

**Legal Positivism: Still Descriptive and Morally Neutral
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Andrei Marmor

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University of Southern California Law School
Los Angeles, CA 90089-0071

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LEGAL POSITIVISM: STILL DESCRIPTIVE AND MORALLY NEUTRAL

Andrei Marmor

It has become increasingly popular, amongst friends and foes alike, to advance the claim that legal positivism is actually a normative theory, and not (or not mainly, or exclusively,) a descriptive one about the nature of law. Some philosophers suggest that a plausible version of normative legal positivism can be developed, while others claim that legal positivism has always been a normative theory, or that it can only be defended as such.¹ It is mostly this second type of claim that I want to address here. I will argue that legal positivism is best understood as a descriptive, morally neutral, theory about the nature of law, along the lines suggested by H.L.A. Hart. By ‘descriptive’ I mean that such an account does not purport to justify or legitimize any aspect of its subject matter. By ‘morally neutral’, I mean that the theory need not take a stance on any particular moral or political issues, nor is it committed to any moral or political evaluations.

Needless to say, both of these characterizations are too rough, and we shall have to refine them as we go along. Furthermore, the terms ‘normative’ as opposed to ‘descriptive’, though widely used, are not particularly well suited to characterize the debate. Partly, because ‘normative’ and ‘descriptive’ are not necessarily opposed or mutually exclusive, and partly because normativity can mean many things, some of which are not relevant to the debate, and others which are confusing. Roughly, when people use the term ‘normative’ in this context, they mean to refer to the realm of judgments that reflect moral evaluations, or evaluations like moral judgments. I will continue to use these terms, bearing in mind that the terminology is confusing, and hoping that the arguments can clarify things that these terms obscure.

¹ Often the same philosophers make both types of claims. Prominent examples of the first type of normative positivism were suggested by Ronald Dworkin, Jeremy Waldron, Tom Campbell, and Neil MacCormick; the second type of claim has been put forward by Dworkin, Waldron, Michael Moore, Stephen Perry, Gerald Postema, and others. References to these works will be mentioned in appropriate places below.

The term ‘normative legal positivism’ does not uniquely apply to a particular view. There are at least five possible views about the relations between normative claims and legal positivism. Not all of them are necessarily opposed to the thesis that I wish to defend here. In order to give a sketchy account of these five views, let me assume that there is some core descriptive content of legal positivism, and let us stipulate that P stands for this core descriptive content, whatever it is. Accordingly, here are the five positions I have in mind:

1. *It ought to be that P (or something roughly coextensive with P).*

To the extent that ought implies can, such a view would also be committed to the thesis that P is a real possibility, that it can actually be materialized, at least to some significant extent. But the main focus of this version of normative positivism is on the moral political domain: it argues that legal positivism is a good thing, that it ought to be materialized in a free and democratic society, for instance, because it is a practice of law that best promotes the goods favored by such a theory. I take it that this is basically the view propounded by Tom Campbell² and, following Campbell, I will call it Ethical Positivism.

2. *It is the case that P, and it is morally-politically good if it is generally recognized that P.*

I believe that this is the position held by H.L.A. Hart. He thought that legal positivism, as a general theory about the nature of law, is basically descriptive and morally neutral. However, Hart also believed that a general, public, recognition of the truth of P, would free us from romanticizing myths, and thus enable a more critical attitude to law, that is not just theoretically correct but also morally-politically beneficial.³

3. *It is the case that P, and it is a good thing too.*

Perhaps at some point Hart may have held such a view as well. Hart seems to have indicated that not just a general recognition of P is morally good, but also certain aspects of P itself (though this is not quite accurate, as we shall see below).

4. *The law ought to be a morally legitimate institution; for law to meet conditions of moral legitimacy, it should be the case that F; F entails P, therefore it is the case that P.*

² *The Legal Theory of Ethical Positivism*, (Dartmouth, 1996).

³ See *The Concept of Law* (Oxford, 1961, 1st ed) at 205-206. If I understand MacCormick correctly, this is one of the main arguments he also makes in ‘A Moralistic Case for A-Moralistic Law’, *20 Valparaiso L Rev.*, 1985, 1. However, it points MacCormick seems also to endorse a version of the argument of type 3.

Dworkin's account of what he calls 'legal conventionalism' is a prominent example of such a view. In *Law's Empire*, Dworkin understands legal conventionalism to be a partly normative theory with descriptive conclusions, a theory that purports to reach conclusions about the nature of law on the basis of some normative moral-political ideals. I will call this view Substantive Normative Positivism.⁴

5. Determining whether it is the case that P or not-P, necessarily relies on some normative, moral-political claims.

This is basically a methodological view about the nature of jurisprudence. As such, it purports to refute Hart's claim that general jurisprudence *can* be purely descriptive and morally neutral. According to this view, then, part of the debate between positivism and its opponents necessarily boils down to a normative one, and if legal positivism can be defended, it must rest, *inter alia*, on some normative claims.

My aim here is to show that the first two versions of normative positivism do not threaten Hart's claim that legal positivism is basically a descriptive and morally neutral theory about the nature of law. The third view is crucially ambiguous; in one sense it may be problematic, in another, and the one that Hart actually maintained, it is not. Mostly, however, I will focus on the latter two versions of normative positivism, the substantive and the methodological, arguing that they are wrong, both as expositions of legal positivism and as critiques of it. First, however, we need to have a clearer sense of legal positivism's descriptive content.

1. What Legal Positivism Is, And What It Is Not.

Legal positivism is not, of course, a single theory about the nature of law. It is a whole tradition of thought, spanning over two centuries, comprised of numerous contributions that often diverge, sometimes even conflict, on key issues. Nevertheless, there are a few core insights that legal positivists share, and I believe that the following three theses capture the core commitments of legal positivism. The first, and probably the least controversial insight, consists in the idea that the law is essentially a means. Law is an

⁴ One may wonder how this view differs from Ethical Legal Positivism. I will try to explain this in section 3.

“instrument of social control”, as Kelsen put it,⁵ and like any instrument, the law can be put to good or bad uses, it can be used for good or bad purposes.⁶ And like any instrument, the law can be more or less suitable for its tasks, more or less efficient. Whether this insight is controversial at all, is not clear.⁷ In any case, it certainly does not imply that law has no moral value, or even that the law is not necessarily good. (I will say more on this in a moment.)

The second main insight of legal positivism has been labeled the *social thesis*. According to the social thesis, law is a social phenomenon, it is a social institution, and therefore, what the law is, is basically a matter of social facts. What kind of social facts? To begin with, ‘social’ is used here somewhat stipulatively to exclude moral, and other evaluative-normative facts. Early legal positivists, like Hobbes, Bentham and Austin, thought that the relevant kinds of social facts that determine what law is are general social facts about political sovereignty (coupled with particular facts about communicative-acts of the political sovereign). Later, 20th century legal positivists have repudiated this focus on political sovereignty, and replaced it with an emphasis on social rules. In every society there are certain social rules that determine what the law is, how it is to be identified, created and modified, and those social rules basically determine what the law in that society is.⁸ An account of the precise nature of these social rules has become rather controversial amongst legal positivists themselves. Some legal positivists claim that these

⁵ *General Theory of Law and State*, 1945, (Wedberg trans.), 20-21

⁶ Arguably, there are single-purpose instruments that can only be used for one particular purpose, that may be either good or bad, or perhaps neither. No pure example comes to my mind, however, in any case, it is clear that the law is not such a case. And of course we should also bear in mind that instruments can be used for purposes other than those for which they were created.

⁷ One way to understand Thomist Natural Law is that it claims that the law essentially promotes the common good, and therefore the law is essentially good. (See Aquinas, *Summa Theologica*, Article 2, concl.) Still, there is an ambiguity here about what this ‘essential’ predicate denotes. As I explain below, something can be necessarily valuable instrumentally. *If* this is a plausible interpretation of Aquinas’ thesis, it is not at odds with legal positivism.

⁸ It may be thought that Kelsen is a notable exception. The Basic Norm is not a social rule, Kelsen claimed, but a theoretical presupposition. But this is not quite accurate, since Kelsen acknowledges that what the Basic Norm in any given society is, depends on actual practice or, its ‘efficacy’, as Kelsen calls it. (e.g. *General Theory of Law and State*, at 118). Thus even if the idea of the Basic Norm is a presupposition, what the Basic Norm in any given society at any given time is, is a matter of social practice. (I have elaborated on this in my entry on Pure Theory of law, *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/lawphil-theory>) Also, it is not entirely clear whether Joseph Raz subscribes to this idea about social rules. As far as I know, he has not explicitly endorsed it anywhere. His *sources thesis*, however, is certainly compatible with it. See, for example, Raz, *Ethics in the Public Domain*, Oxford 1994, at 195.

rules are social conventions (and they still disagree about what kind of conventions they are), while others maintain that the conventional nature of these social rules is somewhat doubtful.⁹ Contemporary legal positivists would generally agree, however, that what the law is, basically depends on the social rules that prevail in the relevant society.

The third, and most problematic, insight of legal positivism is the thesis that has been called *the separation thesis*. There is a great deal of confusion about the precise meaning of the separation thesis, and we have to proceed with caution here. There is a minimal version of the separation thesis that all legal positivists, as such, maintain. And then there is a dispute about its more extended reach. The minimal content of the separation thesis consists in the claim that *determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances*. The main controversy is about an additional, extended version of the separation thesis: Inclusive legal positivism maintains that moral and other evaluative considerations *may* determine, under certain circumstances, what the law is, but this is a contingent matter, depending on the particular social rules of recognition of particular legal systems, at particular times (and, perhaps, depending on the law itself in certain cases). The so called exclusive legal positivism denies this possible dependence of law on moral considerations. It maintains that moral and other evaluative considerations about what the law ought to be in the relevant circumstances cannot, as a conceptual matter, determine what the law is. This debate between the two main versions of contemporary legal positivism is very intricate, but it will not form part of my arguments here, and I will largely ignore it.¹⁰ For our present purposes, the minimal content of the separation thesis, as formulated above, will do.

Before we proceed, it is important to clarify what the separation thesis does *not* amount to, what is not in dispute or, at least, should not be. First, as many contemporary legal positivists have repeatedly emphasized, legal positivism has no theoretical reasons to deny that the law is a good thing, that we have good reasons to have law and have

⁹ See A Marmor, *Positive Law and Objective Values*, Oxford 2001, chapters 1-2, and cf., J. Coleman, *The Practice of Principle*, Oxford 2001. For a critic of understanding the rules of recognition as conventions, see, for example, L. Green, 'The Concept of Law Revisited', *94 Michigan L Rev.* 1996, 1687; and Julie Dickson, [... draft].

¹⁰ For my own defense of the exclusive version of legal positivism, see *Positive Law & Objective Values*, Oxford 2001, chapter 3.

flourishing legal systems.¹¹ Whether the law, as such, has any intrinsic value may well be controversial. But positivism certainly concedes that the law has considerable instrumental value, and therefore, whenever the reasons to use law are present, law would be instrumentally valuable or instrumentally good. Furthermore, legal positivism can concede that the law is necessarily good, if it is true that human nature, or the nature of human society, is such that makes it necessary to have law. If E is an end we necessarily have, and L is a necessary instrument to achieve E, then L is necessarily good, even though L is still valuable only instrumentally. I am not claiming that this is the case, only that legal positivism has no theoretical reason to oppose it.

Second, legal positivism has no reason to deny that law's *content* necessarily overlaps with morality. It may well be the case that every legal system, immoral or wicked as it may be, would necessarily have some morally acceptable content, or that it would necessarily promote some moral goods.¹²

Finally, consider this quote (from Campbell): "In legal theory, Legal Positivism is generally taken to be the view that the concept of law can be elucidated without reference to morality, and that it is the duty of judges to determine the content of and apply the law without recourse to moral judgments."¹³ Both parts of this claim are misleading and it is important to see why. First, I doubt that legal positivists have ever held the view that the concept of law can be elucidated "without reference to morality". Legal positivism is a view about the nature of law. It purports to understand and explain what the law is, what makes it a special instrument of social control, how it figures in our practical reasoning, and what makes it the kind of social institution that it is. None of this can be understood without a great deal of knowledge about the numerous functions and purposes the law serves in our culture. Generally speaking, you cannot even begin to understand a social practice without knowing what it is there for, what is it that it is supposed to do. Without an understanding of the essential functions, or rationale, of a social practice or institution it would be hopeless to attempt a theoretical understanding of it. Now, it is not difficult to

¹¹ See, for example, J Gardner, 'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence* 46 (2001), 199.

¹² Why necessarily? The idea would have to be that a form of regime or de-facto authority that is completely wicked and promotes absolutely nothing of value, could not be recognized as a legal order, would simply not function as law, so to speak. I am not sure about this argument, and I certainly do not wish to defend it here. I tend to think that this is contingently true as a rough generalization, but not necessarily.

¹³ *Legal Theory of Ethical Positivism*, 69.

see that law has moral and political functions in our society. It is there to solve, among other things, moral and political problems. Therefore, it would be futile, if not meaningless, to try to elucidate the nature of law in terms that do not employ moral concepts and do not involve an understanding of the kind of moral and political problems that the law is there to solve. For example, if the law is essentially an authoritative institution, we cannot understand the law without an understanding of what authorities are, what is their rationale, and how authorities function in our practical deliberation. No theory about the nature of authority can do without “reference to morality”. And the same applies to the question of whether the law (or what part of it) is essentially a coercive institution, whether its sanctions are an essential aspect of it, or the question of whether law address itself mostly to its officials or to the public at large. All these are important questions about the nature of law, and none of them can be understood without understanding morality, the moral and political needs of a society, and practical reasoning generally.

The question of whether such reliance on understanding moral issues necessarily implicates a philosophy of law with normative-evaluative claims, is a separate one, and I will consider it in some detail below. But it would be a mistake to begin with the assumption that legal positivism purports to be an account of the concept of law (that I take to stand for an account of the nature of law) that could be reduced to a language which contains no moral terms and has no reference to morality. That just cannot be done, and I am very doubtful that any legal positivist thought otherwise.¹⁴ Once again, to clarify, I do want to deny that an understanding of the moral and political concepts that are essential for an understanding the nature of law, necessarily implicates jurisprudence with any particular moral/political stance, or moral/political evaluations. But this is a far cry from the folly that legal positivism purports to account for the nature of law “without reference to morality”¹⁵. I will say much more about this crucial distinction in section 4.

The second part of the quotation from Campbell is also misguided. Legal positivism is not a theory about the moral duty of judges. Whether judges have a moral duty to apply the law in any given case, is a moral question that can only be answered on moral grounds. Furthermore, no legal positivist that I am aware of has ever suggested that

¹⁴ With the exception, perhaps, of John Austin.

¹⁵ Unless, of course, by “reference to morality” one means a reliance on moral judgments and evaluations.

judges need to set aside morality, so to speak, in their official judicial roles. Perhaps this is the source of the confusion: Hart, and other legal positivists, have repeatedly emphasized that the law often runs out, and then judges have basically no other option but to rely on their best (sometimes moral) judgment in order to determine the case at hand, or in order to determine how to change the law and modify it. But from this it in no way follows that when the law *is* clear, judges have a *moral* duty to apply it. They may trivially have a legal duty¹⁶, but the question of whether there is a moral duty to follow a legal obligation is always open, and should normally be determined on moral grounds. There is, however, a grain of truth in this quote from Campbell, but it is not about the *duty* of judges in figuring out what the law is or how to apply it. It is true that according to legal positivism (or, at least, its “exclusive” version), the law has to be such that it can be *identified* without having to rely on the relevant moral considerations about what the law ought to be in the circumstances. But again, this has nothing to do with the question of what judges ought to do, or how they should decide particular cases.

At this point one may wonder: if the famous separation thesis is so minimal in its content, if it only maintains that determining what the law is does not necessarily or conceptually depend on moral considerations, then what is all the excitement about? Have we not reduced the separation thesis to such a modest claim that nobody could object to it? Perhaps one could have hoped so, but as a matter of fact, the answer is no. Basically, the dispute is about the conditions of legal validity. Non-positivists assert, while positivists deny, that moral considerations form an essential part of the conditions of legal validity, and conceptually so. There are three main versions of this anti-positivist stance:

1. According to (what we call) traditional natural law doctrine, the separation thesis is false because moral considerations form a *necessary condition* of legal validity. Unjust law (or grossly unjust law) is not law, not legally valid.¹⁷
2. According to (early) Dworkin¹⁸, though morality is not a necessary condition of legal validity, it is sometimes a *sufficient* condition. A norm can be a legal norm because it de-

¹⁶ Not necessarily, though. Even when the law is clear, it may be the case that judges are not under a legal duty to apply it to the particular case at hand; they may still have the legal power to change the law.

¹⁷ John Finnis (*Natural Law & Natural Rights*, Oxford, 1980) denies that it is accurate to ascribe this view to Thomist Natural Law. But the position is not unfamiliar, and adherents persist. Robert Alexy, for instance, purports to defend such a view. See his *The Argument from Injustice: A Reply to Legal Positivism*, Oxford 2003.

rives from the best moral justification of other norms ('legal principles'). Thus, at least in some cases, there is a conceptual connection between legal validity and morality.¹⁹

3. According to *Law's Empire* Dworkin, legal validity is *always partly* a matter of moral judgment – because it is always a matter of interpretation what the law is, and interpretation is always partly a matter of moral/evaluative judgments.²⁰

I will not attempt to answer any of these anti-positivist theses. I have only mentioned them in order to clarify what the debate over the separation thesis is about.

2. Ethical Positivism and the Ethics of Positivism.

Assuming, then, that the three main insights of legal positivism that I have mentioned in the previous section basically constitute the core descriptive content of legal positivism, let us now turn to the question of whether they can be viewed from a normative perspective, or indeed, whether they are, somehow, partly normative by necessity. I will have very little to say here about Campbell's Ethical Positivism or any such similar view. Quite explicitly, Campbell does not purport to argue for the truth of legal positivism as a theory about the nature of law. He argues for a moral-political stance that would require a certain vision of law and legal practice that accords with what he takes legal positivism to be. In short, Ethical Positivism is a political theory, not a theory about the nature of law. In one respect, however, it does implicate a theory about the nature of law. Ethical Positivism is committed to the view that legal positivism is at least a possible form of legal practice. In particular, if anti-positivism is right about the falsehood of the separation thesis, Ethical Positivism prescribes the impossible. If it is really the case that determining what the law is, *necessarily* relies on moral considerations about what it ought to be, then there is no room for a prescription that, say, judges should apply the law without considerations about what it ought to be. It would be something that they could not possibly do. Admittedly, the extent of this worry for Ethical Positivism partly de-

¹⁸ *Taking Rights Seriously*, Duckworth 1977, chapter 2.

¹⁹ For a more detailed account of how Dworkin sees the essential moral element in determining the legal validity of principles, see my *Positive Law & Objective Values*, at pp. 81-88.

²⁰ See R Dworkin, *Law's Empire*, London, Fontana, 1986.

depends on the extent to which it is true that ought implies can. But this is not something for me to worry about here.

The only relevant point about Ethical Positivism that we have to notice is that it is not at odds with the view I want to defend here, namely, that legal positivism, as a theory about the nature of law, is basically descriptive and morally neutral. Ethical Positivism does not deny this claim because it does not compete with it. “It ought to be that P” is perfectly consistent with the proposition that “It is the case that P” or that “It is a fact that P”. True, the more obvious it is that P, the less interesting it may become to insist that it ought to be that P. But again, this is not something for me to worry about here. Generally speaking, the truth of a descriptive proposition is not affected by the interest in its moral, normative, endorsement.

H.L.A. Hart’s normative endorsement of legal positivism’s descriptive content is quite different. Hart occasionally mentioned the following type of normative claim: “It is the case that P, and we are all better off recognizing it as such”.²¹ Hart clearly thought that P is a social fact, though in some respects, a sobering one at that. Basically, Hart believed that the more we can come to realize that legal validity and morality are not necessarily or conceptually linked, the easier it is to subject the law to critical appraisal. It is crucial to note, however, that Hart has never thought that the descriptive content of his claims about the nature of law somehow derive from the fact that it is morally or politically beneficial to believe in those facts and recognize their importance. And rightly so, since it is all too clearly a *non sequitur*. From the fact that “It is morally good that everybody believes that P” it does not follow that P.²²

Perhaps there is a more general suspicion that looms large here: looking at the various legal theories on offer, one would quickly observe that almost every theory about the nature of law is accompanied by its normative endorsement by its author. They all seem to claim that it is the case that Q, and in some sense, this is a good thing too. One might then suspect that the theory’s claim that Q is actually motivated by the presumed

²¹ See, for example, *The Concept of Law*, 1st ed, Oxford, 1961, at 205-206, and, *Essays in Jurisprudence and Philosophy*, Oxford 1983, at 72-78.

²² Note that we assume that P is a set of descriptive propositions. At points, one may get the impression that MacCormick (‘A Moralistic Case for A-Moralistic Law’) actually makes this mistake of inferring that P from the thesis that it is morally good if everybody believes that P. But it is not always clear that he takes P to consist of descriptive propositions. In other words, one can interpret MacCormick as advancing a form of Ethical Positivism.

moral-political appeal of Q, or the moral advantage of recognizing Q's truth. Now, it would be difficult, and in any case, pointless, to deny that descriptive theories, particularly about such a normative domain as law, are often motivated by the normative assumptions of their authors. But there are two points to remember here. First, that in a sense this is more generally so, that is, not only with respect to normative preconceptions: it is often the case that we first have a sense of a philosophical conclusion before we can articulate the arguments that support it. Rational deliberation is always an ongoing negotiation between conclusions that seem right to us and the arguments or evidence that would support them. The essence of dogmatism is the refusal to revise one's conclusion in light of contrary evidence. One essential purpose of criticism and philosophical scrutiny is to resist dogmatism. And that is the best we can hope for. We cannot eschew our theoretical or moral preconceptions; but we should always try to subject them to scrutiny, and we should always be willing to revise our initial conclusions in light of contrary evidence.

Secondly, and more to the point, it is, again, undeniable that legal theories emerge from a particular intellectual and political background, and are often motivated, more or less explicitly, by a moral-political vision. For example, as Gerald Postema has convincingly demonstrated, Bentham's legal positivism formed part of his moral-political agenda, and was considerably motivated by Bentham's Utilitarianism and his aspiration for legal reform.²³ Similarly, it is probably the case that Hart's concerns about the relations between law and morality, and the debates about his views at the time, were partly shaped by the intellectual concerns of the post World War II era. Crudely put, the manifest legalism of the Nazi regime, and the practical need to judge its perpetrators *ex post facto*, evoked a dilemma that has never been so stark before: either to admit that law can be so utterly wicked, or to deny that such morally heinous law can be law at all. For those who sought a legalistic justification of the Nuremburg trials, the latter option seemed to offer a neat solution: the Nazi perpetrators could not seek to shelter themselves under the

²³ See Postema, *Bentham and the Common Law Tradition*, Oxford 1986. Furthermore, Postema argues (at p. 331), it is not entirely clear that Bentham was sufficiently aware of the distinction between an account of law *as it is* and his arguments about how to make law more useful or beneficial.

law that they had allegedly complied with at the time, if such wicked law is not law at all.²⁴

Hart clearly thought that this solution is wrong, and that we would better learn the lessons of the Nazi regime by coming to realize that law is not necessarily just, that the law can be morally heinous and still be law. Hart thought that this is an important and sobering political lesson we should learn from jurisprudence, and that we would be on safer grounds, morally and politically, to be alert to the fact that legality is never a guarantee of justice or moral soundness.²⁵ That such views partly motivated Hart's legal positivism I have no doubt. And that I actually share these views I have no qualms to admit. But this neither shows that legal positivism is, in any interesting sense, a normative theory, nor does it show that the truth of its descriptive content depends on the truth of its normative motivation, to the extent that there is one.

Put in simple terms: a descriptive theory about the nature of law makes a claim to truth. The only philosophically relevant question about a philosophical description is whether its claim to truth is warranted or not; whether it is, actually, true. The intellectual and historical background of such a theory, whether moral, political, or other, may help us to a better sense of the content of the theory, but it does not bear on its truth. The motivation for claiming that P is one thing, and the truth of P is another. The former is the business of intellectual historians. Philosophy should be interested in truth.

There is another normative aspect in Hart's theory that may seem more problematic, and this is the third version of normative positivism I have mentioned: At points it seems that Hart claimed not only that a general recognition of P's truth is morally good, but that certain aspects of P are good as well. Of particular concern is chapter 5 of *The Concept of Law*. One of Hart's most important claims about the nature of law is that any developed legal system is a union of primary and secondary rules. In chapter 5, where he presents this thesis, Hart seems to be making the additional claim that this is a good thing too, as the addition of secondary rules remedies certain defects of a rudimentary legal system that would only be comprised of primary rules. Thus the addition of secondary

²⁴ These kind of concerns have resurfaced recently with the collapse of the Berlin Wall and the decision to prosecute former East-German guards who had "shot to kill" escapees to the West, allegedly following the legal orders of the regime at the time.

²⁵ See note 21, above.

rules makes the law more developed and better in serving its social functions. Jeremy Waldron and Stephen Perry understand this argument as a normative one. It “gives the lie to Hart’s claim to be engaged in purely descriptive jurisprudence”, Waldron says.²⁶

It is easy to misunderstand Hart’s claim because it is ambiguous. Consider the difference between the following two propositions:

1. L is x, and this makes L good.
2. L is x, and this makes it good L.

If Hart had made a claim of type 1, perhaps we should have been worried about his mixing a description of law with its normative appraisal.²⁷ But Hart clearly makes a claim of type 2. His claim is not that the development of secondary rules makes the law a better institution, morally more legitimate, so to speak. Hart simply claims that the development of secondary rules enables the law to better serve its functions; it makes it more efficient, *qua* law. This is perfectly consistent with the claim that the law just is whatever it is, regardless of its moral merit, or that it is not necessarily good to have more, rather than less, efficiency in law’s functioning. In other words, this is not a normative claim in the relevant sense. That a knife is sharp, for example, does not make the knife good in any normative-moral sense of ‘good’. It just makes it a good knife; better suited for its putative function.²⁸

Some philosophers claim that any view about law’s essential functions, or purposes, renders it normative; and since, as we have already admitted, no plausible theory about the nature of law can avoid such claims about law’s functions in society, they conclude that any theory about the nature of law must rest on some normative assumptions, legal positivism included. I will examine this claim in some detail in section 4.

²⁶ See J Waldron, ‘Normative (or Ethical) Positivism’, in Coleman (ed.), *Hart’s Postscript*, Oxford 2001, at 429. See also S. Perry ‘Hart’s Methodological Positivism’, *ibid*, at 323ff.

²⁷ Even in this case, however, much would depend on the exact content of the claim. As I have earlier indicated, legal positivism is compatible with the thesis that law is necessarily good.

²⁸ Hart himself made it quite clear that such functional values are not necessarily moral or normative in the relevant sense, in his reply to Fuller’s thesis about the rule of law virtues. See his *Essays in Jurisprudence and Philosophy*, at 349-350. By this I do not mean to endorse Hart’s view that the virtues of the rule of law are purely functional. In fact I have criticized this view in my ‘The Rule of Law and its Limits’, *23 Law and Philosophy*, 2003, 1.

3. Substantive Normative Legal Positivism.

In chapter four of *Law's Empire*, Dworkin purports to present an interpretation of legal positivism, that he calls 'conventionalism', on normative grounds. One immediate problem with it, however, is that very few legal positivists would recognize their work in this chapter. Since Dworkin does not attribute conventionalism to any particular theorist (none is mentioned in this chapter), perhaps he just invented this view as a friendly suggestion. If so, I believe that we need to say thanks, but no thanks. Here is why.

"The heart of any positive conception of law", Dworkin claims, "... is its answer to the question why past politics is decisive of present rights."²⁹ Assuming that this is the main question, conventionalism is presented as a possible answer:

"Past political decisions justify coercion because, and therefore only when, they give fair warning by making the occasions of coercion depend on plain facts available to all rather than on fresh judgments of political morality, which different judges might make differently."³⁰

This line of thought relies on Dworkin's thesis that the central question in jurisprudence is how to justify the use of collective force by the state, and how to justify the fact that certain forms of past political decisions warrant such use of coercive force, and to what extent.³¹ Legal positivism is then presented as a possible answer to this question. So here is the argument, as I see it:

1. The law ought to be a legitimate institution.
2. In order to account for law's legitimacy, we must provide an answer to the question of why past political decisions justify the use (or monopolization) of coercive force.
3. Legal positivism claims that the answer to the question in 2 is given by the ideal of protected expectations.
4. The relevant kinds of expectations can be adequately protected only if law entirely depends on conventional sources.

²⁹ *Law's Empire*, at 117

³⁰ *Ibid.*

³¹ *Ibid.*, at 114.

5. Therefore, tying the identification of law to conventional sources is the best interpretation of legal practice.

There are two ways to read this argument. One is to see it as a form of what we've called Ethical Legal Positivism, namely, as a moral-political argument of the form: *it ought to be that P*. It would then be an argument that recommends something like legal positivism, from the perspective of a political theory; it would be a prescriptive account about the role of law in society, and about how law should be practiced in order to be morally legitimate. As I have already argued, however, Ethical Positivism does not compete with descriptive jurisprudence, and therefore, cannot refute it either. And I don't think that this is what Dworkin has had in mind. Conventionalism is presented by Dworkin as a possible, albeit eventually wrong, *interpretation* of legal practice, not simply as a recommendation about the way law ought to be practiced.

But then there is a serious problem here: how can we get to a descriptive conclusion from answering a question about moral legitimacy? In other words, even if we follow Dworkin's argument until step 4, the move to step 5 remains a bit of mystery. If 5 purports to have a descriptive content, this could not follow from 4. *Ought* just does not imply *is*, no matter how long or sophisticated the argument is. (Note that if 5 is understood in purely prescriptive terms, we are back to Ethical Positivism and its irrelevance to our concerns.) Of course it would have been a different argument if we replace premise 1 with –

1A. The law is a legitimate institution.

Then perhaps something like 5 could somehow follow; not straightforwardly, but perhaps as a possible interpretation of law's legitimacy. But of course, this is a kind of assumption that legal positivism cannot endorse. No theory that begins with the assumption that law is a morally legitimate, or justified, institution can possibly be associated with legal positivism of any kind. As I have indicated earlier, one of the most important insights of legal positivism is that law is a social instrument, and that as such, it can be used for good or bad purposes, it can be used legitimately or illegitimately. Of course we can have a theory about what would render the law in this or that context legitimate, but this would not be a theory about the nature of law. It would be part of a moral political theory about what constitutes good or justified law, not about what law is.

To sum up the problem here: If we begin with a question about what would make law legitimate, we cannot end up with conclusions about what the law is.³² And if we begin with the assumption that the law is legitimate, we are no longer in the realm of legal positivism (or any other descriptive legal theory, for that matter).³³

Undoubtedly, Dworkin would reply that I have ignored his account of what interpretation is, and how interpretation of such a practice as law necessarily combines elements of description and evaluation. I will get to this in a moment, when we consider Dworkin's version of the methodological argument, in the next section.

4. The Methodological Arguments.

In his Postscript to *The Concept of Law*, Hart has re-emphasized that his account of the nature of law is “descriptive in that it is morally neutral and has no justificatory aims; it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my account of law.”³⁴ The upshot of the methodological arguments I want to consider here is that this aspiration is conceptually misguided, and in any case, not attainable. Any jurisprudential account of the nature of law must be premised on moral and other evaluative views about the law. There are three main versions of this argument. The first, propounded by Stephen Perry, rests on the necessity to account for the functions of law. The second argument, espoused by Dworkin, Moore, and Waldron, focuses on nature of the enterprise and its essentially evaluative presuppositions, and the last, suggested by all four scholars and others, focuses on Hart's own idea about the internal point of view and its importance for understanding law. I will consider these three arguments in this order and I will try to show that they all fail, and for similar reasons.

³² This should not be confused with a very different type of argument: Raz has argued that the law necessarily *claims* to be a legitimate authority, and therefore it must meet certain conditions to be the kind of thing that can make such a claim. (*Ethics in the Public Domain*, chapter 9). Raz's argument is not an attempt to derive an is from ought.

³³ Since I find the argument structurally invalid, I did not go into the details of its concrete suggestion to view the ideal of protected expectations as central to the legitimacy of law, and its possible connection with an analysis of social conventions. In my *Positive Law and Objective Values*, 47-48, I have tried to explain why both of these aspects of Dworkin's suggestion are seriously misguided.

³⁴ Hart, *The Concept of Law*, 2nd ed., Bulloch & Raz (eds.), Oxford 1994, at 240.

a. The argument from function.

Perry's argument is best captured by this quotation: "Jurisprudence requires a conceptual framework. The difficulty is that the data can plausibly be conceptualized in more than one way, and choosing among conceptualizations seems to require the attribution to law of a point or function. This in turn involves not just evaluative considerations, but moral argument."³⁵ I have already conceded the first main premise of this argument. It is, indeed, the case that we cannot possibly understand such a complex social practice as law without an elaborate understanding of its essential functions in society. The only question that remains is why would it be necessary to engage in moral argument in order to understand the main functions of law, or its point, as Perry suggests?

Let us suppose that we want to understand a social practice, largely as Hart suggests, constituted by social rules or conventions. Perry is quite right to assume that knowing the rules would not suffice to explain the practice. At the very least, we must also understand their point. For example, we cannot hope to understand the game of chess, without understanding, more generally, what games are, and what is their point. We must understand, among other things, that the participants aim to win the game, which means that we must understand the complex idea of winning (or losing) a game, and such subtleties as winning it decisively, or gracefully, or barely winning, etc.,. In other words, it is certainly true that an understanding of a normative social practice, like law, games, etc., must comprise an understanding of its functions, or points, and often of the values which would render the participants' relevant beliefs in their reasons for action, intelligible. Needless to say, these purposes and beliefs can be put to critical scrutiny. One may wish to say that the putative values are not worth pursuing, that they are foolish or wrong, or that the practice may have had other, better values worth pursuing instead. But this kind of criticism is just an option that a critic may decide to pursue, or not. It is one thing to understand what the game of chess is, and quite another to decide whether it is a good idea to play it or not.

Consider, for example, a straightforward functional explanation of a social rule. Suppose we can show that the function, or rationale, of a social rule, say R, in a given

³⁵ S Perry, 'Interpretation and Methodology in Legal Theory' in A Marmor, (ed.), *Law and Interpretation*, Oxford 1995, 97, at 123.

society S, is to solve a recurrent coordination problem that members of S face under circumstances C. Solving the recurrent coordination problem is what explains the rationale of following rule R in society S under circumstances C. Such an explanation would typically rely on certain propositions about matters of fact, like the nature of the relevant circumstances, people's actual beliefs and preferences, and about the function, or the rationale, of the rule in their practical reason, given those factual assumptions. I find it very difficult to see, however, where the moral argument is hidden here. The explanation need not contend that the coordination problem that rule R is there to solve is one that *ought* to be solved, or that it *morally justifies* following R. It only explains the rationale of R, given certain observations about social facts. Morality is largely about the values that are worth pursuing. A descriptive account of a social practice, or any other type of theory about practical reasoning, need not rely on any particular views about the moral merit or worth of the functions or purposes that would make sense of the practice in question.

Perry's argument rests on the assumption that an account of the functions of a practice like law, is either a "causal explanation of some kind" or else it must be "moral in character: it is grounded in a certain understanding of the moral point or value of the institution of law".³⁶ But this is clearly a false dichotomy. Take for example H.L.A. Hart's thesis, that one of law's most important functions is to guide human conduct *ex ante*, 'out of court', which forms the explicit target of Perry's argument. This is neither a causal explanation nor a moral evaluation. It is a complex thesis, based on certain assumptions about facts (e.g. that people typically know what the law, relevant to their conduct, is; that they actually want to employ such knowledge in their deliberations about their conduct, that they often do so, etc.), and about some of the roles of legal authority in practical reasoning. When we talk about the practical function, or rationale, of a social institution, it need not be a causal explanation, or a moral evaluation. Once again, we can make sense of a social practice, render its rationale intelligible, without forming a moral or other evaluative judgment about the merit of the functions or purposes that render the practice rational for the participants.

Perry would be right to complain that rationality is not a value-free concept. But in this sense, theories are rarely, if ever, value-free, and Perry seems to be quite aware of

³⁶ *Ibid*, at 114.

this, since he is very careful to emphasize that it is *moral* evaluation that he ascribes to jurisprudence, not just theoretical evaluations in general. But this moral component is just not there. Essentially, what Hart was saying is that law is a tool, and tools can be used for good or bad purposes alike. Descriptive jurisprudence, of the kind Hart has had in mind, aims to explain what kind of tool the law is, and how its various features figure in its putative functions. We can say what purposes tools can be used for, this is what it normally means to explain what kind of tool it is, yet at the same time we can remain entirely neutral about the moral merit of such uses. Generally speaking, the idea of usefulness is not necessarily a normative one. By suggesting, for example, that the sharpness of the knife makes it more useful, we are not committed to an evaluation of its uses. A sharp knife is more useful in cutting bread, and is also more useful in killing a person.³⁷ There is simply no argument to support Perry's assumption that an account of the functions of law, or anything else for that matter, is either a causal explanation, or else it is necessarily premised on moral considerations.³⁸

b. The argument from interpretation.

This false dichotomy between causal explanations and moral evaluation of a social practice, sometimes informs Dworkin's methodological argument as well.³⁹ But I believe that we can present a clearer version of it without this fallacy. Jeremy Waldron suggests such a version, and it basically relies on three main premises. First, that it is a central issue in jurisprudence to determine whether certain types of normative claims are legal or not, whether they form part of the law or not. Second, that such disputes cannot be rendered sensible without "testing the respective theories against our sense of why it is important whether something counts as law or not."⁴⁰ Finally, Waldron maintains that an answer to this 'Why' question is bound to be normative, it is bound to rely on certain

³⁷ I do not mean to deny that in certain contexts an expression of the form "x is useful" is *meant* as a normative endorsement or positive appraisal. I only need to deny, as I do, that this is necessarily the case.

³⁸ Although she does not focus on Perry's arguments, Julie Dickson has advanced a very similar line of reasoning against this methodological challenge in her *Evaluation and Legal Theory*, Hart Publishing, 2001.

³⁹ *Law's Empire*, at 64.

⁴⁰ 'Normative (or Ethical) Positivism, at 420.

views about what makes law good and worthy of our appreciation. Therefore, Waldron concludes, jurisprudence necessarily relies on normative considerations.⁴¹

This is a very important argument, and it is almost persuasive. In fact, I think that the first two premises are quite right. Undeniably, it is a central question in jurisprudence what makes certain types of normative claims legal and others not. This is, basically, what the dispute over the conditions of legal validity boils down to. We want to understand what makes certain norms legally valid. And I think that Waldron is right to insist that such a theoretical dispute can only make sense on the background of some understandings about why it is important; why would it matter whether something is a legal norm, or not? So let me propose an answer: it matters to us, as theoretical observers, because we want to *understand what the law is*, as distinguished from other types of norms, and from what the law ought to be. (Note that for participants in the practice, for the subjects of a legal order, it may matter for other reasons; I will get to this shortly.)

Now you may think that I'm just pushing the question one step further. Why would we want to understand what the law is in this respect, as opposed to countless other questions we could have asked instead? Is this not a normative stance? Well, not more than any other quest for theoretical understanding. Theoretical questions always arise on the background of certain assumptions about what it is that needs explanation. Our sense of what needs explanation is typically path-dependent, emerging from the history of the discipline, and certain views that have been collectively shaped over time about what is theoretically or practically important.⁴² Admittedly, any views about relative importance are partly normative, but if this is the only sense of normativity that Waldron has in mind, surely that would be too trivial. Any theory, in any given realm, is normative in *this* respect.

⁴¹ *Ibid.* Michael Moore also makes a similar argument in 'Hart's Concluding Unscientific Postscript', 4 *Legal Theory* (1998). At one point Waldron is unnecessarily too hard on himself: he thinks that this argument commits him to the view that "in order to do positivist jurisprudence in the normative mode, one has to view law as a good thing" [p. 428] and he rightly wonders whether this is not too strong. But I do not see how he is committed to this strong view at all. All that the argument commits him to (as opposed to Dworkin's argument, perhaps), is to say that normative positivism must have some views about what would make law good, or bad, views that would explain why it is important to distinguish legal from other normative claims. This is not tantamount to viewing law as a good thing. Suppose that somebody thinks that law is actually a bad thing. That would give him a very good reason to strive to distinguish what law is from what it is not.

⁴² See, for example, J Raz, *Engaging Reason*, Oxford 1999, at 159.

Dworkin has an interesting answer to this. It combines an emphasis on the interpretative nature of jurisprudence, with the evaluative, normative nature of the practice it purports to interpret. Let me explain. The upshot of Dworkin's methodological argument is very simple: first, it assumes that jurisprudence is necessarily an interpretation of law (as a social practice). Second, it argues that all interpretations, as such, are essentially value laden. Interpretation, by its very nature, necessarily relies on evaluative judgments. Therefore, jurisprudence is necessarily evaluative.

One way to object to this reasoning is to reject its first premise, because it seems to trade on a crucial ambiguity. There is a broad sense of 'interpretation' that would certainly make it plausible to claim that any philosophical account of the nature of law is necessarily interpretative. But in this broad, relaxed, sense of 'interpretation', just about any theoretical explanation would be interpretative. Think of a zoologist who tries to figure out why apes spend so much time grooming each other. Surely, in a clear sense, the zoologist is trying to interpret the apes' behavior. Alternatively, 'interpretation' can be understood much more narrowly, along the lines suggested by Dworkin's *constructive model*. Now the problem is that in the former case, the point has not been proved, since it is not clear that any interpretation in this broad sense is necessarily evaluative. (Think of our zoologist, again; she is not evaluating anything, she just tries to figure out the biological functions of the apes' behavior. She is certainly not trying to present their behavior in its best light.) On the other hand, if we assume a narrow, evaluative, meaning of 'interpretation', it is far from clear that we must concede that any philosophical account of the nature of law is necessarily 'interpretative'. I think that this is a serious worry, but I will not push it any further here. Dworkin's argument fails, even if we generously grant (most of) its main premises.

One of Dworkin's most important insights about interpretation consists in the way he regards evaluations essential to any interpretative project. One cannot even begin to interpret a text, he rightly claims, without first forming a view about the values that are inherent in the genre to which the relevant text belongs. After all, how can I begin to form an interpretation of, say, a novel, without having a pretty good idea about what makes novels good or bad, better than others, and the like. A certain vision of what are the values inherent in the genre, is essential to any attempt to interpret texts which belong

to it. The interpreter, Dworkin claims, must form an evaluative judgment of her own about those values which are inherent in the practice she purports to interpret. Such judgments, Dworkin claims, are not essentially different from the evaluative judgments of the practitioners themselves.⁴³

This last move, however, is not so smooth, at least with respect to social practices like law. There is a crucial difference between forming a view about values that are inherent in a certain practice, and having an evaluative judgment about them. An anthropologist may form the theoretical view that a certain rite is valuable for the people who practice it because it enhances their social cohesion, without having any particular judgment about the value of social cohesion, certainly not one that is somehow competitive with her subjects' evaluative judgments. Similarly, a legal philosopher may suggest that the law is an essentially authoritative institution, without a commitment to any particular views about the legitimacy of legal authorities or their moral worth. Forming a theoretical view about a purpose or value that explains a given practice, is not the same as forming an evaluative judgment about it, nor is the latter entailed by the former.

Arguably, different kinds of theoretical explanations of social practices face different methodological constraints. Presumably, it would not necessarily count against a scientific explanation of a social practice that the participants in the practice could not possibly come to recognize the explanation as something that rationalizes their practice. It is possible that a philosophical explanation is different in this respect. Perhaps a philosophical analysis must be such that it explains the practice in terms that the participants could, at least in principle, recognize as something that explains to them what the point of their practice is. Even so, the explanation need not be one that is based on moral or other normative judgments that compete with the judgments of the participants, to the extent that they have any.

In other words, there is a crucial difference between grasping a value and having an evaluative judgment about it. People can comprehend the values held by others, understand their point, their relevance, etc., without actually forming any judgment of their own about those values. I can understand, for instance, that the glorification of Catholi-

⁴³ *Law's Empire*, 64. A very similar point is made by Waldron, 'Normative (or Ethical) Positivism', at 425-426.

cism formed an essential purpose of the counter-reformation Baroque architecture, without admiring Catholicism (or Baroque for that matter) myself, or actually having any particular evaluative judgment about these evaluative schemes.

Well, in one obvious sense this is not quite accurate. Our understanding of values is limited by our own past experience and conceptual-evaluative scheme. Sometimes people can come to understand new values by learning, but this is a relatively rare occurrence, it takes time and effort, and learning may not succeed. Does this mean that there are values of alien cultures which we could never come to understand? Not necessarily.⁴⁴ It does mean, however, that learning new values is relative to what we already know and to the values we are already familiar with, and this certainly renders our ability to grasp values somewhat limited and dependent on our own experience and culture. Nevertheless, the distinction between grasping a value and having an evaluative judgment about it still holds. The fact that our ability to understand values or practices of other cultures is limited by our own cultural-evaluative background, does not entail that understanding necessarily collapses into judgment. And if this distinction holds, it becomes very difficult to understand why jurisprudence, as an attempt to understand a social practice, must be engaged in moral evaluations of the kind Dworkin and Waldron envisage.

c. The argument from the internal point of view.

It is possible to take the argument from interpretation one step further. Many legal philosophers maintain that it makes a crucial difference that the practice we aim to understand is itself a normative practice, one that purports to guide peoples' conduct and form reasons for their action. After all, it was Hart who introduced to legal philosophy the idea that an adequate explanation of law must take into account the 'internal point of view', that is, the normative point of view of the participants in the practice. Committed participants, mostly judges and other officials, regard the rules of law as reasons for action. Therefore, they must regard the law as valuable or justified, at least in some respect.

This is undeniably true. It is true that we cannot attain an adequate understanding of the law without taking into account the perspective of committed participants, and it is also true that the participants typically regard the law as something that gives them rea-

⁴⁴ See, for example, Raz, *Engaging Reason*, at 157.

sons for action. No doubt, the internal point of view is normative, at least partly in a moral political sense.⁴⁵ But it still remains to be shown why would a philosophical understanding of such a normative point of view be committed to taking any stance on the values or normative assumptions it purports to explain? Why can it not remain essentially descriptive and morally neutral?

Consider the following analogy. Suppose I am told that Sarah had a choice, and was actually deliberating, whether to go to see movie A, say, a thriller, or movie B, that is a melodrama. I learn that she ended up going to movie A, and I also know that it reflects her choice. Can I conclude that Sarah has an evaluative preference of thrillers over melodramas? Or that she had such a preference on that occasion? Probably not. I still need to know more. I need to know why she had made the choice she did, what were her reasons, (e.g. perhaps the melodrama was shown in a theater too far away), and other similar aspects of her deliberation. An adequate understanding of her choice requires some knowledge of this, let us now say, “internal point of view”. I need to know how she reasoned. But do I need to judge those reasons from my own evaluative perspective? Would my account of Sarah’s reasoning necessarily rely on evaluative judgments at all, or some evaluative judgments competitive with hers? Nothing seems to compel such a conclusion. Once again, the opposite view seems to follow from a confusion between grasping a value or an evaluative reasoning, and forming an evaluative judgment about it. As I have already conceded, there are some inherent limits to values and evaluative reasoning we can grasp. To some extent, our ability to understand such things is shaped and limited by our own evaluative schemes and cultural habituation.⁴⁶ But this is not the same, not even

⁴⁵ Hart, actually, resisted this last conclusion, at least if it is understood in moral terms. Hart insisted that even “when judges ... make committed statements... it is not the case that they must necessarily believe that they are referring to a species of moral obligation.” (*Essays on Bentham*, Oxford 1982, at 161.) I have some doubts about the point of this debate. If we assume, as seems plausible, that a reason for Ø-ing entails that Ø is valuable, or that Ø-ing will bring about something valuable, then committed participants must be taken to presume that the reasons for following the law are reasons that derive from some values the law promotes. I tend to think that it matters very little whether we classify these values as necessarily ‘moral’ or not. Morality has very fuzzy boundaries anyway.

⁴⁶ Of course I could not understand Sarah’s choice if I had no idea what thrillers and melodramas are, and what are the differences between them. But my understanding of Sarah’s reasoning about such matters is simply not affected by my own views about the values of thrillers and melodramas, or such. My own evaluative preferences are simply not relevant here.

close, to the conclusion that any understanding of evaluative reasoning collapses into judgment.

Dworkin's reply is not difficult to surmise. My attempt to explain Sarah's reasoning is an interpretation, he would say, and as such, it must purport to present its object in its *best possible light*, as the best possible example of the kind it belongs to. An attempt to present something in its best possible light, all things considered, necessarily relies on evaluative judgments of the kind that would be competitive with the judgments or reasoning one purports to interpret. But here we must part company. This is not the place to present an elaborate argument against Dworkin's theory of interpretation.⁴⁷ Suffice it to say that without this crucial assumption, that interpretation necessarily purports to present its object in *its best possible light*, the argument is not valid. And I think that very few of those who rely on the argument from the internal point of view, share Dworkin's view about interpretation in this respect. But then they must come up with an alternative argument to fill in the gap.

Perhaps the following idea might help. Suppose it could be argued that 'law' is an *essentially contested concept*. Participants rationalize their normative attitude to law, and their reasons for following legal rules, on the basis of different and competing conceptions of the concept law. This would make sense if the concept of law is an essentially contested concept, more or less along the lines suggested by Gallie's analysis.⁴⁸ Would it not then follow that any account of the internal point of view is normative, just as any theory of justice, or theory of democracy, must be normative? Such theories purport to defend a particular conception of a contested concept, and one that inevitably competes with other normative conceptions.

In order to assess such an argument, it is worth reminding ourselves what essentially contested concepts are. According to Gallie, there are five conditions: (1) The concept must be "appraisive", in that it stands for some kind of valued achievement. (2.) This achievement must be internally complex and (3) any explanation of its worth must refer

⁴⁷ I have done that elsewhere; see my *Interpretation and Legal Theory*, Revised Second Edition, Hart Publishing, 2005.

⁴⁸ W B Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society*, 1956, 167-198.

to the respective contributions of its various parts or features. (4.) The accredited achievement must be of a kind that admits of modifications in light of changing circumstances. And, finally, (5) each party recognizes the fact that its own understanding of the concept is contested by other parties.⁴⁹ Gallie's own examples of essentially contested concepts include such things as democracy, art, social justice, and something like "the Christian way of life". Can we include the concept of law in this group?

I think not, because it is far from clear that law, in the relevant respect, is an 'appraisive' concept in Gallie's sense. We must keep in mind that it is the concept of legal validity, and the conditions of legal validity, that forms the focus of our interest here. Now, legality, or legal validity, is basically a phase-sortal concept: Norms are either legally valid, or not; they either belong to the law or they don't. Legal validity is not a kind of achievement that one can attain or fail to attain to a higher or lesser degree. Things can be more or less just, or more or less artistic, but this kind of appraisal is not something we can attribute to the validity of law. Of course, the enactment of *good* law is an achievement, and some laws are better than others, but surely not in terms of legal validity, *per se*; good law is good because it promotes some good, not because it is more legal, or more law, as it were, than some alternative.

To be sure, I do not wish to deny that one can fail to make law, or that there is some sense in which legality admits of degrees of success. Many legal philosophers who have written about the rule of law (including myself), share the view that there are ways in which one can fail to make law.⁵⁰ There are certain conditions that the law has to meet in order to be able to fulfill its pivotal function of guiding human conduct. Law's ability, as a social instrument, to guide human conduct necessitates certain features the law must possess in order to fulfill such a function, regardless of its specific contents. And then there is a sense in which success or failure in this respect is a matter of degree. But this is quite irrelevant to the argument from the internal point of view. First, even if there is a sense in which 'legality' is a form of achievement, it does not, by itself, make it an essentially contested concept. Second, and more importantly, this is not the relevant sense of

⁴⁹ *Ibid*, at 171-180.

⁵⁰ See my 'The Rule of Law and Its Limits', at 5, and references there.

legality that concerns us here. As we have seen, the debate between legal positivism and its opponents is mainly about the conditions of legal validity; it is mainly about the question of what the law is, and what is it that renders certain norms legally valid and others not. In this respect, ‘law’ is not an apprasive concept and therefore not an essentially contested one.⁵¹

So what is it about the concept of law that participants and theorists can have competing and essentially contested conceptions of? I suggest that it is not the concept of law, but the idea of good law, or legitimate law, that is, in a sense, an essentially contested concept. In other words, from the perspective of the participants, the law should be legitimate and justified. The legitimacy of the law in our society is something we have very good reasons to care about. And then we may have, as we do, very different conceptions about what the moral-political conditions of legitimacy should be, and what would make various laws better or worse than others. But none of this shows that the concept of law is an essentially contested concept, even from the internal point of view.

To sum up: a theory about the nature of law must account for the internal point of view. It must explain the sense in which participants regard the law as reason for their action and what are the kinds of purposes or values that would render such reasons intelligible. But this is still a form of understanding, not judgment. We can understand various forms of practical reasoning without forming any evaluative judgment about them. And if we do not need to form a judgment about such reasoning, then jurisprudence is still basically descriptive and morally neutral.⁵²

⁵¹ For a similar argument, claiming that law is not an essentially contested concept, see Leslie Green, ‘The Political Content of Legal Theory’, *17 Philosophy and Social Sciences*, (1987), 1, at 16-20.

⁵² I am grateful to Scott Altman, Leslie Green, Martin Stone, and Joseph Raz for very helpful comments on earlier drafts of this paper.