Positivism, Legal Validity, and the Separation of Law and Morals*

GIORGIO PINO

Abstract. The essay discusses the import of the separability thesis both for legal positivism and for contemporary legal practice. First, the place of the separability thesis in legal positivism will be explored, distinguishing between "standard positivism" and "post-Hartian positivism". Then we will consider various kinds of relations between law and morality that are worth of jurisprudential interest, and will explore, from a positivist point of view, what kind of relations between law and morality must be rejected, what kind of such relations should be taken into account, and what kind of such relations are indeed of no import at all. The upshot of this analysis consists in highlighting the distinction between two different dimensions of legal validity (formal validity and material validity respectively), and in pointing out that the positivist separability thesis can apply to formal validity only; on the contrary, when the ascertainment of material validity is at stake, some form of moral reasoning may well be involved (and, here and now, *necessarily* is involved). The essay concludes with some brief remarks on the persisting importance of the positivist jurisprudential project.

What is the actual significance, for contemporary positivistic theory, of the "separability thesis" – the thesis of the non-necessary connection between law and morality?

As is very well known, the separability thesis is unanimously regarded as the hallmark of legal positivism, one of its central tenets and most important methodological commitment.[1] Still, were one to consider more closely the actual standing of the separability thesis in legal positivistic jurisprudence, one would notice the following interesting data:

(*i*) For a certain period in the history of legal positivism (i.e., during what I will shortly call the age of "standard positivism") the separability thesis has gone basically unchallenged:[2] it was unquestioningly subscribed by all legal positivists without the need of any important qualification, specification, or reservation. So much so, that standard positivism is sometimes identified, rightly or wrongly, with the separability thesis *tout court*.[3] On the contrary, during the last thirty years the separability thesis has become one of the most debated and contested topics *among* legal positivists[4] (while being of course still fiercely contested also by anti-positivists: see Dworkin 1986; Alexy 2010).

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[1] Hart 1958; MacCormick 1981; Coleman 1982; Leiter 1998, 122; Marmor 2001, 71: "There are many versions of legal positivism but all of them subscribe to the so-called separability thesis."

[2] Unchallenged, that is, *within* the positivistic camp. Of course, the separability thesis was deeply disputed by anti-positivists. See for instance Radbruch 2006; Fuller 1958; 1964.

[3] See Hart 1961, 185-6 ("here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality"). See also Green 2005, 570: "the denial of a necessary satisfaction relation […] was Hart's compact definition of *legal positivism*" (emphasis in the original).

[4] Contrast Lyons 1982, 64 ("the meaning of the separation thesis […] may seem perfectly clear, and this may explain why the doctrine has received little systematic attention"), with Green 2005, 570 ("no other position in general jurisprudence has received as much attention in the last 25 years"), and Schauer 1998, 66 ("Although all

(*ii*) While the original import of the separability thesis was ethical-political as well as scientific in character, the more recent positivistic treatment of the separability thesis is mainly a conceptual one: the thesis is now considered as a conceptual truth as far as positivistic theories of law are concerned, or it is regarded as part of a purely conceptual inquiry into the nature of law.[5]

(*iii*) While originally legal positivists used to proclaim the separability thesis in its most wide and generic terms, more recently legal positivists have recognized that the separability thesis is, as it stands, irremediably ambiguous: if taken at face value, it could mean many different things, some of them important, some others trivial, yet some others utterly false.[6] Accordingly, some legal positivists have tried to articulate the general separability thesis in some much more specific requirements, and have claimed that only some of these really belong to the positivistic enterprise.[7]

(*iv*) There seems to be some discomfort, even in the positivistic camp, towards the overwhelmingly conceptual treatment that the separability thesis has received in the contemporary positivistic debate – namely, the debate that runs along the inclusive/exclusive positivism divide. The conceptual turn in the positivistic debate has been considered – even by those legal theorists that are broadly sympathetic with the positivist project – as exceedingly subtle, dry, and remote from the normative and empirical concerns that used to drive legal positivism since its foundation.[8] Such discomfort has led some positivists to try to make sense of the internecine positivistic debate by proposing a (more) precise definition of some of the jurisprudential concepts at stake,[9] while others have tried to explain away the apparent disagreement between positivists over the meaning of the separability thesis (Priel 2005; Poscher 2009), and still others have ended up with repudiating the separability thesis itself (Coleman 2007).

The essay will try to assess the actual import of the separability thesis both for legal positivism and for contemporary legal practice, and will proceed as follows. First (§ 1), I will explore the place of the separability thesis in legal positivism. To this regard, I will try first to capture something that can be plausibly described as "standard positivism" (a set of theoretical tenets that identify the standard view in legal positivism: § 1.1), and then I will consider the ways in which (and the reasons why) standard positivism has been subsequently questioned by positivists themselves (§ 1.2). Then (§ 2), I will explore more deeply the issue of the relations between law and morality, by assessing various kinds of relations between law and morality that are worth of jurisprudential interest (§ 2.1), and by exploring, from a positivist point of view, what kind of relations between law and morality must be rejected,

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versions of legal positivism insist on the conceptual separation of law and morality, the nature of that separation is simultaneously obscure and contested in much of the positivist literature").

[5] This conceptual turn in the separability thesis, and in legal positivism generally, is aptly discussed in Tamanaha 2007; see also Schauer 2011.

[6] Contrast Hart's quote *supra*, fn 3, as well as Waldron 1999, 165 ("Positivism denies any necessary connection between law and morality"), with Gardner 2001, 223 ("This thesis [*viz*., that there is no necessary connection between law and morality] is absurd and no legal philosopher of note has ever endorsed it as it stands.").

[7] See, for instance, Lyons 1982; Green 2003, 2008; Marauta 2004; Coleman 2007, 582.

[8] Waldron 2002, 381; Allen 2003; Bix 2005, 38 ("the defenders of legal positivism may have become too clever for their own good"); Tamanaha 2007; Schauer 2011, 470 ("The question is not whether conceptual legal positivism is true. Rather, it is whether the question to which conceptual legal positivism is the answer is the most important question to be asked about the law").

[9] See Waluchow 2009 (distinguishing four different concepts of validity that seem to be at play in the inclusive/exclusive positivism debate).

what kind of such relations should be taken into account, and what kind of such relations are indeed of no import at all – though they may carry a general philosophical, political, or sociological interest (§ 2.2). The upshot of this analysis will consist in highlighting the distinction between two different dimensions of legal validity (formal validity and material validity respectively), and in pointing out that the positivist separability thesis can apply to formal validity only; on the contrary, when the ascertainment of material validity is at stake, some form of moral reasoning may well be involved (and, I'll suggest, here and now *necessarily* is involved) involved (§ 2.3). I conclude with some brief remarks on the persisting importance of the positivist jurisprudential project (§ 3). Indeed, this essay assumes and defends the general plausibility of a positivistic jurisprudential stance. My aim here, anyway, is not to defend *a priori* a positivist stance, at all costs. Rather, I am just interested in grasping, through the looking-glass of the positivist separation thesis debate, an important aspect of contemporary legal practice.

1. Legal Positivism and the Separation of Law and Morals

In talking about legal positivism, one is forced to make a preliminary point about the use of labels to describe philosophical movements. Theory-labelling is a tricky business. To be sure, labels are useful tools to refer to jurisprudential trends, but they can be misleading in so far as they are taken to convey the idea that there is a uniform trend or even a group of scholars out there – a "school" – united by a uniform and consistent research program, by the use of the same technical (epistemological, theoretical) tools, and by widely shared solutions to a set of problems.

Now, a putative unified account of "legal positivism" would be patently false. Legal positivism is not (at any rate, it is not *now*) anything resembling a school. Rather, it is an array of theses, of theoretical questions perceived of as important, and of theoretical concepts and methods of inquiry agreed upon by positivists only at a fairly high level of abstraction.[10]

Here I will assume that legal positivism is the conjunction of two theses: the social facts thesis (the law is something that is created by means of human acts, something whose existence is a matter of social facts), and the separability thesis.[11] As will become clear from the discussion in the following two sections, both theses can assume a number of forms – they can be interpreted in a number of ways.

1.1. Standard Positivism

[10] See Raz 2007, 319 ("theories belong to a tradition by their frame of reference, sense of what is problematic and what is not, and by similar historical features which do not presuppose that they all share a central credo"). On the lack, or very low degree, of theoretical unity within the positivist field, see MacCormick 1978, 240; Waluchow 1998. See also Summers 1968, 16, and Tarello 1974, 88 (both arguing for a rejection of the "legal positivism" label altogether, as devoid of any precise meaning), and Finnis 2003, 127 ("there's no such thing as positivism").

[11] Definitions of legal positivism along similar lines are offered e.g. by Ross 1961; Nino 1980, 520; MacCormick 1981; Coleman 1982; Lyons 1984, 722; Coleman and Leiter 1996, 243; Leiter 2001, 122; 2010; Kramer 2004, 11; Villa 2009.

I will use "standard positivism" to describe the version of legal positivism that has flourished across Europe for a few decades in mid-20th century (say, between the 1940s and the 1960s), and that has had as its torchbearers such scholars as H.L.A. Hart, Hans Kelsen, Norberto Bobbio, and Alf Ross.

As we have seen, standard positivism embraced a very broad definition of the separability thesis. But what was the thesis intended to mean? It is reasonable to assume that for standard positivism the separability thesis was first and foremost *a thesis about legal validity*:[12] a legally valid rule does not lose its legal standing if it fails to conform to some moral requirement – and conversely, a moral requirement cannot *per se* qualify as a legally valid norm, absent any social practice to give it effect as a legal standard (Hart 1958, 55).

But in standard positivism the separability thesis also had a wider reach, far beyond the scope of legal validity. To understand this, it must be remembered that standard positivism was driven by a strong demystifying attitude towards the law (Hart 1973; Leiter 2009) – an attitude it inherited from the founders themselves of legal positivism (John Austin and, most notably to this concern, Jeremy Bentham). Central to this demystifying project, was the idea that the law does not deserve unqualified moral respect – on the contrary, the law is thought of as always open to moral criticism (Hart 1958, 74-75; 1967, 118; Lyons 1993, ix-x); and this required breaking several possible ties between law and morality, it required denying necessary connections between law and morality across the board. Accordingly, Hart, for example, states that many different relations between law and morality are of course acknowledgeable, but he then insists that they are not necessary in character: they are all contingent.[13] Finally, Hart reiterates the separability thesis also in prescriptive contexts (as opposed to theoretical ones), for instance when he counters the claim of the legal enforcement of morals (Hart 1963).

Other positivists (mainly on the Continent: Hans Kelsen, Alf Ross, and Norberto Bobbio) insisted on the separability of law and morality as the by-product of both the factual character of law, and of the possibility – indeed, the requirement – that law constituted the object of scientific knowledge. This peculiar aspect of the intellectual enterprise of legal positivism is sometimes called "methodological positivism".[14] Inspired by neo-positivism and logical empiricism, many Continental positivists contended that legal knowledge, in order to qualify as a kind of scientific knowledge (legal science), would have to be configured as knowledge of *facts* (law-making facts) only. Whatever else that would have required, legal positivists held for sure that this epistemological stance would banish moral values (not from the law itself, but) from the domain of *legal knowledge*: since moral values are not apt for scientific ascertainment, they are not the proper object of any scientific knowledge, and so they have no room in a scientific knowledge of the law.[15] Note that this too amounted to a demystifying enterprise about the law. The main difference between the Bentham-Hart positivist line and the Kelsen-Bobbio-Ross one, is that the former is *primarily*

[12] See Kelsen 1945, 113-4; Hart 1961, 185-6. But see Green 2008, 1056 (rejecting the idea that the separability thesis is, for Hart, a thesis about legal validity).

[13] Hart 1958; 1961, ch 9; 1983, 6-12; 1994, 259. To be sure, Hart concedes that two such connections are indeed necessary: the minimum content of natural law (a "natural necessity"), and the "germ of justice" connection (due to the fact that legal rules are general in their formulation and application).

[14] This definition is owed to Bobbio 2011; see also Perry 1996; Pino 1999; Bulygin 2006.

[15] Such a connection between the separability thesis and the epistemological commitments of this stream of legal positivism is hinted at by Coleman 1989, 67. See also Raz 1983, 202 (referring to Kelsen's emotivist theory of ethics as his reason for keeping "scientific" legal theory free from moral considerations).

interested in explaining the nature of law (or at least some of its important features), while the latter is *primarily* moved by an epistemological-methodological aim – the aim of making legal knowledge possible.[16]

Of course, the difference between the two approaches turns out to be less a distinction in fields of enquiry than a distinction in emphasis and degree.[17] Moreover, both approaches were ultimately moved by the same kind of political and pedagogical aims: this is evident in some of the arguments Hart adduces to substantiate his adherence to the separability thesis (1958, 72-78; 1961, 210-211). I am not saying that the separability thesis was, to Hart, *only* a matter of political preference: Hart certainly considered it as a self-standing philosophical position, since it contributes to our proper understanding of what the law is. But, at the same time, Hart held for sure that the separability thesis could be defended also on political grounds, since it would yield beneficial political and social effects.[18] And even the apparently arid "methodological" positivist strand often emphasised also the practical import of making legal knowledge a kind of science, since at the very least it would have amounted to making legal knowledge a honest, candid, not manipulative, intellectual enterprise, by keeping at bay any fallacious confusion between "is" and "ought" in the first place.[19]

The foregoing discussion suggests, I think, that there are many different ways to make sense of the separability thesis.[20] And standard legal positivism appears to be committed, at once, both to a narrow and to a wider – indeed, an all-encompassing – interpretation of the separability thesis. The narrow interpretation is related to legal validity only, which, for better or worse, is the main concern of legal positivism.[21] The wider interpretation replicates the idea of a contingent connection – indeed, sometimes even of a necessary separation – between law and morality in many other contexts: descriptive legal theory, scientific knowledge of the law, absence of a general duty to obey the law, etc. And all this is meant to further the philosophical as well as the (broadly understood) political agenda carried on by many legal positivists, such as favouring the demystification of the law, fostering its open moral criticism, and keeping it as far as possible neutral between contested moral values (the enforcement of morals).

Oddly enough, however, from all this the critics of legal positivism have managed to derive the patently false picture, indeed a caricature, that according to legal positivism there

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[16] For a good comparison between the Anglo-American and the European-continental approaches to standard positivism, see Jori 1983.

[17] According to Bix 2005, 29-31, for instance, the origins themselves of legal positivism (Austin, Bentham, and even Hobbes) are better described as an effort to provide the tools for a "scientific" study of the law. See also Tamanaha 2007, 3.

[18] See Marmor 2006, 684: "[Hart] thought that legal positivism, as a general theory about the nature of law, is basically descriptive and morally neutral. However, Hart also believed that a general, public, recognition of the of the truth of P, would free us from romanticizing myths, and thus enable a more critical attitude to law, that is not just theoretically correct but also morally-politically beneficial"; and Green 2005, 577. See also Lyons 1984, 730-733 (arguing that the endorsement of the positivist separability thesis can only be justified on moral grounds).

[19] "Scientific neutrality has become [...] our way of taking part in political struggle" (Bobbio 2000, 418, my translation).

[20] As L. Green rightly remarks, "the problem is not that there is no real issue here; it is that there are too many and that the separability thesis [in Hart's version] tried to solve them all at once" (Green 2005, 570); see also Hart 1961, 185; Lyons 1982, 64; Greenawalt 1996, 11; Waluchow 1998b.

[21] See Nino 1980, 250; Kramer 2004, 152 (stating that legal positivism is a theory about the nature of law-ascertainment in every society).

is no connection whatsoever between law and morality, and that positivists are not interested in any kind of relations between law and morality, or in normative questions generally.[22]

1.2. Post-Hartian Positivism

In the previous section I have identified standard positivism by means of the conjunction of the social facts thesis and the separability thesis. The shift from standard positivism to post-Hartian positivism is captured by a peculiar treatment of both theses. (I will generally define as "post-Hartian" almost all the varieties of legal positivism that emerged after the heydays of standard positivism – say, from the late 1970s onwards.) Post-Hartian positivism retains the social facts thesis (in some of its declinations), but is inclined to demise the separability thesis, or to weaken it considerably. Thus, while for Hart this thesis amounted to a definition of legal positivism itself, post-Hartian positivism does not regard any more the separability thesis as a reliable dividing line between positivism and non-positivism.[23] To be sure, the standard positivist stance on the separability thesis (the idea that *all* significant relations between law and morality are just contingent in character) has not entirely disappeared from the positivistic landscape. Some positivists still attach considerable theoretical and normative import to the idea that all or most of the possible relations between law and morality are indeed contingent only.[24] Nevertheless, it is a fact that the majority of positivists seem now in the business of critically reviewing the separability thesis as it used to appear in its original, all-encompassing interpretation, and of severing it from what is now assumed to be the (real) core tenet of legal positivism.

The reasons for this shift are at least two-fold. One set of reasons is the need to defend legal positivism from the penetrating criticism mounted by Ronald Dworkin since the publication of his essay *The Model of Rules* in 1967, that was mainly grounded on the supposedly unsatisfactory account provided by legal positivism of some relations between law and morality. Dworkin seems to have struck the right chords, and as a consequence many positivists have made considerable efforts at reconsidering the separability thesis, either in order to incorporate Dworkin's criticism in a positivist framework, or to explain it away. Another set of reasons for reframing the separability thesis and some of its corollaries deals with the growing attention paid by legal positivists to the model of State (the "constitutional State") prevalent in many contemporary democracies in the second half of 20th century. Such a model of State is defined *inter alia* by the presence of a written constitution, enshrining a number of fundamental rights and moral principles (equality, dignity, freedom, etc.). In other words, in the constitutional State there is a "Bill of Rights" that works as a material constraint on the validity of statutes and legal norms generally. The presence of Bills of Rights operating also as content-based tests of legal validity in many contemporary legal systems has forced many positivists to take into account the presence of moral principles in

[22] To have a sense of the absurdity of this caricature, suffice it to take a glance at Hart's contributions to such topics as the legal enforcement of morals and the foundations and limits of punishment in criminal law, and at Kelsen's and Bobbio's works on democracy.
[23] See Raz 2003, 167-168; Coleman 2007; 2011, 11-33.
[24] The clearest example of a standing defence of the standard positivist approach to the separability thesis is Kramer 2004. See also Ferrajoli 1989, chs 15-16; Chiassoni 2005.

the law and the way they affect legal validity – which is at least a *prima facie* challenge to the separability thesis.[25]

In post-Hartian positivism, thus, the separability thesis is either weakened, or abandoned, or reformulated in an openly prescriptive way. [26] At the same time, the social facts thesis becomes more and more the real signature of legal positivism.[27]

More precisely, so-called Inclusive positivism reframes the separability thesis as a mere logical or conceptual possibility: it claims that it is conceptually possible – that it is at least conceivable – that a legal system exists in which morality is not a criterion of legal validity (the separability thesis becomes tantamount to "conceptual possibility of separation" between law and morality: Coleman 1982, 141, 143; Himma 2002, 136) – admittedly, a rather trivial thesis, one that nobody would ever dare to deny (Coleman 2001, 151, 152-153; Schauer and Wise 1997, 1087).

So-called Exclusive positivism, in turn, retains – indeed, strengthens – the separation thesis only as long as the identification of law is concerned, excluding that morality can ever figure among the criteria of validity. According to Exclusive positivism, thus, the separability thesis is conflated with, or included into, the social fact thesis (now understood as "the sources thesis"). According to Exclusive positivists, in the identification of valid laws, law and morality are *necessarily separated*. Moreover, while standard positivism applied the separability thesis to many different issues (apart from the one of the sheer identification of law), Exclusive positivists are ready to acknowledge that there are indeed many *necessary* relations between law and morality, worthy of jurisprudential scrutiny.[28] Accordingly, many Exclusive positivists are eager to state clearly that the separability thesis ("there is no necessary connection between law and morality") is, as it stands, false.[29]

Finally, a third strand in post-Hartian positivism consists in the reformulation of the separability thesis in a prescriptive way ("prescriptive", or "normative", positivism):[30] the individuation, interpretation and application of the law should be as much as possible free from moral considerations. Here the relevant positivistic claim is not conceptual or theoretical any more, but rather ethical-political in character:[31] it is the claim that it is a good thing, for reasons having to do with legal certainty, respect for personal autonomy, and democratic legitimacy, that the decisions of those who are in charge to apply the law be made without resorting to moral considerations (and the same goes, to some extent, also with regard to the attitude of the law-subjects); and, to make this state of affairs at least possible, laws should be drafted in such a way that their individuation and application does not call for the exercise of moral judgment.

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[25] This kind of argument in favour of the revision of standard positivism is well exemplified, for instance, in Waluchow 1994, 6-7, and ch 5; Moreso 2001, 38; Villa 2009, 111, 115-6.

[26] See, along similar lines, Kramer 1994, 149-150; Moreso 2004a.

[27] Raz 1979, 37-8; Coleman 2001, 75 ("no claim is more central to legal positivism"; see also 152, 153, 161); 2007; Himma 2002, 126 ("the most fundamental of positivism's core commitments").

[28] See the many instances of necessary relations between law and morality listed by Raz 2003; Gardner 2001; Endicott 2005; Green 2008. Leiter 2001, 162-3, refers to this as an "emerging minor industry" in legal theory.

[29] Raz 1985, 227: "the separability thesis is […] implausible. […] it is very likely that there is some necessary connection between law and morality, that every legal system in force has some moral merit or does some moral good even if it is also the cause of a great deal of moral evil". See also Gardner 2001, 223; Green 2008.

[30] For an overview, see Celano 2010. This approach can be found (with some minor variants) in Scarpelli 1965; MacCormick 1985; Campbell 1996; Waldron 1999a; 1999b; 2001. Normative positivism has its roots in the very historical origins of positivism, namely in the work of Jeremy Bentham: see Postema 1989a, esp. 328-336.

[31] "Normative positivism is itself a moral claim" (Waldron 1999b, 167).

2. Law and Morality: Disentangling the Issues

Let's take stock. I have characterized standard legal positivism as the idea that law is a matter of social fact (positive positivism, social fact thesis), and that legal validity is not necessarily dependent on moral value (negative positivism, separability thesis). Standard positivism has undergone considerable criticism, from positivists and anti-positivists alike. The main point of contention has been the separability thesis. Post-Hartian positivism, thus, has either reformulated the separability thesis into an extremely weak, and in the end trivial, thesis, or has retained it as a thesis on legal validity only (the identification of valid law on purely factual basis), while refuting it in any other possible context – or still, has transformed it into an openly prescriptive stance.

From the discussion in the previous sections it appears that the separation thesis elicits two main sources of unease: it can prove exceedingly generic and ambiguous, and (at least in one of its possible declinations) it does not fit with a quite normal fact of legal practice in contemporary constitutional States – the use of moral argument by courts, especially when assessing the conformity of statutes to the provisions of a Bill of Rights. I for one join these concerns, and in this second part of the essay I will try to assess them both.

More precisely, in the following section I will provide a tentative list of various possible relations between law and morality,[32] while in § 2.2 I will try to assess *a*) what relations between law and morality *cannot*, to my mind, be allowed for by legal positivism; *b*) what relations between law and morality *should* be accounted for by legal positivism, either because they are important, or because they are trivially true; and *c*) what relations between law and morality *have no conceptual bearing* on legal positivism (there need not be any specifically positivist stance on the matter), even if they can indeed raise some jurisprudential interest on their own right: they do not fall within the scope of a positivist theoretical inquiry, even if legal positivism has no reason to deny their existence.

Two caveats are in place here. First, I will loosely talk of "relations" between law and morality, while leaving it an open question whether such relations are necessary and conceptual in character, or contingent and empirical only. My point is that, at least for some types of relation between law and morality, it is far more important to understand if and how a relation in fact obtains, and what its implications are, rather than legislating that such a relation is necessary rather than contingent.[33]

Second, it is common to distinguish between critical or ideal morality on the one hand, and positive morality on the other hand. The separability thesis is supposed to apply to both (Green 2008, 1042). Be that as it may, while I am confident that, in the following discussion, the context will make it apparent what kind of morality I will be referring to in each case, I will assume that in many instances of relation between law and morality the distinction would prove of very little moment.

[32] In this I will in part join, and take advantage of, the efforts already made by other positivists: see supra, fn 7. My tentative list is far from complete, though: see Moore 2012.

[33] See Barberis 2010, 220 (arguing that contingent connections between law and morality can be as interesting and important as the necessary ones). Moreover, "not all necessary truths are important truths" (Green 2008, 1043); see also Schauer 2011, 469.

2.1. A Hitchhiker's Guide to the Law-and-Morality Galaxy

Here is a list of some conceivable relations between law and morality.

R_1) Relations pertaining to the *identification* of law.
This seems to be the most prominent sense in which legal positivism claims that law and morality are separable (standard positivism, Inclusive positivism), or that are necessarily separated (Exclusive positivism), and this is coherent with the general spirit of the positivist enterprise as an inquiry into the conditions of the identification of law. On reflection, though, the issue of the identification of law turns out to be ambiguous. "Identifying the law" can mean different things: it can refer to the question if in a certain society there actually is law – as opposed to mere social customs, religious practices, and the like; or, it can refer to the question if certain law-making facts have occurred, i.e. the question if something counts as a legal *source*; or still, it can refer to the question of the identification of the content of those law-making facts, to the meaning of legal *norms* (what does the law say?).

Accordingly, as far as the identification of the law is concerned, the question of possible relations between law and morality is open to the following three different interpretations:[34]

R_{1a}) The identification of the *concept of law* (the question *quid ius?*).
By concept of law I a mean a set of properties that a social institution must possess in order to count as law. The law of a society is, thus, the institution that satisfies the test of having those properties. Accordingly, those who believe that there is a necessary connection between law and morality at the conceptual level would claim that the definition itself of law includes reference to morality or to moral values, such as justice, equality and so on (i.e., one of the necessary properties of the concept of law is a moral property). Those who claim that there is no necessary connection between morality and the concept of law, on the other hand, assume that the concept of law can – or even must – be defined in purely factual terms.

R_{1b}) The identification of the *sources of law*.
I define the sources of law as the set of facts that are regarded, in a certain social context, as law-making facts.[35] By extension, in those societies where law making-facts usually consist in procedures that end up in the production of an authoritative (legal) *text*, "sources of law" can refer also to the texts so produced. Accordingly, for instance in the strict sense "legislation" (understood as a procedure according to which a legislative assembly is empowered to produce statutes or bills) is a source of law. And, by extension, the statutes thereby produced are also sources of law. Now, the claim of a necessary connection between law and morality in the identification of legal sources could mean either that morality necessarily counts as a legal source (as some strong natural law conception could claim), or that moral arguments are necessarily needed in order to identify legal sources, or some of them – in other words, that morality necessarily affects the identification of otherwise factual

[34] A similar three-fold distinction of identification relations between law and morality is drawn by Barberis 2010, 216-220.
[35] It should be apparent that I am not using "sources of law" in a Razian sense. Raz's use of this expression is, by his own admission, "a somewhat technical sense" (Raz 1979, 47), i.e. a sense that is slightly adjusted to the purposes of his own legal philosophy. Raz includes into the concept of a legal source also the facts that contribute to the ascertainment of the content of a law.

sources.[36] On the contrary, the thesis of the separation claims that legal sources consist only in empirically ascertainable facts; morality can be a source of law only contingently, if the rule of recognition of the system allows for (or even mandates) this possibility.

R_{1c}) The identification of *legal norms* (the question *quid iuris?*).
By a legal norm I mean, paradigmatically, the meaning that is carried by an autoritative legal text. So, while legal texts are sources of law (in the expanded sense discussed above), legal norms are the content of those texts – are what legal texts *say*. Legal interpretation is the act of inferring a meaning from a legal text. Accordingly, I will call this kind of possible relations between law and morality *interpretive relations*[37] (an inquiry into the question of possible or necessary relations between law and morality in the identification of legal norms is tantamount to an inquiry into the possible or necessary relations between law and morality in legal interpretation).

Now, the defender of a necessary interpretative connection between law and morality will claim that interpretation (in the broad sense that I have sketched here) will always entail the use of moral argument. On the contrary, the defender of the necessary interpretative separation will contend that it is *not necessary* that such a relation occurs, or that this is *necessarily not* the case.

R_2) *Methodological*, or *epistemological*, relations.
Methodological relations affect the issue of the study of law, of the construction of a theory of law. Is the law a kind of thing that can be studied (explained, understood) without resort whatsoever to moral considerations? Is a morally pure theory of law possible? The thesis of the *necessary* methodological connection, then, will argue that moral values always affect, influence and guide the task of legal-theory construction (Finnis 1980, ch 1; Dworkin 1986; Perry 1996). The thesis of the necessary non connection will argue that legal-theory construction is never morally committed and is always morally neutral (though it can allow for the presence of other evaluative, non-moral considerations).

R_3) *Justificatory* relations.[38]
Justificatory relations concern the problem of political obligation and of law's normativity: is there an autonomous obligation to obey the law (is law's normativity necessarily built into the nature of law, so to say)? Or does such an obligation (if there ever is one) derive from a source that is external, as it were, to the law? Does the law as such provide reasons for action, or do the reasons to comply with the law necessarily come from other domains (morality, prudence, self-interest, etc.)? I consider these questions to refer not only to the citizens' (purported) obligation to obey the law, but also to the law-applying institutions' (purported) duty to apply the law.

So, according to the thesis of the *necessary justificatory relation* between law and morality, there is always a moral duty to obey the law (such a position is described as "ideological positivism" by Bobbio 2011, and as "legalism" by Green 2008, 1058). According to the thesis of the *contingent justificatory relation* between law and morality, one has a moral duty to obey the law only if and when the law contingently happens to have

[36] This seems to be the main thrust in Dworkin's argument from theoretical disagreement (Dworkin 1986).
[37] I borrow the phrase "interpretive relation" from Nino 1994, ch 3.
[38] The phrase "justificatory relation" is also borrowed from Nino 1994, ch 2, but my use slightly differs from Nino's.

moral value. Finally, the thesis of the *justificatory autonomy of* law and morality would hold that the law is an autonomous source of genuine obligations: legal obligation and moral obligation are two distinct kinds of obligations, each one of them endowed with its own specific kind of normativity.

R_4) *Functional* relations.
The law may be the instrument, the necessary condition for the existence, maintenance and flourishing of any society; and *if* the existence, maintenance and flourishing of a society is considered a morally valuable state of affairs, *then* a kind of necessary relation between law and morality obtains. Or, the law may provide other important services to morality: it may make some generic and perhaps controversial moral requirements more determinate, more precise, more publicly accessible, easier to protect, and so on. Now, if the law invariably renders these kind of services to morality, then a kind of necessary connection takes place (note that this necessary connection would take place even if the law, in addition to these services, produces also some evil – or even great evil, for that matter).

R_5) *Causal* relations.
Since positive law is normally produced by means of deliberate acts of human beings, it is quite obvious that the content of the law reflects its authors' moral expectations: the law normally grapples with the moral issues widely perceived in society – or so perceived by the legal authority, or even by a ruling *élite*. I do not know of any serious attempt (nor any attempt generally) to question that this kind of relation necessary occurs. This is an empirical claim, even if at an extremely abstract level – a "natural necessity", as Hart would have it (Hart 1961, 199).

R_6) *Psychological* relations.
The fact that the law consistently makes some act obligatory, permissible, or forbidden, may as a matter of fact engender the belief (even only at a subliminal level) that those acts are also *morally* obligatory, permissible, or forbidden. Law, in other words, may have the effect of influencing and moulding the prevalent mentality and attitudes of the social group it is addressed to, the positive morality of the relevant society.

R_7) *Content* relations.
At least in part, law and morality refer to the same things (they regulate the same acts), their respective scopes partially overlap. This happens, for instance, when the law forbids some acts that also morality happens to forbid (murder, theft), or when the law requires acts that also morality requires (the duty to take care of one's children). True, the law does not cover every morally relevant issue, and conversely, not everything that there is in the law does have a (direct at least) moral relevance. Nevertheless, it is also true – trivially true – that the law disciplines many things that also have moral relevance.

R_8) *Structural* relations.
It is possible that the formal and structural features of the law, or some of them, are capable of engendering morally valuable consequences. Thus, for instance, the general character of legal rules may bring about some "embryonic" form of justice – everyone to whom a certain legal rule applies is treated in the same way (formal justice). Or, the promulgation and public character that normally attaches to legal rules gives fair notice to the addressees, and thus

ensures at least a minimal degree of respect for of personal autonomy and human dignity (Celano 2012). Or, the very existence of law-applying institutions, that are in charge with the authoritative solution of controversies, may produce a stabilizing effect on social relations, it may prevent uncertainty in certain relations to endure *ad infinitum*, and so on. If all these things are conceived of as necessary, and not just possible, consequences of the way the law is, then the relevant relation between law and morality becomes a necessary one.

R_9) *Incorporation* relations.
Sometimes the law requires its addressees (private citizens or, more likely, law-applying institutions) to make moral evaluations. This can happen either when a moral value or principle is encapsulated in the very wording of a legal text ("equality", "dignity", "freedom"), or when the law instructs the law-applying organ to make a certain kind of substantive evaluation ("reasonableness", "best interest of the child", "undue restrictions", "unfair terms"), or when the law refers explicitly to the discretion of the law-applying organ. The thesis of the necessary connection would claim that in such cases law and morality are not distinguishable – more precisely, that in such cases morality becomes part of the law.

More precisely, there are two ways of vindicating a necessary relation between law and morality by way of incorporation. On one possible interpretation of the incorporation thesis, such connections cannot fail to obtain, albeit sometimes only implicitly (it is necessarily the case that the law includes, even if implicitly, such references to morality); as a consequence, the relevant connection between law and morality would be both necessary and inevitable. On another possible interpretation, such references to morality are contingent in nature: thus, the connection between law and morality would be a necessary one only if and when the relevant conditions explicitly obtain, but that such conditions obtain is itself a contingent matter. The necessary non connection (separation thesis) would maintain that when the law makes such references to morality, it is in fact instructing the law-applying organs to reach "outside" the law, in the separate domain of morality.

R_{10}) *Evaluative* relations.
Law is a kind of thing that (like some other things, but unlike many other things) is apt for moral evaluation; laws are the proper object of moral scrutiny, criticism, assessment in terms of justice and injustice etc. This "evaluative" feature of law is thought sometimes to highlight some kind of necessary relation between law and morality.

R_{11}) *Semantic* relations.
Law and morality seem to share the same deontic terminology: rights, duties, obligations. Do these words have the same meaning in both domains? Do this overlap in vocabulary bring to light a necessary connection between law and morality?

2.2. The Many Relations between Law and Morality, and What Legal Positivism Can(not) Do about Them

The survey of possible relations between law and morality in the previous section paves the way for a better assessment of the real significance, here and now, of the separability thesis for legal positivism.

Legal positivism is conceptually committed to subscribing only to one kind of *necessary separation* between law and morality, i.e. the one bearing on the identification of legal sources as described in R_{1b}). Legal positivism requires, as a key feature of its own theoretical account of the nature of law, that the *sources* of law are only social (human) facts. This is usually understood to be a thesis on (or a definition of) the criteria of legal validity.[39] This is certainly true but, as we will see shortly (§ 2.3), this is far from exhausting the whole concept of legal validity: the thesis of the separation of law and morality, in the relevant sense, bears on the definition of legally valid *sources*, not on the definition of legally valid *norms*. And legal positivism, as I will try to reinterpret and defend it here, is emphatically not committed to an exclusively formal conception of legal validity.[40] Legal positivism conceptually prevents morality to become *per se* a legal source, even if it does not rule out at all the possibility that moral contents become law in virtue of some kind of social (factual) recognition.

At the same time, legal positivism is not committed to an exclusively factual definition of *the concept of law* (R_{1a}). In other words, the separability thesis is not thought of by legal positivists as affecting the whole concept of law: rather, it is placed only at the level of the identification of valid law (Raz 2007). Recasting the separability (or even the necessary separation) thesis as a thesis on the concept of law, and not on the identification of law, is instead a recurring rhetorical move by anti-positivists, aimed at showing the putative overall implausibility of legal positivism.[41] If this is correct, it means that, as far as a more vast inquiry into the concept, or the nature, of law is concerned, legal positivists are not bound to rule out the possibility that many other connections between law and morals can emerge – for instance, when inquiring into what makes the law valuable (if it is valuable), what makes it binding (if it is binding), and what its functions are. Even Hart, as we have seen (supra, § 1.1), when engaged in an inquiry into the concept of law generally (as opposed to the problem of the identification of valid law), envisions a kind of necessary connection between law and morality – namely, the "minimal content of natural law".

Once these points are clearly stated, we can move on to consider the positivist attitude towards other possible relations between law and morality. The next few pages of this section will be devoted to highlighting the three following points:

a) Legal positivism does not in fact ignore these relations between law and morality.

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[39] As I have already pointed out supra, fn 12, in standard positivism the separability thesis bears on the concept of legal validity in the first place. The persisting importance of this declination of the separability thesis for legal positivism is attested, among others, by Lyons 1977, 418; Coleman and Leiter 1996, 243; Shiner 1996, 436, 438; Gardner 2001, 223; Leiter 2001, 163 (who considers this interpretation "obvious"); 2010; Marmor 2001; 2006, 689, 691; 2011, § 1; Moreso 2001; Himma 2002, 135; 2009a, 97; Green 2003; Bulygin 2006, ch 2. *Contra*, Coleman 2011, 8-9 (arguing for the independence of the separability thesis from the concept of legal validity).

[40] See for instance Bustamante 2008, who holds legal positivism guilty of being committed to a merely formal concept of validity. However even Hart, who repeatedly identified "validity" with "enactment", nonetheless allowed for the possibility that legal validity is affected by content-based considerations: see Hart 1958; 1961, 204; 1994, 250. See Pino 2011. Further examples of full-fledged legal positivists who account extensively for material validity are at least Ferrajoli 1989; Guastini 1994.

[41] See for instance Füßer 1996; Alexy 2010. For critical assessment, see Patterson 2012. It is true nonetheless that some positivists are guilty of concurring in this misrepresentation. See for instance some ambiguity between the identification of (valid) law and the identification of the concept of law in Bobbio 1996, 134-136; Hart 1983, 12.

b) On the other hand, legal positivism does not command one single position on each one of these relations: a positivist may even assume, without contradiction, that some of them are indeed necessary.

c) Finally, there is indeed a form of relation between law and morality that (here and now, in the context of contemporary constitutional States) seems to be inevitable, and which perhaps deserves more attention to be paid by legal positivism.

Let's begin with the *interpretative* relation between law and morality (R_{1c}). Positivists are largely inclined to think that such relation is in fact important and pervasive, due to the fact that the law (being a human artefact) has limits and defects, and so legal interpretation can easily require the exercise of discretion by law-applying institutions, i.e. a form of judgement that is not firmly guided by existing law, and is influenced by substantive and also moral considerations – even if they do not always venture into considering this as a necessary relation.[42] Evaluative and even moral judgements can affect legal interpretation in many ways. For instance, this can happen when the same legal text can be interpreted in many alternative ways, and the interpreter, as a consequence, is faced with a choice between the many possible meanings (i.e., the many possible norms) expressed by the legal text. Or, the interpreter may have to look for the relevant legal norm by means of some complex interpretive and argumentative procedure, such as analogy, or the "extraction" of general principles from a series of rules, other principles, and precedents. Or, the interpreter may be required to solve such problems as conflicts of legal norms, gaps, defeasibility, the balancing of competing principles, and so on.[43] All this operations, I submit, require the interpreter to embark in a substantive evaluative argument – sometimes, even in a moral argument. At an even deeper level, moreover, the interpreter has to choose among the many different styles and techniques of legal interpretation that are available to him in the context of a certain legal culture (for instance, the choice between a textualist and a "living tree" approach in constitutional interpretation), and again this choice is itself a matter of substantive ethical-political preferences, one that is guided by such factors as fidelity to democratic values, or stability and certainty in legal decisions, reasonableness, justice for the specific case at hand, and so on. All this shows that, in the context of legal interpretation, there is a standing possibility of plural intersections between legal and moral arguments. I shall have something more to say on this topic shortly (§ 2.3).

The same happens with the *methodological* relation between law and morality (R_2). While many legal positivists claim that legal theory is a morally neutral enterprise (without being entirely value-free), some other legal positivists are ready to allow that legal theory is itself guided or influenced by moral and political values (as long as the legal theorist is not in the business of commending or justifying the law).[44]

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[42] A necessary relation between law and morality in the context of legal interpretation is envisaged for instance by Lyons 1982, 65; Scarpelli 1989, esp. 470-471; Raz 1993; Nino 1994, ch 3; Greenawalt 1996, 13-19; Marmor 2001, 72; Gardner 2001; Diciotti 2003; Waldron 2008, 2009. Hart's position on the topic is more nuanced: while in Hart 1994 he claims that the interpretative relation is not a necessary one (since interpretation can be affected by different kinds of evaluation, not only moral ones), in Hart 1961, 204-205, he seems to allow for necessary interpretative relations between law and morality, but does not deem them important after all.

[43] Some good examples of such norm-creating procedures by means of interpretation are provided by Guastini 1986.

[44] Raz 1983, 209: "the [positivist] doctrine of the nature of law yields a test for identifying law the use of which requires no resort to moral or any other evaluative argument. But it does not follow that one can defend the doctrine of the nature of law itself without using evaluative (though not necessarily moral) arguments". On this

As far as the *justificatory* relation (R_3) is concerned, from a positivist point of view the law is not endowed with intrinsic moral legitimacy – it is just a set of social facts. Since facts are just that – namely, facts – the factual existence of the law as such cannot be a conclusive argument (for some legal positivists, not even a *prima facie* argument) in favour of a purported obligation to obey the law.[45] For most legal positivists, thus, the legitimacy of the law is an entirely "external" and contingent property of law, it depends only on law's capacity to satisfy some independent moral requirement. Accordingly the normativity of law, far from being an immanent property of the law, is entirely parasitic on its contingent moral value, it ultimately rests on moral reasons.[46] Legal positivism is thus conceptually committed to the thesis of the *contingent justificatory connection* between law and morality: as far as the justification of the obligation to obey the law is concerned (when such an obligation in fact there is), this cannot but rest on morality. True, some legal positivists do not want to rule out the conceptual possibility that law's normativity is rooted in specifically legal, non-moral considerations, i.e. that law and morality are, in the justificatory sense, autonomous. But it is disputed if such conceptual moves are in fact coherent with the positivist jurisprudential enterprise.[47]

Many positivists are not reluctant to grant the status of a necessary connection to *causal* relations (R_5);[48] to *content* relations (R_7);[49] and to *evaluative* relations (R_{10}).[50] Many positivists believe that there is a *psychological* relation between law and morality (R_6) (indeed this is but one of those cases in which asking if the relevant relation is necessary or only highly credible would be otiose); according to many positivists, the existence of such a relation – and the need to immunize the citizens against it – is exactly what makes a positivist attitude pragmatically and "pedagogically" preferable, because it educates citizens into thinking that there is no immanent normativity or sacred aura in the law, and so it better prepares them for the moral criticism of the law, and for resistance to unjust laws.[51] As pointed out by Joseph Raz, "Legal positivists are more likely than natural lawyers or other non-positivists to affirm that sometimes courts have (moral) duties to disobey unjust laws" (Raz 2007, fn. 28).

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topic, see the variety of views held by Green 1987; Waluchow 1994, 9-29; Coleman 2001, part III; Dickson 2001; Kramer 2004, 158; Marmor, 2006; Leiter 2007.

[45] Hart 1961, 210 ("the certification of something as legally valid is not conclusive of the question of obedience"); Coleman 1989; Bix 1996; Leiter 2001, 163; Gardner 2001, 213 (arguing that the positivist social sources thesis is "normatively inert"); Schauer 1996 (legal positivists are "the leading proponents of the view that there is *no* moral obligation to obey the law", 37, emphasis in the original); Green 2003 ("No legal positivist argues that the *systemic validity* of law establishes its *moral validity*, i.e. that it should be obeyed by subjects or applied by judges").

[46] MacCormick 1978, 63-64, 139-140; Raz 1984a; 1998, 380-381; 2004, 189 ("in such cases [i.e., when one claims that the law has legitimacy] we cannot separate law from morality as two independent normative points of view, for the legal one derives what validity it has from morality"); Nino 1994, ch 3.

[47] See for instance Coleman 1996, 2001, who roots the idea that law produces genuine (i.e., non-moral) reasons for action on the concept of convention, or of "Shared Cooperative Activity" (for critical assessment, see Bix 1996; Schauer 1998; Celano 2003; Cristiano and Sciaraffa 2003; Schiavello 2010). And Shapiro 2011, who grounds the normativity of law on the concept of "plan" (for critical assessment, see Celano 2013).

[48] Hart 1958; 1961, 185, 198; Ross 1961; Coleman 1982; Coleman and Leiter 1996, 243; Shiner 1996, 437.

[49] Hart 1961, 188, the "minimal content of natural law"; Greenawalt 1996, 11; Shiner 1996, 437; Raz 2003, 168; Celano 2005.

[50] Lyons 1982, 68; Green 2003, § 4.2 ("necessarily, law is justice-apt"); 2008; Raz 2003, 178-180.

[51] Hart 1958, 53-54; 1961, 296; MacCormick 1981, 142; Schauer 1996. According to Tamanaha 2007, 12, this pragmatic benefit "has been a primary motivation for the [positivist] tradition throughout its existence".

Some positivists claim, while others deny, that *structural* relations (R_8),[52] and *functional* relations (R_4)[53] between law and morality have the status of necessary relations. Some positivists claim that *incorporation* relations (R_9) make morality part of the law (and so engendering a kind of necessary relation, as soon as the incorporation obtains), while other positivists contend that even in such cases the two domains (the legal and the moral) are still conceptually separate and distinct.[54] Some positivists acknowledge that semantic relations (R_{11}) are evidence of a conceptual overlap between law and morality, but still maintain that this does not warrant the conclusion of an identity between legal and moral rights, duties, obligations.[55]

2.3. The Real Challenge for Legal Positivism: Accounting for Material Validity

To sum up, legal positivism is a theory of the identification of law, not a complete theory of the nature of law: it is not a theory of political obligation (the theory of the conditions of legitimate legal authority), nor a theory of legal interpretation, nor still a theory of what can make the law morally desirable[56] – even if positivists are of course fully entitled, on their own terms, to produce theories on any such issue. Legal positivism does not *per se* rule out the possibility (or even the necessity, as the case may well be) of many relations between law and morality, and need not be (nor in fact is) indifferent to the moral relevance of both the law and legal theory.

The last point I want to make here is that there is indeed a relation between law and morality that (*here and now*, in the context of contemporary constitutional States) is particularly evident, and which deserves perhaps more attention from legal positivism then it has received so far.[57]

This point can be presented in the following way. As I have already noted, the positivist separability thesis is often framed as a thesis on the criteria of legal validity.[58] The problem is

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[52] A necessary connection of this kind is claimed by Hart 1958, 81; 1961, 206-207; Greenawalt 1996, 11-13. *Contra*, Gardner 2000; Kramer 2004, ch 2; Green 2010.

[53] A necessary connection of this kind is claimed by Endicott 2005; Shapiro 2011, 213-4, 391 (the "moral aim thesis"); Raz 2004, 192. *Contra*, Chiassoni 2005, 219.

[54] The idea that the "incorporation" of moral principles makes them part of the law is already present in Kelsen 1945, 132. This, of course, is also the hallmark of inclusive legal positivism; see Kramer 2007. *Contra*, Raz 1993; Green 2003.

[55] Kramer 2004, 220-221, 235; Himma 2009b, 41-42. The idea that the semantic relation reveals a necessary connection between law and morality is defended by Coleman 2007, who also argues for its full compatibility with a positivist outlook.

[56] See Hartney 1994, 48 ("Legal positivism is simply a theory about what counts as law and nothing else: Only rules with social sources count as legal rules. […] Some theorists may be legal positivists because they are moral skeptics or utilitarians or political authoritarians or because they believe all laws are commands, but none of these theories are part of legal positivism"). See also Bix 2005, 31 ("Legal positivism is a theory about the nature of law, by its self-characterization a descriptive or conceptual theory. By its terms, legal positivism does not have consequences for how particular disputes are decided, how texts are interpreted or how institutions are organized"); Green 2003, § 4; Christiano and Sciaraffa 2003.

[57] I am emphatically not claiming that the relation I am going to talk about is absent in other institutional frameworks (e.g., legal systems without a written constitution or a Bill of Rights), nor that this relation cannot obtain also at the level of statutory law (as opposed to constitutional law). All I am implying is that in constitutional States this relation is particularly evident and utterly inevitable. For a more general argument along similar lines, one not limited to constitutional States, see Priel 2006.

[58] See *supra*, fns 12 and 39, and accompanying text.

that the concept of legal validity is ambiguous, and that, once the different dimensions of legal validity are duly examined, it is possible that the separability thesis does not fare equally well in respect to each of them.

In order to be in a better position to grasp this point, let's recall the distinction between legal sources (or legal texts) and legal norms (see supra, § 2.1). Legal validity can be – and usually is – predicated both of legal sources and of legal norms, but on closer inspection we should notice that cases we are using two different concepts, or dimensions, of validity.

When legal sources (o legal texts) are concerned, the relevant dimension of legal validity is *formal* validity, i.e., the attainment of the formal/procedural conditions regarding the exercise of law-making power, according to which a certain text can be considered as a *legal source*. Formal validity usually coincides with a successful "enactment", and it can be ascertained by means of a factual inquiry about the realization of the relevant law-making procedures.

When legal norms are concerned, on the other hand, the relevant dimension of legal validity is *material* validity. Material validity obtains when a *legal norm* is coherent (or at least is not conflicting) with the relevant higher-rank legal norms.[59] Plainly, material validity is not a matter of fact, but a matter of interpretation: it depends on the content, on the meaning of the relevant norms. More precisely, it requires interpreting both the norm whose validity is to be ascertained, and the (higher) norms that act as the parameter for the validity of the former.

If this is correct, validity in the full sense, as it were, will comprise both a factual/formal dimension and a material/interpretative one. And this will be reflected, as in fact it usually is, in the different arguments that a court, including a Constitutional Court, will use when assessing the validity of a statute on merely formal grounds or on material grounds, respectively. In the former case, the assessment will be something like consulting a checklist of formal/procedural requirements that should be respected in the law-making procedure. (This is what Ronald Dworkin would call "test of pedigree": Dworkin 1967, 17) In the latter case, the assessment will be interpretive and argumentative in character, it will require an evaluation in terms of consistency and coherence between the statutory provisions at stake and the relevant norms and principles of the constitution, as well as other argumentative operations such as giving a more precise meaning to vague constitutional clauses, balancing of conflicting constitutional principles, performing tests of proportionality and reasonableness, and so on.

The interpretive operations involved in the ascertainment of material validity for sure require the interpreter to exercise some kind of evaluative, and sometimes moral, judgement, as it is common with legal interpretation generally (supra, § 2.2). But there is more to it than that, in fact. The constitutional norms that affect the material validity of other norms usually include moral principles, are "drafted in exceedingly abstract moral language".[60] They are phrased as principles, or evaluative standards, not as rules.[61] And the interpretation of such constitutional clauses inevitably requires resorting to some form of moral reasoning, it

[59] In the interest of space, I do not expand here on the relevant concept of "hierarchy of norms". At any rate, the relation between constitutional norms and statutory norms is an obvious case in point. For further details on this topic see Guastini 1996; Pino 2008.

[60] Dworkin 1997, 7. Hart would call them "soft-positivist provisions" (Hart 1994, 254).

[61] The distinction between rules and principles is a notoriously problematic one. For our present purposes, suffice it to point out that "the explicit content of principles is value-oriented, whereas that of rules is action-oriented" (Perry 1997, 788).

requires moral arguments. When a constitution includes references to such concepts as "equality", "dignity", "autonomy", "freedom", "cruel and inhuman", and so on, the interpretation of these concepts requires the interpreter to engage in a form of moral reasoning, it requires using moral arguments.[62]

Now, while in legal systems without a written, "rigid"[63] constitution, and without judicial review of legislation, the concept of material validity plays a limited role indeed (to wit, it does not apply to statutes, but it can apply to relations between statutes and lower-level norms such as bylaws, contracts, and judicial decisions), in the "constitutional State" model the importance of material validity becomes crucial: material validity is the basis itself of judicial review of legislation by contemporary constitutional courts. In constitutional States at least, statutes are fully valid if and only if *a*) they are duly enacted (formal validity), and *b*) they are coherent with the relevant substantive constitutional norms (material validity).

What is the jurisprudential import of all this, as far as the positivist separability thesis is concerned? Here is a possibility: *if* in constitutional States legal validity counts also as material validity, and *if* there is an interpretative relation between law and morality (both in general, and specifically in the interpretation of morally laden constitutional clauses), *then* the conclusion immediately follows: the ascertainment of legal validity, in the guise of material validity, includes a necessary relation between law and morality. In the constitutional State, the ascertainment of material validity of legal norms, far from being a matter of fact, necessarily involves interpretation, and specifically some form of moral reasoning.

This conclusion could of course be contested in a number of ways.[64] Indeed, at least two considerations could counsel that the relevant relation between law and morality is merely contingent in character.

The first consideration is that such a connection between law and morality does not always obtain – it obtains only in a specific institutional context, i.e. the constitutional State model. This consideration is somewhat immaterial, though. In fact, it could be easily replied that *in such context* the relevant connection is indeed a necessary one; and moreover, in most contemporary democracies this is exactly the prevailing institutional model. So there is nothing to be gained in dismissing the relevant relation between law and morality as a contingent relation only – it may well be contingent *sub specie aeternitatis*, but it is of the foremost importance here and now. Rigid constitutions incorporating Bills of Rights – or very similar institutional arrangements – are simply the way the law looks like now. As a consequence, the relation between law and morality thus triggered at the level of material validity is here to stay.

The second consideration consists in attacking the premise that the moral principles encapsulated in the relevant constitutional clauses are really moral principles: rather, the objection goes, they are *legal* principles. Of course these principles "come from" morality.

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[62] Lyons 1982, 80-81; Waluchow 1994, ch V; Moreso 2001, 49; Alexander and Schauer 2007, 1591; Waldron 2009, 72; 2010; Guastini 2011, 199-200.

[63] *Idest*, a constitution that cannot be validly amended by means of ordinary legislation.

[64] I do not engage directly, here, with the typical Exclusive positivist reply this line of argument: that of course the courts are here engaged in a form of moral reasoning, but this is reasoning according to the law (as opposed to reasoning about the law), and it is the exercise of a directed power of the courts to change the law (Raz 1984c; Giudice 2008). But I think that Matthew Kramer has successfully shown that the exclusivist line of argument leads right into a very undesirable form of rule-skepticism (Kramer 2009).

But as soon as they are recognized by the law, they become simply that: law. I will call this "The King Midas argument".[65]

Now, it is not entirely clear what exactly the King Midas argument is supposed to mean. Sometimes it is taken to mean that the moral principles enshrined in a constitution are "legal" simply because they are formulated in a legal source – namely, in the constitution. Well, this is true, but it is also utterly trivial. More frequently, the King Midas argument is taken to mean that as soon as moral principles are written in a legal source such as a constitution, they shed their moral character, and take on a brand new "life" (i.e., a new meaning wholly determined by the law, by legal considerations only). But this is implausible. To be sure, a court's use of a "constitutionalized" moral principle will usually be channelled in the technicalities of legal reasoning (respect for precedents, detection of analogies, relevance of the verbal formulation of the constitutional text, etc.). But, granted all that, it will still be the case that the law itself is not able to define exhaustively the meaning of the morally laden constitutional clauses – and this is why we put such clauses in a constitution in the first place: because we agree on a fairly general formulation of a certain moral value, but we want to leave open the possibility of applying that standard to unforeseen circumstances, of keeping on discussing its content, and to revise past interpretations of the moral value at stake as soon as the background societal conditions change.[66] And all this requires recourse to moral argument in the interpretation of morally laden constitutional clauses, it requires engaging in substantive arguments about the meaning of the moral values encapsulated in the relevant constitutional norms, on their relations (intersections, conflicts, overlaps) with other moral values also recognized by the constitution, and so on; in short, it requires a kind of "moral reading".

Moreover, this moral reading cannot consist in merely detecting the way in which the moral values at stake are perceived within the relevant society (positive morality).[67] There are many reasons why this cannot be so. First, in pluralistic societies it is quite implausible that there will be a single social conception of some moral value; more likely, there will be a majority view on the content of some moral value. Second, the point of including a certain right or moral principle into a constitution is to protect it against the majority; accordingly, interpreting constitutional clauses in a "majoritarian way" would run counter to the point of having constitutionally protected rights and principles in the first place (Marmor 2005, 160-162; Waluchow 2008; Pino 2010, ch. 5). Third, the explicit formulation of morally laden constitutional clauses usually does not seem to refer the interpreter to the social understanding of those values – rather, they refer him to those values themselves, i.e., they require the interpreter to engage in a substantive argument about their meaning and import.[68]

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[65] I borrow this definition from Kelsen 1945, 161 ("just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e. something legally existent"). Instances of this line of argument include Mazzarese 2002; Green 2003, § 3; Priel 2005, 682. Poscher 2009; Guastini 2011, 197-200.

[66] See Postema 1989b, 124: "Rights claims do not close off argument, they invite it". Waldron 1994, 539: "sometimes the point of a legal provision may be to start a discussion rather than settle it, and this may be particularly true of the constitutional provisions that aim at restricting and governing legislation". Accordingly, transforming a moral standard into a list of rules extracted from judicial precedents would "detract from the sort of thoughtfulness that the standard initially seemed to invite. […] The result is a decline in the level of moral argument […] that the standard seemed to require" (Waldron 2010, 289). On "incompletely theorized agreements", see Sunstein 1996, 35-61.

[67] This possibility is proposed by Moreso 2001, 49; Green 2003, § 3; Waldron 2010, 315.

[68] Accordingly it is not by chance, I submit, that even those theorists that suggest the recourse to some form of social morality in giving content to value laden constitutional clauses (see especially Moreso 2001, and

In short, then, though the interpretation of morally laden constitutional clauses is not some unrestrained moral reasoning, because it is affected also by various legal considerations, still it cannot be but a kind of moral reasoning.

To conclude, the fusion of legal and moral reasoning, in the interpretation of constitutional clauses that enshrine moral principles, is inescapable. It does not call for a rejection of the positivist separation thesis across the board, but it drastically narrows its relevance to the determination of formal validity only. In the determination of material validity, a determination that is deeply dependent on interpretation (and most importantly on he interpretation of the relevant morally laden constitutional clauses), the separation thesis does not apply. Once this is duly acknowledged, legal positivists are not only entitled, but all the more required, to study and analyse this kind of relation between law and morality,[69] i.e. the way in which moral considerations affect the legal reasoning aimed at establishing material validity of infra-constitutional legal norms – lest we rest content with leaving this matter in the *terra incognita* of unrestrained judicial discretion and of subjective uncontrolled value-judgments.

3. So, Why Positivism?

I will close this already too long essay with three sketchy concluding remarks about the compatibility of what I have been saying in the preceding section with legal positivism's jurisprudential project.

The first remark is that the moral evaluations elicited by morally laden constitutional clauses do not make the law entirely transparent to the realm of morality. The fact that a constitution includes morally laden provisions does not make the rest of the black-letter law useless: the law still makes a difference in the practical reasoning of its addressees. This is because on the one hand, as we have seen, the kind of moral reasoning at stake is usually contaminated also by legal considerations. And on the other hand, the moral evaluations required by constitutional clauses are quite specific in character as confronted to the whole range of the morally relevant considerations that can possibly affect a legal decision (Alexander and Schauer 2007, 1591; Waldron 2010, 295): accordingly, they do not require the interpreter to engage in an unrestrained, open-ended moral reasoning – they do not just ask the interpreter to leave aside the law and "do the right thing".

Second, the connection between law and morality in the context of material validity does not require the interpreter to necessarily pledge his moral commitment to the legal system, nor it requires that only those who are morally committed to the legal system at hand can assess the legal validity of its norms: for instance, the interpreter might assess the material validity of legal norms by deploying a detached moral argument only (a detached moral argument uses the same concepts and has the same structure – it uses the same premises and reaches the same conclusion – as a committed moral argument: Raz 1998, 388-389). Nor does the presence of morally laden constitutional clauses preclude in any way the moral criticism of the law (Tamanaha 2007; Waluchow 2008, 89-90): even in the

Waldron 2010), end up with designing some form of moral-judicial reasoning that include a substantial role for the interpreter ("reasoned elaboration") in extracting and recrafting the data that apparently emerge from social morality.

[69] Some attempts in this direction: Celano 2005; Waluchow 2007, 197-215; 2008; Pino 2010, ch 5; Waldron 2010; Moreso 2012.

constitutional State, the conclusion that a legal norm is legally valid is not dispositive of the question of that legal norm's all-things-considered moral value; and moreover, a binding judicial statement of material validity might be legally mistaken anyway. And to my mind all this is fully consistent with both the positivist jurisprudential enterprise (separating the knowledge of the law from its moral appraisal), and with positivism's pragmatic aims (preserving a leeway of moral criticism of the law).

Finally, the positivist separability thesis still seems to retain theoretical and descriptive accuracy, even only at the level of formal validity and of the identification of legal sources. This may sound like an excessive limitation for the explicative power of legal positivism, but it need not be. In fact, the concept of formal validity plays no trivial task: we ordinarily know that something like an authoritative text counts as law even before we apprehend its meaning. Accordingly, even a minimally positivistic concept of validity captures an important (if by no means complete) notion of what we consider as law: it explains the way we identify "first stage law",[70] and so it represents a necessary and powerful building block for any legal theory. No theory of law, I submit, may abdicate this peculiarly positivistic level of analysis of the law.

University of Palermo
School of Law
Piazza Bologni 8
90134 Palermo
Italy
Email: giorgio.pino@unipa.it

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[70] Schauer and Wise 1997; Schauer 2004; Spaak 2004; Alexander and Schauer 2007, 1581-1582 (the phrase "first stage law is borrowed from Gavison 1991, 740-741).

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