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THERE IS NO SUCH THING AS THE SEPARABILITY THESIS

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ABSTRACT. *One commendable aspect of the ruminations by H.L.A Hart on legal positivism, which quite a few contemporary philosophers of law have not fully absorbed, is that he recognised the diversity of the points of contention that have pitted the devotees of positivism against the devotees of natural-law theories. Whereas some present-day philosophers of law are inclined to refer to "the separability thesis" of legal positivism – with the definite article "the" as a signal that there is one defining point of dispute between legal positivists and their opponents – Hart knew that there is no single such thesis. Natural-law theorists have in fact postulated numerous connections between law and morality which putatively clinch the character of law as an inherently moral phenomenon, and legal positivists have posed challenges to each of those connections or to the claim that any unchallenged connection serves to establish the inherently moral character of law.*

KEYWORDS: legal positivism, H.L.A. Hart, morality versus prudence, morality versus immorality, law and morality, jurisprudential positivism, morality versus empirical matters.

I. INTRODUCTION

One commendable aspect of the ruminations by H.L.A Hart on legal positivism, which quite a few contemporary philosophers of law have not fully absorbed, is that he recognised the diversity of the points of contention that have pitted the devotees of positivism against the devotees of natural-law theories. Whereas some present-day philosophers of law are inclined to refer to "the separability thesis" of legal positivism – with the definite article "the" as a signal that there is one defining point of dispute between legal positivists and their opponents – Hart knew that there is no single such thesis.[1] He countered the notion of a single defining thesis,

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[1] Though David Plunkett does not use the phrase "the separability thesis", he speaks of "the debate between legal positivists and antipositivists" – as if there were only one major line of controversy between positivists and their opponents. Plunkett writes: "What exactly is at issue in the debate between positivists and antipositivists? … [A]t its core, it is a debate about what kinds of facts ultimately determine the existence and content of legal systems. In short: Is it social facts alone? Or is it a

indeed, in the opening sentence of his chapter on positivism: "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."[2] Hart was keenly aware that natural-law theorists have postulated numerous connections between law and morality which putatively clinch the character of law as an inherently moral phenomenon, and he rightly held that legal positivism poses a challenge to each of those connections or to the claim that any unchallenged connection serves to establish the inherently moral character of law. Far from being confined to a solitary separability thesis, legal positivism consists in a wide-ranging affirmation of the separability of law and morality – an affirmation that contests the multifarious endeavours of natural-law theorists to present law as intrinsically moral.

To be sure, Hart himself inadvertently abetted the tendency of later philosophers of law to equate legal positivism with one pithy thesis. In the second paragraph of his chapter on positivism, he announced that he would "take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so".[3] Although Hart here broached the proposition that was most saliently at issue in the debates between legal positivists and their opponents during past centuries – and although that proposition continues to be quite a prominent focus of controversy in the present day, both among legal positivists and between legal positivists and their adversaries – he went astray in suggesting, even *en passant*, that legal positivism is concerned with only one main way in which law and morality have sometimes been viewed as indisseverable. Later in his ninth chapter and in some of his subsequent writings, Hart revealed that any such suggestion is unfounded. There he charted and entered some of the other principal tussles between legal positivists and natural-law theorists that have occurred both in recent decades and in bygone eras. Moreover, immediately before the somewhat ill-advised suggestion that has just been quoted, Hart readily accepted that the phrases "Legal Positivism" and "Natural Law" have each "come to be used for a range of different theses about law and morals".[4]

Thus, anyone who aspires to understand legal positivism will need to ponder the complex diversity of the debates between positivists and their opponents. Those debates concern the relationships between law and

combination of social facts and moral facts?": D. Plunkett, "Negotiating the Meaning of 'Law': The Metalinguistic Dimension of the Dispute over Legal Positivism" (2016) 22 Legal Theory 205, 206. Plunkett here implies that the stance taken by positivists on a key point of contention between themselves and Dworkinians is the whole, or the core, of legal positivism.

[2] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994), 185, emphasis in original.

[3] Ibid., at 185–86.

[4] Ibid., at 185.

morality, but there is no single understanding of morality that runs through all of them. Of course, one reason for the profuseness of the conceptions of morality which are operative in those debates is that the participants therein subscribe to varying substantive moral standards. At least as important, however, is that different aspects or dimensions of morality are at issue across the sundry disputes between positivists and natural-law theorists. Each of those aspects or dimensions can illuminatingly be approached through a distinction between morality and something else that serves as a point of contrast.[5]

II. Four Aspects or Dimensions of Morality

Let us here contemplate four distinctions. Three of them pertain to aspects or dimensions of morality that have figured conspicuously in controversies over the separability of law and morality, whereas the fourth distinction pertains to an aspect or dimension of morality that is not genuinely at issue in any of those controversies. The reason for including that fourth dichotomy will become clear in my next section, after which we shall glance at some of the disputes that have been associated with the other three facets of morality that are delineated here.

First, then, is a contrast between morality and immorality. It is a distinction that gets invoked pervasively in everyday life, and is construable in either of two chief ways. On the one hand, it is construable as a division between the permissible and the impermissible or between the legitimate and the illegitimate or between right and wrong (where those three pairings are taken to be interchangeable). On the other hand, it can additionally be construed as a division between the morally commendable and the morally deplorable or between the morally salutary and the morally noxious or between virtue and vice (where, again, those three pairings are taken to be interchangeable). Obviously, these two ways of interpreting the morality/immorality diremption are closely related. However, whereas every morally commendable mode of human conduct in ordinary circumstances is morally permissible, not every morally permissible mode of human conduct in ordinary circumstances is morally commendable. Some morally permissible modes of conduct, such as one's scratching of one's nose in any ordinary circumstances, are not properly classified as either commendable or deplorable. Likewise, whereas every morally noxious mode of conduct is morally impermissible, not every morally impermissible mode of conduct

[5] I have previously differentiated among these aspects or dimensions of morality at several junctures in M.H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford 1999). I have also invoked them prominently in M.H. Kramer, *Where Law and Morality Meet* (Oxford 2004), 223–45, and in M.H. Kramer, *H.L.A. Hart: The Nature of Law* (Cambridge 2018), 149–64. I here develop and occasionally modify some of the strands in my past discussions of this matter.

is morally noxious. Some morally impermissible modes of conduct, such as one's breaching of a minor promise in any ordinary circumstances, are not properly classified as either salutary or noxious.

Second is a distinction between morality and prudence. Here the term "prudence" is used in a technical philosophical sense that only tenuously corresponds to its quotidian sense. The morality/prudence dichotomy relates to the reasons that might underlie the actions of any person P. A prudential reason for some action by P is focused exclusively or primarily on the interests of P, and only derivatively if at all on the interests of anyone else. A moral reason for some action by P is focused exclusively or primarily on the interests of other people, and only derivatively if at all on the interests of P. Suppose, for example, that P is deliberating whether she will desist from her habit of smoking cigarettes. Among the prudential reasons for an affirmative decision are that the discontinuation of her habit will save her a lot of money, and that it will improve her health, and that it will keep the stench of tobacco from permeating her clothes and breath and furniture, and that it will halt the discolouration of her teeth. Among the moral reasons for her to terminate her habit of smoking are that such a decision will enhance her ability to support her children and other dependents, and that it will lessen the burdens which she imposes per annum on the public health-care service in her country, and that it will cut off her financial contributions to an industry that imperils the health of countless other people. Now, as should be evident from this example of P and her habit of smoking, prudential reasons and moral reasons are readily combinable and are often overlapping even though they are distinguishable. Moreover, although the distinctness of prudential reasons and moral reasons can be encapsulated straightforwardly at an abstract level, the task of differentiating between them at concrete levels will sometimes be much more difficult.

Before we move on to a third distinction, we should note that the moral/prudential contrast is quite different from the moral/immoral contrast. Though of course many factors that can underlie people's actions are both non-prudential and morally benign, many other such factors are non-prudential but morally odious. For example, if an official in a Communist system of governance imposes harsh penalties on political dissidents in order to protect the system against ideological impurity, or if an official in a fascist system of governance authorises the slaughter of the members of a downtrodden racial or religious group in order to enhance the putative purity of a master race, the official is acting on the basis of a non-prudential but morally evil consideration. Furthermore, though of course many factors that can underlie people's actions are both prudential and morally impermissible, many other such factors are both prudential and permissible. For example, each prudential consideration listed above as a reason for P to desist from her practice of smoking is a morally permissible reason for action. Hence, notwithstanding a sizeable

overlap between the morality/immorality duality and the morality/prudence duality, there are also numerous divergences between them.

A third dichotomy to be noted here is the division between moral matters and empirical matters. Roughly stated, that division lies between what morally *should* be done and what empirically *is* being done or *has* been done or *will* be done. This distinction between moral facts and empirical facts is a feature of everyday life but is also of far-reaching importance in philosophy. It has for example been enshrined by philosophers in what is often known as "Hume's Law", which holds that there is at least one moral premise in every argument that validly draws a moral conclusion from logically consistent premises.[6] In other words, a moral conclusion is never validly inferable from any logically consistent premises that are wholly descriptive. Whether in a somewhat technical philosophical form or in an everyday form, the moral/empirical dichotomy captures an aspect or dimension of morality – its focus on what morally ought to be rather than solely on what was or what is or what will be – that is different from the aspect or dimension captured by each of the other two dichotomies that have been outlined above. When this moral/descriptive distinction is elaborated along epistemic lines, it amounts to a contrast between moral reasoning and purely empirical or logical or mathematical reasoning.

Finally, a fourth distinction is the divide between moral phenomena and non-moral phenomena. In the sense that is relevant here, non-moral phenomena are those things to which moral concepts or categories are not appositely applicable.[7] Virtually all natural processes and states of affairs are non-moral in this sense. For example, suppose that we inquire whether the strong-force interconnectedness of the protons and neutron(s) in some atom of helium is morally permissible or morally impermissible. The appropriate answer to such a question is that neither moral permissibility nor moral impermissibility can ever appositely be predicated of such a state of affairs. If someone ascribes either of those properties to such a state of affairs, she commits a daft conceptual error as well as a moral error. Even more plainly misdirected would be anyone's application of ethical notions such as worthiness and virtue or unworthiness and villainy to the interconnectedness of the subatomic particles in an atom of helium. So applied, such notions would be ludicrously out of place.

By contrast, the doings and decisions and practices undertaken by human beings are always appropriately susceptible to some moral assessments. In precisely that respect, all such doings and decisions and practices are moral

[6] M.H. Kramer, *Moral Realism as a Moral Doctrine* (Chichester 2009), 6–9.
[7] M.H. Kramer, "There's Nothing Quasi about Quasi-Realism: Moral Realism as a Moral Doctrine" (2017) 21 Journal of Ethics 185, 189–90.

rather than non-moral. To be sure, some modes of conduct by human beings are such that the only moral concept pertinently applicable to them is that of permissibility. Such modes of conduct impinge only trivially, if at all, on the interests of other people. For example, if we ask whether Joe's scratching of his nose in any ordinary circumstances is morally virtuous or morally vicious, the answer to our question is that neither of those ethical properties is germanely predicable of such a mode of conduct in such circumstances. Similarly, if we ask whether Alice's choice between playing solitaire and putting together a jigsaw puzzle as a pastime in any ordinary circumstances is morally commendable or morally deplorable, the answer to our question is that neither of those ethical categories is applicable to such a choice. Still, although neither Joe's action nor Alice's decision is properly assessable with these somewhat thicker ethical concepts, both his action and her decision are properly assessable as morally permissible. In that regard, though only in that regard, both his action and her decision are moral rather than non-moral.

III. The Fourth Distinction: No Debates

Each of the first three aspects or dimensions of morality delineated above is associated with a number of debates between legal positivists and natural-law theorists. We shall glance at some of those debates shortly. However, what should be noted straightaway is that the fourth aspect or dimension of morality – the moral versus the non-moral – is not associated with any genuine disputation between positivists and their opponents. As is glaringly evident, the operations of legal systems of governance are run by human beings whose attitudes and beliefs and conduct are integrally constitutive of those operations. Hence, given that all doings and decisions and practices undertaken by human beings are appositely susceptible to moral appraisal, the operations of legal systems are appositely susceptible to moral appraisal. Moreover, as is also glaringly apparent, those operations in any jurisdiction impinge far more than trivially on the interests of people who reside or work or visit there. Legal requirements and judgments and institutions affect people's lives in wide-ranging and far-reaching ways. Indeed, the effects of those requirements and judgments and institutions on people's lives are often momentous. Accordingly, the full repertory of moral concepts can pertinently be applied to the workings of legal systems of governance. Any such system as a whole, along with most of its elements, can germanely be assessed not only as morally legitimate or illegitimate but also as morally salutary or noxious. Although particular moral judgments about a legal system or about some laws and decisions within a legal system can of course be mistaken, the sheer fact that moral concepts

have been applied to such a system or to such laws and decisions is never itself inapposite.

Thus, if we are asking whether law is inherently moral, and if the contrast implicit in the question is between the moral and the non-moral, the answer is that law is indeed inherently moral. No legal positivist in his or her right mind has ever suggested otherwise, because no legal positivist in his or her right mind has ever doubted the points made in the preceding paragraph. As has been emphasised in that paragraph, it is obvious that legal systems and their components can always properly be subjected to moral assessment. Far from denying or doubting that those systems are always open to moral appraisal, positivists such as Hart have emphatically proclaimed the vital need for such appraisal. Precisely because Hart's predecessors Jeremy Bentham and John Austin were so keenly determined to gauge the moral quality of every legal system by reference to the precepts of utilitarianism, they staunchly insisted on the distinction between what the law is and what the law ought to be. Not all positivists are utilitarians, fortunately, but every positivist would join Bentham and Austin in recognising that the subjection of legal systems to rigorous moral scrutiny is an entirely germane endeavour.[8]

In short, because every legal positivist is perfectly well aware that legal systems and norms can suitably undergo moral assessments, no positivist has sought to maintain that law is non-moral rather than moral. Every legal positivist would agree that, insofar as "moral" is contrasted with "non-moral", law is an inherently moral phenomenon. This point is worth stressing because some opponents of legal positivism have egregiously overlooked it. Lon Fuller, for example, submitted that positivists look upon law as "simply a datum of nature"[9] and that their approach to legal institutions is "like [that of] the scientist who discovers a uniformity of inanimate nature".[10] Confronted with such calumnies, Hart quite understandably reacted with exasperation. Specifically with reference to Fuller's phrase "simply a datum of nature", Hart stingingly retorted: "Surely this last phrase merely darkens counsel … The author's use of this opaque philosophical phrase suggests that those who, like myself, attempt to analyse the notion of legislative powers in terms of rules are committed to eliminating from their analysis any reference to anything but the inanimate."[11]

Contrary to what is suggested by Fuller's superfluous remonstrations – and by some equally misguided remonstrations from other anti-positivist writers such as Michael Detmold and Ronald Dworkin[12] – there are no

[8] Kramer, *In Defense of Legal Positivism*, 123–25, 189–91, 200–4.
[9] L.L. Fuller, *The Morality of Law*, revised ed. (New Haven 1969), 148.
[10] Ibid., at 151.
[11] H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford 1983), 359.
[12] See Kramer, *In Defense of Legal Positivism*, 123–25, 189–91.

genuine debates between legal positivists and their foes over the question whether law is moral or non-moral. Every philosopher of law who is at least minimally sensible, whether a positivist or an anti-positivist, concurs on the answer to that question. No such philosopher has failed to grasp that moral concepts are applicable to laws and to legal systems, and therefore no such philosopher has failed to grasp that laws and legal systems in that respect are always moral. Consequently, when legal positivists affirm the separability of law and morality, they are not addressing the moral/non-moral question. They are instead focusing on the other aspects or dimensions of morality that have been summarised in Section II above.

IV. Morality Contrasted with Immorality: Some Debates

Whereas no legal positivist has ever contended that law is non-moral, virtually every legal positivist contends that the efforts by natural-law theorists to portray law as inherently benign or legitimate – that is, as inherently moral rather than immoral – are unfounded. In other words, when morality is contrasted with immorality rather than with non-moral phenomena, there have indeed occurred sundry genuine debates between positivists and their opponents over the proposition that law is inherently moral. Before we glimpse at some of those debates, we should note a couple of caveats that also apply to the next two sections of this essay. First, in this section and those succeeding two sections, this essay will be tersely outlining some debates rather than entering into them. Though I have elsewhere actively participated in the controversies that will be synopsised here, the confines of this essay do not leave room for such participation. Second, although each of the altercations sketched here does pit a positivist insistence on the separability of law and morality against a natural-law insistence on the inseparability thereof, not all philosophers who are aptly classifiable as legal positivists would endorse the positivist stance unswervingly in every one of those altercations. Even while subscribing to the positivist stance on most of the relevant points of contention, some philosophers deviate from that stance occasionally.[13] Though I myself have defended the positivist affirmation of the separability of law and morality in every one of the disputes that will be broached here, most other legal positivists are somewhat less robust. Even Hart, who steadfastly upheld the positivist banner in most of those disputes, abandoned that banner in a few contexts that will be remarked upon below.

[13] For discussions of such deviations by John Gardner and Leslie Green and Joseph Raz and Andrei Marmor, see Kramer, *Where Law and Morality Meet*, 223–30.

Morality as contrasted with immorality is the focus of the debates to which Hart alluded when he offered his one-sentence encapsulation of legal positivism, which I have quoted near the outset of this essay. Those debates are what Bentham and Austin were addressing when they strenuously proclaimed the distinction between what the law is and what the law ought to be. That is, some natural-law theorists over the centuries have declared that the status of any norm N as a law in any legal system is always dependent on the norm's satisfaction of some test of moral legitimacy. Unless the substance of N is at or above a threshold of moral soundness, N is not genuinely a law in any system of governance – even if the officials in some such system treat N as though it were a law. So have proclaimed a bevy of natural-law theorists from ancient times through the present day. Notwithstanding that a number of contemporary natural-law philosophers distance themselves from such a position in order to concentrate on other connections between law and morality, the notion of a test of moral legitimacy for the status of norms as laws has continued to play quite a prominent role in anti-positivist theorising.[14] Legal positivists are unanimous in rejecting the idea that any such test is an essential feature of law. To be sure, some legal positivists – Inclusive Legal Positivists – allow that the consistency of N with correct principles of morality can be a necessary condition for the status of N as a law within this or that jurisdiction.[15] However, those positivists maintain that the operativeness of such a moral test for legal validity in any particular jurisdiction is a contingent aspect of the system of law in that jurisdiction rather than an essential aspect of every system of law. Such a test will be operative in a given system of governance only if the officials there uphold a Rule of Recognition under which the test is among the criteria that have to be satisfied by every norm that belongs to the system as a law. Hence, Inclusive Legal Positivists are like other legal positivists in contending that the status of every law as such within any jurisdiction is fundamentally grounded in the practices of officials. Inclusivists hold that any moral test for legal validity in a

[14] See e.g. M.J. Detmold, *The Unity of Law and Morality: A Refutation of Legal Positivism* (London 1984); D. Beyleveld and R. Brownsword, "The Practical Difference Between Natural-Law Theory and Legal Positivism" (1985) 5 O.J.L.S. 1, 2, fn. 1; R. Dworkin, "A Reply by Ronald Dworkin" in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (London 1984), 247, 256–60; M.S. Moore, "Law as a Functional Kind" in R.P. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford 1992), 188, 198; P. Soper, *The Ethics of Deference: Learning from Law's Morals* (Cambridge 2002), 89–99.

[15] For my main defence of Inclusive Legal Positivism, see Kramer, *Where Law and Morality Meet*, 1–140; see also M.H. Kramer, "Looking Back and Looking Ahead: Replies to the Contributors" in M. McBride and V.A.J. Kurki (eds.), *Without Trimmings: The Legal, Moral, and Political Philosophy of Matthew Kramer* (Oxford 2022), 363, 401–7, 422–33; M. Kramer, "Incorporationism, Inclusivism, and Indeterminacy" in T. Bustamante, S.M.M. de Matos and A. Coelho (eds.), *Law, Morality and Judicial Reasoning: Essays on W.J. Waluchow's Jurisprudence and Constitutional Theory* (Cham 2024 (forthcoming)).

particular jurisdiction is attributable to those practices rather than to the nature of law.

With the focus still on morality in opposition to immorality, another area of disputation between positivists and their foes is concerned with the general function of legal systems of governance. Most natural-law theorists have submitted that the central function of law is inherently commendable and that every full-blown system of law is itself therefore inherently commendable *pro tanto*.[16] Whether the function is deemed to be the securing of basic orderliness and coordination or the governance of human beings as rational agents or the expression of reciprocity between the rulers and the ruled – or any other desideratum or combination of desiderata – the claim by anti-positivist theorists is that the operativeness of a legal system is sufficient as well as necessary for the realisation of morally commendable states of affairs. Those theorists accordingly conclude that law is an inherently moral phenomenon. In rebuttal, legal positivists have in some cases challenged the premises of the natural-law arguments and have in other cases accepted the premises while rejecting the conclusions that have been drawn from them. For example, legal positivists can and do accept that in any sizeable society the existence of a functioning legal system of governance is necessary for the realisation of various morally commendable states of affairs. However, positivists deny that the existence of such a system is *sufficient* for the emergence of any morally commendable states of affairs, and they further deny that the role of such a system as a necessary condition for the realisation of certain moral values is something that endows law with the status of an inherently moral phenomenon.

Yet another flashpoint of contention between positivists and their opponents is the way in which any legal system presents itself through the pronouncements of its officials. As I have discussed elsewhere,[17] some natural-law philosophers contend that every legal system presents itself and its mandates as morally legitimate. Although these theorists are postulating a necessary connection between law and morality at the level of discourse rather than at the level of underlying substance, they do indeed maintain that officials' legal pronouncements are inextricably bound up with assurances of moral legitimacy (which are usually implicit rather than explicit). Moreover, some of these philosophers have argued that the authoritative utterances of the officials cannot retain any credibility if the assurances of moral legitimacy implicit within them are preposterous. Consequently, in the eyes of these philosophers, nothing counts as a genuine system of law unless it surpasses some threshold of

[16] See e.g. J. Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford 2011), 260–96; Fuller, *Morality of Law*; N. Simmonds, *Law as a Moral Idea* (Oxford 2007).
[17] See e.g. Kramer, *In Defense of Legal Positivism*, 101–8; Kramer, *Where Law and Morality Meet*, 216–22.

moral legitimacy.[18] In other words, by reflecting on the presuppositions of the utterances of officials, these philosophers proceed to elaborate a traditional natural-law position – albeit with a test of moral legitimacy applied to the workings of any legal system as a whole rather than to individual laws. Legal positivists, then, have ample grounds for contesting the claims of these philosophers about the assurances that are ostensibly presupposed by the authoritative pronouncements of officials.

One more area of dispute that should be outlined here is the proposition that every system of law attains at least a minimal level of moral worthiness by dint of the procedural or administrative justice that is involved in giving effect to laws in accordance with their terms. Somewhat curiously, Hart went quite a long way toward endorsing that proposition in *The Concept of Law*.[19] However, he later came to have grave doubts about his conciliatory stance,[20] and his conciliatoriness has been criticised in varying ways by some other legal positivists.[21] As Hart came to realise, a few of his later arguments against the efforts by Fuller to ascribe an inner morality to law could be turned upon his own apparent preparedness to acquiesce – however hesitantly – in the proposition about procedural or formal justice.

V. Morality Contrasted with Prudence: Some Debates

When morality contrasted with prudence is the orienting concern, the thesis most commonly propounded by natural-law philosophers is that there are no credible prudential reasons for the officials in any system of governance to abide by the rule of law. These philosophers submit that, in any system of governance, the sole credible reasons for officials to uphold the restrictions integral to the rule of law are moral rather than self-interested.[22] By contrast, Hart expressly left open the nature of the considerations that would motivate the officials in a system of governance to run it as a legal system.[23] He thereby positioned himself against the conclusions of the natural-law philosophers who rule out prudential factors as credible bases for the self-restraint involved in the operations of a legal system. Their conclusions have been impugned at much greater length by me in my previous books and articles on legal positivism.[24] Among the points to be made in the challenges to their anti-positivist conclusions is a distinction

[18] See e.g. Soper, *Ethics of Deference*, 89–99.
[19] Hart, *Concept of Law*, 160–61, 206–7.
[20] Hart, *Essays in Jurisprudence and Philosophy*, 18.
[21] See e.g. Kramer, *In Defense of Legal Positivism*, 21–36; D. Lyons, "On Formal Justice" (1973) 58 Cornell Law Review 833.
[22] See e.g. Finnis, *Natural Law and Natural Rights*, 273–74; Simmonds, *Law as a Moral Idea*, 89–96.
[23] Hart, *Concept of Law*, 203.
[24] See especially Kramer, *In Defense of Legal Positivism*; Kramer, *Where Law and Morality Meet*, 144–245. Particularly pertinent here are the several articles that I published from 2004 to 2011 in vigorous exchanges with the natural-law theorist Nigel Simmonds. For the final instalment in that series of articles, which includes citations to the earlier instalments, see M.H. Kramer, "For the Record: A Final Reply to N.E. Simmonds" (2011) 56 American Journal of Jurisprudence 115.

between the rule of law and the Rule of Law.[25] Whereas the rule of law consists in the individually necessary and jointly sufficient conditions for the existence of a legal system, the Rule of Law consists in the existence of a legal system that exemplifies the values of liberal democracy both procedurally and substantively. Though the claims of the natural-law philosophers about the reasons for action that can credibly account for officials' patterns of conduct are largely sustainable in connection with the Rule of Law, those claims are unsustainable in connection with the rule of law. There are credibly possible systems of governance in which the officials who run the systems have strong prudential reasons for complying with rule-of-law requirements to quite high levels in furtherance of exploitative repression.

Another area of controversy involving the morality/prudence distinction is concerned with the reasons for action which the officials of any legal system implicitly or explicitly invoke when they advert to legal mandates in justification of their decisions. Although Joseph Raz was predominantly a legal positivist, he and his followers have persistently argued that officials' invocations of legal directives assert or imply that there are moral reasons (non-prudential reasons) for citizens to comply with those directives. Whether or not the officials believe all the implications of what they are asserting, their references to legal mandates as the bases for their adjudicative or administrative rulings imply that the addressees of the rulings have been morally bound to obey those mandates. By adverting to legal requirements as grounds for demanding that people behave in specified ways, the officials are adverting to interest-independent reasons for action – that is, reasons for action that are moral rather than prudential. So runs Raz's line of thought, in a number of interesting variations. Hart endeavoured to cast doubt on that line of thought,[26] and I have elsewhere sought at length to strengthen and amplify Hart's objections.[27] While my rejoinders to Raz are multiple, they concentrate on the credible possibility of systems of legal governance in which no punishment-independent reasons for action are asserted or implied by officials' invocations of legal mandates as bases for their decisions. Challenges to Raz's position on this matter are crucial for legal positivism, since his line of thought easily lends itself to being appropriated by natural-law theorists who would deny that legal officials can credibly be systematically mendacious or deluded in the claims which they make concerning the justifiability of their own decisions.

Also eliciting resistance from legal positivists are some arguments by natural-law philosophers who seize upon the fact that law and morality

[25] See M.H. Kramer, *Objectivity and the Rule of Law* (Cambridge 2007), 101–86.
[26] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford 1982), 153–61, 262–68; Hart, *Essays in Jurisprudence and Philosophy*, 9–10.
[27] Kramer, *In Defense of Legal Positivism*, 78–112.

share a wide-ranging deontic vocabulary. Both in morality and in law, key terms such as "rights" and "duties" and "obligations" and "liberties" and "permissions" and "authority" and "justice" and "powers" and "immunities" are prominently wielded. In the eyes of some natural-law theorists, the terminological affinities between morality and law are indicative of deeper connections between those two domains. In the course of arguing that the reasons for action communicated by officials in their authoritative pronouncements are moral rather than prudential, these philosophers have taken for granted that the terminology of "duties" or "obligations" carries the same meaning in legal contexts as in moral contexts.[28] On exactly that point, I have joined Hart in contesting the natural-law position – not by suggesting preposterously that the terminological correspondences between law and morality are unaccompanied by any conceptual overlap, but instead by maintaining that the conceptual overlap is formal rather than substantive. On the one hand, a legal obligation is like a moral obligation in that each of them is a requirement established by some norms that are applicable to human conduct. To fulfil a legal obligation is *pro tanto* to act in accordance with the terms of any legal mandate by which it has been imposed, and to fulfil a moral obligation is *pro tanto* to act in accordance with the content of any moral principle by which it has been imposed. To contravene a legal obligation is to act at odds with the terms of the legal mandate by which it has been imposed, and to contravene a moral obligation is to act at odds with the content of the moral principle by which it has been imposed. To contravene a legal obligation is to commit a legal wrong, and to contravene a moral obligation is to commit a moral wrong. In these respects as well as in some other respects, the deontic structure of the legal domain is homologous to that of the moral domain. On the other hand, however, those several formal parallels between the two domains are accompanied by a major substantive divergence between them. Whereas the correct principles of morality that impose moral duties are always constitutive of objectively binding reasons for compliance with what they require, the legal directives that impose legal duties in any particular jurisdiction do not necessarily constitute such reasons. Some legal directives in some jurisdictions, indeed, do not generate any punishment-independent reasons for their addressees to comply with what those directives require. Not all legal obligations are moral obligations, and not all legal wrongs are moral wrongs; consequently, the language of "obligations" or "duties" is fully available to systems of governance whose officials do not assert or imply the existence of any punishment-independent reasons for citizens to obey the legal requirements that are incumbent on them. The sharing of that

[28] See e.g. S.J. Shapiro, *Legality* (Cambridge, MA 2011), 113–15.

deontic vocabulary between law and morality is consistent with the credible possibility of legal systems in which punishment-centred prudential reasons are the sole reasons for obedience that are implicitly or explicitly invoked by many of the pronouncements issued from officials to citizens.

VI. Morality Contrasted with Empirical Facts: Some Debates

Let us finally turn to the distinction between morality and empirical facts. Here one principal source of disagreements between legal positivists and their foes is the issue or set of issues highlighted by many of the philosophers who refer to "the separability thesis". Jules Coleman, for example, has largely echoed Hart as follows: "Interpreted as a claim about the relationship between substantive morality and the content of the criteria of legality, the separability thesis asserts that it is not necessary that the legality of a standard of conduct depend on its moral value or merit."[29] With such an orientation, legal positivists submit that the endeavours of officials in ascertaining the existence and contents of laws are not necessarily guided by any moral assumptions. Those endeavours can instead concentrate strictly on matters of empirical fact. In this or that jurisdiction, it can be the case that moral soundness is neither a necessary condition nor a sufficient condition for the status of any norm as a law. In reply to Dworkin and other theorists who insist that moral deliberations and judgments are essential in all processes of law-ascertainment, Inclusive Legal Positivists such as Hart have held that the role of moral deliberations and judgments in the processes of law-ascertainment in any particular jurisdiction is a contingent matter that depends on the prevailing Rule of Recognition. The criteria for legal validity in any jurisdiction can include, but need not include, moral standards. Accordingly, the deliberations that occur during the processes of law-ascertainment in some credibly possible jurisdictions do not include moral judgments. In those jurisdictions, the law-ascertaining deliberations are confined to gauging the occurrence or non-occurrence of observable events.

Another area of dispute centred on the moral/empirical dichotomy is a matter of methodology. Many positivists, including Hart most of the time (though not in the final few pages of the ninth chapter in *The Concept of Law*), have insisted not only on the separability of morality and law but also on the separability of morality and legal philosophy. Notwithstanding that every theory must draw upon evaluative judgments in order to be an intelligible account of its explanandum, the values that inform a

[29] J. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford 2001), 151. Elsewhere, Coleman has adopted a somewhat more capacious view of legal positivism's insistence on the separability of law and morality: see ibid., 193, n. 21; J.L. Coleman, "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence" (2007) 27 O.J.L.S. 581.

philosophical theory of law can be strictly theoretical-explanatory rather than moral. In the formation of such a theory, one's evaluations of the relative importance of various phenomena are not perforce moral in their tenor. Instead, a claim about the importance or unimportance of something can derive from one's judgment about the extent to which that thing has to be taken into account by a comprehensive yet parsimonious analysis of the institutions of law and government.[30] Hence, contrary to what Dworkin and many other natural-law philosophers have proclaimed, the inevitably evaluative enterprise of subjecting the nature of law to philosophical investigation is not inevitably oriented toward moral values.

VII. A Brief Peroration

So ends my laconic survey of the paramount lines of confrontation between legal positivists and their opponents. This survey has not in itself presented any arguments in support of the positivist insistence on the separability of law and morality. Rather, it has simply limned some of the chief points of contention that have led positivists to develop an array of pertinent arguments – arguments such as those which Hart advanced and those which I have advanced elsewhere. Nonetheless, although this compendium has merely described some debates instead of entering into them directly, it should suffice to convey their rich multifariousness. It should therefore suffice to indicate how much is omitted when anyone suggests that the wide-ranging positivist insistence on the separability of law and morality can be encapsulated in one terse thesis. When we keep in view the several aspects or dimensions of morality that have been disentangled here, we can grasp how expansively variegated the tussles between positivists and their opponents have long been.

[30] See Kramer, *H.L.A. Hart*, 12–23.