

LAW AND MORALITY IN THE AGE OF BIOSCIENCE

Part 1: The Separation of Law and Morals

Whenever scientific advancements cause major changes to the world and the way we live, deep questions regarding the necessity of legal and ethical constraints to maintain a harmony of balance will arise. This essay hopes to identify and define the boundaries of law and ethics so that debates as to their respective roles, independently as well as conjunctively, may be carried out with some clarity.

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*No light, but rather darkness visible
Served only to discover sights of woe¹*

1 The rapid and tremendous advancements of bioscience are forcing us into dark and uncertain areas of law and ethics just as they are extending the horizon of what we think is humanly possible. If our lives are going to be vastly influenced by it all, we might need to be comforted that it will be for the better, and that all the nefarious and unwanted features, side effects and consequences are contained, if not eliminated. And so we turn to law as the instrument of control; but we flounder in the search for clear and objective directions as to what is right and wrong, lawful or unlawful, ethical or unethical in bio-scientific research and related activities. Why might that be so? It is generally never easy to determine an objective standard as to what is right and wrong, and often when we think that we had a good answer, we seem to have difficulty relying on it consistently. That difficulty is multiplied when we grapple with bioethical matters. Many such questions are deep, fundamental ones that have no universally acceptable answers. Philosophical and theological opinions are deeply divided over questions such as “When does life begin?” or “Why can’t we clone a human being?” These are some of the kind of questions that entwine issues of morality with law, thus creating a morass of ethical-legal issues in its wake.

2 I shall hope to advance in this essay, the view that legal positivism may provide a plausible philosophical response to

¹ John Milton, *Paradise Lost* (Buccaneer Books, 1976).

uncertainties arising from legal-moral conflicts. Isaiah Berlin had a clear vision of the purpose of philosophy. He said:²

The perennial task of the philosopher is to examine what seems unsusceptible to the methods of the sciences and everyday observation, eg categories, concepts, models, ways of thinking or acting, and particularly ways in which they clash with one another, with a view to constructing other, less internally contradictory, and (though this can never be fully attained) less pervertible metaphors, images, symbols, and systems of categories.

The relevance of legal positivism in the way that I shall be advocating concerns mainly two of its three root doctrines stemming from utilitarianism, namely, the separation of law and morals, and the importance of analysis in respect of legal concepts.³ These doctrines are modular, independent and separate doctrines in themselves such that the falsity of one does not affect the other two. Legal positivism, and utilitarianism as well, are likely to be misunderstood if the independence of each doctrine is not appreciated.⁴ The questions concerning the minimum moral content of law, for example, may give rise to confusion if issues relating to the separation of law and morals are considered in the context of the sovereign birth of law.

3 Advancements in bio-scientific discoveries have created a deep abrasion between two naturally human inclinations. One is our appreciation of what such discoveries can do to better our lives, and the other, an inexpressible fear of the extent of moral compromises we might be required to make to accommodate scientific progress. The problem is not new. It has only grown more complex. That fear is borne from a cherished belief that society is held together not only by laws but also by normative moral principles. The further we advance into the world of awesome science the more nervous we become. The root of much uncertainty lies in the inability to discern how laws should be shaped in order to keep science, the scientific community, and the beneficiaries within the limits of moral integrity. This is a legitimate and important concern. There are bound to be many responses that one can adopt. It is hoped that this essay will clear one small but significant area so that any position that one chooses to take will at least be unobstructed by the

² "The Purpose of Philosophy" from *Concepts and Categories* (Princeton University Press, 1999).

³ The third doctrine is that law emanates as commands from a sovereign that is habitually obeyed.

⁴ See Robert P George, *In Defence of Natural Law* (Oxford University Press, 1999).

confusion between what the law is and what it ought to be (the Separation Thesis), that is to say, through appreciation of one of the central doctrines of legal positivism. The statement that what law is and what it ought to be is often referred to as the question of the separation of law and morals. The attraction and convenience of that terminology has been, in fact, the cause of much confusion, as we shall see.⁵ It bears reminding that legal positivism is not without its critics, but it has a host of eminent scholars among its founders and supporters, the leading light being Herbert Lionel Adolphus Hart. It is essential, therefore, not only to express and simplify the doctrine in question but also to deal with the concerns of its critics.

4 When, in the course of defending a particular school of thought, one has to confront its opponents, conventional wisdom of scholarship dictates that one does not choose the weakest, but the strongest. The most formidable opponents to legal positivism, at least in the area concerning the separation of law and morals, are undoubtedly, Lon Fuller, Patrick Devlin, and Ronald Dworkin. In this short essay I shall focus only on the narrow issues concerning the separation of law and morals. That is an area that Fuller confronted Hart directly in. The Devlin-Hart debate concerned the enforcement of morals, which is a different matter but nonetheless relevant to any discussion on the separation of law and morals. Dworkin's challenge to Hart will require a commentary on a much larger scale, but I hope to focus on one or two areas of Dworkin's criticism to show that they do not affect the positivist's Separation Thesis.

5 It is important first, to establish as much as possible, the perimeters of the ubiquitous word "*Law*", which John Austin defined, as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him".⁶ He then expounded the great divide. Laws set by men to men he calls "positive law". Laws set by God to men he calls "natural law".⁷ He did not believe that the determination of moral conduct lies solely in the province of natural law; he conceived a third category of law – laws set by men in pursuance of legal rights or generally held by men in regard to human conduct, but unlike positive

⁵ Nonetheless, it is too entrenched to be discarded; it remains a convenient and useful reference.

⁶ Hart refined this aspect of Austin's theory by the qualification that law consists of primary rules and secondary "rules of recognition", empowering institutions and judges, for example, to make law. Joseph Raz is critical of this sort of linguistic approach to the definition of law: see *Ethics in the Public Domain* (Clarendon Press, 1994).

⁷ John Austin, *The Province of Jurisprudence Determined* (Prometheus Books, 2000).

law, such laws do not emanate from a monarch or a political superior.⁸ I shall return to this aspect shortly because it is the primary target of Dworkin's criticism of Hart.

6 The debate between legal positivists and natural law lawyers (as to whether law requires a moral content) had waxed and waned for a very long time. It had acquired a lasting prominence in the debate between Hart and Fuller. When Hart fired the first of his massive salvos in 1958 he clearly recognised the proponents of natural law (those who adhere to the belief that what the law is and what the law ought to be are somehow indissolubly fused or inseparable) to be the nemesis of legal positivism. Nowadays the debate continues mainly in academic circles. The unrelenting progress of bioscience and biotechnology, in the meantime however, has created a need for clear and careful thinking about the censorship of moral behaviour. There are many who fear that unless legal and moral philosophy can keep pace in shaping the legal and ethical framework for both the research and the researchers and practitioners of bioscience, "the philosophy of science" alone will become the dominant philosophy. They fear that should that happen, philosophy might be "consigned together with theology and other speculative disciplines to the museum of curious antiquities as astrology and alchemy have long ago been relegated".⁹ Thus, a study of the proper relationship between law and morals is important not only as a starting point, but will also provide a balanced and comprehensive view of such an extensive subject. Ever so often, the attention of scientists, lawyers, and the public, is diverted from the ethics of the research to the ethics of the researcher. Implicit in the usual expressions of concern for the confidentiality of patient information and the dignity of human subjects, for example, is the assumption that the ethics of the research itself is morally acceptable, and the focus shifts immediately to the ethics of the researcher.

7 The hope that the courts might rely on a general sense of morals or "public morals" to keep scientific research along the straight and narrow is likely to be a futile one. *Shaw v Director of Public Prosecution*¹⁰ illustrates the reluctance of the courts to enforce "public morals" that are not law. Frederick Charles Shaw published a 28-page booklet called "The Ladies Directory". It was a list of names and contact details of prostitutes. He was charged, *inter alia*, for conspiracy to corrupt public morals. The House of Lords dismissed his appeal against conviction, rejecting his

⁸ *Ibid.* See Lecture V.

⁹ Isaiah Berlin, n 2, *supra*.

¹⁰ [1962] AC 223.

argument that there was no common law offence as “conspiracy to corrupt public morals”.¹¹ Viscount Simonds encapsulated the position of the majority in his adoption of Lord Mansfield’s remark in *R v Delaval*¹² that the court of King’s Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*. Viscount Simonds asserted that the court had “a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare”.¹³ Lord Reid was exuding signs of the true legal positivist. While conceding that criminal conspiracy was a known offence, he held, however, that there was no known criminal offence as “corrupting public morals”. The learned law Lord declined to assume guardianship of such a vast area as “public morals”, illustrating thus that there are certainly, areas of morality that ought to be law but are not. The public may expect the court to be a guardian of morality, reinforcing the values espoused by the state, the religious institutions, and the family. That may be a plausible role for the court if it does not impinge upon the court’s role as the impartial arbiter. That function obliges the court to avoid acts of creativity that are inconsistent with its neutrality.

8 Hart’s criticism of the re-establishment of the courts as the guardian of morals is that it comes at the cost of losing an important value, namely, “the principle of legality which requires criminal offences to be defined as precisely as possible, so that it can be known with reasonable certainty beforehand what acts are criminal and what are not”.¹⁴ The relevance of *Shaw* in the present context is that it continues to pose the question that won’t go away: “whether the courts ought indeed assume the function *custos morum*; or should that be left to the home, the school, and the religious institutions?” Although many moral principles can reasonably be regarded as universal, for example, the axiom that life is sacred and killing is wrong. But there are other facets to this broad statement. Is abortion killing? Is the shutting-down of life support equipment in the case of the terminally ill killing? Rejecting the role as guardians of public morals does not mean that the courts need not be concerned with the definition or enforcement of morals. Hart rigidly defended the notion that judges should not act merely like automatons, stamping the law only upon sight of a judicial precedent. This image of a common law judge, he said, can be blamed on Blackstone and

¹¹ Lord Reid dissented, *ibid* at 269.

¹² (1763) 3 Burr 1434 at 1438–1439; 97 ER 913 at 915.

¹³ *Supra*, n 10, at 268.

¹⁴ H L A Hart, *Law, Liberty, and Morality* (Stanford University Press, 1963).

Montesquieu.¹⁵ Nonetheless, the court's creative role is a limited one. It is most explicitly displayed in cases in the *penumbra*. Two issues that appear connected are in fact discrete. The first is embodied in the proposition from the Wolfenden Committee's statement that "there must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law's business"¹⁶ and the second in Lord Devlin's statement that "the suppression of vice is as much the law's business as the suppression of subversive activities".¹⁷

9 The lack of a consensus on a universal standard is an intractable difficulty. A universal standard must not only be concomitant between legal positivism and natural law but also internally within each of these sets of laws. Consequently, many people adopt moral relativism as their principal belief, accepting thus that different people may view any given conduct differently.¹⁸ Many fundamental moral norms find their origin in theology, but it is clear that ethics and morals are not subject to the domain of theology alone. There are also non-theological bases for moral conduct, of course. The Aristotelian school, for example, provided the credo that man would ultimately strive for happiness, and that the path to happiness lies in seeking all that which is good.¹⁹ The deontological base, as another example, has been forcefully explored in the Kantian philosophy of the categorical imperative – that we must not act except "in such a way that our conduct should become a universal law, and that our right action must arise from [nothing but] a sense of duty".²⁰ In the ideal state, laws ought to operate under a moralistic cover; that is, they ought not only to have a moral content, they ought to be morally good. But how shall we choose moral cover in reality? It may, however, be necessary to subject principles of morality that have their foundations in religion to an examination under the eyes of reason because religious tenets are exegetic in nature. And history has shown how idiosyncratic

¹⁵ H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593.

¹⁶ Section 16, Report of the Committee on Homosexual Offences and Prostitution, (Cmd 247) 1957.

¹⁷ Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1967).

¹⁸ Eskimos believe in euthanasia and see no immorality in mercy killing because they perceive the act as sending the dead to a happier life away from present pain. Other societies do not accept euthanasia on the ground that it is morally reprehensible.

¹⁹ *Nicomachean Ethics, Eudemean Ethics; The Complete Works of Aristotle Vol 2*, (Princeton University Press, 1976).

²⁰ Immanuel Kant, *Groundwork of the Metaphysic of Morals*, (Harper & Row, 1964), H J Paton trans.

the process of exegesis can be. On the other hand, secular or non-religious arguments for or against any given morality principle must equally be as critically examined. The doctrines and arguments in moral philosophy are vastly divergent, and there is, presently, no school or doctrine that precedes all others. But if, indeed, there is a star upon which we ought to fix our gaze that star must be *reason* itself.

10 The doctrine of separation of law and morals has different implications for different moral agents. In determining what moral rules should be incorporated into its laws, the secular state is free to compromise and adjust, deferring to one segment of its society or another as it may find expedient to do so. But theological and philosophical purists may be less enthusiastic about constant change – change that is likely to require a re-interpretation of religious tenets and doctrines (although many a theological compromise has been made in the name of exegesis). A pluralistic, secular state has to address the sensitivities of all the segments of its society in order to achieve social stability. Secular judges, if they are legal positivists, would not necessarily be burdened with the moral content of law in every case. In the scheme of legal positivism, by the doctrine of fidelity to law the judge is obliged to keep law and morals separate, and thus is not himself concerned with any compromise. On the other hand, by adopting or approving such laws, a natural law judge would be personally concerned with the state's compromise merely by assent or adoption of the same. The difference between compromises of the state and that of the judge is that in the case of the former, the position of the state is not necessarily weakened by the compromises it has to make; but in the case of the latter, every compromise weakens the judge's moral position.²¹ The doctrine of separation of law and morals, however, must not be confused with the practice of law. The latter invites all the problems of moral relativism and will be discussed elsewhere.²² A lawyer, for example, may not care whether law is separate from morals or otherwise, but may still have personal reservations concerning his professional task if he thinks that it may conflict with his moral beliefs. For instance, he may not wish to defend a man he believes to be guilty even though so far as the law is concerned, a man is innocent until proven guilty, and even a guilty man must not be condemned until the state has proved its case against him.

11 If we can identify a single thread as representing the difference between Hart and Fuller's positions, it is to be found in the positivist's nomenclature of "fidelity to law". That is to say, law is law and, morals

²¹ Thus natural law lawyers and judges often disguise themselves in positivist robes.

²² Law and Morality in the Age of Bioscience Part 2: The Essence of Goodness (SAclJ forthcoming).

aside, the court's duty is to apply and give effect to the law. This broad and general statement requires some explanation. In the first round of the Hart-Fuller debate the laws of Nazi Germany were used as an example for their respective arguments.²³ Hart referred to the case of the German woman, who had hoped to get rid of her husband. She thus reported him to the Nazi authorities for having insulted Hitler. Her husband was consequently convicted and sent to the front lines. After the war, a democratic German court tried the wife for the offence of depriving a person of his liberty (an offence under German law). The wife denied the charge and in her defence pleaded that she acted in accordance with the then German (Nazi) law. The West German court rejected her defence on the ground that the Nazi laws were not valid because they were contrary to moral principles. Fuller, in line with traditionists in natural law, was content with the court's approach.²⁴ Hart favoured the introduction of retrospective law to punish the grudge case woman rather than to declare that the Nazi law was not law.

12 Fuller's objection to the separation of law and morals, or the doctrine of "fidelity to law" is best expressed in his own words:²⁵

Law, as something deserving loyalty, must represent human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behaviour of state officials. The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation. If laws, even bad laws have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss the mark.

This eloquent dismissal typifies the natural law view that if we place something on a pedestal (in this case, law) the inner voice (that non-specific notion within us) must approve the exaltation we hold towards that object. It underlines the fundamental difference between the legal positivism and natural law approaches. Positivists do not hold law as an object of exaltation in itself, but more importantly, that the one ought not to be mixed with the other because to do so is to engender insoluble

²³ Hart, *supra*, n 15; Lon L Fuller, "Positivism and Fidelity to Law— A Reply to Professor Hart" (1958) 71 Harvard Law Review 630.

²⁴ Although he had inclinations towards natural law, Fuller did not accept that the morality in law was derived from God (the position of the traditional natural law lawyers). Fuller was attracted to the semantic quality of law – an aspect that Dworkin and others expanded on much later.

²⁵ "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harvard Law Review 630 at 632.

conflict between law and morals. Fuller thus based his arguments on two conceptions of morality – the morality of duty and the morality of aspiration.²⁶ The latter represents the ideal state, but he recognised that the frailty of human nature puts the morality of aspiration beyond human achievement. Thus, he contended that that is why we set rules to keep us within manageable limits of morality. Such rules constitute the morality of duty. The positivist is not necessarily averse to letting his conscience tell him whether an act is or is not morally right. As a jurist, however, he applies the law as law, and so he accepts that some laws are morally bad. Natural law lawyers may not conceive of a person upholding a law that he knows to be morally bad. But that apparent paradox is resolved by the separation of law and morals doctrine – so that a morally bad person may still obey a good law and conversely, a morally good person obey a bad one. There is one aspect of the Nazi law example above that is still relevant to the burgeoning number of moral issues arising from bioscience today. In his book *Mein Kampf*, Hitler's idealisation of Germany was that the German society should be bred from a superior stock because he believed that that was the way Nature herself would have intended.²⁷ How far thus may science be permitted to travel before it reaches the point where no reasonable distinction can be discerned between it and Hitler's programmes.

13 Whether obeying a morally bad law makes the moral agent immoral is a separate and distinct question. Sophocles' *Antigone*²⁸ introduced the debate as to the morality of the moral agent in disobeying an unjust law, and that question continues to excite ethicists today. In *Antigone*, Polynices, a citizen of Thebes, led an assault against the city. His brother Eteocles was loyal to Thebes. Both were killed in the battle for the city. Creon, the ruler of Thebes and uncle to the slain warriors, decreed that the traitor Polynices must not be given a proper burial and his corpse was to be left in the streets. Antigone, the sister of Polynices and Eteocles, felt that it was her moral duty to give Polynices a proper burial, but to do so she would have to disobey the law. *Antigone* is a multi-faceted story. It will be sufficient for present purposes to refer to the presentation of the characters by Sophocles in such a way that it is not easy to discern where the lines of moral conduct are to be drawn. Was Creon a just king out to preserve his city or a merciless avenger? Was Antigone the morally upright citizen or a breaker of laws? The story illustrates how faint the line between just and unjust, good and bad can be. It illustrates the point that individual morality and the law of the state

²⁶ *The Morality of Law* (Yale University Press, 1969 Rev Ed).

²⁷ Chapter 2, vol 2 (Pimlico, 1992), Ralph Manheim trans.

²⁸ *Antigone (The Three Theban Plays)* (Penguin Classics, 1984) Robert Fagles trans.

may often be in conflict with each other. Keeping what the law is distinct from what it ought to be is perhaps the strong answer. Creon conceived that his (and everyone else's) duty is to the safety and well-being of the state. He declared:²⁹

[O]ur country is our safety. Only while she voyages true on course can we establish friendships, truer than blood itself. Such are my standards. They make our city great. ... [N]ever at my hands will the traitor be honoured above the patriot.

Antigone pleaded her cause from a different key in morality:³⁰

And even if I die in the act, that death will be a glory. I will lie with the one I love and loved by him – an outrage sacred to the gods! I have longer to please the dead than please the living here: in the kingdom down below I'll lie forever. Do as you like, dishonour the laws the gods hold in honour.

She conceived her act as giving her brother the honour of burial that her gods decreed, and for that “[n]o one will ever convict me for a traitor”.³¹ She chose to disobey the law of the state in order to obey the law of her gods. She did not compromise. Neither did Creon.

14 The tension between private and public morality was the emphatic theme in Devlin's Maccabean Lecture in Jurisprudence.³² The lecture was reproduced together with other lectures in his book *The Enforcement of Morals*.³³ Unfortunately, there is a common perception that the Devlin-Hart debate carries over from the “realm of private morality” issue discussed at length in the Maccabean Lecture. If there were a debate on that issue, it would have been between Devlin and Mill.³⁴ Devlin commented on Mill thus:³⁵

To secure the citadel of freedom Mill flung a line beyond which the law must not trespass. The law was not to interfere with a man unless what he did caused harm to others.

²⁹ *Ibid* at p 68.

³⁰ *Ibid* at p 63.

³¹ *Ibid* at p 61.

³² British Academy, 18 March 1959.

³³ Oxford University Press, 1965.

³⁴ John Stuart Mill, *On Liberty* (Penguin, 1974).

³⁵ *Supra*, n 17, at pp 103–104.

Both Devlin and Hart agree that certain behaviour is undesirable and the law may be used to prohibit and punish such behaviour. Where they disagreed was on the question as to what sort of behaviour calls for legal intervention, and on what basis was such intervention to be carried out. Devlin relied on moral principles to answer both questions. Hart, on the other hand, suggested that it would be justifiable to regulate such behaviour as homosexuality on the basis of paternalism. Devlin criticised this reliance as unsustainable because, in his view, paternalism must apply equally to physical good as well as moral good. He thought that accepting half of Mill made Hart a “physical paternalist” and a “moral individualist” – a somewhat bewildering idea to Devlin. Moral paternalism, however, should not be confused with moral legalism. It has been said:³⁶

Moral legalism is the right of the state to enforce positive morality, no matter how irrational, no matter how much it is based on prejudice and ignorance. Moral paternalism is the right of the state to intervene via law to prevent people from harming themselves morally.

15 Hart’s acceptance of paternalism as a justification for enforcing morals in certain cases when considered in context, further weakens Devlin’s criticism of it. Paternalism as a positivist’s tool is, of course, an aspect of utilitarianism. It enables the positivist to lean towards moral legalism and its mirror component, that is, not enforcing a positive morality notwithstanding that it may be rational to do so. Paternalism, as utilitarianism, is concerned solely with consequentialism.³⁷ Thus, the essence of the Separation Thesis lies in the statement that “not every rule that is morally wrong is not law, nor, conversely, not every rule that is morally desirable must be law”. For, as Hart had pointed out, from saying what some concept of what the law ought to be, it becomes easy to slide into saying that it must be a moral judgment about what the law ought to be.

16 There is a strong field of contemporary defenders of natural law. Their valid, practical, and wholesome arguments as alternatives to legal positivism present a fine foil to the sharp positivist blade. Dworkin’s criticism of Hart, however, is an example. Hart set the jurisprudential world alight when he published *The Concept of Law*³⁸ in 1961. There was, at last, someone to tell us what the word “Law” means, and that seemed,

³⁶ Michael Martin, *The Legal Philosophy of HLA Hart* (Temple University Press, 1987) at p 262.

³⁷ A discussion of the strengths and weaknesses of utilitarianism and other consequentialist theories is outside the scope of this essay.

³⁸ Clarendon Press.

for a while, to hold the promise that the most intractable legal problems would become less daunting. Legal systems, adjudication, law making, and every form of exercise that involved that pervasive but nebulous word “law”, it seemed, were no longer clouded by ignorance and uneasy reservation. Professor Ronald Dworkin (who succeeded Professor Hart as Professor of Jurisprudence at Oxford in 1969) published *Taking Rights Seriously* in 1977, and *Law’s Empire* in 1986.³⁹ These works contain some of the major criticisms of Hart’s concept of law. Dworkin provided a powerful dissent, and one which many believed Hart had not answered directly during his lifetime. Whether his posthumously published *Postscript*⁴⁰ provided an adequate response is still a matter of debate. But, the academic world certainly reacted with deep interest and great enthusiasm – and the Hart-Dworkinian debate was rekindled. The most formidable attack was aimed at the foundation of the concept of law and the legal system in which law operates. Dworkin’s arguments were powerful, but precisely because they were so formidable, one might be misled into thinking that the positivist doctrine of separating law and morals had been destroyed in Dworkin’s assault.

17 True to the school of analytic positivism, Hart’s avowed purpose in *The Concept of Law* had been to provide an understanding of what law is so that we can better distinguish laws from other prescriptive norms, and legal systems from other normative institutions or social practices. The foundation of his system is a bed of primary and secondary rules, including rules of recognition. This foundation was the substance that set alight academic discussion in 1961. The excitement over the concept that he had so rigorously described is not entirely extinguished, but has been replaced by that arising from the challenge of Dworkin. The exercise carried out by Hart was in nature a descriptive analysis of law. Dworkin regards his methodology as expressing an essentially semantic account of law although it was not a description that Hart himself had acknowledged. Thus, so far as he was concerned, law need not have a moral content to qualify as law in his system, or conversely, that bad laws are not laws. On the other hand, the dependence on various values such as justice, fairness and integrity is fundamental to Dworkin’s own theory of what law is. Dworkin believed that some concepts such as law could not be given a semantic account because in pivotal cases, scholars can never agree as to how to disagree. Joseph Raz identified the root of this particular Dworkinian position. As he pointed out, in giving a semantic account of the concept of law, Hart was not attempting to provide the

³⁹ Harvard University Press.

⁴⁰ Included in the 2nd edition of *Concept of Law* (Clarendon Press, 1994).

meaning of law.⁴¹ But, as in all descriptive exercises, it is not entirely possible to describe without including the meaning of that which is being described.⁴² Even Raz himself was critical of Hart's incorporation thesis but his quarrel was with Hart's reliance on the secondary rules of recognition.⁴³ It is the vigour of such criticisms that further obscures the strength of the Separation Thesis.

18 The clarity of Hart's position so evident in his 1958 lecture, had, nonetheless engendered some confusion when the distinction between "what the law is and what the law ought to be" was misunderstood as meaning the same thing as "the separation of law and morals". It created the impression that his theory was an amoral one and yet, at the same time it was also thought that *what the law ought to be* was a reference to the morality of law. Hart did not rule out the relevance of morality but held that it was only in penumbral cases that the judge needed to be troubled by it.⁴⁴ On the contrary, it was his view that in the case of judges who fell into the "formalistic error", the mistake lay in a failure to see that in the penumbral cases, they were not dealing with the standard case, and they were thus interpreting penumbral cases without regard to social values and consequences.⁴⁵ He maintained that "we cannot use the errors of formalism as something which *per se* demonstrates the falsity of the utilitarian insistence on the distinction between law as it is and law as *morally* it ought to be."⁴⁶

19 The difficulty arising from this view is that one cannot help but wonder whether the cases in the penumbra outnumber those in the core; and if so, given his concession that morality is a factor in the determination of such cases, would not the intersection between law and morals be too vast and too frequent such as to render the distinction, between law as it is and law as it ought to be, largely irrelevant? But I think that it is a mistake to compare penumbral cases with core cases. The principle of separation is not numbers dependent. Hence, in theory,

⁴¹ Joseph Raz, "Two Views of the Nature of the Theory of Law – A Partial Comparison" in *Hart's Postscript – Essays on the Postscript to "The Concept of Law"* (Oxford University Press, 2001).

⁴² This topic will be explored in greater detail in *Law and Morality in the Age of Bioscience Part 4: Meaning and Truth in Law and Morals* (provisional subtitle) (SAclJ, forthcoming).

⁴³ Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, 1994).

⁴⁴ Hart uses as his example a law that prescribes an offence for bringing a vehicle into a park.

⁴⁵ *Supra*, n 15, at 610.

⁴⁶ *Ibid* at 614.

even if only one piece of legislation is clear then that is law. It matters little that all the rest of the legislation requires a judge's interpretation and active intervention, including where infusion of law with morals almost seems likely, if not inescapable. The sentencing of criminal offenders is an example of this field. Even though the legislature would already have taken the degree of moral turpitude into account when it prescribed the range of punishment for the offence in question, judges may continue to make refinements within the prescribed range when they are determining the precise punishment in individual cases. In so doing, they may appropriate their ideas of the moral turpitude into their judgments. That would indeed appear to be an exercise of moral judgment. Thus, such judicial decisions become law in the positivist sense because judges are part of the institutions that are regarded as the legitimate sources supplying the secondary rules. One may legitimately argue, of course, that matters of sentencing fall within the penumbra. Hart, in his 1958 essay, had anticipated the temptation to use such examples as grounds for dropping the utilitarian distinction. He attributed the cause of such erroneous thinking to errors of "formalism".

20 Dworkin's semantic sting criticism of Hart (aside from the relatively minor confusion as to what the sting was and who stung whom) is another cause of distraction from the Hart's argument for the separation of law and morals.⁴⁷ Briefly, most theories of law such as positivism and natural law employ the semantic argument to establish the meaning of *law*.⁴⁸ To achieve that, it will be necessary to have some common criteria as to how law is defined. But it is impossible to find common criteria because lawyers have different conceptions about any given concept. For example, an argument over whether an act is negligent or not is an argument over what negligence means. And that requires a common concept. Paradoxically, if there is in fact a common concept, the theoretical argument as to what negligence is becomes redundant. The semantic sting, according to Dworkin, makes theoretical (as opposed to empirical) arguments impossible. The conclusion to this argument was that if it is impossible to find a common standard as to what law is, there can be no firm basis to hold that law and morals must be kept apart since *law* would mean different things to different people if "the grounds

⁴⁷ Most jurists would agree that if Dworkin is right, then Hart is stung. See: Nicos Stavropoulos, "Hart's Semantics" in *Hart's Postscript – Essays on the Postscript to "The Concept of Law"* (Oxford University Press, 2001).

⁴⁸ Positivism uses the semantic argument to defend the proposition that law and morals must be distinct, and natural law relies on the semantic argument to defend the assimilation of law and morals.

for the identification of laws are not uncontroversially fixed.”⁴⁹ Dworkin reckons that in those areas where a judge has no duty to decide either way (the area which Hart calls the “penumbra”) the judge has to resort to other standards that are not strictly “rules” in the positivist sense, for example, policies and principles.

21 In situations when the judge has to make law, he cannot but rely on principles, otherwise, from the Dworkinian point of view, the judge will not be able to answer the basic question, “Under what circumstances do duties and obligations arise?” Dworkin’s answer was thus that “principles” would provide the standard. Some positivists may regard Dworkin as a neo-natural law theorist for his inclusion of principles as a standard of law recognition, and because by his definition, “principles” would include moral norms.⁵⁰ “A principle is a principle of law”, he said, “if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question.”⁵¹ In *Taking Rights Seriously*, he further explained:⁵²

I call a “principle” a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.

It is important to appreciate that Dworkin, who was probably anticipating the problems of moral relativism, advocated that judges ought to apply source-based rules of their country, and where those rules are vague or uncertain, the judges should apply the standards of political morality so as to achieve a coherent moral trend. But Raz exposed the flaw in this superficially harmless approach when he pointed out that it would have thus obliged South African judges to use their power to extend apartheid.⁵³

22 There is, admittedly, an important significance and function in the concept of principles, but since they are used as a standard by which

⁴⁹ Timothy Endicott, “Herbert Hart and the Semantic Sting” in *Hart’s Postscript – Essays on the Postscript to “The Concept of Law”* (Oxford University Press, 2001).

⁵⁰ On the other hand, Dworkin may be rejected by the school of natural law for his positivistic inclination. Dworkin, however, may regard himself as neither but as a *sui generis* legal thinker.

⁵¹ Ronald Dworkin, “The Model of Rules” (1967) 35 *University of Chicago Law Review* 14 at 26.

⁵² Harvard University Press, 1977.

⁵³ *Supra*, n 43.

law as well as morals may be identified and recognised (in the positivist sense), it may not be inconsistent to regard Dworkin's criticism in this context as being limited only to the enquiry as to how law is created. Dworkin's approach, therefore, is distinctly *process* oriented, whereas Hart is *product* oriented. Thus, there is still an inconclusive debate as to whether what counts as law is theory-dependent. So far as the positivist position is concerned, "judges may have theories to help them out when law fails them, but they do not need theories when the law is clear."⁵⁴ The fear that the debate may end in a semantic quagmire was instilled by the pluralism of standpoints on morality concerning the concepts of good and bad, justice and fairness; that is to say, moral norms whether specific or in their raw form, mean different things to different people. Morality for the purpose of the law cannot be what every right-minded person is presumed to consider as immoral because the subjective value-content is too diverse. After all, if principles are the standard by which law is gauged, what, it might be asked, is the standard by which principles are gauged? It would be the same in the case of principles relating to the formulation of moral norms as it would those of legal norms. If the court upholds a pro-life position, does it mean that pro-choice is immoral, and *vice versa*?⁵⁵ Thus David Lyons observed:⁵⁶

Judicial decisions determine the law, but these decisions must be informed by a theory that can be determined only in the light of substantive political considerations. Positivist theory regards it as politically desirable that the determination of law be conducted in a morally neutral manner. Dworkin disagrees. Both approaches presuppose an answer to the question, what is justified judicial decision, and this involves moral argument.

This leads to a stalemate in the Dworkinian challenge to legal positivism. Supporters of Dworkin's theory of law will claim victory in the debate just as positivists maintain, rightly so, in my view, that though Dworkinian arrows had wounded the legal positivism of Hart, they have missed the heart of legal positivism.

23 Viewed as the formidable enterprises of the will as the competing theories are, the legal positivists' apparent willingness to "trade-off" moral claims in the name of ostensibly grandiloquent notions (such as utilitarianism, and the separation of law and morals) compels us to feel the hard face of the law; and natural law and neo-natural law theorists

⁵⁴ David Lyons, *Moral Aspects of Legal Theory* (Rowman & Allanheld, 1984) at p 68.

⁵⁵ Cf Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) at p 15.

⁵⁶ *Supra*, n 54.

thereby emerge as the more resolute and righteous. But this illusion rapidly dissolves when confronted with hard cases because that is when the heroic virtues of attempting to anchor law onto moral norms so often wilt into whimpering hypocrisy. This is what we should guard against during crucial times when we are faced, as we do now, with such varied and numerous moral and ethical demands from the bottomless well of bioscience.

24 The arena of moral debate has also been enlarged. It will be recalled that the morality content of Devlin-Hart debate was principally homosexuality and other sexual vices. References were also made to abortion and euthanasia, but the range of the ethical-legal issues then was a small one because the intrusion of science was just beginning. Euthanasia was contemplated as the actual killing of a terminally ill person. Today, artificial life support can keep a person alive but in a vegetative form for years, draining the finances of the family, tearing against their conscience. The case of Terri Schiavo⁵⁷ is the most recently publicised example. The use of embryonic stem cells for research or fertility cases raises new questions about abortion that was not apparent to Devlin or Hart. Moreover, we now have equally difficult moral issues that transcend issues concerning death. Cloning a human being, for example, creates life, not death.⁵⁸ The real-life marking and tracing of individuals through their genetic codes rubs the shine off otherwise marvellous science-fiction films like *Gattaca*.⁵⁹ And the morality of claims to intellectual property rights of bio-scientific discoveries has yet to be mapped. The range, extent, and complexity of moral issues in the legal arena may lead to variety in judicial decisions. An absolute separation of law and morals, however, is impossible, for as Hart acknowledged, in hard cases the judge might be obliged to exercise his discretion and, of course, in this regard, considerations of morality may have a relevant influence in the court's decision as to *what the law ought to be*. And we should be mindful of Hart's gentle reminder that in answering the question what the law ought to be, we are not necessarily compelled to extend the inquiry in the form of the question, how *moral* ought the law

⁵⁷ This is the case of the brain-damaged woman in Florida whose husband obtained a court order to disconnect her feeding tube; the consequence is that she would die. The Florida Governor (Jeb Bush) invoked a controversial legislation and intervened, ordering that the tubes be re-inserted. There is now a heated contest of rights between Schiavo's husband and her parents.

⁵⁸ Law and Morality in the Age of Bioscience Part 3: Midnight in the Garden of Good and Evil (SAclJ forthcoming) will discuss law and morality in specific areas such as cloning and stem cell research.

⁵⁹ A film concerning the story in which humans with the requisite genetic components qualify to be astronauts and other high stations in life while those with defective genes are condemned to sweep the floors the others walk on.

be. However, this opens Hart's approach to the same danger that Raz pointed out in respect of the Dworkinian use of the political morality of the country.

25 It is not difficult to see that sometimes what the law ought to be need not necessarily be one that matches the general consensus of morality. In the case of Nazi Germany, for instance, it was reasonable for the state and the courts to uphold a law that required citizens to report those who criticise the state. Nonetheless, between Dworkin and Hart, it would seem that the latter offers a more liberal and flexible application of morals in hard cases. Much, of course, depends on what the courts consider to be the moral standards and values they would adopt. The study of the elusive subject of the nature of *good*, so often cloaked with erudition, but soaked in caprice, belongs to the second part of this essay, where the idea of morality, and moral disagreements will be explored, not confidently, but tremulously.
