Three Separation Theses

James Morauta

Abstract. Legal positivism's "separation thesis" is usually taken in one of two ways: as an analytic claim about the nature of law—roughly, as some version of the *Social Thesis*; or as a substantive moral claim about the value of law—roughly, as some version of the *No Value Thesis*. In this paper I argue that we should recognize a third kind of positivist separation thesis, one which complements, but is distinct from, positivism's analytic and moral claims. The *Neutrality Thesis* says that the correct analytic claim about the nature of law does not by itself entail any substantive moral claims about the value of law. I give careful formulations of these three separation theses, explain the relationships between them, and sketch the role that each plays in the positivist approach to law. [A version of this paper is published in *Law and Philosophy* (2004).]

1. Introduction

Everybody knows that legal positivists hold that there is some kind of "separation"— some kind of distinction—between law and morality. But what exactly is this positivist *separation thesis*? In what way, according to legal positivism, are law and morality distinct?

There are many possible answers to this question. Legal positivism is standardly thought of as a cluster of three kinds of claims: an *analytic claim* about the nature of law; a *moral claim* about law's value; and a *linguistic claim* about the meaning of the normative terms that appear in legal statements.[1] I won't have anything to say here about the linguistic issue. My interest is in positivism's analytic and moral claims, for it is versions of these that are most often referred to as "separation theses".

Here are two standard formulations:

> *The Social Thesis*. What counts as law in any given society is a matter of social fact. (Positivism's analytic claim.)
>
> *The No Value Thesis*. Laws and legal systems do not necessarily have any moral value. (Positivism's moral claim.)

[1] The origins of this tripartite view of positivism are in Raz 1979, ch. 3.

These formulations are only rough ones, and they will be explained and refined later. Nevertheless, I think we can agree that both claims can be regarded as kinds of separation theses. They tell us something about the distinctions between law and morality.[2]

In this paper I will argue that there is a third kind of positivist separation thesis, one which complements, but is distinct from, the various analytic and moral claims held by positivists. I call it the *Neutrality Thesis*. The Neutrality Thesis is concerned with the *relationship between* analytic and moral claims. Roughly, it says that the correct analytic claim about the nature of law does not by itself entail any substantive claims about the moral value of law. This Neutrality Thesis, together with the Social and Value theses, form the "three separation theses" of my title.

The Neutrality Thesis has been surprisingly neglected in recent debates. I won't say that it has been *missed*. The basic issues aren't particularly novel, and related ideas have been explored before, for instance by Joseph Raz.[3] But it hasn't been given the kind of explicit and systematic attention that it needs. That is what I aim to do here: I want to give a clear account of the Neutrality Thesis and its place in the positivist approach to law. This is a modest task, but it is necessary for a proper understanding of positivism. We will see, for instance, that the Neutrality Thesis is one of a small number of claims that are common ground between all positivists. (In fact, so far as I can tell there are only two such points of common ground. The other is a weak analytic claim, what in Section 3 I call the "Minimal Social Thesis".)

The plan of the paper is as follows. To set the stage for the Neutrality Thesis, we first need reasonably precise formulations of the Social and No Value theses. Sections 2 and 3 deal with the Social Thesis, and Section 4 deals with the No Value Thesis. While the work in these sections is necessary for what follows, the issues have independent interest. In Section 5 I set out the Neutrality Thesis and explain why it is distinct from the Social and No Value theses.

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[2] For examples of the identification of the separation thesis with a version of the Social Thesis (or more generally, with some analytic claim about the nature of law) see Coleman 1982; Himma 2002, pp. 135-136; Leiter 1998, pp. 534-535. Those who appear to identify the separation thesis with the No Value Thesis (or more generally, with some moral claim about law's value) include Holton 1998, pp. 609, 614-616; Lyons 1982 (the "expanded separation thesis"); Raz 1985, pp. 311-312. There are numerous other examples. Just what it means to say that the separation thesis is an "analytic" or a "moral" claim will be explained below.

[3] See esp. Raz 1975, pp. 163-170; Raz 1979, pp. 38-89.

Section 6 says a bit more about the place of the Neutrality Thesis in the positivist framework, and Section 7 sums up.

One last preliminary point. The separation thesis is sometimes described as the claim that there are no "necessary connections" between law and morality. Unfortunately, that could mean almost anything. Moreover, on some interpretations the claim is clearly false, and one that no sensible legal positivist should accept.[4] I think legal philosophers should jettison this confusing talk of "necessary connections", and focus instead on more specific and carefully formulated claims about the relations between law and morality. The three separation theses that I discuss are examples.

2. Analytic Claims

Let's start with the Social Thesis. The Social Thesis is an analytic claim about the nature of law. I'll explain it in two steps. First I'll explain what an analytic claim about the nature of law is. That is the job of this section. With this account in hand, I'll then turn in Section 3 to look at the particular analytic claim made by the Social Thesis.

For the purposes of this paper, I will take an analytic claim about the nature of law to be *a general statement of the truth-conditions for legal propositions*. This needs a bit of elaboration.

First, what are legal propositions? I will take them to be statements about what the law of a particular legal system requires, prohibits or permits people to do.[5] Where A is a legal system and F some deontic norm (a norm of requirement, prohibition, permission, etc.), legal propositions are any propositions that have the following form:

It is the law in A that F

Examples are: "It is the law in the United Kingdom that people must drive on the left hand side of the road", and "It is the law in Australia that people must swim every day". (There are false and well as true legal propositions.)

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[4] John Gardner (2001) and Leslie Green (2003) have recently made this point.

[5] For a fuller account, distinguishing for instance between pure- and semi-legal propositions, see Raz 1994, ch. 8, esp. pp. 181-182. My legal propositions roughly what Dworkin calls "propositions of law" (Dworkin 1986, p. 4).

Second, what is a general statement of the truth-conditions for legal propositions? I will take it to be a statement—call it an *analysis-statement*—of the following form:

(A) For all S and p: It is the law in S that p if and only if C

where "S" ranges over legal systems and "p" over deontic norms, and where "C" is a description of the fact or facts that make legal propositions true—or as I will usually put it, borrowing some contemporary philosophical jargon, the facts that are the *truthmakers* for legal propositions.

Note that analysis-statements are *general* statements. They purport to give the truth-conditions for any legal proposition, regardless of what legal system or deontic norm the proposition is about. (That is the effect of the initial quantifiers.) For instance, consider the two propositions mentioned above: "It is the law in the United Kingdom that cars must drive on the left-hand side of the road", and "It is the law in Australia that people must swim every day". An analysis-statement will give truth-conditions for both these legal propositions, as well as for any other legal proposition.

Couldn't it be vague or indeterminate whether or not some deontic norm is part of the law of a particular legal system? Yes it could. Doesn't that undermine the project of giving general statements of the truth-conditions for legal propositions? No it doesn't—so long as we're flexible enough about the form that the description of the legal truthmakers can take. For one thing, we can allow the description to be such that it is sometimes vague or indeterminate whether or not the truthmaker obtains. If it can be vague or indeterminate whether or not some deontic norm is part of the law of a particular legal system, then the correct analysis-statement will just have to reflect that fact.

There are interesting questions about how one goes about defending a particular analysis-statement. One traditional view is that analysis-statements are to be defended on purely conceptual grounds—via some kind of analysis of the concept of law and related concepts. However, exactly what it means to do conceptual analysis, and how much we can hope to achieve by such analysis, are hard and hotly disputed questions; and we don't need to take a view on these issues here.[6] For what it's worth, it seems to me more likely that there are a

[6] An example of an alternative framework is the naturalist approach to legal philosophy defended in recent times by Brian Leiter (see Leiter 1998, 2002). Leiter has suggested that the claims of exclusive positivists (on which see Section 3 below) might be defended on

variety of considerations that are relevant to assessing analysis-statements, not all of which are considerations about the content of our concepts. But as I say, we don't need to settle these issues here. For our purposes, all we need is that there *are* truth-conditions for legal propositions, and that analysis-statements are better or worse to the extent that they accurately capture those truth-conditions.

3. The Social Thesis and Its Rivals

The framework just developed enables us to state the distinctive positivist analytic claim—the Social Thesis—and also to explain how it differs from the analytic claim offered by positivism's traditional rival, natural law theory.

3.1 The Social Thesis

I said earlier that the Social Thesis was the claim that "What counts as law in any given society is a matter of social fact". We can now put this slightly differently.

The Social Thesis is the claim that *the truthmakers for legal propositions are social facts*: facts about the existence and history of social institutions, the behaviour and attitudes of members of the society, etc.[7] The key contrast here is with *moral facts*: facts about what is morally valuable and non-valuable, right and wrong, required and forbidden, etc. Unlike moral facts, social facts are ones whose existence can be determined without engaging in moral reasoning.[8] So if a legal proposition has a social fact as its truthmaker, one can determine whether the proposition is true—hence, one can determine whether the relevant norm is part of the law of the relevant legal system—without engaging in moral reasoning. (Positivists often contrast social facts not just with moral facts but also with other kinds of evaluative and/or normative facts. I will be focusing on the contrast with moral facts, but much of what I say can be applied with suitable modification to the other cases.)

The Social Thesis is not itself a complete analysis-statement. Rather, it is a thesis about the *general type* of facts that are the truthmakers for legal propositions. Different positivists pick

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grounds other than the traditional conceptual ones advanced by Raz and others. If he is right, perhaps something similar could be said about the analysis-statements that I consider here.

[7] This description of social facts borrows from Holton 1998, p. 609.

[8] For this characterisation of social facts see e.g. Raz 1979, pp. 39-40. Raz elsewhere (1985, p. 296) uses the broader terminology of "evaluative" rather than "moral" reasoning.

different social facts, the different choices producing different analysis-statements. But common to all of them, and what makes them all positivist analysis-statements, is the view that legal truthmakers are social facts. When I say that positivists endorse the Social Thesis, or that the Social Thesis is positivism's analytic claim, what I mean is that a positivist analysis-statement is one that conforms to the Social Thesis: it is one according to which the legal truthmakers are social facts.[9]

3.2 Modal Complications

The broad statement of the Social Thesis just given needs to be refined, for it obscures a major dispute within positivism about the modal force that should be given to the thesis. In presenting this dispute, it's easiest to focus on a particular positivist analysis. The best-known analysis is the one given by Hart in *The Concept of Law* (1961). From now on, when I need to discuss specifics—not just in this section but throughout the paper—I will assume that positivists accept Hart's basic analysis. (This is anyway true of nearly all contemporary positivists, including me.)

Hart's analysis is this:

(H) For all S and p: It is the law in S that p if and only if p is validated by the rule of recognition R in S.[10]

Think of the rule of recognition R in a legal system S as a rule which pairs each deontic norm p with some fact R(p). (Different legal systems will have different rules of recognition, and

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[9] Cf. Finnis 1980 for a self-described "natural law theorist" who appears to accept a version of the Social Thesis. As I see it, if Finnis accepts the Social Thesis, then he *is* a positivist on the analytic issues. If he is also a natural law theorist, that is in some other sense. I should mention here that although I won't be worrying too much about the differences between (i) endorsing the Social Thesis and (ii) endorsing some particular analysis-statement which conforms to the Social Thesis, strictly speaking these are different things (a parallel distinction holds for natural law theories). If we take the Social Thesis as a general claim about the nature of legal truthmakers—a constraint on the form of an acceptable analysis-statement, if you like—then one might well endorse the Social Thesis without yet being committed to any particular positivist analysis. Indeed, positivists often give arguments for the Social Thesis which are neutral in this way.

[10] Hart also requires that the norms validated by the rule of recognition be "generally obeyed" (Hart 1994, p.116). But we needn't worry about that aspect here.

hence different pairings.) A norm p is validated by a rule of recognition R just in case the fact that R pairs it with—R(p)—exists.

To illustrate, suppose the rule of recognition in Middle Earth's legal system is this: For all p, it is the law in Middle Earth that p if and only if Gandalf says that p. This rule of recognition pairs each norm p with the fact that Gandalf says that p; a norm p is validated by this rule just in case Gandalf says that p.[11]

According to this positivist picture, the truthmaker for a legal proposition of the form "It is the law in S that p" has a complex structure, consisting in two related facts. The first fact is the existence of a rule of recognition R in S. Call this the *primary truthmaker*. The second fact is the existence of the fact R(p) which S's rule of recognition R pairs with the norm p. Call this the *secondary truthmaker*. The primary and secondary truthmakers taken together constitute the full truthmaker for the legal proposition. They are individually necessary and jointly sufficient for the truth of the proposition.

Hart argued that the primary truthmakers for legal propositions are social facts. A society's rule of recognition is constituted by a certain distinctive pattern of behaviour and attitudes among the members of the society. Very roughly, it is that rule which: (1) the legal authorities (especially the adjudicative institutions) in fact use to identify the laws—or at least, which picks out the same set of laws that the authorities pick out;[12] and which (2) is accepted by the authorities, an acceptance which they express by taking up the "internal point of view" toward the rule. Taking the internal point of view toward a rule means: demanding conformity with the rule; criticising departures from the rule; and believing that such uses of

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[11] As this example shows, it's natural to formulate rules of recognition using statements with a form similar to what I'm calling analysis-statements (on this point see also Coleman 1982, p. 141). Nevertheless, we shouldn't confuse these two sorts of statements. An analysis-statement specifies the truth-conditions for any legal proposition, whatever legal system it belongs to. It has the form: "For all S and p: it is the law in S that p if and only if...". By contrast, a statement of some particular rule of recognition specifies the truth-conditions only for the legal propositions of *that particular legal system*. It has the form: "For all p: it is the law in A that p if and only if…", where "A" is not a variable but a name for a particular legal system. Statements in this second form lack the generality required for analysis-statements. They don't tell us anything about the truth-conditions for legal propositions of systems other than A.

[12] On the reasons for the qualification, see Coleman's distinction between the epistemic and semantic senses of the rule of recognition (e.g. Coleman 1982, p. 141).

the rule, by oneself and others, are morally justified.[13] But believing that a use of a rule is morally justified does not entail that it *is* morally justified. Facts about use and belief are social not moral facts. So, we can ascertain whether this pattern of behaviour and attitudes exists in a society without engaging in moral reasoning. Whether a society has a rule of recognition, and what its content is, are matters of social fact.

This much is common ground among positivists. The differences emerge over the nature of the secondary truthmakers. In the positivist picture, the criteria set out in a legal system's rule of recognition determine which facts are the secondary truthmakers in that system. The dispute is about whether there are any constraints on the kinds of criteria that are possible—and, hence, on the kinds of facts that can be secondary truthmakers.

If the rule of recognition R for a legal system S contains only non-moral criteria, then the secondary truthmakers in S will consist exclusively of social facts; so, given that the primary truthmakers are also social facts, the legal truthmakers (simpliciter) in S will consist exclusively of social facts. By contrast, if R contains moral criteria, then the secondary truthmakers in S will include moral facts; so, the legal truthmakers (simpliciter) in S will include moral facts.

All positivists agree on this: there is a possible legal system whose rule of recognition contains only non-moral criteria; there is a possible legal system whose legal truthmakers consist exclusively of social facts. Let's call this the "Minimal Social Thesis". What positivists disagree about is whether that is necessarily the case—the case in any possible legal system.

Exclusive (or hard) positivists say that it is. For any possible legal system, the rule of recognition in that system contains only non-moral criteria; for any possible legal system, the legal truthmakers in that system consist exclusively of social facts. *Inclusive (or soft) positivists* say that it is not. There is a possible legal system whose rule of recognition contains moral criteria; there is a possible legal system whose legal truthmakers include moral facts.[14]

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[13] e.g. Hart 1994, pp. 56-57. Is the internal point of view really a *moral* point of view? Hart himself didn't think so (e.g. Hart 1994, pp. 203, 242-243). But I'm sympathetic to Richard Holton's suggestion that the internal point of view is best understood in moral terms (Holton 1998, pp. 600-606). This dispute doesn't affect the issues here.

[14] The leading exclusive positivist is Raz: see, e.g., Raz 1979 and Raz 1985. More recent defenders include Shapiro 1998 and Leiter 1998. Prominent inclusive positivists include

The main issue in the debate is whether inclusive positivism can give an adequate account of the authoritative nature of law, or whether that instead requires an exclusive analysis. I am sympathetic to the arguments for exclusive positivism, but it isn't necessary to adjudicate between the two theories here.

3.3 Natural Law Theory

Positivism is traditionally contrasted with natural law theory. As a first stab, natural law theorists think that *the truthmakers for legal propositions include moral facts.* As with the Social Thesis, however, this view comes in different modal varieties. In particular, it can be read as a claim about all or only some possible legal systems.

The choice is between the following two claims:

(i) For any possible legal system S, the truthmakers for the legal propositions of S include moral facts.

(ii) There exists a possible legal system S, such that the truthmakers for the legal propositions of S include moral facts.

Although the exclusive positivist will reject (ii), the inclusive positivist will happily accept it. So only claim (i) provides a general contrast with positivism. From now on I'll therefore take natural law theories to be those that endorse (i).

Like the Social Thesis, (i) is not itself a complete analysis-statement. Rather, it is a thesis about the *general type* of facts that are the truthmakers for legal propositions. Different natural law theorists pick different moral facts (or more usually, different combinations of social and moral facts), the different choices produces different analysis-statements. But what's common to all of them is that they all imply (i) above.

One simple example would be the following:

(N1) For all S and p: It is the law in S that p if and only if it would be morally valuable for it to be the law in S that p.

Coleman 1982; Hart 1994, pp. 250-254; Lyons 1977; Soper 1977; Waluchow 1994.

According to N1, the truthmaker for "It is the law in S that p" is the fact that *it would be morally valuable for it to be the law in S that p*. That is clearly a moral fact. So anyone who endorses N1 is a natural law theorist.

N1 is not merely simple, but also very implausible. But of course more sophisticated analyses are possible. For instance, Dworkin's "interpretive" theory of law arguably qualifies as a natural law analysis under our definition.[15] One way to understand Dworkin is as claiming that the truthmakers for the legal propositions of a system S are facts about what is contained in or entailed by the theory that is the best "constructive interpretation" of S's settled law and legal practice. And without going into the detail, Dworkin thinks of these as at least partly moral facts. For deciding on the best constructive interpretation of S requires deciding which theory of S's law and practice, passing a certain threshold level of "fit" or coherence with that law and practice, allows us to see it as based on principles most closely approximating the principles of *sound political morality*. You have to work out what those sound principles are in order to decide what the best constructive interpretation is.

3.4 The Analytic Terrain

To summarise our discussion in this section, consider the following claims:

(ST) The truthmakers for legal propositions are social facts.

(ST1) There exists a possible legal system S, such that the truthmakers for the legal propositions of S consist exclusively of social facts (the *Minimal Social Thesis*).

(ST2) There exists a possible legal system S, such that the truthmakers for the legal propositions of S include moral facts.

(ST3) For any possible legal system S, the truthmakers for the legal propositions of S consist exclusively of social facts.

(N) For any possible legal system S, the truthmakers for the legal propositions of S include moral facts.

ST was our initial, broad statement of the Social Thesis. Different combinations of ST1–ST3 generate the more precise modal variants. The Minimal Social Thesis ST1 (and so the rejection of N) is common ground between inclusive and exclusive positivism. If there are any distinctively positivist claims, ST1 is one of them. Exclusive positivism accepts ST1 and

[15] See Dworkin 1986, ch. 7, pp. 225ff.

ST3, and rejects ST2 and N. Inclusive positivism accepts ST1 and ST2, and rejects ST3 and N. Natural law theories accepts N and ST2, but reject ST1 and ST3.[16]

Exclusive positivism: ST1 & ¬ ST2 & ST3 & ¬ N
Inclusive positivism: ST1 & ST2 & ¬ ST3 & ¬ N
Natural law theory: ¬ ST1 & ST2 & ¬ ST3 & N

No doubt there are other ways to define these theories. But this seems to me a fair representation (perhaps with a little precisification) of the way they are usually understood in the literature. In contexts where it isn't necessary to distinguish between exclusive and inclusive positivism, I'll sometimes describe positivists simply as endorsing the "Social Thesis". What I mean is: they endorse the Minimal Social Thesis ST1, together with either ST2 or ST3.

4. The No Value Thesis

I have now given an account of the Social Thesis. That is the first of positivism's separation theses. Keep in mind the character of the Social Thesis: it is an analytic claim about the nature of law, in the sense I have explained. The second of positivism's separation theses, the No Value Thesis, has a rather different character.

Recall my initial formulation of the No Value Thesis:

(NV) Laws and legal systems do not necessarily have any moral value.

This is loosely expressed. A more careful formulation would be this: it is not necessarily the case that either the existence of an individual law, or the existence of a legal system, has moral value; it is possible for the existence of an individual law and the existence of legal system to have no moral value at all. For ease of expression, I will allow myself to use the shorter and looser formulation in (NV), but you should interpret this in the way I've just

[16] Given the various entailments between these claims, it would be possible to give more economical definitions of these theories. For example, exclusive positivism could be defined simply as ST3, since ST3 by itself entails ST1 and the negations of ST2 and N. However, I think it is useful in making comparisons to display explicitly what each theory says about each of ST1–ST3 and N.

indicated. Also, I'll often talk ambiguously about "laws" and "the law", without explicitly distinguishing between individual laws and legal systems. I mean my points to apply to both.

Although many legal positivists accept the No Value Thesis, not all do. Some think either that the existence of individual laws or (more commonly) the existence of legal systems does necessarily have some moral value.

There is a parallel dispute about whether we necessarily have moral obligations or moral reasons to obey the law: although many positivists deny that we necessarily have such obligations or reasons, some think that we do. My focus here is on claims about the moral value of law. But with suitable adjustments, what I say will carry over to claims about moral obligations or moral reasons to obey the law.

I'm not going to get into the debate about whether the No Value Thesis is true. (For the record I'm inclined to accept it.) Since positivists themselves disagree about the No Value Thesis, there seems no need *qua* positivist to come down one way or the other.[17] What I want to do instead is get a bit clearer about the *type* of claims that positivists are making when they accept or reject the No Value Thesis. I'll focus particularly on how the Social Thesis constrains what positivists can say about this issue. The conclusions we reach will clarify the nature of the No Value Thesis, and will also be relevant in Section 5 when we come to look at the Neutrality Thesis.

4.1 Rejecting the No Value Thesis

Let's begin with those who reject the No Value Thesis. Suppose someone wants to argue that laws *do* necessarily have some moral value. How might they do that? There are two rather different ways they might proceed. I'll call these the *definitional* and the *substantive* arguments against the No Value Thesis.[18] As we'll see, only the second sort of argument is available to the positivist.

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[17] Hart seems to have rejected the No Value Thesis (see e.g. Hart 1994, pp. 206-207). Raz on the other hand is sometimes taken to endorse the No Value Thesis; but I'm not sure that is right. At least in one place, Raz suggests that we should distinguish between the claim that the existence of laws or legal systems always has some moral value, and the claim that there is always a prima facie moral obligation to obey the law, and that we should *accept* the first claim while rejecting the second: see Raz 1985, pp. 311-312, 323 n.13. See also the discussion in Raz 1975, pp. 165-170.

[18] For a related distinction see Raz 1975, pp. 163-170.

Start with definitional arguments. According to this kind of argument, the No Value Thesis is false because its falsity is built into the correct analysis-statement. What I mean by "built into the correct analysis-statement" is this: the correct analysis-statement entails that the No Value Thesis is false—*and the entailment doesn't rely on any substantive moral claims.*

For instance, consider again the simple natural law analysis-statement mentioned earlier:

(N1) For all S and p: It is the law in S that p if and only if it would be morally valuable for it to be the law in S that p.

If N1 were correct, it would entail that laws necessarily have moral value—and that entailment wouldn't rely on any substantive moral claims.

So, one way to argue against the No Value Thesis is simply to defend an analysis-statement, like N1, which has the falsity of the No Value Thesis built into it. If your argument against the No Value Thesis is an argument of this form, then it is a definitional argument. You can run a definitional argument against the No Value Thesis without making any substantive moral claims. Positivists, of course, cannot run definitional arguments, because the sorts of analysis-statements which are needed to run such arguments—N1, for example—are inconsistent with the Social Thesis.

Now consider a second kind of argument against the No Value Thesis—a substantive argument. According to this kind of argument, the falsity of the No Value Thesis is *not* built into the correct analysis-statement. The correct analysis-statement might well be a positivist one. But the No Value Thesis is nevertheless false; and that's because, so the argument goes, the correct substantive moral theory entails that laws necessarily have moral value. The main point here is that, unlike a definitional argument, a substantive argument against the No Value Thesis relies on substantive moral claims. Finally, note that if a positivist wants to argue against the No Value Thesis, the only sort of argument open to her is a substantive argument. This means that when a positivist rejects the No Value Thesis, we must take her to be making a substantive moral claim.

(Are people who reject the No Value Thesis really *positivists*? I don't have any in-principle objection to withholding the "positivist" tag from such people. But given that being a positivist on the analytic issues—accepting the Social Thesis—is consistent with either accepting or rejecting the No Value Thesis, I prefer to think of the No Value Thesis not as a mark of positivism, but simply as an optional extra for positivists.)

4.2 Accepting the No Value Thesis

A similar point applies to any positivist who accepts the No Value Thesis. If a positivist wants to accept the No Value Thesis, then she will of course have to reject all definitional arguments against the No Value Thesis. That is, she will have to reject all analysis-statements, like N1, which have the falsity of the No Value Thesis built into them. (That wouldn't be surprising, of course: since positivists are committed to the Social Thesis, they are already committed to rejecting such analysis-statements.)

But rejecting the definitional arguments won't be enough—for there might still be a good *substantive* argument against the No Value Thesis. So if a positivist wants to accept the No Value Thesis, she will also have to reject all substantive arguments against the No Value Thesis. And that will require her to make her own substantive moral claim. She will have to claim that the correct substantive moral theory implies that laws *do not* necessarily have any moral value.

This is what I meant when I said that the No Value Thesis has a different character from the Social Thesis. Whereas the Social Thesis is merely an analytic claim about the nature of law, the No Value Thesis is a substantive moral claim.

5. The Neutrality Thesis

We have looked at two separation theses: the Social Thesis and the No Value Thesis. Let's now turn to the third: the Neutrality Thesis. The work we've already done makes explaining the Neutrality Thesis fairly straightforward. (The basic idea was implicit in my discussion in the last section.)

Roughly, the Neutrality Thesis is a claim about the entailment relations between analytic and moral claims about the law. More precisely, it is this:

> *The Neutrality Thesis.* The correct analysis-statement does not by itself entail any substantive moral claims about the value of laws or legal systems.

The idea behind the Neutrality Thesis is that the correct analysis-statement leaves it an open question—a question for substantive moral theory to decide—what kind of moral value the law has, if any. The correct analysis-statement is in this sense neutral about the moral value

of the law. The Neutrality Thesis thus gives us a third kind of "separation" between law and morality.

The Neutrality Thesis is distinct from both the Social Thesis and the No Value Thesis. Why is it distinct from the Social Thesis? Here are two reasons. The first is that endorsing the Neutrality Thesis involves more than merely endorsing the Social Thesis. Suppose I think that Hart's positivist analysis is correct. If so, I accept the Social Thesis. But whether I accept the Neutrality Thesis depends on a further issue, namely whether I think that Hart's analysis by itself entails any substantive moral claims about the value of law. (I guess most people will think it obvious that Hart's analysis doesn't by itself entail any such substantive moral claims. But the fact that claim A is obvious given claim B doesn't show that claim A is identical to claim B.)

A second reason for thinking that the Neutrality Thesis is distinct from the Social Thesis is that the former could be true even if the latter were false. I will defer the argument for this until Section 6. (What I show there is that the Neutrality Thesis will also come out true if certain non-positivist analysis-statements are correct.) But if what I say in Section 6 is right—if the Neutrality Thesis could be true even if the Social Thesis were false—then that is as good a reason as any to regard them as distinct.

Why is the Neutrality Thesis distinct from the No Value Thesis? Because, unlike the No Value Thesis, the Neutrality Thesis is not a substantive moral claim about the value of law. All the Neutrality Thesis says is that the correct analysis-statement does not by itself entail any such substantive moral claims. Endorsing the Neutrality Thesis is one thing. Endorsing some substantive moral claim about the value of law—such as the No Value Thesis—is quite another matter.

I should perhaps emphasize that the Neutrality Thesis is about analysis-statements of the form "For all S and p: It is the law in S that p if and only if...", rather than about singular legal propositions. There are some nice questions about the entailment relations between singular legal propositions and evaluative and normative claims about the law; but that's a topic for another time.[19]

[19] For a good discussion of the issues, see Holton 1998.

6. Positivism and the Neutrality Thesis

We now have a formulation of the Neutrality Thesis. But is it true? That depends on what the correct analysis-statement is. In the remainder of the paper I'm going to assume that the correct analysis is a positivist one, and make some general comments about the implications of that for the Neutrality Thesis. As I see it, there are good reasons to regard the Neutrality Thesis as a key part of the positivist outlook.

6.1 Plausibility

Anyone who accepts positivism's analytic claims should find the Neutrality Thesis very plausible. If the Social Thesis is true, then it's very plausible that the Neutrality Thesis is true as well. It does indeed seem that *positivist* analysis-statements don't by themselves entail any substantive moral claims about the value of law. In order to arrive at such substantive moral claims, we need to go beyond positivism's analytic claims and appeal to some body of substantive moral theory.

6.2 Common Ground

I said in my introduction that positivism is often thought of as a cluster of analytic, moral and linguistic claims. But as we have seen, that way of thinking is a little misleading—at least in relation to the analytic and moral issues. The area that is strictly common ground between positivists is actually very small. On the analytic issues, the only common ground is the weak analytic claim that I called the Minimal Social Thesis. Beyond that, exclusive and inclusive positivists disagree. On the moral issues, the divisions are even starker: there is *no* single view about the moral value of law which is common ground. In particular, not all positivists accept the No Value Thesis.[20]

One interesting feature of the Neutrality Thesis is that, like the Minimal Social Thesis, it *is* arguably common ground between all positivists. Or at least it should be: for not only is the Neutrality Thesis plausible on both the inclusive and exclusive analyses, but it is also consistent with any substantive moral claim about the value of law. Positivists may hold different substantive moral views about the value of law, but that's no reason for them to disagree about the Neutrality Thesis.

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[20] Although I haven't discussed this, something similar can be said about the linguistic issues. As Raz pointed out some time ago, positivism's analytic claims are consistent with widely divergent views on linguistic matters (Raz 1979, p. 38).

It is tempting to go further at this point. Perhaps the Neutrality Thesis, again like the Minimal Social Thesis, is a claim that is *distinctively* positivist? Perhaps the Neutrality Thesis should be accepted by *all and only* positivists? This is a very natural line of thought. Interestingly, however, it turns out to be wrong. Some natural law theorists can accept the Neutrality Thesis as well.

For instance, consider the following natural law analysis-statement:

(N2) For all S and p: It is the law in S that p if and only if what p requires is what morality requires.

If N2 is correct, then the Neutrality Thesis will be true. Here's why. Suppose morality requires that (say) people not engage in racial discrimination. Then N2 tells us that the law contains a similar requirement. But is it morally valuable to have a law requiring that people not engage in racial discrimination? In this particular case, the answer is probably "yes". But we can't get to that answer without appealing to a body of substantive moral theory. For it is in general an open question—it is a question for substantive moral theory to decide—whether, and at what points, legal systems should police the boundaries of morality. This is a version of the old question about the moral value of legal paternalism. In effect, N2 says that all legal systems are paternalistic: they contain laws requiring all and only the things that morality requires. But N2 doesn't by itself tell us whether it is morally valuable to have such laws. That is a substantive moral matter. So although the Neutrality Thesis should be common ground among positivists, it isn't a distinctively positivist view.

As promised earlier, natural law analyses like N2 also give us further reason to regard the Neutrality Thesis and the Social Thesis as distinct claims. If N2 were correct, then the Neutrality Thesis would be true even though the Social Thesis would be false. That shows that the Neutrality Thesis and the Social Thesis are distinct.

6.3 The Character of Positivism

The final comment I want to make is that the Neutrality Thesis gives us a natural way to both formulate and vindicate a traditional view about the nature of the positivist project. This is another reason to think that it captures something central to the positivist outlook.

It is common in the literature to distinguish between different types of positivism. Let's say that an *analytical positivist* is someone who accepts a positivist analysis-statement—one

which conforms to the Social Thesis. Analytical positivism has traditionally thought of itself as a "descriptive" or "non-moral" theory.[21] What does this mean?

The Neutrality Thesis gives us a natural answer. We have seen that if analytical positivism is true—if the correct analysis-statement conforms to the Social Thesis—then the Neutrality Thesis is also true. That gives us one way to interpret the claim that analytical positivism is a descriptive theory: what it means is that analytical positivism is a theory which, if correct, will make the Neutrality Thesis true. Equivalently, what it means is that analytical positivists are not committed by their analyses alone to any substantive moral claims about the value of law.

Of course, as we've also seen, this isn't the exclusive property of analytical positivism: there are also non-positivist analysis-statements which, if correct, will make the Neutrality Thesis true. So there are also non-positivists who aren't committed by their analyses alone to any substantive moral claims about the value of law. But this seems to me a virtue of the current interpretation of the notion of a descriptive theory, not a drawback. For those who think that positivism is a descriptive theory typically think that at least some non-positivist theories are descriptive in the very same way.

7. What is Legal Positivism?

The positivist "separation thesis" is usually taken in one of two ways: as an analytic claim about the nature of law—roughly, as some version of the Social Thesis; or as a substantive moral claim about the value of law—roughly, as some version of the No Value Thesis. In this paper I have argued that we should recognize a third, distinct kind of separation thesis: the Neutrality Thesis.

Like the Social Thesis (strictly, the Minimal Social Thesis) the Neutrality Thesis is, or at least should be, common ground between all positivists: as we saw in Section 6, there are good reasons to regard the Neutrality Thesis as capturing something central to the positivist

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[21] See e.g. Hart 1994, p. 240; Raz 1994, pp. 192-193; Coleman 1982, p. 147. Analytical positivism is often contrasted with so-called *normative (or ethical) positivism*. Normative positivism is an explicitly moral theory which says, roughly, that it is morally valuable to have legal systems in which the truthmakers for legal propositions are social facts. Contemporary normative positivists include Campbell 1996, MacCormick 1985 and Waldron 2001.

outlook. Unlike the Social Thesis, however, the Neutrality Thesis is not a distinctively positivist claim, in the sense of a claim that should be accepted by all and only positivists. At least some natural law theorists can also accept the Neutrality Thesis. The Neutrality Thesis is *more* central to positivism than the No Value Thesis: as we saw in Section 4, the No Value Thesis isn't even common ground among positivists, let alone a distinctively positivist claim.

In fact, if we were after a definition of positivism—one which was both theoretically illuminating and sensitive to the historical usage of the term—a natural move would be to define a positivist theory as one that is committed to the Social Thesis and the Neutrality Thesis. Endorsing these two separation theses would be individually necessary and jointly sufficient for being a positivist, with the No Value Thesis an optional extra. But in any case, whatever the merits of this definition, it should at least be clear that distinguishing these three separation theses, and understanding the ways in which they relate to each other, is vital to a proper understanding of the positivist approach to law.

Acknowledgements. Thanks to John Broome, Tom Campbell, and Adrian Viens for helpful comments.

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