What *Is* Law and What *Counts As* Law? The Separation Thesis In Context

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There are not many philosophical theses that have generated as much confusion and misunderstandings as the so called “separation thesis” in legal philosophy. John Austin’s famous dictum that “the existence of the law is one thing; its merit or demerit is another” may not have actually engendered this confusion but it is certainly associated with it.¹ The tradition of legal positivism, that Austin is one of its founders, is sometimes characterized by espousing to the idea that there is no necessary connection between law and morality. Yet of course there are many essential connections between law and morality, some of them quite plausibly necessary connections, and legal positivists have never denied it. But then, detractors claim, if law and morality are necessarily linked, what is left of the separation thesis? I want to begin my discussion with John Gardner’s excellent answer to this question, and show that it needs some modifications and further elaboration.² Along the way, I hope to show what is the main philosophical challenge here, and why it is important. I also hope to show that a proper construal of the separation thesis goes a long way supporting Austin’s main philosophical insight here.

1.

The separation thesis amounts to the claim that there is a fundamental aspect of law, its “existence” in Austin’s formulation, which does not depend on morality. The first question that arises here is what is it that legal positivists mean by this fundamental aspect? What is it for a law “to exist” in a way that is independent of its merit? Gardner claims, and rightly so in my mind, that the separation thesis pertains to one, and only one, aspect of law: the conditions of legal validity. Gardner’s formulation of this idea, which

¹ J. Austin, *The Province of Jurisprudence Determined* (1832; ed. W.W. Rumble, Cambridge University Press, 1995), 157.

² J. Gardner, “Legal Positivism: 51/2 Myths”, 46 *The American Journal of Jurisprudence*, (2001), 199.

he takes to be the core commitment of the legal positivist tradition, is the following proposition:

“(LP) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.”³

Now this proposition, (LP), is in need of two adjustments, one of which Gardner provides and one which he omits. The latter concerns the distinction between legal validity and membership of norms in a legal system. The formulation of (LP) suggests that if a norm is legally valid in legal system S, it is “part of the law of” S. But, as Joseph Raz pointed out, this is not true.⁴ Membership of norms in a legal system is more restricted than the set of norms legally valid in the system. The distinction is somewhat technical and may not be all that important, but we might as well get it out of the way. Consider, for example, the norms governing the conduct of members of Oxford University. They are legally valid norms, presumably enforceable in UK courts, but it would be rather strange to say that Oxford University’s rules and regulations are part of UK law. Similarly, a collective bargaining agreement between General Motors and its employees, is legally valid but not part of US law. Furthermore, as Raz pointed out, legal systems often recognize as valid some laws of other legal systems and, under certain conditions, would apply those norms to resolve a dispute, but the foreign norms do not thereby gain membership in the system that recognizes them.⁵ Having said this, I will leave the issue aside, and focus, as Gardner does, on the idea of legal validity.

The second modification bears directly on the proper articulation of the separation thesis. To explain it I will use an example different from Gardner’s but in the same spirit. Thus consider a small tribal society in which people believe that they are, and ought to be, guided by the spirit of their ancestors. And they believe that the Grand Shaman is the only one who communicates with the ancestors and therefore regard the Grand Shaman’s directives as the law of their land. Now, when you think about the application of (LP) to this society you might think that there is a problem. After all, it matters to the people who regard the Grand Shaman’s directives as law that the Grand Shaman is, as they believe, a

³ “Legal Positivism: 51/2 Myths”, 199.

⁴ See, for example, J. Raz, *Between Authority and Interpretation*, (2009, Oxford University Press), 193-4.

⁵ *ibid.*

conduit to the ancestors' spirit. In other words, the Grand Shaman's directives are law only if, and in so far as, the Grand Shaman conveys the will of the spirits. Therefore, if there are any doubts about that, if the population learns, for example, that the Shaman is a fraud, they would no longer regard his directives legally binding. It would no longer be law. Or suppose that a different kind of doubt creeps in: suppose members of this population begin to doubt that they are bound by the spirits' will or, maybe, even begin to doubt that the spirits exist. You would think that this would lead them to doubt the legitimacy of the Grand Shaman's authority. And then they might no longer think that the Grand Shaman's directives are legally valid. Would that refute (LP)? After all, we seem to see here how beliefs about legitimacy affect legal validity. The latter seems to depend, *inter alia*, on considerations of merit, not source.

The question, to generalize, is whether the moral legitimacy of legal authority bears on the conditions of legal validity. According to Gardner, (LP) is to be understood as answering this question in the negative. The whole point of (LP), according to Gardner, is to deny that the conditions of legal validity depend on anything but sources; considerations of merit, either the merit of particular norms or the merit of the authority issuing those norms, have no bearing on the question of whether the norms are legally valid or not. Thus he reformulates (LP) to capture this idea:

(LP*) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).⁶

Now there is something right and something a bit more tricky about (LP*). It seems quite right to claim that as long as the relevant population regards the Grand Shaman's directives as law, it is law, irrespective of the reasons they may have, or not have, for so regarding it. And if, for whatever reason, they no longer regard the Grand Shaman's directives as law, then the Shaman's directives are not legally valid. In other words, legal validity does not depend on peoples' reasons for regarding it as legally valid. And this view gains a lot of support from the idea that the legal validity of a norm or a

⁶ "Legal Positivism: 51/2 Myths", 201.

directive does not necessarily entail that the subjects of the norm ought to comply. There are many legally valid norms that ought to be ignored or sometimes even deliberately violated. Legal validity is no guarantee of moral soundness. That much, at least, we can all agree on.

And yet, this is a bit more complicated. Consider an analogy with promises⁷: a promise is valid, morally binding, regardless of the reason the promisor may have had for making the promise. If you made a promise, you have a reason to keep it, and you would have this reason even if your reason to make the promise was not a good one. But this only holds up to a point. If the promise was made under duress, or extracted by fraud, and things like that, it is not a binding one. So it is not entirely accurate to say that the reasons for making a promise are always irrelevant to the questions of whether a valid, or binding, promise has been made. If the making of a promise fails certain moral conditions, it is not really a promise. Why would this be different in the legal case? Why cannot we say that if the making of a putative law fails certain moral constraints, it is not really law?

The answer is that promises, unlike the law, are entirely within the moral domain. It is true, and quite important, actually, that in both cases, the making of a promise and the making of law, it normally takes a speech act to accomplish. And it is true in both cases that there are certain conditions which have to be met to enable us to recognize the relevant speech act as one of promising or law making. But our reasons for treating certain speech acts as the making of a promise are moral reasons and the ramifications of it are determined by the moral considerations that apply. Law is much more complex than that. There are, no doubt, moral reasons to have law, and those reasons would have bearing on what we expect of law to accomplish. And this is true of law in general, as it is of particular laws. But the law is not a moral practice, like promising, it is a social one. And it is this social, institutional aspect of law that creates a gap between legal validity and moral validity. A valid promise cannot be anything else but a morally valid promise; a legally valid norm or directive can be morally invalid. In other words, promising is entirely a moral practice, whereas law is a social practice with moral aspects.

⁷ This analogy and its main point is inspired by Raz's discussion of it in *Between Authority and Interpretation*, 178-9. I think that the point I make here is somewhat different from Raz's but in line with his argument.

None of this proves, of course, that (LP*) is correct. In fact, there are at least two aspects of it which invite some pressure. So let me mention them upfront and then elaborate on one of them, which I take to be the core issue here. For one thing, Gardner tells us precious little about the kind of facts that would establish what the sources of law are in any given legal order, except that they are not merit based. As Gardner puts it, a norm is legally valid in a system if at some point “some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged in it.”⁸ And I certainly agree with that, law, as I argued elsewhere in some detail, is an artifact, it has to be created, and its persistence as law depends on practice, on a population treating it as such.⁹ Law is, to use Gardner’s words, a product of human engagement. But we still need an answer to the question of what makes it the case, in any given society, that certain types of human engagement are legally significant and others are not. In other words, what constitutes the legal sources? Scholars in the legal positivist tradition have given different answers to this question; some suggested that it’s a matter of social rules or social conventions, while others have reservations about the rule/convention based account. But perhaps none of this matters. Gardner clearly thinks that the only commitment legal positivists share or, at least, the only commitment embodied in the separation thesis, is the idea that whatever makes it the case that something counts as law is not merit-based.

Fair enough, but then we must acknowledge that the core idea of (LP*) relies on the dichotomy between source and merit. And according to Gardner, a dichotomy it is: “The two categories.... are jointly exhaustive of the possible conditions of validity for any norm.” Anything that can ground the legal validity of a norm “counts as source-based if it is not merits based”.¹⁰ But here we begin to run into serious difficulties. The idea that the validity of a norm is either source based or merits based sounds too dogmatic. Pressure on it comes from two directions: one, which Gardner mentions, is that there might be an overlap. Source based norms might direct us to condition the validity of other norms on their merits. This is the position held by “soft” or “inclusive” legal positivism.

⁸ “Legal Positivism: 51/2 Myths”, 200.

⁹ See my *Philosophy of Law* (2011, Princeton University Press), chapters 1-4; and “Law as Authoritative Fiction”, (2017, forthcoming in *Law & Philosophy*).

¹⁰ “Legal Positivism: 51/2 Myths”, 200.

This view takes legal validity to be foundationally source based, but it allows for those sources to condition the validity of some subset of law on merit based considerations.¹¹ Let's call this the question of incorporation. I will get to this problem in the last section. The second, and more important challenge, however, is not about the possibility of overlap, but about the soundness of the dichotomy itself. According to critics, the distinction between source and merit is not nearly as sustainable as (LP*) would have it.

2.

The distinction between source and merit seems to be a very close relative of the familiar distinction between *is* and *ought*, or between description and evaluation. It is rather uncontroversial that we can draw a distinction between propositional content that describes some aspect of the world, and propositional content that expresses a view about the way things ought to be from some normative vantage point. The former kind is rendered true or false by the way things are, in the world. If I assert that "P is Q", the proposition is true if P is, indeed, Q, and false if P is not Q. But if I assert that "P ought to be Q", then the fact that P is not, actually, Q, would not render my proposition false. It would only be false if P ought not to be Q. In other words, the source v. merit distinction heavily relies on the distinction between the *is* and the *ought*, between statements describing how things are and statements prescribing ways things should or ought to be. Notice, however, that (LP*) is not committed to Hume's famous argument that *ought* cannot be derived from *is*.¹² It is only committed to the distinction underlying Hume's argument, namely, to the idea that there is a clear distinction between statements of a descriptive kind and statements of an evaluative kind. Whether Hume was correct to maintain that no evaluative conclusions can possibly follow from any set of statements

¹¹ See Gardner "Legal Positivism: 51/2 Myths", 202. The soft or inclusive version of legal positivism has been articulated by J. Coleman, "Negative and Positive Positivism", (1982), 11 *Journal of Legal Studies*, 139; W. Waluchow, *Inclusive Legal Positivism* (1994, Oxford University Press), and endorsed by many others, including, arguably, by H.L.A. Hart in his postscript to *The Concept of Law* (2nd ed., 1994, Bulloch & Raz eds, Oxford University Press).

¹² D. Hume, *A Treatise of Human Nature* (1740, 2nd ed. Nidditch ed. 1978, Oxford University Press), 469.

which are only descriptive, is not something that needs to be settled; Hume's argument is not part of what makes (LP*) plausible.¹³

One way to understand Dworkin's interpretative objection to the legal positivist tradition is to see it as a direct challenge to the idea that source and merit can be clearly distinguished as (LP*) presupposes.¹⁴ Dworkin's argument is based on the nature of interpretative reasoning. Interpretation, by its very nature, involves an inextricable mix of the evaluative and the descriptive. And, since legal reasoning is profoundly interpretative, any conclusion about what the law is, involves a mix of source based with the merit based considerations. As I argued elsewhere in some detail, Dworkin's conclusion that the distinction between source and merit cannot be sustained rests on two premises, only one of which is sound.¹⁵ Dworkin is quite right to maintain that typical interpretative reasoning relies on both descriptive and evaluative considerations. But this is not enough to refute (LP*). The separation thesis is in trouble only if it is also true that interpretative reasoning identifies or discovers, as it were, what the law had been prior to the interpretative reasoning. Proponents of (LP*) can readily admit that whenever the law is in need of interpretation, evaluative considerations and judgments would have to play a role. But interpretation is employed by judges and other legal actors as a way of concretizing, extending or modifying the law, changing it, or even creating new law, not as a way of identifying what the law is. Law is identified by its sources, and then, when it turns out that law thus identified is not sufficiently clear to settle the legal issue at hand, or otherwise leaves some questions unanswered, then judges may need to engage in ways of concretizing, specifying, and modifying the law by interpretative reasoning.¹⁶

Thus, even if it is true, as I think it is, that interpretation typically involves a mix of descriptive and evaluative considerations, it does not follow that (LP*) is false. The

¹³ With the exception, perhaps, of Kelsen's legal theory. As I explained elsewhere (*Philosophy of Law*, ch 1) Kelsen took the Humean argument very seriously, and thought that it frames the challenge any theory of law needs to answer, namely, the challenge of explaining how actions and events in the world can be construed to have normative force. But all this pertains to the question of legal normativity, it does not have a direct bearing on the conditions of legal validity.

¹⁴ R.M. Dworkin, *Law's Empire*, (1986, Harvard University Press).

¹⁵ See my *Philosophy of Law*, ch 4.

¹⁶ On these issues, articulating what, in my view, is quite right and important in Dworkin's theory of interpretation, and why I think that it is misapplied to the legal case, I have elaborated on several occasions. See, for example, my *Interpretation and Legal Theory: Revised Second Edition* (2005, Hart Publishing); "Farewell to Conceptual Analysis (in Jurisprudence)" in *The Nature of Law* (2013, Waluchow & Sciaraffa eds., Oxford University Press), 209; and my *Philosophy of Law*, ch 4.

separation thesis is threatened only if it is also true that interpretation is employed to figure out what the law on this or that is. But this is precisely the thesis that (LP*) is committed to denying. To put the same idea differently, the dispute between Dworkin and legal positivism is not about the nature of interpretation but about the role that interpretation plays in determining what the law is. According to Dworkin any conclusion about what the law on this or that is, is a result of some interpretation or other. According to proponents of (LP*), however, interpretation is just one of the ways in which human engagement with the law modifies it and creates new law. When judges, in their official capacity, interpret the law and conclude that the correct interpretation of it is X, X may well be the law, but not because X is the correct interpretation; X becomes the law because judges *say* (*viz.*, officially hold) that it is.

To be sure, none of the above was meant to be a conclusive argument against Dworkin's view. It was only meant to show that Dworkin's theory of interpretation, that is, of what interpretative reasoning necessarily involves, does not settle anything about the truth or falsehood of (LP*); it leaves the argument about it where it found it. But there may be an argument in the vicinity that does threaten (LP*) directly. It would have to be an argument about the role interpretative reasoning plays in ways of determining whether something is an object of a certain type. So this is the general thought: when we pose a question of the kind "Is o an F?" we would normally expect the answer to be determined by the relevant properties of o and the relevant properties of the predicate or category F. But sometimes things are not so simple; there are areas in which answering such questions necessarily involves evaluative considerations. Whether o is an F or not might depend on what it is about F that we value, appreciate or care about. The realm of art provides a very good example.

Some time ago I visited with some friends, among them a distinguished art historian, the art exhibit at the Dia Beacon gallery in NY. Among the displays we saw a work entitled "Leaning Mirror"¹⁷ which consisted of a double sided mirror stuck in a pile of sand (and yes, it was leaning). That was it; an ordinary pile of sand with a mirror stuck in it. I told my friends that this is ridiculous, it's not a work of art. My art historian friend objected; it is definitely a work of art, he said, though perhaps not a very good one at that.

¹⁷ Robert Smithson, "Leaning Mirror", 1969.

So there we are: is *o* an *F*? Is this object a work of art? You can see the various arguments one can deploy in both directions here. I tried to argue that a work of art needs to demonstrate some special talent in its creation, some special skills required to create it; my friend replied that there are many kinds of talent that might be in play; artistic talent might consist in the artist's ability to see something others haven't, not necessarily to do something that others cannot readily accomplish. And so on and so forth, we kept arguing for a while. But of course our arguments were very closely entangled with our views about the values of art and what we thought that makes art worthy of our appreciation. And then of course different evaluative views about the nature of art yield different answers to the question of whether the object in front of us, the "Leaning Mirror", is a work of art or not.

I hope you can see that if something similar applies to law, the separation thesis is in trouble. (LP*) tells us that an answer to the question of the type "is *o* an *F*?" where *o* is some norm and *F* is law in a given legal system, can always be answered by tracing *o*'s sources, that is, without considerations of merit. But as I just exemplified, in the realm of art, whether *o* is an *F* or not (where *o* is an object and *F* is work of art) may well depend on the merit of *F*, that is, it depends on views about what makes *F* valuable and worthy of appreciation. If that is true of law as well, the source v. merit distinction that (LP*) presupposes cannot be sustained. Whether a norm is law or not may well depend, partly, on what values we find in law and what makes law, or laws of that kind, worthy of appreciation.

How can proponents of (LP*) respond to that? There are two ways to go here. One, rather obvious route, is to protest the analogy between law and art. We could say that law is not like art, at least not in this respect. The other way is to draw on the distinction between *what is an F* and *what counts as an F*. I will come to defend this second track, but not before I explore the first.

Let me return to one of the arguments about the "Leaning Mirror" I've had with my art historian friend. So here is what I told him; if one held the view that institutional recognition, instantiated by exhibit in museums and art galleries, supported by art dealership markets, etc., is constitutive of what is a work of art, then of course the "Leaning Mirror" is a work of art. But we immediately agreed that this would be a

profoundly misguided view about the nature of art. When curators pick an object to exhibit in an art gallery they pick it because they think that it is a work of art; they would not think that it becomes art because they have exhibited it in the gallery. But this is precisely the point at which the analogy between law and art breaks down. In the legal case, institutional recognition is constitutive of what is a legal norm. Legislatures do not enact something because they think that it is law already; they make it law by enacting it. Similarly, according to (LP*), when judges and other officials modify the law or apply it in certain ways, their engagement with the relevant norm is what makes it law. So at least in this crucial respect, law is very much unlike art.

This rejoinder seems right as far as it goes. But it may not go far enough. There might be a deeper sense in which identifying an object as a work of art is very similar to identifying a norm as legal. In both cases, where the proposition takes the form “o is an F”, the “F” in question, a work of art in one case, a legal norm in the other, are neither purely descriptive nor purely evaluative, but an inextricable mixture of both. It is certainly plausible to argue that an attribution of artistic qualities to an artifact is not value-neutral; to view something as art is also to view it in some positive light, something we would have reasons to pay attention to, value in some respect, etc. And notice that this would still hold even if you think that the object you classify as art is not a successful exemplar, namely, that it’s not good art. Which is partly what explains why an argument about whether a particular object is, or is not, a work of art is a sensible kind of argument. It is a sensible argument precisely because we think that even if the object is not good art, it being art endows it with some value, something that we appreciate. That is, even if, all things considered, the object is not artistically praiseworthy. Thus, to be fair to critics, one cannot dismiss out of hand a similar line of thought applied to law. Since we all admit that there are very good reasons to have law, that there are good reasons to have human interactions regulated by legal means, and good reasons to prefer legal regulation to many other alternatives, etc. etc., there might be something to be said for the idea that there is some good in legality, per se, even if, on particular occasions, all things considered the law is not good.¹⁸ So the idea is that in certain cases, the F, in “o is an F”

¹⁸ See, for example, Raz, *Between Authority and Interpretation*, ch 6. Of course there might be some versions of political anarchism that deny that law is good in any sense whatsoever. But an anarchist need

type of statement, is neither a purely descriptive predicate nor a purely evaluative one, but a mix of both. And if that's true not just about art but about law as well, (LP*) might be false. If F has some evaluative aspects, then it would seem that an answer to the question of the type "is o is an F?" would have to be sensitive to the values associated with F.

The obvious rejoinder on behalf of proponents of (LP*) is to deny the analogy again. That is, to deny that the F predicate, when construed strictly in terms of legal validity, has any evaluative dimensions. On this view, to say that a norm is legally valid in a given legal system, is simply to point out a social fact, something that just happens to be the case somewhere at some time. It does not involve, so the argument would go, any positive or negative evaluative stance; unlike art, which may be inherently good in itself, legal validity is not. It is just something that occurs in a social context, something that happens to be the case.

In order to strengthen this last point, proponents of (LP*) often dwell on the point that the legal validity of a norm does not entail a moral obligation to comply with it. Some may dispute that, but I won't; let us assume that the fact that there is a legally valid norm that applies to X at some point, and would require X to ϕ in those circumstances, does not necessarily give X a moral obligation to ϕ , even *pro tanto*. It may give X a reason to ϕ , but that is not saying much; anything can count as a reason for action. Facts that count in favor of doing (or not doing) something do not have to be of the kind of things we value. We may value something else, and the fact in question counts in favor of doing something in light of the things we may want to accomplish or other things we need to do. Granted all this, in particular, granted that there is no general moral obligation to obey the law, there is still something unsatisfactory about the idea that legal validity is a value-neutral predicate. After all, there is some value to legality; we do seem to share the view that legal regulation of social and inter-personal problems is a good thing, at least better than feasible alternatives.¹⁹ So how can legal validity be devoid of any

not maintain such a view; anarchism is compatible with the view that there are reasons supporting having law and legal regulation in society, but those reasons are always defeated by the reasons that count against subjection to law.

¹⁹ For a more detailed argument to that effect, see my "The Ideal of the Rule of Law" in *A Companion to Philosophy of Law and Legal Theory* (2nd ed., 2010, Patterson ed., Blackwell), 666.

evaluative dimensions? In my view, the one I will strive to articulate in the next section, there is no need to deny that the F predicate, even if construed in terms of legal validity, is partly evaluative in some sense. In other words, I will try to show that proponents of (LP*) do not need to focus on rebutting the analogy between art and law in this respect. What we need to show is that the “is o an F?” type of question depends on the particular theoretical context in which the question is asked. And then I will try to show that in the theoretical context that gives rise to (LP*), it makes sense to construe the F predicate in purely descriptive terms.

3.

Let us suppose that the question we ask is not “is o an F?” but a modified version of it; we ask “what makes it the case that o *counts as* F in S?” or, more generally, “what counts as an F in S?” (where S stands for a given society or some relevant population). So, for example, my art historian friend can ask what kind of artifacts were regarded as works of art in the 12th century Seljuk empire? Did they have a distinction between ornamental artifacts and works of art? Or what makes it the case that abstract compositions started to count as art in the early decades of the 20th century in Europe? Obviously, these are different kinds of question from the one we discussed before, whether the “Leaning Mirror” is, or is not, a work of art. Crucially, in order to answer the second type of questions, my friend would not need to rely on his own views about what makes art valuable. He just seeks an understanding of what makes people, in some relevant population, treat something as a work of art; what makes them believe that it is, how they respond to it, how do they rationalize those reactions, etc.,. The question is, you might think, essentially sociological in nature, and thus the answer to it is expected in terms of some sociological explanation or other.²⁰

Now I hope we can see that the separation thesis can be seen as an answer to this second type of question, what makes it the case that *o counts as an F in S*. On this interpretation, (LP*) should be seen as an answer to the question of what kind of things

²⁰ I am not using the word sociology here to refer to the academic discipline of sociology; my use of the term should be understood in terms of the subject matter, concerning description of social facts and social reality.

make it the case that a norm counts as legally valid in a given legal system. On this reading of it, (LP*) provides a reductive explanation as the answer; it maintains that whatever it is that makes people regard norms as legally valid in their legal system can be fully articulated in terms of sources, not values. To be more precise, as I will explain in a moment, the explanation of legal validity on this reading can be given in terms of articulating people's actual conduct and attitudes (namely, beliefs, intentions, dispositions, etc.). But now you might think that we are cheating; of course if you ask a sociological question you are bound to seek a sociological answer. But why should we ask the question as one about social facts? Why should we confine our interest to what counts as an F in S, and not what makes it the case that an o is an F (in S)?

There is no cheating here. In order to see this, we need to understand the main theoretical motivation of the legal positivist tradition. When Austin talks about the existence of law as distinct from law's merit, he has a particular theoretical ambition in mind. The ambition is to explain the legal phenomenon, at least some important aspects of it, by way of a reductive explanation. What Austin sought to accomplish is to show that legal validity (and on his account, the normative aspects of law as well) can be fully explained by reducing the surface phenomena to facts about people's conduct, beliefs and other attitudes. As I explained elsewhere in some detail, H.L.A. Hart shared the same theoretical ambition. His dispute with Austin was not about the reductive nature of the explanation sought, but about the particular building blocks that Austin had offered. Hart argued, and quite successfully, that Austin's building blocks are too crude and inadequate to the task.²¹ Nevertheless, Hart clearly shared Austin's theoretical ambition to explain some essential aspects of law by way of reducing them to more foundational truths about people's actual modes of conduct, the beliefs they share about them, and other attitudes that accompany those beliefs. In other words, the hallmark of Hart's theory of law is the idea that social rules are at the foundation of law, and that social rules, in turn, can be explained reductively in terms of peoples overt conduct and attitudes accompanying it. And, as I argued in the past, with the exception of Kelsen, this project of trying to articulate a reductive explanation of law is characteristic of the legal positivist tradition.²²

²¹ H.L.A. Hart, *The Concept of Law*, chs 2-5.

²² See my *Philosophy of Law*, chs 1-3 and "Farewell to Conceptual Analysis (in Jurisprudence)".

The idea of a reductive explanation is to show that a distinct type of phenomenon is actually constituted by, and thus fully explicable in terms of, some other, more foundational type of facts. The main criterion of success for a reductive explanation is its completeness. A reductive explanation is successful only when it provides a complete explanation of the reduced class by the building blocks of the more foundational class. For example, think about the possibility of reduction of the biological to the chemical and physical aspects of the material world. It is not enough to show that chemistry and physics explain some aspects of biological phenomena. A reduction of biology to chemistry and physics is successful only if it is complete, only when all the biological aspects of the world are fully explicable by the laws of chemistry and physics. And this, of course, is a tall order; reductive explanations are rather ambitious by their nature, and often remain questionable because they are incomplete.

One of the main differences between scholars in the legal positivist tradition consists in the scope of their reductive ambitions. With the exception of Kelsen, I think that all legal positivists shared the assumption that the notion of legal validity is reducible to social facts; they differed, however, about the explanation of the normativity of law.²³ Austin applied his reductive explanation to the normativity of law as well, purporting to show that we can explain how law gives its subjects reasons for action in terms of people's desire to avoid unpleasant consequences from failure to comply with the law. Hart and other legal positivists have not shared this reductive ambition when applied to the normativity of law. But, as we have assumed here all along, the separation thesis is not about law's normativity; it is only about the conditions of legal validity.

Now I hope we can see that if the theoretical ambition is to offer a reductive explanation of legal validity, then the main issue here is not well captured by the question "What is law?". Law is, undoubtedly, a lot of things, some of them contingent, others essential or at least more central to what law is, and so on and so forth. No doubt, some essential aspects of law are of great moral significance, and people can have reasonable disagreements about them. Therefore, it should come as no surprise that the "is o an F?"

²³ As I explained elsewhere in detail (see my *Philosophy of Law*, ch 1), though Kelsen was rather explicit in trying to avoid a reductive explanation of legal validity, he actually failed in that endeavor. His explanation turns out to be reductive after all, which is precisely what makes his theory of law belong to the legal positivist tradition.

type of question might well admit of different and incompatible answers, equally plausible, depending on what aspects of law one deems relevant, essential or important (including, if you will, morally important). The theoretical ambition of trying to articulate a reductive explanation of legal validity points in the direction of asking a different question; it points us to ask “what counts as an F?” in a given society or a given legal system. In other words, the ambition is to try to articulate the conditions under which members of a given society identify the norms and directives that purport to govern them as distinctly legal norms and directives. And it is to this question that (LP*) purports to be the answer.

Now you might think that I am drawing the target around the arrow here. As if first we have an answer, given by (LP*), and then I formulate around it the kind of question it might be the answer to. But this is not really what I am suggesting. The suggestion is that there are various ways of formulating the question about the conditions of legal validity, and that the formulations should be sensitive to the theoretical framework in which they arise. If the theoretical ambition is to see how far a reductive explanation of legal validity can go, as I think it is, at least historically speaking, then it makes sense to focus on trying to figure out what makes people regard norms of this or that type as distinctly legal norms. In other words, it makes sense to focus on what people have to do and believe and what other attitudes they need to entertain or exhibit for them to say that this is law and that is not law.

But then, you might suspect, we have already committed ourselves to an (LP*) kind of answer just by asking the question in terms of “what counts as an F in S?”. But that is not true. (LP*) amounts to denying that we ever need to rely on moral argument to determine whether an *o* counts as an F in S. And this is not something that automatically follows, as it were, from the formulation of the question in the way I suggest. In fact, it is precisely what renders the reductive explanation contestable and subject to disagreement.

In order to see this last point, consider Dworkin’s early critique of Hart’s legal positivism, in which he clearly rejects the reductive explanation of legal validity that Hart has given.²⁴ By introducing the idea of legal principles, Dworkin aimed to show that no

²⁴ Dworkin, *Taking Rights Seriously*, (1977, Duckworth) chs 2-3.

reductive explanation is possible to answer the question of what counts as an F in S; and that is so, because at least when the legal validity of principles is in play, the facts that partly establish legal validity are moral facts, not just facts about people's conduct and attitudes. In this dispute about the idea of legal validity, Hart and Dworkin try to answer the same question; they both focus on the question of what counts as legally valid in a given legal system. Hart purported to show that we can provide the answer by way of a reductive explanation that takes social facts to be foundational, whereby those facts provide necessary and sufficient conditions for legal validity. Whereas Dworkin argued that this reductive explanation is bound to be utterly incomplete because it cannot apply to ways in which judges and other legal actors come to regard certain principles to have legal validity; the legal validity of principles, Dworkin argued, is partly, but necessarily a matter of moral truths.

Dworkin's theory of legal principles is precisely the kind of argument that forms the relevant type of challenge to the reductive explanation embodied in (LP*). Remember that according to Dworkin's argument, principles, as opposed to legal rules, gain their legal validity by way of a combination of source based and merit based considerations. A principle is legally valid if it forms part of the best moral justification (or, as he later claimed, interpretation) of some source based law. Which means that a conclusion to the legal validity of a principle partly, but necessarily, depends on moral reasoning. Clearly, if this is true, (LP*) is false.

My aim in this essay, however, is not to settle this particular issue; elsewhere I presented in greater detail my arguments against Dworkin's theory of legal principles, and I will not repeat those arguments here.²⁵ I will just say, briefly, that the problem Dworkin's theory faces here is essentially the same problem we mentioned earlier about the interpretative nature of law. Proponents of (LP*) can easily admit that when judges face a case that would seem to be unsettled by existing law, they might reason to the solution in the way Dworkin describes, namely, they would look at the relevant body of existing law and try to figure out the best moral justification underlying the relevant legal material. And once they come up with a justifying principle, they apply it to bear on the case at hand. So far, none of this would show that (LP*) is false, because none of it

²⁵ See my *Philosophy of Law*, ch 4.

shows that the principle in play had been the law prior to, and irrespective of, the judicial decision that applies it. The principle might become part of the law, as (LP*) would have it, only because and to the extent that judges engage with it, rely on it, and apply it.

Dworkin's response to this kind of critique was to argue that it misses the ways in which judges and other legal actors rationalize their own decisions. On his view, an (LP*) type of explanation is just not the kind of explanation that judges can come to recognize as their own, as it were, it is just not the way they would think about it.²⁶ They would think that they apply a legal principle because it is the law, and not that it becomes law because they apply it. We can raise some doubts about the generality of Dworkin's claim here, arguing that judges are often quite aware of the fact that they are modifying the law by their decisions, even if they claim otherwise. But this is not the point I would like to pursue here. The more general, methodological point, is to question the relevance of rationalization to the kind of reductive explanation that (LP*) aims to provide. Let me explain this briefly.

There are certain types of theoretical explanations of social phenomena that are subject to what we can call an internal rationalization constraint; namely, they would have to be the kind of explanation that the participants in the social practice explained could come to recognize as their own, so to speak, rationalizing *for them* the relevant conduct they engage in and the attitudes they have about it. In other words, those are the explanations that, if successful, would create a kind of "aha!" moment for the participants, enabling them to see more clearly what makes them do this or that and have the attitudes they do. Dworkin clearly assumes that a theory about the nature of law is subject to the internal rationalization constraint; it must provide the kind of explanation that would rationalize, *for the participants*, their reasons for engaging in the practice and the various attitudes they hold about it. The problem is that, generally speaking, a reductive explanation of a social practice is not committed to this internal rationalization constraint. A reductive explanation is successful, as I mentioned earlier, if it is a complete reduction. But it does not have to rationalize the practice it purports to explain in the way

²⁶ See, for example, his *Law's Empire*, chs 1-3. The same theme is reiterated, even further emphasized, in his *Justice in Robes* (2006, Harvard University Press). See also N. Stavropoulos, "Obligations, Interpretivism, and the Legal Point of View", in *Routledge Companion to Philosophy of Law* (2012, Marmor ed., Routledge), 76.

that participants could come to recognize as their own explanation for engaging in it. The clearest example of this is a Marxist explanation of religion, or more generally, of ideology. It is, no doubt, a reductive explanation, and it might be a good or a bad one at that, but it does not have to be the kind of explanation that participants can employ to rationalize their engagement with the practice. If you are a religious person you would not be inclined to endorse a Marxist explanation by way of trying to rationalize to yourself your system of beliefs; that's not going to work for you. But of course it would not show a Marxist explanation to be wrong, it just shows that it is the kind of explanation that is not subject to the internal rationalization constraint. And I think that this is generally true of reductive explanations of social practices; they are not the kind of explanations that are subject to the internal rationalization constraint. And if I am right about the proper construal of (LP*) as forming part of a reductive explanation, I think we should not count as a possible counter-example to it the fact that it may not be the best tool to explain how participants in the legal practice, perhaps judges in particular, would rationalize their own engagement with the law.²⁷

4.

Gardner was right to claim that his formulation of (LP*) does not rule out the possibility that merit based considerations bear on the legal validity of norms if, but only if those merit based considerations are source based. In other words, (LP*) would seem to leave room for a construal that allows for source based norms to condition or otherwise constrain the legal validity of some subset of putative norms on merit.²⁸ There are two ways in which this may come to be: on the view of so called *soft* legal positivism, those same factual criteria that establish the particular sources of law in a given legal system, such as, say, Hart's rules of recognition, may be such that they direct the conditions of legal validity as partly merit based. On this view, we need to draw a distinction between two levels of what Gardner calls "sources": at a foundational level, we have social facts

²⁷ It may be worth bearing in mind that neither Hart's legal theory, nor Dworkin's for that matter, comply with the internal rationalization constraint when applied to various religious legal orders. Dworkin's theory of law may sit well with the common law tradition in this respect, but not really with anything like canon law or Sharia law.

²⁸ "Legal Positivism: 51/2 Myths", 201.

that constitute what counts as the sources of law in the particular jurisdiction in question. And then, based on these foundational sources, we have particular sources, such as acts of a legislature or decisions of higher courts, etc., as established sources of law in the system. According to soft legal positivism, there is nothing to prevent the foundational sources from mandating or recognizing various types of merit considerations as particular sources of law. We may have a legal system, for example, in which the foundational sources of law condition some subset of norms' legal validity on certain moral conditions. So this is one way in which merit may be part of the conditions of legal validity, that is, due to the foundational sources of law that happen to prevail in a given society.

The second way in which merit based consideration may bear on legal validity, which is much more familiar to lawyers, is by way of explicit legal instruction. The clear cases are typically constitutional, whereby the constitution renders unconstitutional, and thus not legally valid, certain norms that violate moral-political principles, such as respect for freedom of speech or, human dignity, and such. In other words, it seems that the law can incorporate, explicitly and perhaps sometimes implicitly, merit based considerations as conditions on the legal validity of norms.²⁹

These two types of incorporation of merit based considerations as conditions of legal validity raise different questions and we need to deal with them separately. Let me start with the second type since it is more focused and easier to handle. So take, for example, part of the US Constitution's first amendment, saying that "Congress shall make no law ... abridging the freedom of speech". It would seem that this constitutional provision makes the legal validity of certain norms depend on the question of whether their content is such that they violate the moral-political right to free speech. If an act of Congress violates freedom of speech it is not legally valid in the US. Or so it seems that the Constitution prescribes. And of course, whether an act of Congress violates freedom of speech or not, is a matter of moral-political argument, it depends on the law's merit, as it were. But this portrayal of the constitutional provision is misleading. What such constitutional provisions do, legally speaking, is grant legal power to the courts, the legal power to strike down acts of the legislature if the court finds them in violation of the

²⁹ Cf Raz, *Between Authority and Interpretation*, ch 7.

rights to freedom of speech. To see the difference, just bear in mind that an act of Congress that violates the freedom of speech is not legally void unless, and until, a court with a final authority on the matter holds that it is.

There is nothing special about legal powers that direct the power holder to exercise the power on the basis of certain types of considerations or, as more often the case, directing the power holder to exclude from consideration certain types of reasons. Legal power is always constrained in various ways. For example, by granting some official bureau the power to issue building permits, the power would be directed and limited in many ways. It would normally direct the relevant bureau to consider granting or withholding the permit on some set of grounds, and exclude others. And some of those grounds may well involve considerations of merit; aesthetic merit, moral merit (e.g. needs of the community, fairness in the allocation of resources, etc.,), economic merit, and so on and so forth. Legal powers are invariably constrained and there is nothing special about them being constrained by all sorts of merit based considerations. In any case, and this is why incorporation is not a problem for proponents of (LP*), when a legal power is granted, law is modified only by the actual exercise of the power. Once again, a law abridging the freedom of speech is not law only if it is actually held to be unconstitutional by the court. And this, of course, is perfectly consistent with the content of (LP*).

The type of alleged incorporation of morality as a condition of legal validity espoused by soft legal positivism is theoretically very different. It is not about legal power, but about the nature of the sources thesis itself. There are many complicated issues involved here and I cannot do justice to the extensive literature on the topic in a few short paragraphs. But I will conclude this essay by pointing to what, in my mind, is the main difficulty here.

Soft positivism would have us envisage the possibility that a fully reductive explanation of legal validity, along the lines formulated by (LP*), is compatible, at least theoretically, with the idea that the legal validity of some norms actually depends on their merit. But this seems very unlikely on its face, unless we substitute “depends on merit” with “depends on what people in S take to be the merit”. The latter is fully compatible with a reductive explanation, it reduces the conditions of legal validity to peoples’

conduct and attitudes. In other words, on this latter construal of the possible role of moral considerations in determining the legal validity of norms, what matters is not the soundness or truth of the relevant moral considerations but the mere fact, social fact, that people, particularly judges and other legal officials, believe them to be true and treat them as constraints on legal validity. This is fine, and consistent with (LP*). But problems begin when we shift from beliefs and other attitudes to moral truths. Then the view is no longer consistent with any reductive explanation. Unless, of course, you think that there is nothing more to morality and moral truths than whatever it is that people believe to be morally right. I don't think that this questionable meta-ethical stance is what soft positivists want to adhere to. In short, I think that the price tag for adhering to a soft kind of legal positivism consists in giving up the kind of reductionist project that legal positivism aimed to pursue. And then the problem is that if we give up the reductionist aspiration of legal positivism, we may also lose the theoretical motivation for its core commitments.