institutional origins of laws – the sources thesis (Raz, 1979: 37–52); and
3 the centrality of rules in legal systems – the model of rules (Dworkin, 1977, chs 2 and 3).

In fact, these themes permeate the entire volume and bring out the perceived strengths and weaknesses of legal positivism. The strengths of the theory are usually located in its insights into the institutional nature of law and the interface of law and politics, while its weaknesses are thought be manifest in its alleged failure to explain legal authority and its narrow view of adjudication.

The separability thesis is in fact a specific expression of the traditional conceptual foundation of legal positivism – the distinction between what is the case and what ought to be the case – which makes it possible to distinguish between factual questions about law as it is and normative questions about law as it ought to be, the former being a matter of legal validity and the latter a matter of moral and political judgement (Hart, 1962). Traditionally, legal positivists have been involved in theorizing about both approaches to law, offering definitions and explanations of law as a social phenomenon on the one hand and setting up standards for the criticism of existing laws and legal systems on the other.

Partly due to the fact that some legal positivists, such as Hans Kelsen, have sought to exclude value judgements altogether from their study of law (Kelsen, 1967), and other legal positivists, such as Jeremy Bentham, have argued for a rigid separation between the (expository) study of

what law is and the (critical) study of what law ought to be (Postema, 1986), legal positivism has become more associated with empirical and explanatory approaches than with moral and political issues. However the separability thesis itself is not a rejection of moral and political questions along the lines of the sceptical doctrines of the philosophical theory of logical positivism (Ayer, 1936), nor is it an empirical claim about the lack of overlap between the content or nature of law and morality. In fact it has usually been presented as a conceptual thesis about law to the effect that there is no necessary connection between law and morals, a proposition which H.L.A. Hart, for instance, identified as the most characteristic doctrine of legal positivism (Hart, 1962: 253).

The implications of this doctrine have been, and continue to be, vigorously debated within legal positivism. No one doubts that the content of some laws coincides with the content of some moral rules and, with few exceptions, it is accepted that it is sometimes morally correct to require others to act in certain ways, with only anarchists holding that no laws are ever morally justified. Further, few would doubt that the content of law is, and should be, affected by a society's morality, and vice versa. What is rejected, however, is the view, associated with the tradition of natural law, that all laws must, in order to count as laws, meet certain moral criteria, in that they are not, for instance, seriously unjust (but see Finnis, 1980).

While the necessity for a moral criterion for the existence of law would be impossible to establish as an empirical fact, it can be put forward as a conceptual truth on the basis that the criteria of legal validity must include the requirement of minimal moral rectitude, or, in the language of the theory in question, conformity to fundamental natural law. Only this assumption, it is argued, can explain the authority or obligation-creating aspect of law. Such a claim takes the issue to a different level by focusing on the criteria of validity for the acceptance of a rule as a rule of law, the test which such a rule must satisfy to qualify as legally valid, which Hart helpfully described as a 'rule of recognition' (Hart, 1962: 92–107). The contention of natural law theory is that every rule of recognition must include a natural law test. Legal positivism rejects this assertion of a necessary connection between law and morals, partly on the grounds that it has the dubious implication that there can be no such thing as a seriously unjust law.

In an influential article published in 1982 Jules Coleman uses the 'separability' label to identify this fundamental aspect of legal positivism. There he defines the separability thesis as the 'claim that there exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for any proposition of law' (Coleman, 1982: 141). In other words, while a legal system may use moral standards as criteria of validity within its rule of recognition, it does not have to do so in order to constitute a legal system. The corollary of this view, which Coleman calls 'incorporationism', is that legal systems can, although they need not, include moral criteria in their rule of recognition, a position which is adopted by Hart under the label of 'soft positivism' and, more recently, by Wil Waluchow, as 'inclusive positivism' (Coleman, 1991; Waluchow, 1994).

However, if all that legal positivism claims is that there *could* be a legal system which does not include a moral criterion in its rule of recognition, then it is a rather thin theory which leaves open the possibility that most legal systems routinely authorize officials to use their moral opinions to identify positive law. In this context Joseph Raz's more restrictive version of legal positivism looks more interesting. Raz approaches the same subject matter through the sources thesis, according to which laws are known not by their content but by their origins or

pedigree, and in particular he asserts that the validating origins of law must be an identifiable social event, such as an enactment or a command. In the first essay in this collection Raz defines and defends the sources thesis that '[a]ll law is source-based' (Chapter 1: 3), adding that '[a] law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument' (p. 4). This more controversial line, that no legal system can incorporate an evaluative criterion in its rule of recognition, is the view that has come to be known as 'hard' or 'exclusive' legal positivism.

In Chapter 2 Coleman reaffirms his separability thesis, which he calls 'negative positivism', as conceptually and descriptively accurate and goes on, following Hart's sociological approach, to expound his theory of 'positive positivism', according to which 'law is ultimately a matter of social fact in the sense that the authority of the rule of recognition is itself a matter of social convention' (p. 47). At the same time, he takes the soft positivist line by rejecting Raz's sources thesis, which is set out in Chapter 1. Indeed, Coleman argues that his conceptual claim about the separability of law and morality and his metaphysical claim about the sociological status of the rule of recognition are consistent with the descriptive claim that a society's morals and its laws can be co-extensive, thus rejecting Schauer's 'limited domain' thesis according to which law must be some subset of a society's total set of social norms (Schauer, 1991: 667).

It is clearly much easier to defend soft than hard positivism as a generalization about legal systems, many of which make liberal use of moral terminology in their operative rule of recognition. However, Raz presents an influential argument in favour of hard positivism which depends on the claim that law cannot fulfil its social function of mediating between citizens and their ideas of rightness if its content is dependent on the differing moral opinions of those whose conduct it is meant to govern. This position is criticized by Waluchow who commends his 'inclusive legal positivism' as providing a more compelling explanation of legal systems and the way they operate. In the essay reproduced as Chapter 3 Tim Dare responds to Waluchow's critique by seeking to demonstrate that Waluchow does not succeed in undermining the conceptual thesis that a legal system must at least *claim* legitimate authority.

The final essay in Part I takes up the analysis of law as a system of rules – an exercise which is characteristic of many positivist theories, but is not strictly required by either the separability or the sources thesis. Schauer's seminal essay 'Rules and the Rule of Law' draws on his book *Playing by the Rules: A Philosophical Examination of Rule-based Decision-making* (1991) which provides comprehensive analysis and justification of the general desirability of having rules in the form of entrenched generalizations as part of his theory of 'presumptive positivism'. Schauer argues, for instance, that because rules can be over- and underinclusive in that they are bound to cover more cases than their authors intend in some respects and less than was intended in other respects, the initial commitment to rule-following can be tempered by allowing the presumption in favour of rule-conformity being overruled from time to time by other considerations.

In the tradition of Kelsen, as continued by Coleman, Lyons, Soper and others, Schauer accepts that a legal system may exist by virtue of rules which give judges the power to make decisions without these decisions themselves requiring the application of conduct-guiding rules. However, his analysis is directed towards demonstrating the possibility of rule-based decision-making and the plausibility of describing legal systems as involving a 'restricted domain' of practical reasoning in which decisions are made and adhered to in accordance with a distinct set of rules which have a limited range of recognised pedigrees. Within this context,

the theory of presumptive positivism allows that judges, while giving great *prima facie* force to rules, may exceptionally override them in the light of wider considerations when there is a reason of 'great strength' to do so (Schauer, 1991: 676).

Rules and Authority

My account of the essays in Part I concentrates on their analyses of various types of legal positivism, but they all deal also with the concept of rules and its connection with the authority or normative force of law. This is the central theme of the four essays which make up Part II. The core of the debates in these essays arises in relation to Raz's claim that the power to create exclusionary reasons is what constitutes legal authority. Exclusionary reasons, by definition, require those to whom the rules are addressed – the rule-subjects – to subordinate their own judgement as to what they ought to do to the restrictions on reasoning provided by the relevant exclusionary rules. Raz maintains that that is compatible with moral autonomy, for rule-subjects themselves can accept that there can be good reasons to follow rules even when they do not appear to lead to the best results, all things considered.

While contemporary legal positivists consider that Raz is close to the mark with his analysis of the relationships between rules, exclusionary reasons and legal authority there is considerable discussion about the details of this account. Stephen Perry's essay, which opens Part II, presents a sympathetic critique of Raz. Perry argues that Raz's notion of second-order reasons, reasons which apply to the use of first-order reasons – that is reasons which relate directly to human interests, desires and morality – does illuminate the role of rules in practical reasoning. However, Perry contends that it is a mistake to hold that such second-order reasons cannot themselves draw directly on human interests, desires and morality, and this, in his view, undermines the distinction between Razian positivism and Dworkinian natural law. In making this point, Perry draws on Raz's own admission that the adoption of the sources theory involves a value choice related to the function of law, albeit the values involved are not, for Raz, moral ones. At the same time Perry offers as an alternative, an 'adjudicative' theory of law which places less emphasis on statute law and more emphasis on the role of the common law in settling disputes through courts, often with the use of rules but also by the direct application of moral standards. Interestingly, in changing the perspective of theory from legislation to adjudication, Perry introduces further value considerations which he sees as supplementing rather than replacing the positivist model. His overall conclusion is that exclusionary rules do not provide a distinctive account of the authority claimed by law.

The background to this debate may be seen in Sartorius's affirmation of a strong positivist separation of law and morals which carries through into the separation of legal and moral authority. In Chapter 7 Rolf Sartorius starts off from Hart's analysis of a legal system as a combination of primary rules, which are directed at ordinary conduct, and secondary rules, which authorize the application and modification of these rules, and argues that such a system can be understood without positing any moral commitment on the part of either officials or subjects of the legal system. The legal authority exists if the rules of the system are generally obeyed, leaving the moral right to rule in this or any other way as a separate matter to be determined by moral and political reasoning. Law, as such, has no authority, and legal officials have no automatic right to be obeyed. Raz's position is not in direct contradiction to that

adopted by Sartorius, for Raz claims no more than that a legal system must claim to have authority.

The difficulty of explaining legal authority as Raz and Schauer seek to do in terms of the capacity to create exclusionary or strongly presumptive reasons for action is taken up by Larry Alexander's essay, 'Law and Exlusionary Reasons' (Chapter 6), which argues that, despite all the many ways in which rules may assist in reducing moral error, increasing predictability and facilitating coordination, they cannot provide the subject with reason for action except by affecting her expectations as to the conduct of others, so that, strictly speaking, law does no more than add to the stock of the subject's first-order reasons for action, thus undermining the claim that law's claim to authority rests on the capacity to create exclusionary reasons. Alexander concludes that law, as such, does not create obligations and legal subjects therefore do not have an obligation to obey the law. However, the law must nevertheless make an unequivocal claim to authority and, by successfully claiming this authority, it does alter the subject's first-order reasons for action so as to give the subject reason to conform to the law. For Alexander, this has the unfortunate implication that law must claim to have an authority that it does not have.

In Chapter 4, 'Rules and the Rule of Law', an essay which explores in some detail the debate about whether law must or can be a system of rule-based decision-making, Schauer comes to a similar view of legal authority to that of Raz. He accepts that law may be justified in imposing sanctions for acts of non-conformity to legal rules, even though subjects were morally right to follow their own judgements and disobey them. His 'Positivism Through Thick and Thin' (Chapter 8) brings out more starkly Sartorius's general conclusion that legal rules have in themselves no moral authority, while retaining the thesis that legal systems are designed to discourage individuals from making up their own minds about how to obey in specified circumstances.

Prescriptive Positivism

A strict positivist line on legal authority seems better adapted to establishing when a legal system may be said to exist than it is to helping us decide if legal authority is really authoritative in the sense that it justifiably demands obedience and creates morally binding obligations on the part of the subject. In so far as legal positivists seek to show that judges and citizens really do have all-things-considered reasons to conform to an operative system of law, they tend to draw on arguments which show the important role which law plays in society by aiding cooperation, resolving disputes, providing public goods and controlling harmful conduct. However, in particular circumstances laws may not, indeed often do not, achieve these objectives. Hence the problem of authority.

Perhaps the only way in which such a gap can be bridged is by separating the analysis of a legal system from its justification in a more thoroughly positivist way, while bringing to the fore the view that the positivist analysis is not an evaluatively neutral approach but represents a particular view of the role of government and the ways in which it ought to be conducted. The essays in Part III explicitly adopt this version of legal positivism as a prescriptive theory about the justification and proper *modus operandi* of government. Prescriptive positivism of this sort is, perhaps, implicit in Raz's references to the function of law in the context of

explaining exclusionary reasons. Certainly, Schauer, while holding to the view that soft positivism is in general descriptively adequate for many legal systems, accepts that whether or not to adopt a system of rule-based decision-making is a question of desirability which is separate from the analysis of what such methods involve. He concludes that there is much to be said in favour of a good deal of rule-based decision-making, provided that it remains presumptive in its operation.

Neil MacCormick has advocated a similar position in a number of essays (MacCormick, 1985; 1989; 1990). In the opening essay of Part III the argument is as much about the moral reasons for being frugal in enforcing moralities as it is about the moral reason for adopting a positivist or non-moral definition of law. MacCormick's principal argument for positivism is derived from Hart's insistence, against Fuller (1958), that this encourages a critical attitude to a law, while his 'moral disestablishmentarianism' is based more on his affirmation of the need to preserve a sphere for the autonomy of individual conscience.

This line is commonly taken by prescriptive positivists primarily with respect to ordinary law, but in Chapter 10 Schauer insists that it applies, both descriptively and normatively, to constitutional law, and that it is conducive to the adoption of a role morality of constitutional interpretation according to which the judges may draw on only a limited range of materials in the determination of the cases that come before them – a morality which is enforced through the social and political pressures that are brought to bear in the nomination and confirmation of Supreme Court justices. This application of his limited domain theory of positivism to constitutional law is presented as an evaluatively controversial position the assessment of which depends, not on legal argument, but on a complex range of moral and empirical questions which have different practical answers in different historical circumstances.

Robin West's essay (Chapter 11) is included as an example of a relatively rare phenomenon, a defence of legal positivism from a feminist standpoint. The more common feminist view is highly critical of the unhelpful formality of strict adherence to rules and the blindness of legal positivism to the inevitable gender bias of courts in the application of such rules as there may be (see Stubbs, 1986). In contrast, West brings out the importance of the separability of law and morals in making room for a critical attitude to constitutional law, particularly from the perspective of constitutional criticism, but also from the point of view of the judge who is troubled by the demands on what she perceives to be an unjust law.

Jeremy Waldron, perhaps the most persistent recent advocate of prescriptive positivism, which he calls 'normative positivism', brings out the significance of prescriptive positivism for our understanding of legislation and its authority in Chapter 12. It is the Hobbesian need for decisiveness in the face of political disagreement on matters requiring urgent coordinated solutions, when coupled with the mutual respect which is involved in adopting a procedure of majority decision-making after genuine discussion, that gives authority to legislation despite the apparent arbitrariness of the head-counting element in democratic politics. For Waldron, the 'circumstances of politics', the urgent need for a working agreement in questions of justice and morality, is the essential background to the understanding of the nature and authority of law.

Tom Campbell's essay (Chapter 13) draws on his account of 'ethical positivism' as part of a broad political theory which emphasizes the role of rules in facilitating and controlling the exercise of power. He presents a strong, or hard, variant of normative positivism by emphasizing, first, that legal positivism is in part an aspirational ideal of a desirable form of law which may

be supported by moral and political argument and, second, that these justifications highlight the importance of government being tightly rule-based and rule-restricted – a system of law which cannot operate adequately without an ethical commitment on the part of those involved in its administration. His prescriptive hard positivism is directed at the political need for clear and precise legislative determinations and a judiciary which is adept at the techniques of interpreting law in a value-neutral manner rather than acting as a watchdog with respect to the morally disputed content of laws.

Revisiting the Classical Positivists

Part IV consists of a selection of essays which demonstrate the current reaffirmation and revival of interest in the nature and significance of classical positivism. Gerald Postema's essay (Chapter 16) encapsulates his thesis that Bentham is a censor as well as an expositor of law, which he developed in his influential and scholarly book, *Bentham and the Common Law* (1986). Jeremy Waldron, with considerable originality, seeks, in Chapter 15, to demonstrate that Kant's later work is essentially a form of normative positivism. It is interesting to read Stanley Paulson's neo-Kantian interpretation of Kelsen (Chapter 17) together with Waldron's account of Kant. Perhaps this opens the way for seeing Kelsen also as a prescriptive positivist, which would not be out of line with our knowledge of his intense moral and political commitments.

On the other hand, Mark Murphy's essay (Chapter 14) uses the same sort of evidence, with respect to Hobbes, to argue that Hobbes is more of a natural law theorist than a legal positivist. Hobbes' assertion of the instrumental value of law for the artificial attainment of a sort of peace is made more rather than less emphatic by the limits to the obligation to obey the sovereign which he allows do exist when threats to the life of the subject undermine the whole purpose of the exercise. Murphy's perceptive analysis can thus be seen as leading to a prescriptive presumptive positivist reading of Hobbes. While Murphy might argue that prescriptive positivism is really a form of second-hand natural law theory along the lines of Lon Fuller's procedural model (Fuller, 1969), this categorization may be resisted as a misrepresentation of the classical theorists. It is also unwarranted conceptually, in that prescriptive positivism does not negate the separability or the sources theses and gives reasons for resisting loose judicial surmises as to legislative purpose.

Finally, the long essay by Anthony Sebok is included as the final chapter of this volume because of the masterly way in which he explains the relative neglect and persistent misrepresentation of legal positivism in the USA, where it has been routinely confused with such very different positions as conceptual formalism and legal realism. This powerful essay should encourage many scholars to reappraise legal positivism as a theory with immediate contemporary relevance in all areas of law. Legal positivism, in its hard or exclusive forms at any rate, may not provide an accurate description of any legal system, let alone one which has developed under the influence of legal realism and involves a form of judicial review that seems well captured in Dworkin's form of natural law. Nevertheless, the tradition of legal positivism may provide a basis for political and moral critiques of such systems in relation to their lack of rule governance and the dubious democratic credentials of courts which become detached from the constraints of substantive positive law.

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Part I
Separability, Sources and Rules

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[1]

AUTHORITY, LAW AND MORALITY[1]

H. L. A. Hart is heir and torch-bearer of a great tradition in the philosophy of law which is realist and unromantic in outlook. It regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious. His analysis of the concept of law is part of the enterprise of demythologising the law, of instilling rational critical attitudes to it. Right from his inaugural lecture in Oxford[2] he was anxious to dispel the philosophical mist which he found in both legal culture and legal theory. In recent years he has shown time and again how much the rejection of the moralizing myths which accumulated around the law is central to his whole outlook. His essays on "Bentham and the Demystification of the Law" and on "The Nightmare and the Noble Dream"[3] showed him to be consciously sharing the Benthamite sense of the excessive veneration in which the law is held in Common Law countries, and its deleterious moral consequences. His fear that in recent years legal theory has lurched back in that direction, and his view that a major part of its role is to lay the conceptual foundation for a cool and potentially critical assessment of the law are evident.

This attitude strikes at the age old question of the relation between morality and law. In particular it concerns the question whether it is ever the case that a rule is a rule of law because it is morally binding, and whether a rule can ever fail to be legally binding on the ground that it is morally unacceptable. As so often in philosophy, a large part of the answer to this question consists in rejecting it as simplistic and misleading and substituting more complex questions concerning the relation between moral worth and legal validity. Let us, however, keep the simplistic question in mind because it helps to launch us on our inquiry.

Three theses with clear implications concerning the relation between law and morality have been defended in recent years. They can be briefly, if somewhat roughly, stated as follows:

The Sources Thesis: All law is source-based.

The Incorporation Thesis: All law is either source-based or entailed by source-based law.

The Coherence Thesis: The law consists of source-based law together with the morally soundest justification of source-based law.[4]

A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument. All three theses give source-based law a special role in the identification of law. But whereas the parsimonious Sources Thesis holds that there is nothing more to law than source-based law, the other two allow that the law can be enriched by non-source-based laws in different ways. Indeed the Coherence Thesis insists that every legal system necessarily includes such laws.

The main purpose of this essay is to defend the Sources Thesis against some common misunderstandings[5] and to provide one reason for preferring it to the other two. The argument turns on the nature of authority, which is the subject of the first section. In the second section some of the implications of this analysis are shown to be relevant to our understanding of the law. Their relation with the three theses is then examined. The connection between law and authority is used to criticise Dworkin's support of the Coherence Thesis, as well as the Incorporation Thesis advocated by H. L. A. Hart and others. The rejection of these views leads to the endorsement of the Sources Thesis. The essay concludes with some observations concerning the relations between legal theory, law and morality. Throughout the argument is exploratory rather than conclusive.

1. Authority and Justification

Authority in general can be divided into legitimate and de facto authority. The latter either claims to be legitimate or is believed to be so, and is effective in imposing its will on many over whom it claims authority, perhaps because its claim to legitimacy is recognised by many of its subjects. But it does not necessarily possess legitimacy. Legitimate authority is either practical or theoretical (or both). The directives of a person or institution with practical authority are reasons for action for their subjects, whereas the advice of a theoretical authority is a reason for belief for those regarding whom that person or institution has authority. Though the views here expressed apply to theoretical authorities as well, unless otherwise indicated I shall use "authority" to refer to legitimate practical authority. Since our interest is in the law we will be primarily concerned with political authorities. But I shall make no attempt to characterize the special features of those, as opposed to practical authorities in general or legal authorities in particular.

The distinction between reasons for action and reasons for belief may be sufficient to distinguish between practical and theoretical authorities, but it is inadequate to distinguish between authorities and other people. Anyone's sincere assertion can be a reason for belief, and anyone's request can be a reason for action. What distinguishes authoritative directives is

their special peremptory status. One is tempted to say that they are marked by their authoritativeness. This peremptory character has often led people to say that in accepting the authority of another one is surrendering one's judgment to him, that the acceptance of authority is the denial of one's moral automony, and so on. Some saw in these alleged features of authority a good deal of what often justifies submitting to authority. Many more derived from such reflections prove that acceptance of authority is wrong, or even inconsistent with one's status as a moral agent. Elsewhere[6] I have developed a conception of authority which accounts for its peremptory force while explaining the conditions under which it may be right to accept authority. Let me briefly repeat the main tenets of this conception of authority. Its details and the arguments in its support cannot be explored here.

Consider the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute, for they agreed to abide by his decision. Two features stand out. First the arbitrator's decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case. It is not just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. The arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome. He has reason to act so that his decision will reflect the reasons which apply to the litigants. I shall call reasons of the kind which apply to the arbitrator dependent reasons. I shall also refer to his decision as a dependent reason for the litigants. Notice that in this second sense a dependent reason is not one which does in fact reflect the balance of reasons on which it is based. It is one which is meant to, i.e., which should, do so.

This leads directly to the second distinguishing feature of the example. The arbitrator's decision is also meant to replace the reasons on which it depends. In agreeing to obey his decision the disputants agreed to follow his judgment of the balance of reasons rather than their own. Henceforth his decision will settle for them what to do. Lawyers say that the original reasons merge into the decision of the arbitrator or the judgment of a court, which, if binding, becomes *res judicata*. This means that the original cause of action can no longer be relied upon for any purpose. I shall call a reason which displaces others a preemptive reason.

It is not that the arbitrator's word is an absolute reason which has to be obeyed come what may. It can be challenged and justifiably disobeyed in certain circumstances. If, e.g., the arbitrator was bribed, was drunk while considering the case, or if new evidence of great importance unexpectedly

turns up, each party may ignore the decision. The point is that reasons that could have been relied upon to justify action before his decision cannot be relied upon once the decision is given. Note that there is no reason for anyone to restrain their thoughts or their reflections on the reasons which apply to the case, nor are they necessarily debarred from criticising the arbitrator for having ignored certain reasons or for having been mistaken about their significance. It is merely action for some of these reasons which is excluded.

The two features, dependence and preemptiveness, are intimately connected. Because the arbitrator is meant to decide on the basis of certain reasons the disputants are excluded from later relying on them. They handed over to him the task of evaluating those reasons. If they do not then reject those reasons as possible bases for their own action they defeat the very point and purpose of the arbitration. The only proper way to acknowledge the arbitrator's authority is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide.

The crucial question is whether the arbitrator's is a typical authority, or whether the two features picked out above are peculiar to it and perhaps a few others, but are not characteristic of authorities in general. It might be thought, for example, that the arbitrator is typical of adjudicative authorities, and that what might be called legislative authorities differ from them in precisely these respects. Adjudicative authorities, one might say, are precisely those in which the role of the authority is to judge what are the reasons which apply to its subjects and decide accordingly, i.e., their decisions are merely meant to declare what ought to be done in any case. A legislative authority on the other hand is one whose job is to create new reasons for its subjects, i.e., reasons which are new not merely in the sense of replacing other reasons on which they depend, but in not purporting to replace any reasons at all. If we understand "legislative" and "adjudicative" broadly, so the objection continues, all practical authorities belong to at least one of these kinds. It will be conceded of course that legislative authorities act for reasons. But theirs are reasons which apply to them and which do not depend on, i.e., are not meant to reflect, reasons which apply to their subjects.

The apparent attractiveness of the above distinction is, however, misguided. Consider, e.g., an Act of Parliament imposing on parents a duty to maintain their young children. Parents have such a duty independently of this Act, and only because they have it is the Act justified. Further argument is required to show that the same features are present in all practical authorities. Instead let me summarise my conception of authority in three theses:

The Dependence Thesis:
All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives. Such reasons I shall call dependent reasons.[7]

The Normal Justification Thesis:
The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly.[8]

The Preemption Thesis:
The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.

The first and the last theses generalise the features we noted in the arbitration example. The Normal Justification thesis replaces the agreement between the litigants which was the basis of the arbitrator's authority. Agreement or consent to accept authority is binding, for the most part, only if conditions rather like those of the normal justification thesis obtain.

The first two theses articulate what I shall call the service conception of authority. They regard authorities as *mediating* between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason. The people on their part take their cue from the authority whose pronouncements replace for them the force of the dependent reasons. This last implication of the service conception is made explicit in the preemption thesis. The mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend. No blind obedience to authority is here implied. Acceptance of authority has to be justified, and this normally means meeting the conditions set in the justification thesis. This brings into play the dependent reasons, for only if the authority's compliance with them is likely to be better than that of its subjects is its claim to legitimacy justified. At the level of general justification the preempted reasons have an important role to play. But once that level has been passed and we are concerned with particular action, dependent reasons are replaced by authoritative directives. To count both as independent reasons is to be guilty of double counting.

This is the insight which the surrender of judgment metaphor seeks to capture. It does not express the immense power of authorities. Rather it reflects their limited role. They are not there to introduce new and independent considerations (though when they make a mistake and issue the wrong decrees they do precisely that). They are meant to reflect dependent reasons in situations where they are better placed to do so. They mediate between ultimate reasons and the people to whom they apply.

2. Authority and the Law

I will assume that necessarily law, every legal system which is in force anywhere, has de facto authority. That entails that the law either claims that it possesses legitimate authority or is held to possess it, or both. I shall argue that though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority. If the claim to authority is part of the nature of law then whatever else the law is it must be capable of possessing authority. A legal system may lack legitimate authority. If it lacks the moral attributes required to endow it with legitimate authority then it has none. But it must possess all the other features of authority, or else it would be odd to say that it claims authority. To claim authority it must be capable of having it, it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority. These considerations, I shall argue, create a weighty argument in favour of the sources thesis. Let us review them step by step.

The claims the law makes for itself are evident from the language it adopts and from the opinions expressed by its spokesmen, i.e., by the institutions of the law. The law's claim to authority is manifested by the fact that legal institutions are officially designated as "authorities," by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed (i.e., in all cases except those in which some legal doctrine justifies breach of duty). Even a bad law, is the inevitable official doctrine, should be obeyed for as long as it is in force, while lawful action is taken to try and bring about its amendment or repeal. One caveat needs be entered here. In various legal systems certain modes of conduct are technically unlawful without being so in substance. It is left to the prosecutorial authorities to refrain from prosecuting for such conduct, or to the courts to give absolute discharge. Where legally recognised policies direct such authorities to avoid prosecution or conviction the conduct should not be regarded as unlawful except in a technical sense, which is immaterial to our considerations.

Does the fact that the law claims authority help us understand its nature in any way, beyond the sheer fact that the law makes this claim? If of necessity all legal systems have legitimate authority then we can conclude that they have the features which constitute the service conception of authority. But it is all too plain that in many cases the law's claim to legitimate authority cannot be supported. There are legal systems whose authority cannot be justified by the normal justification thesis or in any other way. Can it not be argued that since the law may lack authority a conception of authority cannot contribute to our understanding of what it is, except by showing what it claims to be? This conclusion is at the very least premature. It could be that in order to be able to claim authority the law must at the very least come close to the target, i.e., that it must have some of the characteristics of authority. It can fail to have authority. But it can fail in certain ways only. If this is so then there are features of authority that it must have. If so then we can learn from the doctrine of authority something about the nature of law.

Note that nothing in this suggestion assumes that all the necessary features of the law are necessary features of every practical authority. The law may well have others. Indeed I am already assuming that the law does have others, since it is not necessary that every person who has legitimate authority claims to have it, as the law necessarily does. All that we are trying to establish is whether some necessary characteristics of law are necessary characteristics of authority, which the law must have if it is to be capable of claiming authority.

I suggested above that only those who can have authority can sincerely claim to have it, and that therefore the law must be capable of having authority. This claim is so vague that even if correct it cannot be more than a gesture towards an argument. What might that be? Consider the fact that the law is a normative system. If it were not it would be incapable of having practical authority. If the law were a set of propositions about the behavior of volcanoes, for example, then it would not only lack authority over action, it would be incapable of having such authority. The statement that a normative system is authoritatively binding on us may be false, but at least it makes sense, whereas the claim that a set of propositions about volcanoes authoritatively determines what we ought to do does not even make sense.

But cannot one claim that a person X has authority which it would make no sense to attribute to X? The claim makes sense because we understand what is claimed, even while we know that it is not merely false, but is necessarily, or conceptually, false. For example, what cannot communicate with people cannot have authority over them. Trees cannot have authority over people. But someone whose awareness of what trees are is incomplete,

a young child for example, can claim that they do have authority. He is simply wrong. Similarly, even if he is aware of the nature of trees, he may make an insincere claim to that effect. Perhaps he is trying to deceive a newly arrived Martian sociologist. Notice, however, that one cannot sincerely claim that someone who is conceptually incapable of having authority has authority if one understands the nature of one's claim and of the person of whom it is made. If I say that trees have authority over people, you will know that either my grasp of the concepts of authority or of trees is deficient or that I am trying to deceive (or, of course, that I am not really stating that trees have authority but merely pretending to do so, or that I am playacting, etc.).

That is enough to show that since the law claims to have authority it is capable of having it. Since the claim is made by legal officials wherever a legal system is in force the possibility that it is normally insincere or based on a conceptual mistake is ruled out. It may, of course, be sometimes insincere or based on conceptual mistakes. But at the very least in the normal case the fact that the law claims authority for itself shows that it is capable of having authority.

Why cannot legal officials and institutions be conceptually confused? One answer is that while they can be occasionally they cannot be systematically confused. For given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority. It is what it is in part as a result of the claims and conceptions of legal institutions. This answer applies where the legal institutions themselves employ the concept of authority. But there may be law in societies which do not have our concept of authority. We say of their legal institutions that they claim authority because they claim to impose duties, confer rights, etc. Not having the concept they cannot be confused about it, though we can be confused in attributing the claim of authority to them.

The argument of the last four paragraphs established, first, that one can fail to have authority because one is incapable of possessing authority (though even those capable of having authority may fail to have it), second, that since the law claims authority it is capable of having authority. There are two kinds of reasons for not having authority. One is that the moral or normative conditions for one's directives being authoritative are absent. Typically this will be either because the normal justification, explained above, is unavailable or because though available it is insufficient to outweigh the conflicting reasons which obtain in this particular case. The second kind of reason for not having authority is that one lacks some of the other, non-moral or non-normative, prerequisites of authority, for example, that one cannot communicate with others.

It is natural to hold that the non-moral, non-normative conditions for having authority are also the conditions of the ability to have authority. A person's authority may be denied on the ground that he is morally incompetent or wicked. But such facts do not show that he is incapable of having authority in the way that trees are incapable of having authority. Nazi rules may not be authoritatively binding but they are the sort of thing that can be authoritatively binding, whereas statements about volcanoes cannot. Most arguments about the authority of governments and other institutions revolve around their moral claim to the obedience of their subjects. The existence of the non-moral qualifications is taken for granted. The argument does not start except regarding persons and institutions who meet those other conditions. That is why they are thought of as the conditions which establish capacity to possess authority.

If this view is correct then since the law necessarily claims authority, and therefore typically has the capacity to be authoritative, it follows that it typically has all the non-moral, or non-normative, attributes of authority. The remainder of my argument, however, does not depend on this strong conclusion. We will concentrate on two features which must be possessed by anything capable of being authoritatively binding. These two features will then be used to support the sources thesis.

It is convenient to concentrate attention on instructions or directives. The terms are used in a wide sense which can cover propositions, norms, rules, standards, principles, doctrines and the like. In that sense the law is a system of directives and it is authoritative if and only if its directives are authoritatively binding. Likewise whoever issues the directives has authority if and only if his directives are authoritatively binding because he makes them, that is (1) they are authoritative, and (2) part of the reason is that he made them.

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

The first feature reflects the mediating role of authority. It is there to act on reasons which apply to us anyway, because we will more closely conform to those reasons if we do our best to follow the directives of the authority than if we try to act on those reasons directly. Hence, though the alleged authoritative instruction may be wrongly conceived and misguided, it must represent the judgment of the alleged authority on the reasons which apply to its subjects, or at least it must be presented as the authority's judgment. Otherwise it cannot be an authoritative instruction. It fails not because it is a bad instruction, but because it is not an instruction of the

right kind. It may be an instruction given for some other occasion, or in jest, or an order or threat of a gangster who cares for and considers only his own good. Strictly speaking to be capable of being authoritative a directive or a rule has actually to express its author's view on what its subjects should do. But given that this element is one where pretence and deceit are so easy there is little surprise that appearances are all one can go by here, and the concept of de facto authority, as well as all others which presuppose capacity to have authority are based on them. If the rule is presented as expressing a judgment on what its subjects should do then it is capable of being authoritative.

The second feature too is closely tied to the mediating role of authority. Suppose that an arbitrator, asked to decide what is fair in a situation, has given a correct decision. That is, suppose there is only one fair outcome, and it was picked out by the arbitrator. Suppose that the parties to the dispute are told only that about his decision, i.e., that he gave the only correct decision. They will feel that they know little more of what the decision is than they did before. They were given a uniquely identifying description of the decision and yet it is an entirely unhelpful description.[9] If they could agree on what was fair they would not have needed the arbitrator in the first place. A decision is servicable only if it can be identified by means other than the considerations the weight and outcome of which it was meant to settle.

This applies to all decisions, as much to those that a person takes for himself, as to those taken for him by others. If I decide what would be the best life insurance to buy, it is no good trying to remind me of my decision by saying that I decided to buy the policy which it is best to buy. It means that I have to decide again in order to know what I decided before, so the earlier decision might just as well never have happened. The same applies to the subjects of any authority. They can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle.

Can it not be objected that my argument presupposes that people know the normal justification thesis, and the others which go with it? To be sure such an assumption would not be justified. Nor is it made. All I am assuming is that the service conception of authority is sound, i.e., that it correctly represents our concept of authority. It is not assumed that people believe that it does.

It is worth noting that a set of conditions rather like the pair I have argued for can be derived from a much weaker assumption than that of the service conception of authority explained above. I will call this the alternative argument. Its premise is nothing more than the claim that it is part of

our notion of legitimate authority that authorities should act for reasons and that their legitimacy depends on a degree of success in doing so. Even those who reject the service conception of authority will accept conditions similar to the two I have argued for if they accept that legitimacy depends on (a degree of) success in acting for reasons. It is obvious that this weak assumption is enough to hold that only what is presented as someone's view can be an authoritative directive.

Instead of the second condition, that directives be capable of independent identification (i.e., independent of the reasons they should be based upon), two weaker conditions can be established. I will assume that authorities make a difference, i.e., the fact that an authority issued a directive changes the subjects' reasons. It follows that the existence of reasons for an authority to issue a directive does not by itself, without the directive having actually been issued, lead to this change in the reasons which face the subjects. Therefore, the existence of reasons which establish that a certain directive, if issued, would be the right one to have issued cannot show that such a directive exists and is binding. Its existence and content, in other words, cannot depend exclusively on the reasons for it. The existence and content of every directive depend on the existence of some condition which is itself independent of the reasons for that directive. Moreover, that further condition cannot simply be that that or some other authority issued another directive. Often the existence of one law is a reason for passing another. But we have just established that the existence of a law cannot depend simply on the existence of reasons for it, on reasons showing that it would be good if people behaved in the way it prescribes, or that it would be good if the law required them to do so. Therefore, the existence of one directive though it may show that another is desirable or right cannot, by itself, establish its existence.

3. The Coherence Thesis

The previous section argued that, even though the law may lack legitimate authority, one can learn quite a lot about it from the fact that it claims legitimate authority. It must be capable of being authoritative. In particular it must be, or be presented as, someone's view on what the subjects ought to do, and it must be identifiable by means which are independent of the considerations the authority should decide upon.

It is interesting to note that legal sources meet both conditions. To anticipate and simplify, the three common sources of law, legislation, judicial decisions and custom, are capable of being sources of authoritative directives. They meet the non-moral conditions implied in the service conception of authority. Legislation can be arbitrary and it can fail to comply with the

dependence thesis in many ways. But it expresses, or is at least presented as expressing, the legislator's judgment of what the subjects are to do in the situations to which the legislation applies. Therefore, it can be the product of the legislator's judgment on the reasons which apply to his subjects. The same is true of judicial decisions. Judges may be bribed. They may act arbitrarily. But a judicial decision expresses a judgment on the legal consequences of the behaviour of the litigants. It is presented as a judgment on the way the parties, and others in the same circumstances, ought to behave. Similarly with custom. It is not normally generated by people intending to make law. But it can hardly avoid reflecting the judgment of the bulk of the population on how people in the relevant circumstances should act. Source-based law can conform to the dependence thesis. It therefore conforms to the first of our conditions which are entailed by the fact that the law claims authority.

Legal sources also conform with the second of our two conditions since they are capable of being identified in ways which do not rely on the considerations they are meant to decide upon. An income tax statute is meant to decide what is the fair contribution of public funds to be borne out of income. To establish the content of the statute all one need do is to establish that the enactment took place, and what it says. To do this one needs little more than knowledge of English (including technical legal English), and of the events which took place in Parliament on a few occasions. One need not come to any view on the fair contribution to public funds.

As was noted above, all three rivals, the coherence, the incorporation and the sources theses, are united in attributing a special significance to source-based law. The preceding simplified account illustrates the way central features of the law can mesh in with and acquire a special significance from the service conception of authority and the two necessary features of law which it entails. It does not follow that these are the reasons normally given for the centrality of source-based law. The coherence thesis represents an account which is at the very least indifferent to the considerations outlined above. I identified it as the view that the law consists of source-based law together with the morally best justification of the source-based law. This may look an unholy mixture of disparate elements. But it need not be. In the hands of its best advocate, R. M. Dworkin, it embodies a powerful and intriguing conception of the law.

Dworkin's conception of the law, expressed in various articles over many years, is not easy to ascertain. Some points of detail which are nevertheless essential to its interpretation remain elusive. Many readers of his celebrated "Hard Cases" (1975) took it to express a view of law which can be summarised in the following way:

> To establish the content of the law of a certain country one first finds out what are the legal sources valid in that country and then one considers one master question: Assuming that all the laws ever made by these sources which are still in force, were made by one person, on one occasion, in conformity with a complete and consistent political morality (i.e, that part of a moral theory which deals with the actions of political institutions), what is that morality?

The answer to the master question and all that it entails, in combination with other true premises is, according to this reading of Dworkin, the law. The master question may fail to produce an answer for two opposite reasons, and Dworkin complicates his account to deal with both. First, there may be conflicts within a legal system which stop it from conforming with any consistent political morality. To meet this point Dworkin allows the answer to be a political morality with which all but a small number of conflicting laws conform. Secondly, there may be more than one political morality meeting the condition of the master question (especially once the allowance made by the first complication is taken into account). In that case Dworkin instructs that the law is that political morality which is, morally, the better theory. That is, the one which approximates more closely to ideal, correct or true morality.

In his "Reply to Seven Critics" (1977) Dworkin returns to the question of the nature of law. He gives what he calls too crude an answer, which can be encapsulated in a different master question:

> To establish the content of the law of a certain country one first finds out what are the legal sources valid in that country and then one considers one master question: What is the least change one has to allow in the correct, sound political morality in order to generate a possibly less than perfect moral theory which explains much of the legal history of that country on the assumption that it is the product of one political morality?

That (possibly less than perfect) political morality is the law. Both master questions depend on an interaction of two dimensions. One is conformity with ideal morality, the other ability to explain the legal history of the country. The new master question differs from its predecessor in two important respects. First, its fit condition concerns all the legal history of the country. Acts of Parliament enacted in the 13th century and repealed 50 years later are also in the picture. They also count when measuring the degree to which a political morality fits the facts. The earlier test refered only to laws still in force. Only fitting in with them counted. Secondly, the new master question gives less weight to the condition of fit. It is no longer the case that the law consists of the political morality which fits the facts best, with ideal morality coming in just as a tie breaker. Fit (a certain unspecified level of it) now provides only a sort of flexible threshold test. Among the, presumably

numerous, political moralities which pass it the one which is closest to correct morality is the law.

I hesitate to attribute either view to Dworkin. The articles are not clear enough on some of the pertinent points, and his thought may have developed in a somewhat new direction since these articles were written. Luckily, the precise formulation of the master question does not matter to our purpose. Enough of Dworkin's thought is clear to show that its moving ideas are two. First, that judges' decisions, all their decisions, are based on considerations of political morality. This is readily admitted regarding cases in which source-based laws are indeterminate or where they conflict. Dworkin insists that the same is true of ordinary cases involving, say, simple statutory interpretation or indeed the decision to apply statute at all. This does not mean that every time judges apply statutes they consider and reendorse their faith in representative democracy, or in some other doctrine of political morality from which it follows that they ought to apply these statutes. It merely means that they present themselves as believing that there is such a doctrine. Their decisions are moral decisions in expressing a moral position. A conscientious judge actually believes in the existence of a valid doctrine, a political morality, which supports his action.

If I interpret Dworkin's first leading idea correctly and it is as stated above then I fully share it. I am not so confident about his second leading idea. It is that judges owe a duty, which he sometimes calls a duty of professional responsibility, which requires them to respect and extend the political morality of their country. Roughly speaking, Dworkin thinks that morality (i.e., correct or ideal morality) requires judges to apply the source-based legal rules of their country, and, where these conflict or are indeterminate, to decide cases by those standards of political morality which inform the source-based law, those which make sense if it is an expression of a coherent moral outlook.

Notice how far-reaching this second idea is. Many believe that the law of their country, though not perfect, ought to be respected. It provides reasonable constitutional means for its own development. Where reform is called for it should be accomplished by legal means. While the law is in force it should be respected. For most this belief depends to a large degree on the content of the law. They will deny that the laws of Nazi Germany deserved to be respected. Dworkin's obligation of professional responsibility is different. It applies to every legal system simply because it is a legal system, regardless of its content. Furthermore, it is not merely an obligation to obey the letter of the law, but its spirit as well. Judges are called upon to decide cases where source-based law is indeterminate or includes unresolved conflicts in accordance with the prevailing spirit behind the bulk

of the law. That would require a South African judge to use his power to extend Apartheid.

Problems such as these led to the weakening of the element of fit in the second formulation of the master question. But then they also weaken the duty of professional responsibility. There is an attractive simplicity in holding that morality requires any person who joins an institution to respect both its letter and its spirit. If this simple doctrine does not apply to judges in this form, if their respect for their institution, the law, is weakened from its pure form in the first master question to that of the second then one loses the theoretical motivation for such a duty, at least if it means more than saying that one ought to respect the legal institutions of a particular country because their structure and actions merit such respect, or to the extent that they do.

These are some of the doubts that Dworkin's second leading idea raises. My formulations of the two leading ideas (and of the doubts concerning the second) are mere rough and ready sketches. They are meant to outline an approach to law which gives source-based law a special role in the account of law on grounds other than those explained in the previous section. It is easy to see that Dworkin's conception of law contradicts the two necessary features of law argued for above. First, according to him there can be laws which do not express anyone's judgment on what their subjects ought to do, nor are they presented as expressing such a judgment. The law includes the best justification of source-based law, to use again the brief description given in the coherence thesis of which Dworkin's master questions are different interpretations. The best justification, or some aspects of it, may never have been thought of, let alone endorsed by anyone. Dworkin draws our attention to this fact by saying that it requires a Hercules to work out what the law is. Nor does Dworkin's best justification of the law consist of the implied consequences of the political morality which actually motivated the activities of legal institutions. He is aware of the fact that many different and incompatible moral conceptions influenced different governments and their officials over the centuries. His best justification may well be one which was never endorsed, not even in its fundamental precepts, by anyone in government. Much of the law of any country may, according to Dworkin, be unknown. Yet it is already legally binding, waiting there to be discovered. Hence it neither is nor is it presented as being anyone's judgment on what the law's subjects ought to do.

Second, the identification of much of the law depends, according to Dworkin's analysis, on considerations which are the very same considerations which the law is there to settle. This aspect of his theory is enhanced by his second master question, but it makes a modest appearance in the first as

well. Establishing what the law is involves judgment on what it ought to be. Imagine a tax problem on which source-based law is indeterminate. Some people say that in such a case there is no law on the issue. The court ought to ask what the law ought to be and to decide accordingly. If it is a higher court whose decision is a binding precedent it will have thereby made a new law. Dworkin, on the other hand, says that there is already law on the matter. It consists in the best justification of the source-based law. So in order to decide what the tax liability is in law the court has to go into the issue of what a fair tax law would be and what is the least change in it which will make source-based law conform to it. This violates the second feature of the law argued for above.

It is important to realize that the disagreement I am pursuing is not about how judges should decide cases. In commenting on Dworkin's second leading idea I expressed doubts regarding his view on that. But they are entirely irrelevant here. So let me assume that Dworkin's duty of professional responsibility is valid and his advice to judges on how to decide cases is sound. We still have a disagreement regarding what judges do when they follow his advice. We assume that they follow right morality, but do they also follow the law or do they make law. My disagreement with Dworkin here is that in saying that they follow pre-existing law he makes the identification of a tax law, e.g., depend on settling what a morally just tax law would be, i.e., on the very considerations which a tax law is supposed to have authoritatively settled.

For similar reasons Dworkin's theory violates the conditions of the alternative argument, the argument based on nothing more than the very weak assumption that authorities ought to act for reasons and that the validity of authoritative directives depends on some degree of success in doing so. This assumption leads to the same first condition, i.e., that the law must be presented as the law-maker's view on right reasons. As we have just seen Dworkin's argument violates this condition. He also violates the other condition established by the alternative argument, i.e., that the validity of a law cannot derive entirely from its desirability in light of the existence of other laws. Dworkin's theory claims that at least some of the rules which are desirable or right in view of the existence of source-based law are already legally binding.

Dworkin's theory, one must conclude, is inconsistent with the authoritative nature of law. That is, it does not allow for the fact that the law necessarily claims authority and that it therefore must be capable of possessing legitimate authority. To do so it must occupy, as all authority does, a mediating role between the precepts of morality and their application by people in their behaviour. It is this mediating role of authority which is denied to the law by Dworkin's conception of it.

4. The Incorporation Thesis

The problem we detected with the coherence thesis was that though it assigns source-based law a special role in its account of law, it fails to see the special connection between source-based law and the law's claim to authority, and is ultimately inconsistent with the latter. It severs the essential link between law and the views on right action presented to their subjects by those who claim the right to rule them. In these respects, the incorporation thesis seems to have the advantage. It regards as law source-based law and those standards recognised as binding by source-based law. The approval of those who claim a right to rule is a prerequisite for a rule being a rule of law. Thus, the law's claim to authority appears to be consistent with the incorporation thesis.[10]

I should hasten to add that many of the supporters of the incorporation thesis do not resort to the above argument in its defence. Nor do they interpret the centrality of source-based law to their conception of law in that way. They regard it as supported by and necessary for some version of a thesis about the separability of law and morals. Jules Coleman, e.g., is anxious to deny that there is "a necessary connection between law and morality."[11] He mistakenly identifies this thesis with another: "The separability thesis is the claim that there exists at least one conceivable rule of recognition and therefore one possible legal system that does not specify truth as a moral principle as a truth condition for any proposition of law."[12] If this were a correct rendering of the separability thesis stated by Coleman in the first quotation above then the incorporation thesis entails separability. But Coleman's rendering of his own separability thesis is mistaken. A necessary connection between law and morality does not require that truth as a moral principle be a condition of legal validity. All it requires is that the social features which identify something as a legal system entail that it possesses moral value. For example, assume that the maintenance of orderly social relations is itself morally valuable. Assume further that a legal system can be the law in force in a society only if it succeeds in maintaining orderly social relations. A necessary connection between law and morality would then have been established, without the legal validity of any rule being made, by the rule of recognition, to depend on the truth of any moral proposition.

Supporters of the incorporation thesis may admit that while it is not sufficient to establish the separability thesis, at least it is necessary for it, and is therefore supported by it. The separability thesis is, however, implausible. Of course the remarks about orderly social relations do not disprove it. They are much too vague and woolly to do that. But it is very likely that there is some necessary connection between law and morality,

that every legal system in force has some moral merit or does some moral good even if it is also the cause of a great deal of moral evil. It is relevant to remember that all major traditions in western political thought, including both the Aristotelian and the Hobbesian traditions, believed in such a connection.[13] If the incorporation thesis seems much more secure than the separability thesis it is because it seems to be required by the fact that all law comes under the guise of authority, together with the considerations on the nature of authority advanced in the previous sections. The law is the product of human activity because if it were not it could not be an outcome of a judgment based on dependent reasons, that is it could not provide reasons set by authority.

There may, of course, be other cogent reasons for favouring the incorporation thesis. They will not be explored here. Instead I will argue that the thesis ought to be rejected, and that the support it seems to derive from the argument about the nature of authority is illusory. In fact the incorporation thesis is incompatible with the authoritative nature of law. To explain the point let us turn for a moment to look at theoretical authority.

Suppose that a brilliant mathematician, Andrew, proves that the Goldbach hypothesis, that every integer greater than two is the sum of two prime numbers, is true if and only if the solution to a certain equation is positive. Neither he nor anyone else knows the solution of the equation. Fifty years later that equation is solved by another mathematician and the truth of the Goldbach hypothesis is established. Clearly we would not say that Andrew proved the hypothesis, even though he made the first major breakthrough and even though the truth of the hypothesis is a logical consequence of his discovery. Or suppose that Betty is an astrophysicist who demonstrates that the big bang theory of the origin of the universe is true if and only if certain equations have a certain resolution. Again their resolution is not known at the time, and is discovered only later. It seems as clear of Betty as it was of Andrew that she cannot be credited with proving (or disproving) the big bang theory even though the truth (or falsity) of the theory is entailed by her discovery. Now imagine that Alice tells you of Andrew's discovery, or that Bernard tells you of Betty's. Alice and Bernard are experts in their respective fields. They give you authoritative advice. But Alice does not advise you to accept the Goldbach hypothesis. She merely advises belief in it if the relevant equation has a positive solution. The fact that the truth of the hypothesis is entailed by her advice is neither here nor there. The same applies to Bernard's advice based on Betty's work.

All this is commonplace. Nor is it difficult to understand why one cannot be said to have advised acceptance of a particular proposition simply on the ground that it is entailed by another proposition acceptance of which

one did advise. People do not believe in all that is entailed by their beliefs. Beliefs play a certain role in our lives in supporting other beliefs, in providing premises for our practical deliberations. They colour our emotional and imaginative life. More generally they are fixed points determining our sense of orientation in the world. Many of the propositions entailed by our beliefs do not play this role in our lives. Therefore they do not count amongst our beliefs. One mark of this is the fact that had people been aware of some of the consequences of their beliefs, rather than embrace them they might have preferred to abandon the beliefs which entail them (or even provisionally to stick by them and refuse their consequences, i.e., embrace inconsistencies until they found a satisfactory way out). This consideration explains why we cannot attribute to people belief in all the logical consequences of their beliefs. It also explains why a person cannot be said to have advised belief in a proposition he does not himself believe in. (Though it is possible to advise others to take the risk and act as if certain propositions are true even if one does not believe in them and equally possible to advise believing in a proposition if it is true.)

Advice shares the mediating role of authoritative directives. It too is an expression of a judgment on the reasons which apply to the addressee of the advice. Because the advice has this mediating role it can include only matters on which the advisor has a view, or presents himself as having one (to cover cases of insincere advice). Since a person does not believe in all the consequences of his beliefs he does not, barring special circumstances, advise others to believe in them either.

The analogy with authority is clear and hardly needs further elaboration. The mediating role of authority implies that the content of an authoritative directive is confined to what the authority which lends the directive its binding force, can be said to have held or to have presented itself as holding. It does not extend to what it would have directed, given a chance to do so, nor to all that is entailed by what it has directed. It will by now be clear why the incorporation thesis must be rejected if the law does necessarily claim authority. The main thrust of the incorporation thesis is that all that is derivable from the law (with the help of other true premises) is law. It makes the law include standards which are inconsistent with its mediating role for they were never endorsed by the law-making institutions on whose authority they are supposed to rest. The mistake of the incorporation thesis is to identify being entailed by the source-based law with being endorsed by the sources of law.

Law is a complex social institution and some of its complexities help mask the incorporation thesis's mistake. When thinking of a piece of advice or of an authoritative directive we tend to think of them as having one

author. In the law, as in other hierarchical institutions, matters are complicated in two respects. First, authoritative directives are typically issued by institutions following an elaborate process of drafting and evaluation. Secondly, they are often amended, modified, and their content amplified and changed by a succession of subsequent legislative, administrative and judicial actions. A convention of reference sometimes exists which allows one to refer to a statute, or to the original judicial decision, when citing a legal rule, even though they are no more than the starting point in the development of the rule, which is in a very real sense the product of the activities of several bodies over a period of time.

These complications mean of course that the rule as it is now may include aspects which cannot be attributed to its original creator. They are part of the rule because they are attributable to the author of a later intervention. E.g., typically successive judicial interpretations change or add to the meaning of statutes. Likewise, though we attribute beliefs and intentions to institutions and corporations on the basis of the beliefs and intentions of their officials, the attributing functions may sometimes sanction holding a corporate body to have had a belief or an intention which none of its officials had. This is not the place to inquire into the rules of attributions invoked when we talk of the intentions or beliefs of states, governments, corporations, trade unions, universities, etc. All that is required for our present purposes is that attribution is made in a restrictive way which does not allow one to attribute to such a body all the logical consequences of its beliefs and intentions. Restrictions to all the forseen or forseeable consequences are the ones most common in the law. This is enough to show that the incorporation thesis receives no sustenance from the institutional complexities of the law since it insists that the law includes all the logical consequences of source-based law.

In disputing the incorporation thesis I am not denying two other points which are asserted by D. Lyons in the most thorough going defence of this position. First, I agree with him that judges who work out what is required by, e.g., the due process provision of the American constitution are engaged in interpreting the constitution. Lyons is mistaken, however, in thinking that it follows from that that they are merely applying the law as it is (at least if they succeed in discovering the right answer). Judicial interpretation can be as creative as a Glen Gould interpretation of a Beethoven piano sonata. It is a mistake to confuse interpretation with paraphrase or with any other mere rendering of what the interpreted object is in any case. Secondly, Lyons is quite right to think that there is more to the law than is explicitly stated in the authoritative texts. Authorities can and do direct and guide by implication. It does not follow, however, that they imply all that is entailed

by what they say, let alone all that is entailed by it with the addition of true premises. The limits of the justifiable imputation of directives are no wider, I have argued above, than the limits of the imputation of belief.

5. The Sources Thesis

The last section established that not all the moral consequences of a legal rule are part of the law.[14] But it leaves open the possibility that some are: i.e., that some moral consequences of a legal rule can be attributed to the author of that legal rule as representing its intention or meaning and thus being part of the law. I will not present a refutation of this possibility. The purpose of the present section is more modest. It argues that the authoritative nature of law gives a reason to prefer the sources thesis. It leaves open the possibility that additional considerations lead to a complex view of the law lying between the incorporation and the sources theses.

Let us distinguish between what source-based law states explicitly and what it establishes by implication. If a statute in country A says that income earned abroad by a citizen of A is liable to income tax in A then it only implicitly establishes that I am liable to such tax. For my liability is not stated by the statute but is inferred from it (and some other premises). Similarly if earnings abroad are taxed at a different rate from earnings at home the fact that the proceeds of export sales are subject to the home rate is implied rather than stated. It is inferred from this statute and other legal rules on the location of various transactions.

The two examples differ in that the statement that I am liable to tax at a certain rate is an applied legal statement depending for its truth on both law and fact. The statement that export earnings are taxed at a certain rate is a pure legal statement depending for its truth on law only (i.e., on acts of legislation and other law-making facts). The sources thesis as stated at the beginning of this paper can bear a narrow or a wide interpretation. The narrow thesis concerns the truth conditions of pure legal statements only. Pure legal statements are those which state the content of the law, i.e., of legal rules, principles, doctrines, etc. The wide thesis concerns the truth conditions of all legal statements, including applied ones. It claims that the truth or falsity of legal statements depends on social facts which can be established without resort to moral argument.

The fact that the law claims authority supports the narrow sources thesis because it leads to a conception of law as playing a mediating role between ultimate reasons and people's decisions and actions. To play this role the law must be, or at least be presented as being, an expression of the judgment of some people or of some institutions on the merits of the actions it requires. Hence, the identification of a rule as a rule of law consists in at-

tributing it to the relevant person or institution as representing their decisions and expressing their judgments. Such attribution need not be on the ground that this is what the person or institution explicitly said. It may be based on an implication. But the attribution must establish that the view expressed in the alleged statement is the view of the relevant legal institution. Such attributions can only be based on factual considerations. Moral argument can establish what legal institutions should have said or should have held but not what they did say or hold.

We have already traced one source of resistance to this conclusion to the assumption that if attribution is on factual rather than moral grounds then it must be a non-controversial, easily established matter which requires at most the application of a procedure of reasoning having the character of an algorithm to some non-controversial simple facts. The assumption that only moral questions can resist easy agreement or solution by algorithmic procedures has nothing to recommend it, and I in no way share it. The case for saying that attribution of belief and intention to their author is based on factual criteria only does not rest on the false claim that such attributions are straightforward and noncontroversial. A second source of resistance, also noted above, derives from overlooking the greater complexity involved in attributing views or intentions to complex institutions whose activities spread over long stretches of time, and the tendency to think that nothing more is involved in these cases than is involved in attributing beliefs or intentions to individuals.

But there is a third difficulty with the view I am advocating which must be addressed now. One may ask: If an authority explicitly prohibited e.g., unfair discrimination, is not the fact that certain cases display unfair discrimination evidence enough for attributing their prohibition to the authority? Two considerations are usually brought to support the view that these reasons are sufficient to determine the content of the law on such matters. I shall try to rebut this view by showing that these supporting considerations are mistaken. First is the claim that the only alternative view holds that the law is determined only regarding cases which the law maker actually contemplated and had in mind when making the law. This, let it be conceded right away, is not merely false but very likely an incoherent view. Second (and it does not matter that this point may be incompatible with the first), it is sometimes said that the only alternative view assumes that the law-makers intend their particular view of what is unfair discrimination to become law even if they are wrong.

Suppose that the fathers of the constitution outlawed cruel punishment. Suppose further that it is beyond doubt that they thought that flagging is not cruel, and finally, that in fact (or in morals) it is cruel. Are we to

assume that the law-maker's intention was to exclude flogging from the scope of the constitutional prohibition of cruel punishments? Would not the correct view be that in making cruelty a benchmark of legality the law-makers intended their own judgment to be subject to that criterion, so that though believing flogging not to be cruel, they expressed the view that if it is cruel it is unlawful?

Both points have a *déjà vu* aspect. They depend on the unimaginative assumption that either the law is determined by the thoughts actually entertained by the law-maker when making the law or it must include all the implications of those thoughts. Since it must be granted, and I do grant, that it is not the first, the second is supposed to be the case. This was the structure of Lyons's argument regarding the explicit content thesis. As he saw it either the law is confined to its explicit content or it contains all its implications. Since Hart rejects the second alternative he was saddled by Lyons with the first. Since Lyons sees, as everyone must, that the first is wrong, he embraces the second. The two considerations explained above are the psychological variants of Lyons's linguistic dichotomy. They contrast not actual language with its implications but actual thoughts with their implications.

The answer to both arguments is the same: the dichotomy is a false one. There are other possibilities. Sometimes we know of a person that, e.g., if only he realized that certain forms of psychological abuse are cruel he would not be so indifferent to them. At others we know that if he were convinced that they are cruel he would find some other way to justify them. He would come to believe that cruelty is sometimes justifiable. In attributing such views to people one does not endorse either of the two unacceptable views mentioned above. Naturally it is often impossible to impute any such view to a person. The question would he have maintained his intention to prohibit cruel punishment had he known that capital punishment is cruel (assuming for a moment that it is) may admit of no answer.

Furthermore, and this is often overlooked, the sources thesis by itself does not dictate any one rule of interpretation. It is compatible with several. It is compatible, e.g., with saying that if it is known that the law-makers prohibited cruel punishment only because they regarded flogging as not cruel then that law does not prohibit flogging. It is also compatible with the rule that the law is confined in such cases to the intention expressed by the law-maker. This is to prohibit cruel punishment. Since, by this rule of interpretation, no more specific intention is attributable to the law-maker, the law gives discretion to the courts to forbid punishments they consider cruel (this reflects the lack of specificity in the law) and instructs them to forbid those which are cruel.[15] Which of these or of a number of alternative inter-

pretations is the right one varies from one legal system to another. It is a matter of their own rules of interpretation. One possibility is that they have none on this issue, that the question is unsettled in some legal systems. The only point which is essential to the sources thesis is that the character of the rules of interpretation prevailing in any legal system, i.e., the character of the rules for imputing intentions and directives to the legal authorities, is a matter of fact and not a moral issue. It is a matter of fact because it has to sustain conclusions of the kind: "That is in fact the view held by these institutions on the moral issues in question."

Two further points have to be made to avoid misunderstanding. First, none of the above bears on what judges should do, how they should decide cases. The issue addressed is that of the nature and limits of law. If the argument here advanced is sound then it follows that the function of courts to apply and enforce the law coexists with others. One is authoritatively to settle disputes, whether or not their solution is determined by law. Another additional function the courts have is to supervise the working of the law and revise it interstitially when the need arises. In some legal systems they are assigned additional roles which may be of great importance. For example, the courts may be made custodians of Freedom of Expression, a supervisory body in charge both of laying down standards for the protection of free expression and adjudicating in disputes arising out of their application.

Secondly, it may be objected that relying on the mediating role of authority becomes an empty phrase when it comes to legal rules which evolved through the activities of many hands over a long time. The fact that we implicitly or explicitly endorse rules of attribution which sanction talk of the intention of the law where that intention was never had by any one person does not support the argument from the mediating role of the law. It merely shows it to be a formalistic hollow shell. This objection, like some of the earlier ones, seems to betray impatience with the complexities, and shortcomings, of the world. Every attribution of an intention to the law is based on an attribution of a real intention to a real person in authority or exerting influence over authority. That intention may well relate to a small aspect or modification of the rule. If the intention of the law regarding the rule as a whole differs from that of any single individual this is because it is a function of the intentions of many. Sometimes, but by no means always, this leads to reprehensible results. Be that as it may, the view propounded here will in such circumstances highlight the indirect and complex way in which the law has played its mediting role.

All the arguments so far concern the narrow sources thesis only. Nothing was said about its application to applied legal statements. I tend to feel that it applies to them as well since they are legal statements whose truth value depends on contingent facts as well as on law. If one assumes that

contingent facts cannot be moral facts, then the sources thesis applies here as well. That is, what is required is the assumption that what makes it contingently true that a person acted fairly on a particular occasion is not the standard of fairness, which is not contingent, but the "brute fact" that he performed a certain action describable in value-neutral ways. If such an assumption is sustainable in all cases then the sources thesis holds regarding applied legal statements as well.

The considerations adumbrated above dispel some of the misunderstandings which surround the sources thesis. First, it does not commit one to the view that all law is explicit law.[16] Much that is not explicitly stated in legal sources is nevertheless legally binding. Second, the sources thesis does not rest on an assumption that law cannot be controversial. Nor does it entail that conclusion. Its claim that the existence and content of the law is a matter of social fact which can be established without resort to moral argument does not presuppose nor does it entail the false proposition that all factual matters are non-controversial nor the equally false view that all moral propositions are controversial. The sources thesis is based on the mediating role of the law. It is true that the law fails in that role if it is not, in general, easier to establish and less controversial than the underlying considerations it reflects. But this generalization is exaggerated and distorted when it turns into the universal, conceptual dogmas of the explicit content or the non-controversiality theses.

The sources thesis leads to the conclusion that courts often exercise discretion and participate in the law-making process. They do so when their decisions are binding on future courts (even where the decisions can be modified or reversed under restrictive conditions) and where their decisions do not merely reflect previous authoritative rulings. Saying this does not mean, however, that courts in exercising their discretion either do or should act on the basis of their personal views on how the world should be ideally run. That would be sheer folly. Naturally judges act on their personal views, otherwise they would be insincere. (Though the fact that these are their views is not their reason for relying on them. Their reasons are that those propositions are true or sound, for whatever reason they find them to be so.) But judges are not allowed to forget that they are not almighty dictators who can fashion the world to their own blue-print of the ideal society. They must bear in mind that their decisions will take effect in society as it is and the moral and economic reasons they resort to should establish which is the best or the just decision given things as they are rather than as they will be in an ideal world.

Finally, the sources thesis does not presuppose a non-naturalist ethical position. Even if a certain social fact entails certain moral consequences it can still be a source of law. It is a source of law as the social fact it is, and not

as a source of moral rights and obligations. It is a source of law under its naturalistic rather than under its moral description.[17]

6. The Role of Values in Legal Theory

According to R. M. Dworkin legal positivists endorse the model of rules because of a political theory about the function of law which they think is to "provide a settled public and dependable set of standards for private and official conduct, standards whose force cannot be called into question by some individual official's conception of policy or morality."[18] The argument of this article shows that something like Dworkin's description applies to my argument. But notice that Dworkin's remark suggests that legal positivists endorse the non-controversiality and the explicit contents theses, which I do not share. Besides, it is misleading to regard the thesis and argument explained here as moral ones. The argument is indeed evaluative, but in the sense that any good theory of society is based on evaluative considerations in that its success is in highlighting important social structures and processes, and every judgment of importance is evaluative.[19]

Let me exemplify the difference between my conception of the role of evaluation in explaining the nature of law and that of Dworkin by considering one central objection to the sources thesis. Some people object not to the attribution of intention to legislators or interpreters of the law in itself, but to the presupposition of the sources thesis that whenever one is faced with valid legislation one can also find an intention behind it. Is it always the case? Do we not know that sometimes members of parliaments vote knowing nothing and intending only to get home as early as possible? An adequate answer to this and related questions has to await a comprehensive treatment of interpretation and the role of intention within its context. A brief indication of the direction in which an answer is to be sought will have to do.

Let us start by considering the view which denies the importance of the law-makers' intention to our understanding of the law. To the question: "why should one assign any importance to a particular text as legally binding?" that view will reply: "Because is was endorsed by the proper constitutional procedure." To the question "how should the text be interpreted other than by reference to the intentions of its author or of those whose action maintains its force as law?" the answer would refer to existing conventions of interpretation which need not refer to anyone's intention. There is nothing wrong with these replies. They merely raise further questions. Why does the endorsement of a certain text in accord with those procedures endow it with a special status? Is it some form of magic or fetishism?

That procedure is a way of endowing a text with legal force because it is a procedure designed to allow those in authority to express a view on how people should behave, in a way which will make it binding. That it is such a procedure, and not just any arbitrarily chosen ritual, is part of what makes it into a legal procedure. The law-making procedure includes conventions of interpretation. A change in the conventions of interpretation of a legal system changes its law. Consider the simple example of a change from an understanding of "person" to include only people to a reading of it which covers foetuses as well. Law-makers need not intend anything other than that the bill become law with the meaning given it by the conventions of interpretation of their country. To deny them that intention is to deny that they know what they are doing when they make law.

How is this sketchy reply to the objection to be defended? It turns on evaluative conceptions about what is significant and important about central social institutions, i.e., legal institutions. But in claiming that these features are important one is not commending them as good. Their importance can be agreed upon by anarchists who reject any possibility of legitimacy for such institutions. All that is claimed is the centrality to our social experience of institutions which express what they claim to be the collective and binding judgment of their society as to how people should behave. Given the centrality of that feature it is justified to interpret the action of law-makers who are in a hurry to get back home, who vote without paying attention to what they are voting for, in the way described. Two features stand out. First, while this is an evaluative judgment, it is not a judgment of the moral merit of anything. Second, its application depends on the fact that the perception of importance of the feature focused upon is shared in our society, that it is shared, among others, by the law-makers themselves.

The concept of law is part of our culture and of our cultural traditions. It plays a role in the way in which ordinary people as well as the legal profession understand their own and other people's actions. It is part of the way they "conceptualize" social reality. But the culture and tradition of which the concept is a part provide it with neither sharply defined contours nor a clearly identifiable focus. Various, sometimes conflicting, ideas are displayed in them. It falls to legal theory to pick on those which are central and significant to the way the concept plays its role in people's understanding of society, to elaborate and explain them.

Legal theory contributes in this respect to an improved understanding of society. But it would be wrong to conclude, as D. Lyons has done,[20] that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like "mass" or "electron," "the law" is a concept used by people to

understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.

To do so it does engage in evaluative judgment for such judgment is inescapable in trying to sort out what is central and significant in the common understanding of the concept of law. It was my claim in this article that one such feature is the law's claim to authority and the mediating role it carries with it. The significance of this feature is both in its distinctive character as a method of social organisation and in its distinctive moral aspect, which brings special considerations to bear on the determination of a correct moral attitude to authoritative institutions. This is a point missed both by those who regard the law as a gunman situation writ large, and by those who in pointing to the close connection between law and morality assume a linkage inconsistent with it.

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NOTES

1. I am grateful to K. Greenawalt, K. Kress, D. Lyons, S. Quevedo and R. Shiner for helpful comments on an earlier draft.

2. *Definition and Theory in Jurisprudence*, Oxford 1953.

3. See his *Essays on Bentham*, ch. 1; *Essays in Jurisprudence and Philosophy*, (Oxford: Oxford University Press, 1982).

4. These formulations of the theses aim to preserve simplicity and comparability, and pay the price of crudeness. The coherence thesis is distorted most. Its advocates may insist that only a holistically conceived soundest theory enables us to interpret accurately many, perhaps even all, of the sources of law and to identify which law is based on them. This point will be taken up below.

5. I have defended the thesis before. See *The Authority of Law* (Oxford University Press, 1979), ch.3, *The Concept of a Legal System*, 2nd ed. (Oxford University Press, 1980), pp. 213-16, and "The problem about the Nature of Law", *Contemporary Philosophy. A new survey*. Vol. 3, pp. 107–25.

6. I have discussed this conception of authority in "Authority and Justification", *Philosophy and Public Affairs*, 14 (1985) 3.

7. The nondependent reasons authorities may act for are those which make them better able to satisfy the normal justification thesis, i.e., reasons which make their directives reflect more closely the dependent reasons. Because of the circumstances of their action a direct attempt to pursue all the dependent reasons and no other is likely to backfire. All bureaucracies have to adopt rules which deviate from the underlying reasons in detail in order better to conform with them overall.

8. The normal justification thesis specifies only the reasons for recognising an authority. It says nothing on the reasons against doing so. These exist to various degrees depending on the nature of the case. They determine how strong the case for recognising the authority has to be. It must be sufficient to overcome the reasons to the contrary.

9. I am disregarding possible complications. E.g., if the parties believed that theirs is an honest disagreement about what is fair in the case the information they were given leaves them where they were. If they knew that one of them is trying to take advantage of the other the answer they were given may be more meaningful to them.

10. Works recommending the incorporation thesis include E. Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" *Michigan L.R.* 75 (1977) 473, 511/2; Jules L. Coleman, "Negative and Positive Positivism" *J. of Legal Studies* 11 (1982) 139, 160 and 162; D. Lyons, "Moral Aspects of Legal Theory" *Midwest Studies in Philosophy* 7 (1982) 223, eds. P. A. French, T. E. Uehling Jr., H. K. Wettstein, at p. 237.

11. J. L. Coleman, Ibid., p. 140.

12. Ibid., p. 141.

13. The following are some of the authors who advocated versions of the necessary connection thesis which are all compatible with the incorporation thesis: H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), ch.9 (on the minimum content of natural law); L. Fuller, *The Morality of Law*, (Cambridge, MA: Harvard University Press, 1964), and "Forms and Limits of Adjudication", *Harvard L.R.* 92 (1978) 353; J. M. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980). I have discussed this approach in *Practical Reason and Norms*, (London: Hutchinson, 1975, pp. 162–70). It has been considered by F. P. Soper in "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute", *Michigan Law Rev.* 75 (1977) 473, and by D. Lyons in "Moral Aspects of Legal Theory", *Midwest Studies in Philosophy* vol. 7, Social and Political Philosophy, 1982, pp. 223, 226. Though surprisingly he advances, albeit tentatively, the view that the facts which determine the existence and content of law do not guarantee it any moral value (p. 251). This, as I said, seems implausible. What does appear true is that the necessary connection between law and morality which is likely to be established by arguments of the kind canvassed by the above mentioned authors is a weak one. It is insufficient, e.g., to establish a prima facie obligation to obey the law.

14. By the same reasoning it also established that not all the factual consequences of a rule of law are part of the law.

15. See for a detailed explanation "The Inner Logic of the Law", *Materiali per una Storia della Cultura Giuridica* a. XIV, n.2, dicembre 1984.

16. See the discussion of this distinction in Lyons *op. cit.* p. 238ff. Lyons mistakenly attributes to Hart and to me commitment to what he calls the Explicit Content Thesis. See my discussion in the articles mentioned in note 5.

17. That is why the sources thesis refers to social facts which can be described without resort to moral argument, and not to "a social fact which does not entail any moral consequences." This point is misunderstood by D. Lyons, *op. cit.*

18. R. M. Dworkin, *Taking Rights Seriously*, (Harvard University Press, 1977), p. 347.

19. D. Lyons, *op. cit.* p. 245, without page references to my work to support this interpretation of it, attributes to me the following argument: "The social order is

liable to break down if substantive moral arguments used in adjudication are counted as helping to interpret the law because that would encourage members of the society to break the law in hope of avoiding the legal consequences by challenging the justification of the standard." I am happy to say that nothing remotely like this ever crossed my mind or my pen.

20. D. Lyons, *Ethics and The Rule of Law* (Cambridge: Cambridge University Press, 1983), pp. 57–59.

[2]

RULES AND SOCIAL FACTS

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Ronald Dworkin has identified H.L.A. Hart with the view that law consists in rules.[1] That attribution is partially understandable, if ultimately unwarranted. Hart does claim that law consists in rules, but he also explicitly acknowledges that customary norms can constitute part of a community's law though they are not rules. Even if Dworkin overstates the point, it is true that rules are essential both to Hart's jurisprudence and to his theory of adjudication. Why is it that law, for Hart, is primarily a matter of rules?

I. HART AND AUSTIN

In *The Concept of Law*,[2] Hart develops his own position by contrasting it with Austin's. My view is that Hart is constrained by his methodology, which is to develop his view in the light of the particular shortcomings he identifies in Austin's jurisprudence. Nowhere is this clearer than in his development and articulation of the view that law consists in social rules. Before turning to the way in which Hart is drawn to identify law with social rules, it is useful to look at another example of the way in which Hart develops his view as a response to, and ultimately as an extension of, Austin's.

Hart correctly argues that Austin's view of law as the order of a sovereign, backed by a threat of sanction, can explain neither (1) the fact that the commands of dead and departed sovereigns continue to be law, nor (2) the fact that the first command of a nascent sovereign is law in spite of the fact that it has not yet secured the requisite habit of obedience from those it orders.[3]

The flaw in Austin's logic lies in his narrow conception of the nature of law as consisting in liberty-limiting or constraining

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1. *See* R. DWORKIN, LAW'S EMPIRE 34-35 (1986).
2. H.L.A. HART, THE CONCEPT OF LAW (1961).
3. *See id.* at 60-76.

principles or norms.[4] By introducing into the concept of law the idea that some legal norms enhance the scope of liberty by empowering individuals, the problem Hart poses for Austin's account is solved. The sovereign at any given time is someone who occupies a legal office. Occupants of that office have authority of a certain sort; their commands are law. Thus, they are empowered with legal authority by the rules that define their office.

Were all positive law liberty-limiting, then the concept of an office of this sort would be impossible. Such offices are defined by legal rules, but these rules do not constrain. Rather, these rules empower. Were there no such rules, there could be no offices. Were there no office of the sovereign, there would be only particular sovereigns whose identities as such would depend on having secured and maintained the habit of obedience. Thus, the problems of persistence and continuity to which Hart draws our attention would remain. They can be resolved only by notions of sovereignty and the office from which the sovereign governs. Such offices, in turn, are constituted by rules that empower, not by norms that constrain.

Because offices require power-conferring or enabling norms, it comes as no surprise that in identifying the core of his position, Hart claims that law consists in norms of two sorts: those that *constrain*, consistent with Austin's analysis, and those that *enable*.[5]

Hart's introduction of rules into the concept of law has a similar genesis. He begins by noting a problem in Austin's account and demonstrates that the source of the problem is Austin's identification of law with particular commands rather than with norms of sufficient generality and normativity (that is, rules).[6] Jurisprudential theories have traditionally attempted to answer two distinct but related questions. First, what is law, and second, why is it binding? The first of these questions is analytic, hence the concept of analytic jurisprudence. The second question is normative. Many scholars have taken the first question to be an invitation to provide an account of the meaning or the proper or ordinary use of the term "law." These are the theo-

4. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954).

5. *See* H.L.A. HART, *supra* note 2, at 77-79.

6. *See id.* at 78-96.