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Common Law Positivism Through Civil Law Eyes

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Abstract: The paper purports to argue for two theses: 1. Common law theories of legal positivism take "the separation thesis" as encompassing both meta-theoretical and theoretical claims, while civil law theories of legal positivism take it as dwelling entirely on a meta-theoretical level; 2. Common law theories of legal positivism, in arguing for the theoretical separation between law and morals also as a riposte to Dworkin's critiques, have made a claim concerning the limits of the law that is at odds with the separation thesis as a meta-theoretical claim. The paper proceeds in two steps. The first step argues for the first thesis by providing a brief comparative account of common law and civil law theories of legal positivism, as instanced by Herbert Hart and Norberto Bobbio, respectively. The second step argues for the second thesis by analysing the Hartian, Inclusivist and Exclusivist varieties of legal positivism from the standpoint of their way of solving the law and morality puzzle.

Keywords: Legal Positivism, Hart, Bobbio, Separation Thesis, Inclusivism, Incorporationism, Exclusivism.

> «The point of a theory of legal obligation (and indeed of descriptive jurisprudence in general) is to provide an illuminating form of description of a specific type of social institution which will bring out clearly certain salient features of the institution, which, given the general human condition, are of universal importance»
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> H. L. A. Hart[1]

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[1] Hart 1988, p. 284.

1. Foreword

In this paper I purport to argue for two theses:

1. Common law theories of legal positivism take "the separation thesis" as encompassing both meta-theoretical and theoretical claims, while civil law theories of legal positivism take it as dwelling entirely on a meta-theoretical level;

2. Common law theories of legal positivism, in arguing for the theoretical separation between law and morals, also as a riposte to Dworkin's critiques, have made a claim concerning the limits of the law that is at odds with the separation thesis as a meta-theoretical claim.

The paper will proceed in two steps. The first step is dedicated to arguing for the first thesis. This will be done, as we shall see in a moment, by providing a brief comparative account of common law and civil law theories of legal positivism, as instanced by Herbert Hart and Norberto Bobbio, respectively (§ 2 below). The second step is devoted to arguing for the second thesis. This will be done by analysing the Hartian, Inclusivist and Exclusivist varieties of legal positivism from the standpoint of their way of solving (what I shall call) the law and morality puzzle: i.e., the problem(s) concerning the *jurisprudentially proper way of coping* with the relations between positive law, on the hand, and critical or positive morality, on the other (§ 3 below).

One terminological precision is needed before proceeding. Throughout the paper I will use the phrase "theory of legal positivism" – and cognate expressions like "conception of legal positivism", "view about legal positivism", "account of legal positivism", etc. – to refer to any jurisprudential discourse, usually handed-down in a paper or book form, which purports to identify clarify and argue for or against the set of theses that would constitute (the core of) a positivistic account of positive law in general. Accordingly, a theory of legal positivism can be of a positivist, but also of a non-positivist, anti-positivist or post-positivist cast.

2. Common Law, Civil Law and Legal Positivism

The attacks natural lawyers waged against legal positivism in the years after WWII had the heterogenetic effect of stimulating a self-reflexive attitude in those jurisprudents who were used to conceive of themselves as legal positivists. They felt the need of establishing what legal positivism really amounted to, if only to show that positivism – or, at least, their own version, or the one inherited from revered predecessors like Bentham, Austin, Jhering, Thon, Kelsen, etc. – was not the abominable view natural lawyers were uncharitably targeting.

To the purpose of defining legal positivism, they put to work the portentous tools made available by analytic philosophy (logical empiricism and ordinary language philosophy)[2]. Ruling out essentialist investigations as preposterous, they came to see that "legal positivism" stood in fact for a variety of heterogeneous claims concerning positive law in general, and, on that footing, they set to the task of identifying, clarifying, and eventually developing each and every one of those several claims.

Herbert Hart, on the common law side, and Norberto Bobbio, on the civil law side, can be regarded as the path breakers of that analytic positivist approach[3]. The outcomes of their enquiries are partially different, though. And the difference, as we shall see in a moment, is worthwhile emphasizing.

Hart's coping with legal positivism shows a deconstructive and a reconstructive side.

On the deconstructive side, Hart picks out six different «contentions» faring under the banner of "legal positivism". These are an imperativist view of law («laws are commands of human beings»); the idea that «there is no necessary connection between law and morals or law as it is and law as it ought to be», which in the jurisprudential jargon has come to be known, due to Hart, as "the separation thesis"; the idea of the analytic study of law as a useful and rewarding enterprise, both in its own and in its synergetic connexions with historical, dogmatic, and censorial jurisprudence; the idea of law as a «logically closed» normative system; the idea that value judgments are not supportable by rational argument, evidence, or proof in the same way as statements of fact are (ethical non cognitivism); the ideology arguing for people's moral duty to obey positive laws as such, i.e., *qua* positive laws[4].

On the reconstructive side, Hart presents legal positivism as the theory of positive law in general that turns on three basic claims. The first claim, the (social) *sources thesis*, maintains that laws are a variety of human-made social

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[2] Some of the tools were already part of the stock and trade of analytic jurisprudence, but analytic philosophy provided a comprehensive and alluring fresh start in philosophical methodology. See Hart 1953; Hart 1982.

[3] A third hero worth mentioning is Alf Ross. Ross identifies the nucleus of legal positivism in two «fundamental theses». The first thesis amounts to the ontological claim that there is no other law, but positive law, so denying the very existence of any "natural law" as law proper; the second thesis amounts to the epistemological claim that the existence and content of positive law can be established by means of empirical investigations based on the observation and interpretation of social facts, without any need to resort to natural law or natural morality (see Ross 1961, § 1).

[4] Hart 1958b, p. 57 fn 25; Hart 1961, p. 302; Hart 1967a, pp. 237-239.

rules. The second claim, the *separation thesis*, holds that there is no necessary or conceptual connection between law and morals, or law as it is and law as it ought to be («it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so»). The third claim, the *judicial discretion thesis*, argues that legal norms (rules, standards, principles) are doomed to run out at some point; therefore, when this happens, if a judicial decision has to be pronounced anyway, as it is the case in modern municipal legal systems, it cannot be but the output of judges' discretionary law-making choice[5].

Taking stock of Hart's deconstructive enquiry, Bobbio works out an analysis of legal positivism that immediately acquired, and still holds, the mark of a successful paradigm inside of the civil law world[6]. The analysis singles out three "aspects" of legal positivism.

The first aspect is *methodological* or *epistemological*. Legal positivism features here as an *approach*, as a "way of conceiving the study of the law", calling for ethical neutrality (*Wertfreiheit*) and a genuine drive towards scientific knowledge of law, which imposes keeping «the real» and «the ideal law» separate, avoiding any confusion between the law as it is and the law as it ought to be[7].

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[5] Hart 1958a, pp. 84-94; Hart 1961, pp. 185-186; Hart 1980, § I; Hart 1983a, p. 6; Hart 1988, p. 281-287; Hart 1994, pp. 272-276; Hart 1956, pp. 652-665. Hart himself looks at the three theses I mentioned in the text as making up the nucleus of a positivist theory of law. The third thesis, however, turns on two further theses that Hart's followers later brought to the fore. As we shall see in a moment, these are the *indeterminacy thesis* and the *limits of law* thesis, which make clear why and in what sense legal norms are doomed to "run out" (see § 2.2 below).

[6] Bobbio 1965, pp. 101-105, text and fn 5, where Bobbio refers to the "Bellagio Conference on Legal Positivism", which took place in September 1960 and was attended by Hart, Bobbio, Ross, Alessandro Passerin d'Entrèves, Renato Treves, and younger scholars (see the report by Falk, Schuman 1961, pp. 542-557); Bobbio 1979, pp. 1-2.

[7] It may be useful quoting the central passage of Bobbio's argument: «According to this first acceptation of legal positivism, therefore, a positivist is somebody who takes, as regards to the law, a value-free, objective, ethically neutral attitude, i.e., somebody that assumes as a criterion to tell a legal rule from a non legal one its derivation from ascertainable facts, like having been issued by certain organs by way of certain procedures, or having been actually followed during a certain period of time by a certain group of persons, and not its correspondence or non correspondence to a certain system of values. What a positivist rejects is the way of thinking of those who include in the definition of law finalistic ingredients: like, for instance, the realization of the common good, the implementation of justice, the protection of liberty rights, [...] and because of such inclusion [are] [...] obliged – in order to be consistent [...] – to rule out as non legal those norms that, though having been issued by competent organs [...], do not lead to the common good, or to the implementation of justice [etc.]», acting, in so doing, as a (weird) «linguist who claims to include in the definition of linguistic phenomenon its correspondence to an ideal language, and accordingly would consider

The second aspect is *theoretical*. Legal positivism features here as a theory of positive law in general. There are however, as Bobbio emphasizes, two different positivist theories of positive law worthwhile considering. The *narrow positivist theory*, which is a XIX century cultural output, characterizes for conceiving law as an intrinsically coherent and complete system of imperative (duty-imposing) norms, backed by coercive sanctions, essentially coming in statutory form, and liable to be discovered, by judges and jurists alike, through the cognitive process of interpretation. Contrariwise, the *broad positivist theory*, which supervenes in the XX century, offers an improved, refined account of law as a normative coercive and dynamic order, adopts a pluralistic view about legal sources, and rejects the views of the intrinsic coherence, intrinsic completeness and cognitive character of legal interpretation.

The third, and last, aspect Bobbio brings to the fore is *ideological*. Legal positivism features here as a set of normative ethical theories arguing for the moral duty each individual would have of obeying positive laws; the theories ranging from the extreme ones affirming the existence of an unconditional duty of abiding by positive laws *qua* positive laws, to more moderate ones that, instead, make the duty of obedience conditional upon the law (legal system) actually providing people with benefits like order, peace, legal certainty, formal equality, and, in the more demanding varieties, the protection of basic individual rights and liberties[8].

Most of the differences between Hart's and Bobbio's accounts of legal positivism are more a matter of presentation than a matter of substance. For instance, Hart's positivist view of law as a "closed logical system" corresponds, in Bobbio's account of theoretical positivism, to the ideas of law's intrinsic coherence and completeness, together with legal interpretation's cognitive character.

There are, however, two points where the two accounts differ. And on one of them, the difference is the index of a different meta-philosophical attitude: i.e., of a different attitude in coping with legal positivism as a philosophy of positive law.

On the one side, Bobbio draws a clear-cut distinction between the ideological, the theoretical, and the methodological or epistemological dimensions ("aspects") of legal positivism. Contrariwise, Hart does not seem to feel any need for drawing it.

On the other side, Hart considers the separation thesis, the claim that there is no necessary or conceptual connection between law and morals, *also and primarily* as one of the basic claims of (what Bobbio would regard as) a positivist *theory* of

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outside of his observation field all the linguistic phenomena at odds with the ideal language» (Bobbio 1961, p. 106).

[8] Bobbio 1961a, pp. 101-126; Bobbio 1962, pp. 147-158; Bobbio1979, pp. 151-288.

law[9]. Contrariwise, Bobbio considers Hart's separation thesis as *entirely* belonging, not to legal positivism as a *theory* of positive law in general, but, rather, to legal positivism as an *approach* or *method* inspired by a scientific attitude concerning the study of law as a social phenomenon.

The different location Hart and Bobbio envisage for the separation thesis inside of legal positivism mirrors a different appreciation of the scope of the law and morality puzzle, which, in turn, has tangible effects on the direction of jurisprudential enquiries.

A legal philosopher who considers the separation thesis as belonging to the positivist *approach* to the study of positive law is (only) committed to providing *meta-theoretical* arguments for it: namely, arguments appealing to the epistemic correctness and epistemic benefit that would come from adopting a posture of (ethical) value neutrality, and so from avoiding any confusion between the law as it is and the law as it ought to be, between what the law is in fact and its (moral) merits or demerits, while doing philosophical and empirical research on the law in general. This explains why Bobbio's (and civil law) positivism sees no real puzzle, no really intricate or confusing problem, in the relation(s) between positive law and positive or critical moralities. Once the posture of (ethical) value neutrality is strictly adhered to, empirical (sociological and historical) and analytical enquiries will provide all we need to know about them.

Contrariwise, a legal philosopher who considers the separation thesis as belonging (also) to the positivist *theory* of positive law is committed to providing *theoretical* arguments for it: namely, arguments pointing to *where*, *in general*, the limits between positive law and positive or critical morality *run*. This explains why Hart's (and contemporary common law) positivism is driven by the law and morality puzzle; why he and his fellow positivists devote a conspicuous amount of philosophical investigation in arguing for the separation thesis as part of a positivist theory of law. As we shall see now, in a way that is partly at odds with the separation thesis as a meta-theoretical posture.

3. The Separation Thesis in Common Law Legal Positivism

Post-WWII common law theory of legal positivism is a complex intellectual phenomenon[10]. As soon as one casts even a shallow glance, not fewer than six

[9] The sense of this "also and primarily" qualification clause will be made clear in a moment (see § 3.1, below).

[10] For general, thoughtful, survey of contemporary common-law jurisprudence, see Postema 2011.

distinct strands show up for report. The first strand is represented by Hart's theory of legal positivism, which is endowed with the unique foundational import of a powerful and (destined to be) influential "fresh start". The second strand corresponds to Lon Fuller's and, above all, Ronald Dworkin's critique of the Hartian conception of legal positivism[11]. The third strand encompasses the theories of legal positivism developed by Hart's followers (disciples, sympathetic scholars, etc.) from the late 1970s onwards, and has its kernel in the "inclusive" v. "exclusive" positivism debate[12]. The fourth strand argues for "ethical positivism" as the only worthwhile variety of positivist account of law[13]. The fifth strands, waving the banner of a "new" natural law theory, purports to bring to the fore positivism's "poverty" and "self-contradictory" character[14]. The sixth – and for the present inventory, last – strand corresponds to the legal realism reviving, "naturalistic" critique to the analytic conception of legal positivism[15].

I consider the first and the third strand to be paramount to the present purpose. In the following, I will start by offering a swift account of Hart's original theory of legal positivism (§ 3.1 below). Next, I will briefly consider the third strand (§ 3.2 below) and the development of Hart's theory that went along to it (§ 3.3 below). A few conclusions will end my enquiry (§ 4).

3.1. Hart's Original Theory

Hart's theory of legal positivism and, particularly, his view of the separation thesis, has been recounted and reconstructed many times by friends and foes alike[16]. Take what follows as a further exercise in reconstruction, (hopefully) inspired by the strictest adherence to the principle of fair and exhaustive comprehension usually faring under the name of "charitable interpretation".

In the preceding section (§ 2 above), I emphasized that Hart, unlike Bobbio, considers "the separation thesis" *also* and *primarily* as belonging to legal positivism

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[11] See, e.g., Fuller 1958, pp. 630-672; Fuller 1964; Fuller 1968; Dworkin 1978, chs. 2, 3 and 4; Dworkin 1985, pp. 131-137; Dworkin 1986, chs. 1-4; Dworkin 2006, chs. 6, 7 and 8; Dworkin 2011, ch. 19.

[12] The literature is immense. See e.g., Coleman 1982; Himma 2002; Marmor 2002; Raz 1979c; Raz 1994; Waluchow 1994; Kramer 1999; Shapiro 2001; Kramer 2004; Kramer 2018; Kramer 2019.

[13] See, e.g., Campbell 1996; Waldron 2001.

[14] See Finnis 1980; Finnis 1996.

[15] See Leiter 1997.

[16] See, e.g, MacCormick 2008; Gardner 2001; Gardner 2012a; Green 2012; Green 2013; Green 2019.

as a *theory* of positive law in general. By that clause I meant to bring to the fore that «the contention» according to which «there is no necessary connection between law and morals or law as it is and law as it ought to be»[17] is not, in the light of Hart's own actual coping with it, *one* contention, but, rather, a port-manteaux phrase conveying a plurality of heterogeneous theses.

Two preliminary remarks are in order before proceeding.

First, while arguing for the separation thesis, Hart also argues for the complementary empirical thesis pointing to the manifold contingent connections that do hold in fact between positive laws and moral rules and principles, these connections having to do, as we know, with the authority, the content, the interpretation, the validity criteria, and the criticism of law[18].

Second, Hart plainly avows, by way of qualification of usually unqualified formulations of the separation thesis, that positivists can concede that there are *some* necessary connections between law and morals (having to do, in particular, with "legality" and "natural" justice), but he also emphasizes that these are not so theoretically worthwhile («important») to make an amendment of positivism necessary[19].

With those remarks in mind, let us move to "the separation thesis". In what can be regarded as its standard Hartian formulation, the thesis claims that there is *no necessary conceptual connection* between law and morals, or law as it is and law as it ought to be[20].

If we pause for a moment to reflect, the formulation above is, to say the least, puzzling. What does it mean? Which sort of thesis does it convey? Does it express

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[17] Hart 1958b, p. 57 fn 25; Hart 1961 (2012), p. 253.

[18] Hart 1961 (2012), pp. 184-185: «There are many different types of relation between law and morals and there is nothing that can be profitably singled out for study as *the* relation between them [...] it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so»; Hart 1961 (2012), pp. 202-212; Hart 1980, § I: «even though there are numerous and important connexions between law and morality, so that there are frequently some coincidence or overlapping "de facto" between law and some requirements of morality, these connexions are contingent, *not necessary neither logically nor conceptually*» (italics added, ndr); Hart 1988, 288: «there are no necessary connections (though many contingent ones) between law and morality»; Hart 1994, p. 268: «I argue in this book that though there are many different contingent connections between law and morality there are *no necessary conceptual connections* between the content of law and morality; and hence morally iniquitous provisions may be valid rules or principles» (italics added, ndr)..

[19] Hart 1961 (2012), pp. 203-204 (conceding that the typical, recurrent phenomenon of positive laws getting their contents from moral rules can be regarded as an instance of «the necessary connection of law and morals»: p. 204); pp. 160, 206-207; Hart1983a, p. 6: «first, my denial that there are any important necessary connections between law and morality».

[20] See the references and quotations at fn 18 above.

just one thesis (as Hart suggests by talking of "the separation thesis"), or does it stand, rather, for a plurality of theses, though so strictly intertwined to appear as one?

The idea that, in the formulation above, Hart conflates a plurality of theses that should be carefully kept apart, comes to the mind not only upon a reflection on Hart's own words, but also as soon as we consider a few platitudes.

First, a conceptual connection only can obtain between concepts: i.e., between the meanings of descriptive terms which are not proper names. There can be a conceptual connection between the meaning of "law" and the meaning of "morality". There can be no conceptual connection between law and morality as social phenomena.

Second, once we rule out the Platonist or essentialist conception of concepts as preposterous, any conceptual connection between the meanings of two descriptive terms (in the present case, "law" and "morality") only can be, *either* something that in fact obtains in the actual uses of those terms by a certain group of speakers, *or* something that is established by way of stipulation, in view of some contextually avowed theoretical or practical goal.

Third, the record of merely contingent connections between legal norms and moral norms (or legal validity and moral validity, legal rights and moral rights, legal duties and moral duties, legal authorities and moral authorities) can be regarded as providing a theoretically (or philosophically) sound reason against any stipulation purporting to establish some conceptual connection between "law" and "morality" ("legal validity" and "moral validity", "legal right" and "moral right", "legal duty" and "moral duty", "legal authority" and "moral authority").

If we read Hart's standard formulation of the separation thesis in the light both of the ways Hart copes with it, and also of the platitudinous remarks above, it seems reasonable to maintain that it stands for (not fewer than) *four* distinct *basic separation theses*. Furthermore, as we shall see in a moment, the four basic separation theses are in turn connected to five *separation theses of detail*.

The *first basic separation thesis* (BST1) corresponds to what may be called the *epistemological principle of no confusion* ("no blurring") between the law as it is and the law as it ought to be[21]. In a very rough formulation, the principle holds that, while carrying out theoretical enquiries upon the law, one should make sure to avoid *both* any confusion between what the law is in fact and what the law ought to be according to any normative (moral) standpoint one may happen to endorse, *and* any smuggling of moral judgments under the pretence of theoretical or empirical

[21] Hart 1958b, p. 55: «the utilitarian separation of law and morals [...] something that enables lawyers to attain a new clarity»; Hart 1961 (2012), pp. 209-210.

statements. From the vantage point of Bobbio's distinction between the three aspects of legal positivism, the principle belongs to legal positivism as a *method* or *approach* to the study of law. It is the Hartian homologue, of clear Benthamite ascent, to Kelsen's purity principle in its *Wertfreiheit* dimension. It lays at the core of Hart's model of a general and descriptive jurisprudence, as a different and heterogeneous enterprise from the justificatory jurisprudence advocated, e.g., by Ronald Dworkin, Gustav Radbruch or Lon Fuller[22].

The *second basic separation thesis* (BST2) corresponds to what may the called the *prudential principle of no confusion* ("no blurring") between the law as it is and the law as it ought to be[23]. The principle may be formulated, roughly, as follows: if you are after clarity, honesty, and the avoidance of any oversimplification in the formulation and resolution of moral issues raised by existing social rules presenting as "positive laws", make sure to avoid any confusion between what the law is in fact, and what the law ought to be according to any normative (moral) standpoint you may happen to endorse[24]. The principle escapes any qualification from the vantage point of Bobbio's analysis of legal positivism. From a Benthamite vantage point, however, it belongs to the realm of censorial jurisprudence broadly understood, and stays at the core of Hart's view about the practical (ethical, moral) criticism of positive law[25].

The *third basic separation thesis* (BST3) corresponds to what may be called the *theoretical thesis of conceptual separation* of "law" and "morals" (or "law" and "morality"). The thesis may be formulated, roughly, as follows: No reference to morality is needed in (must enter into) a *theoretically adequate elucidation* of the concept of law or legal system – meaning by "theoretically adequate elucidation" an elucidation that is adequate from the standpoint of a general and descriptive, not justificatory, jurisprudence[26]. From the vantage point of Bobbio's distinction between the three aspects of legal positivism, BST3 belongs to legal positivism as a *theory* of positive law in general; it contributes to offering a theoretically adequate

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[22] Hart 1967b, pp. 109-111; Hart 1987, pp. 35-42; Hart 1988, pp. 284, 285-287; Hart 1994, pp. 239-244.
[23] Hart 1961 (2012), pp. 207-209, 210-212.
[24] Hart 1961 (2012), pp. 207-208, 210-212; «what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules socially effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both» (p. 209).
[25] Hart 1961 (2012), p. 207-209, 210-212; Hart 1967b, pp. 109-111.
[26] Hart 1961 (2012), pp. 209-210; Hart 1963, pp. 2-4; Hart 1988, p. 284.

elucidation of ("our") concept of law or legal system, as part of a wider elucidation of the structure of ("our") legal thought.

Finally, the *fourth basic separation thesis* (BST4) corresponds to what may be called the *theoretical thesis of coincidence between existing law and definite explicit law* (for brevity's sake: *coincidence thesis*). The thesis may be formulated, again in a very rough way, as follows: to avoid any confusion between the law as it is and the law as it ought to be (as it is required by BST1), *existing law* must be conceived as being tantamount, at any moment in the life of any legal system, to *explicit and definite law*, i.e., to the set of *norms* (rules, standards, principles) that represent the *definite* (clear univocal exact) *meaning* of *legal sources* (like, e.g., constitutional provisions, statutory provisions, customs, binding judicial precedents), either by dint of linguistic conventions or juristic methodology[27], or, ultimately, by dint of collective (co-ordinated, shared, convergent) judicial interpretations[28]. By contrast, so-called *implicit law*, the law that would "exist" even though it has not been formulated yet in any authoritative way, the law that would dwell in the fuzzy areas where explicit norms prove indeterminate, should be regarded as being tantamount to the law that ought to be, provided its existence really depends only on the preferences (or wishful thinking) of isolated judges and jurists. From the vantage point of Bobbio's distinction between the three aspects of legal positivism, we may notice, BST4 belongs to legal positivism as a *theory* of positive law in general. It is a thesis about the *limits* of positive legal norms or the *limits of the law* (and under this name we shall meet it again while dealing with inclusive and exclusive positivism), provided it marks the border between the province of actually existing (settled, valid) positive laws, on the one side, and the province of the standards that are not (yet) laws, on the other.

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[27] Hart 1961 (2012), pp. 126-136 («Canons of "interpretation" cannot eliminate, though they can diminish, these uncertainties [deriving from "the nature of language", ndr], for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation», p. 126); Hart 1967b, pp. 103-108 («The clear cases are those in which there is a general agreement that they fall within the scope of a rule», p. 106); Hart 1983a, pp. 7-8: «the question whether a *rule* applies or does not apply to some particular situation of fact is not the same as the question whether according to the settled conventions of language this is determined or left open by the words of that rule. For a legal system often has other resources besides the words used in the formulations of its rule which serve to determine their content or meaning in particular cases. Thus [...] the obvious or agreed purpose of a rule may be used to render determinate a rule whose application may be left open by the conventions of language, and may serve to show that words in the context of a legal rule may have a meaning different from that which they have in other contexts» (italics in the original, ndr). Coleman (2005, p. 240) sums up Hart's position in the following terms: «The scope of judicial duty is fixed by meaning or practice. Where either meaning or practice runs out, judicial discretion [...] enters».

[28] Hart 1988, pp. 285-286.

Let us have now a quick look also at the five separation theses of detail I mentioned.

The *first separation thesis of detail* (DST1) holds that the concepts composing the conceptual apparatus by means of which a general and descriptive jurisprudence purports to elucidate the structure of ("our") legal thought must be defined in morally neutral ways. DST1 is, accordingly, an *epistemological* thesis belonging to legal positivism as a *method* or *way* of inquiring upon the law. It can also be regarded, accordingly, as a specification or concretization of the first basic separation thesis (BST1).

The second, third, fourth and fifth separation theses of detail hold, respectively, that no reference to morality is needed (must enter) into a *theoretically adequate elucidation* of the concept of "legal right" (DST2)[29], "legal validity" (DST3)[30], "legal duty" (DST4)[31], or "legal authority" (DST5)[32].

The four theses DST2-DST5 belong to legal positivism as a *theory* of positive law and fundamental legal concepts. They can be regarded as providing separate but converging theoretical arguments supporting the third basic separation thesis, which, as we have seen, is about the elucidation of the concept of law (BST3). Insofar as they concern the elucidation of the concepts of "legal right", "legal validity", "legal duty" and "legal authority", these theses – it must be noticed – are about *stipulations*: i.e., about how the elucidation of key legal concepts is to be carried out. It must be emphasized, however, that they are about stipulations of that weak theoretical variety that, in philosophical jargon, fares under the label of rational reconstruction or redefinition[33]. To be theoretically adequate, rational reconstructions must ultimately depend (among other things) on true statements of facts. Now, as Hart makes clear, DST2, DST3, DST4 and DST5 do ultimately rest on true statements about social facts: namely, the social fact that the acceptance of a legal rule as a *right-conferring* or *duty-imposing* rule does not necessarily involve, as a matter of *empirical necessity*, its acceptance as a morally correct and binding rule[34]; the social fact that the acceptance of a rule as a *valid legal rule* (i.e., as a rule that belongs to a legal system and is accordingly *legally* to be observed by people at large and applied by officials) does not necessarily involve, as a matter of *empirical necessity*, its acceptance as a morally valid rule[35]; the

[29] Hart 1958b, pp. 56-62.
[30] Hart 1961 (2012), pp. 207-212.
[31] Hart 1958a, pp. 82-107; Hart 1961 (2012), pp. 167-180; Hart 1966, pp. 147-161; Hart 1988, p. 281-284.
[32] Hart 1958a, pp. 84-99; Hart 1961 (2012), pp. 202-203; Hart 1982a, pp. 262-268.
[33] See, e.g. Robinson 1962, ch. IV.
[34] Hart 1958a, pp. 82-107; Hart 1958b, pp. 56-62; Hart 1961 (2012), pp. 167-180; Hart 1966, pp. 147-161; Hart 1988, p. 281-284.
[35] Hart 1961 (2012), pp. 100-110, 207-212.

social fact that the acceptance of somebody's words as *expressing valid legal rules* (valid content-independent and peremptory legal reasons for guiding and evaluating actions, in Hart's later terminology) does not necessarily involve, as a matter of *empirical necessity*, the acceptance of that legal authority as a moral authority as well[36].

The several separation theses I have picked out can be regarded as representing (the nucleus of) Hart's original positivist solution to the law and morality puzzle[37]. They provide in fact an answer, which Hart presents as jurisprudentially proper, to the problem(s) about the relation(s) between positive law and positive or critical morality.

In the *Postscript* to *The Concept of Law*, Hart adds some further details on the legal validity-moral validity issue[38]. In order to understand them, and get a fuller picture of common law positivism, an incursion into the third strand of the common law theory of legal positivism is required.

3.2. Inclusive v. Exclusive Legal Positivism

The reflexion on inclusive and exclusive legal positivism, and the debate between supporters and opponents of the two camps, have been conspicuous in jurisprudence for about thirty years in the final part of the XX century, beginning of the XXI century, resulting in an immense literary output.

The law and morality puzzle, the problem(s) about the adequate way for a positivist jurisprudence to cope with the relations between law and morals, is paramount in both sides. The three theses characterizing the Hartian positivist theory of positive law in general – the social sources thesis, the separation thesis (which, as we have seen, is not *one* thesis), and the judicial discretion thesis – are reformulated and refined by inclusivists and exclusivists alike with the law and morality puzzle in view. Haunted by Dworkin's anti-positivist theory of law (the "model of principles" and its interpretive evolution[39]) and the need to provide a knockdown reply to his critique about positivism's inadequacy to accommodate

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[36] See Hart 1958a, pp. 84-94; Hart 1961 (2012), pp. 202-203; Hart 1966, pp. 147-161; Hart 1982, pp. 262-268; Hart 1987, pp. 38-42 (where he argues that «moral claims and moral beliefs are [...] merely contingent accompaniments», not «constituent features of the legal practices and institutions»: p. 38); Hart 1988, pp. 282-284;

[37] I say "the nucleus", for my reconstruction does not account for a further issue which was prominent in Hart's dealing with the law and morality puzzle: i.e., the issue of the legal enforcement of morals (see Hart 1959; Hart 1963; Hart 1964).

[38] Hart 1994, pp. 250-254.

[39] Dworkin 1978; Dworkin 1986; Dworkin 2011.

for legal principles and "theoretical disagreements"[40], Hart's followers put the puzzle at the very centre of their positivistic accounts of law.

My reconstruction of this very tangled leaf in jurisprudence's book will be very swift and condensed (though hopefully not unfair).

Inclusive legal positivism (ILP) is "inclusive" since it allows for the possibility that moral principles (standards, values) be part of a positive legal system, working as validity criteria and the sources of implicit legal norms. The nucleus of ILP can be recounted as encompassing six theses[41].

The *inclusive sources of the sources thesis* (IST) holds that the existence of positive legal systems depends on a set of social facts, which consists in iterated convergent and interdependent behaviours of judges and other officials, and establishes a supreme customary *rule of recognition*. These facts are *the sources of the sources of law* ("the grounds of the grounds of law"): they identify the *sources* (like, e.g., the constitution, legislation, precedent, custom, etc.) of each and every positive law belonging to the system and set the criteria of legal validity.

The *inclusive validity thesis* (IVT), usually known as "separability thesis", holds that legal validity may contingently depend on conformity to moral principles. The rule of recognition may, or may not, contain moral-merit criteria of legal validity. Accordingly, it is *not* necessarily the case that the identification and content of legal norms does *not* depend on moral arguments (i.e., on arguments from moral principles, standards or values).

The *inclusive incorporation thesis* (IIT) holds that whenever the rule of recognition of a legal system makes legal validity to depend on conformity to moral principles, this fact has the effect of automatically incorporating those moral principles into the legal system.

The *inclusive indeterminacy thesis* (INT) holds that whenever a legal system incorporates moral principles, these are not necessarily tantamount to indeterminate legal norms. This is so because indeterminacy only shows up in two sorts of situation. First, when moral principles contain expressions referring to *thin* moral

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[40] Dworkin 1977, pp. 81 ff., 293 ff., 335 ff.; Dworkin 1983, 254, 280; Dworkin 1986, pp. 3-44. Very roughly speaking, the first critique holds that positivism is unable to account for the existence of legal principles, its net being fit for catching rules only. The second critique holds that positivism is unable to account for the disagreements about what makes "propositions of law" (holistically) true or false ("theoretical disagreements in law" or "disagreements about the grounds of law").

[41] The present reconstruction draws on Coleman 1982, pp. 28-48; Coleman 2001a, pp. 99-147; Moreso 2001, pp. 37-62; Bayón 2002; Himma 2002; Bulygin 2006; Coleman 2006; Shapiro 2007.

concepts (like, e.g., "good", "bad", "evil", "right", "wrong", "obligatory", etc.). Second, when moral principles contain expressions referring to *thick* moral concepts (like, e.g., "cruel punishment", "degrading treatment", "justice", "equality", "fair dealing", "unfair competition", etc.), *and* the case at hand does not qualify as an instance of a paradigm or central (generic) case.

The *inclusive limits of law thesis* (ILT) holds that the positive law of a society – whether it does, or does not, incorporate moral principles – reaches up to the point where its norms have a conventionally definite meaning in relation to the cases to be regulated.

Finally, the *inclusive discretion thesis* (IDT) holds that, whenever the positive laws of a society run out, because either of gaps or indeterminacy (which, as we have seen, may also affect the moral principles contingently incorporated in the legal system), judges must exercise an interstitial law-making power, if they have the duty to decide cases anyway.

By contrast, exclusive legal positivism (ELP) is "exclusive" since it rules out the possibility that moral principles (standards, values) be part of a positive legal system, working either as validity criteria or as the sources of implicit legal norms. The nucleus of ELP can be recounted as made, likewise, of six theses[42].

The *exclusive social sources thesis* (EST) holds that the existence and content of each and every norm belonging to a legal system *solely* depend on social facts ("sources"). There are two kinds of sources: "formal sources", like, e.g., the constitution, legislation, customs, and judicial precedents, and "interpretive sources", i.e., the "materials" relevant to determine the meaning of formal sources (like, e.g., the moral views and intentions of the persons that produced a piece of legislation). In no case the existence and content of a legal norm can depend on moral argument. Accordingly, knowing existing laws and their content is a matter of an empirical, social facts-based, enquiry.

The *exclusive validity thesis* (EVT) holds that in no case the morality of a norm (i.e., its conformity to, or derivation from, a moral principle) can be a necessary condition of its legal validity (i.e., of its being a norm belonging to a legal system).

The *exclusive indeterminacy thesis* (ENT) holds that positive legal systems are typically indeterminate. Their indeterminacy depends on the presence of "gaps".

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[42] My reconstruction is based on Raz 1975, pp. 103-121; Raz 1979b, pp. 37-52; Raz 1983, pp. 81-86; Raz 1985, pp. 210-237; Raz 2006, pp. 126 ff.; Coleman 1982; Coleman 2006; Moreso 2001.

Gaps can be either "voluntary", i.e., due to the normative authority's intention (for instance, the legislature enacts provisions phrased in terms of "human dignity", "inviolable rights", "degrading treatment", etc.), or also "involuntary", i.e., the ones that show up when a case is altogether unprovided for by existing laws, or when there are no settled criteria to solve an antinomy between two norms of the legal system[43].

The *exclusive limits of law thesis* (ELT) holds that the positive law of a society reaches up to the point where its norms have a definite meaning identifiable by means of empirical investigations upon linguistic uses, authorial intentions or other interpretive sources. Beyond that point, there is no law, no legal norms, but only extra-legal standards, including moral principles, which may be used to make new laws.

The *exclusive discretion thesis* (EDT) holds that judicial discretion, the judicial interstitial law-making power, is a regular feature in positive legal systems, due to the presence of voluntary and involuntary gaps, the indeterminacy of the meaning of legal norms, and also the working of judge-made adjudication principles that empower the judges to condition the recognition of the validity of norms to their being in tune with justice or morality.

Finally, the *exclusive incorporation thesis* (EIT) holds that whenever the law asks judges to decide according to moral principles (for instance, by means of a constitutional provision including a moral term), this is tantamount to empowering them to make new laws according to those principles. In that event, the applied moral principles become part of positive law, unless their application was the effect of a mere "reference" to standards meant to remain outside of the law (as it occurs with the references a municipal legal system may make to foreign laws).

It is worthwhile pausing for a few remarks, before proceeding.

1. Upon reflexion, the several ILP and ELP theses above suggest that the difference between ILP and ELP is mainly a fake[44]. ILP and ELP share the same basic views about positive law in general, though conveyed in a different packaging. To begin with, ILP and ELP hold the same view about the crucial issue of the *limits of law*: both adopt Hart's idea of the equivalence between existing laws and definite explicit laws (see BST4, § 2.1 above). Furthermore, both ILP and ELP hold roughly the same views about laws' *indeterminacy* and

[43] Raz 1979a, p. 77.

[44] According to Bulygin 2007, pp. 73 ff., ILP just «collapses into» ELP.

judicial discretion. In the light of the inclusive limits of the law thesis (ILT), the inclusive indeterminacy thesis (INT), and the inclusive judicial discretion thesis (IDT), therefore, the inclusive validity thesis (IVT), which should make the difference between ILP and ELP, loses its point. Incorporated moral principles count as as many valid laws *only* insofar as they have a clear and determinate meaning determined by linguistic or legal conventions, or, in any case by a convergent judicial interpretive practice. Contrariwise, in their area of indeterminacy, i.e., where incorporated moral principles "run out", their application requires the exercise of law-making judicial discretion. Therefore, from the standpoint of ILT or Hart's BST4, the presence of, say, some constitutional provisions (read as) containing moral terms – and so liable to be interpreted as expressing incorporated moral principles – does not push the frontier-line of the law farther than the reach of their collectively settled definite meaning, which is a matter of social fact.

2. ILP would really make a different theory from ELP, if, and only if, it endorsed a different incorporation thesis, a different limits of the law thesis, and a different judicial discretion thesis. The *revised inclusive incorporation thesis* (IIT^{I}) should hold not only that whenever the rule of recognition of a legal system makes legal validity to depend on conformity to moral principles, this fact has the effect of automatically incorporating those moral principles into the legal system. It should also hold that *which* moral principles *have actually and precisely been incorporated* into the legal system can turn out to be an *essentially controversial interpretive question*: namely, one giving rise to genuine interpretive disagreements among jurists and judges. The *revised inclusive limits of law thesis* (ILT^{I}) should likewise put down the idea that moral principles, once incorporated into a positive legal system, only reach up to the point of their collectively settled definite meaning, and accept, instead, that there is law that is not (yet) explicit and definite, that there is law even though it is still implicit and may be controversial what that law is. Finally, the *revised inclusive judicial discretion thesis* (IDT^{I}) should hold that, provided there is law that is implicit, and provided it may be an essentially controversial question which moral principles have been incorporated into the law by social sources, when their decisions depend on solving questions concerning the identity or the meaning of incorporated moral principles, judges do not enjoy of a strong law-making discretion, but only of a weak interpretive discretion.

3. The revisions suggested above give rise to a variety of ILP that might be called *interpretive inclusive legal positivism* (ILP^{I}), to mark its difference from the *standard* or *non-interpretive* ILP I have considered above. ILP^{I} adopts a relativist

stance as to the limits of law. In those legal systems that do not allow for any moral criteria of legal validity, existing law just coincides with definite explicit law (*à la* Hart). By contrast, in those legal systems that do allow for moral criteria of legal validity, existing law embraces both explicit and definite laws, and implicit and indeterminate laws as well. There is unfortunately an inconvenience with ILP^{I}. When legal systems allowing for moral criteria of legal validity are concerned (which nowadays are estimated to be a stark majority), the account ILP^{I} provides of existing law appears to be *extremely* close to the one offered by Dworkin's interpretive theory of law. Indeed, so close that one may wonder whether ILP^{I} is not, after all, just a spurious form of "positivist theory" of law.

4. We are led apparently to a surprising and disappointing conclusion.

On the one hand, standard (non-interpretive) inclusive positivism and exclusive positivism hold substantially the same basic (Hartian) views about positive law in general, though in different dressings.

On the other hand, from their vantage point, interpretive inclusive positivism fares dubiously as "positivism" at all, since it relativizes the coincidence or limits of law thesis (BST4, ILT and ELT) and virtually gives it up when "inclusivist" legal systems are at stake. In a word: Much ado about nothing.

This conclusion leads in turn to embarrassing questions. Which is the detail that hides the demon of pointlessness in the debate between inclusive and exclusive legal positivism? Where do the theory of Hart, as well as inclusive and exclusive positivism, go astray?

The mischief has to do, apparently, with the thesis of coincidence between existing law and definite explicit law (BST4), which Hart considers, as we have seen, as one of the building blocks of any sound positivist theory of law, and with its inclusive and exclusive positivism homologues (ILT and ELT, respectively).

We have seen that the function (and relevance) of BST4 consists in making the distinction between the law as it is and the law as it ought to be sound and viable (see § 3.1 above). Yet, one cannot do without noticing the uncertain status of the thesis. To which branch of legal study does it belong?

On the one hand, Hart and fellow (standard) inclusive and exclusive positivists regard it as a very important component of a general and descriptive positivist jurisprudence: i.e., as a genuinely *theoretical* thesis.

On the other hand, Dworkin considers it, and, in general, any thesis whatsoever purporting to draw the limits of law, as belonging to *interpretive* (and, in Hart's terminology, *normative* and *justificatory*) jurisprudence.

From a civil law perspective, the Hartian, inclusivist and exclusivist theses about the limits of the law (BST4, ILT, ELT) look suspect. To be sure, they are

theoretical in spirit and by design. Nonetheless, they have, and are likely to have, a momentous practical bearing.

To begin with, it must be emphasized that Hart is apparently aware of the practical import of his coincidence or limits of the law thesis (BST4). Indeed, he plainly avows that his «consensus»-based claim about the coincidence between existing law and law (clearly) defined by convergent judicial interpretation «is of the utmost importance if incoherence in the decisions of the judiciary as a whole is to be avoided, and *if the law is to be a coherent guide* to citizens *which will enable them* to *co-ordinate their activities and their* behaviour»[45]. Hart, in other words, defends his limits of the law thesis since it promotes the working of law as an efficient guiding-and-coordinating device; since it satisfies the *rationalist expectation* about law as an effective means of guidance and co-ordination of citizens' activities and behaviours.

Furthermore, whatever Hart and fellow positivists may think about them, the BST4, ILT and ELT theses can in fact be used to practical purposes in the practice-of-law game: in the game jurists, judges, and lawyers daily play out of professional privilege and duty. Which practical purposes may the theses be put to serve? Perhaps the following example will cast some light. Suppose you are a jurist favouring a "passive" judicial attitude in constitutional interpretation. In such an event, you will find the Hartian limits of the law thesis (together with the indeterminacy and judicial discretion theses) quite congenial to your (normative and justificatory) view. In fact, they support you, with all the authoritative weight of seemingly *theoretical* claims, in arguing that the constitution *reaches up to* the point of the *determinate linguistic, purposive or intentional meaning of its provisions*, if any, whenever no collective judicial meaning has yet been established to overcome strictly interpretive uncertainties; and, when a collective determinate judicial meaning has been established, that it reaches up to the point such a collective judicial meaning reaches. In so doing, you will be able to criticize as instances of *unconstitutional* judicial "activism" any reading of the constitution that departs, either from the determinate linguistic purposive or intentional meaning of its

[45] Hart 1988, p. 286: «Dworkin does not acknowledge the importance of such judicial consensus, and even welcomes the possibility of a single judge interpreting the law in a creative way without attempting to co-ordinate his interpretation with that of other judges. This indifference to the need for a consensus among judges as to the criterion of valid law and for collective judicial interpretation seems to me one of the major defects of Dworkin's theory; for such consensus is of the utmost importance if incoherence in the decisions of the judiciary as a whole is to be avoided, and if the law is to be a coherent guide to citizens which will enable them to co-ordinate their activities and their behaviour».

provisions, if any, or from the determinate collective judicial meaning, once it has been established. In so doing, you will be able to claim that every judicial interpretation of a constitutional provision departing from the meanings above is *legally wrong*: that it is a piece of contrary-to-law interpretation, or, in the terminology of medieval jurists, an instance of *interpretatio contra legem*, or, more precisely, *contra constitutionem*.

If the previous argument is sound, the Hartian thesis of the limits of the law (together with its cognate theses, ILT and ELT) turns out to be dubious as a genuinely theoretical thesis, since it works like a piece of engaged, ethical value-laden, juristic claim. The Hartian BST4 thesis, and its ILT and ELT homologues, in other words, seem to fly in the face of the separation thesis as a meta-theoretical posture.

Is there room for any limits of the law thesis within a genuinely general and descriptive positivist account of law? Is any limits of the law thesis conceivable, which, unlike the Hartian (and ILT and ELT) thesis, cannot be put to any practical use? It is conceivable. But, unlike the Hartian (and ILT and ELT) thesis, it must avoid taking side as to the existing law/definite explicit law/implicit law issue. That issue should be regarded – and openly presented – as one that wholly belongs to the province of legal practice and juristic value-laden controversies. No legal theory, *qua* theory, can claim to be competent to provide a solution. Accordingly, from a genuinely theoretical point of view, the only limits of the law thesis that looks viable is a second-order, meta-doctrinal, descriptive thesis. To wit, a thesis that accounts for the juristic positions that are, or can be, argued for in a legal system as to the existing law/definite explicit law/implicit law issue, and brings to the fore their respective ideological backgrounds and the practical consequences (also in terms of "winners" and "losers") likely to follow from their adoption.

Is this second-order, meta-doctrinal, descriptive thesis in fact tantamount to the limits of the law thesis endorsed by interpretive inclusive legal positivism (ILT^I)?

The question commands a negative answer. Interpretive inclusive positivism's limits of the law thesis ultimately rests on what is presented as a *correct interpretation* of the legal materials of actual or possible legal systems. If they include moral validity clauses, then the coincidence between existing law and definite explicit law does not hold; contrariwise, if, they do not include moral validity clauses, then the coincidence between existing law and definite explicit law does hold. In so claiming, also the ILT^I appears to trespass into the field of juristic doctrines, rather than merely accounting for them from an external point of view.

3.3. The Updated Hartian Conception

While the debate between inclusive and exclusive legal positivists was afoot, Hart took side. He declared himself a "soft positivist", the name he preferred for inclusive legal positivism[46].

Hart, however, poses as a soft positivist of a peculiar variety: something in between (standard, non-interpretive) inclusivism, on the one side, and exclusivism, on the other. The difference between Hart's updated version of his positivist theory of law, (standard) ILP and ELP comes to the fore as soon as we consider jointly two theses of (standard) ILP, namely, the *inclusive validity thesis* (IVT) and the *inclusive incorporation thesis* (IIT), and the two corresponding theses of ELP, namely, the *exclusive validity thesis* (EVT) and the *exclusive incorporation thesis* (EIT).

To begin with, Hart endorses the inclusive validity thesis (IVT), while rejecting the exclusive validity thesis (EVT)[47].

Secondly, Hart rejects *both* the inclusive incorporation thesis (IIT) *and* the exclusive incorporation thesis (EIT). Both theses, he claims, are unfit to a genuinely general and descriptive theory of positive law. Why? Hart's argument is well known, but it is worthwhile rehearsing. In a nutshell, Hart argues as follows.

The inclusive incorporation thesis (IIT) would be acceptable, if, and only if, the *truth* of the statement affirming the objective ontological status ("objective standing") of moral principles (roughly, that there *are* moral principles "out there", existing independently of human beliefs, attitudes, and preferences) were an uncontroversial matter of course.

Likewise, the exclusive incorporation thesis (EIT) would be acceptable, if, and only if, the *falsity* of the statement affirming the objective ontological status of moral principles were an uncontroversial matter of course.

Unfortunately, the truth or falsity of that statement, far from being an uncontroversial matter of course, is controversial within ethical theory. Accordingly, both the IIT and the EIT should be abandoned, for, Hart claims, no genuinely

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[46] Hart 1994, pp. 250-254.

[47] We have seen that if we read IVT in the light of the inclusive indeterminacy thesis (INT) and the inclusive limits of the law thesis (ILT), there is really no substantive difference between (non-interpretive) ILP and ELP. So, from the point of view of the IVT, there is really no substantive difference between Hart's updated positivist theory of law and ELP either. Indeed, insofar as a moral principle – for instance, one formulated in a constitutional provision – has a conventional settled and clear meaning, it can work as a moral criterion of legal validity in a way that pass the test of both ILP and ELP.

general and descriptive legal theory should adopt any thesis about positive law that depends on controversial ethical issues.

Thirdly, Hart sets forth, instead of IIT and EIT, the *practical indifference thesis* (PIT). The thesis holds that the reference a legal source makes to moral principles as criteria of legal validity does *actually* work always *in the same way*: both if we consider those principles as being inside of the law, as inclusivists do, and if we consider them to be outside of the law, as exclusivists do. In both cases, Hart argues, whenever the referred-to moral principles, proving indeterminate, do not dictate a unique solution, whenever, in other terms, they "run out", judges are in fact called to perform *exactly the same* activity: i.e., to exercise their "best moral judgment" as to the legal norm that is to be applied to a case at hand[48].

One point must be noted. The practical indifference thesis is an opaque and troublesome way of recalling Hart's theoretical thesis of coincidence between existing law and definite explicit law (BST4), the inclusive limits of law thesis (ILT) and the exclusive limits of law thesis (ELT). Provided that, at any moment in the life of a legal system, existing law coincides with definite explicit law, judges will be called to exercise their "best moral judgment", if, and only if, on the issue at hand, no explicit and definite law is available. In relation to such a situation, however, the issue about the "objective standing" of moral principles seems to be totally *irrelevant*. The more so, once we remember Hart's sound warning about the "folly" of assuming that the principles of any positive or critical morality – having or not an objective standing – would make up a coherent and complete set of norms always endowed with a determinate meaning, and so capable of rescuing the law from any indeterminacy whatsoever[49].

A further lesson can be drawn from the story I have just recalled. Apparently, we run again into the limits of the law thesis: the Hartian coincidence thesis (BST4) and its inclusive and exclusive positivism homologues (namely, ILT and ELT). We meet, again, the thesis that makes the common law theory of positivism go astray, that makes it stepping outside of the province of descriptive jurisprudence and raising critiques, like Dworkin's, that are in fact not satisfactorily reposted.

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[48] Hart 1994, pp. 253-254.

[49] See, e.g., Hart 1961 (2012), p. 204: «Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer»; see also Hart 1994, pp. 272-275.

4. Concluding Remarks

Which is, to conclude, the morale of this little story (if there is any)? Jeremy Bentham built his theory of jurisprudence upon the sharp divide between expository and censorial tasks. As we know, he thought both tasks to be very important for any rational coping with the social phenomenon of law. He also thought extremely important, though, that the two tasks, so far as possible, be carried out *separately*.

Common law positivist and analytic theories of law have taken Bentham's model seriously. Coping with the issue about how a positivist theory of law in general, *qua* theory, should be, common law positivists have put themselves on the path of expository jurisprudence. Hart's general and descriptive jurisprudence is nothing but an updated version of Bentham's expository prototype.

It must be noticed, however, that common law theories have not succeeded, at least not entirely, in keeping their purportedly descriptive (explanatory, clarifying) claims free from the influence of practical preoccupations mirroring the needs of a rationalist censorial jurisprudence.

In fact, the limits of the law thesis, in its different versions (BST4, ILT, ELT), poses (also) as an answer to the rational need of encapsulating into "our" re-defined and clarified concept of law a strong reading of the idea of law as a normative social order with an effective conduct-guiding and conduct-coordinating function.

The outcome, in sum, is a set of positivist theories of law that, all-things-considered, have not succeeded in providing a purely descriptive, value-neutral, indifferent to practical consequences, view of positive legal systems.

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