The Self-Destruction of Legal Positivism
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The Self-Destruction of Legal Positivism

JEFFREY D. GOLDSWORTHY*

1. The Factual and Normative Aspects of Law

The legal decisions which judges make are essentially practical, not theoretical. Moreover, they are doubly practical. First, they include judgments of other people's actions, judgments of what others ought to have done or ought to do. Secondly they are decisions, based on those judgments, to act. Judges act by commanding other people—other legal officials and citizens—to perform specified actions. Thus, both the subject-matter and the conclusion of the reasoning leading to such decisions is how people, the judges and those under their authority, ought to act. It hardly needs mention that these decisions are grave: they affect reputation, property, liberty and sometimes human life itself.

Since legal decisions are practical, legal reasoning—the reasoning on which those decisions are based, or in other words, by which they are justified—is practical reasoning. Its purpose, like that of prudential and moral reasoning, is to justify action. Immediately the central and most difficult questions of legal philosophy are posed. To what extent, if any, is legal reasoning different and separate from these other kinds of practical reasoning—and in particular, moral reasoning? In asking how they themselves or other people 'ought' to act, are judges asking a moral question, a distinct legal question involving a special non-moral sense of 'ought', or both? Are the ultimate grounds upon which the question should be answered—the grounds on which legal decisions are justified—moral, legal or both?

Philosophical speculation as to the true nature or essence of law is inspired by questions such as these. The questions are puzzling because law seems to present two aspects. From one point of view it seems purely factual: a traveller in a foreign land can learn its law in the same way that he can learn its capital, currency, Head

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1 In the footnotes to this article, the following abbreviations will be used. AL: J. Raz, The Authority of Law (1979); ALM: J. Raz, ‘Authority, Law and Morality’ (1985) 68 The Monist 295; CL: H. L. A. Hart, The Concept of Law (1961); PRN: J. Raz, Practical Reason and Norms (1975); ULM: M. J. Detmold, The Unity of Law and Morality (1984).

2 M. J. Detmold has recently emphasized this aspect of law, in ULM. He refutes the view that a legal judgment is simply 'an authoritative certificate as to what the law requires' which must be executed by others who make, and are therefore responsible for, the relevant practical decisions, at 27–30. See also R. Dworkin, Law's Empire (1986), 1 and D. Lyons, ‘Derivability, Defensibility, and the Justification of Judicial Decisions’ (1985) 68 The Monist 325, 339.

3 This question can be asked of the other branches of practical reason. For example, there is debate as to whether moral reasoning is autonomous, or a branch of prudential reasoning (as a Hobbesian would argue).


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of State and so on. Indeed, since what these things are is determined by law, this must be literally true. Legal positivists have found in this aspect of law its true essence. But from another point of view it has the normative aspect referred to in our opening paragraph. Law purports to declare what people ought to do, what their rights and duties are. And since, as we learned from Hume, what people ought to do cannot be determined by facts alone, how can law be purely factual? Natural lawyers have found the essence of law in this second aspect, and have understood normative legal language and the attitudes expressed in it to be moral in nature.

No one has suggested that the first aspect of law is illusory or eliminable. Natural lawyers have argued that justice is a necessary, but not a sufficient, condition for the existence of law: there is no law without actual, man-made institutions. On the other hand, the classical positivists argued that the second, normative aspect was eliminable. They proposed various forms of reductivism designed to show that normative legal propositions are really just factual propositions in disguise: propositions about force, habitual behaviour, or the likely reactions of officials, for example. But more recently leading positivists such as Kelsen and Hart have eschewed reductivism, and few advocate it today. As Hart acknowledges, the two aspects of law must be reconciled and both accounted for in any plausible philosophical analysis of law.

The different aspects which law presents have been described in terms of different 'points of view', a notion which might hold the key to their reconciliation. After all, something can appear differently to observers who are differently situated, each appearance revealing only a part of its true nature. This question of point of view has become prominent in recent debate, and is best dealt with at the outset. Three different 'points of view' towards a particular system of law have been distinguished. First, there is the 'internal' point of view of those who are governed by the system and who accept its laws as binding or obligatory. Secondly, there is the 'external' point of view of those who do not accept this; they include some who are governed by the system (such as criminals, revolutionaries, uncommitted conformists), and others who are not (such as foreign sociologists). Thirdly, there is the 'detached' point of view of those who for heuristic purposes adopt the internal point of view hypothetically, without genuine commitment. The detached point of view need not concern us at this stage.

These distinctions might help us reconcile the factual and normative aspects of law. Perhaps from the external point of view law is fundamentally factual, not  

5 In the relevant sense of municipal law.  
6 For a general treatment of reductivism in philosophy, see S. Blackburn, Spreading the Word (1984), 151–8.  
7 Hart also discusses other ways of reducing such statements, such as to statements about feelings of compulsion or fear, or to prudential statements, which form a species of normative statements ('a is obliged (by the sovereign's threat) to obey'). See CL, 80–3.  
9 See text to n 25, below.  
10 CL, 86–8.  
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normative, while from the internal point of view it is, at least fundamentally, normative and not factual. Clearly from the external point of view the law is determined by facts alone, but these facts could be or include facts about the normative beliefs of those who inhabit the internal point of view. From the internal point of view the law could be determined ultimately by norms, in the broad sense of ‘norm’ which includes reasons for action and in particular reasons for accepting authority. The philosophy of natural law could then be understood as a philosophy for those internal to law—as a ‘participant theory’, as Postema puts it—while positivism could be understood as a philosophy for people such as sociologists—an ‘observer’ theory. The division of labour between the two philosophies would resemble that between the ‘critical’ study of morality in the sense of true or de jure morality, and the ‘positive’ study of de facto moralities which are accepted by individuals or communities.

Attractive as this resolution may seem, it has not been advocated by contemporary positivists. Hart and Raz both occasionally emphasize the need for a descriptive theory of law which the political scientist or sociologist can use, but they seem to aim at developing participant as well as observer theories of law. This is an inescapable necessity. For the sociologist the law must depend on the beliefs of those internal to it, and so he must understand how they conceive of it: an observer theory must therefore be constructed around a participant theory—it must be, as MacCormick argues, hermeneutic. But the suggested resolution then involves a positivist observer theory built around a natural law participant theory, and this does not seem to be Hart’s or Raz’s position. They believe that from the internal, as well as from the external, point of view law is primarily a matter of facts: their participant theories as well as their observer theories are therefore positivist. It is important to determine whether or not this is a happy coincidence or, as has sometimes been alleged, an incoherent confusion of perspectives.

In this article Hart’s and Raz’s participant theories of law will be scrutinized. This is surely the real locus of the debate between positivists and natural lawyers: it is unlikely that a natural lawyer would argue that for a sociologist wanting to identify the laws of some foreign legal system, moral criteria are more pertinent

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12 G. Postema, op cit n 4, 85.
13 Ibid.
14 For an explanation of this distinction see H. L. A. Hart, Law, Liberty and Morality (1963), 20. N. E. Simmonds uses just this distinction to illuminate the problematic nature of the internal point of view in law: see 'Practice and Validity' [1979] CLJ 361, 362.
15 It is sometimes suggested that Dworkin’s attack on Hart’s positivism miscarries because the latter is concerned only with a descriptive theory applicable to legal systems in general, rather than with a normative theory applicable within a particular system—with ‘what is law?’ rather than ‘what is the law?’: J. Finnis, ‘On Reason and Authority in Law’s Empire’, (1987) 6 Law and Philosophy 357, 367–8; S. Burton, ‘Ronald Dworkin and Legal Positivism’ (1987) 73 Iowa LJ 109, 110–11. See also K. Greenawalt, ‘The Rule of Recognition and the Constitution’ (1987) 85 Mich L Rev 621, 663. But as suggested in the text following this note, in building his descriptive theory Hart concerns himself with the normative thought of participants within legal systems. In asking ‘what is law?’ he must ask ‘how do participants decide what is the law?’
18 See, eg, ULM, 54.
than the actual attitudes and practices of the foreigners in question.19 Natural law is surely not an observer theory of law. It will be argued here that natural law provides a more plausible account of the internal point of view, and is therefore superior as a participant theory of law. Indeed, it will be argued that Hart’s and Raz’s own arguments suggest as much. The intrinsically normative character of the internal point of view, which both rightly concede, cannot be reconciled with the primacy which both attribute to law’s factual aspect. This ultimately entails the self-destruction of positivism as a participant theory.

2. Hart’s Theory of Non-Moral Legal Normativity

Before discussing Hart’s theory, it is useful to distinguish the different theses with which legal positivism has been associated. Raz identifies three such theses, as follows:20

(a) the social thesis: what is law and what is not is a matter of social fact, that is, a matter of ‘facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument’.21 Positivists have in mind facts establishing the existence of efficacious legal systems, and facts about the behaviour and intentions of officials within those systems, such as legislators in assenting to statutes and judges in deciding cases. There are two different versions of this thesis:
   (ai) the pure fact social thesis (which Raz calls the ‘strong’ social thesis): what is or is not law is exclusively a matter of social fact.22
   (aii) the fact dependent social thesis: what is or is not law may depend partly on moral criteria, but only in so far as such criteria are made relevant by social facts (such as rules whose existence is a matter of social fact). In other words, what is or is not law depends ultimately on matters of social fact alone.

(b) the moral thesis: it is not necessarily true that a law or a whole legal system has some moral value or merit—whether or not it does is contingent on its content and context.

(c) the semantic thesis: normative terms such as ‘ought’, ‘right’, and ‘duty’ have different meanings when used in legal and moral contexts.

Hart defends the first and third, if not the second, of these theses (although whether the ‘pure fact’ or ‘fact dependent’ version of the social thesis has been debated).23 The main features of his theory are well-known, and so can be summarized succinctly. He argues, through extensive criticisms of Austin’s theory, that mature legal systems are hierarchical systems of rules, based on fundamental rules of recognition, change and adjudication which determine the creation, destruction and application of the other rules.24 He depicts the fundamental rules

19 It can, of course, be argued that the sociologist must sometimes make normative judgments to facilitate the interpretation of those attitudes and practices.
20 AL, 37-8.
21 Id, 39-40. Elsewhere, Raz sometimes calls the social thesis the sources thesis.
22 Id, 39.
24 CL, chs 2-5.
as social practices in which participants share the 'internal' point of view: certain standards of behaviour are regarded as proper (in some cases as obligatory), members of the social group believe that they have good reasons for demanding compliance with these standards and criticizing non-compliance, and they use normative language (ought, right, duty, etc) to express these demands and criticisms. The necessary criteria for the existence of a legal system are first, that its officials adopt this internal point of view towards its rules, which, secondly, must be generally obeyed by private citizens.

Hart's observer theory clearly includes the social thesis. To say that law, in the sense of a legal system, exists is to say that these two purely factual criteria are satisfied. To say that a law exists, which is to say of some rule that it is valid, is to say that it satisfies the fundamental rule of recognition of some legal system, and even if satisfaction of the rule of recognition is not a matter of pure fact, the existence of the rule of recognition is, which establishes at least the fact dependent social thesis. But what of participants? What do they mean by saying that rules are valid, and what do they regard as grounding the truth or falsity of such statements? Here we must turn to the semantic thesis. Since this is possibly the most vulnerable of the three theses (Raz, otherwise a staunch positivist, rejects it), Hart's defence of it warrants careful examination.

Refusing to interpret normative legal discourse either (by reduction) as factual discourse, or as moral discourse, Hart posits distinctive legal senses for terms such as 'ought', 'right' and 'duty'. Before explaining this further, it is necessary to recall the 'internal', 'external' and 'detached' points of view. Legal statements made from the internal and the detached points of view are both irreducibly normative, but only the former express what Raz calls 'full-blooded' commitment to the law. It might seem to follow that internal legal statements express a moral commitment to the legal system. Fuller was one of the first to think so. But Hart denies that even these statements necessarily, or even typically, express moral judgments or commitments. He describes his interpretation of them as non-cognitive. He seems to regard them as having two aspects or components, one of them factual—asserting the existence of some practice or rule—and the other emotive or prescriptive—expressing such things as the speaker's attitude of acceptance of that practice or rule or his demand that others comply with it. The first aspect is capable of being true or false, but expressions of non-cognitive attitudes, such as emotions or preferences, are not. Thus, we can say that the social

25 Id, 54–6 and 80–8.
26 Id, 107–14.
27 Which is to say that the rule is valid: id, 97–107.
30 AL, 154.
31 L. Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 Harv L Rev 630, 638–9.
32 Essays on Bentham, op cit n 29, 159–60.
thesis is part of Hart’s participant, as well as his observer, theory. The existence of a law for the participant, as for the observer, depends on questions of fact, although in reporting such facts the participant, but not the observer, expresses non-cognitive attitudes towards them. Furthermore—and this constitutes his defence of the semantic thesis—Hart’s analysis of this second, non-cognitive component of internal legal statements in terms of illocutionary or expressive force avoids any reference to moral attitudes. In response to Fuller, he says that those who accept a legal system voluntarily need not

conceive of themselves as morally bound to do so . . . In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do . . . Those who accept the authority of a legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in normative language which is common to both law and morals . . . Yet they are not thereby committed to a moral judgment that it is morally right to do what the law requires.

However, this defence of the semantic thesis will not do, because it fails to account for those aspects of law which Hart himself relies on to refute Austinian reductivism.

Hart’s apparently decisive criticisms of the Austinian conception of law as commands issued by a sovereign to its habitually obedient subjects, showed that the idea of authoritative rules is the ‘key to the science of jurisprudence’. Moreover, Hart argued that such rules can only be explained in terms of ‘the whole distinctive style of human thought, speech, and action . . . which constitutes the normative structure of society’. The normativity of law and legal thought could not be reduced to the elements of the Austinian conception, the ideas of orders, obedience, habits, and threats. The existence of authoritative rules in a community depends on at least some of its members (in the case of law, at least legal officials) adopting the internal point of view, and the internal point of view is characterized by criticism of others (expressed in normative language common to law and morals) for failing to comply with the rules, and by the belief that their non-compliance is a good reason for the criticism. Summarizing and applying all this to legal officials, Hart says that the ordinary citizen’s obedience

34 See text at n 28, above.
35 There is doubt as to whether or not Hart believes that the non-cognitivist component is part of the semantic meaning of internal legal statements, or merely a normal implication of their being uttered by someone adopting the internal point of view. If the latter then, as G. P. Baker has pointed out, Hart’s analysis of the meaning of those statements is reductionist, after all: see his ‘Defeasibility and Meaning’, in P. M. S. Hacker and J. Raz, (eds), Law, Morality and Society (1977), 26, 41–2.
36 CL, 198–9.
37 See n 8, above.
38 CL, 79.
39 Id, 86.
40 Id, 112–14. Note that normally a majority of citizens will also adopt the internal point of view: id, 88.
41 Id, 54–6.
42 Ibid; and see 83 and 199. In his more recent Essays on Bentham (1982), Hart writes of ‘authoritative legal reasons’ rather than rules and his analysis of these in terms of ‘content independence’ and ‘peremptoriness’ resembles Raz’s analysis of exclusionary reasons (see nn 80–81, below).
need involve no thought . . . that what he does is the right thing both for himself and for others to do . . . [h]e need not think of his conforming behaviour as ‘right’, ‘correct’, or ‘obligatory’ . . . he may obey it out of fear of the consequences or from inertia . . . But this merely personal concern with the rules . . . cannot characterise the attitude of the courts to the rules with which they operate as courts.43

How can Hart say, then, that the internal point of view can be adopted on the basis of ‘calculations of long-term interest’?44 As Raz objects, one can comply with a law for self-interested reasons but

one cannot adduce one’s preferences or one’s self interest by themselves as a justification for holding that other people must, or have a duty to act in a certain way. To claim that another has to act in my interest is normally to make a moral claim about his moral obligations.45

Perhaps, though, we are being unfair to Hart. Although he says that the internal point of view may be adopted for reasons of self-interest, he does not say that demands and criticisms which are thereafter made from that point of view express, or depend for their justification upon, those reasons. Perhaps they are reasons to adopt a point of view which is autonomous, in that one’s judgments, demands, criticisms and so on have some normative force or sense which does not depend on the reasons which initially induced one to adopt it.46 If so, the normative force or sense of legal demands and criticisms made by those who accept law as authoritative are independent of the reasons which initially motivated their acceptance, whether those reasons were amoral, immoral, or moral. In this respect, it might be argued, the law is like the rules of a game or a club: since demands and criticisms based on these rules are made, understood and accepted as legitimate by all participants, although they may have joined for any number of reasons, the normative force or sense of their demands and criticisms must be independent of those reasons—it must be autonomous and sui generis.

But this leaves the normative force or sense of such demands and criticisms unanalysed and mysterious. Demands and criticisms are usually intended to motivate those to whom they are addressed, and so they should make, or at least be able to make, sense to those people. Demands and criticisms should express or imply the existence of some point—some reason—for acting which is discernible by those to whom they are addressed. This is why, as Raz points out, the self-interest of the speaker does not suffice. Demands that people act otherwise than in accordance with their own self-interest are normally interpreted as moral demands because it is generally assumed that there are good reasons to act morally. But what could be the point—the force or sense—of demands and criticisms whose normativity is sui generis?

Hart would object that this analysis of normative demands and criticisms is cognitivist, whereas his is non-cognitivist in that it does not assume the existence of

43 CL, 112.
44 Id, 198.
45 J. Raz, ‘The Purity of the Pure Theory’, op cit n 33, 454. See also G. Postema, op cit n 4, 99.
46 This interpretation of Hart was suggested to me by C. L. Ten.
objective reasons for action which demands and criticisms advert to. But this just indicates the weakness of non-cognitivism: if demands and criticisms merely express or reflect the attitudes and desires of those who utter them, regardless of whether these are of any relevance whatsoever to those addressed, their rationale is obscure. But regardless of this, Hart offers no reason for thinking that the non-cognitive attitudes and demands he believes to be expressed in legal statements differ from those expressed in moral statements. His analysis of legal statements may be non-cognitive, but this does not in itself distinguish those statements from moral statements of which Hart might also offer a non-cognitive analysis.

Consider the case of games and clubs. Even here, it seems likely that demands and criticisms concerning compliance with the rules are moral demands and criticisms. Although players may enter a game for any number of reasons, by entering it they tacitly agree to abide by its rules, and it is surely this, and the consequent unfairness to other players if they renege, which makes sense of, and justifies, the demand that they do so. But be that as it may, there is a crucial difference between law and games. A chess-player will demand that other players comply with the rules of chess, but it would be senseless to make this demand of someone using a chess board and pieces to play some other game. This suggests that, even if it is not moral, the force or sense of demands that the rules of a game or club be obeyed derives from its players or members having voluntarily joined in. But this cannot be true of law. A legal official or other person who accepts the legal system from the internal point of view, demands the obedience of all to whom its laws apply, whether or not they have agreed to do so, either expressly or tacitly. From the internal point of view the law possesses an authority not claimed by the rules of any game or club, an authority not dependent on its being acknowledged by all concerned. It is doubtful that this kind of authority, and the demands and criticisms which issue from it, can be anything other than moral in nature.

This criticism of Hart can be reinforced by returning to our starting point. Legal decisions are practical not only in the sense that they are decisions about what other people ought to do or have done, but also in that they are decisions to act in ways seriously affecting other people’s interests. The function of legal reasoning is to determine when these actions are justified, and so the ultimate norms upon which that reasoning is based must somehow be self-justifying. Now, whether or not these most fundamental norms are regarded as legal, they must surely be moral.

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48 See G. Postema, op cit n 4, 89.
49 Id, 101.
50 There must be such norms if an infinite regress of reasons is to be avoided. This does not assume a foundational model of legal reasoning rather than, say, a coherence model. Even within a coherence model some reasons will be more basic than others, in that the former will be used to justify the latter but not vice versa, even if the most basic reasons are justified by their mutual coherence. A model of this sort would be consistent with the argument in the text.
51 It might seem odd to say they are not legal, given that they are fundamental to the operation of the legal system, necessarily forming part of every chain of reasoning leading to a decision at law, and hence standing behind every legal decision. Nevertheless, some positivists would argue that they are not legal, because they are moral—for reasons similar to those which lead Raz to conclude that, while the rule, or rules, of recognition of any legal system may be said to be legal, the principles or values which justify allegiance to the rule(s) of recognition are not. See AL, 69. These reasons depend upon a particular conception of ‘law’ which need not concern us here, but which is referred to in the text to nn 85–8, below.
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If they were immoral or amoral they could not fulfil their role of justifying judicial action. Amoral or immoral reasons can justify action to the actor, but they cannot justify it to others, especially not to those likely to be adversely affected by the action. But the role of legal reasoning is to \textit{publicly} justify judicial action: reasons which the judge addresses only to herself cannot in principle play that role. It is clear from Hart's description of the internal point of view that it involves a commitment to this kind of \textit{public} reasoning; it expresses itself in demands and criticisms which other members of the relevant social group are expected to accept as legitimate and persuasive.\textsuperscript{52} So the ultimate norms cannot be amoral or immoral. Nor can they be in some other sense non-moral, pertaining to some quite separate category of norms. Norms which were \textit{purely legal}, having no extra-legal (eg, moral) normative force, would also fail to justify judicial action. Such norms could not be, as moral norms are usually taken to be,\textsuperscript{53} self-justifying. A judge whose \textit{ultimate} justification for acting was a purely legal norm would rightly be regarded as having acted senselessly and incomprehensibly.\textsuperscript{54} As MacCormick says, this would be justification only in a very Pickwickian sense.\textsuperscript{55}

It might be objected on Hart's behalf that in his view the minimum conditions for the existence of a legal system require merely that its laws be generally obeyed, and that its officials regard its secondary rules of recognition, change and adjudication 'as common standards of official behaviour and appraise critically their own and each other's deviations as lapses'.\textsuperscript{56} This implies that it is not necessary for non-officials to adopt the internal point of view towards the law. It might also be thought to imply that it is not necessary for officials to adopt towards non-officials the normative attitudes and language characteristic of the internal point of view. Hart clearly intends the first implication: 'in an extreme case the internal point of view with its characteristic normative use of legal language . . . might be confined to the official world'.\textsuperscript{57} But it is extremely doubtful that he intends the second implication: if so, he envisages a legal system whose officials claim on its behalf authority over one another, but not over their subjects, whose compliance is secured by naked force. He does, though, refer to cases in which law is used 'to subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master group, may be large', provided it is much less well-organized and powerful than the master group.\textsuperscript{58} In such cases, there is 'nothing in the system to command [the subjects'] loyalty but only things to fear',\textsuperscript{59} which might make it pointless for officials to use normative demands and

\textsuperscript{52} CL, 54–6, 86–8 and 110–12.
\textsuperscript{53} Not always, of course. Some believe that compliance with moral norms must be justified in terms other than the norms of morality themselves, for example, in terms of essentially prudential norms. On this view only prudential behaviour is self-justifying.
\textsuperscript{54} On this see M. J. Detmold's illuminating discussion in ULM, 22–7 and 52–3; D. Lyons, 'Derivahility, Defensibility, and the Justification of Judicial Decisions', op cit n 2, 339–42; and AL, 10.
\textsuperscript{56} CL, 113, emphasis added.
\textsuperscript{57} Id, 114.
\textsuperscript{58} Id, 197.
\textsuperscript{59} Ibid.
criticisms, rather than sheer brute force, to induce obedience.

If Hart does accept this implausible second implication, the objection made on his behalf would be that (on his view) it is possible for there to be a legal system for which even its officials do not claim moral authority or, indeed, any moral justification.

Whether or not such a legal system has ever existed may be doubted; it would certainly be unlikely to survive for long. It is well known that even in slave societies many slaves have themselves to some extent accepted the legitimacy of their subordinate status. It is unlikely that even the most cynical of ruling castes would make no attempt to induce or sustain such acceptance by claiming moral authority over their subjects. Moreover, as historical experience seems to confirm, the ruling caste is more likely than not to believe its own claims in that regard. But even if such cases are possible, at least two replies can be made to this objection on Hart’s behalf.

First, our criticism of Hart would still hold even in relation to such an ‘extreme case’. Even if the rulers adopt only towards one another the normative attitudes and language characteristic of the internal point of view, this would surely be to express a moral demand for solidarity within the ruling caste in maintaining the legal system. Otherwise it is very difficult—for the reasons already given—to explain their resort to those notions, such as authority, right, obligation and justification, which exemplify the internal point of view.

The second reply is this. Too much emphasis has been given to Hart’s ‘two minimum conditions necessary and sufficient for the existence of a legal system’, at the expense of his fundamental methodology of the ‘central case’. Hart is not greatly interested in defining ‘law’ or ‘legal system’. Although he finds in the combination of primary and secondary rules ‘the key to the science of jurisprudence’, he is not willing to claim that even this combination is to be found wherever ‘law’ is properly used. He says that ‘the diverse range of cases of which the word “law” is used are not linked by any simple uniformity, but by less direct relations . . . to a central case’. By analysing the central case, Hart hopes to resolve the major questions which have perplexed legal philosophers, concerning the resemblances and differences between law, coercion and morality. Resolving doubts about the proper classification of borderline cases is only a secondary concern.

It seems that Hart’s ‘central case’ should contain those features which are common to ‘the clear standard cases constituted by the legal systems of modern states’. It is these features which make up ‘the distinctive structure of a municipal legal system’, which Hart sets out to analyse. Furthermore, it is these features

60 D. Wrong, Power, Its Form, Bases and Uses (1980), ch 5 is a fascinating discussion of these issues. His conclusions at 121–3 are consonent with ours.

61 In discussing slave societies Hart points out that although slaves are often regarded as less than human, the dominant group ‘may yet remain morally sensitive to each other’s claims and interests’: CL, 196.

62 Id, 79. See also id, 208.

63 Ibid.

64 Id, 6–17.

65 Id, 3.

66 Id, 17.
which have given rise to the perplexing questions with which Hart is primarily concerned. Borderline cases may lack some of those features, but this is irrelevant to his primary concerns.

Now, it is surely clear that the ‘extreme case’ involving a small ruling caste oppressing, with no claim of right, a larger helot caste, is a borderline case. This judgment could, but need not, be based on Finnis’ argument that the central case of law is determined by ‘the practical viewpoint that brings law into being as a significantly differentiated type of social order’, a viewpoint of which Hart’s ‘extreme case’ is a ‘manifestly deviant, diluted or watered-down . . . [and] parasitic’ example.67 The judgment is required by Hart’s own argument as it stands. His primary interest is in the central case most closely approximated by modern municipal legal systems, in which (as he often acknowledges) legal officials claim authority over citizens, as well as other officials.

This is confirmed by Hart’s oft repeated references to the following patterns of thought which must be explained in an adequate account of law, but which are not adequately explained by Austinian theory. First, there is the claim to authority which is made by legal officials, and which distinguishes laws from orders backed merely by threats.68 The secondary rules of a legal system purport to confer on officials the right to rule, which makes it right to obey them.69 This is why someone legally required to act is said to have an obligation, and not just to be obliged by a threat, to act.70 (And note that obligations are said to exist when imposed by rules ‘believed to be necessary to the maintenance of social life or some highly prized feature of it’.71) Moreover, it explains why citizens are expected to, and usually do, comply with the law for reasons independent of threatened sanctions—its practical guidance in this manner being the ‘primary’ or ‘principal’ function of law, and its imposition of sanctions a result of the ‘breakdown or failure’ of that function.72

These patterns of thought, which pervade all ‘mature’ legal systems, are unquestionably among those phenomena which have inspired the puzzling philosophical questions with which Hart is concerned. It has been argued here that they are best explained as patterns of moral thought. To ignore them on the ground that the minimum sufficient and necessary conditions for the existence of a legal system do not require that non-officials be included within them, either as participants or as subjects, the latter claim being dubious anyway in the context of Hart’s own theory, is to mistake one of Hart’s secondary interests (the classification of borderline cases) for his primary interest in elucidating the inter-relationships between law, coercion and morality in the central case. To focus on very unusual and extreme borderline cases in analysing those inter-relationships must lead to distortion.

68 CL, 19–20, 56–60 and 92.
69 Id, 53–4, 57, 58–9 and 61 (the right to rule) and 56–7 (the rightness of obedience).
70 Id, 80–8.
71 Id, 85.
72 Id, 38–9.
Hart’s response to criticism along these lines is surprisingly weak. First, he says that the settled practice of judges is to enforce laws regardless of their view of those laws’ moral value. But obviously they would claim, and generally believe, that doing this is morally justified (or even required). It is a commonplace that it may be morally right to enforce laws which, in themselves, are morally bad; indeed, the efficacy of law depends on this being widely understood and accepted. Secondly, Hart says that such criticism depends on a cognitive account of objective reasons for action, to which moral and legal statements both refer, as opposed to his own non-cognitive account of legal statements. This response has already been discussed.

Hart’s defence of the semantic thesis in terms of non-moral normativity therefore fails. Can positivism survive the admission that internal legal statements express moral commitment to law? According to Raz, the fundamental positivist thesis is the social thesis, and he believes that it can stand independently of the semantic thesis.

3. Raz’s Theory of Morally Committed Positivism

Raz persuasively argues that it is part of the very concept of law that legal officials claim authority for the rules they enact and enforce. He says that this claim

is manifested by the fact that legal institutions are officially designated as ‘authorities’, by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed.

According to Raz something is authoritative in practical matters only if it constitutes a special sort of reason for action, a reason for action which excludes at least some of the reasons against action. When there are ordinary reasons for and against a certain action, an all-things-considered practical judgment depends on their relative weight. But truly authoritative norms are not to be weighed along with all other relevant reasons for and against action; that they are authoritative is a reason to exclude at least some of the competing reasons. But to say this is to say that a truly authoritative norm imposes an obligation to act regardless of the existence of those competing reasons. As we have seen, Raz also argues that this is to make a moral claim. Now, Raz also argues that in claiming that the law is authoritative, legal officials must understand what they are claiming—they must

74 G. Postema makes this point in ‘The Normativity of Law’, op cit n 4, 93.
75 Some of the reasons for this are mentioned in the text to nn 85–8, below.
76 See the text to nn 47–8, above.
77 AL, 38.
78 AL, 29–33, 116–17 and 158–9, and ‘ALM’.
79 ALM, 300.
80 AL, chs 1 and 2; PRN, 40–4, 62–84, 132–48; ‘ALM’.
81 AL, 234–5.
82 See n 45, above.
know what authority is. In making this claim they are therefore quite deliberately claiming that those to whom the law applies have a moral obligation to obey it. Finally, Raz argues not only that the claim must be made, but that it will normally be made sincerely.

Raz also advocates the pure fact social thesis, which maintains that the identification of law depends solely on facts about human behaviour and intentions. In its defence he argues that this thesis is embedded in the conception of law which we happen, for good reason, to have. In *The Authority of Law* he appeals first to our linguistic practices—inter-related distinctions we draw between legal skill and moral wisdom, between applying law and developing it, and between settled and unsettled law—and secondly to the value or function of law, which explains and justifies those distinctions. An essential function of law is to provide rules which can be identified objectively, and accepted as the basis for the co-ordination of social life, despite substantive moral disagreement. It can do so only if it can be identified by ‘publicly ascertainable standards not involving moral argument’. In a more recent article, this function argument is couched in terms of the claim to be authoritative which, as we have just seen, he takes to be part of law’s essence. He calls his analysis of authority the ‘service’ conception of authority: authority is justified because it helps people do what they ought to do, by obviating the need for them to rely on their own more fallible judgments on the matter. But for this to be possible, subjects must be able to identify the authority’s directives without themselves having to consider what they ought to do; otherwise, the directives would be redundant. But this is to say that the pure fact social thesis must apply.

Although the identification of law must depend solely on social facts, Raz argues that internal legal statements express moral commitment. Raz’s current view seems to be that in internal legal statements ‘valid’ is used to express a moral judgment. In *The Authority of Law* Raz expressly adopts ‘the natural law view on the meaning of “validity”: the view “that a valid rule” means a justified one, a rule that one is justified, indeed required, to observe and endorse’. Claiming to follow Kelsen, he also says that ‘a legally valid rule is one which has the normative effects (in law)
which it claims to have,’91 and as we have seen his current view is that these claimed normative effects are moral in nature.92 This interpretation of internal validity statements is most plausible. For a judge the purpose of determining the validity of a rule is to determine whether or not it is a rule which he really—that is, morally—must take into account in his deliberations (which, as we have seen, are practical). A judge does not, after deciding that a rule is valid, consider whether or not he really ought to obey or apply it: that question is just what the decision has settled.93 Moreover, other internal legal statements concerning legal rights, obligations and so on, are entailed by internal validity statements,94 and so if the former are normative the latter must be too.

Thus, 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—described at the beginning of this paper. But how can this be so: how can the validity of law be (partly) a matter of moral bindingness, if the identification of law depends purely on social facts, which it must do if the pure fact social thesis is correct? 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.) Raz’s solution turns on the notion of ‘systemic’ validity: the moral bindingness of law primarily depends not on the merits of each individual legal rule, but on the community’s need for an effective system of authoritative rules. Since he regards law as authoritative only if it can be identified and interpreted without reference to moral criteria, that is, on the basis of certain social facts alone, and because legal authority is morally valuable, those social facts possess moral value. An individual rule is morally binding—that is, ought to be obeyed—‘because it is part of a legal system which is in force in the country concerned . . . Hence proof that the [rule] rests on a [factual] source which is [in fact] recognized by the system is an essential part of the argument for its legal validity’.95 He concludes:

Validity presupposes membership [in the system] and enforceability. Judgments of membership and of enforceability are judgments of social fact. Judgments of legal validity are normative judgments partly based on those facts.96

Thus, from the internal point of view the moral value of an authoritative system

91 AL, 149. Raz has apparently changed his mind since discussing legal validity in PRN, 127–8.
92 See text to n 45, above. Raz’s view has changed: in his earlier writings he agreed with Hart that the internal point of view does not necessarily include moral commitment to law: see PRN, 147–8; AL, 155 and The Concept of a Legal System (2nd ed, 1980), 235.
93 As Raz points out, ‘legally valid’ is used interchangeably with ‘legally binding’: AL, 149.
94 For example, whether or not a rule, purporting to impose an obligation, really does impose that obligation depends, from the internal point of view, on whether the rule is valid.
95 AL, 152, emphasis added.
96 Id, 153.
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of rules confers moral value on its component rules, whatever their individual merits.97

4. The Foundational Thesis

It might seem that, for Raz, the role of moral judgment in legal reasoning is properly limited to a once-and-for-all judgment of systemic validity, which justifies the decision to treat all the positive norms of the legal system as authoritative, so that legal reasoning can thereafter proceed without further reference to moral values.98 This is just what treating the law as authoritative involves, and this (we will assume for now) can be morally justified. This rather crude thesis about legal reasoning we will call the 'crude foundational thesis'. As MacCormick puts it (although neither he nor Raz would endorse the thesis in this crude form),

Lawyers are hired to argue cases at law, and judges are appointed to resolve legal cases. Neither would welcome (or, one would suppose, be much good at fulfilling) a duty to deal in terms of raw moral argumentation as part of their professional or official role. This limitation of lawyerly and judicial skills and tasks is not however a morally disgraceful one . . . [because] there is moral justification for a specialized practice of legal justification of claims, defences and decisions. The practical need for definability of interpersonal issues and determinability of human disputes by reference to interpersonally pre-established (albeit never fully determinate) norms of decisions and of conduct seems to me to supply just such a moral justification for recourse to a specialized practice of legal justification.99

Considered superficially, certain prominent features of legal thinking (often denigrated as ‘formalistic’ or ‘legalistic’) might appear to reflect endorsement of the crude foundational thesis. Finnis, for example, has observed that practical legal thought tends to operate on the basis of ‘working postulates’. One of them is the ‘no gaps’ postulate ‘that every practical question . . . has, in every respect, been . . . “provided for” by some . . . past juridical act or acts’.100 Another is the undiscussed postulate that the law is morally binding; undiscussed because ‘in strictly legal thought . . . [it] never becomes a topic of conversation’.101 This ‘framework principle or postulate’, Finnis says, enables legal reasoning to be isolated from the general flow of practical (including moral) reasoning by giving

97 (Actually, Raz’s position is more subtle than this: he is aware that real people will often have a number of reasons, applying to different types of legal rules, for accepting their validity. Officials, however, presumably must believe the law to be systemically valid in the sense just discussed.) On this view, those adopting the internal point of view accept something like a Kelsenian grund-norm, an assumption of the validity (bindingness) of the system’s constitution and consequently of that of all the other rules of the system. At least, that is so if Raz’s interpretation of Kelsen is correct: see in particular ‘The Purity of the Pure Theory’, op cit n 33, 456–7. M. J. Detmold’s interpretation of Kelsen (ULM, 57) is similar to Raz’s, although Detmold understands the grund-norm to be an actual assumption of the internal point of view, while Raz understands it to be a heuristic assumption of the detached legal scientist. But these interpretations are controversial: see n 90, above.

98 As Raz puts it: ‘At the level of general justification the pre-empted reasons [including moral reasons] have an important role to play. But once that level has been passed and we are concerned with particular action, dependent reasons are replaced by authoritative directives’. ALM, 299.


100 J. Finnis, Natural Law and Natural Rights (1980), 269.

101 Id, 316–17.
legal norms an unquestioned or dogmatic status. Detmold’s analysis of the internal point of view is similar. That point of view, he says, is constituted by two assumptions: first, that the legal system’s rule of recognition is morally binding, and secondly, that the other members of the relevant social group make the first assumption. Legal reasoning operates within boundaries set by these two assumptions, which (as assumptions) are never discussed: what is said within those boundaries ‘is normative and therefore committed talk; but the commitment is displayed rather than put in issue’. The existence of a legal system depends in part on a sufficient number of people making these two assumptions. Indeed, ‘a legal system is an ongoing conversation constituted by the two assumptions . . . If [they] are not made, any ensuing statement is external, and we have lost the thing, law’.

Now, these postulates or assumptions are just what one would expect if the crude foundational thesis was accepted by the legal profession. Assuming the existence of moral norms justifying the legal system, (the precise details of which can be left to the political philosopher), lawyers and legal scholars should (on this view) proceed with their own enquiries into the identification, interpretation and application of law, all of which turn on questions of fact alone. Legal reasoning should be based solely on positive legal norms, norms which can be identified and interpreted without reference to moral norms; and although the normative force of this ‘should’ derives from moral norms underlying the law, providing that force exhausts their role in legal reasoning.

But for good reasons, no one today would endorse the crude foundational thesis. It is universally acknowledged that moral norms necessarily play a much more pervasive role in legal reasoning than it allows. Legal reasoning cannot be based solely on positive legal norms, because the ‘no gaps’ postulate identified by Finnis is (as he points out) obviously false. There are ‘hard cases’ for which no determinate solution is prescribed by positive legal norms alone, and moral norms must enter directly into the resolution of such cases. Positivists such as Hart and Raz, and their most prominent rival Dworkin, actually agree in this. Their disagreement concerns the mode of reasoning which should be employed in deciding hard cases (that is, how the required moral norms should be identified), and whether or not those norms should be called ‘legal’ as well as moral.

There are, arguably, several different kinds of hard case:
(a) where a critical issue is simply not governed by a positive legal norm;
(b) where the governing positive legal norm or norms are vague or ambiguous and cannot, or should not, be made fully determinate by any process which is free of moral judgment (eg, by determining the intentions, purposes or preferences of the legislator);

103 ULM, 49–50 and 59–60.
104 Id, 46.
105 Id, 59.
(c) where inconsistent positive legal norms require different results, and no superior legal norm resolves the inconsistency;
(d) where the governing positive legal norm or norms expressly require recourse to a moral norm for the determination of the case.

While all agree that there are hard cases, there is some disagreement—which need not concern us—as to whether or not all these kinds of hard case really exist.\(^{107}\) It follows that legal reasoning cannot eschew direct reliance on moral norms because in hard cases decisions cannot be based on positive legal norms alone. In hard cases the crude foundational thesis must be rejected. But this necessitates only a relatively minor amendment to that thesis. The thesis, it might be thought, remains true of most legal questions—including most of those over which litigation is never contemplated, as well as ‘easy’ cases in the courts—because the law can be applied without moral judgments being needed to resolve gaps, inconsistencies or ambiguities. The foundational thesis might be amended to assert that in relation to these ‘easy’ questions moral judgment in legal reasoning should be confined to the single, foundational judgment of the law’s moral bindingness. In what follows this is what will be meant by ‘the foundational thesis’.

The foundational thesis must be distinguished from the social thesis. The latter concerns the identification of law, while the former concerns the reasoning which justifies legal decisions, and asserts that in easy cases such reasoning should be restricted to the application of law identified in accordance with the social thesis. To use a distinction recently drawn by Raz, the social thesis is part of a positivist theory of law, whereas the foundational thesis is part of a theory of adjudication, which—he frankly concedes—must be a moral theory because ‘the question of which considerations courts should rely upon . . . is clearly a question of political morality’.\(^{108}\) If judges should sometimes decide ‘easy’ questions for reasons independent of or even contrary to law, the foundational thesis is false although the social thesis may still be true. The social thesis—indeed, the pure fact social thesis—must be true for the foundational thesis to be true, but not vice versa.

But although these theses must be distinguished, and it is the social thesis which he defends, Raz seems committed to the foundational thesis as well. As we have seen, the social thesis rests on claims he makes about an essential function of law and of authority more generally: to enable conduct to be guided by, and disputes to be settled according to, standards which can be identified without moral judgments

\(^{107}\) Some theorists have denied the existence of the first kind of hard case, arguing that in a mature legal system ‘closure rules’ always fill the breach: see AL, 75-7; A. Hutchinson and J. Wakefield, ‘A Hard Look at “Hard Cases”: The Nightmare of the Noble Dreamer’ (1982) 2 OJLS 86, 103-7. Rolf Sartorius takes the most restrictive view of hard cases: he admits the existence of only the fourth kind: see his Individual Conduct and Social Norms (1975), 190-7. He does not necessarily deny that in some cases positive legal rules may be either lacking, or vague or ambiguous, or inconsistent. He argues that positive legal norms, other than rules are ‘exemplified, established, or implied’ by ‘first order’ legal norms (such as rules), and can be identified and used to determine such cases without resort to moral judgment. Dworkin refutes this thesis in Taking Rights Seriously (1977), 341.

\(^{108}\) This distinction is drawn by Raz in ‘The Problem About the Nature of Law’, op cit n 16, 217. Raz uses this distinction to criticize Dworkin for having ‘developed a theory of law out of a theory of adjudication’ or, rather, for having ‘developed a theory of adjudication and regard[ed] it willy nilly and without further argument as a theory of law’: id, 211. Dworkin has replied that Raz’s distinction is arbitrary, and in addition purely linguistic and therefore of little practical significance: ‘Reply to Raz’, in M. Cohen (ed), Ronald Dworkin and Contemporary Jurisprudence (1984), 262-3. Raz presents an outline of his theory of adjudication in AL., ch 10.
having to be made. But this surely requires that the standards be not just identified, but also applied, without argument as to their moral merit. It would be pointless to insist on identifying them in this way, but then to make their application in every case subject to moral debate and judgment. The point of an authoritative ruling is to terminate deliberation: in Raz's words, if considerations are authoritatively binding 'those subject to them are not, normally, allowed, by the social institution concerned, to challenge or query their validity or conclusiveness'. If the social thesis is justified by law's authoritativeness, then so too is the foundational thesis. Conversely, if good reasons are found for rejecting the foundational thesis, they will also impugn the social thesis.

The significance of the foundational thesis clearly depends on the extent to which legal questions are 'easy'. If, as some have argued, all legal questions are hard—in the sense that a moral judgment, in addition to the foundational judgment of systemic validity, is needed in order to resolve them—the thesis is worthless.

5. The Common Law

If the foundational thesis applies to common law reasoning, there must be common law norms which can be identified and applied without moral judgments having to be made. There are two objections to this.

The first objection attacks the social thesis which, as we have seen, the foundational thesis depends on. It is that the norms of the common law (called rationes decidendi) can rarely, or never, be identified without moral judgments being made. Two reasons have been given for this. First, some argue that the very nature of rationes decidendi is controversial; because theories as to what a ratio is differ in critical respects, the fundamental common law rule that they are binding is itself ambiguous. Alternatively or in addition, the application of these theories in concrete cases is fraught with uncertainty. Consequently, every case at common law is a hard case requiring a moral judgment as to what in earlier cases ought to be regarded as binding (ie, what meaning ought to be given to the term 'ratio decidendi', and what in any particular case ought to be taken to constitute it).

Secondly, others argue that a ratio decidendi is, at least in part, intrinsically normative rather than factual: the ratio of a previous decision is the norm which provides the morally soundest justification for the decision, rather than the norm stated in the judgment or actually relied on by the judge.

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109 See text to nn 85-8, above.
110 J. Raz, 'The Problem About the Nature of Law', op cit n 16, 215; italics added. See also n 93, above.
112 M. Moore, in 'A Natural Law Theory of Interpretation' (1985) 58 Southern California L Rev 277, 358-76, and 'Precedent, Induction, and Ethical Generalization', in L. Goldstein (ed), Precedent in Law (1987) (Moore uses the term 'holding' rather than ratio decidendi). Although Dworkin does not speak of holdings or rationes decidendi, his approach to common law is similar: the rules or reasons which judges have actually relied on in deciding cases are not decisive, but have only a prima facie place in any theory of legal principles; what is decisive are the principles which together provide the morally soundest justification of a sufficient number of past decisions and settled legal rules. See Taking Rights Seriously (1977), ch 4, esp. 110-22, and 339-42.
Both versions of the first objection are of course debatable, but we need not enter into this here, because the foundational thesis is confronted by a second, decisive objection. That is that even if the identification of rationes decidendi does not require any moral judgment, their application does. Let us adopt for the sake of argument a positivist definition of ‘ratio decidendi’, for example, as the universalization of whatever reasons in fact persuaded a court to make its decision—the identification of those reasons being a matter of fact, for which the court’s published reasons for judgment provide evidence, rather than an exercise requiring substantive moral judgment.\footnote{AL, 183-4; A. W. B. Simpson, ‘The Ratio Decidendi of a Case and the Doctrine of Binding Precedent’, in A. G. Guest (ed), Oxford Essays in Jurisprudence (1961), 160-3 and 168-70. For a refinement of this kind of approach, see N. MacCormick, ‘Why Cases Have Rationes and What These Are’, op cit n 55.} One problem is that, once a ratio is found, the question of its application to the case at hand arises, and this involves deciding whether or not this case should be distinguished. A case is distinguished if it is held to include a fact which was not present in the precedent and which requires a decision different from that which would follow from applying the ratio.\footnote{This is the stronger form of distinguishing identified by Raz in AL, 185. A very useful discussion of distinguishing, and its compatibility with a positivist theory of law such as Raz’s, is S. Perry, ‘Judicial Obligation, Precedent and the Common Law’ (1987) 7 OJLS 215, 234-43.} Necessarily this issue is not governed by a positive legal norm (the only potentially relevant ones are the very rationes whose applicability is in question): its resolution therefore requires moral judgment. Now, it is impossible that any two cases could ever have identical facts: when the applicability of a ratio is in issue, therefore, a court always has before it at least one fact (actually, of course, a multitude of facts) which was not present in the precedent. In order to decide whether or not to apply the ratio, the court must as a matter of logic decide whether this fact calls for a different result and that decision requires moral judgment. A moral judgment must therefore be made in every case at common law, even if it is made sub silentio.

The courts’ power to distinguish can be characterized in quite different ways. According to Raz, it is a power to change the law, by modifying a ratio which did purport to apply to the case so that it no longer does so.\footnote{AL, 185. The argument in the text concerns what Raz here calls ‘strong’ distinguishing; ‘tame’ distinguishing is simply the decision that the ratio does not even purport to apply.} On the other hand, Michael Moore argues that a ratio which is distinguished is found never to have applied to the case at hand, regardless of the terms in which it may have been framed in the precedent itself.\footnote{M. Moore, ‘A Natural Law Theory of Interpretation’ op cit n 112, 359-76.} Moore’s view entails that any formulation of a ratio is necessarily ‘incomplete’; that a ratio is an essentially moral norm which any judicial formulation can never hope fully to capture.\footnote{M. J. Detmold’s view of precedents is in some respects similar: precedents are ‘incomplete’ because they are examples of how cases ought to be decided, rather than sources of norms which can be applied mechanically in subsequent cases: ULM, 174-9 and 190-2. But Detmold would disagree that they are imperfect attempts to capture moral norms, because he rejects the idea that moral thought involves the application of norms (id, ch 4). A. W. B. Simpson has also described case-law rules as ‘incomplete things’: ‘The Ratio Decidendi of a Case and the Doctrine of Binding Precedent’, op cit n 113, 166.} This is inconsistent with the positivist conception of rationes decidendi which we adopted for the sake of argument: it is the second version of the first objection. But however the point is...
put—whether in terms of the identification of rationes, or of their application—it seems indisputable that common law norms can never be applied without moral judgments being made.

Problems for the foundational thesis do not end here, however. The highest court in the judicial hierarchy usually has the power to over-rule as well as to distinguish rationes, and whether or not it should exercise this power is also necessarily a matter for moral judgment. While the power to over-rule must be limited by the requirement that the reason for exercising it must possess a certain strength or weight, there is no plausible way of limiting it to certain kinds of reasons. Everything normally relevant in moral decision-making, as well as the special considerations which support adherence to precedent, must be taken into account by any court deciding whether or not to over-rule. Since over-ruling is always a possibility, the highest court must make that decision in every case coming before it, even if it is made sub silentio.

It must be emphasized that this does not directly undermine either the pure fact or the fact dependent social thesis. According to the former, the existence and content of the law can be identified by reference to social facts alone; but Raz might concede that whether or not the law, having been ascertained in this fashion, ought to be applied is a moral question requiring separate treatment. The social thesis is part of the positivist theory of law, rather than a theory of adjudication which is a moral theory concerned with the question of which considerations courts should rely on. Now, according to Raz the law often requires judges to make moral judgments. This is consistent with the pure fact social thesis because, although judges are legally bound to make such judgments, they do so on the basis of extra-legal considerations: source-based law itself requires them to go beyond it.

In the case of common law, Raz might say, the law itself requires judges in every case to decide whether rationes decidendi morally ought to be applied: but this does not mean that what the law is depends in any way on moral considerations—it means that the law confers on judges a residual discretion, potentially exercisable in every case, to change the law.

But whether or not the social thesis remains secure, this would be to concede that the foundational thesis is inapplicable to the common law. It is simply not the case that courts regard rationes decidendi as norms to be identified and applied without the making of moral judgments, apart from a once-and-for-all foundational

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118 M. J. Detmold argues that if the highest court has power to over-rule then, judicial orthodoxy notwithstanding, lower courts must also decide whether a precedent morally ought to be over-ruled. He points out that otherwise the law contradicts itself, the lower courts having to say that what (according to the highest court) is not the law is the law. See ULM, 204–6. If he is right, the point made in the text holds for every court. His argument depends on its being the case that, in over-ruling, the highest court does not change the law, but declares what the law ‘really’ was all along (see on this n 136).


120 See text to n 108, above.

121 This is where the distinction between the pure fact social thesis defended by Raz, and the fact dependent social thesis, must be drawn. Defenders of the latter reject Raz’s characterization of such considerations as ‘extra-legal’. See the text to nn 20–3, above.

122 Raz offers just this defence, against an objection which is related to that under discussion here, in ‘Legal Rights’ (1984) 4 OJLS 1, 18–19.
judgment that doing so is justified. Even if they can be identified in this way, their application depends in every case on their not being distinguished or over-ruled. It is beside the point that it is often, or even usually, so obvious that this should not happen, that the question is not discussed or even adverted to. These are ‘easy’ cases at common law, but only in the sense that they are morally easy, not in the sense that moral judgment is unnecessary. The common law is a dynamic, continually evolving body of moral judgments, in which nothing is immune from revision or repudiation, which are used to guide, but not to supersede, moral judgments in the present.

Perhaps Raz would accept this. He has criticized the ‘classical image’ of the judge—as simply identifying the law, determining the facts, and applying the law to the facts—as misleading. ‘The courts’, he says, ‘carry with them both their functions of applying pre-existing law and of making new ones into almost all cases (I do not mean that they almost always make new laws, only that almost always they have to consider whether to do so)’.123 But if the law itself requires that common law rules never be applied without a decision first being made as to whether or not they ought to be changed (by being distinguished or over-ruled), it would appear that no decision is ever required by the common law. ‘In every case’, Raz writes elsewhere, ‘there is one legal question which encompasses all the others: What decision does the law require in this case? . . . When no decision is required by law the question is unanswerable and there is a legal gap’.124 A decision is not required by law if no set of true legal statements answers the question posed.125 The truth of a legal statement depends on the existence or non-existence of social facts (including sources of law) specifiable without resort to moral argument.126 Thus, if the truth of a statement depends on moral values, which are not social facts, it is not a legal statement. If a question (such as the master question ‘what does the law require in this case?’) cannot be answered solely by true legal statements, it is not determined by law—that is, no answer to it is required by law. Now, if decisions at common law always depend on moral judgments as to whether the relevant rationales ought to be distinguished or over-ruled, the question ‘what does the law require in this case?’ is never determined by law. To use Raz’s terminology, to decide any case at common law the courts must fill a ‘gap’ in the law; the common law itself never determines the decision of any particular case. On this view, questions such as ‘is the plaintiff legally liable to the defendant?’ never have a legal answer before they are judicially resolved.

Raz says that ‘the law may make certain legal rules have prima-facie force only, by subjecting them to moral or other non-source-based considerations’, for example by declaring that contracts are valid only if not immoral.127 It now appears that he should regard the whole of the common law as having ‘prima-facie force
only'. But it is far from clear that this is how common law has been conceived of by lawyers and judges over the centuries. As a descriptive theory of the concept of law Raz's position is thus problematic. (Note that it is the pure fact, not the fact dependent, social thesis which leads to this result: the thesis that 'the law' cannot include moral principles, such as those governing the power to distinguish and over-rule, even if they are both uncontroversial and required to be applied by legal norms.)

Raz may be in even worse trouble than this, however. As we have seen, he argues that legal officials necessarily, and usually sincerely, claim that law is authoritative, and that if that claim is not made for a body of norms then they cannot be law. To claim that norms are authoritative is to claim that they should be identified and applied in accordance with the social and foundational theses, which is to say, without moral judgments being made.128 But it seems to be the case that common law judges do not regard rationes as having to be applied regardless of the moral justification of doing so. It follows from Raz's theory of law and authority that these judges do not claim that rationes are authoritative, and that therefore what we call common law is not really law.129 Something is badly amiss.

6. The Interpretation of Statutes

At first blush, the social and foundational theses seem better suited to statute than to common law. It must surely be possible for judges to identify and apply statutes regardless of their own moral and political views, because considerations of democracy and institutional competence support the widely held opinion that this is what they ought to do, and 'ought' implies 'can'. Those considerations, one might think, help to justify the once-and-for-all foundational judgment that statutory norms are binding, which enables legal reasoning to proceed without further reference to morality—at least, apart from those relatively rare 'hard' cases where statutes are ambiguous or inconsistent, or themselves require the making of moral judgments. However, even here it is possible to raise objections similar to those we have just canvassed in the case of the common law.

Notoriously, many different considerations compete for priority in the interpretation of statutes: they include the meanings of words, the legislature's intentions, compatibility with other parts of the law, the expectations of citizens, and substantive justice. In any case in which they compete, there are good reasons for taking each into account; which should prevail must depend on an overall moral judgment of their relative weights in the particular circumstances of that case.130

128 See text to nn 78–88 and 109–10, above.
129 This point was made by Dworkin in Taking Rights Seriously (1977), 37.
130 As J. Bell puts it, 'any reading is going to involve a sensitive understanding and application of the values involved in the law... Informed reading necessarily involves judgments about which values should be developed and which restrained in a particular legal context... The judges do not simply give effect to whatever value appears in a statute. They relate the statute to the values which they think they ought to put into effect and interpret this statute accordingly... The determination of what is law may involve contentious judgments of political morality and can never be just a technical exercise of chasing established social facts about a statute's enactment': Bennion's Statutory Interpretation (1986) 6 OJLS 288, 296–7.
Common law principles and maxims assist the making of such judgments, but they are flexible and defeasible; even if they can be construed as rules, we have just seen that common law rules cannot be applied without a moral judgment—whether or not to distinguish—first being made. Now, for the foundational thesis to have any significance, most cases involving statutes must be easy, not requiring any such moral judgment. This would be the case only if (a) either one, or some combination, of the non-moral considerations have absolute priority over moral considerations, obviating the need to make any moral judgment in cases in which it, or they, are available, and (b) in most, but admittedly not all, cases these decisive non-moral considerations are available. For example, it might be argued that if the natural meaning of statutory words is unambiguous the question of interpretation is settled, no other matter needing to be considered, and that this is so in most cases.

Michael Moore has recently discussed the propriety of a court ignoring clear statutory words. There are cases in which the application of a statutory provision, in strict accordance with the clear meaning of its terms, will produce an absurd or very unjust result, which the legislature can be assumed not to have intended; in such cases, the courts will usually refuse to give that meaning to the provision, holding that the law does not require this. It cannot seriously be argued either that the courts do not do this, or that in so doing they act wrongly (morally or legally).

There is some similarity between the courts’ power to do this, and their power to distinguish or over-rule established common law rules. In both cases quite different accounts of what a court does in exercising its power might be offered. Here, one possible positivist account is that the court has a limited power to change statutes, a power conferred by a legal norm which authorizes the courts to consider extra-legal norms (e.g., justice and fairness) in exercising it. An alternative account is that the court simply finds the true meaning of the statute: a statutory norm somehow lies ‘behind’ the statutory text, which may sometimes fail to give accurate expression to it. On this view, the text of the statute is merely defeasible evidence of what the statute ‘really’ requires, and so the court is not changing the statute but applying it. Again, for our purposes it does not matter which of these accounts—that the court is changing, or that it is applying, the

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131 J. Bell denies this in id, 292–3.
132 For these reasons, inter alia, Raz undermines the social thesis (which here he calls the sources thesis) when he acknowledges that it ‘is essential to the sources thesis that the character of the rules of interpretation prevailing in any legal system, i.e., the character of the rules for imputing intentions and directives to the legal authorities, is a matter of fact and not a moral issue’. (ALM, 318.) Apart from the fact that the courts sometimes refuse to interpret legislation in accordance with the legislature’s intentions, there are probably no rules of interpretation which can be applied—even if they can be identified and themselves interpreted—without moral judgments being made.
134 See id, 277 for some examples.
135 Raz hints at this account in AL, 191–2.
136 As noted previously (text to nn 115–17, above), similar rival accounts of distinguishing common law rationes have been offered: first, that this is a way of changing them (which is Raz’s view), and secondly, that it is a way of discovering what they ‘really’ were all along (which is Moore’s view). Similar rival accounts of over-ruling are also possible: although it is generally believed that over-ruling changes the law, Dworkin suggests that it merely rejects ‘mistakes’ which were never ‘really’ part of the law at all.
law—is correct. In either case the court’s reasoning arguably includes direct reference to moral norms (a result is deemed ‘absurd’ if it is so unjust as to seem arbitrary). In either case, Moore argues, the court must ‘balance off its linguistic intuitions against its ethical intuitions about what, in rules of this sort, the word ought to mean’. Furthermore—and this is crucial to his argument—just as in the case of common law norms, the courts must as a matter of logic decide in every case whether moral norms require that the meaning of the statutory text be discounted. The power is always available in case it is needed, and whether or not it is needed depends on those moral norms. As Moore puts it,

[someone] who asserts that a good ground for a decision of any case can be that such decision is just, fair, not absurd, et cetera, commits himself to asserting the same for every case, for he has no way to distinguish the two classes of cases except on those same moral grounds.

If sound, this argument vitiates the foundational thesis, by demonstrating that in questions of statutory as well as common law, legal reasoning necessarily includes the making of moral judgments even in ‘easy’ cases—or, rather, that there are no easy cases.

Of course, even if the foundational thesis is discredited, the pure fact social thesis can still be defended. As we have seen, Raz might attribute to the courts a limited power to change statutory law: on this view what is law is still a matter purely of fact, even if in every case the courts are legally required to consider whether or not it ought to be changed rather than simply applied. But this is the same strategy which, in relation to common law, proved to be highly problematic. Given Raz’s own premises, it seems to entail the following: that the law does not require any particular decision, that it has prima facie force only, that therefore it does not claim to be authoritative, and (absurdly) that therefore it is not law.

However, the foundational thesis can be defended on the ground that the judgments which Moore says are necessary in every case are not really moral judgments as such, but judgments as to the most likely intention of the legislature. In other words, although the courts are sometimes justified in setting aside the natural meaning of statutory words, this is only when palpable absurdity or injustice shows that meaning to be unintended; if it is clear that the legislature did intend it, the courts must accept it. Blackstone, for example, said that if a statute would otherwise lead to ‘absurd consequences, manifestly contradictory to common reason . . . the judges are in decency to conclude that the consequence was not foreseen by Parliament, and therefore they are at liberty to . . . quoad hoc disregard it’. On the other hand, he asserted, ‘if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it’. On this view, the primary question is really one of fact—what did the

138 Id, 281.
139 See the text to nn 123–8, above.
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legislature intend, or what would it have intended if it had anticipated this case? Moral judgments are relevant in helping to resolve that factual question, but only in so far as the court's moral sensibility can be assumed to resemble that of the legislature. Strictly speaking, the court need not at this stage make a committed moral judgment at all: it must attempt to simulate that which the legislature would make. A moral judgment is needed only if it concludes that the natural meaning of the words does not accord with the legislature's intentions, in which case it must decide which ought to have priority. Since it can also be plausibly argued that in most cases the natural meaning of statutory words does reflect the intentions of the legislature, that moral judgment will rarely be required, and so the foundational thesis remains valid and significant.

But whether or not this defence succeeds, there are other grounds for doubting the applicability of the positivist social thesis to statutory law. If they are sound, the foundational thesis, as well as the social thesis, may yet be doomed.

7. The Validity of Statutes

According to the positivist defence just discussed, effect must be given to clear statutory words evincing an unambiguous legislative purpose which is extremely unjust, provided only that it does not violate any express constitutional norms. But is this so? The positivist may be right to this extent: that such injustice cannot be avoided by interpretation, because there is no plausible construction of the statute's meaning other than the one intended. But perhaps the question is one of validity: are all statutes, duly enacted in accordance with express constitutional norms, necessarily valid?

The social thesis seems to require an affirmative answer to this question. If statutory law is identifiable ultimately by reference to social facts alone, how can the validity of a statute depend even partly on whether or not it violates principles of justice, apart from those incorporated in express constitutional provisions? But this is problematic if valid means morally binding, as Raz suggests it does and as it must if reductivism is to be avoided. Raz's solution is what, in a more general form, we have called the foundational thesis: that moral bindingness can be established by social facts alone, provided that a once-and-for-all judgment of systemic validity is justified. Unfortunately for Raz and the social thesis, this solution seems to fail.

One problem is that, even if the foundational thesis is sound, this 'solution' does not really save the social thesis. It depends on distinguishing between the identification of law and judgments about legal validity, the former depending purely on social facts (membership and enforceability) and the latter only partly on those facts. He says:

Validity presupposes membership [in the system] and enforceability. Judgments of

141 See the text to nn 95–9 and following n 107, above.
member and of enforceability are judgments of social fact. Judgments of legal validity are normative judgments partly based on those facts.\footnote{142} But surely no such distinction is possible. As Raz himself says, a law which is not valid \textit{is not a law}, and vice versa,\footnote{143} and so to say that validity depends partly on moral criteria is surely to say that the identification of law depends partly on moral criteria—which contradicts the social thesis—even if those criteria can be simply assumed to hold as the foundational thesis maintains.\footnote{144} The difficulty cannot be escaped by shifting from the pure fact social thesis to the fact dependent social thesis. According to the latter, moral criteria may be relevant to the identification of law but only if social facts (contingent official practices) make them relevant. But if legal validity consists of genuine moral bindingness, it cannot depend on moral criteria which owe their relevance entirely to social facts: to argue the contrary would be to argue that genuine moral judgment can depend ultimately on facts alone, which would violate the Humean dichotomy between facts and values. Indeed, the fact dependent social thesis, when used in this context, seems to invert the true relationship.\footnote{145} As Raz’s argument makes clear, moral values make relevant the facts of system membership and enforceability, not vice versa. These considerations suggest that there may be a fundamental and irresolvable incompatibility between the social thesis, in both its versions, and any attempt to abandon the positivists’ semantic thesis. If it is part of the meaning of internal legal statements to express genuine moral judgment, they cannot be based wholly or ultimately on social facts alone.\footnote{146}

This difficulty casts doubt on Raz’s distinction between a theory of law and a theory of adjudication. Since judgments of validity are moral judgments about what norms ought to be applied, they presumably fall within the province of a theory of adjudication, concerning ‘which considerations the courts should rely on’. \footnote{147} See further the text to n 175, below. \footnote{148}

\footnote{142} \textit{AL}, 153. \footnote{143} \textit{AL}, 146. \footnote{144} As MacCormick puts it: ‘Only in some few cases . . . do the underpinning reasons come overtly to the surface in litigious argument and judicial opinions. Only in these rare cases are the underpinning reasons necessarily offered as essential to the explicit justification of a decision. Nevertheless, are they not always relevant? . . . From the point of view of those who have reasons (which they sometimes have to argue out in litigious contexts) for accepting and operating the system’s criteria of validity, it could be argued that those reasons are \textit{always} tacitly relevant to justifying the decision or accepting it as validly justified.’ N. MacCormick, \textit{Legal Reasoning and Legal Theory} (1978), 64-5. \footnote{145} See further the text to n 175, below. \footnote{146} Raz says that if a law is valid it ought to be obeyed (nn 89–92, above), and if so it is a reason for action (\textit{AL}, 12 on ‘ought’). He sometimes says that facts are reasons for action (\textit{PRN}, 16–18), and he clearly believes that valid laws are facts of this sort, that is facts which are reasons for action (\textit{AL}, 23, 25, 68–9; \textit{PRN}, 155). Furthermore, he says that rules are ‘complete’ reasons for action, reasons for which there may be other reasons but which provide a full justification for action without reference to those other reasons (\textit{PRN}, 22–5 and 78–80). Could this be Raz’s response to the points raised in the text?: that although there must be underlying reasons for law constituting a reason for action, law is, considered by itself, a complete reason for action. The problem is that, in speaking of facts as reasons for action, Raz is not referring to empirical facts but is ‘using the term “fact” in an extended sense to designate that in virtue of which true or justified statements are true or justified . . . A fact is that of which we talk when making a statement by the use of sentences of the form “it is a fact that . . . .” In this sense facts are not contrasted with values, but include them (“It is a fact that human life is the supreme value”).’ (\textit{PRN}, 17–18.) In saying that a rule is a fact which is a ‘complete reason’ for action, Raz means a \textit{valid} rule (he says elsewhere that ‘an invalid rule is not a rule at all’; \textit{AL}, 146). Thus a rule is a ‘fact’ which constitutes a complete reason for action in the ‘extended sense’ of ‘fact’ which in this case includes the essentially normative quality of ‘validity’ which, as pointed out in the text, is ultimately grounded in morals rather than empirical facts. So law is a complete reason for action only if ‘law’ means ‘valid law’ and, as Raz acknowledges, validity is not a matter of empirical fact.
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upon'. On the other hand, the identification of law must be part of a theory of law. But if judgments of identification and judgments of validity are one and the same, or even if they are just necessarily congruent, then the correct theory of law and (the relevant parts of) the correct theory of adjudication must be isomorphic. The theory of law must identify as law just those norms whose application is morally justified by the moral theory of adjudication. But how could this be unless both theories are one and the same, and the theory of law, therefore, is a moral theory?

If, as Raz seems to concede, the test for validity and the test for identification must concur, it is highly implausible that the latter could be based on social facts alone. How could the moral bindingness of law be guaranteed by any set of social facts alone? Surely whatever social facts, in the real world, are taken to establish which rules are law, there can be no absolute assurance that such rules will be morally binding—or, that is, valid. The qualification 'in the real world' is needed because in an ideal world the law could be whatever a morally infallible legislator enacted: the law would be whatever the legislator in fact enacted, but its moral bindingness would be guaranteed. The point is that in the real world there are no morally infallible legislators. It must always be possible for rules selected solely on the basis of social facts to be not merely morally bad (as we saw when considering Hart, morally bad laws may still be morally binding), but so morally bad that they morally ought not to be obeyed. And this shows that a once-and-for-all foundational judgment of systemic validity can never be justified, which vitiates the foundational thesis.

An excellent illustration of this difficulty is the common law doctrine of Parliamentary sovereignty, usually said to be the most fundamental rule of British constitutional law. According to this doctrine, supported by Blackstone and entrenched as orthodoxy in British constitutional thought by Dicey, the British Parliament possesses absolute sovereignty: it can make or unmake any law whatsoever, and no court can hold any of its enactments—no matter how undemocratic or evil—to be invalid. As Leslie Stephen said in a notorious passage quoted approvingly by Dicey, 'if a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal'.

This is a doctrine tailor made for legal positivism. The identification of statutory law depends purely on social facts: what Parliament has in fact enacted. If common law and custom could also be shown to depend on social facts, a positivist account of British law would be complete. But now consider Raz's suggestion that to assert the validity of a law is, in part, to assert its moral bindingness. Could one reasonably assert that whatever Parliament enacts—no matter how undemocratic or

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147 See text to n 108, above.
148 The 'relevant parts' of the correct theory of adjudication because the latter will also deal with adjudication in hard cases, where positive legal norms are absent or indeterminate.
evil—is morally binding? Of course not. But then, if Raz is right, one could not reasonably assert that whatever Parliament enacts is legally valid. Surely Raz must dismiss the doctrine of Parliamentary sovereignty as the result of either an utterly unreasonable practical judgment, a mistake due to bad philosophy, or an exaggeration of a more qualified truth.\textsuperscript{152}

The same point can be put in terms of authority. To say that Parliament’s enactments are valid—that they ought to be obeyed, although they might be thought to be wrong—is to say that Parliament has \textit{practical authority}, that is, authority to determine what its subjects ought to do. According to Raz, if someone possesses \textit{de jure} practical authority then her subjects ought to obey her directive regardless of their own view of the merits.\textsuperscript{153} In other words, the foundational thesis applies to those subjects’ practical reasoning.

Raz’s account of the authority claimed by law has one puzzling feature. This is that, although there can be no such thing as absolute practical authority, because it can never be ‘right to take anybody’s word as an absolute reason to be followed under all circumstances’,\textsuperscript{154} he says that law always claims to have unlimited authority. The doctrine of absolute Parliamentary sovereignty is not an idiosyncratic aspect of British law:

Britain is a country without entrenched constitutional limits on the powers of its supreme regular legislator, Parliament. But things are much the same in countries with strong constitutional traditions. The American Congress’s power to legislate may be limited by the Constitution, but the Constitution itself may be changed by law. Hence, even in the U.S.A., the law claims unlimited authority.

Any conditional or qualified recognition of legitimacy will deny the law the authority it claims for itself. If you say ‘one has an obligation to obey any law which does not violate fundamental human rights’ you have denied that the law has the authority it claims for itself . . . That is, it claims unlimited authority, it claims that there is an obligation to obey it whatever its content may be.\textsuperscript{155}

But how can the law (by which he means legal officials) make such a palpably unreasonable claim, a claim to an authority which arguably not even God could possess? After all, as Raz has pointed out, in claiming authority legal officials must know what it is that they are claiming, because ‘given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority. It is what it is in part as a result of the claims and conceptions of legal institutions’.\textsuperscript{156} If Raz is right to accept that legal officials are normally sincere in claiming authority for the law, one must wonder why legal officials everywhere are such fools.\textsuperscript{157}

\textsuperscript{152} See further the text to nn 160 and 182, below.
\textsuperscript{153} See the text to nn 87–8, above.
\textsuperscript{154} \textit{AL}, 13.
\textsuperscript{155} J. Raz, \textit{The Morality of Freedom} (1986), 76. However, see K. Greenawalt, ‘The Rule of Recognition and the Constitution’, op cit n 15, 632 in relation to the Indian Constitution.
\textsuperscript{156} \textit{ALM}, 302.
\textsuperscript{157} Ibid, 302. However, it might be argued that officials are often not sincere, in that their claim of absolute authority on behalf of law is a ‘noble lie’. See the text to nn 160 and 182, below.
There must be reasons justifying submission to any practical authority, reasons which simply could not justify submission whatever the authority directs. A practical authority is necessarily subject to jurisdictional limits set by those underlying reasons. Raz often acknowledges this,\(^{158}\) and his own account of authority entails at least two jurisdictional limits: an authority’s directives must express its views as to how its subjects ought to act, and those views must be more likely to be correct than its subjects’ views. If a particular directive is manifestly unreasonable, it must be concluded either that it does not express the authority’s sincere view of how its subjects ought to act, or that notwithstanding the authority’s generally superior competence in practical reasoning, it has in this instance made an egregious error. In either case, the directive cannot be authoritative (although there may be some other contingent reason for complying with it).

The upshot is that neither the foundational thesis nor the social thesis is justified: as for the former, a foundational judgment can at best establish a defeasible presumption that the directives of an authority ought to be obeyed; and as for the latter, whether or not that presumption stands, and so whether or not the directives are valid and therefore to be deemed law, depends on moral judgments. The social thesis must be true of the detached and external points of view only.

It might be objected that, even if authority is limited, this must be compatible with the social and the foundational theses. The jurisdictional limits to authority must be ascertainable without moral judgments having to be made, because otherwise there could be no authority: if in every case it must be decided whether or not an authority has acted intra vires, and if that decision depends on a moral judgment, then the authority is illusory and its directives useless. In every case subjects would have to rely on just those fallible practical judgments which according to Raz’s ‘service’ conception the authority’s directives are supposed to pre-empt.

Raz wrestles with this problem. He says that even if authority is limited by the condition that its directives must not be clearly wrong—as to which he expresses no opinion—‘establishing that something is clearly wrong does not require going through the underlying reasoning’. For example, it may be clear that thirty numbers have been added incorrectly, without recalculating and arriving at the correct sum, ‘as when the sum is an integer whereas one and only one of the added numbers is a fraction’.\(^{159}\) In the case of a practical authority, the implication seems to be that, although it is more likely to be right than its subjects, it may make clear mistakes which they can detect without relying on their own less reliable reasoning abilities (which would be unreasonable).

But this saves neither the social nor the foundational thesis. The judgment that an integer cannot be the sum of other numbers only one of which is a fraction is an arithmetical judgment, based on knowledge of arithmetical laws. Similarly, the judgment that a directive of a practical authority is clearly wrong is a moral

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\(^{159}\) J. Raz, ‘Authority and Justification’, op cit n 158, 26.
judgment. The practical authority of directives cannot be fully established by a once-and-for-all foundational judgment. A foundational judgment can establish a presumption only, the authority of every particular directive still depending on the further moral judgment that it is not clearly so wrong that it ought to be disobeyed.

Raz is right to argue that the authority of law depends on certain kinds of individual moral judgments being pre-empted, but not in the wholesale fashion suggested by the social and the foundational theses. It is not that questions requiring individual moral judgments are wholly displaced by factual questions concerned with the decisions taken by authorities. Rather, while difficult moral questions are displaced by such factual questions, the latter remain subject to deeper moral questions which are easier, or at least less controversial, than those displaced. These easier questions concern the jurisdictional limits of legal authority. That they are easier, or less controversial, is shown by the fact that disagreements as to the merits of statutes are much more common than disagreements as to whether or not they should be obeyed: the latter arise only in a very small sub-class of the former. Indeed, these questions are so much easier, or less controversial, that their answers are usually so obvious that they are not discussed or even adverted to. This shows that easy cases are morally easy, not that moral judgment is unnecessary.

Is Raz right to suggest that the need to make these judgments does not undermine the authority of law? He suggests that when a directive is clearly wrong, this can be established without subjects having to rely on their more fallible reasoning abilities, and so legal authority in other cases will not be disturbed. This may be too optimistic. If it is believed that rules need not be obeyed if they are clearly wrong, there will be disagreement as to what constitutes clear error. Mistakes will inevitably be made, sometimes causing directives which ought to be obeyed to be disobeyed, and at other times vice versa. In a reasonably enlightened community, this should not seriously threaten the authority of law in general, although it would no doubt be somewhat less complete than the lawmakers might desire. But if even a small number of the lawmakers' directives were rejected by the judges, without express constitutional authority, more serious repercussions might ensue, damaging the very structure of the legal system. It may be for reasons such as these that lawmakers claim, at least according to Raz, more authority than they can really be entitled to. Doctrines such as that of the absolute sovereignty of the British Parliament may be explained in this way: as exaggerations—'noble lies', perhaps—which help to prevent any erosion of the authority of law by concealing its real limits.160

Whether such exaggerations are justified is obscure, because it is difficult to estimate the likelihood and magnitude of both the risk they attempt to minimize (insufficient deference to authority) and the risk they pose (excessive deference to authority). But even if they are justified, which seems dubious, they are still exaggerations—at best useful fictions, just like (some would argue) the existence of

160 See n 182 and accompanying text, below.
God or the objectivity of morality. While the fiction may serve a useful function, as long as lawmakers do not enact very evil statutes, its continued maintenance would be hard to justify if they did. In a sufficiently extreme case, we should hope that the true scope and limits of the authority of law would be clearly recognized.\textsuperscript{161}

When Raz's theory is developed along these lines it is tempting to conclude that, from the internal point of view, evil laws must be deemed invalid. But we must be cautious here; in particular, the distinction between the internal and detached points of view must be kept in mind. If only a single judge believes a rule to be so evil that it morally ought not be obeyed, should he say it is invalid, that it is not law? Although the preceding discussion may seem to suggest this, there is a stumbling block. If the legal system is efficacious, and all its officials other than that judge believe the rule to be morally binding, it appears from their point of view to be valid and it will be enforced. Surely for the single judge to declare that it is not law is not just futile, but misleading and indeed false.

The law is, in Raz's terms, 'an institutionalized normative system'.\textsuperscript{162} Laws are norms which 'have the characteristic of being part of a system of norms united by its relation to legal institutions'.\textsuperscript{163} Therefore, he argues, 'it is . . . reasonable to take the law to consist of those norms, rules, and principles, that are presented to individuals and institutions as guides to their behaviour by the body of legal institutions as a whole'.\textsuperscript{164} Law is necessarily the product of the collective, public reasoning of a body of officials: without a large measure of agreement among them as to the criteria of validity there could be no legal system.\textsuperscript{165} And as Postema argues,

\begin{quote}
[s]ince self-identified participants would not be indifferent to the conditions necessary for achieving and maintaining 'the characteristic unity and continuity' of their legal practice, they would regard the fact that the criteria are widely accepted and practiced as an essential part of their argument for the authority of those criteria.\textsuperscript{166}
\end{quote}

On taking office, a judge joins a social practice in which institutions and norms have been established by the collective endeavours of the other, past and present, participants.\textsuperscript{167} In swearing allegiance to the law, the judge swears allegiance to those institutions and norms, rather than to whatever set of norms he finds personally most congenial. This suggests that, unless his purpose is to confuse and disrupt the legal system, the single judge who is unable to agree with other judges and officials should nevertheless say that the rule is law, because it is valid from their point of view although not from his own. In other words, although he cannot conscientiously make an \textit{internal} statement that the rule is valid, he should not say that it is therefore invalid; rather, he can and should make a \textit{detached} statement that

\begin{footnotes}
\footnotetext{161}{See text to nn 184–5, below.}
\footnotetext{162}{AF, 105.}
\footnotetext{163}{Id, 87.}
\footnotetext{164}{Id, 88; italics added.}
\footnotetext{165}{CL, 112–13.}
\footnotetext{166}{Postema, op cit n 4, 99–100.}
\end{footnotes}
it is valid (which of course is consistent with the claim that it morally ought not to be obeyed). As Finnis says:

[T]here is little point in meditating about the legal-obligation-imposing force of normative meaning-contents which are not treated as having legal effect in the principal legal institutions of a community (viz the courts) . . . It is not conducive to clear thought, or to any good practical purpose, to smudge the positivity of law by denying the legal obligatoriness in the legal or intra-systemic sense of a rule recently affirmed as legally valid and obligatory by the highest institution of the ‘legal system’.

8. Pure Fact and Fact Dependent Positivism

These considerations suggest a more general objection to our argument: that while it may have demolished pure fact positivism, it leaves fact dependent positivism unscathed. According to the fact dependent social thesis the identification of law may depend partly on moral criteria, but only if such criteria are made relevant by contingent social facts—namely, the practices of officials, especially judges, in identifying law. Moral criteria may form part of the rule of recognition of a legal system, but only if it is part of the actual practice of the system’s officials to use, and to regard themselves as being bound to use, them in identifying law.169 And have we not conceded this, by acknowledging that law is constituted by the collective social practice of officials? Hence, the identification of law still depends ultimately, if not exclusively, on matters of contingent social fact alone. Before concluding our discussion of the validity of evil laws, we must consider this objection.

The strength of the objection is demonstrated by the following example. It appears to be a fact, despite our objections, that British judges accept the rule of unlimited Parliamentary sovereignty, which is therefore part of the British rule of recognition even if it is iniquitous. Does this not vindicate the social thesis, by showing that the identification of law does, after all, depend ultimately on matters of social fact alone? Perhaps, if they were persuaded by our argument, the judges would no longer accept that rule, and if so the British rule of recognition would change. But of course this would be perfectly consistent with the fact dependent social thesis: although the new rule of recognition might make the validity of legislation subject to moral criteria, it would do so only because the judges would have decided to accept it.

However, it must be kept in mind that our interest is in participant theory—in what is law from the internal point of view of those who accept the rule of

168 J. Finnis, Natural Law and Natural Rights (1980), 357.

169 This thesis has recently been explicated by philosophers attempting to defend positivism against Dworkin’s criticisms. They argue that Dworkin’s own theory of law is an instance of fact dependent positivism, because as they interpret his theory the identification of law depends on moral criteria only if and to the extent that it is in fact the practice of judges to use them. See, eg, E. P. Soper, ‘Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute’ (1977) 75 Mich L Rev 473, 511–16; J. Coleman, ‘Negative and Positive Positivism’ (1982) 11 Journal of Legal Studies 139; W. J. Waluchow, ‘Herculean Positivism’, op cit n 23 (Soper’s and Coleman’s essays are reprinted in M. Cohen, ed, Ronald Dworkin and Contemporary Jurisprudence (1984)). For Dworkin’s response, see his Law’s Empire (1986), 124–30.
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recognition as binding. The fact dependent social thesis may be acceptable as part of an observer theory, but it cannot be accepted by a judge as a description of what determines law for his purposes. A judge cannot think that what is or is not law ultimately depends just on the factual question of what criteria of validity are accepted by officials. This is because he is one of them: for him, determining the criteria of legal validity cannot be a merely factual enquiry, because ‘validity’ is inherently normative, the ground for the practical judgments he makes as an official. Even if British judges do believe that Parliament has unlimited authority, they do so because they believe this to be morally justified, and not because—or at least, not just because—they believe that all other officials accept it. If there is official consensus then it rests not on brute convention but on what Postema calls ‘constructive conventionalism’.170

Dworkin has argued that official consensus as to the criteria of legal validity arises out of ‘independent conviction’ rather than mere conformity to convention: officials endorse the same criteria, but principally because they each believe, independently of one another’s beliefs, that those criteria morally ought to be followed.171 But Postema persuasively argues that officials must regard as ‘an essential part of the case to be made for the criteria [of validity] . . . the fact that they jointly accept the criteria, or could come to accept them after reflection and participation in a forum in which reasoned and principled arguments are exchanged amongst equals’.172 Nevertheless, he agrees that consensus alone is insufficient: the officials’ joint acceptance of a set of criteria of legal validity ‘must be linked to more general moral-political concerns’.173 This is because ‘if appeals to existing law are to justify judicial decisions and exercises of coercive power, they must rest on something morally more substantial than the mere fact that others follow the rules’.174

This complex amalgamation of moral principle and convention which, as Postema suggests, lies at the foundation of a legal system, is not accurately depicted by the fact dependent social thesis. If legal validity consists of genuine moral bindingness, it cannot depend on moral criteria which owe their relevance entirely to social facts: to argue the contrary would be to argue that genuine moral judgment can depend ultimately on facts alone, which would violate the Humean dichotomy between facts and values.175 Indeed, the positivist puts the cart before the horse. From the internal point of view, moral principles are relevant not just because and in so far as there is official consensus; rather, official consensus is relevant only because of deeper moral principles, which recommend allegiance to an effective system of government, one which possesses or has a good chance of acquiring de facto authority, rather than the futile advocacy of worthy but unpopular moral ideals.

170 G. Postema, op cit n 4, 104.
172 G. Postema, op cit n 4, 104.
173 Id, 103.
174 Id, 101.
175 See the text following n 145, above.
The amalgamation of moral principle and convention at the foundation of law is illuminated by the increasingly popular conception of law as an interpretive social practice. Such a practice is constituted not by unreflective conformity to rigidly defined rules; rather, it is assumed to have purposes or values which cannot in principle be fully attained through strict compliance with formulated rules. The infinite variety of situations which can arise must inevitably defeat any attempt by rule-makers to prescribe comprehensively in advance which actions will best serve such purposes or values. Moreover, the perceived purposes and values of a social practice are themselves likely to evolve as new situations and demands force participants to reconsider them. Reflective participants who seek a better understanding of these purposes and values, both for the sake of self-knowledge and to improve their ability to decide what is required of them, must interpret their practice, to uncover and articulate its meaning or rationale. But as Postema insists, if it is indeed a social practice then it must be assumed to have some rationale to which to some extent all participants subscribe. The question for each is not ‘what do our common actions mean to me?’ but ‘what do they mean to us?’ This does not mean, however, that they must all be able to reach agreement in answering that question. Some disagreement is possible as long as there remains a sufficient overlap of experience so that ‘the parties [can] recognise that they participate in a common activity and move around in a common world, one which they recognise to be the product of common work’.!

The notion of a rule of recognition must be readjusted accordingly. A rule of recognition is formulated by interpreting the common practice of legal officials in determining the rules and principles by which they believe they are bound, to articulate its underlying rationale. As Hart puts it, ‘in the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule . . . For the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified . . .’ To formulate a rule of recognition, it is necessary ‘to enter into the spirit of the constitution’. One must extrapolate from the practices of officials, including their intentions, values and beliefs, as well as their actions, and this is fraught with difficulty. This is true of the officials themselves; they too may fail to formulate with complete accuracy the rationale underlying their activities.

For this reason it is not clear that British judges do in fact accept the rule of unlimited Parliamentary sovereignty. They may say they do, but they may be mistaken: they may be misinterpreting their own practices. Consider the blue-eyed babies Act. Judicial endorsements of the rule of unlimited Parliamentary sovereignty imply that were such an Act to be passed, the judges would be bound

178 Id, 312.
179 CL, 98.
181 See n 151, above.
to enforce it. But would they in fact believe themselves bound to do so? More importantly for our purposes, do they now believe that they would be bound to do so? If, as we are surely entitled to assume, they are reasonable people, the answer to both questions must be no. If so, then the rule of unlimited Parliamentary sovereignty must be either a mistake, or an exaggeration of a more qualified truth. Both are genuine possibilities. If a mistake, it may be the quite understandable result of bad philosophy: classical legal positivism. If an exaggeration, it is equally understandable and possibly justifiable as a ‘noble lie’: since Parliament is unlikely to enact truly evil laws, why not ignore unnecessary complications and say that whatever Parliament enacts is necessarily valid? But whatever the reason for their misrepresenting it, the rule which judges really accept is surely the rule on which they are actually prepared to act, rather than the rule on which they merely say or imply that they are prepared to act. Thus, it can be argued that the alleged rule of unlimited Parliamentary sovereignty is a misinterpretation of the traditional deference of British judges to Parliament. That deference must really be based on Parliament’s having vast, but not unlimited, authority. For them to accept this, and consequently modify their conception of Parliament’s sovereignty, would constitute not a change in their practice, but an improvement in their understanding of it.

This is no doubt true of other legal systems in which officials have proclaimed the unlimited sovereignty of their supreme lawmaker. Even in the case of ostensibly absolute monarchs or fuhrers, assertions of their unlimited sovereignty are best understood as being subject to qualifications which are unspoken either because they are overlooked, or because their expression is thought to be unnecessary and impertinent. Submission even to such authorities as these is premised on their representing or serving some aspiration or ideology, and this necessarily limits their room for manoeuvre. If they should act plainly contrary to that aspiration or ideology, they would be disobeyed—which shows that they would be believed to have thereby transgressed implicit limits to their authority. But their followers find this eventuality almost inconceivable, and therefore overlook those limits or see no point in explicitly asserting them. Instead, to emphasize the amplitude of the authority encompassed within, and their faith that their ruler will never violate, those limits, they may say that ‘the king can do no wrong’. While perfectly adequate in normal circumstances, this would depend on presuppositions which may remain unspoken or even unnoticed unless exceptional circumstances arise. If they do arise subjects tend belatedly to embrace the idea that their ruler’s authority was implicitly limited all along. The point is that their re-interpretation of the situation need not be dismissed as a mere rationalization; it reflects a sounder conception of the nature of legal authority than their previous profession of blind allegiance.

182 See text to n 160, above.
184 Lucas, op cit n 180, 28–9.
185 Id, 325–7.
Authoritative legal institutions help to settle disagreements about what ought to be done. But the establishment and general efficacy of such institutions depends on the existence of a deeper level of agreement, a public morality, which must include agreement as to some substantive values.\textsuperscript{186} It is both the values included within, and any known to be excluded from,\textsuperscript{187} this deeper agreement which determine the limits to the de facto authority of legal institutions, whose decisions will be disobeyed if they transgress them. But why should they not also be regarded as setting limits to those institutions' legal authority? Since there is necessarily widespread agreement as to both some substantive values, and the need for the authoritative resolution, consistent with them, of many\textsuperscript{188} of the matters as to which there is no agreement, the right to deny the validity of any law flouting those values—the blue-eyed babies statute, for example—need not threaten authority more generally.

We can now return to the question of the validity of evil laws. The suggestion which prompted our diversion was that a judge who believes a rule to be evil, and is therefore unable to agree with other judges and officials that it is valid in the full, internal sense, should nevertheless say that it is valid in the detached sense.\textsuperscript{189} The suggestion was based on the observation that the criteria for legal validity are determined by the common practices of legal officials as a group. But it is now clear that the matter is not as straightforward as this. At least from the internal point of view of officials themselves, it is doubtful that consensus among them is an essential condition for the validity of law. Dworkin has persuasively argued that judges do not believe that there is no law, and no judicial duty to decide one way rather than another, just because there is controversy—even among the judges themselves—as to what law is.\textsuperscript{190} Nor do the judges believe that the law is whatever a majority of them decides that it is: dissenting judges necessarily believe that the majority's opinion is wrong.\textsuperscript{191} Now, if this is true in more familiar cases involving problems of the ambiguity, vagueness or prima-facie inconsistency of rules, why is it not equally true of cases involving the moral criteria upon which—as we have argued—the practice of law and the validity of all rules is ultimately based? The criteria of legal validity may be determined by the common practices of officials, but these are interpretive practices. Disagreement among participants as to the rationale underlying a social practice is possible,\textsuperscript{192} and none need assume that the view of the majority is necessarily correct. This can be so, at least provided that

\textsuperscript{186} This point is stressed in id, 19, 33–4, 36–7, 318, 324–5, and 336–8.
\textsuperscript{187} Even in the case of some substantive values held only by a minority of officials or citizens, if that minority regards them more highly than even the preservation of ordered government, why should it not let it be known that it deems the authority of legal institutions to be limited by them? This need not threaten the authority of those institutions provided that they take the warning seriously and act accordingly.
\textsuperscript{188} See the text to nn 162–8, above.
\textsuperscript{189} See in particular R. Dworkin, \\textit{Taking Rights Seriously} (1977), ch 3.
\textsuperscript{190} 'Necessarily' because otherwise they would not dissent. Of course, the principles of \textit{stare decisis} may require that the majority's decision thenceforth be accepted as correct. But those principles are not absolute and unqualified: the reasons for a judge deferring to a majority decision which he thinks mistaken must be weighed against other reasons for over-ruling it.
\textsuperscript{191} See the text to n 177, above.
disagreement is infrequent and marginal, and does not threaten the efficacy of the practice. Moreover, even if some disagreement does threaten the efficacy of the practice, it is not clear that participants must be mistaken in believing that either one side or the other is right. In times of fundamental official dissension, and perhaps even civil war, it may from the external point of view seem obvious either that there are two different and rival legal systems, or that there is no law at all. But the disputants themselves often hold the very different opinion that they are defending the law against unlawful opposition. This reflects a conception of law rooted in the notion of rightful—that is, morally legitimate—authority.

A judge confronted by a rule he believes to be so evil that it ought not to be applied may not know that this belief is not shared by other judges, although he may suspect as much. He should know that the validity of law depends partly on moral criteria and not solely on social facts. If he believes that the rule does not satisfy those moral criteria, must he not say that in his opinion it is not law? He may hope thereby to persuade his colleagues to follow his example, as in fact they should do if they endorse his moral judgment. They should do so because they too could not sincerely make an internal statement that the rule is valid, and there is no reason to make a detached statement that it is valid unless it is clearly known that the vast majority of officials are of that opinion. The single judge can therefore quite properly express his opinion that the rule is, from the point of view of the legal system as a whole, invalid. If his opinion is authoritatively rejected, or if he knows that it inevitably will be, then by continuing to assert it he may merely confuse and mislead—and unless that is in itself a worthwhile objective, then as Finnis points out there is no good practical purpose in doing so. But otherwise there is every reason to assert it, not only because he hopes to persuade others and a claim of legal right is ideologically useful, but because he believes that it is, and it may indeed be, true.

9. Conclusion

Moral judgments have a greater role to play in legal reasoning than the foundational thesis acknowledges. It maintains that moral norms provide the ultimate justification for every chain of legal reasoning, but except in hard cases—where they necessarily enter more directly into legal reasoning—need not be explicitly adverted to, because they justify a once-and-for-all judgment that all positive norms of the legal system should be enforced. But it is logically impossible even in otherwise ‘easy’ cases properly to reach a decision merely by applying positive legal norms: moral norms are directly relevant to the reasoning by which every case is decided. This is because judges are required, legally as well as morally, to refuse to

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193 J. R. Lucas, op cit n 180, 326.
194 Disputes over succession, for example, have often been expressed in these terms. Hart acknowledges that although it is normally, it is not necessarily, either meaningless or pointless 'to talk of the validity of a rule of a system which has never established itself or has been discarded': CL, 101.
195 See n 168, above. For this reason I have criticized M. J. Detmold's analysis of this problem in my 'Detmold's The Unity of Law and Morality' (1986) 12 Monash University L Rev 8, 14–17.
apply positive legal norms if they believe that there are compelling moral reasons for doing so. This is true of both common law, statutory and even constitutional norms.

Sophisticated positivists might resist the threatened collapse of legal positivism into natural law by arguing that the former is a theory of law, and not a theory of adjudication; a theory about the identification rather than the application of legal norms. They might explain the pervasive role of moral judgments in adjudication by attributing to the courts legal powers to change common law and statutory law, which is nevertheless identifiable on the basis of social facts alone. But if such powers extend to every case, then in every case a moral judgment—whether or not to exercise them—must be made, which vitiates the foundational thesis. Worse, by detracting from the authoritativeness of law, this undermines the social thesis as well, by depriving it of its rationale.196 Indeed, we have argued that on Raz's own premises—that practical authority is claimed by the law and is essential to its proper functioning, that this claim is reflected in internal legal statements such as assertions of validity, and that judgments of validity are judgments as to what is law—there can be no distinction between the best theory of law and (the relevant parts of) the best theory of adjudication.197

Our argument rests on premises accepted by positivists themselves. Positivism set about its own demise when Hart rightly insisted on the intrinsic normativity of law. Raz has rightly insisted that this normativity is moral. By endorsing the view that internal legal statements express moral commitment to the law, Raz has undermined the social thesis and—since it is the most fundamental commitment of positivism198—legal positivism itself, as a participant theory of law. As such, legal positivism has self-destructed.

196 See the text to and following nn 109–10, above.
197 See nn 147–8, above.
198 AL, 38.