Positivism and the Internal Point of View

RICHARD HOLTON, RSSS

H. L. A. Hart famously held that brute force alone does not make for law. A system of institutionalized terror might force compliance, just as a gunman might force us to hand over our money. But such a system will not be a legal system unless a further condition is met. On Hart's account this further condition concerns the attitude of the officials. We only get a legal system when the officials take the internal point of view towards the law: that is, when they think that there are *reasons* for obeying and enforcing the law, reasons that give rise to an *obligation*.

How should we understand the internal point of view? A natural reading is that it is a moral point of view: the officials believe that they have *moral* reasons, and hence a *moral* obligation, to obey and enforce the law. But this was not Hart's position. Hart argued that the internal point of view is not a moral point of view at all: officials can take the internal point of view towards the law without thinking that they have moral obligations under the law. In the first part of this paper I assess this claim. My contention is that Hart's own arguments for it do not work: he gives us no good reason for denying that the internal point of view is a moral point of view. So Hart's condition on legal systems should be understood as what I shall call the *moral attitude constraint*: officials must take a moral attitude towards the law.

If this is right, then a further question becomes very pressing: can one consistently accept the moral attitude constraint on legal systems, and be a positivist? For short, can one be a *moral attitude positivist*? Indeed this question is interesting in its own right, whether or not my arguments about Hart are correct. A number of recent theorists have adopted moral attitude positivism, so it would be good to know whether the position is a stable one.[1] Readers interested in this question, and not in the details of Hart exegesis, might like to skip straight to Section Two.

At first blush there do seem to be tensions in the position. Positivists are in the business of denying that legal systems are essentially moral; how can they then go on to require that legal officials must, of necessity, take a moral attitude to the law? Some commentators have held that there is a straight-out contradiction. Thus R. A. Shiner argues that positivists are bound to think that taking the internal point of view involves something less than a moral commitment to the law:

> It is an expression of legitimate opposition to positivism that officials who have a less than full moral commitment to the "common public standard" are officials in name only. Positivism thus has a significant theoretical interest in arguing that a range of attitudes other than full moral commitment nonetheless count as possession of the internal point of view.[2]

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[1] See for instance Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), pp. 62ff. The position is sometimes attributed to Raz, although on rather shaky grounds; see below n. 7.

[2] Roger A Shiner, *Norm and Nature: The Movements of Legal Thought* (Oxford: Clarendon Press, 1992), p. 70.

If this is so then moral attitude positivism will be untenable: its insistence that officials need take a moral point of view will undermine its positivism.

This first complaint is not new; and a number of positivists, including Hart himself, have made a start on answering it.[3] But alongside it lies another, that, so far as I know, has received no response. Even if moral attitude positivism is not actually inconsistent, is it a position that legal officials could themselves embrace? If they must, of necessity, take a moral attitude to the law, then doesn't this preclude them from thinking that the law might not be moral—doesn't it preclude them from being positivists? A criticism along these lines is urged by Jeff Goldsworthy.[4] It doesn't quite amount to a refutation of moral attitude positivism. But if it were true, the moral attitude positivist would be forced to the unhappy conclusion that legal officials are bound to be misguided about the true nature of law. There would be, to adapt Michael Stocker's memorable phrase, a kind of schizophrenia of positivist legal theory.[5] There can be no happy resolution of the difficulty by distinguishing distinct but consistent perspectives, in the way that a sociologist of religion might, in her professional life, study Christianity from an observer perspective, whilst remaining a Christian in her personal life. Such a combination will not be possible since, if the schizophrenia charge against moral attitude positivism is true, the perspectives will not simply be distinct but inconsistent. Moral attitude positivism could not be, in Postema's term, a participant theory: a theory held by participants to describe or justify their own behaviour.[6] At best it would find its place as an observer theory: a theory held by observers who were describing the social delusions of the participants did.

My aim in the second half of this paper is to examine these two challenges to moral attitude positivism. My conclusion is that neither is right. They trade on scope ambiguities; on conflations of what is said and what is implicated; and on misleading parallels between moral and legal speech acts. Moral attitude positivism is a perfectly coherent position, and one that legal officials can quite coherently espouse. It emerges as a very attractive theory; one which captures the insights in Hart's account, whilst giving a far more plausible account of the internal point of view.

A position rather like moral attitude positivism has become associated with the work of Joseph Raz.[7] So it might seem that my conclusions would lend

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[3] H. L. A. Hart, "Comment," in *Issues in Contemporary Legal Philosophy*, ed. R. Gavison (Oxford: Clarendon Press, 1987), pp. 37-42 at p. 39; and "Postscript," in *The Concept of Law*, Second Edition (Oxford: Clarendon Press, 1994), pp. 238-76 at p. 234

[4] J Goldsworthy, "The Self-Destruction of Legal Positivism," *Oxford Journal of Legal Studies* 10 (1990): 449-486.

[5] Michael Stocker, "The Schizophrenia of Modern Ethical Theories," *The Journal of Philosophy* 73 (1976): 453-65

[6] G Postema, "The Normativity of Law," in *Issues in Contemporary Legal Philosophy*, ed. R Gavison (Oxford: Clarendon Press, 1987), pp. 81-104.

[7] This is very much the position attributed to Raz by Hart in *Essays on Bentham* (Oxford: Clarendon Press, 1982), p. 153. However, in each of the three works that Hart cites on that page, Raz explicitly denies that the officials need think that they are morally obliged to obey the law. Thus in *Practical Reason and Norms* (London: Hutchinson, 1975), p. 148, he writes, "it is not only logically possible but also not uncommon for an official of the system to follow its rules of recognition without regarding them as morally justified"; in *The Authority of Law* (Oxford: Clarendon Press, 1979), p. 155, he writes "It seems to me that Hart is right in saying that judges and all other officials regularly involved in applying and enforcing the law do accept and follow it. They may have reservations concerning the moral justifiability of the law but

support to his. Perhaps, to some extent, they do. But there are many issues on which I disagree with him. Raz holds that some legal statements are moral statements: that when a person makes what Raz calls a *committed* legal statement, they thereby make a moral statement. I argue that such a contention is incompatible with central elements of positivism—including elements that Raz himself wants to maintain—so the positivist should have no part of it. I suggest a way that the positivist can reject the idea that committed legal statements are moral statements, whilst respecting the intuition that those who make them do thereby reveal their moral commitments.

I Is Hart's Internal Point of View a Moral Point of View?

Let us start by sketching the familiar outlines of Hart's conception of law. A legal system is seen as a complex of primary and secondary rules (that is, roughly, primary rules which regulate behaviour directly, and secondary rules which regulate the nature and application of the primary rules). For a legal system to be in force in a given society, the rules must be generally obeyed. But this is not sufficient on its own. In addition the secondary rules must be *accepted* by the officials.[8] It is the importance placed on this notion of acceptance that distinguishes Hart's theory from that of his positivist precursors, Bentham and Austin. Hart was concerned that their approach did nothing to distinguish legal systems from simple relations of force, like that of the gunman who demands money with menaces. Hart held that it took more than this to make a legal system. The extra element is acceptance.[9]

To accept the rules is to take the internal point of view towards them, which Hart explains as follows:

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nevertheless they accept and apply it for their own reasons (salary, social involvement, etc.) or for no reason at all.... When they state the legal validity of a rule they do mean to assert its binding force, though not necessarily its moral force"; and in *The Concept of a Legal System*, Second Edition (Oxford: Clarendon Press, 1980), p. 235 he writes "Acceptance here does not impart moral approbation of the rule, nor even belief that there are adequate moral reasons for obeying it. Acceptance could be for moral, prudential or any other reasons, or for no reason at all. All it means is belief that the agent should follow the rule according to its terms." Surprisingly, in reviewing Hart's book, Raz does not object to Hart's misattribution, but rather goes on to accept the position attributed to him; see "Hart on Moral Rights and Legal Duties," *Oxford Journal of Legal Studies* 4 (1984): 123-131, at p. 130. The other work of Raz's which Hart cites, and in which Raz does come close to endorsing the position which Hart attributes to him, is "The Purity of the Pure Theory," *Revue internationale de philosophie* 35 (1981): 441-459. However, there the claim is the different one (which I think mistaken) that committed statements of legal obligation *are* statements of moral obligation.

[8] *The Concept of Law* p. 113; cf. p. 88. I think that if the secondary rules are accepted, then any primary rules that follow from them should themselves be accepted; that is part of what it is to accept the secondary rules. But this is controversial.

[9] Hart raised many objections to the gunman model, and to Austin's theory which he saw as an elaboration of it; I have focussed exclusively on what Hart saw as "the root cause" of the failure of such accounts (*The Concept of Law* p. 78), and hence as the basis of "the fundamental objection" to them (p. 82).

Hart's discussion of acceptance is at times difficult to follow, since he tends to run together his substantial account with the methodological thesis that is needed to underpin it. Against the behaviourists, Hart insists that to understand a legal system one must make reference to the attitudes of the participants, and not just to their behaviour (see esp. pp. 87–8). But to make that methodological point is not yet to say that we only get a legal system where the attitude is that of acceptance.

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought' 'must' and 'should', 'right' and 'wrong'.[10]

Someone who does not accept the authority of the law may still have prudential reasons for *obeying* the law; but obedience does not amount to acceptance. As Hart remarks, in obeying the law such a person need have no view "that what he does is the right thing both for himself and for others to do: he need have no view of what he does as fulfilment of a standard of behaviour for others of the social group".[11] In contrast, the insider does think that obedience to the law is "the right thing" in this way.

As I remarked at the outset, it is easy to assume that Hart takes the internal point of view to be a moral point of view. In the quotation above, Hart says that the insider will criticize, demand conformity, and take such criticisms and demands to be justified. These look to be hallmarks of a moral attitude. Indeed, much recent moral and political philosophy has taken them as such. Thus, for instance, Thomas Scanlon sees moral motivation as driven by the desire to justify our actions to others on grounds they could not reasonably reject; and this in turn is satisfied if "we know that there is a adequate justification for our action even though others refuse to accept it."[12]

But Hart does not think that the internal point of view is a moral point of view. He says:

> Those who accept the authority of the legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals: 'I (you) ought', 'I (he) must', 'I (they) have an obligation'. Yet they are not thereby committed a *moral* judgement that it is morally right to do what the law requires.[13]

What is Hart's argument for this position? Here is what he says:

> [I]t is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so ... their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their

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[10] *The Concept of Law* p. 56

[11] *The Concept of Law* p. 112. See also p 88, although this is one point where the discussion is confusing, since Hart tends to run together the position of the person who simply does not accept the law (perhaps because they think it totally unjustified), with that of the behaviourist who talks only in terms of 'observable regularities of behaviour'.

[12] T. M. Scanlon, 'Contractualism and Utilitarianism' in A. Sen and B. Williams eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982) pp. 103–28, at p. 116. For further discussion of this and related ideas see G. Gaus, *Value and Justification* (Cambridge: Cambridge University Press, 1990) and *Justificatory Liberalism* (New York: Oxford University Press, 1996).

[13] *The Concept of Law* p. 199.

> conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.[14]

This might seem surprising. To accept the law is to think that its demands are justified. How can one both think that one morally ought not accept the law, and yet still think that its demands are justified? There is indeed something odd about Hart's argument. Hart says that an individual might have a variety of reasons for accepting the law which are not moral. Amongst those that he mentions is an unreflecting or traditional attitude. Yet whilst it might be true that the reason many individuals come to accept the authority of law is because of an unreflecting traditional attitude, such individuals would scarcely cite such a factor as a reason for accepting it. There is ambiguity in our talk of reasons, which we need to clear up.

Consider someone who, in a drunken haze, mistakes her flatmate for a burglar, and hits him. For what reason did she act as she did? In one sense we might say that the reason she hit her flatmate was that she was drunk. In a second sense we might say that her reason for hitting her flatmate was that she believed he was a burglar. In yet a third sense we might say that she had no reason for hitting her flatmate at all. The first sense treats reasons for actions as causal explanations. We explain our subject's action by reference to her drunken state. We haven't given an intentional explanation; we have made no reference to the subject's beliefs and desires. Call such reasons *genetic reasons for action*. The second sense is also explanatory, but this time the explanation is intentional: she believed he was a burglar.[15] Here we explain the action by citing the beliefs and desires of the actor. Following Thomas Nagel and Michael Smith, call these *motivating reasons for action*.[16] The third sense of 'reason' does not provide an explanation of action at all. Instead in citing the presence or absence of such reasons we are evaluating the action: we are saying whether or not it was justified. In saying that she had no reason to hit her flat mate, we are saying that her action was not justified. Again following Smith, call such reasons *normative reasons for action*. In the case we have been considering the three sorts of reason come apart. But they need not. It could be that the best genetic reason we can give for why an agent performs an action is a motivating reason; and it could be that this also is, or is believed by the agent to be, a normative reason.[17]

With these distinctions in place, we can return to our main theme. Let us first rephrase, in this new vocabulary, Hart's account of what it is for agents to

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[14] Ibid pp. 198–9.

[15] If the Humean theory of motivation is right, we also need to advert to a desire to get the full motivational story: in this case perhaps a desire to hit anyone who broke into the flat. But the desire is at least *part* of the motivating reason, and I'll go on talking just in terms of desires. The question of whether moral desires are motivating on their own is a highly controversial one which we need not address here. Nor need we address the tricky question of whether motivating reasons are themselves causal.

[16] Thomas Nagel, *The Possibility of Altruism* (Oxford: Clarendon Press, 1970), p. 15; Michael Smith, *The Moral Problem* (Oxford: Blackwell, 1994), pp. 94-8. Nagel and Smith actually use the expression in slightly different ways. For Nagel the motivating reason is the content of the mental state; for Smith it is the having of the mental state. Since nothing turns on it here, I fudge this distinction.

[17] A distinction between something like motivating and normative reasons was made in the 18th Century by Hutcheson; he called them "exciting" and "justifying" reasons. See Francis Hutcheson, *Illustrations on the Moral Sense*, ed. B. Peach (Cambridge: Harvard University Press, 1971, 1728), p. 121. The three-fold distinction made here is the same as that made in Stephen Darwall, *Impartial Reason* (Ithaca: Cornell University Press, 1983) pp. 28-32.

accept the authority of the law. To say that agents accept the law is partly to make a statement about their motivating reasons: it is to say that they have a particular attitude to the law which explains certain actions. But as we have seen, the mere fact that someone has motivating reasons for *obeying* the law is not enough to show that they *accept* it. Outsiders who aim to avoid punishment have motivating reasons for obeying the law. To know whether someone accepts the law we need to know about the *nature* of the motivating reasons that lead them to obey it. This brings us into the sphere of normative reasons, or, more accurately, into the sphere of the agent's beliefs about their normative reasons. In order to accept the law, an individual's motivating reasons for obeying the law must include the belief that they, and others, have normative reasons to do so, and that these normative reasons will justify criticism of those who fail. Acceptance of the law, in Hart's terms, requires the belief that there are normative reasons for acceptance.

So if Hart is to show that acceptance is not a moral stance, he must show that his talk of "the right thing" is not talk of the *morally* right thing. He must show that agents can think they have normative reasons for accepting the law without thereby thinking that they have moral reasons for accepting it. Do the considerations raised in the passage quoted above establish this possibility? Surely not. Hart says there that individuals can accept the authority of the law as a result of "calculations of long-term interest; disinterested interest in others; an unreflecting or traditional attitude; or the mere wish to do as others do". Certainly we can agree with Hart that these do not look like moral reasons for accepting the authority of the law (with the possible exception of the second). The problem is that they do not look like normative reasons for accepting the law either (again, with the possible exception of the second). So they do not show us that there can be normative reasons for accepting the law which are not moral. What Hart has given us rather are considerations that can either be understood as genetic reasons for accepting the law—this is surely how to understand the talk of unreflecting or traditional attitudes—or else as motivating reasons for *obeying* it.

This takes us back to our initial worry. Once we understand acceptance of the law in the strong way that Hart requires—as involving the idea that demands for conformity, and criticisms of those who do conform, are *justified*—it is hard to see how someone could accept the law whilst "deciding that, morally, they ought not to accept it". For if they think that they ought not to accept the law, then surely they will think that such demands and criticisms are *not* justified.[18]

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[18] Hart himself returns to this argument on p. 257 of the 1994 "Postscript" to *The Concept of Law*:

> But when the question arises as to why those who have accepted conventional rules as a guide to their behaviour or as standards of criticism have done so I see no reason for selecting from the many answers to be given a belief in the moral justification of rules as the sole possible or adequate answer. For some rules may be accepted simply out of deference to tradition or the wish to identify with others or in the belief that society knows best what is to the advantage of individuals. These attitudes may coexist with a more or less vivid realization that the rules are morally objectionable.

The passage is vulnerable to the same objection as made in the text. However, Hart hints here at another argument when he says that acceptance of the rules "may co-exist with a more *or less* vivid realization that the rules are morally objectionable" (my italics). I have argued that Hart hasn't shown that someone can use the law as a standard of behaviour whilst *clearly* thinking that

I conclude that Hart has given us no good argument for thinking that the internal point of view is not a moral point of view. Perhaps other arguments could be given; if so we would need to assess them on their merits.[19] But until they are we have no reason for abandoning the *prima facie* plausible claim that the internal point of view is a moral point of view. If that is right we need to ask whether an insistence that the officials take the internal point of view is consistent with positivism; we need to ask whether moral attitude positivism is a coherent position. It is to that task that I now turn.

II The Moral Attitude Constraint

As we saw in the introduction, moral attitude positivism faces two challenges: that it is straight-out inconsistent, and that is schizophrenic. My aim in the next two sections is to show that both these inconsistency claims are wrong. I think that the key theses of positivism are quite consistent with the idea that internal point of view is a moral point of view; and moreover it is quite consistent for someone who takes such a moral point of view to accept positivism. My strategy is as follows. I will give a constraint on what something must be in order to be a law, a constraint which requires that the officials must take a moral attitude. So the constraint will entail that the officials will, of necessity, take the internal point of view, where this is understood as a moral point of view. I will then argue that the constraint is compatible with positivism, and hence that moral attitude positivism is a coherent position; and moreover that it is a position that the participants themselves can consistently accept, and hence that the complaint of schizophrenia is groundless.

Here is the constraint:

> *The Moral Attitude Constraint*
> If it is a law in S that P, then the officials of S must believe that they are morally justified in enforcing the requirement that P, and that the subjects of S are morally obliged to conform to it.

There are a number of immediate objections that the constraint will surely elicit. In one respect it appears that the requirement it places—on a strict reading—is too strong. First, it is implausible to suggest that *all* officials must believe that the laws are morally binding on the subjects. Second, it is implausible to suggest that they should think the laws are morally binding on *all subjects*, rather than just on fellow officials. In another respect the constraint seems too weak: don't we require acceptance on the part of at least some of the

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the law is morally unjustified. But perhaps the idea is that someone who has a mere inkling that the law is morally unjustified can do so. However, this doesn't show that the internal point of view is not a moral point of view; all it shows is that such a person is morally self-deceived. It is all too familiar that someone can hold that a position is morally justified (especially if it is in their interest) whilst at the same time having an inkling that it is not.

[19] One idea, which has been suggested to me by several people, is that Hart could be read as characterizing the internal point of view as involving belief in a kind of conditional justification: the belief that *if* one accepts the authority of the law, then one is justifiably criticized for departing from it. Were this a correct characterization of the internal point of view, then perhaps it would not amount to a moral point of view. But it cannot be correct, for it will not do to distinguish insiders from outsiders. Outsiders too can believe in this sort of conditional justification. Where they differ from insiders is in rejecting the idea that acceptance of the law is justified all things considered.

subjects as well as the officials?[20] Finally it might appear that the whole idea of giving necessary conditions for the existence of laws is misguided. Didn't Hart himself show that the concept of law is a cluster concept, the precise extension of which is clouded by semantic indeterminacy? Shouldn't we think of the constraint as simply binding on the centre of the cluster?[21] I concede force to all these objections. Conceding the third points the way to answering the first two. Once we realize that the notion of law is a cluster concept, we can accept that there is indeterminacy over quite where the boundary should be drawn. It is surely good enough, for instance, if a clear majority of officials believe that they are morally justified in enforcing the law. But I shan't be concerned with developing detailed responses here. My aim is simply to show that the constraint as it stands is compatible with the key theses of positivism. For that I need something that is simple enough to make the point clearly. If its content or force needs to be amended in these ways, we can be confident that the compatibility will carry over to the amended version.

One clarification should, however, be made now. The constraint does not say that the officials must believe that each law is morally good, or even that it is just. These beliefs concern the question of whether the law should have been enacted by the legislature (or, in the case of a proposition of common law, whether it is a good thing that the law has developed in the way it has). It is quite possible that there are laws that the officials think should never have passed, but which they think should be obeyed, and which they think they are justified in enforcing. Thus suppose the officials think that the legal system as a whole is morally good, and worth defending. Then they might think that adding certain morally bad laws to it would still result in a system that is, overall, good. And they might think that their moral duty would be to enforce such laws (and the duty of citizens would be to obey them), whilst hoping (and perhaps campaigning) for change. In short, they might think that there is a *systemic* moral justification for obeying and enforcing bad laws, up to a certain point.[22] The constraint allows for this, without, of course, requiring it.

III The Compatibility of the Constraint with Positivism

Let us now turn to our central question: that of the consistency of the constraint with positivism. We need to start by saying what we are taking positivism to be. I'm a little sceptical of attempts to find the true essence of positivism; it is better to think of it as a bundle of associated doctrines. If Hart and others are right to say that the concept of law is a cluster concept, then positivism is a cluster theory about a cluster concept. Here are three central positivist theses, taken, with some amendments, from Raz:

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[20] Gerald Postema gives an argument which has the consequence that this condition would follow from the constraint: he suggests that, at least in the absence of self-deception, officials can only be convinced of the rightness of the law if they think that their subjects are convinced of its rightness; see "The Normativity of Law," pp. 92-3. I suspect that this underestimates the capacity of those convinced of their own moral insight to enforce it in the face of disagreement.

[21] H. L. A. Hart, "Theory and Definition in Jurisprudence," *Proceedings of the Aristotelian Society* Supplementary Volume 29 (1955): 239-64, at pp. 251-2.

[22] Raz discusses the notion of systemic justification in *The Authority of Law* Ch. 8. For a clear attempt to argue for the systemic justifiability of law, in a broadly positivist spirit, see Gerald Postema, "Coordination and Convention at the Foundations of Law," *Journal of Legal Studies* 11 (1982): 165-203.

(i) the social thesis: the question of what the law is in any given society ultimately reduces to questions of social fact, i.e. facts concerning the existence of institutions within the society, and the behaviour and attitudes of the members of the society etc.

(ii) the separation thesis: there is no guarantee that a law, or a legal system, is just, or otherwise morally good, simply in virtue of being a law or a legal system; and there is no guarantee that a subject morally ought to do what the law requires of them.[23]

(iii) the semantic thesis: the sense of normative terms in legal claims is distinct from their sense in moral claims.

These are distinct theses. The first is a metaphysical claim about what the law consists in; the second is a moral claim about its worth; and the third a semantic claim about the meanings of words. Doubtless there are various entailment relations between the theses, although exactly what these relations are is controversial. So let us just think of positivism as the doctrine formed by this cluster of theses. Is the constraint incompatible with any of them? And must the participants believe that it is? I shall take the theses one at a time.

(i) The Social Thesis

It should be clear that the facts mentioned in the constraint are social facts about the rule of recognition, and attitudes of the officials. A moral belief is an attitude (whether it is properly understood as a belief, or as some other kind of attitude, is a meta-ethical issue that need not concern us here). So there should be no worry that the constraint is incompatible with positivism. Hart made a very similar point himself.[24] The more pressing worry concerns the question of whether an official can accept the constraint, and embrace the social thesis. An apparent problem is this: when judges take the internal point of view, they will think that they are justified in enforcing the law. On the account of this that I am proposing, this is because they think that they are morally justified in making people conform to the law. But then doesn't that mean that when a judge says 'you are legally obliged to F' they will think that this entails 'you are morally obliged to F'? How is that compatible with the social fact thesis? If a legal claim entails a moral claim, then it cannot be purely a claim about a social fact; it must be at least partly a moral claim itself. We will be forced to agree with Raz when he says "I find it impossible to resist the conclusion that most internal or committed legal statements, at any rate those about the rights or duties of others, are moral claims."[25] (To see how this ramifies: suppose a sincere but morally misguided judge in a corrupt legal system says, for instance, 'You have a

[23]The first half of this is roughly what Lyons calls the "expanded separation thesis", which he sees as capturing the true spirit of positivism; he adds the requirement that the law is subject to moral appraisal David Lyons, "Moral Aspects of Legal Theory," in *Moral Aspects of Legal Theory*, (Cambridge: Cambridge University Press, 1982), pp. 64-101, at p. 100.

[24]See his "Postscript," to *The Concept of Law*, Second Edition, at pp. 242-3; see also Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) p. 62. As Hart goes on to point out, it is arguable that theorists have to have moral beliefs of their own in order to ascribe moral beliefs to others. But they surely don't have to have the *same* moral beliefs. So the constraint does not thereby entail that the theorist will be bound to think that any legal system they can identify is morally binding.

[25]J Raz, "The Purity of the Pure Theory," *Revue internationale de philosophie* 35 (1981): 441-459, at p. 455.

legal duty to uphold slavery'. Then, if the entailment claim is correct, this will entail 'You have a moral duty to uphold slavery'. But this is false; so, by *modus tollens*, the judge's legal claim is false. But that means that the legal claim is false just because it is immoral; we seem to have a natural law account back with a vengeance.)

How does the positivist resist the argument? By denying that 'you are legally obliged' entails 'you are morally obliged'. According to the constraint we have given, the former claim entails only that the officials think the person is morally obliged. Moreover it is quite possible for a judge to agree with this. If a consistent judge agrees with our constraint, then she'll think that in passing a legal judgement she hasn't passed a moral judgement. She will think that it was necessary for her (or at least for most of her colleagues) to pass the moral judgement in order to pass the legal judgement, but that the two are nonetheless quite distinct: she'll think that true legal judgements can be made by judges in wicked legal systems who hold false moral judgements. In addition, if the judge accepts our constraint, she'll think that the statement 'you are legally obliged' entails 'the legal officials think that you are morally obliged' (or at least that most of them do); and from this, and the fact that she is a legal official, it will follow that she thinks the person is morally obliged (or at least that it's highly likely that she does). So in making a legal judgement she will have pragmatically *implicated* that she believes there is a moral obligation to obey that judgement. But that doesn't mean she thinks she has strictly and literally *said* that there is a moral obligation, or said anything that entails this.

One of the biggest breakthroughs in philosophy of language in recent years has been the realization of how central to our linguistic practices the phenomenon of implication is. To cite one of Grice's more celebrated examples: if, in a writing a reference for a candidate for an academic job, I say only that the candidate is punctual and has neat handwriting, you can infer that I think they are academically incompetent. But I have not strictly *said* that they are. If I say something in English, you can infer that I want to be understood by the rules of English; but I have not strictly *said* that that is what I want. If I make a promise, what I do only makes sense against a background practice of promise making, and you can infer that I believe that there is such a practice. But I have not strictly *said* that there is. Similarly if the existence of a system of laws requires that the judges believe they are morally binding, then when a judge makes a judgement, we can infer that the judge thinks it is morally binding. But she has not strictly *said* that it is. As in all these cases, the inference is defeasible. The speaker may explicitly cancel the inference: 'The candidate is punctual, has neat handwriting, and moreover is the most talented philosopher I have ever taught'; 'I promise to help, although in this environment, that means nothing'; 'The law forces me to send you to prison, but you may go with a clean conscience knowing that you your conduct has been morally blameless'. Or we may reject the inference on other grounds. However, the fact that the *prima facie* inference is there allows the speaker to exploit it to communicate more than they strictly and literally say.[26]

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[26]The notion of pragmatic implicature comes from Grice; see Paul Grice, *Studies in the Way of Words* (Cambridge, Massachusetts: Harvard University Press, 1989), Ch. 2. I use it here in a broader sense than Grice's account would licence. (Astute readers will notice many differences between the examples I give, that, in a fuller presentation, would be worthy of discussion.) For a broader account of implicature, that would licence the use made here, see Dan Sperber, and

Raz rejects this line of argument. He says

> It is possible that while officials believe that legal obligations are morally binding this is not what they say when they assert the validity of obligations according to law. It may be that all they state is that certain relations exist between certain people and certain legal sources or laws. Their belief that those relations give rise to a (moral) obligation may be quite separate and may not be part of what they actually say when asserting obligations according to the law. But such an interpretation seems contrived and artificial.[27]

I really don't see why Raz reaches this conclusion. Do we have a strong intuition that when judges say that a legal obligation exists, they *say* that a moral obligation exists? I doubt very much that we do. Yet it is only against the background of such an intuition that the alternative will seem "contrived and artificial". It seems to me that, lacking any such intuition, we should be guided on the question by the rest of our theory. Moreover, Raz, as much as anyone, should embrace the conclusion defended here. For he embraces the social thesis; and he holds that a moral fact is not a social fact. Yet if a legal sentence makes a moral claim, and that moral claim is false (as Raz admits it can be), then the legal sentence must itself be false. (Any sentence that entails a false sentence is false.) And that means that the truth of legal claims is being determined by moral facts, rather than just by social facts. This is directly inconsistent with the social thesis. Raz's contention that committed legal statements are moral statements lands him in contradiction.[28]

(ii) The Separation Thesis

The relation between this thesis and the constraint is less obvious. Obviously the constraint does guarantee that the officials will think their legal system morally justified. But that is only a claim about their beliefs; it doesn't mean that they

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Deirdre Wilson, *Relevance* (Oxford: Basil Blackwell, 1986), and, for a simpler presentation of the same account, Diane Blakemore, *Understanding Utterances* (Oxford: Basil Blackwell, 1992).

A claim similar to the one made here is made in G Baker, "Defeasibility and Meaning," in *Law, Morality, and Society*, eds. P Hacker and J Raz (Oxford: Clarendon Press, 1977), pp. 26-57, at pp. 41-2; and in David Lyons, "Comment on Postema," in *Issues in Contemporary Legal Philosophy*, ed. Ruth Gavison (Oxford: Clarendon Press, 1987), pp. 114-126, at pp. 122-4. Lyons' account has been criticized in Roger A Shiner, *Norm and Nature: The Movements of Legal Thought* (Oxford: Clarendon Press, 1992) pp. 139-41. The main force of Shiner's criticism is that Lyons has ignored various lessons that he should have learnt from Austin, in particular the distinction between locutionary meaning and illocutionary force. But the Gricean point that Lyons makes is quite compatible with these Austinian distinctions. The idea is that in giving a judgment a judge neither performs the locutionary act of uttering a sentence that entails that they believe the judgment is morally correct; not performs the illocutionary act of asserting that they have such a belief. Rather they have implicated that they have the belief. Many of Shiner's criticisms seem based upon the idea that normative force should be identified as a form of illocutionary force. But this is to equivocate on the notion of *force*. Beliefs, as well as speech acts, can have normative force, but they have no illocutionary force. Austin himself was in fact very suspicious of the notion of the normative; see *How to do things with Words* (Oxford: Clarendon Press, 1962), p. 149.

[27] "Hart on Moral Rights and Legal Duties," p. 131.

[28] There is a further problem for Raz here. At times he suggests that we get a legal system not just when the officials believe in the moral justification of the law, but also when they simply pretend to; see "Hart on Moral Rights and Legal Duties," p. 130. But if legal statements are moral statements, then, since such judges will be in no position to sincerely utter moral statements, they will be in no position to sincerely utter legal statements. They will be simply pretending to make legal statements. But then we will surely just have a pretend legal system; not a real legal system underpinned by moral pretence.

are right. So it doesn't conflict with the separation thesis directly. But what consequences does it have for the beliefs of the officials? It does of course entail that what the participants judge to be legally justified, they judge to be morally justified. From this mightn't we infer that the participants can't believe that there is a distinction between what it is for something to be legally justified, and what it is for something to be morally justified? And from this mightn't we conclude that the officials cannot accept the separation thesis? Some commentators have thought just that. Here is Jeff Goldsworthy discussing Raz:

> Raz depicts law as a system of norms whose identification is purely a matter of fact, but which those adopting the internal point of view accept as morally binding on themselves and others subject to them. In this way he reconciles the two aspects of law—the factual and the normative ... But how can this be so ... ? If norms whose existence is a matter of social facts alone are thought always to give rise to genuine moral rights and duties, those social facts must be thought to possess some necessary and not merely contingent moral value. (Which is to say that from the internal point of view the positivists' moral thesis is false.)[29]

He goes on to suggest that Raz escapes the problem by treating the essential moral bindingness of law as stemming from its systemic nature: what is morally required is that there is a legal system; particular laws gain their moral weight as members of such a system. Thus there is a moral obligation to obey the law, whatever (within limits) it might be, although it is a matter of social fact what the particular laws are.

But there is no need for such expedients, since there is no problem to be escaped. The argument that Goldsworthy cites is fallacious. It moves from the idea that the officials will, of necessity, accept the laws "as morally binding on themselves and others subject to them", in other words,

> (1) Necessarily the officials believe that the laws of their society are morally binding

to the idea that the laws "must be thought to possess some necessary and not merely contingent moral value", that is

> (2) The officials believe that necessarily the laws of their society are morally binding.[30]

Now the account I have proposed does indeed commit us to (1): if the officials didn't believe that the laws were morally binding, there would be no laws. And

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[29] "The Self-Destruction of Legal Positivism," p. 462. Note that Goldsworthy does not rest his case for the self-destruction of legal positivism on this argument. His primary argument is that positivism's self-destruction would follow from Raz's contention that committed legal statements are moral statements. Here, as we have seen, I agree with him, and simply deny that the moral attitude positivist should follow Raz. I am grateful to Jeff Goldsworthy for discussion here.

[30] Strictly the argument concludes only that

> (2*) The officials believe that necessarily the laws are morally valuable.

But if (2*) is to follow from (1), it presumably does so by means of an intermediary step like (2); so I have simplified the argument by focussing on the problematic move, namely from (1) to (2).

(2) is, on the obvious reading, incompatible with the separation thesis.[31] So if (2) did follow from (1) the separation thesis would be refuted. I suspect that it is reasoning like this that has led Raz to reject it. However, (2) does not follow from (1). The argument involves a scope fallacy. As a parallel, consider the following Cartesian conjecture:

(3) Necessarily anyone who endorses Descartes' *Meditations* will believe that she exists.

Now I'm not sure that (3) is true, but it seems reasonable enough; let's assume that it is. Does it follow from (3) that

(4) Anyone who endorses Descartes' *Meditations* will believe that she necessarily exists?

Clearly it does not. I have read the *Meditations*, and am convinced that I do indeed exist. But I haven't thereby gained the false belief that I am a necessarily existing thing. I know that my existence is all too contingent.

The example illustrates the scope fallacy involved in moving from a sentence of the form

(5) Necessarily Fs believe that P

to one of the form

(6) Fs believe that necessarily P

But this is just the move made in the argument Goldsworthy cites. Moreover it is clear that, on the account I have been presenting, (2), the conclusion of the argument, is false. For the officials will not think that it is a necessary truth that the laws of their system are morally binding. they will think that if their legal system had contained heinously immoral laws, then these laws would not be morally binding. And they will think that it is possible for their legal system to contain such laws. Of course, were their system to contain such laws, then there would need to be morally misguided officials to enforce them. But there is no reason why the actual legal officials cannot think that their legal system might have had morally misguided officials; both because it is possible that it would have officials other than them; and because it is possible that they themselves could have been misguided.

(iii) The Semantic Thesis

We are now in a position to discuss the semantic thesis. We have seen that, on the account proposed here, 'P is legally obligatory' does not entail 'P is morally obligatory'. So 'legally obligatory' and 'morally obligatory' mean different things. However, that does not show that 'obligatory' has a different sense in each construction, any more than the fact that the father of Louis XIV was not the father of Louis XV shows that 'father' has a different sense in each of those constructions. There is, though, a consideration which has lain behind much of our discussion so far, and which does show that 'obligatory' has different senses in the two constructions. Statements of legal obligation are made true simply in virtue of social facts; that is guaranteed by the truth of the social thesis.

[31] I.e. one that treats the description 'the laws' as a non-rigid designator picking out, with respect to any world, whichever laws the society happens to have in that world (and not as a rigid designator always picking out the laws which the society actually has).

Statements of moral obligation, in contrast, are not. In short, they fall on either side of the is/ought divide. Since they have such radically different sorts of truth conditions, we can quite reasonably think of them as having distinct meanings.

Of course if we do think this, we had better not think that any legal sentences bring with them, as part of their meaning, a moral commitment on the part of the speaker. Here once again we part company with Raz. Raz thinks that we need to distinguish between two sorts of legal statements that can be made with the same words: the detached and the committed. The latter bring with them a moral commitment, whilst the former do not. This alleged distinction between legal statements is motivated by appeal to a distinction between different sorts of moral statements. Raz asks us to consider a carnivore who says to a morally committed vegetarian friend: 'You should not eat this dish. It contains meat.'[32] In saying this the carnivore does not commit himself to the proposition that the vegetarian has a moral reason not to eat the dish. He thus makes a different statement to that which would be made by a fellow vegetarian who uttered the same sentences. The fellow vegetarian makes a committed statement, whereas the carnivore's is detached. Raz is surely right to think that a distinction needs to be drawn here; and it is no easy matter to know how to draw it. I would suggest, and perhaps Raz would agree, that we should understand detached statements as implicitly prefixed by something analogous to a fiction operator. Thus, just as 'Holmes lived at 221b Baker Street' can be understood as a true sentence (even though there was no Holmes and no 221b Baker Street) by thinking of it as prefixed by an implicit fiction operator 'According to the Sherlock Holmes stores, Holmes lived at 221b Baker Street', so the carnivore's sentence can be thought of as prefixed with an implicit operator to give us 'According to your moral point of view you should not eat this dish ...'.[33] However, this is not the place to try to develop such an account. What does concern us here is whether an analogous distinction needs to be drawn between legal statements. Raz thinks it does. He writes:

> Legal scholars—and this includes ordinary practising lawyers—can use normative language when describing the law and make legal statements without thereby endorsing the law's moral authority. There is a special kind of legal statement which, though it is made by the use of ordinary normative terms, does not carry the same normative force of an ordinary legal statement.[34]

Clearly the approach I have been advocating in this paper needs make no such distinction, since it does not hold that there is a class of committed legal statements, where this is understood as a class of legal statements that, by their very meaning, commit the speaker to the moral authority of the law. Rather, by making a legal statement an actor might pragmatically implicate that they are committed to the moral authority of the law. I have argued for this contention in previous sections, and I shall not repeat those arguments. However, it is worth pointing out here that what Raz sees as detached legal statements do not need to be understood along the lines of the detached moral statements that we briefly examined in the previous paragraph. That is, we should resist the idea

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[32] *Practical Reason and Norms* p. 175; see also *The Authority of Law* p. 156.

[33] David Lewis, "Truth in Fiction," in *Philosophical Papers* I (Oxford: Oxford University Press, 1978), pp. 261-80.

[34] *The Authority of Law* p. 156.

that, just because a semantic distinction between detached and committed statements needs to be drawn in the moral case, it should be drawn in the legal case too.

Raz is rather vague on the circumstances in which detached legal statements are made (and this in itself should make us wonder whether there is really a difference in the statements made, or just a difference in the implicatures); but he does say that "Lawyers' advice to their clients, law teachers' expositions in front of their students often belong to his category.".[35] So let us imagine a tax lawyer giving advice to her client on the taxes he needs to pay. The lawyer's advice would surely be detached, in the sense that it would not entail any moral requirement to pay the taxes. But it would not be detached in the way that the carnivore's would be.

To see this, suppose we had quizzed the carnivore 'Do you *really* think that your friend morally shouldn't eat the dish?' He might have replied 'Well, *I* don't think that he morally shouldn't; what I meant was that by his lights he morally shouldn't.' That is, he would not have complained that we had misunderstood the relevant sense of 'should' (understood it as moral when it was not meant to be). Rather he would have complained that he was not really making the normative claim he seemed to be making; this was merely, to use Frege's term, a 'mock' normative assertion. Hence the need for something like the fiction operator. In contrast, if we said to the lawyer 'Do you *really* think that your client should, morally, pay these taxes' a likely reply would be: 'Who said anything about what he *morally* should do? I was just talking about his *legal* obligations. If he wants moral advice he should go to a priest.' The lawyer would object that we had misunderstood the sense of 'should' that she was employing.

If this is right, we have no need to make use of anything like fiction operators in understanding non-committed legal statements. Such statements do not involve the mock assertion of a normative claim; they involve the whole-hearted assertion of a descriptive claim. So we should not be moved by parallels with the moral case into thinking that there are two sorts of legal statements that differ in their meaning.

IV Loose Ends

I have argued that positivism is quite consistent with the moral attitude constraint. That was my main goal. But having got this far, it might be useful to explore the repercussions that the constraint has in some related areas. Much of this will involve making explicit what was implicit in what went before.

Normativity

It is sometimes held that any adequate account of law must show it to be normative. What consequences does the constraint have for this issue? Talk of normativity can be understood in several different ways. Sometimes when we speak of the law being normative we mean that it provides normative reasons for action: that is, we mean that the subjects are justified in obeying the law. At others we say that the law is normative for an agent when the agent believes that there is a normative reason for obeying the law. Finally, we might say that the

35 *The Authority of Law* p. 153.

law is normative for an agent when reference to the law features in an agent's motivating reasons for action: when the law is in some way action guiding for them. Of course, the three are related: the law will typically be action guiding for an individual if the individual believes that there are normative reasons for following it. And when we reflect on our own situation, our beliefs about what we have normative reason to do, and our beliefs about what we believe we have normative reason to do, will come together. But this is a general feature of present tense first person belief ascriptions. To take an example from Gareth Evans, suppose I ask you "Do you believe that there will be a third world war?"[36] In answering the question you will look to just the same evidence that you would look to if I asked you "Will there be a third world war?" Nevertheless the two questions are distinct; the answers to them can come apart, as we see when we consider third person cases ('He believes that there will be a third world war, but there won't be') or our own modal or past tense ascriptions ('I might have believed that there would be a third world war, but there won't be'; 'I used to believe that there would be a third world war, but there won't be'). The point is just that from the current, actual, first person perspective we are in no position to evaluate the two questions differently; this can only be done from the third person perspective, modally, or in prospect or retrospect. Similarly in the case of law, we must keep the question of what we have normative reason to do separate from the question of what we believe we have normative reason to do; even though we know that we could never be in a position to deliver different verdicts on the two questions in the first person present case.

We thus need to know the consequences of moral attitude positivism for the distinct questions of (i) whether the officials have a normative reason to enforce and obey the law; (ii) whether they *believe* they have a normative reason to enforce and obey the law; and (iii) whether they have a motivating reason, that is, one that will actually move them to act, to enforce and obey the law. I shall take these one at a time.

(i) The account doesn't entail that the officials have a normative reason for obeying and enforcing the law. They might have; but that depends on the nature of the law. If the law is evil, they will have no normative reason to obey it, even though they will believe that they do. This, I think, is just as it should be. It should be a feature of any positivist account that it does not guarantee that there is a normative reason to obey the law (even a defeasible one).[37]

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[36] Gareth Evans, *The Varieties of Reference* (Oxford: Clarendon Press, 1982), p. 225.

[37] Was this Hart's position? Stephen Perry seems to think not. He seems to think that for Hart there always is a normative reason to obey the law:

> Hart regards social rules of the kind he analyses as giving rise not just to a belief among a majority of persons within the group that they are obligated, but to actual (non-moral) obligations. ... The theorist must understand and take account of the viewpoint of those who accept social rules, because such acceptance in fact gives them reasons for action. ... The fact that some persons accept social rules is significant from a purely descriptive perspective, but beyond that it also explains, according to Hart, why a normative practice is normative. On Hart's philosophical analysis of social rules, the fact that the members of a group adopt the internal point of view towards their own behaviour is enough to give them reasons for action, in the form of social obligations. (Stephen Perry, "Interpretation and Methodology in Legal Theory," in *Law and Interpretation*, ed. Andrei Marmor (Oxford: Clarendon Press, 1995), pp. 97-135, at p. 105.)

I don't agree. I think that whilst Hart believed that these social factors give rise to legal obligations, he didn't think that legal obligations automatically gave rise to normative reasons

(ii) The account does entail that the officials will believe they have a normative reason for enforcing and obeying the law.

(iii) The constraint does at least suggest that the officials will typically have motivating reasons for enforcing and obeying the law. If they believe that they are morally required to act then they will surely typically be motivated to do so. But whether we think that this has the status of an entailment depends on what we think of the thesis of internalism: the thesis that moral beliefs are always motivating. I am rather sceptical of that thesis myself; but I shall not enter into the question here.

Adjudication

The constraint is a constraint on the nature of law; it is not a constraint on the theory of adjudication. That is, it makes a claim about the nature of the law, not about the methods that a judge must use in coming to a decision. The constraint does not entail that a judge must decide a case on the basis of their own moral convictions, nor on the basis of their beliefs about the moral convictions of their fellow judges. (Similarly Hart holds that it is a necessary condition for law that it be generally obeyed. But we do not *need* to think that this is reflected in the theory of adjudication: that one of the factors that should influence a judge in coming to a decision is whether or not their judgment will be obeyed.) The constraint is thus simply silent on the theory of adjudication. Someone could consistently endorse the constraint and hold that in order to come to the correct decision a judge will need to ask whether that decision is morally justified. Similarly someone could consistently endorse the constraint and hold that the judge will need to ask whether the other judges will think the decision morally justified. Alternatively, and quite compatibly with the constraint, someone could deny one or both of these claims. They could hold that judges simply decide a case by asking what follows from the rule of recognition, without considering the moral merits of their verdict. Indeed, I think that we would do well to reject the second idea: the idea that judges must decide cases by looking over their shoulders to see what their colleagues think.

It might be wondered whether can a judge disregard the opinions of their colleagues in this way, and accept the constraint. For if they gave a ruling that their colleagues did not approve of, wouldn't the constraint entail that it was not law? So how could they knowingly give such a ruling? There are two things to say to this. Firstly, the constraint does not require that the legal officials approve of the decision, in the sense that they think it is morally right, or even that it is the decision they would have made in the circumstances. They only need think that once it has been made, it is morally binding on the citizens, and that they are morally justified in enforcing it. It is quite possible for a judge to make a ruling knowing that it is not the ruling that others would have made, but knowing that once it is made, the others will think themselves morally obliged to enforce it. This might occur if the others think there is some systemic justification for the law. Of course it is also possible for a judge to make a ruling that is so opposed to the moral beliefs of their colleagues that even this would not be true of it. Here the second point needs to be made. Suppose a judge arrives at a ruling which she knows will not be respected by her colleagues in this

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for actions. See for instance the discussion of the non-justificatory nature of the claim that a certain rule exists in H. L. A. Hart, "Comment," in *Issues in Contemporary Legal Philosophy*, ed. R. Gavison (Oxford: Clarendon Press, 1987), pp. 37-42, at p. 39.

way: her colleagues will not believe that the citizens ought morally to obey it, or that they ought morally to enforce it. Then if the judge accepts the constraint, she will believe that her ruling will not count as law. But that is quite possible. Indeed she can think that she is both morally and legally obliged to give a ruling that will not count as law. An analogy here might be helpful. The full bench of the High Court of Australia consists of seven judges. The decision of the court is reached by majority verdict; and the judges know this. However, when each of the judges reaches their verdict, their aim is not to place themselves in the majority (or at least it shouldn't be); rather, each reaches their verdict on their perception of the merits of the case, even if they are certain that they will not be in the majority. Thus they can think that they are morally and legally obliged to give a certain verdict, even though they know that that verdict will not accord with the majority verdict of the court, and hence in an important sense will not be law (which is not to deny that their opinion may be influential on subsequent judgements).[38]

A further point concerning the behaviour of judges should be made: it does not follow from the constraint that legal officials must give a moral justification for their decision in giving a ruling. Whether or not they will depends on the legal culture and institutions in place. It could be that courts never give the moral reasons they think support their decisions, on the grounds that this takes too long, undercuts the peremptory authority of the courts, tends to encourage disobedience from those who remain unconvinced, or whatever. Or it could be that they always provide a moral justification, on the grounds that they owe it to the persons affected. The constraint takes no stand on this issue.

V Concluding Remarks

I have argued in this paper that moral attitude positivism is a consistent theory, and that the schizophrenia objection can be met. This is perhaps a surprising result. Certainly it was not obvious that the schizophrenia objection could be met without cost to the intuitive appeal of the account.

I think that moral attitude positivism emerges as a very attractive position, one that provides a better understanding of Hart's criticisms of Bentham and Austin than that provided by Hart himself. However, I have done nothing to argue for its truth. Why should we prefer it to a simpler account that makes no reference to the moral attitudes, or any other normative attitudes, of the participants? That is, why should we follow Hart in thinking that to have a legal system it is necessary to have participants who take the internal point of view? I have not addressed this question here. I have simply assumed the semantic claim that we should not be prepared to call a system a legal system if it did not have this feature; or at least, we should not think that it provided a paradigm case.[39]

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[38] It has become widespread for positivists to make a distinction between the theory of law and the theory of adjudication. Standardly this is to enable them to accept moral criteria in their theory of adjudication, without these criteria entering into the theory of law. (This gives rise to what is called "soft positivism" by Hart in the Postscript to the second edition of The *Concept of Law*; and "inclusive positivism" by Waluchow in *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).) The point made here is that this process can go in the other direction too; there can be reference to moral criteria (or at least moral beliefs) in the theory of law, without there necessarily being parallel reference in the theory of adjudication.

[39] Cf *The Concept of Law* pp. 112-13, where Hart claims that such a feature "is logically a necessary condition of our ability to speak of the existence of a single legal system."

But if this semantic claim is to be convincing, we need some explanation of why it should be true; we need some explanation of why we take the attitudes of the participants to be so central. I suspect that the answer lies in the role that we want the notion of law to play in our account of practical reasoning. We want to explain the distinctive way that the law guides action; and we want to explain the kinds of pressures that lead practitioners to reform the law. This would be to take further the themes first raised in *The Concept of Law*. Unfortunately, a discussion of these issues falls outside the scope of this paper. My aim has been to show that such a discussion need not be inimical to positivism.