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THE PRACTICAL DIFFERENCE BETWEEN NATURAL-LAW THEORY AND LEGAL POSITIVISM

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I

According to H. L. A. Hart, if a reasoned choice between the concepts of law offered by natural-law theory and legal positivism[1] is possible

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1 In our article 'Law as a Moral Judgment *vs* Law as the Rules of the Powerful' 28 *Amer J Juris* 79 (1983), we outline our understanding of the dispute between natural-law theory and legal positivism as follows:

> The conflict between natural-law theory and legal positivism is standardly presented as follows: natural lawyers maintain that there is a necessary connection between law and morality which positivists deny. The idea of a necessary connection is, however, open to interpretation, and not all 'necessary' connections between law and morality are incompatible with legal positivism. According to positivists, whether or not there are objectively valid moral principles by which the merits of positive law can be assessed, 'The existence of law is one thing; its merit or demerit is another' [Austin, *The Province of Jurisprudence Determined* (London, 1955 184]. Whatever connections, necessary or otherwise, may exist between law and morality, there is no necessary connection between law and morality *within the concept of law itself.* Legal provisions are to be identified as legal by their empirically observable sources in legislation, decided cases, custom, codes or whatever, the moral status of these sources being irrelevant to their status as sources of *legal* provisions. Legal validity is not relative to morality. If natural lawyers and positivists genuinely disagree, *and if* the standard location of their dispute is correct, then natural lawyers must contest this particular doctrine of the separation of law and morals. They must hold that morality enters into the concept of law itself; that to judge a provision to be legally valid is to judge it to be in conformity with specific moral principles; that a provision which violates these principles is defective in its legality (79–80).

Some influential legal philosophers would argue against such a hard-nosed characterization of natural-law theory. For example, in his 'The Matchmaker or Towards a Synthesis of Legal Idealism and Positivism' 12 *Journal of Legal Education,* 1, 4 (1959–60), Iredell Jenkins says of 'the insistence that Natural Law . . . stands as a transcendent body of principles and rules against which positive law must be measured and declared invalid—not merely "bad" or "wrong" or "mistaken" in case of conflict' that 'it is . . . true that statements of this sort do occur in the idealistic tradition: but they have to be searched for among the writings of third and fourth-class minds, and even more among the writings of secondary sources that purport to expound this doctrine'. Moreover, John Finnis in his *Natural Law and Natural Rights* (Oxford, 1980) consistently and strenuously rejects any such hard-nosed view. According to Finnis, 'Far from "denying legal validity to iniquitous rules", the tradition explicitly (by speaking of "unjust *laws*") accords to iniquitous rules legal validity', op cit, 365.

continued on page 2

it must be because one is superior to the other in the way in which it will assist our theoretical inquiries or advance and clarify our moral deliberations, or both.[2]

Some positivists, for example Joseph Raz,[3] employ the theoretical test; but others, notably Neil MacCormick[4] and perhaps Hart himself,[5] appeal to the moral test, treating this as a short-cut through the debate between positivism and natural-law theory.

Our purpose in this article is to examine what difference, if any, it makes to our moral deliberations whether we adopt a natural-law theory or a positivist concept of law. To begin with we will consider what appears to be the standard positivist reason for believing that natural-law theory provides an inferior concept of law from a moral point of view. John Ladd expresses it neatly:

> Legal positivists . . . are quick to point out that the practical effect of identifying law with a part of morals is either to nullify existing law in favor of an ideal law, or to elevate all existing law to the status of what is moral; in other words, the natural-law theorist, they maintain, has to be either a radical revolutionary or an unregenerate reactionary.[6]

In either event, it is alleged, the natural-law theorist is led to oversimplify complex moral issues and cannot 'retain a critical moral stance in face of the law which is'.[7]

It is not always clear whether it is being asserted that natural-law theory *logically entails* anarchism or conservatism and, in either event, dogmatism (we can call this kind of thesis the 'positivist strong claim'), or merely that it is more likely than positivism to generate such attitudes (this we can call the 'positivist weaker claim')[8]. We contend that the positivist strong claim is false, resting either

continued from page 1

Notwithstanding such powerful denials, our position remains that if (i) natural lawyers and positivists genuinely disagree, and (ii) the focus of the disagreement concerns a necessary conceptual connection between law and morality, then natural lawyers must hold that a relevant moral failure entails a legal failure. In our view, iniquitous rules cannot be legally valid; and, for the record, we would not consciously speak of unjust *laws*.

2 Hart, *The Concept of Law* (Oxford, 1961) 204–205.

3 See especially Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, 1979) Chap 3.

4 See MacCormick, *H.L.A. Hart* (London, 1981) 160. And see n 24 *infra*.

5 See Hart op cit, n 2 *supra*, 203–207.

6 Kant, *The Metaphysical Elements of Justice* (translated by John Ladd), (Indianapolis, 1965) (translator's introduction) xxix. Similarly see Hart, 'Positivism and the Separation of Law and Morals' 71 *HLR* 593, 598 (1958).

7 MacCormick, op cit, n 4 *supra*, 24.

8 The context should make it clear what kind of strong or weaker claim (or thesis) we are considering but the scheme we have in mind is as follows:

strong claim	— particular concepts of law entail particular (different) practical attitudes;
weaker claim	— particular concepts of law tend towards particular (different) practical attitudes;
positivist strong claim	— natural-law theory entails undesirable practical attitudes;
positivist weaker claim	— natural-law theory tends towards undesirable practical attitudes;
natural-law strong claim	— positivism entails undesirable practical attitudes; and
natural-law weaker claim	— positivism tends towards undesirable practical attitudes.

on too specific versions of natural-law theory or else involving logical fallacies: most notably, the fallacy of equivocation (by employing positivist concepts of law within the framework of what is supposed to be natural-law reasoning), and the fallacy of Denying the Antecedent (by arguing that because natural-law theory holds that the legal validity of a rule entails a moral obligation to obey it therefore the legal invalidity of a rule entails the absence of a moral obligation to obey it, or even a moral obligation to disobey it).

A likely response to our analysis, however, is that this defence of natural-law theory is bought only at the price of turning the 'dispute' between positivism and natural-law theory into a verbal quibble. Positivists, it may be said, like natural lawyers, are interested both in the law-as-it-is and in the law-as-it-ought-to-be. They insist, however, that an objective science of law requires that the law-as-it-is be defined and thereby identified in a morally neutral fashion. Natural-law theorists, on the other hand, wish to define law in a morally loaded way: they insist on withholding the title 'law' from rules promulgated in the name of law unless these meet specified moral criteria. But if our defence of natural-law theory is employed then this insistence is merely linguistic, for the defence, it seems, implies that what may be apprehended to be the social (legal) facts, and the distance between these (if any) and what they ought to be, is unaffected by the conceptual scheme which we choose to adopt.

We contend, however, that there is a significant (not merely linguistic) conceptual and theoretical issue between natural-law theory and legal positivism. The two positions may be seen to contest different views about the relationship between practical reason in general and the moral point of view as a part of practical reason. As a result the two positions have different views about the nature of social facts.

Nevertheless, even if this is accepted, it may be maintained that our analysis makes the dispute, although theoretically significant, trivial from a moral point of view. Provided that a positivist and a natural-law theorist share the same moral principles, and there is no logical reason why they should not, positivism and natural-law theory do not require different rules, procedures and institutions for a just system of legislation, adjudication, and government.

Although we agree that positivism and natural-law theory are not logically tied to different moral points of view, it does not, however, follow that the adoption of a concept of law has no moral implications. It may be the case, for example, that positivism is regularly associated with different moral attitudes from natural-law theory, or there may be reasons why the two positions are likely to encourage different attitudes towards the institutions or agencies of social control, or alternatively, positivism, whilst not requiring different attitudes from natural-law theory, may be compatible with attitudes with which natural-law theory is not (and vice versa). In other words, we should seek the practical difference between natural-law theory and legal positivism, not as a thesis about logical entailment (i.e. not as a strong claim), but as one about contingent conjunction, likely tendency, or logical compatibility (i.e. as a weaker claim).

We contend, however, that none of these weaker claim strategies can achieve practical significance unless they can explain why positivism and natural-law theory should tend to foster different attitudes. This requires the formulation of a theory of ideology[9] which is missing in attempts to argue for the moral superiority of natural-law theory or positivism on the basis of conjunctions, tendencies, or compatibilities.

We suggest, therefore, that if the second of Hart's criteria for choosing between natural-law theory and positivism (the advancement and clarification of our moral deliberations) is to be employed—whether as a means of demonstrating that the debate about the concept of law has some practical significance, or as a polemical strategy in the dispute between positivism and natural-law theory—then the development of a theory of legal ideology must become a major preoccupation of jurisprudence. Drawing together these strands we conclude that Hart's moral test is anything but the short-cut that some positivists suppose.

II

According to natural-law theory there is a necessary conceptual connection between law and morality. This claim is open to interpretation, but we take it to mean that the concept of legal validity is a concept of moral legitimacy. In relation to laws, this entails that rules lack legal validity, lack status as laws, insofar as they are morally illegitimate in some specified way or ways. The moral values which are to be employed in making such a judgement and the form in which congruence with them constitutes legal validity, may, however, vary between different natural-law theories. In principle, natural-law theory may adopt any ethics. It may also take as its value-reference what are alleged to be objective values, the cultural values of a community, or the values of an individual assessor.[10] Furthermore, whichever values and value-reference are employed, different forms of impingement of morality on legality may be alleged. Thus, for example, it may be held that what matters primarily is the moral validity of rules; alternatively, that what is of prime importance is the moral legitimacy of the source of promulgation, enforcement or the like.

As far as the form of impingement is concerned, it will simplify matters if we simply state our own view and use this as the reference point for discussing the positivist arguments against natural-law theory. Even if the positivist arguments are valid against some versions of natural-law theory, if they do not hold against

9 In his *Ideology* (London, 1971), John Plamenatz rightly notes that there is 'a tradition of careless use' (20) of the concept of ideology. By a 'theory of ideology' we mean a theory exploring how people come to have the ideas that they do, how ideas relate to one another, and how abstract ideas bear on practical attitudes and actions.

10 Accordingly we would take issue with the implication in Harris, *Legal Philosophies* (London, 1980) 19–21, that natural-law theory, strictly speaking, must be 'objectivistic' and restricted in its ethical theory.

our version then they cannot be valid against natural-law theory *per se*—which they are intended to be.

In our view, the concept of law is the concept of morally legitimate power and the concept of a legally valid rule is the concept of a rule which there is a moral right to enforce. Where the rule is positive (i.e. promulgated and administered in fact) the existence of the moral right to enforce—equally the existence of a fully legally valid rule—is subject to three conditions:

(a) the rule itself must not be immoral;
(b) the rule must be administered in a morally legitimate fashion (according to something like the principles that comprise Fuller's inner morality of law);[11] and
(c) the rule must be promulgated by a morally legitimate source.

When all three conditions hold there is not only a moral right to enforce the rule but also a moral obligation to obey it. However, our view of the relationship between legal validity (LV), the moral right to enforce a rule (MR), and the moral obligation to comply with a rule (MO), is not symmetrical and requires some discussion.

We can start by stating baldly our view of the relationships between the critical law concepts. They are as follows:

(i) (LV) *entails* (MO)
(ii) (MO) *does not entail* (LV)
(iii) (LV) *entails* (MR)
(iv) (MR) *entails* (LV)

It will be seen that there is an asymmetry between the (LV) (MO) relationship and the (LV) (MR) relationship. We shall speak briefly to our four root propositions.

Proposition (i): (LV) entails *(MO)*

When a rule is fully legally valid, the rule itself will not be immoral, it will be morally administered, and it will be issued by one who has genuine moral authority. Subject to one detail, it seems beyond dispute that such a rule will create a moral obligation. The one detail concerns the first condition of legal validity. Why insist only that the rule *not be* immoral? Why not insist positively that the rule must be moral? The reason why we eschew phrasing of this latter positive kind is that it would imply that the only rules which could meet the conditions would be those which were moral *per se*, that is, rules which prohibited immoral or required moral conduct. This condition would be too strong. Regulating a complex society calls for countless decisions on matters which, on the face of it, are morally optional. Whether it be a decision about driving on the left or the right hand side of the road, making tax returns in April or December, having two or three witnesses to a signature by a testator or whatever, a framework of regulatory rules is required and we do not wish to imply that such

11 See Fuller, *The Morality of Law* (London, 1969 revised edition), especially Chap 2.

rules fail the test of legal validity simply because they are not moral *per se.* Provided that such rules are not immoral (that is, do not prohibit morally required conduct, or require morally prohibited conduct, or regulate morally optional conduct in some illegitimate way),[12] and provided that the other conditions of legal validity are met, then directly or indirectly[13] such rules will generate moral obligations.

Proposition (ii): (MO) does not entail *(LV)*

What follows from proposition (i), that (LV) *entails* (MO)? If (LV) *entails* (MO) then it certainly follows that not-(MO) *entails* not-(LV) for this is a straightforward employment of *modus tollens.* But does logic compel us to hold that (MO) *entails* (LV)? The argument would run thus:

If p (LV) then q (MO)
q (MO)
∴ p (LV) (i.e. (MO) *entails* (LV))

This, however, is flawed for it commits the fallacy of Affirming the Consequent. Logic, then, does not take us to (MO) *entails* (LV). Neither, of course, does logic alone take us to our own proposition (ii) that (MO) *does not entail* (LV). Nevertheless, logic does permit such a proposition and it is our view that (MO) *does not entail* (LV).

In what kind of circumstances might one find (MO) without (LV)? By way of illustration we can outline two such situations. The first case is that in which a positive rule is not immoral but where the rule is not administered in a morally legitimate way and/or is not issued by a morally legitimate source. Although such a rule cannot be legally valid—it fails to meet one or more of the relevant conditions—nevertheless there might be a moral obligation to comply with its requirements. For instance, the rule might prohibit killing and we would not treat the moral prohibition against killing as lifted simply because the purported legal rule lacked full legal validity.

Our second illustration fixes on what is, indeed, the paradigm of legal invalidity, a rule which meets none of the conditions for legal validity. Here, there are obvious arguments for disobeying the rule but, exceptionally, there might be overriding arguments on the other side. It may be that disobedience threatens worse moral consequences than obedience, in which case obedience is required as

12 How could morally optional conduct be regulated illegitimately? One possible case is where the conduct in question affects no other person. Here, regulation seems gratuitously intrusive and therefore morally illegitimate.

13 In our motoring and tax examples in the text the obligations bear directly on drivers and tax-payers, but do the rules about valid wills place obligations on anybody? Obviously this raises the old jurisprudential chestnut about the distinction between power-conferring and duty-imposing rules. We need not pursue the question here. Suffice it to say that our reference in the text to indirect obligations is simply a precautionary move in case the duty-imposing school is correct in its analysis of legal material.

the lesser of two moral evils.[14] For example, an illegitimate regime may decree that the families of all males with long hair will be executed. It may be considered that persons have a moral right to adopt any hair style they choose; but in such a case this moral right will be overridden by the right to life of those threatened by the vicarious punishment. Admittedly, this is an extreme example, but less extreme examples, where the moral calculation is also more difficult, are not hard to find in most societies.

Proposition (iii): (LV) entails *(MR) and Proposition (iv): (MR)* entails *(LV)*

For present purposes we can treat both these propositions as unproblematic. Our concept of law is the concept of morally legitimate power. By this we mean that a rule is legally valid if and only if there is a moral right to enforce it. In a wider context such a view requires a defence; but here we are only concerned to state our view and to examine what it entails.

For the sake of completeness, and to avoid misinterpretation, there are two further formal or structural features of our natural-law position which we should mention. First, we draw a distinction between 'natural-non-positive law' and 'natural-positive law' (or simply 'positive law'). The former refers to edicts which there is a moral right to enforce but which in fact are not being promulgated and administered; the latter refers to such edicts which are in fact being promulgated and enforced. Where there is no moral right to enforce an edict it is not law. In short, all positive law is natural law, but not all natural law is positive law. Naturally, it does not follow that any positive rule which is claimed to be a law is a law. In the abstract the predication of legality is the predication of morality. If the rule fails moral criteria, whether it be a deficiency in substance, title, or procedure, then it is not legal. Practically speaking, if the rule is judged to fail the moral criteria employed by the adjudicator then it should be judged to be not legal, but in terms of any hypothetical objective morality any such judgements are corrigible.[15] Secondly, we discriminate between 'ideal' and 'non-ideal' law whether or not this is positive. 'Ideal law' refers to those edicts which there would be a moral right to enforce in an ideal world. 'Non-ideal law' refers to edicts which there is a moral right to enforce in a non-ideal world. This kind of distinction is familiar enough in political philosophy but requires very much more elaboration than we can give it

14 A caveat is in order here. The traditional categorization of ethical positions into deontological and teleological theories has supported some serious misunderstandings. One is that ethical theories either take account of consequences and nothing but consequences or else they take no account whatsoever of consequences. Another is that all consequential theories are utilitarian. These misunderstandings might foster the idea that we are utilitarians. This would be quite wrong. We stand firmly on the deontological side of the traditional divide, drawing support from contemporary liberals such as Ronald Dworkin, John Rawls, and Alan Gewirth, but where basic rights or duties conflict we look to the consequences of giving effect to one set of rights (or duties) as against a conflicting set. This does *not* let utilitarianism in through the back-door but development of this point is too much for even a long footnote.

15 See the discussion of controversial moral cases in text, *infra* at 10–13.

here.[16] For the moment we merely wish to point out that what is morally permissible in a non-ideal world may not be permissible in an ideal world and that judgements of legality should always be referred to the context of the social arrangements in which 'the enterprise of subjecting human conduct to the governance of rules'[17] takes place. What is law must be judged according to what is practically possible, not according to what is merely ideally desirable.

III

We are in a position now to consider the positivist strong claim that there is a logical entailment between natural-law theory and reactionary or revolutionary attitudes. Our contention is that this entailment does not hold.

First, we can examine the supposed entailment between natural-law theory and a revolutionary attitude. Why should a natural-law theorist have to be a radical revolutionary or, to use Neil MacCormick's phrase, a revolutionary anarchist? MacCormick presents the reason very cryptically:

> [S]ince [for the natural-law theorist] whatever is law must be moral, governments must be disobeyed or even overthrown if what they propound as 'law' is not morally justified.[18]

Granted, this is presented in parentheses, not as a developed argument; even so, it is not merely elliptical, it is a *non-sequitur*. For, while the antecedent states perfectly correctly that natural-law theory holds that (LV) *entails* (MO), logic does not commit us to MacCormick's conclusion that not-(LV) *entails* not-(MO) (actually, that not-(LV) entails disobedience or revolution, but since (MO) entails obedience and therefore disobedience entails not-(MO), this entails that not-(LV) *entails* not-(MO)). As we saw in the previous section, logic does not compel one to argue that because (LV) *entails* (MO) therefore (MC) *entails* (LV); this is the error of Affirming the Consequent. Equally, it is an error to think that because (LV) *entails* (MO) therefore not-(LV) *entails* not-(MO); in this case it is the error of Denying the Antecedent. And it is precisely this error that undermines MacCormick's reasoning. To force MacCormick's conclusion we need the proposition that (MO) *entails* (LV) for it will follow from this that not-(LV) *entails* not-(MO). However, the snag is that (MO) *entails* (LV) is not entailed by (LV) *entails* (MO), and so this appears to be a dead-end.

MacCormick might try to derive the critical bridge proposition that (MO) *entails* (LV) by an indirect route. The three steps in the reasoning might be thus:

16 See e.g. Rawls, *A Theory of Justice* (London, 1972) for the contrast between ideal theory and non-ideal theory, and Ackerman, *Social Justice in the Liberal State* (New Haven, 1980) for the distinction between ideal theory and second-best theory. On the latter generally see our 'Liberalism in Quest of Itself' 45 *MLR* 104 (1982).

17 We take Fuller's famous phrase (see Fuller op cit 96) as the referent of the word 'law' or 'the legal enterprise'. This seems to be a pretty general starting-point for the debate about the concept of law and it has the virtue of eliminating the possibility that rival concepts of law can be attributed to differences in the initial focus of interest.

18 MacCormick op cit, n 4, *supra*, 24.

(i) (MO) *entails* (MR)
(ii) (MR) *entails* (LV)
(iii) ∴ (MO) *entails* (LV)

This certainly is a valid progression and it employs our own self-confessed pivotal proposition that (MR) *entails* (LV) as its second step. The snag, therefore, has to be the first step; and so it is. The first step is incompatible with our own root propositions. We have already explained these underpinning propositions and although the proposition (MO) *entails* (MR) looks plausible it is not a proposition to which we subscribe. So, this indirect route will not work unless MacCormick rewrites our basic propositions. Moreover, the crucial change that would generate (MO) *entails* (MR) is in fact to delete our proposition (ii) that (MO) *does not entail* (LV) in favour of (MO) *entails* (LV), the very proposition that MacCormick needs. The irony here, of course, is that the key to this indirect route involves a *direct* substitution of the bridge proposition. Positivists may be puzzled by the asymmetrical structure of our natural-law theory but it observes the dictates of logic, it is (we think) substantively coherent, and positivist puzzlement is no licence to rewrite our position.

A classic exponent of the idea that natural-law theory is connected with attitudes of revolution and anarchy is John Austin. According to Austin, the view that human 'laws' which conflict with the Divine law are not morally obligatory and therefore not *laws*, is an abuse of langauge which

> is not merely puerile, it is mischievous. When it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command at variance with them are paramount to all others. But the laws of God are not always certain . . . What appears pernicious to one person may appear beneficial to another.[19]

Revelation, Austin holds, is an incomplete guide to the will of God, utility is no index of it, and appeals to conscience are a cloak for superstition and ignorance. He continues:

> To prove by pertinent reasons that a law is pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful, for resistance, grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to present anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.[20]

This argument is specifically presented as a response to Sir William Blackstone, so it is rather unfair to criticize it as a response to natural-law theory generally; but it is often so taken and so it is useful to see in what ways it misses the mark when directed at the more general target. In general terms we must, of course

19 Austin, op cit, n 1 *supra*, 185–186.
20 Ibid, 186.

substitute something like 'the moral law' or 'the dictates of the true morality' for 'the Divine law'.

Firstly, Austin is perfectly entitled to charge our version of natural-law theory with the view that an immoral rule cannot be a law. The mistake he makes is to think that this commits the natural-law theorist to the view that there can never be a moral obligation to comply with a legally invalid rule. As we have indicated at length already this is a striking *non-sequitur* in positivist thought, and we can be excused yet further rehearsals of the argument.

Austin's main point, however, seems to revolve around the inherent controversiality of moral questions, his argument being that if we follow natural-law theory by employing a controversial and uncertain (moral) test for law then this will necessarily invite anarchy. Before we can comment on this aspect of Austin's criticism of natural-law theory we have to explain our own thinking on the status of rules the morality of which is genuinely controversial.[21]

Suppose that *A* has been delegated the right to govern a community, the terms of the delegation being such as to confine *A*'s government within the bounds of a particular (let us suppose, objectively correct)[22] moral theory. The moral theory is the constitution under which *A* has the moral right to govern. So long as *A* endeavours to observe the moral groundrules of his office it seems unlikely that any obvious violations of the constitution will occur. Even so, and notwithstanding *A*'s best endeavours, there is the standing possibility that moral violations will take place as soon as *A*'s government has to make decisions that go beyond the straightforward application of the cornerstones of the constitution. The moral principles of the constitution provide the basic materials but, on any number of issues, we must expect genuine disagreement between good faith protagonists who attempt to argue through the logic of the principles. Do we hold that there is a moral right to enforce rules in such controversial cases and/or a moral obligation to comply with such rules?

The short answer to this is as follows. If the rules are not in fact immoral and if the other conditions of legal validity are met then there is a moral right to enforce the rules; if not, then there is no moral right. But, correct though this is, it seems to miss the thrust of the problem. For, given that we are not morally omniscient, what is required is some practical guidance not some abstract theoretical statement.

In our view there are two legitimate practical tacks on this tricky problem. First, we can approach the question in terms of controversial legality. Given that the moral arguments are inconclusive either way we are forced to suspend judgment on the legality of the rule. With the legality of the rule bracketed off

21 The idea of *genuine* controversiality raises a complex issue about the distinction between a question which is rationally regarded as open and one which is not. Ronald Dworkin's distinction between anthropological and discriminatory moral positions (see Dworkin, *Taking Rights Seriously* (London, 1978 new impression) 248–253) provides some useful leads but there is clearly a lot of work to be carried out here.

22 We are making this assumption to simplify our discussion. In principle, however, our discussion is applicable equally to the case of a morally controversial constitution.

from consideration this makes highly problematic both the moral right to enforce the rule and the moral obligation to comply with it (to the extent that the obligation relies on legal validity). Since legal validity is controversial in the case under discussion we can only defend legality-dependent rights and obligations in a provisional way. We can say the surrounding evidence of moral good faith and the like is such that we can presume, at least for the time being, that there is a moral right to enforce the rule and/or a moral obligation to comply with the rule. But if our educated second-guess is wrong then this basis for the presumed rights and obligations collapses. This is somewhat analogous to the logic of the criminal trial where the accused is not guilty if he did not in fact commit the offence. Sometimes the accused will admit guilt but if, as in the notorious English case of Maxwell Confait, the confession is false then the accused is not guilty (no matter that we have been led to believe otherwise). At other times guilt is denied and we employ various procedures designed to indicate guilt or innocence. Again, though, mistakes are made and, no matter that the procedures have indicated guilt, if the ruling is mistaken it *is* mistaken and the accused is not guilty. Analogously, the logic of our natural-law theory is such that there is no moral right to enforce rules unless the rules are legally valid (no matter how favourable second-best evidence of good moral faith and the like might be) and the same holds of moral obligations where those obligations turn on legal validity. Second-best tests can have a provisional practical bearing but, in the final analysis, it is the conceptual map that sits in judgment on our practice.

Not all moral obligations to comply with rules hinge on legal validity, and under a second approach to the controversial rule situation we might look for collateral rights and obligations, that is, rights and obligations that do not hinge on legal validity. In the case of the moral right to enforce we have ruled out the possibility of any such collateral argument[23] but in the case of a moral obligation to comply with controversial rules there is a perfectly plausible collateral argument. This argument locates the moral obligation in the terms of delegation to the rule-maker. Rational contractors will recognize that a moral community will confront controversial questions, that indecision will paralyse government, and that failure to accept controversial outcomes will threaten social stability. Under those circumstances it seems rational to accept that one is morally bound to comply

23 A curious reader might wonder what we think about a moral right to enforce in those two situations where we earlier located a moral obligation to obey a legally invalid rule. In the first situation, it will be recalled, there was a rule which was moral *per se* but defective on one of the other conditions of legal validity. This being so we would reject any moral right to enforce the rule. In the second situation, we postulated a moral obligation to comply with a legally invalid rule as the lesser of two evils. Again, though, legal invalidity would be fatal to the argument that there was a moral right to issue and enforce a rule. In our view, it is impossible to argue that the existence of the moral obligation to comply with the immoral rule somehow converts the lack of a moral right to enforce the rule into such a right. Certainly, the presence of a moral duty to conform with the rule indicates the presence of correlative moral rights, but these are not the rights of the immoral enforcer. Rather, the rights are held by the recipients of one's action should one fail to comply with the rule.

with controversial decisions provided that the decision has been made in good faith and provided that the possibility of further debate on the question has not been closed.[24] In this way one could plausibly argue that this is another case of a moral obligation exisiting in respect of a rule which is known to be controversial and which in fact (although, of course, this is not known) is legally invalid.

Now we can return directly to Austin. The first point is this. While there is no denying that the government of modern complex societies is a minefield of moral controversiality, this is not to say that rational citizens treat themselves as under no moral obligation to observe the requirements of decisions/rules which they judge to be morally wrong. On the contrary, and as we have just explained, it is at the very least plausible to argue that the terms of a rational delegation of governing authority would provide for a collateral moral obligation to conform to the rules in the genuinely controversial case (subject to moral good faith). Thus, contrary to Austin's suggestion, this does not present any kind of threat to 'wise and benign rule' if by that he means good faith moral government.

Secondly, and building on the previous point, we have seen already that our kind of natural-law theorist holds a complex view of legal validity. Legal validity is not just a matter of the content of the rule; questions of procedure and title are relevant as well. Moreover, there can be a failure to satisfy the criteria of legal validity not only along the dimension of attainment but also along the dimension of attempt. The idea that the natural-law theorist is a simple-minded demagogue fits very uneasily with our view of such a theorist.

Thirdly, it is worthwhile pausing to consider how positivism's guarantee of a non-controversial test for law eliminates the seeds of anarchy inevitably sown by people's disagreements concerning what the law ought to be. Surely, holding the positivist view that the law is to be determined independently of moral judgement is not going to insure us against anarchy, *unless* we adopt the extremely paradoxical view that what is law (independent of its morality) morally determines our obedience to it. Indeed, Austin gets perilously close to this unsavoury view. We are to be permitted to question and criticize the rules of government, but not to disobey or attempt to overthrow government in any circumstances. We can work for change within the constitutional structures of the system with which we are faced, but never outside them. This may be all very well if we are faced with a

24 For an interesting discussion of controversiality from a positivist perspective see MacCormick 'Law, Morality and Positivism' 1 *Legal Studies* 131 (1981). MacCormick's overall position seems to be extremely cautious. First, as he indicates clearly in the paper referred to in this note, he is not at all convinced that natural-law theorists and positivists have been engaging in anything other than 'mock battles' (op cit, 145). But, secondly, if there is a real question between the rival concepts of law then he favours positivism for the reason of practical moral superiority (see op cit, n 4 *supra*, 158–162). Thirdly, however, whatever the status of the positivism/natural-law theory debate, he senses that perhaps there is an important insight in natural-law theory to the effect that there is a special relationship between legislators and their subjects, such that 'those who exercise power and discretion *within* a legal system must always at least purport to be acting on the basis of seriously held and seriously considered values' op cit, n 24, 144.

reasonably democratic or moral constitution; but can we afford to worship the clear and certain dictates of the powerful beyond all other values? Is any order better than disorder?[25] If order exists in human societies then it exists only because, and to the extent that there is consensus in society over values, both the values specifying behaviour directly and the values specifying the constitution of dispute-resolving institutions. If this breaks down society becomes unstable, as Hart recognizes in his 'Minimum Content of Natural Law' thesis.[26] The natural-law theory view, by advocating the moral test for obedience does not threaten anarchy, it merely states the test which people already employ. To advocate that they give up this test is to advocate subservience. Austin is right to stress the controversial nature of moral questions, but wrong to think that natural-law theory entails anarchy. Moreover, in seeking out this entailment, Austin himself gets perilously close to advocating reaction, the alternative undesirable attitude that positivists wish to pin on natural-law theory. Indeed, although we cannot pursue the matter here, this raises some intriguing questions about the general positivist recipe for social stability (certain law plus critical citizens).

We can turn now to the supposed entailment between natural-law theory and reaction. MacCormick summarizes the positivist argument as follows:

> Whatever is law must be moral, therefore all law is morally binding.[27]

This inference will, of course, be embraced by the natural-law theorist: (LV) *entails* (MO). But where is the reaction? In the terms of natural-law theory this is merely a tautology. The inference being charged, however, is that the natural-law theorist must hold that 'All law must be moral (by definition), therefore anything which anyone claims to be law (no matter how immoral this is) must be held to be morally binding'.

The inference must, of course, be invalid for it involves inferring a contradiction from a definition, and if natural-law theorists are guilty of it then it is surprising that the main criticism is that this makes natural-law theory morally undesirable and not that it makes it incoherent.

The fact is that for the natural-law theorist what is claimed to be law, or what the positivist will recognize as law, cannot *necessarily* be law. 'This is law' entails that this *is* law no more than does 'this is true' entail that this *is* true, or 'this is right' entail that this *is* right. 'This is law' is a normative utterance, not a

25 In his celebrated debate with Lord Devlin, Hart puts this question forcefully (Hart, *Law, Liberty, and Morality* (London, 1963) 19): 'We might wish to argue that whether or not a society is justified in taking steps to preserve itself must depend both on what sort of society it is and what the steps to be taken are. If a society were mainly devoted to the cruel persecution of a racial or religious minority, or if the steps to be taken included hideous tortures, it is arguable that what Lord Devlin terms the 'disintegration' of such a society would be morally better than its continued existence, and steps ought not to be taken to preserve it.'

26 See Hart, op cit, n 2 *supra*, 189–195.

27 MacCormick, op cit, n 4 *supra*, 24.

self-guaranteeing performative one. In our version of natural-law theory it is only if the rule meets the three moral conditions of legal validity that it is law.

Quite simply, the allegation is radically question-begging. It relies upon importing a positivist concept of law into what is supposed to be natural-law theory reasoning. It totally ignores the fact that natural-law theorists and positivists do not identify law in the same way and that the identification of law is the focus of their dispute. It identifies law positively and then attributes natural-law predication to that identification. The natural lawyer simply won't accept the identification.

Joseph Raz is aware of this sort of response. In *Practical Reason and Norms* he states:

> This answer is, however, misconceived. All it shows is that the theory is consistent on this issue, not that it is correct. It is precisely because such obvious laws are ruled out as non-laws by the theory that it is incorrect. It fails to explain correctly our ordinary concept of law which does allow for the possibility of laws of this objectionable kind [bad laws or laws of a government without moral authority].[28]

It is Raz's response, however, which is misconceived. The natural-law theorist is not *by this argument* trying to show that his position is correct, merely that it is consistent and that the positivist's attack on it does not show it to be either morally inferior or incorrect. If Raz's appeal to the 'obvious facts' were uncontroversial then natural-law theory would thereby be shown to be incorrect, but then there would be no dispute between natural-law theory and positivism.

No discussion of the positivist strong claim would be complete without considering the views of H.L.A. Hart. In a celebrated discussion of the issue, Hart, like all positivists, seems to have little doubt that natural-law theory must be dogmatic and that it cannot sustain a critical moral attitude in the face of 'the law which is' (although to avoid begging the question, we should say 'those rules and institutions which the positivist would claim were legal' or something like that).

Hart presents us with three arguments. Firstly, according to Hart, positivism will treat as law both morally permissible and morally offensive rules, whereas natural-law theory will insist on a narrower concept which will treat as law only morally permissible rules. This is over-simple, but it can be left to ride. Hart claims that if we adopt the narrower concept then this will preclude us from studying, within the science of law, iniquitous rules.

> Nothing, surely, but confusion could follow from a proposal to leave the study of such rules to another discipline, and certainly no history or other form of legal study has found it profitable to do this. If we adopt the wider [positivist] concept of law, we can accommodate within it the study of whatever features morally iniquitous laws have, and the reaction of society to them.[29]

28 Raz, *Practical Reason and Norms* (London, 1975) 164.
29 Hart, op cit, n 2 *supra*, 205.

This, however, is clearly a *non-sequitur*. The effect of adopting natural-law theory is not to assign the study of morally permissible rules to the science of law, morally iniquitous ones to another discipline.[30] Its primary effect is to make legal theory into a part of political and moral theory. The study of iniquitous rules is just as much a part of political and moral theory as is the study of morally permissible rules. And, even within the sub-category of legal theory, to judge that X is morally permissible involves judging what is morally impermissible. Hart's belief that legal theory is a discipline autonomous from political and moral theory (because of the doctrine of the separation of law and morals) is no warrant for his accusation. The natural-law theorists could as well retort that Hart, by attempting to establish legal theory as a discipline autonomous from morality, wishes to assign the study of law to an imaginary discipline to which it does not belong.

Secondly, Hart claims that a sense

> that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.[31]

This is stated as an argument of tendency; but as an argument of entailment it simply repeats the allegation of a logical tie between natural-law theory and conservatism, which is to be rejected in exactly the same way as we have already done.

Hart's third argument is really the key to his position. He alleges that the only moral judgment which matters for the natural-law theorist is whether or not a rule is legal. If it is legal then there is a moral obligation to obey it. If it is not then there is a moral obligation not to obey it. This has the effect of oversimplifying the moral issues of obedience, submission, duress and punishment which have to be faced.[32]

What is being simplified here, however, is the position of natural-law theory. Hart's allegation only holds if the natural-law theorist identifies law with morality, whereas he only holds (or need hold) that law is a part of morality. As has been argued previously the natural-law theorist need only hold that (LV) *entails* (MO). He need not hold that (MO) *entails* (LV). Furthermore, by making distinctions between what is ideally desirable and what is best or permissible given highly undesirable circumstances the natural-law theorist is fully able to take account of such matters as duress (when considering whether or not someone should be punished for doing what evil rules permitted or required), or submission (whether

30 Even MacCormick finds the argument unconvincing, see MacCormick, op cit, n 4 *supra*, 159–160. Also, for an effective refutation of Hart on this point see Hall, *Foundations of Jurisprudence* (Indianapolis, 1973) 16.

31 Hart, op cit, n 2 *supra*, 206.

32 Ibid, 206–207.

or not someone sentenced under an evil regime should submit to punishment or attempt to escape etc.).

Consider first the question of duress. Suppose that in a war crimes trial X presents a defence to the effect (a) that his actions were legal under the rules in force at the time, and (b) that, had he not carried out his orders, he himself would have been killed. Suppose, further, that a natural-law theorist would hold that the rules and orders cited by X were immoral and thus legally invalid. Why should this prevent the natural-law theorist from tackling the moral issues raised by X's case? Admittedly, the natural-law theorist, on these facts, would reject part (a) of X's defence but this would not close the case, for there is no logical inconsistency involved in rejecting part (a) while allowing the duress pleaded in part (b) to count either as a full defence or as mitigation. Indeed, the interesting tendency towards oversimplification seems, if anything, to be involved in the positivist way of thinking that X can *justify* his actions merely by pleading the rules in force at the time. No doubt, though, this is as much a caricature of critical positivism as is the oversimplification argument a caricature of natural-law theory. Secondly, we can comment briefly on the classic Socratic question of submission. In our earlier discussion of the relationship between legal validity and moral obligation we noted that in exceptional circumstances it might be the lesser of two evils to comply with a legally invalid rule. We can extend this reasoning to cover the case of submission: if submission is the lesser of two moral evils, then there will be a moral obligation to submit to punishment, notwithstanding that the regime and its rules are immoral. We suggest, then, that although Hart is correct in observing that there are many difficult moral problems which can be raised in connection with our attitudes and reactions to social control, he is quite wrong to suppose that natural-law theory blinds us to these difficulties.[33]

IV

Our general opinion is that positivist arguments for the moral superiority of their position are extremely poor if read as arguments of entailment. They invariably beg the question, oversimplify their targets or involve simple logical fallacies.

There is a difficulty with our defence, however, and this is that it may lead to the charge that it is bought only at the price of turning the 'dispute' between natural-law theory and positivism into a verbal quibble. The defence at various points, and most notably in connection with the allegation that natural-law theory

33 For a variation on this theme see Jenkins, *Social Order and the Limits of Law* (Princeton, 1980) 369, where the author embellishes Hart's arguments thus:

> To Hart's arguments, I would add one of a practical nature. If we think of iniquitous law as not really law—and even more, if we think of an unjust 'legal' system as not actually a legal system—this has the effect of focusing our attention solely on the legal aspect of the matter. And this in turn leads us to treat the problem in strictly legal terms: since the supposed 'law' is not such, there is no real law present, and all we need to do is to enact laws that will right the actual wrongs. And that is quite certainly a self-defeating policy.
>
> And that, we should respond, is quite certainly a *non-sequitur*.

leads to reaction, in effect, forecloses the objection by employing a definitional stop. The consequences alleged to follow from natural-law theory do not follow because natural-law theory simply defines law in a way which does not allow them to follow. But if this is so, it may be said, then there is no genuine debate between natural-law theory and positivism. Apparent differences are merely a matter of terminology. When the positivist identifies a rule as law, he does so because of morally neutral features which the rule possesses. The natural-law theorist takes the rules selected by the positivist according to these morally neutral identification procedures and divides them into two categories—rules which are legal, and rules which are not legal according to whether or not they fulfil specified moral criteria. If, for the sake of convenience we call rules which fit the moral criteria 'moral rules' and those which do not 'immoral rules' then what we have is a case of positivists dividing *laws* into moral and immoral laws, whereas the natural lawyer divides *rules* into moral and immoral rules and only allows the moral rules to be called 'laws'. But the effect of this is that there is no difference between what the natural-law theorist calls 'laws' and what the positivist calls 'moral laws' and no difference between what the positivist calls 'immoral laws' and what the natural-law theorist calls 'immoral rules claimed to be law'. The terminology of positivism and natural-law theory is intertranslatable, and once translation is effected then we see that what has happened is merely that different languages have been used to classify the same social facts. Provided that we are clear about which language we are using there can be no confusion. By the same token, however, there cannot be anything significant to debate between the two ways of speaking: it is merely a matter of which convention we choose to adopt. Something like this is, in fact, alleged to be the case by Glanville Williams in his celebrated paper 'The Controversy Concerning the Word "Law"'.[34]

When considering this position we must be careful to distinguish two types of significance, (a) conceptual (or theoretical) significance and (b) practical significance.

(*a*) *Is the debate between natural-law theory and positivism conceptually significant?*

To our way of thinking, the reasoning employed by Williams completely misses the point of the dispute between natural-law theory and positivism. If Williams is right then natural-law theorists and positivists have been wasting their time by getting involved in polemic against each other. But where so much ink has been

34 Williams, 'The Controversy Concerning the Word "Law"', in Laslett (Ed), *Philosophy, Politics and Society* (Oxford, 1956) 134. Thus, for example, Williams says: 'Those who construe law as command refuse to apply the *word* law to any system of rules that cannot be regarded as a command. Those who construe law as a principle certified by reason refuse to apply the *word* law to any system of rules that cannot be regarded as certified by reason. And so on. In each case the controversy is simply as to the application of a word, not as to the characteristics of any particular system of rules under dispute', (ibid, 155).

spilled and hot words exchanged we should be wary of leaping to over-hasty conclusions. If there is a way of interpreting the debate as being significant we should do so.

There is such a way. The debate need not be seen as one about how to employ the word 'law', but primarily as an epistemological one about the nature of our knowledge of social facts. In particular as one about whether or not our knowledge of social (and hence, legal) facts can be value-free.

The Williams-type argument supposes that what the social facts are is something which is knowable independent of the conceptual scheme (natural-law theory or positivism) which we adopt. In fact it supposes that the social facts which are called 'laws' by the positivist ('laws' or 'immoral rules' by the natural-law theorist) are to be identified in a positivistic manner, and that it is only after the relevant facts have been identified that the positivist or natural-law theorist imposes a classification on them. This, however, is not equivalent to saying that the 'dispute' between natural-law theory and positivism is a verbal quibble: in practice, it amounts to endorsing positivism.

Much the same thing occurs in Iredell Jenkins' attempt to reconcile natural-law theory and positivism.[35] According to Jenkins positivism and natural-law theory should be seen, not as being in conflict, but as sharing a division of labour. Both the positivist and the natural-law theorist have descriptive and evaluative concerns. They are both interested in the 'law-as-it-is' and the 'law-as-it-ought-to-be'. The *primary* interest of the positivist, however, is in the 'law-as-it-is', whereas the *primary* interest of the natural-law theorist is in the 'law-as-it-ought-to-be'. The different terminology of positivists and natural-law theorists should be interpreted merely as pointing to this different emphasis. Here again, however, we have a conceptual affirmation of positivism and not, as is alleged, a reconciliation of the rival postures. The facts are apprehended as positivism would have them be—in a morally neutral fashion.

That the dispute between natural-law theory and positivism is, at root, one about the relationship between fact and value, is, of course, widely recognized. However, it is often stated that what the positivist affirms is the so-called 'is/ought' distinction and that the natural-law theorist denies this. This is getting to the point but it can be very misleading owing to the different ways in which denial of the is/ought distinction can be interpreted. Firstly, it can be interpreted as saying that there is no difference between what is the case and what ought to be the case. Of course there is a difference and natural-law theory does not deny it. Secondly, it can be interpreted as saying that what ought to be the case can be derived from non-evaluative statements about what is the case. This may be true in the case of hypothetical imperatives but it is far from obvious that it holds for categorical (or moral) imperatives, and it is the denial of the latter which is

35 Jenkins, op cit, n 1 *supra*. In Jenkins' recent book, see note 33 *supra*, he pursues this line by saying, *inter alia*, that he finds 'it rather difficult to understand just what it is that the positivists and idealists are arguing about, unless it is words' (210).

standardly attributed to Hume's famous dictum about not being able to derive an 'ought' from 'is'. But whether or not Hume is correct, this is not something which we wish to contest, for we do not think that natural-law theory needs to contest Hume's dictum. Thirdly, it can be interpreted as saying that some 'is' statements (factual statements) are implicitly evaluative, and in particular that social facts contain implicit evaluations. Any derivation of an explicit 'ought' from such an 'is' will therefore really be a derivation of an 'ought' from an 'ought'. The derivation will merely make explicit what is already implicit. It is this interpretation which can be validly attributed to natural-law theory.

The facility with which positivists tend to dismiss natural-law theory is, we believe, due in considerable part to latching on to the wrong interpretation of 'denying the is/ought distinction' and attributing this to natural-law theory. This mis-attribution will certainly account for the fact that MacCormick and Raz (to cite just two examples), in passages considered earlier in this paper, seem to think that they have a conclusive refutation of natural-law theory in the fact that what is claimed to be law ('law' in their terms) very often, as a matter of fact, does not coincide with what 'the law' morally ought to be.

All of this is, however, a bit cryptic. What exactly does it mean to say that social (legal) facts are implicitly evaluative?

In our earlier article 'Law as a Moral Judgment *vs* Law as the Rules of the Powerful'[36] we argue that if, as is generally supposed, the facts of law are facts of practical reason (or, in more familiar terminology, an understanding of 'the internal point of view' is essential for our understanding of legal facts) then the question arises, 'What is the relationship between reasoning in moral terms and practical reasoning more generally?' According to Hart the form of practical reasoning which is essentially related to law need only be contingently moral, it can also be non-moral. This is strikingly revealed in his analysis of legal authority in terms of voluntary obedience to the lawgiver and not as something which necessarily involves a judgement about the moral rights of the lawgiver to make law or about the moral correctness of what he promulgates as law.[37]

If, however, moral principles can be shown to be implicit in the framework of practical reason or even if it can be shown that no practical point of view can be adopted without committing oneself to a moral point of view, then it will follow that no practical reasons can be adequate as reasons unless they are morally circumscribed. As Finnis maintains, the morally correct set of facts will be a central case against which our descriptions, evaluations and explanations will have to proceed.[38] Social facts (all facts which are essentially related to practical reason)

36 See n 1 *supra*.

37 See Hart, op cit, n 2 *supra*, 198–199.

38 See Finnis, op cit, n 1 *supra*, especially Chap 1. Finnis' argument is not, however, that practical reason presupposes moral principles/reason, but that the viewpoint of moral reason is the practically (morally) significant one within practical reason, and we do not believe that this will secure natural-law theory.

will have to be seen as having an ideal content. This is to say that their existence can only be realized when they meet ideal conditions. Whatever exists without meeting these conditions will be a fact but one which represents itself as something other than that which it really is.

This is still rather dark but perhaps we can illuminate a little if we disentangle two crucial ideas at the bottom of this discussion. First, there is the idea that social facts are concept-neutral, this being the idea propounded by Williams-type sceptics and disputed by ourselves. But what precisely is the nub of this dispute? Suppose, for example, that an IRA bomb man blows up some English soldiers in Northern Ireland. The *physical* facts, here, are clear enough but what are the *social* facts? Some might say that this is a case of murder, others that it is a killing for political purposes or a liberating act. The sceptic, it seems, wants to say that the social facts are the brute facts of the killing and that such social facts remain unaffected by our *ex post facto* characterization of the situation. Thus, argues the sceptic, the social facts are not altered by calling the killing a murder, or a political killing, or anything else for that matter. We, on the other hand, hold that the social facts are constituted by the concepts we employ over and above the raw physical situation. In our view, the sceptic is in danger of reducing social facts to simple physical facts. Hans Kelsen, it seems to us, makes the sound point that external appearances alone do not yield the distinctively legal facts.[39] External appearances do not tell us whether *A*'s killing *B* is a murder or a State execution, whether *A* is making a valid contract, whether this group of people are legislating a new rule or whatever. Similarly, external appearances alone do not yield the distinctively cultural facts: a purely physical account of the situation will not tell us, for instance, whether this activity is a cricket-match or a rain-making ceremony. Thus, wherever we are seeking to identify the distinctively social facts we see no plausible basis for asserting that such social facts are concept-neutral. Secondly, there is the idea that even if social facts are not concept-neutral, nevertheless they are value-neutral. This is where, we suggest, positivists and natural-law theorists join issue. Whereas positivists conceive of the social facts associated with law in morally neutral terms, natural-law theorists conceive of such facts in morally dependent terms. These rival conceptual frameworks yield different sets of social facts, not (as the sceptic would have it) merely different classifications of the same social facts. In a nutshell, then, the core of the positivism/natural-law debate is value-neutrality, the core of the debate with the sceptics concept-neutrality.

To round off our discussion we can return to the sceptic's claim that the social facts gathered under one conceptual scheme can be translated without factual alteration into the language of a different conceptual scheme. This follows, of course, from the sceptic's epistemology being such that concepts do no epistemological work: our direct experience of the social world yields the social facts, which facts are then assembled into whichever conceptual classifications we choose to employ. If positivists and natural-law theorists are to have a significant

39 See Kelsen, *Pure Theory of Law* (Berkeley, 1967) 3–4.

theoretical debate they must reject the sceptic's epistemological position and insist that the particular concepts employed structure our identification of the social facts. From this it will follow that there is no translation from positivism to natural-law theory. Certainly positivists and natural-law theorists can agree that the *word* 'law' shall, for the purposes of the debate, be used to refer to 'the rules of the powerful claimed to be law', or something of the sort. However, from here on the positions diverge in theoretically significant ways. For the positivist, the stipulated social phenomena are all phenomena of one kind: each particular rule of the powerful claimed to be law is, for the purposes of social science, exactly the same kind of social fact as any other such rule. The natural-law theorist, however, employs moral criteria here with the result that, potentially, there are two different sets of social phenomena, two distinct kinds of social facts in play. Thus, for the natural-law theorist, although there is a superficial external similarity between rules claimed to be law, the social facts correctly understood might reveal that only some of these rules are law; the remainder will be social facts of a different order, non-law. To say that notwithstanding these conceptual discriminations the social phenomena are 'basically' the same is about on a par with saying that there is really no difference between payments by way of compensation and payments by way of fine since in both situations the court orders a party to pay over a sum of money.

We can summarize the central strands in our position in this way:

(1) legal facts are a category of social facts;
(2) knowledge of social facts is not given directly and exclusively through experience but only through experience working under a particular conceptual regime, or in other words, social facts are not concept-neutral;
(3) a genuine debate between positivism and natural-law theory can operate where the common assumption is that social facts are not concept-neutral but there is a dispute about whether social facts are morally-neutral;
(4) the core of natural-law theory is that social facts are concept-dependent and value-dependent; and
(5) the critical focus of the dispute is whether or not practical reason in general presupposes moral reason.

Two final points should be made. First, although we have distanced ourselves from the Williams-type of sceptic (who sees the theoretical debate as a verbal quibble) there is another sceptical position from which we would have to dissociate ourselves if space permitted. This is the epistemological view that social facts are concept-dependent but that in the final analysis there is no way of arbitrating between rival conceptual schemes; different conceptual schemes simply yield different knowledges of the social world. Such a position does not deny the importance of constructing conceptual schemes but it would have to deny any significance to a debate between protagonists of rival concepts of law as to their supposed theoretical superiority. In our view, this epistemological relativism is as mistaken as Williams-type scepticism. Secondly, there is some

reason for optimism—at least, amongst natural-law theorists—about the possibility of cashing the crucial claim that practical reason presupposes moral reason. For there are numerous arguments to be found in contemporary philosophy of ethics which attempt to show that moral principles or at least a moral point of view is presupposed by practical reason, most notably the arguments presented by Alan Gewirth in his *Reason and Morality*.[40] These are by no means uncontroversial, but whether or not they are valid they cannot be dismissed by a simple appeal to Hume or other orthodoxies of analytic philosophy. And whether or not they are valid the issue is certainly not a quibble. We must therefore conclude that the dispute between natural-law theory and positivism is conceptually significant.

(*b*) *Is the debate between natural-law theory and positivism practically significant?*

Even if it is conceded that the debate between natural-law theory and positivism is conceptually significant, it may be contended nevertheless that the dispute is trivial from a practical point of view. The argument would run in the following form:

(1) since neither natural-law theory nor positivism is tied to any specific ethical position there would be nothing in principle to prevent rival conceptual protagonists holding an identical view of ethics; in which case

(2) there would be no necessary practically significant disagreement between such conceptual rivals.

Is the first step in this argument sound? No one suggests that positivism is tied to any particular ethics; but what about natural-law theory? We have said earlier that, as things stand, natural-law theory can have any ethics. For, in the present state of the debate, a natural-law theory simply has to assert a necessary conceptual connection between law and morality. Suppose, however, that we are correct in our contention that the crux of the natural-law/positivism debate is to be found in the relationship between practical and moral reason; and suppose, further, that Gewirth is correct in arguing that practical reason not only presupposes moral reason in general but also specific moral principles (that is, the practical actor cannot without contradiction deny the existence of specific duties towards other actors). On these suppositions it would follow that a *tenable* natural-law theory would be logically committed to Gewirthian egalitarian ethics. Even this, however, would not undermine the first step in the argument presently under consideration for none of this ties positivism to any particular ethics. The position remains not only that a positivist *can* hold any ethics (even Gewirthian

40 Gewirth, *Reason and Morality* (Chicago, 1978). Gewirth argues that the supreme principle of morality is the Principle of Generic Consistency (PGC), namely: 'Act in accord with the generic rights of your recipients as well as of yourself' (ibid, 135). This is very similar to the rather more familiar Dworkinian ideal that one should treat others with equal concern and respect, but is more specific in that the features which should be treated equally are indicated.

ethics) and still be a positivist without any semblance of contradiction, but also that there is a standing possibility of conceptual rivals sharing identical ethics.

What, then, of the second step in the argument? First, we can dispose of a red-herring. Somewhat obviously, if we compare a natural-law theorist who holds ethics *A* with a positivist who holds ethics *B* then, other things being equal, there will be a difference (of practical importance) between their positions. But the difference will not be attributable to the fact that one is a natural-law theorist whereas the other is a positivist. It will be due simply to the fact that they hold different views on ethics.

If, therefore, we are to show that there is a necessary practical difference between natural-law theory and positivism our test case must be one where the protagonists share the same view of ethics (in substance at any rate, even if not in their methodology for justifying doing so). If there is a necessary practical difference between natural-law theory and positivism then it must be shown that despite this axiological coincidence positivism and natural-law theory are committed to different judgments about what are desirable and permissible institutions and rules for the enterprise of subjecting human conduct to the governance of rules. By definition there cannot be a necessary difference at the level of ethical principle. Nevertheless, there could be differences once the protagonists attempted to operationalize their common ethical guidelines. For example, suppose that utilitarianism was the shared ethical baseline, but whereas one party believed that man's essential nature is to be aggressive and competitive the other party took the view that man is by nature sociable and creative. These different theories of human nature in combination with utilitarianism could quite possibly generate different views about the shape and substance of an ideal legal system. Again, though, any differences generated would be due to the protagonists' theories of man rather than their concepts of law. Strictly speaking, therefore, our test case must be one where the protagonists' theoretical premises are identical apart from their holding different concepts of law.

We suggest that under these test case circumstances the protagonists' practical attitudes would yield no necessary difference. On the contrary, their practical attitudes would necessarily be the same. Thus, the second step of the argument, like the first, is sound.

This implies that, despite its theoretical significance, the debate between positivism and natural-law theory is practically trivial. But this implication is too quick. No *necessary* practical difference is not at all the same thing as no practical difference, so we must turn our attention to different assertions about a practical difference.

V

A weaker claim about a practical difference between natural-law theory and positivism abandons any attempt to establish an entailment between particular concepts of law and particular attitudes or views; rather, it settles for some looser

association or connection. The weaker claim may run in at least three different forms, namely:

(a) The espousal of natural-law theory has been regularly associated with different political and moral views or attitudes from the espousal of positivism (the 'conjunction thesis').

(b) There are reasons, located in the structure and mechanics of society, why natural-law theory should tend to promote different political and moral views or attitudes from positivism (the 'tendency thesis').

(c) Natural-law theory is compatible with political views etc with which positivism is not (and/or vice versa) (the 'compatibility thesis').

(*a*) *The Conjunction Thesis*

Positivists can no doubt point to many natural-law theorists who have held reactionary political views. Alf Ross, a leading positivist, makes just this claim:

> [N]atural law in history has primarily fulfilled the conservative function of endowing the existing power relations with the halo of validity. Natural law is first and foremost an ideology created by those in power . . . to legitimise and reinforce their position of authority.[41]

However, in the same breath, Ross concedes that '[p]olitically natural law can be conservative, evolutionary or revolutionary'.[42] Friedrich Kessler, while agreeing that natural-law has a variety of potential political conjunctions, takes a different view from Ross about the historical weight being on the reaction side:

> Natural law theories have often been used to legitimise the established order, but not less frequently to support claims for political and social changes.[43]

Positivists, it seems, would be hard-pressed to find a consistent conjunction between natural-law and some particular political view, whether that view be extreme or otherwise. More to the point, natural-law theorists can point to positivists with reactionary, liberal and revolutionary tendencies. The arguments of Austin against natural-law theory have a distinct flavour of conservatism about them, even if the general tenor of his writings is in a liberal direction. Marxism, although Marxists will generally claim to have their own special position which cannot be classified as positivist or natural-law theory, can, if the division between these two views depends entirely on the impact of views on the doctrine of the separation of fact and value on the concept of law, be divided into positivist

41 Ross, *On Law and Justice* (London, 1958) 264.

42 Ibid, 263.

43 Kessler, 'Theoretic Bases of Law' 9 *University of Chicago Law Review*, 98, 99 (1941–42).

Marxism[44] and natural-law theory Marxism. Positivism within Marxism has not prevented revolutionary preaching and endeavour.

Apart from the haphazard pattern of conjunction which is discernible (no regular pattern emerging) this kind of attribution is merely *ad hominem.* If anything is to be made of it then a regularity must be discerned, this regularity explained, or else, in the absence of regularity in the past or present, it must be explained why a regularity should be expected in the future.

Thus, if the conjuction thesis has any significance it can only be in subordination to a tendency thesis.[45]

(*b*) *The Tendency Thesis*

Positivists, who do not wish to claim that natural-law theory *entails* iniquitous views, probably wish to allege at least a *tendency* towards iniquitous views. This has already been noted and an example of this attribution has been cited from

44 The 1949 textbook on the *Theory of the State and Law* published by the Institute of Law of the Academy of Sciences of the USSR defines law in a hard-nosed positivistic fashion as follows: 'Law is a combination of the rules of behaviour (norms), established or sanctioned by state authority, reflecting the will of the ruling class—rules of behaviour, whose application is assured by the coercive power of the state for the purpose of protecting, strengthening and developing relationships and procedures suitable and beneficial to the ruling class' (cited by Hazard in his Introduction to *Soviet Legal Philosophy* (Twentieth Century Legal Philosophy Series: Volume V) (Cambridge Mass., 1951) xxxvi).

45 Suppose that it were conceded that the English natural-law theorists of the eighteenth-century were dogmatic conservatives, that Bentham used positivism as a way of exposing such dogmatism, and that English positivists from Bentham through to Hart have combined their positivism with an open-minded reforming attitude. What implications would such concessions have for the weaker thesis?

So far as the conjunction thesis is concerned it would be of no significance that English natural-law theorists at a particular time happened to hold conservative views. At other times and in other places, as we have said in the text, natural-law theory has been associated with radical political views. However, it might be suggested that the crucial aspect of eighteenth-century English natural-law theory was not so much its conservatism as its dogmatism. Moreover, it might be argued, this contrasts sharply with the reforming spirit of positivism. Whatever truth there may be in this version of the conjunction thesis in the case of England, it is impossible to generalize it. Positivism has not been invariably associated with a critical outlook and natural-law theory has not been regularly paired with a dogmatic attitude (on both points see e.g. the German experience described in text *infra*, 26). So, whether one seizes on the conservatism or the dogmatism of Blackstone and Co., there is no straightforward conjunction to be identified.

Nevertheless, one might think that the English experience is evidence of some kind of tendency to be found in positivism. Maybe there is no general conjunction between positivism and an open-minded reforming attitude, but is there not at least a tendency in this direction? As we argue in the text, this kind of speculation can only be taken seriously if it is grounded in a theory of ideology. In this note suffice it to say that, in principle, natural-law theorists can be just as open-minded (or dogmatic) as positivists, and if Bentham had found eighteenth-century thought dominated by dogmatic *positivists* might he not have turned instead to a critical natural-law position? If so, it has yet to be shown that English positivism has the intrinsic tendencies that the weaker thesis requires.

Hart who, although he speculates that the tendency towards revolution has been overrated,[46] nevertheless alleges a tendency towards reaction. Why, however, does Hart think that this tendency should exist? He provides no empirical evidence that the tendency exists. Furthermore the only mechanism which he provides for expecting the tendency to exist is the attribution of fallacious reasoning to people who will believe the natural-law thesis (viz: the move from 'Only what is moral can be law' to 'Anything called "law" by anyone must be moral'). But, if telling people that only what is moral can be law will make them think that everything called 'law' must be moral, why is this so? Why, in any case, should Hart think that academic pronouncements will have any effect at all on the attitudes of people in society generally? Without answers to these questions what we have is merely the drafting of a logical (in fact illogical) thesis to do service as an explanation of why people will think in particular ways.

Moreover, Hart himself is quick to point out weaknesses of just this kind when natural-law theorists run a tendency thesis against positivism. For example, Hart has no hesitation in finding 'an extraordinary naivete in [Gustav Radbruch's] view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality'.[47] The lesson Hart draws from this is that:

> [T]his terrible history prompts inquiry into why emphasis on the slogan 'law is law', and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere, as with the Utilitarians themselves, went along with the most enlightened liberal attitudes.[48]

But this lesson is double-edged. If Radbruch's speculations are inadequate when positivism stands accused of undesirable tendencies then natural-law theory is entitled to the same due process.

An interesting version of the tendency thesis is presented by J. L. Mackie. Whereas the traditional positivist focus has been on the attitudes of *citizens* operating with natural-law theory, Mackie quite legitimately shifts the focus to the attitudes of natural-law judges:

> The argument of this book therefore has, as a corollary, the rejection of the doctrine of natural-law as a philosophical theory. Whether it is, none the less, a useful fiction is a further question, and one to which no general answer can be given. Where the doctrine is adopted, judges will treat enactments with somewhat less respect, and will attend also to their 'conscience' or their 'reason'. What effects this will have depends upon the current state of these judicial organs, and on the character of the legislatures on which they impose a check. The doctrine may provide a barrier against excesses of governmental policy; it

46 Hart, op cit, n 2 *supra*, 206.
47 Hart, op cit, n 6 *supra*, 617–618.
48 Hart, ibid, 618.

may equally set up obstacles to much-needed reforms; and of course the same operations may be described in both these ways from opposite points of view.[49]

Although Mackie is not using the tendency thesis as an argument to reject natural-law theory—he believes that ethical relativism applies the *coup de grace* to natural-law—it is significant that he thinks that natural-law judges would tend to have different attitudes from their positivist counterparts. In fact he seems to be saying that natural-law judges would tend to operate more along the lines of Llewellyn's 'grand style' of judging whereas, presumably, positivist judges would work more along the lines of Llewellyn's 'formal style'.[50] If Mackie were right about this it would be a tremendously important finding and, on the face of it, a revelation that, in our view, could do no harm at all to natural-law theory. But is Mackie's speculation correct? The truth is that we do not know. Certainly it is not self-evidently correct. For, there is no obvious reason to suppose that positivist judges would suppress their conscience and reason. Any positivist judge who had read Hart would recall that the positivist approach to legal validity does not foreclose consideration of the further question of application. Thus, if the rule was sufficiently iniquitous one would expect even a positivist judge to refuse to enforce it. Indeed, this very point is implicit in Ronald Dworkin's recent discussion of one such iniquitous rule, the Fugitive Slave Acts. About a refusal to apply such a rule Dworkin says this:

> It would not matter if you put your conclusion in the terminology of older natural law theories, and said that the Fugitive Slave Acts were not really law. Or if you used the language of modern positivism, and said that though they were law they were too evil to be enforced. For the important issue is not what you say but what you do . . .[51]

The clear implication of this is that judges who think and speak within different conceptual frameworks can end up acting in precisely the same way. And this seems plausible does it not? However, the nub of the matter is that we are still in the realm of speculation and hunch and until the tendency thesis is anchored in a theory of ideology it can make no real headway. We shall return to this point in a moment.[52]

49 Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth, 1977) 233.

50 See Llewellyn, *The Common Law Tradition* (Boston, 1960).

51 Dworkin, '"Natural" Law Revisited' 34 *University of Florida Law Review*, 165, 187 (1982).

52 It has been suggested to us by Professor P. S. Atiyah that an examination of the rival judicial traditions of England and the USA may provide some evidence in support of Mackie's hypothesis. The suggestion is that

1 The USA's legal/constitutional system is much closer to that required by natural-law theory than its British counterpart (which is closer to a positivistic system).

2 In England judges are brought up in a tradition which requires them to disregard moral objections to bad laws, whereas in the USA judges are constitutionally required to throw out strongly objectionable legislation.

3 There is more 'Judicial Activism' (judges ruling on political and moral principle) in the USA than in England.

continued on page 28

(c) *The Compatibility Thesis*

It is possible to argue that a tenable natural-law theory requires a particular set of attitudes and beliefs about the nature of just rules and institutions, whereas a tenable positivism, though compatible with these views does not actually require

continued from page 27

4 An enculturation hypothesis (members of the legal profession tend to absorb the tradition they are brought up in), or a related selection hypothesis (judges are selected from members of the legal profession according to the degree of enculturation which they display) is capable of explaining (3) on the basis of (2).

5 It is difficult to believe that the existence of the divergent legal traditions owes nothing to differences in legal ideology (natural-law theory *v* legal positivism) which characterize the two jurisdictions.

6 Therefore, a differential impact of natural-law theory and legal positivism may be responsible for different levels of judicial activism.

This suggestion certainly raises a number of interesting questions which require empirical investigation, notably the enculturation and selection hypotheses. It is also in line with our thinking in highlighting the importance of investigating connections between legal ideology and institutional practice and style. However, as it stands the suggestion presents some conceptual difficulties. In particular, how are we to interpret the assertion that the USA's legal system is closer to natural-law theory than its English counterpart?

Does this allege

(a) In the USA judges are taught that to make legal judgments they must make moral judgments, whereas in England judges are taught to avoid moral judgments?

or (b) The USA has a constitution entrenching moral considerations in the law whereas England does not?

If we take (a) then the link between (1) and (2) in the suggestion above becomes a tautology and nothing more than the highly plausible enculturation or selection hypotheses is required to link different levels of judicial activism to differences between natural-law theory and legal positivism. If we take (b) then the suggestion is equally plausible since (b) will lead to (a) on simple and plausible assumptions.

The difficulty, however, is that neither interpretation (a) nor interpretation (b) is entailed by the way in which we have defined natural-law theory *v* legal positivism. The doctrine of the separation of law and morals (characteristic of 'legal positivism' as we wish this position to be understood) does not entail that judges must not make moral judgments when making legal decisions, only that when making legal decisions they are not necessarily making moral judgments. Furthermore, if the doctrine of the separation of law and morals were to entail that judges must not make moral judgments then this would make a critical positivism impossible *by definition*. Also, it is certain that the doctrine of the separation of law and morals does not entail that a legal constitution cannot entrench moral considerations (if it did then positivists would have to say that the USA does not have a legal system). So, whatever the constitutional and practical requirements of natural-law theory, these requirements are not ruled out by legal positivism in our primary sense, and it seems that (1) is false in relation to the way in which we wish 'natural-law theory' and 'legal positivism' to be understood.

This, of course, does not mean that adoption of the doctrine of the separation of law and morals does not create (in certain circumstances) a tendency to treat legal decisions as autonomous from moral judgments in practice. But if this is so, it first has to be established that this is so (despite the lack of entailment) and then explained. (See our discussion of the compatibility thesis for futher elaboration.) In the terms which we are considering the present suggestion begs the question at this crucial point.

them. If one follows Gewirth and uses his argument to justify a natural-law position then it will have to be argued that a legal system must enshrine moral principles within its constitution; that judicial discretion must be limited by these values (indeed that courts must be moral courts) and that agencies of government must be accountable to citizens in terms of these values. There can be no justifiable attempt to separate out from a substantive moral practice a special, autonomous category of 'legal justice' which is purely formal and amounts to no more than impartiality in terms of the dictum 'Treat like cases alike, unlike cases unlike'. Such a 'justice' is no justice at all. Of course there is, in ordinary language usage, a concept of such justice, but this must be taken to show no more than an ideological sedimentation of (false) positivistic attitudes. The legal enterprise must be viewed as one which is organized around values of co-operation and accountability as between rulers and subjects.[53]

A positivist might, of course, regard such an arrangement as highly desirable, in which case he would not run this particular argument against natural-law theory; but there is no logical requirement for him to do so. The positivistic sources thesis entails a view of practical reason which is morally neutral (practical reason does not revolve around moral reason; it contains autonomous moral and non-moral spheres of reason). It entails a view of human personal identity which is again morally neutral (persons have no essences which are defined by their real (moral) interests, inasmuch as human nature is to be defined by a capacity to engage in practical reason). It entails a doctrine of judicial discretion not necessarily limited by specified moral values. The general legal relationship, as Fuller has pointed out, is not a reciprocal one, but is instead hierarchical, 'a one-way projection of authority'.[54] These premises make it possible to interpret the 'impartiality of the law' as 'freedom from the values of a particular group or class' (rather than as accountability to all classes), to present 'the law' as autonomous from political institutions and their requirements, and to see the 'purpose' of law as primarily social control.[55] There is thus the possibility of an ideological gap between positivism and natural-law theory. Positivism may be used to justify arrangements which cannot be justified using tenable natural-law theory.

But if this ideological gap constitutes a practical difference between natural-law theory and positivism, it is only a *formal practical difference.* The existence of the

53 Generally on this theme see Lon Fuller, op cit, n 11 *supra*, Selznick, 'Sociology and Natural Law' 6 *Natural Law Forum* 84 (1961), and *Law, Society, and Industrial Justice* (New York, 1969); also, Duff, 'Legal Obligation and the Moral Nature of Law' *The Juridical Review* 61 (1980).

54 Fuller, op cit, 192.

55 Fuller (op cit, 191–242) wants to argue, it seems, that positivism consists of a number of interrelated premises gravitating around the idea that law is 'a one-way projection of authority' with no special role morality attaching to the law-giver. From here positivists conceive of the law-giver/citizen relationship in terms of managerial direction and this, of course, yields particular practical attitudes towards this relationship. If Fuller's position is that these linkages are actually entailments then he is taking a stronger view than that presented in the text. In fact, he would be arguing for the strong thesis.

gap does not entail that it will be exploited, and the thesis tells us nothing about the material conditions which enable it to be exploited. Like the conjunction thesis, the compatibility thesis needs to be supplemented by an explicated tendency thesis if it is to do any real work in demonstrating that there is a practical difference between natural-law theory and positivism which is of practical significance in the way in which society operates.

Thus, the tendency thesis is, clearly, the key to developing the weaker claim. To explicate it requires, however, nothing less than the development of a full-scale theory of legal ideology. Before we start saying that to use a natural-law theory (or positivism) will lead people to think and act in particular ways we need to know how they do think, how this is related to how they act, how they come to think as they do, and, in particular, how legal rhetoric arises and affects these things. An appeal to Hart's second criterion for choosing between natural-law theory and positivism is nothing but empty rhetoric without such a theory.

Assuming that we are correct in isolating the tendency thesis as the key to the weaker claim can we be a little clearer as to the way in which a theory of ideology could support this thesis? Our underlying point is that the tendency thesis as stated in the abstract lacks both social and ideological context. Let us suppose that the abstract statement of the tendency thesis runs as follows: if X holds this particular concept of law then this will tend towards X holding such and such a practical viewpoint. It will be noticed that this version of the thesis claims only a relational tendency *within* X; it makes no claim about the possibility that X's holding a particular concept of law may tend towards persons *other than* X holding particular practical viewpoints. So we are dealing with the tendency thesis in a very simple form. In what respects is this abstract statement of the thesis theoretically undeveloped?

First, the tendency thesis presupposes that one's concept of law tends to influence one's practical attitudes in a more or less direct cause and effect manner. It is almost as though the formation of a particular idea about the concept of law triggers off a set of practical viewpoints. This raises a whole host of questions. Are our ideas related in such a mechanical push-pull fashion? If so, is our law idea the antecedent cause of our practical attitudes? Are these relationships the work of a rational or an irrational mind? If they are the work of a rational mind is this tantamount to resurrecting the strong claim? If the tendency only operates in an irrational mind how drastically does this limit the scope of the thesis?

Secondly, although the simple version of the tendency thesis does not claim anything about the possible effects that X's ideas may have on other persons, it cannot escape the possibility that other persons' ideas and rhetoric may interact with X's ideas in a significant way. Such interactions could be highly important and they badly need to be theorized. This also raises tricky questions about the effective cause of X's practical attitudes. Suppose, for instance, that X is a natural-lawyer, that he believes that he should defer to the moral judgments of those in power, and that he believes that those in power are natural-lawyers, whereas, in fact, they are disingenuous positivists. The net effect of this is that X

displays a reactionary attitude towards the rules of the powerful, such rules having been subjected to no critical moral scrutiny. No doubt academic positivists would bemoan such a situation, but the interesting question of causation here is whether the effective cause of *X*'s undesirable reactionary attitude is his natural-law concept of law, his deference to the moral judgments of others, or his mistaken idea that those in power are natural-lawyers (or, for that matter, the positivism of those in power).

A third set of questions is generated by reflecting upon the basis of one's practical attitudes. As Hart notes, our practical attitudes can be a mixture of uncritical habit or tradition and critical prudence or morality.[56] Is the tendency thesis presupposing critical or uncritical practical attitudes? If it assumes a context of uncritical attitudes how much scope does the thesis retain? If it assumes a context of critical attitudes we are back to our earlier questions about rational and irrational minds.

It will be apparent even from these sketchy comments that the development of a theory of legal ideology is a truly major task. In our present state of ignorance it is anybody's guess what connections such a theory would reveal. The only certainty, in our view, is that until we have theorized the tendency thesis in the way outlined above we have to remain agnostic about the weaker claim.

We can conclude our discussion by returning to the point at which we began, Hart's statement of the criteria for making a reasoned choice between natural-law theory and positivism. Although we believe that the ultimate reason for choosing between natural-law theory and positivism is not the moral reason but the reason of theoretical superiority, some protagonists, as we noted at the outset, think that the key to the resolution of the debate—and a resolution in favour of positivism—lies in Hart's test of practical moral superiority. We have argued in this paper that with respect to the moral test the positivist strong claim is false and that any kind of weaker claim cannot be cashed without a supporting theory of ideology. What we have not said, but could have said, is that we believe that in order to negotiate the weaker claim positivists will anyway eventually be driven back to the theoretical question.[57] If this and our other contentions are correct

56 See Hart, op cit, n 2 *supra*, 198.

57 The reason why the positivist weaker claim runs back into the theoretical question is as follows. Positivists argue under the weaker claim that natural-law theory tends towards undesirable attitudes towards the law. Whether it be natural-law citizens who allegedly have submissive or revolutionary attitudes or natural-law judges who allegedly have similar attitudes, in each case the attitude is specifically centred on law. In other words, the structure of the weaker claim is that possession of a particular concept of law has a tendency to generate particular undesirable attitudes towards the law. Yet we cannot test out this claim unless we adopt a particular concept of law to identify the phenomena towards which natural-law theory supposedly cultivates undesirable attitudes. But, which concept of law? We are back, it seems, to the theoretical question.

There are a number of ways in which the positivist might think that there is a response to this difficulty. First, why not develop a general theory of ideology and see what it yields? There are,

continued on page 32

then Hart's test of practical moral superiority is not the short-cut that some suppose. For, the positivist strong claim is false and no weaker claim can work without a theory of ideology; the theory of ideology may reveal no practical significance between rival concepts of law, or (even worse from a positivist viewpoint) a practical significance that shows natural-law theory to be superior; and, anyway, none of this may be viable until the theoretical question has been settled, in which case no one will be interested any longer in a short-cut.

continued from page 31

though, two problems with this. One is that the construction of a general theory of ideology is a social scientific endeavour and, thus, the inquirer should employ those concepts that are generally superior for social scientific purposes. In other words, the general theory of ideology should build on the theoretically superior concept of law. The other problem is that so long as the theory of ideology remains general it cannot have much purchase on the particular thesis advanced under the weaker claim. Sooner or later the general theory has to be applied to attitudes to law and we are back to square one.

A more promising response, perhaps, is to set up a hypothesis for empirical validation, such hypothesis eliminating all references to law. For instance, we should test out a tendency between natural-law theory and particular attitudes towards those in power. Suppose, then that such research revealed some connection between natural-law theory and revolutionary or submissive attitudes/reactions to the rules of those in power. What claim would this evidence support? It would not, we suggest, clinch the positivist weaker claim, for it would be unclear whether the attitudes/actions were undesirable. What the positivist weaker claim needs to show is that natural-law theory tends to generate submissive attitudes to the immoral powerful and/or revolutionary attitudes towards the moral powerful. A simple connection between submission/revolution and the rules of the powerful is not enough for the positivist weaker claim. Neither would such a connection establish the basic weaker claim that particular concepts of law tend towards particular (different) practical attitudes. For, the evidence that natural-law theory cultivates a distinctive attitude towards the rules of the powerful presupposes that 'the rules of the powerful' represents a unitary social phenomenon towards which one can have a practical attitude. Yet this clearly begs the theoretical question.

A third response, drawing on situation ethics, argues that we have missed the point about the undesirability of revolutionary or submissive attitudes. The point is that these are patterned attitudes involving the loss of moral autonomy. Moreover, natural-law theory suffers inescapably from this defect for its practitioners are slaves to the ethics of their systems. The short answer to this is that natural-law theory, in principle, can have any kind of ethics—even situation ethics—and so this response is an *ad hominem* claim. Admittedly, there would be a serious point here if the only tenable versions of natural-law theory were non-situationist but that is a bridge to be crossed at some future date.

No doubt a good deal more could be said about the involvement of the theoretical question in attempts to cash the weaker claim. But, we suggest that the burden is now with the positivists who wish to engage natural-law theory on this front.