

# THE NATURE OF LAW

## An Introduction

*Andrei Marmor*

Imagine the following scenario: driving on a California highway, you are pulled over by a police officer, officiously informing you that you have been caught on his radar exceeding the speed limit and are about to be fined. You are in a philosophical mood, and the police officer happens to be very patient and ready to answer your questions. So first you ask him "Officer, have I done anything wrong?" "Of course you have," he tells you. "You have exceeded the legal speed limit." "No, no, that's not what I mean," you clarify. "Have I done something really *wrong*? Morally wrong, for example?" "Well, I don't know that," the officer replies. "I only know that you have violated the law." "And is that necessarily wrong?" you ask. The police officer replies that it is not really for him to tell. He just knows that you violated the law. You realize that this is not leading anywhere, so you try a different tack: "Officer, what makes it the law that the speed limit here is, as you claim, 65 mph?" The officer responds by citing you the relevant section of the California Vehicle Code. "But what makes this code the law?" you ask him. "It is the law in California," he says, "because the code was duly enacted in 1959 by the California Legislature." "But what makes that enactment the law?" you ask. "After all, enactment, as you call it, is just an event that happens somewhere—people gather in a hall, talk, argue, raise their hands, etc.—why is that the law?" Still patient, the police officer explains to you that the California Legislature is an institution created in accordance with the Constitution of California, and granted by it the authority to enact such laws as the California Vehicle Code according to certain prescribed procedures. "Now I see," you reply. "The California Vehicle Code is the law around here because it was enacted by a legislature, and the legislature's authority to make such laws was granted to it by some other law, the Constitution of California. I get it. But what makes the Constitution of California the law around here?" The police officer knows the answer: "The California Constitution is the law because it was duly enacted by the authorization granted to the people of California to have such a constitution by the Constitution of the United States." Still, you are not quite satisfied. "What makes the U.S. Constitution the law?" you ask. "The U.S. Constitution? It is the supreme law of the land!" the officer proudly proclaims. "Yes, yes," you tell him. "I know that it is what people say. But what *makes it* the supreme law of the land?" you ask him again. Not surprisingly at this point the police officer loses his patience, hands you the citation and off he goes.

As a curious philosopher, you remain unsatisfied by this little encounter. The police officer dodged two crucial questions: first, you still do not know whether you have done anything wrong, though you ended up with a hefty fine that you have to pay. Is this all there is to it? Violating the law is just unpleasant, resulting in something bad that happens to you if you are caught? Mustn't the law assume that you deserve to be punished? Second, you still have no idea what makes anything "the law." You have learned that certain actions or events in the world gain the legal significance that they have by way of an authorization granted by some other law; but this chain of authorization comes to an end; at some point we end up with something that amounts to "the supreme law of the land," the kind of law that authorizes the creation of all other laws. But what makes *that* the law? You still have no idea.

Nevertheless, this encounter was not without merits. Although we have not learned much about the answers, at least we know what the questions are. The two main questions that the police officer has dodged are the main questions about the nature of law that have preoccupied philosophers for centuries: one is about the normative character of law; the other is about law's conditions of validity. As we shall see, both of these questions concern, though in different ways, the relations between law and morality. I will take them up in reverse order, starting with the question about the nature of legal validity.

### The Conditions of Legal Validity

Whenever one says, "It is the law that X" or, more precisely, "according to legal system S at time *t* it is the law that X," one expresses a proposition that is either true or false (or, perhaps in some cases, it is indeterminate whether it is true or false). The philosophical question here is: what makes it the case that the proposition is true (or false)? What does it *generally* depend on? Notice that it is not a legal answer that we seek here. As we learned from the encounter with the police officer, the legalistic answers are bound to run out. In other words, we are not asking what makes this or that particular requirement a legal one, but what makes anything at all legal to begin with?

Sometimes the best way to understand a philosophical question is by way of looking at the controversies that exist about its answer. The main controversy about the general question of legality is, ultimately, about the possibility of reduction. Can we fully explain the conditions of legality in terms of something else, more foundational in nature? In particular, is it possible to reduce the conditions of legal validity to social (*viz.*, nonnormative) facts, namely facts about people's conduct, beliefs and attitudes? Or is it the case that no such reduction is possible, partly because the content of legal norms, especially their moral content, also bears on the conditions of their validity?

It is the nature of theories, in general, that they try to explain one thing in terms of another. There is, however, a type of theory or explanation we call *reductive*: if there is a clear demarcation of one type of discourse or class of statements, and we can provide a full explanation of that class of statements in terms of some other type or class of statements, then the explanation is reductive. For example, if we could fully explain the realm of our mental life in terms of truths about the physical aspects of the world, we would have provided a reduction of the mental to the physical realm. It is this kind of reduction that we need to consider about the legal case as well. Some legal philosophers have claimed that we can explain what constitutes legality in terms of something else, more foundational in nature. According to this line of thought, in order to answer the question about the conditions of legal validity, we need to have an account of the

relevant social facts, concerning the ways in which people behave and the kind of beliefs and attitudes they share about their conduct. Other philosophers, however, deny the possibility of such a reduction. They claim that legality is not fully explicable by social facts, and mostly because legal validity is partly a matter of moral truths. At least in some cases, they claim, truths about morality determine what law actually is.

With one notable exception (Hans Kelsen's "pure theory of law"; see Marmor 2011, ch. 1), the jurisprudential tradition called *legal positivism* (Postema 2012) strove to provide a reductionist account of legal validity. One of the most influential nineteenth-century legal positivists, John Austin, propounded a theory of law that is perhaps the clearest example of a reductionist account of law. According to Austin, law consists in the commands of the political sovereign. A command is defined by Austin as the expression of a wish by one person (or group of persons) that some other person(s) behave in a certain way, backed by a threat of sanction if the addressee does not comply. "Do/don't do this . . . or else . . ." And then sovereignty is defined sociologically: the sovereign is the person or group of persons who are habitually obeyed by a certain population and are not themselves in a habit of obeying anyone else (Austin 1832).

Thus, according to Austin, the conditions of legal validity are fully reducible to facts of a nonnormative kind: facts about the relevant social reality constituting political sovereignty, identified by habits of obedience, and facts about actual commands issued by (or on behalf of) the sovereign. Though there is something intuitively compelling about Austin's model, later legal positivists have subjected the command model of law to fierce criticism. In particular, H. L. A. Hart, in his seminal work *The Concept of Law* (1961), devoted three or four chapters to a detailed critique of Austin's theory. But a careful reading of Hart should reveal that it is not Austin's reductionist project that Hart objected to, since his own theory of law is just as reductive. Hart's disagreement with Austin is about the main building blocks which are supposed to constitute the foundations.

Austin's main insight has two components: that law always consists of commands (do this . . . or else . . .), and that it always originates with the political sovereign. Hart argued that both theses are fraught with difficulties. To begin with, only a small fraction of law has the structure of a command. The main provisions of a criminal code, or traffic regulations for that matter, do have such a structure: they impose an obligation (do/don't do this . . .), backed by a threat of sanction for failure to comply (or else . . .). However, a great many laws, perhaps even most, do not purport to impose an obligation; they grant legal powers of various kinds, that is, the power to introduce a change in the normative relations that obtain between the relevant parties concerned. Consider, for example, the laws which determine how to form a legally binding contract; such laws do not have the structure of "do this . . . or else." The law is not in the business of telling anyone to form a contract; it is up to the parties whether they want to enter into contractual relations or not. The law only provides a tool here: it designates certain ways in which people can introduce a change in their legal relations, if they want to do so. And this is more typical of most of the areas of private law and many other legal domains. Most of the law is not like the criminal law, where the law imposes an obligation backed by a threat of sanction (Hart 1961, ch. 3; for more details, see Marmor 2011: 36–40).

Furthermore, H. L. A. Hart and other contemporary legal positivists have argued that early positivism exaggerated the centrality of sanctions, and more generally, law's coercive powers, to an understanding of what the law is, and what its main functions in society are. No doubt, the law is a coercive order (Edmundson 2012), and many laws

are backed by a threat of sanction for failure to comply. But it is very doubtful that this element of force or law's ability to coerce its subjects is as central to law's main functions in our lives as people tend to assume. In order to see this, consider a thought experiment suggested by Joseph Raz (1990/1975: 158–60): imagine that there is a world inhabited by creatures who are exactly like us, with one important difference, namely, that whatever it is in human nature that requires the law to threaten us with sanctions, those people do not have. They just do not need to be threatened with sanctions in order to comply. Now ask yourself, would this world have need for various norms and institutions that are similar to what we call law in our world? The answer is clearly yes. Even in this world without need for sanctions, people need rules to solve large-scale coordination problems, and rules and institutions to determine what needs to be done when people have reasonable disagreements about their collective endeavors. They would need institutions to determine matters of fact in conflictual situations, and so on and so forth. In short, the law's ability to use force and compel compliance, important as it is, is actually much less important than usually thought. Many of the functions that law serves in our public lives have very little to do with the need for coercion (for some reservations about this argument, see Marmor 2011: 42–44).

Hart's second main disagreement with Austin's reductionism consists in his argument that we cannot explicate the sources of law in terms of political sovereignty because the very idea of sovereignty is a juridical one. Law partly constitutes our conception of sovereignty; it cannot be reduced to it. We can only identify the political sovereign on the basis of the constitutional legal structure that prevails in the relevant community, not the other way around. Austin's idea that habits of obedience are sufficient to constitute political sovereignty, Hart argued, is not a workable idea (Hart 1961, ch. 4). Think, for example, about this question: who is the sovereign in the United States these days? That is, think about the question: Who is the person, or group of persons, that U.S. residents habitually obey, and itself is not in the habit of obeying anyone else? Mindboggling question, no doubt, but whatever answer you come up with would have to be based on facts that you know about U.S. constitutional law. In short, we just cannot suggest that law is whatever the sovereign commands, because the very identity of the sovereign is law dependent. First, we must have some legal regime in place, then we can come up with some notion of who the sovereign is (that is, at least as long as we seek to identify the sovereign as a source of law).

The failure of Austin's command theory of law does not necessarily doom the reductionist project. In fact, Austin begins with a sound intuition. Even if laws are not necessarily commands, as he thought, they are, by and large, products of deliberate human creation. Laws are created by human agents, enacted by institutions or persons in various institutional roles (Kelsen 1961/1945: 110–11). We need not assume that this is necessarily or always the case; suffice it for now to admit, as one must, that it is typically the case that laws are made, that they are products of an act of will. But of course not everyone who might want to enact a law or change one actually can. My proclamations to the world, wise and commendable as they may be, are not going to have any legal effect whatsoever. I am not in a position to make laws or change existing ones. But then, who is? And more importantly, what makes it the case that anyone is in such a position? Hart's answer boils down to this: certain agents get to make (or modify) the law in a given population in virtue of the fact that most people in the relevant society *regularly behave* in ways which assume that these agents get to do so, *believe* that to be the case, and share certain *critical attitudes* that are in line with this shared belief. In every legal

system in place, there are some *social rules* followed by the relevant population determining who gets to make law and how it is to be done. Hart called such rules the *rules of recognition* (1961, ch. 5). The social rules of recognition constitute what we take to be the conditions of legality in the relevant legal system. (So now, if you want to chase down the police officer who got tired of your questions and tell him what makes it the case that the U.S. Constitution is the supreme law of the land in the United States, you could tell him that according to H. L. A. Hart, it is the case simply because most Americans just *take it to be the case*. It is the main rule of recognition we follow around here; certainly the rule that judges, lawyers, legislators and other officials follow, which is what really matters.)

Notice that this is just as reductionist an account of legal validity as Austin's, albeit based on different building blocks. Legality is fully determined, according to Hart, by the social rules of recognition. A social rule consists of actual patterns of conduct accompanied by certain beliefs and attitudes. We have a social rule when there is a regularity of behavior in the relevant population, attended by a complex idea that Hart called "acceptance" of a rule, which consists of (1) a belief shared by most members of the population that the existence of the rule provides them with reasons to comply and (2) a shared attitude of positive endorsement of the rule that is manifest in its use as grounds for exerting pressure on others to comply and criticizing them if they do not (Hart 1961: 82–86).

The reduction is a bit complex here, so let me reiterate the steps: the first step is to realize that there must be some normative framework that determines how law is created or what makes certain actions and events have the legal significance that they do. This normative framework consists in the rules of recognition that prevail in the relevant society. The second step is to realize that these rules of recognition are social rules, actually practiced in the community. Finally, Hart offers a reductive account of social rules, given in terms of people's regularities of behavior, their beliefs and attitudes. Notice that this is also an aggregative account of social rules because it purports to provide an explanation of what social rules are in terms of the conduct, beliefs and attitudes of individual members of the population. If most members of a given population behave in a certain way, and share some beliefs and attitudes with respect to that behavior, then we have "the idea of a social rule," Hart claimed, "without which we cannot hope to elucidate even the most elementary forms of law" (1961: 78).

The kind of reduction Hart offered about the idea of legality has come under a lot of pressure over the years. In particular, it has been argued that no such reduction is possible because moral considerations can sometimes determine what the law is. According to these views, often simply called anti-positivism, the content of the law is partly deduced by moral (and perhaps other types of evaluative) reasoning. We will take a close look at one of the most influential arguments to that effect, propounded by Ronald Dworkin (1977).

First, however, some additional background. Hart clearly recognized that his views about the nature of law entail that the law is bound to run out. It is inevitable, he argued, that cases would come before courts of law that are not settled by the existing law. Because law is mostly created by human agents, such as legislatures and courts, law consists of a finite set of rules and directives, and those rules cannot possibly determine an outcome about every possible case that would need some legal resolution. Since judges rarely have the option of not deciding a legal case they adjudicate, it is inevitable that some cases that they have to decide would require them to create, or at least

modify, the law that would settle the case. Therefore, when such an unsettled case comes before a court of law, the decision that judges reach cannot be described as one that *applies* the law, because there is no relevant law to apply. In such unsettled cases, the court's ruling amounts to a modification of the law; it is an act of creating new law, akin to other familiar ways in which law is created or modified by legislatures and other legal authorities (Hart 1961: 121–32). This idea that law is bound to run out—and therefore judges would need to participate in the creation of new law by way of judicial legislation—has been labeled the doctrine of *judicial discretion*.

In a famous article criticizing Hart's theory of law, Dworkin (1977) has argued that the doctrine of judicial discretion is fundamentally flawed. The gist of Dworkin's argument is this: Hart wrongly assumed, Dworkin claimed, that the law consists only of rules. But in addition to legal rules, which are typically enacted by legal authorities (as Hart assumed), there is another type of legal norms, *legal principles*, which do not derive their legal validity from any particular enactment. Legal principles gain their legal validity by a process of reasoning, including moral reasoning, and not by decree.

In order to understand Dworkin's argument, it is essential to realize that there are two main conclusions he wanted to draw from the idea that there are legal principles: first, that the law does not run out, and therefore judges do not have the kind of discretion Hart envisaged; and second, that there is a distinct class of legal norms that cannot derive its legal validity from Hart's rules of recognition. Underlying both of these conclusions is the idea that the legal validity of principles partly, but necessarily, depends on some truths about morality; it is partly a matter of moral truths that some norms are legally valid and form part of the law.

Dworkin begins the argument by suggesting that the distinction between legal rules and legal principles is a categorical one. Rules operate in a kind of "all or nothing" fashion: if a rule applies to the circumstances, it determines a legal outcome; if an outcome is not determined by a rule, then it must be because the rule does not really apply to the case at hand. Contrary to this, principles do not necessarily determine an outcome: if a principle applies to the circumstances, it only provides a reason to decide the case one way or the other, which may weigh more or less under the relevant circumstances, depending on various considerations. To illustrate, consider, for example, our worn-out example of the speed limit on California highways: if you drive on the highway, the rule clearly applies to you, and therefore the outcome is determined; if you exceed the speed limit, you have committed the offense. Now compare such a rule with the legal principle that judges sometimes employ in their decisions (to take one of Dworkin's favorite examples, 1977: 26): a person should not be allowed to profit from his own wrong. This general principle does not quite determine legal outcomes. The law sometimes allows people to profit from a wrong they have committed (a good example is adverse possession in property law). The role of such principles is subtler: to provide judges and other legal agents with reasons to make certain decisions in doubtful or borderline cases. If there is a choice to be made, as it were, and one of the options would allow a person to profit from his own wrong, then the principle counts against allowing such an outcome. But, by itself, the principle does not dictate the outcome—certainly not in every case in which a person may profit from his wrongs.

Whether the distinction between rules and principles is as sharp as Dworkin claims is far from clear (Raz 1984; Marmor 2011: 86), but I will not dwell on this here because the main argument depends on Dworkin's additional thesis pertaining to the ways in which rules and principles gain their legal validity. Legal rules, Dworkin claims, typically gain

their validity by an act of enactment, more or less along the lines presumed by Hart and other legal positivists. Legal principles, however, are not enacted: they are deduced by reasoning from certain facts and, crucially, moral considerations. How is that? Suppose, for example, that a court is faced with a problematic case that would seem to be unsettled by the existing legal rules; as far as we can tell, no previously recognized law would settle the case. In such cases judges can, as they often do, reason in the following way: they would look at the legal history of the settled law in the relevant legal area (such as previous precedents, statutes and regulations) and then try to figure out the best moral principles that would justify the bulk of those settled cases. The general principle that forms *the best moral justification* of the relevant body of law is the legal principle that would bear on the case at hand. In other words, we conclude that a legal principle forms part of the law by a process of reasoning. We start by observing the relevant legal facts that are established by previous law and then try to reason to the principle that forms the best moral justification of this body of law. The conclusion of this reasoning—which is partly, but essentially, a moral one—is a legal principle, one that forms part of the law (all this is made much clearer in Dworkin 1986, chs. 2 and 7).

So now we can see why Dworkin concludes both that the law never quite runs out and that legal principles are such that they cannot derive their legal validity from anything like the rules of recognition. The law never quite runs out simply because the kind of reasoning that leads to legal principles is one that is always available. Whenever judges might think that existing law does not settle the case they face, the judges can reason their way to the solution by the same process; they can always ask themselves what would be the best moral justification of the relevant body of law and apply the principle that forms the answer to this question to the case at hand. At the very least, it should give the court a reason, a legal reason, to decide the case one way or another. So there is always some law that applies, namely, the general principle that constitutes the best moral justification of previous decisions in the relevant area.

The idea that legal principles are partly deduced by reasoning also shows why these norms cannot gain their legal validity by reference to the rules of recognition in the way Hart had envisaged. Principles do not become part of the law because an authority has decided that they do; their legal validity is partly, but necessarily, a matter of moral truths. A given principle, say *P*, is part of the law if and only if *P* actually constitutes the best moral justification of previous legal decisions. *P*'s legal validity, therefore, depends on some truths about what constitutes the best moral justification of previous decisions. Legal validity is thus partly a matter of moral truth.

Dworkin's thesis about legal principles has attracted an enormous amount of attention over the years. Many objections and modifications have been offered, but it has been generally conceded that Dworkin succeeded in showing something of great importance, both about the ways in which judges, especially in the common-law tradition, reason to resolve hard cases, and about the diversity of norms that forms part of our legal landscape. The crucial question, however, is whether what Dworkin describes is really a way in which judges *identify what the law is*, or is better described as a form of judicial reasoning leading judges to *create new law* or at least to modify the existing law, in order to settle new cases (Marmor 2011: 89–92). Even if it is true that whenever judges face a case that would seem to be unsettled by the existing body of law, they reason to the solution in the way Dworkin describes, it would not show that the principle the judges have settled on is one that had been part of the law prior to their decision. An equally plausible option is that the identified principle becomes part of the law because, and

only because, of the judicial decision that applies it. Prior to the judicial decision that identifies a certain principle as a legal one, the principle had not actually formed part of the law. It only becomes law when judges say that it is, and only because they say so. And this interpretation would be perfectly in line with Hart's theory of law.

In order to rebut this objection, Dworkin would have had to show that the judicial reasoning that leads to the identification of a certain principle as a legal one is reasoning about what the law had been prior to the decision—that it is a form of reasoning purporting to discover, as it were, what the law is, and not, as I suggest, reasoning about ways in which the law needs to be changed. As far as I can tell, however, the only argument Dworkin presents to support his interpretation is an appeal to judicial rhetoric (1986, ch. 1). When judges apply a legal principle to the cases they adjudicate, they tend to *say* that they just apply a principle that had always been the law, not that they invent a new principle that they favor (morally or otherwise). But this appeal to rhetoric is problematic, and certainly inconclusive; often judges are quite forthcoming in admitting that they create new law, without pretending to apply some preexisting legal principle.

More importantly, as I explained elsewhere (Marmor 2011: 90–92), the view that makes moral truths determine legal validity in some cases faces the problem of rendering a considerable part of the law legally mistaken. Suppose, for example, that the highest courts in a certain legal system *systematically err* on the moral considerations that they rely upon and end up relying on legal principles that are morally off, so to speak; the principles they employ in their decisions do not adequately reflect the correct moral considerations. Dworkin would have to say that in such cases, the courts make a legal mistake: they misidentify the law. But this might lead to the conclusion that a great deal of the law—or, at least, what jurists take to be the law—in a given legal system is legally mistaken. Surely, at some point one would have to doubt whether a theory which allows for a great part of the law to be a legal error is a theory that can actually tell us what the law is.

Needless to say, this is not the end of the debate. Dworkin has modified and extended his views since (Dworkin 1986). His more recent views are grounded on a comprehensive theory about interpretation and the interpretative nature of law. Dworkin's interpretative theory of law strives to show that the identification of legal norms is *always* a matter of evaluative judgments, moral considerations included. Every conclusion about what the law requires in particular cases, Dworkin argues, is a result of some interpretation or other. And interpretation is necessarily the kind of reasoning that relies on evaluative judgments. Therefore, every conclusion about what the law requires is inevitably entangled with evaluative judgments about ways in which the law ought to be from a moral-political point of view. Dworkin's theory of interpretation, and its alleged implications for law, has generated a considerable amount of controversy, and it raises many interesting issues I cannot discuss here (see Marmor 2005 and Stavropoulos 2012).

Additionally, even some contemporary legal positivists have come to argue that the relations between moral considerations and legality are more complex than Hart had originally envisaged, and in his "Postscript" to *The Concept of Law* (1994) published posthumously, Hart seems to have agreed (see, for example, Coleman 1982 and Waluchow 1994; and see Stavropoulos 2012). Others, however, argue that these modifications, allowing moral considerations to determine legality, face the same problems that Dworkin's original theory faces, even if the foundations are different (Raz 1985; Marmor 2011: 92–97). It is, however, time for us to move on, and consider some aspects of the questions about law's normative character and how law might be related to morality in that respect.



### The Normativity of Law

The law is, undoubtedly, a normative system; laws are, by and large, prescriptions instructing us, the law's subjects, what to do and what actions to avoid, how to go about achieving some results we might want to achieve in numerous practical domains, and so on and so forth. In short, legal norms purport to guide our conduct. But what kind of conduct guidance is involved here? Suppose, for example, that a law imposes a particular obligation, say, "X is under a legal obligation to  $\phi$  in circumstances C." Does it mean that X *ought* to  $\phi$ ? And what is the nature of this "ought"? Is it a moral ought? Or does it have nothing to do with morality?

There are, actually, two separate questions involved here, only one of which is relevant to our concerns. One question, discussed by George Klosko in this volume (2012), is about the moral obligation to obey the law: is there a general moral obligation to obey the laws of our legal system? This is quite clearly a moral-political question, one that has to be answered on moral-political grounds. Philosophy of law, however, concerning the nature of law, is interested in *explaining*, not necessarily justifying (or challenging), the ways in which the law purports to guide conduct, and what this guidance consists in.

Once again, the main philosophical question here begins with the possibility of reduction. Can we reduce the idea of a legal obligation to some facts of a nonnormative kind? Austin (1832) clearly thought that the answer is yes. In his view, a statement that expresses the existence of a legal obligation, such as "X is under a legal obligation to  $\phi$ ," is tantamount to a predictive statement that "if X fails to  $\phi$ , X is very likely to incur some unpleasant consequences." But this is a very questionable approach. It seems to miss the idea that laws aim to guide the conduct of their subjects and mostly in the form of giving them reasons for action. Hart (1961: 80) explained this critique very nicely by giving the example of the order of a robber pointing a gun at his victim, ordering the victim to hand over his money, or else. . . . According to Austin, the only difference between the order of a gunman and the law is that the gunman happens not to be the sovereign. But that seems to be quite wrong. Though there is a sense in which we could say that the victim is obliged to hand over his money to the gunman, surely we do not think that he has an obligation or a duty to do so. On the other hand, it is essential to law's way of guiding conduct that it purports to impose obligations. In short, at least from the perspective of those who regard the law as a binding normative system, law is there to give subjects reasons for action; people regard the law as something that guides their conduct, not mainly a prediction that something bad will happen to them if they do not comply.

Hart expressed this idea in terms of a distinction between what he called the external and the internal points of view: from *an external point of view*, that is, just observing people's conduct from the outside, as it were, there may not be much of a difference between the gunman and the law. However, when we aim to provide a theoretical account of law's normative character, we must take into account *the internal point of view*, the point of view of those who see themselves as cooperative participants in the practice, that is, people who regard the law as something that is there to guide their conduct (Hart 1961: 87).

Unfortunately, Hart's distinction between the external and internal points of view has generated considerable confusion in the literature. Many commentators assumed that its main point is to show why we cannot provide a reductionist account of law's normative character. But a careful reading of Hart's text should reveal that the opposite

is the case. True enough, Hart thought that an adequate account of law's normativity must take into account the internal point of view, the point of view of the participants in the practice who regard law's instructions as reason for action. But he also thought that we can provide such an account by describing people's actual beliefs and attitudes: "For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from the outside refer to the way in which they are concerned with them from the internal point of view" (Hart 1961: 87). In short, it is possible, Hart claimed, to provide an adequate account of a normative practice such as law by describing the internal, participants' point of view, in terms of the kind of beliefs and attitudes they have with respect to the rules they follow.

So once again, Hart's objection to Austin's attempt to reduce the normative character of law to nonnormative facts is not about reductionism, *per se*, but about the details of the reduction. Hart's own account of what law's normativity consists in is also reductive; it aims to explain how law guides conduct by focusing on the relevant beliefs and attitudes of those who *regard* the law as binding. Clearly Hart thought that philosophy of law, distinct from moral-political philosophy, can only point out that wherever there is a functioning legal system in place, most members of the relevant population *regard* the requirements of law, by and large, as binding, that is, as giving them reasons for action. Whether these reasons are moral reasons, and whether they are adequate to the task, are questions for moral philosophers to figure out, and presumably answers will vary with different legal systems in play.

I think that Hart is only partly correct about this issue. Consider the gunman situation again: the crucial difference between the gunman scenario and the law is much better explained by introducing the concept of authority. The gunman is only interested in getting your money. He does not claim—at least there is nothing in the situation to force him to claim—that he is in a position that authorizes him to order you to hand over your money. In other words, the gunman makes no claim to be a legitimate authority or to have a legitimate authoritative claim on your conduct. However, as Joseph Raz (1985) famously argued, it is an essential aspect of law that it always *claims* to be a legitimate authority. When the law makes a claim to your money (by imposing a tax, or a fine, or whatever), it makes this claim as an exercise of its putative legitimate authority. And that is the sense in which legal requirements purport to create obligations: they are requirements based on claims of legitimate political authority. Needless to say, Raz does not suggest that law's claim to be a legitimate authority is generally a sound one, morally or otherwise justified. Whether the law's claim to the legitimacy of its authority is warranted or not—either in particular cases, or wholesale—is a separate, moral-political question, and the answers would vary from case to case. But it is essential to an understanding of what the law is that it always makes this kind of claim—that it claims to be a legitimate political authority. I am not suggesting that Hart's reductionism about the normativity of law necessarily fails. But even if we aim for a reduction of law's normative concepts to social facts, we must acknowledge that law's language, and the kind of claims law has on its subjects, are much closer to morality and moral claims than Hart envisaged (see Marmor 2011, ch. 3).

### A Necessary Connection Between Law and Morality?

Since law aims to guide conduct, and it aims to guide conduct for reasons—very often moral reasons—it is natural to think that there must be a necessary or otherwise some

essential connection between law and morality. Can we conclude that there is such a necessary connection? It would be a mistake to think that this is one question that can be answered by yes or no. There are various senses in which the answer is clearly yes, others in which the answer is clearly no, and still others in which the answer is problematic and contentious. Very few would deny, for example, that there is something essentially good, perhaps even necessarily so—given certain truths about human society and human nature—about having law in our society. Even wicked legal regimes promote some goods: they provide some services that people need and would be worse off without. So the idea that there is something good about having law seems like a very plausible idea. One might think that political anarchists, at least, are bound to deny this. But they do not have to: anarchists can hold the view that whatever good there is in having law is outweighed by its evils and, therefore, we would be better off without law. Even if you have no anarchist tendencies, you might concede that when a legal regime is totally corrupt and heinous, its subjects might be better off, overall, without it. But all this is compatible with the view that there is something essentially good in having law; that is, having our social lives governed by a legal regime. Perhaps this good is outweighed or undercut in some extreme cases, but to have our social lives governed by law is generally a good thing.

At the other end, yet again, nobody would deny that particular laws are never guaranteed to be morally good. That something is required by a law does not necessarily entail that it is morally required as well, or even that it is morally permitted. In this sense, surely there is no necessary connection between law and morality; it is possible, even in a decent and morally legitimate legal regime, to find particular laws that are morally wrong or unjustified. But can laws be totally iniquitous and still be law? Can an entire legal system be totally wicked and still be a legal system? There were times (mostly after World War II, for understandable reasons) when jurists thought that these are difficult questions worthy of serious consideration (Fuller 1958; Hart 1958). There were some jurists and philosophers who thought that morally unacceptable laws cannot count as law at all. Mostly they relied on what they took to be a central tenet of the natural law tradition that laws must meet a certain threshold of moral acceptability to be legally valid. As the famous dictum of St. Augustin has it, *lex iniusta non est lex* (unjust law is not law). It is, however, questionable whether the mainstream natural law tradition (viz., the Thomist tradition, named after the thirteenth-century philosopher and theologian Thomas Aquinas) has really maintained this problematic thesis (e.g., John Finnis (1980) has long argued that it has not). The idea that an unjust law, even profoundly and unquestionably unjust, cannot be law, that is, legally valid, seems to fly in the face of reality. There is simply nothing incoherent in saying about a particular legal requirement that it is a profoundly immoral law.

A more serious concern, perhaps, might be about the limits of immorality concerning an entire regime. Suppose we think about a mafia-style regime or form of social control based on sheer terror and oppression. Could that be a legal system? The answer is far from clear. Presumably, in some extreme cases, a regime of sheer terror might have almost nothing to do with law. In most real-life examples, however, even very corrupt regimes have some features that would make them legal—that is, they perform certain functions of law (such as guaranteeing that certain contracts are enforced, or certain harms are remedied, etc.) and others which would make us doubt that they have anything to do with legality. In other words, some forms of governance or social control might be borderline cases of law. As with other borderline cases of vague concepts (see

Soames 2012), there is no saying about such instances whether they are an instance of the relevant concept or not. Borderline cases are just that, borderline cases. I doubt that there is a theoretical payoff in trying to determine whether some borderline cases of legal regimes are really legal or not.

A third sense in which law is necessarily related to morality, and in a way that is hardly controversial, consists in the idea that laws have some essential moral functions in our lives. Part of what laws are there to do, as it were, is to solve some problems in our social lives that have moral significance. In other words, it is quite plausible to maintain that we could not come to understand the functions of law in society without understanding some of the main moral problems we face and ways in which laws aim to solve them.

There are, however, two main areas in which the essential connections between law and morality are controversial. We have already considered one of them in some detail above, with respect to the conditions of legal validity and the question of whether those conditions may depend on moral truths. There is another area, however, in which there might be a necessary connection between law and morality, concerning law's essential purposes and its inherent standards of perfection. As John Finnis explains in his contribution to this volume (2012), there is a long tradition in jurisprudence, going back to ancient Greek philosophy, maintaining that it is an essential feature of law that it aims to promote the *common good* and thus has certain standards of perfection inherent in it. Law is a purposeful institution; it has certain aims which make it the kind of institution that it is. And those aims must have something to do with the good that is common to those whose institution it is.

This view, however, is controversial in two respects: first, in connecting, as this long tradition does, the common good that is essentially law's main purpose with a conception of natural law—or some sense in which law's *telos* or purposes somehow reflect the true nature of things, morally speaking—the thesis has a great deal to say about the nature of morality, perhaps even more than it has to say about law. And of course, views about the nature of morality are philosophically controversial, if anything is.

Second, the idea that the law is necessarily the kind of institution that aims to promote the common good has been challenged from a critical point of view, most notably by the Marxist traditions. Marxists do not doubt that law is manifestly concerned with the “common good”; what they challenge is the true nature of this good, claiming that far from being really good, it is a form of *ideology* or false consciousness, aimed at masking people's true and authentic interests, which are class interests to be free of domination. Some of the contemporary “critical” theories in jurisprudence, including some versions of feminist jurisprudence, make a very similar claim. They argue that the “common good” that law inevitably advances is actually exclusionary in its nature; that is, advancing the common good of the wealthy and powerful segments of the population at the expense of the weak and vulnerable. From a philosophical perspective, the cogency of these kinds of critiques depends on the distinction between critical evaluations of existing practices—no doubt flawed in many ways and in need of reform—from claims about the inevitable, that is, the essential nature of the practices under consideration. Is it really an essential, inevitable, nature of law that it favors the strong over the weak, the wealthy over the poor, etc.? Or is it (if it really is) just the way things have developed over time but could be made to be different? This is a very difficult question and I will not try to answer it here.

## References

- Austin, J. (1832) *The Province of Jurisprudence Determined*, London: J. Murray.
- Coleman, J. (1982) "Negative and Positive Positivism," 11 *Journal of Legal Studies*: 139–64.
- Dworkin, R. (1977) *Taking Rights Seriously*, London: Duckworth.
- (1986) *Law's Empire*, Cambridge, Mass.: The Belknap Press of Harvard University Press.
- Edmundson, W. A. (2012) "Coercion," in A. Marmor, ed., *Routledge Companion to Philosophy of Law*, New York: Routledge.
- Finnis, J. (1980) *Natural Law and Natural Rights*, New York: Oxford University Press.
- (2012) "Natural Law Theory: Its Past and Its Present," in A. Marmor, ed., *Routledge Companion to Philosophy of Law*, New York: Routledge.
- Fuller, L. (1958) "Positivism and Fidelity to Law: A Reply to Professor Hart," 71 *Harvard Law Review*: 630–72.
- Hart, H. L. A. (1958) "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review*: 593–629.
- (1961) *The Concept of Law*, Oxford: Clarendon Press.
- (1994) *The Concept of Law*, 2nd edition, P. Bulloch and J. Raz, eds., Oxford: Oxford University Press.
- Kelsen, H. (1961/1945) *General Theory of Law and State*, A. Wedberg, trans., New York: Russell and Russell.
- Klosko, G. (2012) "The Moral Obligation to Obey the Law," in A. Marmor, ed., *Routledge Companion to Philosophy of Law*, New York: Routledge.
- Marmor, A. (2005) *Interpretation and Legal Theory*, revised 2nd edition, Oxford: Hart Publishing.
- (2011) *Philosophy of Law*, Princeton: Princeton University Press.
- Postema, G. J. (2012) "Legal Positivism: Early Foundations," in A. Marmor, ed., *Routledge Companion to Philosophy of Law*, New York: Routledge.
- Raz, J. (1984) "Legal Principles and the Limits of Law," in M. Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence*, Totowa, NJ: Rowman and Littlefield.
- (1985) "Authority, Law and Morality," 68 *The Monist*: 295.
- (1990/1975) *Practical Reason and Norms*, Princeton: Princeton University Press.
- Soames, S. (2012) "Vagueness and the Law," in A. Marmor, ed., *Routledge Companion to Philosophy of Law*, New York: Routledge.
- Stavropoulos, N. (2012) "Obligations, Interpretivism and the Legal Point of View," in A. Marmor, ed., *Routledge Companion to Philosophy of Law*, New York: Routledge.
- Waluchow, W. (1994) *Inclusive Legal Positivism*, Oxford: Oxford University Press.

## Further Reading

For further reading, see: R. Dworkin (2006) *Justice in Robes*, Cambridge, Mass.: Harvard University Press; H. L. A. Hart (1994) "Postscript," in P. Bulloch and J. Raz, eds., Oxford: Oxford University Press; A. Marmor (2009) *Social Conventions: From Language to Law*, Princeton: Princeton University Press; G. J. Postema (1989) *Bentham and the Common Law Tradition*, Oxford: Oxford University Press; J. Raz (1979) *The Authority of Law*, Oxford: Oxford University Press; and J. Raz (1985) "Authority, Law and Morality," 68 *The Monist*: 295.