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## MORAL POSITIVISM AND THE INTERNAL LEGALITY OF MORALS

CONRAD D. JOHNSON\*

There is perhaps no more enduring legacy of legal positivism than the thesis of the separation of law and morals. One writer after another, focusing on legal positivist theories themselves, has rightly placed the separation thesis at the center of positivism's contribution to jurisprudential debate.<sup>1</sup> Indeed, the importance of the separation thesis can be seen in the fact that it is usually both the central feature serving as the teacher's and commentator's introduction to legal positivism, and the positivist doctrine to which so many cling even after they have abandoned many aspects of positivist theory in the large.

In assessing the impact—rationally justified or not—of positivism's separation thesis, it is useful to make a distinction between the separation thesis as a *theoretical position* about the differences between law and morality, and the separation thesis as a set of *practical precepts* about the way in which citizens and judges ought to view the law of their society. Most often, of course, the impact of the separation thesis is due to the appeal, often as part of a larger program of political criticism or education, of certain practical precepts: the teaching that laws must be critically evaluated from an independent, moral point of view; the notion, as Richards<sup>2</sup> puts it, that "legal systems may exist that are substantively evil"; and the companion teaching that the existence of a legal obligation does not entail the existence of any similar moral obligation. When considered in this way, as a set of practical precepts associated with a program of political and moral education, the separation thesis has an undeniable appeal and often a valid use. For there is an obvious need to evaluate laws and legal systems from an independent, critical moral point of view.<sup>3</sup>

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1. The *locus classicus* in recent times is Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). See also Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

2. Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069 (1977).

3. Neil MacCormick, in H.L.A. HART 160 (1981), claims that Hart's defense of the separation thesis is based on "an appeal to the autonomy and supremacy of

It is clear that some systems that in common parlance we would designate as legal systems are substantively evil. And there is a straightforward sense in which one can be under a legal obligation to take some course of action even though the morality of conscience speaks against it. These are just some of the ways in which positivism's familiar idea that what the law is is one thing and what one morally ought to do is another has an appeal that is bound to outlast the theories constructed in its support.

In this paper I wish to direct attention to the theoretical side of the separation thesis, and primarily one aspect of that theoretical side, namely, the conception of morality as it is contrasted (usually by implication) with law. The separation thesis is much more questionable when the object is to construct a balanced and adequate theory of morality and law than it is when taken as a set of practical precepts. And this is not because there are no fundamental differences between morality and law; it is rather because positivism's separation thesis tends to mislocate and misconceive those differences, and often does so by implying and presupposing contrasts rather than explicitly stating and supporting them. In the discussion that follows, I shall first examine some of the often-suggested distinctions between law and morality, and the ways in which these distinctions are supposed to support a separation thesis. My argument will lead to several general conclusions which I shall attempt to spell out in some detail: (1) most of the supposed grounds for distinction between law and morality do not work, and proceed from a misconception sometimes of law, but more often of morality; (2) the most promising central idea around which to understand the differences between law and morality is that law involves a greater degree of centralization and external application of sanctions than does morality; (3) since centralization and externality of sanctions are themselves matters of degree, the main differences between law and morality are also matters of degree. I have made these claims at least tangentially in a number of places.<sup>4</sup> What I have to say now overlaps, but, I certainly hope, does not duplicate the ideas in those earlier discussions. My excuse for reviv-

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critical morality." My point is that such appeals can be viewed as practical precepts, in which case they may be on balance beneficial; or as theoretical views about the differences between law and morality or legal and moral reasoning, in which case they are flawed.

4. Johnson, *Moral and Legal Obligation*, 72 J. PHIL. 315 (1975); Johnson, *Toward a Cautious Return to Natural Law*, 14 U.W. ONTARIO L. REV. 31 (1975); Johnson, *What Moral Philosophers Can Learn from the Law*, 7 U. MD. L.F. 115 (1977); Johnson, *Legal and Moral Change: Deriving Rights and Duties from the Preexisting*, 5 SOC. THEORY & PRAC. 305 (1980).

ing the issue now is that, no matter what observations may have been made on the subject before and perhaps by others, the notion that morality and law are fundamentally different is so deeply rooted in the thinking of many that it reappears in a variety of forms, and the sources of this thinking need to be examined with special care.

## I

Let us consider in turn some of the recurrent claims made as part of the positivist separation thesis. I shall consider them not as the practical precepts included in a program of political education, but rather as suggestions about the ways in which law and morality are to be distinguished from one another in a balanced and coherent theory.

*Legal systems may exist that are substantively evil.* David Richards, in the process of evaluating Lon Fuller's claim that there is an "internal morality of law" consisting of, among other things, such principles as *nullum crimen sine lege*, concludes that

the main thesis of legal positivism remains intact: *legal systems may exist that are substantively evil*. Nothing in the language or thought of law ensures its morality.<sup>5</sup>

This observation is, of course, a useful corrective to the notion that laws or legal systems always spring from the same sources as do valid moral criteria, whether those sources be natural evolution, reason, or whatever. It serves as a reminder of the fact that legal systems are institutional, consisting of certain existing practices and critical attitudes, all of which are open to fundamental moral evaluation. But this observation needs to be matched with another equally simple observation: morality too must in significant part<sup>6</sup> function as a body of socially accepted understandings and practices. As such, there can be substantively evil moralities in existence. It is just as clear for morality as for law that, so far as language or thought are concerned, the mere (correct) designation of a social phenomenon as a morality

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5. Richards, *supra* note 2. A similar idea, defended in a somewhat more technical way is to be found in [ ] RAZ, PRACTICAL REASON AND NORMS 162-70 (1975).

6. We need not go so far here as to claim that *all* moral principles or rules must exist as socially accepted understandings and practices; but there is a strong argument that at least a significant part of morality must be. Thus if (as seems plausible) at least *part* of the reason for moral guides to action is to make possible the reaching of certain socially desirable or necessary goals, and if there are different, incompatible ways in which the actions of many can be coordinated to reach these goals, a need arises for generally accepted understandings and practices.

does not guarantee that it is, from a more fundamental point of view, even a tolerable morality. This is so because the concept of morality, and the related concepts of moral rule or moral principle include at most certain formal features such as generality, publicity, and the absence of essential limitation to a designated person or set of persons. Possession of these formal features is obviously consistent with many different substantive goals, including some that are wholly evil.<sup>7</sup>

*The existence of legal rules and principles as a descriptive question.* One idea exercising a firm hold on jurisprudential thinking is that the existence not only of a legal system, but of the rules, principles, and other elements it contains are matters of descriptive fact. To many it has seemed an easy next step to make the comparison with morality: what is morally right or wrong, just or unjust, is not simply a matter of prevailing attitudes and behavior, but is, in some sense, a normative question about what ought to be the case, whether it is the case or not. Thinkers as different in the details of their theories as are Austin and Hart nevertheless have this in common: they attempt to provide accounts of the existence of legal obligation that make it a matter of fact (thus employing an old and familiar philosophical distinction between the factual and the evaluative). In Austin's case, legal obligation unpacks into existence conditions such as commands backed by threats, a habit of obedience to the sovereign, and the fact that a command backed by a threat was issued in a particular case. In Hart's case, the account is more subtle, making a distinction between the behavior and attitudes of ordinary citizens on the one hand and allowing, on the other hand, a distinction between internal and external points of view.<sup>8</sup> In either case, the question whether one has a legal obligation to do some thing is dependent on descriptive factual—even sociological—determinations. And in both cases, whether the system satisfies anything other than the most minimal moral criteria is quite separate from whether it contains genuine, binding legal obligations.

This notion of the fundamental contrast, and thus separation, between law and morality fares much better on the surface than it does under close scrutiny. The contrast suffers when we realize that moral judgments can be, or can be dependent on, descriptive fact just as

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7. Note that Ronald Dworkin, answering Richards on a related point, also draws attention to this fact. See Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1255 (1977).

8. H.L.A. HART, *THE CONCEPT OF LAW* 113 (1961). See also Richards, *supra* note 2, at 1095, for the view that this descriptive characterization can be applied to Dworkin's notion of legal principles.

legal judgments can.<sup>9</sup> It suffers further when we see that legal judgments that go contrary to any existing practices and attitudes can be as meaningful and significant as moral judgments that oppose existing moral practices and attitudes.

Consider first the relevant ways in which moral judgments can be, or can be dependent on, descriptive fact. There is first the obvious connection where the claim of existing moral right or obligation is merely a descriptive claim about the moral attitudes and behavior of a particular group. Not all behavior and attitudes, of course, even qualify as moral, and thus there are some formal criteria that must be satisfied by existing attitudes and practices for them to fall within the descriptive category of 'moral'. This runs parallel to the fact that, even by legal positivist reckoning, there are certain formal criteria that must be satisfied by complex practices and attitudes if they are to count as legal phenomena in our description of legal systems and their contents. This then marks out a theoretical enterprise that we could by analogy designate as 'moral positivism': seeking to delineate the concept of the moral from a sociologist's or social anthropologist's point of view, and proceeding to describe the contents of existing moralities while making no commitment to their moral adequacy.

A second way in which moral judgments can be dependent on descriptive fact is more interesting and complex, and frequently goes unnoticed. Normative moral judgments can be in various degrees pointless, confusing, or undesirable when made in the absence of the appropriate background practices and attitudes. If this is so, then there are important ways in which normative moral judgments depend, for their adequacy or appropriateness, on the existence of certain factual conditions very similar to those described in the moral positivist's claims about the contents of this or that system. Consider a schematic example of this. Suppose that, in the midst of chaotic social conditions, there is widely conflicting opinion about whether one has a moral right to engage in a given kind of behavior X. The consequences of a general permission for people to engage in behavior X, let us suppose, would be perfectly acceptable *so long as there is not also a general permission to engage in behavior Y*. In short, the permissions would together be unacceptable, but just one permission would not only be

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9. A recent discussion of the way in which the existence of social conventions shows how *law* is both a form of practical reasoning and a social fact is to be found in Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982). My claim here is the somewhat more controversial one that morality too depends in significant part on social fact.

acceptable, but socially preferable to a prohibition both on X and on Y.<sup>10</sup> In such circumstances, an isolated judgment that people do have a right to engage in behavior X would indeed have a point, perhaps as an expression of an ideal about how society ought to be organized, but the fact that there would also be some warrant for a different judgment and ideal, *i.e.*, that people have a right to engage in behavior Y, tends to diminish the impact of either judgment. On the other hand, if it is a fact that people *already* recognize and generally act in accordance with a permission to do X but a prohibition on Y, then a judgment that a particular person has a right to do X, but not to do Y, has greater impact and foundation: one who is judged harshly for doing X would be treated unfairly; and one who is allowed without censure to do Y might very well be allowed thereby an unfair advantage as a free-rider. The exact reverse of this would be the case if general behavior, attitudes, and mutual understandings were reversed. More generally, there are situations confronting moral thinking that have the following characteristics:

- (1) There is a goal which is to be secured by the recognition and enforcement of a duty and/or a right; and
- (2) there are at least two structurings of rights and duties,  $S_1$  and  $S_2$ , and these two structurings are incompatible in that the goal will only be secured if all or some substantial percentage of the population act in accordance with one of the structurings; if too few act in accordance with a given structuring, their effort will either be wasted, or will diminish the effect of others' adherence to another structuring.

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10. Some might object that what is morally right or wrong is not something that could change so dramatically from one time to another or from one culture to another. (For here, though people have a moral right to do X, circumstances are easily imaginable in which they would not have a moral right to do X.) But this fact about the particular right or prohibition does not make it non-moral. For example, think of the different moral values that have been attached to saving as opposed to spending. It can be argued that changes in savings habits are sometimes called for by the fact that too many people save too extensively at one time. The (partial) cure for this social defect might well be the changed moral teaching that thrift is not the virtue that it once was. Compare what Robert Lekachman says about John Maynard Keynes' ideas (THE AGE OF KEYNES 71 (1966)):

Keynes's conclusions in the *Treatise* amounted to this: when employment is full and resources are completely engaged, and especially when inflation threatens, then indeed thrift is a virtue. But in any slack economy, further savings intensify the difficulty. Successful alleviation of the economy's condition demanded either increased investment or diminished saving.

This is an important reason why normative moral judgments often depend on the existence of parallel behavior and attitudes even though not being a mere claim about them: without the necessary coordination around *one* of the structurings, a moral judgment made against an individual for having violated a duty or right would have lost much of its point.

Another reason looms when we consider the role that moral judgments play in applying sanctions to the behavior of another. Criticism, censure, and blame are either justified by an adverse moral judgment, or are implicit in the judgment itself. Even if the sanction operates internally, via conscience, it is an evil (though perhaps justified) for the individual involved. It is an evil because it involves pain, or the restriction on one's freedom, or both. Because of this, there are reasons just as there are in law for softening adverse moral judgments, or omitting them entirely, where the person to be judged was not adequately put on notice that his behavior would be considered wrong. And adequate notice is difficult to provide where there is widely conflicting opinion and behavior on the subject.

Just as it is often difficult, given the intellectual framework within which the positivist separation thesis sits, to believe that the appropriateness and even the validity of moral judgments can depend deeply on the facts of attitude and behavior, so too it is difficult to believe that claims about *legal* rights and obligations can sensibly be made even when they go *against* existing attitudes and behavior (even, or especially, the attitudes and behavior of those holding power). Hart recognizes one respect in which such claims can make sense, as when one, taking the *internal* point of view, claims that the only law one recognizes for Russia is that of the Czarist regime.<sup>11</sup> If we pursue this idea further, we will see that it is the putative lack of practical effect or importance of such judgments that makes them appear so strange. This is so because any one individual's insistence that it is the legal system of the Czarist regime that imposes genuine legal obligations and confers rights is likely to have no practical effect at all, even if that person is in an official position in the contemporary U.S.S.R. Nevertheless, moral and legal judgments are not essentially different in this respect. If one person's ideals about familial duties, individual property rights, and other moral relations are accepted by no one else, those conceptions are not likely to have much practical effect. But they sometimes can be given a reasoned and persuasive foundation and may, if accepted by enough people, have practical ef-

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11. HART, *supra* note 8, at 116.



fect too. Similarly, one isolated individual's conception of what legal rights and obligations exist will probably have little practical effect, but it is at least possible that that conception can be supported by argument as solid and objective, and occasionally persuasive as the moralist's.

The fundamental *source* of difference between the legal and moral seems to me to come to this: law differs from morality primarily in the nature and degree of centralization of the system of sanctions. Since decisions about the application of legal sanctions are made by a (usually small) subset of the community, most people have at most a tangential interest in such questions as whether a legal obligation or right really can be shown by valid argument to exist. Their interest is closer to that of Holmes' bad man: what is likely to happen to me if I do this or now that I have done this? Even if they had a theoretical interest in questions of normative validity, this interest would have far less practical application than it would if they were members of officialdom, especially, say, of the highest court. On the other hand, most people do have a more immediate practical interest in questions of normative *moral* validity, because it is the role of the ordinary person, and not of some narrow subset of the people, to decide about and apply ordinary moral sanctions of criticism and blame (and to teach and set examples in ways that inculcate a developed moral conscience). Legal positivism's separation thesis, when addressed primarily to ordinary citizens and others who as individuals may be relatively powerless to alter the behavior and attitudes of officials, can thus make the characterization of law as institutional fact seem quite plausible.

*The alleged fundamental character of normative moral evaluations.* Another idea that is perhaps the most pervasive and deeply held of all is the notion that moral principles, standards, and values generally are by the nature of the case more fundamental than the legal; that, indeed, they may be the most fundamental of all, and that, beyond statements of what the law is lie fundamental critical evaluations that are themselves not legal, but moral. One way of illustrating the point is that it seems wholly natural to proceed first by determining what the law is (and here a sophisticated theorist like Ronald Dworkin can recognize that moral considerations may be involved in answering this question),<sup>12</sup> and then to ask whether the law, as it exists, is from a moral point of view good or bad, just or unjust. But we usually find

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12. See Dworkin's general account in *Hard Cases* in *TAKING RIGHTS SERIOUSLY* 81 (1978); also in his discussion of Richards in *Seven Critics*, *supra* note 5, at 1254.

it difficult to imagine how we might reverse this procedure, *i.e.*, what it could mean first to determine what is morally right or wrong, and then to ask about the *legal* qualities of the moral. The strangeness and unlikeliness of this reflects a well-entrenched idea that it is moral evaluations that are somehow more fundamental than legal, and not the other way around. Indeed, this tendency to view the moral as that which has fundamental importance can be seen in the claim, defended most notably by Lon Fuller,<sup>13</sup> that the very nature of law and legality is such as to include the *moral* properties of publicity, consistency, and prospectivity; it is especially to be seen in interpretations of Fuller's claim.<sup>14</sup> I shall return to this particular contrast below, in my discussion of the internal legality of morals.

Assigning fundamentality to moral evaluations in contrast with the legal is usually harmless enough, but it is not, ultimately, an accurate representation of the relationship between morality and law. Perhaps most important here is the fact that it falsely skews the case in favor of the separation thesis. By designating as moral those critical evaluations that are somehow ultimate, and law as something which must like other things be evaluated at various levels, normative moral evaluations are by definition made to appear unassailable, even while the justice or moral desirability of law is made to appear a contingent matter. On the view that morality is fundamental, the following contrast is both natural and explainable: (1) When a lawyer, or even Dworkin's judge Hercules,<sup>15</sup> makes a careful, critical determination of what the law is, perhaps in a hard case, it is always possible to go on and ask, from a moral point of view, whether this law or legal answer is fully just, the most desirable, or ideal. (2) When any ordinary person makes a careful, critical determination of what is morally right or wrong, good or bad, it makes no sense for that same person to go on and ask, as a *separate* question, whether that is morally ideal, right, or precisely as it ought to be; for the first and second questions are identical. The contrast between (1) and (2) is explainable, on this view, because moral questions just are the most fundamental normative questions that an individual can ask, and they are questions that are to be answered using principles that do not depend, for their validity, on prevailing convention or any other kind of social acceptance. They are the principles by which conventions are judged, and so they cannot be derived from those very conventions.

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13. See L. FULLER, *THE MORALITY OF LAW* (1964); see also *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER*, (Kenneth I. Winston, ed. 1981).

14. A similar characterization is to be found in Richards, *supra* note 2, at 1073.

15. See *Hard Cases*, *supra* note 12.

It is clear that (1) is correct enough, at least when properly construed, but (2) is not correct, and is at the very least extremely misleading. There is the same possibility in morality as in law to divide questions into those about actually existing rights and duties on the one hand, and, on the other, what ideally ought to be the case. For example, if someone asks me what his moral duties are as a parent, I would of necessity give him an answer that derives largely from conventional arrangements. This is so because, given the long-established expectations around which people have coordinated their behavior, certain duties are fairly well determined, such as the duty of a parent to care for his or her biological child. It is hardly your duty to care for someone else's child, unless special circumstances obtain. At the same time that I give my questioner this answer, however, I might recognize that there is something far short of ideal in our existing institutional arrangements, and so one might well ask, as a further, separate question, whether it is just or morally desirable that moral rights and duties be apportioned in the existing way.<sup>16</sup> There are more moral questions that are divisible in this way than we are apt to realize.

## II

A more promising way of conceptualizing those aspects of morality and law toward which the positivist separation thesis is usually directed begins with the fact that law and morality use different systems of sanctions. Law is characterized by a relatively centralized system for the application of sanctions,<sup>17</sup> and by a limited set of

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16. Notice that the familiar philosophical contrast between describing social practices and making normative statements about what ought to be the case is too crude. When I characterize some person's duties as a parent I may in doing so be recognizing more than that this is the way things are usually done and that people generally believe there is such a duty; I also recognize that, partly for that reason, the individual parent ought to do what the duty requires. And this is consistent with believing that existing practices could be better and, indeed, that they ought to be changed.

17. Criticism of sanction theories is by now a familiar piece of contemporary jurisprudence, especially since Hart's criticism of Austin and Kelsen in *THE CONCEPT OF LAW*. But here I do not even implicitly make a commitment to the idea that each rule or norm of a legal system is connected to a sanction for its enforcement. Nor do I claim that every genuinely legal duty must be connected to organized and, as Kelsen would put it, "provided-for" sanctions. (See, e.g., H. Kelsen, *GENERAL THEORY OF LAW AND STATES* 18-19 (1961). For criticism (made in passing), of the idea of distinguishing between morality and law by their types of sanctions, see John Rawls' review of TOULMIN, *AN EXAMINATION OF THE PLACE OF REASON IN ETHICS*; 60 *PHIL. REV.* 576 (1951).

individuals who have the authority to make judgments about the applicability of sanctions. Further, the sanctions in law are primarily<sup>18</sup> "external" in character, *i.e.*, their application to one person requires the actions of some other person and is not a built-in psychological response. Morality, on the other hand, operates via the uncanceled application of external sanctions (as is clear from the fact that one does not need to be an office-holder of any kind in order to direct criticisms or rebukes at others for their wrong-doing or other moral faults),<sup>19</sup> and by the internal sanctions of conscience, the development of which is itself the result of a largely uncanceled system of teaching, example, and other social pressures.

Now instead of thinking of law as something about which one can ask fundamental moral questions (but that morality is not something about which one can ask fundamental *legal* questions), we can conceptualize the matter somewhat differently: there are fundamental normative moral questions, and fundamental normative legal questions, and the central reason why the questions and their answers branch out in different directions is due to the fact that, in each case, we contemplate the quite different application of quite different sorts of sanctions. An example should help to illustrate the point.

Suppose that someone asks why it is that there is a legal duty to pay income tax at a particular rate this year that happens to be different from the last year's tax rate. Now this question might in some circumstances be construed merely as a question about the likely behavior of officials: it might be a request for information about the mechanisms by which people in power alter their behavior, and change the grounds on which they impose penalties. Thus, the questioner may need to know what actions need to be taken by whom in order that judges and those charged with enforcing the law generally will indeed recognize that changes in the law have occurred. This question fully parallels the question in which one asks for information about

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18. Some may be primarily internal. Thus, the duty of the President to "take care that the laws be faithfully executed" in Article II, Section 3 of the U.S. Constitution does not have any clear external sanction attached to it for its enforcement. A *locus classicus* for the distinction between external and internal sanctions, as well as the use of the idea of sanctions to define duty is in J.S. MILL, *UTILITARIANISM* (Oskar Pietsch ed. 1957). A good account of Kant's use of the external-internal distinction is in O. NELL, *ACTING ON PRINCIPLE* Ch. 4 (1975).

19. Here I take some liberties. It is clear that not everyone is literally *equally* qualified or authorized to direct criticism at anyone else who is at fault. Parents more appropriately direct criticism at their own children than at other people's children; individuals more appropriately at friends than at total strangers, and so on. But nothing like the clear lines of official authority exist in morality as in law.

people's moral attitudes, and what will lead to criticism and trouble in this community, even while the questioner has in no way identified with, or internalized, the ideals and standards of that community.

The question about the legal duty to pay income tax may, however, take a normative direction. The request may be for an account that links this claim of legal duty to normative standards the questioner either accepts already or ultimately will accept after reasoning and reflection. This normative version of the question obviously parallels the normative version of the moral question, *i.e.*, that in which we ask why we are bound in conscience and by the community to do or refrain from doing certain things. But it is natural that the kinds of justification appropriate to the question will be different in the two cases. This is so primarily for two reasons: (1) In justifying the claim that persons in this situation have a legal duty to pay such-and-such taxes, and that consequently it is proper for those in official positions of power to penalize them if they do not, you must show that those persons in power, and not just anyone, appropriately apply the sanctions in case of failure. (2) Justifying the claim of legal duty also requires, in a way that a moral claim would not, a justification for using the often blunt and harsh sanctions of the law and an enforcement mechanism with its own peculiar inefficiencies and dangers.

These two features of legal justification account for a number of differences between the legal and the moral, perhaps the most important of which is the heavily institutional character of legal justification. Consider in turn the impact of each of (1) and (2). The effect of (1) is, among other things, to put a heavy burden on the justification of institutions and persons as having legitimate authority. If I ask why I have this particular duty to pay this particular tax, I need to know why it would be proper for (i) *these* individuals exercising power to punish me, and (ii) why for *this* failure (say, to pay a 24% effective rate rather than a 27% effective rate). If there is an adequate answer to these questions, it derives directly from a political philosophy. Various stories can be told, and this is surely not the place to examine even one of them with care. But some might stress the role of the constitution, in a system with a written and recently adopted constitution, as well as the role of the majoritarian principle at various levels. Thus, if we ask why there is only a 24% effective rate even though a politically influential group would prefer it to be 27%, the answer is that the 24% rate was duly enacted by legislators elected in accordance with the constitution. If we ask why that particular constitution is determinative, the answer might be that it was adopted by a two-thirds majority of representatives of the states (or

other communities) at the constitutional convention. If we ask why a two-thirds rather than three-fourths majority was sufficient, perhaps the answer is that all participants in the convention at least tacitly understood that such would be the rule, and no one ever really objected. Perhaps one or more of these answers would fail for some reason, and another theory would have to be provided, perhaps some principle of fair play.<sup>20</sup> What is important is that an account of a legal duty must focus, as an account of moral duty usually<sup>21</sup> does not, on the authority of a narrow set of individuals to *create* duties of this kind; and an account of legal duty must also focus, as an account of moral duty rarely does, on the authority of some narrow set of individuals to apply the sanctions backing those duties.

That there is a subset of society who legislate and enforce the law arises out of functions of law that themselves explain much about the differences between moral and legal justification. This function is that of allowing for quick alterations in the set of legal duties and rights, and in a way that is consistent with a substantial degree of objectivity in the determination of what duties and rights there are. The understanding that there is a narrow subset of individuals who can alter those legal relations through acts of will advances these goals far beyond what is possible in morality, where there are no clearly designated persons whose understood job it is to legislate for others. Now these functions explain further why legal justification supporting normative claims about legal rights and duties must center on (though not be exclusively defined by) existing institutional facts. That one particular regime happens to be long established in power is a fact that gives authoritative weight to its legislation and its definitions of rights and duties. The existing regime is, after all, the one around which opinion about law is most coordinated, so to opt for other possibilities, perhaps on grounds of another political philosophy of legitimacy, is to undercut the goal of objectivity. Though this fact of existence carries much weight, what we might call "purely philosophical" considerations of legitimacy still carry weight too. Thus, a regime in power may be rejected as incapable of imposing legal obligations in the normative sense because conditions of legitimacy have

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<sup>20</sup>. On the principle of fair play, and on the subject of the foundation of political obligation generally, see A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATION* (1979).

<sup>21</sup>. But an account of moral duty, if wholly adequate, must of course explain why individuals sometimes do have the authority to create moral duties. Indeed, the authority of the legislator is usually not just the authority to create legal duties, i.e., to bind citizens in conscience as well as by way of external sanctions.

not been satisfied. In this case, claims about the existence of legal obligation, made by one who rejects the regime as illegitimate, would be descriptive statements about exercises of power and the likely consequences of various actions.

It is instructive to examine why claims or denials of moral obligation running counter to prevailing attitudes and behavior are more frequently plausible than are their legal counterparts. This fact gives rise to the many familiar examples used to illustrate the "separation" of law and morality. Thus, we are told in most introductory courses in ethics, from the mere fact that it is widely accepted that people have no obligation to do X it does not follow that such is really the case. A similar denial that there is a legal obligation to do X, even when such an obligation is recognized and enforced by a well-established power structure, would have at the very least an odd ring to it. A primary reason for this difference is that the function of providing very specific, practically authoritative, objectively demonstrable, and readily alterable coordinations of actions for a large society does not figure prominently in morality. As a consequence, compromises between ideal conceptions of what obligations there ought to be and the practical facts of what conventions already exist are not present to such a degree.<sup>22</sup>

Consider now (2), the way in which claims of legal rights and duties require a special kind of justification that takes into account the bluntness of legal sanctions and the mechanism by which they are applied. Legal sanctions *generally* have one or more of several characteristics that are not *usually* associated with moral sanctions. First, legal sanctions are commonly more severe than moral sanctions. One reason for this (beyond the obvious fact that they sometimes include large fines or imprisonment) is that legal sanctions have a degree of finality that the moral do not. Once appeals have run out, it is part of the nature of a legal system to allow for no (or relatively little) disagreement *that has any practical effect*. In a morally pluralistic society, on the other hand, there may be lingering disagreement about the degree of one's moral fault; judgments are constantly open to reconsideration; and one can often flee the opprobrium of one sub-community for the safe haven of another sub-community of different convictions. Secondly, reasons of cost as well as of the protection of

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22. I have tried to illustrate the ways in which practical considerations of what is politically feasible can affect the rational person's conception of a moral code worthy of support. See Brandt's *Ideally Rational Moral Legislation*, 7 SOC. THEORY & PRAC. 205 (1981).

liberty have the result that legal mechanisms for gathering and presenting evidence will screen out some subtleties that, in a close interpersonal relationship, would be both available and relevant to making moral (and other) judgments. Thus, you and I may know a great deal about our interaction, all of which is highly relevant to judging who is at fault or who misled whom for instance, but to have a legal system that has the same access to all those facts and impressions would likely be costly, dangerous, or just impossible. Many consequences for normative legal claims flow from these facts, but two deserve special attention. One is that there is a standing reason (which again may be overridden by other considerations) against extending legal duties with their attendant sanctions into certain areas where moral sanctions may still operate freely. There are obvious reasons for refusing to attach legal penalties to one lover for misleading the other, and for refusing to enforce rash promises made without bargained-for consideration. Another consequence is that the rule-of-law principle, *nullum crimen sine lege, nulla poena sine lege*, a principle which, I shall argue, has application in moral reasoning,<sup>23</sup> has special force in legal thinking. The very seriousness and finality of legal sanctions, as well as their alterability through legislation, when compared with those of morality, make adequate notice acutely necessary.

Consider again the concept of an "internal morality of law" by which, it is suggested, there is incorporated at the very foundation of law some fundamental moral principles. Presumably, such requirements as those of publicity, consistency, and prospectivity are thought to be moral requirements (on the received view) because they do not owe their validity to any enactment or to the contingent fact of being accepted in this or that legal system.

This conception of the matter is very subtly flawed, however. The requirements of publicity, consistency, and prospectivity (among others) belong both to morality and to law. They are requirements belonging to the efficient and fair governance of conduct, whether that governance be by the mechanisms of law or of morality. Therefore, to think of these requirements as moral principles at the foundation of law is to lend unwarranted support to the view that law, in contrast to morality, consists primarily (or exclusively) of socially constructed and alterable norms.

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23. Thus, it is not accurately construed as a *moral* principle that legal systems contingently or necessarily contain. It is, rather, a *normative* principle that has application both in legal and in moral thinking.



Following a line of philosophical thinking that appears especially in the Kantian tradition,<sup>24</sup> we can think of the concept of right as a general category which includes moral and legal standards of right as sub-categories. The requirements of legality derive from the functions shared by both law and morality. In this way, those (like Lon Fuller) who have claimed that we must ask what the functions and purposes of law are have touched on important truths: one is that there is no very clear foundation for legal justification in the absence of a conception of the functions<sup>25</sup> of a moral code, and of moral thinking and that these functions overlap those of law at several major points.

It is illuminating to conduct a thought-experiment, attempting in the process to see how one might argue, with as much force as the legal positivist argues for the institutional character of law and the priority of the moral point of view, for the priority of the legal point of view and the institutional character of morality: prospectivity, publicity, consistency, and generality are properties characteristic of the legal point of view, and derive from the requirements of ruling society by law. Further, moral opinions about how people ought to behave, if these opinions are to form the basis for acceptable guidance and criticism, must have these properties. Moral opinions and attitudes, though these are sociological and sometimes institutional facts, must satisfy legal tests if they are to be binding on individuals as moral guides are, *i.e.*, in conscience and as guides for informal criticism. At this point, the theory might go in one of two directions: some might

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24. Contemporary philosophers who hold that moral principles must be universal and public are easy to find. Kurt Baier, in *THE MORAL POINT OF VIEW* 195-96 (1958), holds that "the teaching of morality must be completely universal and open," and that an esoteric morality is a "contradiction in terms." John Rawls, in *A THEORY OF JUSTICE* 130-31 (1971), presents the requirement of publicity as one of the constraints of the concept of right. The correctness of this and other such constraints derive, in his view, from the role that principles of right play in adjusting the claims that persons make, both on their institutions and on one another.

Rawls' ideas derive from Kant, who states that the formal attribute of publicity is a feature of *both* the ethical and the juridical. If I cannot declare a maxim openly without frustrating my own intention; if it must be kept secret in order to succeed; or if it cannot be publicly acknowledged without arousing the resistance of others, it does not satisfy the requirement of publicity. See the discussion in *Perpetual Peace*, in *KANT'S POLITICAL WRITINGS* 125-30 (Hans Reiss ed. 1970).

25. This reference to the "functions" of a moral code need involve no commitment to utilitarian moral theory. Whether such a commitment is involved depends on the full answer to the question, what those functions are. Thus, if one function is to insure that people not tell lies *simply* because lying is wrong in itself, that is consistent with a non-utilitarian moral theory.

claim that "what morality is is one thing; whether it satisfies legal tests is another." Others might claim that morality inherently has its own "integral legality."

Both views, and the priority of legality over morality on which they are based, are, I would maintain, as unbalanced and misleading as the more familiar view that places morality prior to legality. As parts of practical reasoning, law and morality are more accurately viewed as branching off in slightly different directions rather than as one single strand beginning with moral reasoning as most fundamental and leading to legal reasoning as less fundamental.

### III

The idea of a "separation" between law and morality itself needs, for proper assessment, to be separated into the quite different theses it can be understood to include. The following are perhaps the most common:

- (1)(a) what the law requires
  - (b) what one morally ought to do
- (2)(a) what one's legal obligations are
  - (b) what one's moral obligations are
- (3)(a) what the law is
  - (b) what the law ought to be

Each of these becomes a separation thesis when combined with the further claim that no statement about (a) entails anything about (b). For each of these, the separation theorist would say that significant conclusions about (b) would follow from (a) only when combined with premises about the moral properties of existing law or the legal obligations it imposes.

Let us examine these in turn, beginning with (1). This separation thesis is most plausible when interpreted in the following way. Think of what fills (a) as mere descriptive statements about a particular legal system. Of course, one might insist that only a system in which officials respect such requirements as those of consistency, publicity, prospectivity, really is a legal system; but this does not really tell us anything significant about (b), since substantively evil laws can often be made to satisfy those requirements. Also, on the most plausible interpretation, (b) is filled out with a normative conclusion, from a moral point of view, finally reached after all things have been considered, about what one as an individual ought to do. Since there are

many ways in which existing law can in some systems fail to be morally worthy of obedience, nothing significant about (b) follows from statements about (a). But on another interpretation of (1), the impact of the separation thesis is considerably diminished, and certainly the separation claim must become more complicated. On this interpretation, a claim about (a) is a claim about what centralized, external sanctions would *appropriately* be applied to various kinds of behavior. The claim is thus an internal one (to use Hart's terminology) or a normative one (to use mine). It is not simply a descriptive claim about what sanctions are generally applied, or likely to be applied. We should bear in mind again the nature of such a normative claim, and particularly the way in which it will probably be tied to the facts about what institutions and practices already exist. So long as those institutions and practices are, in the view of one making a normative judgment about legal obligations, basically legitimate and tolerably just, it will not be necessary that particular laws be ideal (from any point of view) in order for it to be appropriate for people to enforce them by applying sanctions for failure to obey. Further, the making of a *normative* judgment of this kind of *necessity* involves accepting the idea that the appropriate people are acting properly when they do apply these sanctions. To what is one then committed as to (b), *i.e.*, what one morally ought to do? It does not without more follow that one is also bound in conscience to do what the law requires. Thus, one can consistently hold that the official application of formal, external sanctions for failure to do X would be legitimate and proper, but that an individual need not feel guilty for failure to do X (which the law requires).<sup>26</sup> One might, for example, hold that this area of behavior is one in which it would be too much to expect individual, unpressured cooperation with the law, but that external legal sanctions are nevertheless appropriate since that would produce the right balance of general conforming behavior with disobedience where individual circumstances or conviction make such disobedience desirable or at least acceptable. Or perhaps the government has legitimate authority to make laws and impose sanctions, but an individual has conflicting obligations to family, religious group, or other sub-group. In that case, the latter obligations may take priority *in conscience* even though one

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26. One might call such obligations *hollow* obligations in that they are properly enforceable by external sanctions, but not by internal sanctions. In this connection, see Rolf Sartorius's attack on what he calls a "fallacious general principle," *i.e.*, one that "lends credence to the naive view that the legal prohibition and punishment of morally justified behavior must represent either imperfect human judgment, bad laws, or faulty institutional design." R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 56 (1975).

would not in the circumstances deny the authority of government to pursue the individual disobedient.<sup>27</sup>

Though (1)(a) does not imply strong conclusions about (1)(b), it would perhaps be more accurate to say that it does create a *presumption* about (1)(b). Taking the position that the law requires some behavior X, and meaning thereby that it is right and proper for officials to enforce that behavior, does create the presumption that the behavior in question is sufficiently desirable or necessary from a social point of view that one should also feel guilty for failing to conform. Having realized the *propriety* of external sanctions, one who holds that there is no reason in conscience for complying assumes a burden of explaining why. For the presumption is just that, having given or somehow recognized the authority of others to get you by coercive measures to do or not do something, you have also recognized their authority to bind you in conscience. To deny this outright is at least strange, and it teeters on the brink of converting one's claims about what the law requires into purely descriptive observations about regular and likely uses of power. In this latter case, one's view of the law in one's own society would be hardly distinguishable from one's view of power relations in that or in any society.

Consider now (2). A full exploration of such connections as there might be between (2)(a) and (2)(b) would need to take account of the fact that each can be understood as having either a normative or a descriptive meaning, and that therefore four combinations of (a) and (b) are possible.<sup>28</sup> The main points just made in connection with (1) apply here as well. The case for a connection between (2)(a) and (2)(b) is stronger if the claims of obligation in each case are understood to be normative claims; it is weaker if (a) is understood as descriptive and (b) as normative. Here, one primary philosophical task is to show how there can be normative claims of legal obligation that are not

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27. On this general subject, see the stimulating essay by Michael Welzer. *The Obligation to Disobey*, in OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR AND CITIZENSHIP 3 (1970).

28. Descriptive (premise) to descriptive (conclusion), normative to descriptive, descriptive to normative, and normative to normative. To be sure, these are not equally likely combinations. Thus, when legal positivists defend a separation thesis, it is usually and most plausibly aimed against the idea that from a descriptive understanding of (a) one can draw normative conclusions of kind (b). But surely other of these combinations are of interest too. For example, those who are interested in the concept of obligation from a descriptive, social-anthropological point of view, and who seek to construct an adequate account of the way in which legal obligations must in fact be connected to moral obligations, must focus on the inference from descriptive premise to a descriptive conclusion.

just disguised descriptive claims. A normative claim of legal obligation involves a recognition of the *appropriateness* of certain individuals in official positions applying sanctions under specific conditions. A descriptive claim does not involve any such recognition. And, to summarize an earlier argument, normative claims of legal obligation are likely to track descriptive claims of legal obligation more closely than moral claims are.

But suppose that we take both (2)(a) and (2)(b) to be normative. If one acknowledges the existence of a legal obligation to do X, that creates at least a presumption that there is also a moral obligation to do X. Those who have argued that there is this kind of a connection between law and morality have often sought to make the case in a way that is consistent with a descriptive account of legal obligation. Thus, one might argue, for example, that by and large legal systems are fairly just and at least not evil, that most of the time obedience is better than disobedience, and that we should therefore act on the assumption that legal obligations ought to be respected, particularly if there is no strong evidence available to the contrary. But my argument here is a different one. It is that the same kind of foundation supports a normative claim of moral obligation: if you grant that the state is justified, on principles you respect and accept,<sup>29</sup> in employing sanctions against you to get you to do X, then to deny that you also have a moral obligation to do X calls for a special explanation. To be sure, this moral obligation is not to be identified with that which one morally ought to do, all things considered. Moral philosophers have often made a distinction between these two things, using such examples as the necessity of breaking a promise in order to save a life. In such a case, one might indeed have a moral obligation arising out of the promise, but other important moral considerations, such as the need to prevent a disaster, outweigh the importance of keeping the promise. So this provides some slippage between what one is morally obligated to do, and what one ought to do after taking all things into consideration.

Finally, consider (3). Here we must make a distinction between "the law" where that is understood as law enacted by a legislative body, and "the law" understood as those entrenched principles and

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29. By speaking here of being "justified on principles you respect and accept," I mean only that conditions are met for the foundation of authority and legitimacy. This authority of government over the individual is in liberal political theory usually grounded in some form of consent or acceptance, if even only hypothetical, on the part of the individual citizen to be obligated. Whether that is really the case, and, if so, what form that acceptance must take, is not something that I can examine here.

policies that do not owe their force to legislative enactment. In the first case, the natural focus is on whether the legislature did indeed enjoy the authority to enact that kind of law. The fact that a legislature can typically exercise such authority within a broad range without seriously touching the boundaries of its legitimate authority means that relatively little about what legislated law ought to be can be inferred from what it is. This is so also for the related reason that judgments about what ought to be the law are very commonly judgments about the relative utility of various possible pieces of legislation. Sometimes these utilitarian judgments are in answer to questions about how to maximize utility through the pursuit of some social goal; other times these utilitarian judgments are connected to judgments about rights, as when the costs of protecting rights must be weighed in the balance. The important point is that, within the rather broad framework inherent in legislative authority, the law can fall far short of what it ought to be while nevertheless remaining law.

When questions about what the law is tend, as they usually do in what Dworkin has called "hard" cases, to focus on those entrenched principles and policies that have not been enacted, the separation between what the law is and what it ought to be is more difficult to maintain. So, as Dworkin puts it, "[i]n some cases the answer to the question of what the law requires may depend on (though it is never identical with) the question of what background morality requires."<sup>30</sup> Indeed, when legal questions do not focus primarily on what has been enacted, there is naturally more place for background morality to play a role in determining what the law is, for the fact of enactment has the effect—indeed, is designed to have the effect—of blocking out moral considerations over a substantially broad range.

#### SUMMARY

The positivist separation thesis, though possibly beneficial as a practical precept, is in most forms unacceptable as a theoretical position about the differences between law and morality. This can be seen by examining several of the most important claims made by separation theorists in their attempts to contrast law and morality. The contrasts turn out to be false, though this has not always been immediately obvious.

In Section II, I suggested an alternative starting point for conceptualizing the difference between law and morality: that law and morality are characterized by different systems of sanctions. On this

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30. See *Seven Critics*, *supra* note 7, at 1254.

view, both law and morality have associated with them descriptive and normative points of view; neither can properly be regarded as prior to the other at the most fundamental level, and differences that there are in legal and moral points of view spring primarily from differences in systems of sanctions and their contemplated use in actual or hypothetical situations.

In Section III, three different simple versions of the separation thesis were examined in light of the idea that law and morality differ most fundamentally with respect to their systems of sanctions. Pursuing the idea that there are legal analogues of normative moral claims, and moral analogues of descriptive legal claims, we can see that the various versions of the separation thesis do not fare so well when both legal premise and moral conclusion are understood as normative claims. If you grant that the state is justified, on principles you respect and accept, in employing sanctions against you to get you to do X, then there is a presumption that you should recognize a moral obligation as well, and to deny this requires a special explanation.