

# POSITIVISM AND THE INSEPARABILITY OF LAW AND MORALS

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*H.L.A. Hart made a famous claim that legal positivism somehow involves a “separation of law and morals.” This Article seeks to clarify and assess this claim, contending that Hart’s separability thesis should not be confused with the social thesis, the sources thesis, or a methodological thesis about jurisprudence. In contrast, Hart’s separability thesis denies the existence of any necessary conceptual connections between law and morality. That thesis, however, is false: There are many necessary connections between law and morality, some of them conceptually significant. Among them is an important negative connection: Law is, of its nature, morally fallible and morally risky. Lon Fuller emphasized what he called the “internal morality of law,” the “morality that makes law possible.” This Article argues that Hart’s most important message is that there is also an immorality that law makes possible. Law’s nature is seen not only in its internal virtues, in legality, but also in its internal vices, in legalism.*

## INTRODUCTION

H.L.A. Hart’s Holmes Lecture gave new expression to the old idea that legal systems comprise positive law only, a thesis usually labeled “legal positivism.” Hart did this in two ways. First, he disentangled the idea from the independent and distracting projects of the imperative theory of law, the analytic study of legal language, and non-cognitivist moral philosophies. Hart’s second move was to offer a fresh characterization of the thesis. He argued that legal positivism involves, as his title put it, the “separation of law and morals.”<sup>1</sup>

Of course, by this Hart did not mean anything as silly as the idea that law and morality should be *kept separate* (as if the separation of

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<sup>1</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957).

law and morals were like the separation of church and state).<sup>2</sup> Morality sets ideals for law, and law should live up to them. Nor did he mean that law and morality *are* separated. We see their union everywhere. We prohibit sex discrimination because we judge it immoral; the point of prohibiting it is to enforce and clarify that judgment, and we do so by using ordinary moral terms such as “duty” and “equality.” To the extent that it suggests otherwise, the term “separation” is misleading. To pacify the literal-minded, Hart might have entitled his lecture “Positivism and the *Separability* of Law and Morals.”<sup>3</sup> That captures well his idea that “there is no necessary connection between law and morals or law as it is and ought to be.”<sup>4</sup>

Lon Fuller refused to take Hart at his word. He thought that Hart *was* recommending that “law must be strictly severed from morality”<sup>5</sup>—if Hart was not, then why did he say that it is *morally* better to retain a broad concept of law, one that applies even to wicked legal systems? And anyway, if positivists were *not* recommending separation, then what advice *were* they offering to politicians who have to design constitutions or judges who have to decide cases?

The answer is that legal positivists were not offering advice. They were trying to understand the nature of law. Fuller’s unwillingness to credit that project flowed from his apparent conviction that it could amount to nothing better than “a series of definitional fiats.”<sup>6</sup> Fuller was certainly not the last to have doubts about the prospects for an explanation of the concept of law, nor the first to think it more important to change the world than to interpret it. The only surprising thing was that Fuller also supposed that world-changing could be brought about by philosophy-changing. He thought that jurists could improve society by treating philosophies of law not as efforts to understand social reality but as “direction posts for the application of human

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<sup>2</sup> The association of this idea with Hart seems to be a confused interpretation of a thesis that he *did* hold, namely that the law ought not to prohibit harmless deviation from conventional moral standards. See H.L.A. HART, *LAW, LIBERTY AND MORALITY* 57 (1963) (“Where there is no harm to be prevented and no potential victim to be protected . . . it is difficult to understand the assertion that conformity . . . is a value worth pursuing, notwithstanding the misery and sacrifice of freedom it involves.”). That is a normative thesis about legislation and not a theory of the nature of law. If positive law necessarily enforces conventional morality, the recommendation would have been pointless.

<sup>3</sup> Hart sometimes described the thesis that he opposed as making the claim that law and morals are “indissolubly fused or inseparable.” Hart, *supra* note 1, at 594. I think Jules Coleman first used the term “separability thesis.” See Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 140–41 (1982) (using term to refer to “the denial of a necessary or constitutive relationship between law and morality”).

<sup>4</sup> Hart, *supra* note 1, at 601 n.25.

<sup>5</sup> Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 656 (1957).

<sup>6</sup> *Id.* at 631.

energies.”<sup>7</sup> In which direction should they point? Toward a much greater “fidelity to law.”<sup>8</sup>

But that was scarcely the beginning. Fuller also wanted general jurisprudence to see to it that constitutions not “incorporate a host of economic and political measures of the type [that] one would ordinarily associate with statutory law,”<sup>9</sup> and he wanted it to give solace to trial judges who have expertise in commerce but find themselves under the thumb of a supreme court with no business sense.<sup>10</sup> Legal positivism’s laxity about such things agitated him: “What disturbs me about the school of legal positivism is that it not only refuses to deal with [these] problems . . . but bans them on principle from the province of legal philosophy.”<sup>11</sup>

In truth, there are no such bans; positivists simply believe there to be more than one province in the empire of legal philosophy. They think that, say, opposition to having economic provisions in constitutions must be defended within the province of political morality, not dragged into general jurisprudence as a supposed inference from, or presupposition of, some theory about the nature of law. Positivists think that general jurisprudence itself should have no pretension to be a “guide to conscience”<sup>12</sup> and are neither surprised nor disappointed when it proves “incapable of aiding [a] judge.”<sup>13</sup> The mission of legal positivism is thus not to promote economic liberalism or even “fidelity to law.” It should be oriented, not to any of these pieties, but to truth and clarity—what Hart called “a sovereign virtue in jurisprudence.”<sup>14</sup> It is this project, not some other one, that reveals the “separation of law and morals.”

The victory of Hart’s lecture in promoting this slogan was virtually total. People who know nothing else about jurisprudence know that legal positivists are those who maintain the separability of law and morality. The one group amongst which the slogan did not really catch fire was the legal positivists themselves. Joseph Raz noticed,

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<sup>7</sup> *Id.* at 632.

<sup>8</sup> *Id.* at 631.

<sup>9</sup> *Id.* at 643.

<sup>10</sup> *See id.* at 646–47 (suggesting that trial judge who “has the misfortune . . . to live under a supreme court which he considers woefully ignorant of the ways and needs of commerce” cannot “achieve a satisfactory resolution of his dilemma unless he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be”).

<sup>11</sup> *Id.* at 643.

<sup>12</sup> *Id.* at 634.

<sup>13</sup> *Id.* at 647.

<sup>14</sup> Hart, *supra* note 1, at 593.

over thirty years ago, that the separability thesis is logically independent of the idea that legal systems contain positive law only:

The claim that what is law and what is not is purely a matter of social fact still leaves it an open question whether or not those social facts by which we identify the law or determine its existence do or do not endow it with moral merit. If they do, it has of necessity a moral character.<sup>15</sup>

More recently, Jules Coleman described the separability thesis as undeniable and therefore useless as a demarcation line in legal theory: “We cannot usefully characterize legal positivism in terms of the separability thesis, once it is understood properly, because virtually no one—positivist or not—rejects it.”<sup>16</sup> John Gardner, on the other hand, maintained that the separability thesis cannot characterize positivism for the opposite reason: It is “absurd and no legal philosopher of note has ever endorsed it.”<sup>17</sup> Amid such cacophony, it is perhaps unsurprising that some onlookers found the thesis “hopelessly ambiguous” and the half-century of debate about the separability of law and morals “entirely pointless.”<sup>18</sup>

In this Article, I offer a different diagnosis. The separability thesis is not ambiguous, nor absurd, nor obvious. On the contrary, it is clear, coherent, and false. But it is false for reasons that Fuller did not notice and that throw into sharp relief—and into question—his celebratory view of law.

## I

### WHAT THE SEPARABILITY THESIS IS NOT

The separability thesis is not a methodological claim. It bears only on the object-level domain—that is, on laws and legal systems.<sup>19</sup> Hart’s method was to approach the nature of law through a hermeneutic study of the concept of law. He considered this method non-committal with respect to the moral value of its objects and, in that

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<sup>15</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 38–39 (1979) [hereinafter RAZ, *AUTHORITY*]; see also JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 165–70 (2d ed. 1990) [hereinafter RAZ, *PRACTICAL REASON*] (discussing “derivative approach” and its “need for a socially oriented identification of [the] law”).

<sup>16</sup> JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 152 (2001).

<sup>17</sup> John Gardner, *Legal Positivism: 5½ Myths*, 46 *AM. J. JURIS.* 199, 223 (2001).

<sup>18</sup> Klaus Füller, *Farewell to ‘Legal Positivism’: The Separation Thesis Unraveling*, in *THE AUTONOMY OF LAW* 119, 120 (Robert P. George ed., 1996).

<sup>19</sup> It is therefore what Stephen Perry calls “substantive,” as opposed to “methodological,” positivism. See generally Stephen R. Perry, *The Varieties of Legal Positivism*, 9 *CANADIAN J.L. & JURISPRUDENCE* 361 (1996). For the view that the separability thesis includes at least one methodological commitment, see James Morauta, *Three Separation Theses*, 23 *LAW & PHIL.* 111, 128 (2004) (“The correct analysis [of the concept of law] does not by itself entail any substantive claims about the moral value of law as such.”).

sense, morally neutral. But that is not the engine of the separability thesis. There is no reason why a noncommittal method cannot discover necessary connections between law and morals, and to discover that there *are* such connections is not to presuppose or assert that it is morally good that they exist. Hart's methodological neutrality is no more than the claim that general jurisprudence must not arrive precommitted to conclusions about the moral value of law. This neutrality does not prompt or preclude any conclusions, nor does it presume any other kind of value-neutrality.

Does Hart's discussion of the moral reasons for retaining a broad concept of law cast doubt on such neutrality? It does not. The separability thesis rests wholly on his destructive arguments against the necessary connection thesis. The moral and pragmatic considerations that he mentions respond to something that he considers "less an intellectual argument . . . than a passionate appeal."<sup>20</sup> The appeal comes from a conceptual reformer who asks us to revise the concept of law so as to deprive wicked legal systems of whatever allure attaches to the label "law." Hart is not suggesting that moral and pragmatic considerations *establish* the separability of law and morals. He is arguing that there are moral and pragmatic reasons *against* pretending that the nature of law is other than what it is shown to be by a neutral method. This does assume that the concept of law is sufficiently determinate to make intelligible the idea of a conceptual revision—there must be something that the revisionist is revising—but it does not assume that law has the nature that it would be good for it to have.

Because the separability thesis is a substantive claim about the nature of law, it might be tempting to identify it with one of two influential theories of the nature of law, each of which claims some association with the tradition of legal positivism—the social thesis and the sources thesis.

According to the social thesis, law must be grounded in social facts, and any non-factual criteria for the existence and content of law must likewise be grounded in such facts. Coleman favors the social thesis. He holds that the separability thesis, "properly understood," is only a claim about "the *content* of the membership criteria for law" and as such is not open to serious doubt.<sup>21</sup> If the just-quoted phrase means that the separability thesis is only a claim about *what the membership criteria are*, then it is probably true that no one holds that *the criteria* are necessarily moral—not even a Thomist like John Finnis,

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<sup>20</sup> Hart, *supra* note 1, at 615.

<sup>21</sup> COLEMAN, *supra* note 16, at 152–53.

who sensibly acknowledges that “human law is artefact and artifice, and not a conclusion from moral premises.”<sup>22</sup> Coleman infers that the real demarcation line between positivists and others turns on the “existence conditions” for the not-necessarily-moral criteria. He says that positivists maintain, while others deny, that these conditions are conventional or social.<sup>23</sup>

Now, one may, with fair warning, use “separability” however one likes. But Coleman’s thesis diverges from Hart’s, for it neglects one of Hart’s central teachings: “There are many different types of relation between law and morals and there is nothing which can be profitably singled out for study as *the* relation between them.”<sup>24</sup> Hart’s thesis is that *none* of these relations holds as a matter of necessity. Far from zeroing in on one narrow (if important) question about law and morals, Hart’s theory is pluralistic to the point of tedium. He canvasses just about everything that anyone ever thought might constitute some kind of necessary connection and then argues,<sup>25</sup> one by one, that “it ain’t necessarily so.” The familiar social thesis that Coleman has in mind is narrower than the thesis that Hart sought to vindicate.

For similar reasons, the separability thesis cannot be identified with the sources thesis—that is, with the view that the existence and content of law depends on its sources and not on its merits.<sup>26</sup> We have already noticed one way in which this thesis is less stringent than the separability thesis: The sources thesis only excludes the *dependence* of law on morality. As Raz notes, this leaves wide open the question of whether there are other necessary relations between the two

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<sup>22</sup> John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW*, *supra* note 18, at 195, 205.

<sup>23</sup> COLEMAN, *supra* note 16, at 152–53. For my own view, see Leslie Green, *Positivism and Conventionalism*, 12 *CANADIAN J.L. & JURISPRUDENCE* 35, 36 (1999) (“[T]he rule of recognition cannot be understood as a merely conventional norm.”).

<sup>24</sup> H.L.A. HART, *THE CONCEPT OF LAW* 185 (2d ed. 1994).

<sup>25</sup> See *id.* at 185–212 (identifying and discussing various connections between law and morality). See *generally* Hart, *supra* note 1 (exploring arguments for separability of law and morals).

<sup>26</sup> It is the last clause (“and not on its merits”) that distinguishes the sources thesis from the social thesis. The social thesis permits the merit-dependence of law, provided only that this dependence is itself a consequence of social facts. See Gardner, *supra* note 17, at 200 (discussing “attempt[s] to validate certain norms by relying on *merit-based tests of their sources*”). Others have provided statements and defenses of the sources thesis. See RAZ, *AUTHORITY*, *supra* note 15, at 45–52 (proposing that sources thesis “reflects and systemizes several interconnected distinctions embedded in our conception of the law” and “provide[s] publicly ascertainable standards by which members of . . . society are held to be bound”); JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 210–37 (rev. ed. 1995) (defending sources thesis and explaining its relationship to social—or “incorporation”—and to coherence theses); Green, *supra* note \* (reviewing several considerations supporting sources thesis).

(including relations of entailment *from* propositions about law *to* propositions about morality).<sup>27</sup> In another way, however, the sources thesis is more stringent than the separability thesis. It excludes from the criteria for identifying law not only morality but *any* merits—that is, any evaluative considerations that would justify making or sustaining a possible legal rule. Hart is interested in all sorts of relations between law and morals; he never pauses to consider what positivism holds about, say, the relationship between law and economics. According to the sources thesis, however, the fact that a certain legal rule would be inefficient is no better reason for doubting its existence than the fact that it would be inhumane or unjust. John Austin put it this way: “A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.”<sup>28</sup> Austin intends the quantification *for all* “texts.”

## II

### UNDERSTANDING THE SEPARABILITY THESIS

So the separability thesis is not the methodological neutrality thesis, not the social thesis, and not the sources thesis. It is the contention that there are no necessary connections between law and morality. Do not mistake the breathtaking sweep of this thesis for ambiguity. It applies to various relata (to individual laws and to legal systems, to positive morality and to valid morality); to various relations (causal, formal, normative); and to various modalities (both conceptual and natural necessities). It boldly proclaims that, among all the permutations and combinations, you will not come up with any necessary connections at all.

Let us catch our breath. To understand the thesis, there are three terms that we need to clarify: “connection,” “morality,” and “necessary.” *Connection* is not a technical notion; it is simply any sort of relation. Connections matter because we do not fully understand law until we understand how it relates to things like social power, social rules, and morality. There are external relations between law and the rest of the social world. There are also internal relations without which something would not *be* law—that is, relations that belong to the concept of law. Because law is not a natural kind, it is not plausible to suppose that its nature could be hidden to us, to be revealed

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<sup>27</sup> RAZ, *AUTHORITY*, *supra* note 15, at 38–39.

<sup>28</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (Hackett Publishing Co. 1998) (1832). Hart also remarks on Austin’s point, *see* Hart, *supra* note 1, at 597, 612–13, but the only trace it leaves in the subsequent argument is his claim that not all “oughts” are *moral* “oughts.”

only in some yet-undiscovered microstructure. Because law is not a logical principle, it is not plausible to suppose that its nature is buried in some yet-unproven theorem. Law is a human institution; we can study it only in the ways that such institutions can be studied. One such way is to study the concepts through which institutions are structured and elaborated—concepts implicit in our thought, language, and practices. To grasp the concept of law is to grasp what cannot fail to be true of law, whenever or wherever law turns up.

Now for *morality*. While the loudest disputes involve law's relation to valid (or ideal) morality, the separability thesis applies no less to conventional (or positive) morality. There is a connection between these two, for valid morality is what every conventional morality claims (or is taken) to be. The separability thesis rejects necessary connections on either front. It denies not only the so-called "natural law" view that there must be moral tests for law, but also the opinion of those "consensus sociologists" who suppose that all legal systems necessarily embody the spirit, traditions, or values of their communities.

The only somewhat tricky idea is that of a *necessary* connection. The separability thesis allows for any sort of *contingent* connection between law and morals. But what, precisely, is the difference? It turns out to be less precise than some philosophers might like. Hart gives "necessity" a large and liberal interpretation. Apart from thinking that a necessary relation is one that cannot fail to hold, he espouses no firmer commitment about its nature. In particular, he does not attempt to take any advantage that might be gained from arguing that what is naturally necessary or humanly necessary is not really necessary, on the ground that it is not, as the familiar slogan has it, "true in all possible worlds." Hart expressly allows for necessary truths to be contextual—that is, to depend on stable empirical features such as our embodiment, our mutual vulnerability, and our mortality, all of which are "reflected in whole structures of our thought and language."<sup>29</sup> Given such deep facts, to label a feature of law that necessarily follows as a mere "contingency" would be misleading, for although it could change in tandem with human nature, the fact that it would *take* a change in human nature shows that it is essentially unavoidable.

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<sup>29</sup> HART, *supra* note 24, at 192; *see also* Hart, *supra* note 1, at 622 ("The world in which we live . . . may one day change . . . and if this change were radical enough . . . whole ways of thinking and talking which constitute our present conceptual apparatus . . . would lapse.").

So “why not call it a ‘natural’ necessity?”<sup>30</sup> The fact that law has these features is, after all, “no accident.”<sup>31</sup> As far as legal philosophy is concerned, natural necessities and human necessities are no less necessary than conceptual necessities, and there are no very sharp boundaries around them. Hart is interested in all of them.

Only three further issues about the modality need mention. First, an obvious point: “Necessary” and “contingent” are not contradictories. From the denial that there are necessary moral tests for the existence of law, it does not follow that there are contingent moral tests. There may be none at all. Thus, the separability thesis lends no support to Hart’s view that as a contingent matter, in some legal systems, the existence of law does depend on its satisfying moral tests.

Second, not all necessary truths are important truths. Rousseau said that “laws are always useful to those with possessions and harmful to those who have nothing.”<sup>32</sup> Suppose that this is neither false nor necessarily true. Although a contingent truth, it is just as important as many necessary truths about law (for example, the truth that every legal system regulates agents). Rousseau’s truth is of obvious moral importance and explanatory power though it is contingent; on the other hand, the fact that law regulates agents, though necessarily true, is not a very fecund truth. Moreover, the relationships *between* necessary and contingent truths often contribute to our interest in the necessary ones. Every legal system necessarily contains power-conferring norms that play an important role in explaining how law governs its own creation. But power-conferring norms are also important because they provide facilities to certain agents on certain terms, such as the powers to legislate or appropriate. They therefore have a contingent relation to the distribution of social power within a society, a matter of the first importance in legal and political theory.

As a final caution, we should bear in mind that a necessary connection need not be obvious or self-evident. It may be something that we only come to see on reflection. Nor need it be uncontroversial. One may have an incomplete grasp of the concept of law and thus fail to recognize some of its necessary features, just as one may know that arthritis is not a disease of the skin without knowing that it is a disease that necessarily afflicts only the joints. There are also areas of uncertainty. There are respects in which the concepts of law or of a legal system are indeterminate, and thus there are conceptual claims about them with respect to which there is no truth of the matter. If these

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<sup>30</sup> Hart, *supra* note 1, at 623.

<sup>31</sup> HART, *supra* note 24, at 172.

<sup>32</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 68 (Maurice Cranston trans., Penguin Books 1968) (1762).

indeterminacies generate any controversy that needs to be settled, we can do so only by a stipulation that, while perhaps more or less useful for our purposes, cannot be judged true or false.

### III

#### REFUTING THE SEPARABILITY THESIS

Let us turn to assessing the thesis. Now that we understand it, we can see that it is false, for there are many necessary relations between law and morality, including the following:<sup>33</sup>

$N_a$ —Necessarily, law and morality both contain norms.

$N_\beta$ —Necessarily, the content of every moral norm could be the content of a legal norm.

$N_\gamma$ —Necessarily, no legal system has any of the personal vices.

Is this just a smart-alecky trick? Does anyone actually maintain, contrary to  $N_\gamma$ , that law could have, say, the vice of infidelity? Probably not literally (at any rate, not an Anglophone philosopher). Some philosophers do think it a bad idea, or self-defeating, for certain moral norms to be made the content of legal norms; that does not, however, contradict  $N_\beta$ . To try to impose a legal obligation to love one's neighbor as oneself might be pointless, but it would not be the first time that the law created obligations pointlessly. A few people also seem to deny  $N_a$ . Some legal realists write as if law were a set of predictions about what will happen, rather than a system of prescriptions about what should happen. It is open to doubt whether they seriously believe that law is nothing but "prophecies of what the courts will do in fact."<sup>34</sup> Do they, for example, believe that if a given court is predictably racist, it follows that *the law* requires that black litigants lose? In any event, the point is not that these theses have never been denied in the history of legal philosophy, nor that they are undeniable, but that they are true.

Maybe these truths are not so impressive. Possibly Hart caught a glimmer of things like  $N_a$ ,  $N_\beta$ , and  $N_\gamma$  but thought that they should be bracketed as trivial exceptions. In his very last formulation of the separability thesis, he does seem to hedge a bit: He says that "there is no *important* necessary or conceptual connection between law and morality."<sup>35</sup> Considerations of importance are interest-relative, and I tend to think that  $N_a$  and  $N_\beta$  are somewhat important truths about law. Moreover, as I explained above, some necessary truths get their

<sup>33</sup> Cf., e.g., Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 2 (2003) (discussing whether connection between law and morality should be "litmus test" for theories of law).

<sup>34</sup> O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

<sup>35</sup> HART, *supra* note 24, at 259 (emphasis added).

theoretical interest through their relation to contingent truths. Indeed, we shall see that  $N_a$ —together with some other truths—leads Hart to conclude that there is a special relation between law and justice.<sup>36</sup> That conclusion is very interesting, if it is true. But there is no need to debate the point, for there are, in any case, necessary connections between law and morality that no one would think trivial or unimportant to a theory of law.

### A. *Derivative Connections*

Fuller holds that the fundamental postulate of positivism—“that law must be strictly severed from morality”<sup>37</sup>—renders the idea that law creates obligations not only false but unintelligible: How could there possibly be “an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it”?<sup>38</sup> Fuller here takes for granted a proposition that other legal philosophers think requires defense: He assumes that there *is* a moral duty to obey the law as such.<sup>39</sup> If there is not, then his claim that the “postulate” renders that idea incoherent is beside the point.

But Fuller makes another, more rash, assumption, and one that may explain why his argument takes the shape it does. Fuller supposes that if law *were* an “amoral datum,” then there would be something peculiar about the fact that it creates obligations. Why is that? Perhaps he has unwittingly absorbed from Hans Kelsen and Hart the Humean thesis that there is a fundamental split between fact and value and that we cannot derive an “ought” from an “is” alone. That would explain why Fuller thinks it incoherent to suppose that law is an “amoral datum.” If the Humean thesis is correct, then no conclusion about our moral obligations could follow from the nature of law alone, unless law itself has a moral nature. So Fuller concludes that law *does* have a moral nature.

Fuller does not, however, pause to consider two possibilities that would block that inference. It may be that the Humean thesis is incorrect and that moral conclusions do, after all, follow from some factual premises alone. Or it may be that conclusions about moral obligations do not follow from propositions about law’s nature alone; they may follow from those together with other necessarily true propositions

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<sup>36</sup> See *infra* Part III.A (explaining Hart’s minimum content and germ-of-justice theses).

<sup>37</sup> Fuller, *supra* note 5, at 656.

<sup>38</sup> *Id.*

<sup>39</sup> For an assessment of the debates, see generally Leslie Green, *Law and Obligations*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 514–47 (Jules Coleman & Scott Shapiro eds., 2002), exploring leading theories of political obligation and defending a version of philosophical anarchism.

about morality and human well-being. Even Hume believed that whether a promise has been made is a matter of social fact and, also, that there is an obligation to keep promises.<sup>40</sup> Promises have no “peculiar quality,” but they are morally binding all the same. That is because there can be *derivative* necessary connections between factually determined practices and full-blooded moral conclusions (whether or not those derivations require the help of other propositions).<sup>41</sup>

We should not make too much of this analogy to promises. It does not follow from the fact that there are good reasons for considering self-imposed obligations morally binding that other-imposed obligations are binding, too. The derivative connections between law and morality might not support the obligation to obey it, in spite of claims to the contrary by philosophers as diverse as Plato, Aquinas, Hobbes, Locke, Hume, and Kant. But their general line of argument may nonetheless be sound even if it does not go so far as to establish a general duty to obey. Legal systems make moral norms determinate; they supply both information and motivation that help make those norms effective; they support valuable forms of social cooperation. Human nature being what it is, it is overwhelmingly likely that *some* good will come of all this, if only as a matter of natural necessity.

Hart is both alert to and suspicious of these arguments. He concedes that there are at least “two reasons (or excuses) for talking of a certain overlap between legal and moral standards as necessary and natural.”<sup>42</sup> The first is his “minimum content” thesis: Legal systems cannot be identified by their structure alone; law also has a necessary content.<sup>43</sup> It must contain rules that regulate things like violence, property, and agreements in a way that promotes the survival of (at least some of) its subjects. The second is the thesis that every existing legal system does some administrative—or, as he also calls it, “formal”—justice.<sup>44</sup> Hart holds that every legal system necessarily

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<sup>40</sup> See 2 DAVID HUME, *A TREATISE OF HUMAN NATURE* 219 (J.M. Dent & Sons 1966) (1739) (“[A] promise would not be intelligible before human conventions had established it; and . . . even if it were intelligible, it would not be attended with any moral obligation.” (emphasis omitted)).

<sup>41</sup> See RAZ, *PRACTICAL REASON*, *supra* note 15, at 165–70 (noting that derivative approach “accepts the need for a socially oriented identification of law”).

<sup>42</sup> Hart, *supra* note 1, at 624.

<sup>43</sup> *Id.* at 79–82; HART, *supra* note 24, at 193–200.

<sup>44</sup> The second thesis is subject to stringent criticism by, who asserts that formal justice is “an exaggerated expression of otherwise legitimate concern for justice in the administration of the law.” David Lyons, *On Formal Justice*, 58 *CORNELL L. REV.* 833, 861 (1973). See also John Gardner, *The Virtue of Justice and the Character of Law*, 53 *CURRENT LEGAL PROBS.* 1, 9–10, 12–13 (M.D.A. Freeman ed., 2000) (arguing that idea of formal justice is myth, as principles of justice and principles of injustice do not differ in form). I try to make

contains general rules, that general rules cannot exist unless they are applied with some constancy, and that such constancy is a kind of justice: “[T]hough the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice.”<sup>45</sup> Hart sympathetically develops both the minimum content thesis and the germ-of-justice thesis and then stops just short—in any case, I think he means to stop short—of concluding that these theses prove there to be necessary connections between law and morals. His grounds for hesitation seem to be that neither argument establishes a moral duty to obey the law and that each is consistent with the most stringent moral criticism of a legal system that realizes them: Such legal systems may even be “hideously oppressive,” denying to “rightless slave[s]” the minimum benefits that law necessarily provides to some.<sup>46</sup>

All of this is so, but it does not prove the separability thesis. At most, it shows that the values that the minimum content and germ-of-justice theses necessarily contribute to law may well be accompanied by serious immoralities. Still, if every legal system necessarily gives rise to *A* and *B*, then it necessarily gives rise to *A*, even if *B* counts on the demerit side.

### B. *Non-Derivative Connections*

The derivative connections just discussed rely on the supposition that a legal system is effective amongst people with natures much like our own, living in circumstances much like our own. They are therefore among the contextually necessary connections between law and morality. But there are necessary connections between law and morality that are more direct. Here are four of the more interesting ones:

*N<sub>1</sub>*—*Necessarily, law regulates objects of morality.*

Morality has objects, and some of those objects are necessarily law’s objects. Wherever there is law, there is morality, and they regulate the same subject matter—and do so by analogous techniques. As

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some sense of the thesis in Leslie Green, *The Germ of Justice* 11–13 (May 2005) (unpublished manuscript, on file with the *New York University Law Review*).

<sup>45</sup> HART, *supra* note 24, at 206. Hart cites the application of a law prohibiting murder as an example, explaining that such law is “justly applied” if it is “impartially applied to all those and only those who are alike in having done what the law forbids.” *Id.* at 160. Hart also notes that rules of procedural justice “are designed to ensure that rules are applied only to what are genuinely cases of the rule or at least to minimize the risks of inequalities in this sense.” Hart, *supra* note 1, at 624.

<sup>46</sup> Hart, *supra* note 1, at 624.

Kelsen noted, “[j]ust as natural and positive law govern the same subject-matter, and relate, therefore, to the same norm-*object*, namely the mutual relationships of men . . . so both also have in common the universal form of this governance, namely *obligation*.”<sup>47</sup>

This is broader than the minimum-content thesis. Some think Hart is too timid in limiting the necessary content of law to survival-promoting rules.<sup>48</sup> Actually, unless “survival” is understood in a vacuously broad way, Hart’s claim is too bold: There are lots of suicide pacts around these days. But even legal systems that hinder individual or collective survival for the sake of things like unrestrained consumption, national glory, or religious purity nonetheless share a common content: They regulate things that the society (or its elites) takes to be high-stakes matters of social morality. If we encounter a normative system that regulates only low-stakes matters (such as games or courtesies), then we have not found a legal system. It is in the nature of law to have a large normative reach, one that extends to the most important concerns of the social morality of the society in which it exists. Exactly how law regulates these matters (whether by enforcing them, protecting them, or repressing them) varies, as does its success and the merit in doing so. Unlike the derivative arguments, therefore,  $N_1$  does not show that every legal system necessarily has some moral merit; it shows that there is a necessary relation between the scope of law and morality. This is one of the things that make law so important; it also explains why normative debates about law’s legitimacy and authority have the significance that they do.

$N_2$ —*Necessarily, law makes moral claims of its subjects.*

Law tells us what we must do, not merely what it would be advantageous to do, and it requires us to act in the interests of other individuals or in the public interest generally, except when law itself permits otherwise. Every legal system contains obligation-imposing norms and claims legitimate authority to impose them.<sup>49</sup> For example,

<sup>47</sup> HANS Kelsen, *The Idea of Natural Law*, in *ESSAYS IN LEGAL AND MORAL PHILOSOPHY* 34 (Ota Weinberger ed., Peter Heath trans., 1973).

<sup>48</sup> See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 82 (1980) (“[Hart’s] list of universally recognized or ‘indisputable’ ends contains only one entry: survival.”). Finnis’s list includes at least: life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion. *Id.* at 85–92.

<sup>49</sup> The argument that follows is abridged; for elaboration, see RAZ, *AUTHORITY*, *supra* note 15, at 28–33, 122–45. See also LESLIE GREEN, *THE AUTHORITY OF THE STATE* 21–88 (1988) (exploring nature of authority and state’s “self image” as legitimate authority); Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 *OXFORD J. LEGAL STUD.* 123, 129–31 (1984) (arguing that, if having duty entails having reason to act, then judges who accept rule of recognition must either accept or pretend to accept that legal duties are morally binding). Note that I am not following Kelsen, *see supra* note 47, at 31–33, in his

judges speak as if their orders create reasons for their subjects to conform in the first instance, not merely reasons to conform if they happen to be followed by a further conviction for contempt, obstruction, or resisting arrest. Law's subjects are to conform whether or not it is in their self-interest to do so; legal obligations thus purport to be categorical reasons for acting. To impose duties on others in this spirit is to treat them as being morally bound to obey—it is also to claim legitimate authority to rule. None of this entails that law's claim be sound. The necessary connection that it establishes is a very thin one. Law's claims may be misguided or unjustified; they may be made in a spirit that is half-hearted or cynical. Yet it is nevertheless the nature of law to project the self-image of a morally legitimate authority.

For this reason, neither a regime of “stark imperatives” that simply bosses people around<sup>50</sup> nor a price system that structures people's incentives while leaving them free to act as they please would be a system of law. It is true that we can capture something about law by thinking of it as a boss or as an incentivizer. It may also be true that we can represent some of the content of a legal system *as if* it were stark imperatives or mere incentives.  $N_2$  says that these accounts are necessarily incomplete and cannot represent the nature of law *without loss*—for example, loss of the distinction between being obliged and having an obligation or the distinction between a penalty and a tax on conduct.

While  $N_2$  says that law necessarily has moral pretensions, it says nothing about their soundness. I am inclined to think that some of law's pretensions are unsound. Suppose that were true—would there be any paradox? Could it be of the nature of an institution that it necessarily makes claims that are not valid or that are typically invalid? It can. Assume that all theological propositions are false. This plainly does nothing to undermine the fact that part of what it is to be Pope is to claim apostolic succession from St. Peter. Regardless of whether there really is a succession, a bishop who does not at least put on a show of claiming it, and of claiming his place in it, is not the Pope. The nature of law is similarly shaped by the self-image it adopts and projects to its subjects.

Obviously there is more to be said here, for  $N_2$  is an example of a necessary connection between law and morality that is neither self-

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assumption that *all* laws impose obligations. I am assuming only that all legal systems contain obligation-imposing norms, and that these purport to be morally binding on their subjects.

<sup>50</sup> *But see* MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 84–89 (1999) (“[T]he requirements of legal norms can be stark imperatives that do not in themselves . . . constitute such reasons-for-action.”).

evident nor uncontroversial. One is brought to see it (if one is) by argument and on reflection—that is why there is work for philosophy to do. Hart himself denied  $N_2$ .<sup>51</sup> This is of considerable interest, and not only because it might give pause to those of us who endorse it. Hart is willing to go very far to save the separability thesis from  $N_2$ , as far as flirting with the sanction theory of duty that he labored to discredit.<sup>52</sup> Perhaps he simply thought that the arguments for  $N_2$  were wrong and that there were other coherent interpretations of the moralized language of law. One suspects, however, that he also saw that  $N_2$  poses an immediate threat to the separability thesis, a thesis to which he had great loyalty.

$N_3$ —*Necessarily, law is justice-apt.*

In view of the function of law in creating and enforcing obligations, it necessarily makes sense to ask whether law is just and, where it is found deficient, to demand reform. This applies as much to the substance of law as it does to its administration and procedures. Law is the kind of thing that is *apt* for inspection and appraisal in light of justice; we might say, then, that it is *justice-apt*. This does not entail that every individual *law* is justice-apt. Considerations of justice apply directly only to those laws that aim to secure or maintain a distribution of burdens and benefits among people. But even laws that have some other aim can give rise to disputes, all of which the law claims authority to settle in its courts, by judges who are oriented to the question of who deserves the benefit of winning and who the burden of losing.<sup>53</sup>

The fact that there is this necessary connection between law and a particular department of morality is quite significant. Not all human practices are justice-apt. Consider music. It makes no sense to ask whether a certain fugue is just, or to demand that it become so. The musical standards of fugal excellence are preeminently internal. An excellent fugue should be melodic, interesting, and inventive—but we

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<sup>51</sup> H.L.A. HART, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 127, 157–60 (1982) [hereinafter HART, *Legal Duty and Obligation*]; cf. H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 10 (1983) (“[I]t seems to me to be unrealistic to suppose that judges . . . *must* always either believe or pretend to believe in the false theory that there is always a moral obligation to conform to the law.”).

<sup>52</sup> See HART, *Legal Duty and Obligation*, *supra* note 51, at 160 (“[T]o say that an individual has a legal obligation to act in a certain way is to say that such action may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action.”).

<sup>53</sup> See Gardner, *supra* note 44, at 2; Green, *supra* note 44, at 29 (explaining allocative role of adjudication).

do not expect a fugue to answer to justice. With law, things are different.

One of Fuller's great contributions to legal philosophy was to offer the first fairly comprehensive analysis of the internal excellences of law or the virtues that inhere in its law-like character: its "inner" or "internal" morality—a morality, he claimed, that makes law possible.<sup>54</sup> That there are such excellences is not open to doubt; the difficulty is in correctly explaining their relationship to the existence conditions for legal systems and in keeping their value in proper perspective. Thesis  $N_3$  says that these excellences can never preclude or displace the assessment of law on independent criteria such as justice. A fugue may be at its best when it has all the virtues of fugacity; law is *not* necessarily at its best when it excels in legality. To enhance legality may bring a cost to other values: General laws may do injustice in particular cases, precise laws may be useless as guides to action, and prospective laws may leave past injuries without remedy. When a legal system maximally instantiates the inner morality of law, we have law at its *most legal* but not necessarily law at its best.

While  $N_2$  and  $N_3$  are important, we must take care not to overstate what they imply. I think that Tony Honoré overstates the case when he says that law, by making moral claims, is always vulnerable to having such claims contested in a given case.<sup>55</sup> If this were true, ideal morality would necessarily be a *source* of law, albeit only a persuasive one. Since law is justice-apt, principles of justice will be among such persuasive sources, regardless of whether any source-based consideration directs judges to apply them.

What exactly is a persuasive source of law? The fact that it is persuasive presumably means that it is not conclusive in its application. That is not unusual, for statutes, decisions, and customs are often not conclusive either. But these all have an additional feature: The fact that their requirements would, on balance, be morally wrong does not absolve the courts of their legal duty to apply them (though some courts may have the power to set them aside when the wrong is of a certain kind or degree). It is a feature of the moral considerations mentioned in  $N_3$ , however, that they are to be followed only to the extent that they are *sound*. Justice does not require or permit a court to do injustice. This shows that it is mistaken to assimilate the operation of justice to a kind of "source," persuasive or otherwise.<sup>56</sup>

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<sup>54</sup> Fuller, *supra* note 5, at 644–48.

<sup>55</sup> Tony Honoré, *The Necessary Connection Between Law and Morality*, 22 OXFORD J. LEGAL STUD. 489, 491 (2002).

<sup>56</sup> This point is not unique to moral considerations. Something that binds a court only as far as it rationally persuades it is not a source because it lacks authority. There are,

Morality is neither source-based nor a source; it is present of its own force in adjudication unless it is ousted by some source-based consideration.

It is therefore incorrect to say that it is law's moral claims that open the door to morality in adjudication. It is not the claim to justice that makes some legal norms (and all judicial decisions) answerable to justice—it is the fact that they are, of their nature, justice-apt. An allocative institution that makes no claims at all (such as a price system) is no less exposed to assessment on grounds of morality, including grounds of justice. Morality is relevant to adjudication because law involves matters of moral substance and because judges' allocative decisions can make these matters go better or worse—not because morality is a persuasive source of law.

*N<sub>4</sub>—Necessarily, law is morally risky.*

It is a curious fact that almost all theories that insist on the essentially moral character of law take law's character to be essentially good. The gravamen of Fuller's philosophy is that law is essentially a moral enterprise, made possible only by a robust adherence to its own inner morality.<sup>57</sup> The thought that the law might have an inner *immorality* never occurred to him.<sup>58</sup> It has occurred to others, including Grant Gilmore, whose brilliant epigram is often cited: "In Heaven there will be no law, and the lion will lie down with the lamb. . . . In Hell there will be nothing but law, and due process will be meticulously observed."<sup>59</sup>

Everyone knows that law can be hellish, but some believe that, in its essentials, legality shines with a heavenly light. E.P. Thompson thus shocked his fellow Marxists when he wrote: "We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good."<sup>60</sup> The rule of law is

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however, *permissive* sources of law which have a very weak form of authority and apply only in limited circumstances. In Scotland, for example, the institutional writers were traditionally a permissive source of law: Customary practice of the courts gave their views weight independent of their merits. In some jurisdictions, foreign law functions as a permissive source. I cannot explore the special features of permissive sources here. For some brief remarks on the issue, see HART, *supra* note 24, at 294 n.101.

<sup>57</sup> See *supra* note 54 and accompanying text (describing Fuller's analysis of "internal" morality of law).

<sup>58</sup> Ffüber notes this possibility, though he associates it with anarchism. Ffüber, *supra* note 18, at 122.

<sup>59</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110–11 (1977).

<sup>60</sup> E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

certainly a human good, and Thompson was right to oppose the crude reductivisms that suggest otherwise. But *unqualified*? Is the rule of law really all gain and no loss?

Hart is sometimes suspected of sharing that sort of enthusiasm. After all, he does say that as societies become larger, more mobile, and more diverse, life under a customary social order is liable to become uncertain, conservative, and inefficient.<sup>61</sup> We can therefore think of law as a *remedy* for those “defects.”<sup>62</sup> Does that not show that Hart, too, supposes that law is all to the good? Stephen Guest thinks that it does:

[Hart] openly invest[ed] his central set of elements constituting law in terms with characteristics showing the moral superiority of a society which has adopted a set of rules which allow for progress (rules conferring public and private powers), for efficient handling of disputes (rules conferring powers of adjudication) and rules that create the possibility of publicly ascertainable—*certain*—criteria of what is to count as law.<sup>63</sup>

There are two mistakes here, and they are sufficiently common to be worth correcting. First, the fact that law necessarily brings gains does not show the moral superiority of the society to which the law belongs. Such a society might be inferior to one that turns its back on law and instead opts for the social conditions that make possible governance by customary rules alone. Consider an analogy: One can hold that fuel-inefficient cars have a defect without thinking that a car-driving society is morally superior to a car-free society. All we are committed to is that, *if* we are to drive cars, it is better that they be efficient ones. Likewise, *if* we are to have large, mobile, and anonymous societies, it is in some respects better that we have the forms of guidance that law makes available. Whether those are in any sense morally superior societies is another question entirely.

The second error is the obverse of one we encountered in exploring the derivative connections between law and morality. There we were interested in the gains that are necessary results of effective law. When we enter the world of legality, however, it is not without cost: “The gains are those of adaptability to change, certainty, and efficiency, and . . . the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary

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<sup>61</sup> HART, *supra* note 24, at 91–97.

<sup>62</sup> *See id.* at 94 (describing introduction of remedies for these defects as “a step from the prelegal into the legal world”).

<sup>63</sup> Stephen Guest, *Two Strands in Hart's Theory of Law*, in *POSITIVISM TODAY* 29, 30 (Stephen Guest ed., 1996).

rules could not.”<sup>64</sup> Importantly, this risk is one that cannot exist without law and one that exists whenever and wherever there is law:

In the simpler structure [of a customary regime], since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules. But where there is a union of primary and secondary rules, which is, as we have argued, the most fruitful way of regarding a legal system, the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone.<sup>65</sup>

How far the acceptance of common standards gets split off is a contingent matter; only in really pathological cases is it confined to the official class alone. But where there is “a union of primary and secondary rules”—that is to say, *wherever there is law*—new moral risks emerge as a matter of necessity. There are not only more efficient forms of oppression, there are also new vices: the alienation of community and value, the loss of transparency, the rise of a new hierarchy, and the possibility that some who should resist injustice may be bought off by the goods that legal order (in some cases, necessarily) brings. Although law necessarily has virtues, it also necessarily risks certain vices, and this marks a connection between law and morality of a reverse kind. There are moral risks that law’s subjects are guaranteed to run, and they are risks against which law itself provides no prophylactic.

#### IV

#### FALLIBLE BY NATURE

So the separability thesis is false, as shown by (possibly) trivial theses like  $N_\alpha$  through  $N_\gamma$  and by manifestly nontrivial theses like  $N_7$  through  $N_4$ . But now we have a puzzle: How can Hart endorse both  $N_4$  and the separability thesis, with which  $N_4$  is inconsistent? As we have seen, when he has to choose between the separability thesis and  $N_2$ , he sticks by his thesis, even at cost to his earlier theory of obligations. With respect to  $N_4$ , on the other hand, he feels no need to choose; it is not even clear that he notices any tension. Why should that be?

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<sup>64</sup> HART, *supra* note 24, at 202.

<sup>65</sup> *Id.* at 117. For an important discussion of this passage, from which we draw somewhat different lessons, see Jeremy Waldron, *All We Like Sheep*, 12 CANADIAN J.L. & JURISPRUDENCE 169, 186 (1999).

Perhaps Hart did not, after all, mean what he said about the absence of any necessary connections between law and morals. Maybe his real commitment was to the sources thesis, which is compatible with every one of the necessary connections between law and morality that have been identified in this Article. Do we not hear echoes of the sources thesis when he is adumbrating Bentham's brand of positivism?

The most fundamental of these ideas is that law, good or bad, is a man-made artifact which men create and add to the world by the exercise of their will: not something which they discover through the exercise of their reason to be already in the world. There are indeed good reasons for having laws, but a reason for a law, even a good reason, is not a law, any more . . . than "hunger is bread."<sup>66</sup>

Were Hart speaking in his own voice here, there would be less talk of "will" and more talk of the varied ways by which the artifact of law is made. With that amendment, this passage comes as close to the sources thesis as Hart gets. The fact remains, however, that when he expressly considers the sources thesis, he rejects it in favor of what he calls "soft" positivism, which allows for laws that are not made by anyone, provided only that they are entailed or presupposed by laws that are.<sup>67</sup> Hart's reason for rejecting the sources thesis is that some constitutions contain moral provisions that guarantee things like "equality before and under the law" and "human dignity." On that basis, he holds that the existence of law can depend on its merits, provided that the fact that it depends on its merits depends only on social facts.

That is a poor argument. First, what Hart takes as evidence for the merit-dependence of law seems universal amongst legal systems: Even where there is no express constitutional reference to moral principles, notions of fairness and reasonableness pervade ordinary adjudication. The dispute is not about these facts but about their explanation. Second, because of his willingness to allow contextual necessities, Hart is open to the charge that the social facts that allegedly make morality a test for law obtain as a matter of natural necessity—if not in constitutions, then in the ordinary moral considerations we find in adjudication. By his own lights, he needs to show not merely that it is conceivable that there could be a legal system in which morality is not a test for law; he must show also that this is

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<sup>66</sup> H.L.A. HART, *1776–1976: Law in the Perspective of Philosophy*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 51, at 145, 146–47.

<sup>67</sup> HART, *supra* note 24, at 250–54.

humanly possible in view of the necessary structure and content of law. Hart never even attempts this.

Perhaps Hart should not have rejected the sources thesis. But the fact remains that he did, and we are thus stuck with the problem of  $N_4$ . There is a simpler explanation, however. Hart is not worried about whether law should turn out to have necessary moral defects; he is worried about a misunderstanding and overvaluation of law's moral merits. Hart does not see much risk of his interlocutors undervaluing law and the virtues of legality. He thinks instead that the standard defenses of a necessary connection between law and morality tend to *overvalue* them.

Hart's briefest definition of positivism is this: "[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."<sup>68</sup> This definition is much narrower than the separability thesis; it is narrower even than the social thesis (which says nothing about "reproducing" moral demands). All of  $N_1$  through  $N_4$  are compatible with it. Even if law must try to achieve moral ends, must achieve them minimally, must contain the germ of justice, or must be apt for justice, each of these is "compatible with very great iniquity."<sup>69</sup> What this definition wants us to grasp is not some ambitious thesis about the connections between law and morality, and it is not even a thesis about the nature of legal validity. Its point is that there is no guarantee that law will satisfy those moral standards by which law should be judged. Law, the definition tells us, is morally fallible.<sup>70</sup>

The fallibility thesis is both correct and important. Positivism has no patent on it, however. Moral fallibility is a feature of law for which any competent theory must account.<sup>71</sup> Still, it would be a mistake to suppose that whenever two theories both assert a proposition  $P$ , it follows that there is no difference between them. That depends on

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<sup>68</sup> *Id.* at 185–86.

<sup>69</sup> *Id.* at 207.

<sup>70</sup> *See id.* at 185 (rejecting view that law necessarily satisfies criteria of morality or justice); DAVID LYONS, *ETHICS AND THE RULE OF LAW* 63 (1984) (citing positivist view that "law is not necessarily good, right, and just"). Note that this is not Fűber's weaker "Fallibility Thesis," according to which "under certain counterfactual circumstances the law would not be morally valuable." Fűber, *supra* note 18, at 128. It is instead the claim that under actual conditions, there is no guarantee that law satisfies the moral standards by which it is properly appraised.

<sup>71</sup> Lyons calls it a "regulating principle," by which he means that it imposes a presumptive justificatory burden on those who deny it. LYONS, *supra* note 70, at 67 ("The doctrine that law is morally fallible is not a finding of legal theory but a regulating principle. . . . Any theory implying the law is inherently good, right, and just will bear a heavy burden of implausibility."). My claim is stronger: No acceptable legal theory may deny it; explaining the moral fallibility of law is an adequacy condition of any successful theory of law.

their grounds for asserting *P* and on the place of *P* in the web of explanatory propositions within the theories. For Fuller, law's fallibility is—to adapt one of his favorite metaphors—something *external* to law, a result of someone's failure to apply the means proper to law or to pursue the good ends with which those means reliably cohere.

Hart goes further. The perversion of law to seriously wrong ends is, he says, something compatible with the *full* realization of the inner morality of law; legality is "compatible with very great iniquity."<sup>72</sup> Fuller does not buy this, though he is well aware that he has no argument against it: "I shall have to rest on the assertion of a belief that may seem naïve, namely, that coherence and goodness have more affinity than coherence and evil."<sup>73</sup> But there is an even deeper difference between the two with respect to the bearing of law's nature on its fallibility. While Fuller thinks that law's vices typically result from too little legality, Hart maintains that they can also result from too much of it—for instance, when immoral rules are applied with all the "pedantic impartiality" of the rule of law.<sup>74</sup> What's more, law's nature as an institutionalized system of norms makes it endemically liable to become alienated from its subjects—that is the lesson of *N<sub>4</sub>*. For Hart, the fallibility of law is *internally* connected with law's nature and is not merely a result of some kind of external pollution.

This recalls a theme in Aristotle's constitutional theory as presented in Book 3 of the *Politics*.<sup>75</sup> He identifies modes of degeneration native to specific forms of governance. The virtuous form of government known as kingship has a shadow version in tyranny; when kingships degenerate, they turn into tyrannies, which are kingships gone wrong. Aristotle was not so pessimistic as to think that such degeneration is necessary—that depends on the character of the king, his subjects, the political and economic context, and so forth. But when kingship goes wrong, it does so in ways shaped by its nature. A bit like unstable isotopes, political institutions have standard patterns of decay that are explained by the nature of the thing that is decaying. That is why the degenerate form of kingship is tyranny rather than oligarchy or democracy.

How would the analogy go here? *Kingship* is to *tyranny* as *legality* is to—what? We have already encountered the vice in our discussion of *N<sub>4</sub>*; we now need only name it. The vice internal to law

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<sup>72</sup> HART, *supra* note 24, at 207.

<sup>73</sup> Fuller, *supra* note 5, at 636.

<sup>74</sup> Hart, *supra* note 1, at 624.

<sup>75</sup> ARISTOTLE, *POLITICS* 113–16 (Ernest Barker trans., Oxford Univ. Press 1962).

is, unsurprisingly, *legalism*.<sup>76</sup> It has two main dimensions: the overvaluation of legality at the expense of other virtues that a political system should have (including other virtues law should have) and the alienation of law from life. Of course, this is not news. That the virtues of legality can degenerate into the vices of legalism is something we might have learned from Marx or Weber, de Tocqueville or Dickens. What is original, perhaps, is Hart's identification of the specific contribution that law's nature makes to all this. Law is a matter of social rules, and the rule of rules is generally a mixed blessing. Even the best rule will get things right only in the general run of cases. Law is also a matter of institutionalized rules, and that adds not only gains but costs into the mix. Without law, social order requires considerable buy-in from the general population: The people are regulated by norms that are more or less accepted. It would be going too far to suggest that widely accepted norms are always morally acceptable, but some kinds of injustice are less stable in those circumstances. With the emergence of law, however, people are also regulated by norms that meet officials' criteria of validity and are enforced by specialized agencies. This division of labor can alienate people from the most important rules that govern their lives—rules that threaten to become remote, technical, and arcane. That is one more reason why the rule of law is not an unqualified human good: It is in the nature of law to pose such risks, and the rule of law cannot eliminate them. The rule of law subjects lawmaking and law-application to more *law*.

Underlying Hart's mistaken separability thesis lies the correct fallibility thesis. Perhaps this is not surprising, as it is common ground amongst legal philosophers. But his distinctive spin on that thesis is that some of law's failures are necessarily connected to law's nature. Fuller is interested in the morality that makes law possible; Hart is also interested in the *immorality* that *law* makes possible.

At a time when the rule of law is again under threat from official illegality and popular indifference, it is natural to be especially receptive to Fuller's concerns. And we are wise to be vigilant; lawless power is a terrible thing. At the same time, however, this thought makes some wish for a more perfect and complete penetration of legality into political life. Hart reminds us to be careful what we wish for.

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<sup>76</sup> For a classic study, with a somewhat different emphasis from mine, see generally JUDITH N. SHKLAR, *LEGALISM* (1964).