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# SEARCHING FOR POSITIVISM

*Philip Soper\**

INCLUSIVE LEGAL POSITIVISM. By *W.J. Waluchow*. Oxford: Clarendon Press. 1994. Pp. vii, 290. \$49.95.

## INTRODUCTION

Issues in philosophy have life cycles of their own. Problems neglected or forgotten revive — either in response to the times (witness the renewed interest in political theory during the Vietnam War) or in response to a new and original argument (the revival of Kantian ethics after Rawls). Once revived, these issues often enjoy a brief period of intense flourishing, followed by a gradual return to dormancy — either because the times move on to make the issue less pressing, or because a point of diminishing originality or interest is reached in academic discussions.

The nature-of-law issue in jurisprudence might seem to be in the late stages of one of these periodic cycles. Revived more than thirty years ago with the appearance of H.L.A. Hart's *The Concept of Law*<sup>1</sup> and energized by Ronald Dworkin's original reformulation of the "natural law" side of the issue,<sup>2</sup> the entire field flourished over the next quarter century in a way that was both unprecedented and bound to lead to subtle and enlightening refinements.

In view of the extensive interest in this issue in recent years, one understandably might think that we are now close to exhaustion and that little more can be expected until the next turn of the cycle. All the more pleasant to discover Professor Waluchow's<sup>3</sup> fine book. Waluchow's contribution is original and beautifully crafted, and it also provides one of the best overviews of the debate during the past thirty years. The writing style is enviable for its clarity, and the argument is admirably honest, giving fair due to opposing views and anticipating and handling virtually all serious objections to the argument that might occur to any reader. Although the book is

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1. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (originally published in 1961).

2. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter Dworkin, *Hard Cases*]; Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter Dworkin, *The Model of Rules*]; Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972) [hereinafter Dworkin, *Social Rules and Legal Theory*].

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pitched at a fairly high level — one that seems to take for granted reader familiarity with much of the literature in the area — the result for those who follow this field is a rich and rewarding tour of the landscape. Despite the familiar themes and issues, Waluchow never fails to place his own stamp on them by the way he summarizes, clarifies, or refines the ideas. The book deserves a place on anyone's jurisprudence shelf.

What makes Waluchow's book so intriguing, in part, is that it purports to aim at a very narrow question — a small gap, one might think, in positivist legal theory. Waluchow indeed is refreshingly, if unnecessarily, modest in confessing to a "fairly narrow scope" and a "lack of novelty" in his thesis (p. 4). But the gap he aims to fill, as is often the case, proves to be a chink through which one sees, with the aid of Waluchow's analysis, deep inside the natural law-positivism debate. As a result, one comes away with a clearer view of the entire field as well as a powerful argument for a new and arguably better form of positivism.

The small gap in the positivist literature results from an interesting twist on the usual question that underlies these debates. The question usually posed is whether there is a necessary (conceptual) connection between law and morality; Waluchow asks instead whether there is a necessary *lack* of connection between these concepts. This shift in focus reflects developments in legal theory since Hart's book first appeared. Whereas Hart suggested that connections between law and morality were, at best, contingent rather than necessary, subsequent developments in the positivist literature, supported by characterizations of positivism from the natural law side, support a stronger thesis: Far from there being no necessary connection between law and morality, there is a necessary *separation* of law and morality; moral standards cannot be part of the "law" in legal systems.

Waluchow calls this strong thesis, most clearly associated with the work of Joseph Raz,<sup>4</sup> "exclusive positivism." He sets out, in contrast to Raz, to defend "inclusive positivism" — the view, originally suggested by Hart, that law *may* include moral standards, but need not do so. In the course of the argument, Waluchow also presents two other theses: (1) Inclusive positivism is distinguishable from and superior to Dworkin's alternative, nonpositivist account of how moral principles figure in law; and (2) Although it is a contingent question whether a legal system includes moral principles among the legal standards courts are asked to apply, it is in general a good thing for them to do so.

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4. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 47 (1979).

Along the way to establishing these claims, Waluchow develops a number of original distinctions and insights into the current debate — too many to be summarized usefully here. In this review, I focus on the central argument of the book — whether and why positivism can or cannot accept moral principles as part of the law and, assuming it can, whether the case for positivism over natural law is thus strengthened. In brief, I argue: (1) that Waluchow does establish a case for viewing inclusive positivism as superior in some respects to exclusive positivism; but (2) that this victory is only partial — neither version of positivism, exclusive or inclusive, is quite good enough. The central idea of the natural law theorist concerning the conceptual connection between law and morality survives the challenge of both forms of positivism because that connection is of a different — and more modest — kind than commonly has been assumed.

### I. THE BACKGROUND

The question about the status of moral principles in legal theory began as a by-product of the debate that followed Dworkin's challenge to Hart.<sup>5</sup> Dworkin stressed that the "right answers" to legal decisions were, in theory, to be found by undertaking a Herculean inquiry in two dimensions: (1) institutional history — convention and legal norms identified by the ordinary positivist's pedigree (the "fit" dimension); and (2) the political and moral theories that provide the best justification for using those conventions as the basis for state coercion (the "moral" dimension). Dworkin's theory encountered two initial responses designed to suggest that the theory might, after all, be just another form of positivism. First, because the requirement of "fit" seemed to restrict Dworkin's moral principles to the conventions of the particular society in which judges found themselves (conventional morality, not true morality), some claimed that Dworkin had advanced only a more refined version of positivism: conventional moral principles should be added to the positivist's conventional rules as part of the "pedigree" or test for determining legal norms.<sup>6</sup> Second, even if Dworkin was right that the moral dimension required a judge to reach beyond conventional morality into true principles of political morality, that fact was itself the result of social conventions authorizing or requiring judges to adopt this particular method of adjudication. Thus, just as Hart had suggested that legal systems contingently could include moral standards (as in the Due Process Clause of the United States Constitu-

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5. See Dworkin, *Hard Cases*, *supra* note 2; Dworkin, *The Model of Rules*, *supra* note 2; Dworkin, *Social Rules and Legal Theory*, *supra* note 2.

6. See, e.g., Rolf Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151, 156 (1971).

tion), so Dworkin's theory could be viewed as reflecting an assignment to judges in Anglo-American jurisdictions to test laws by reference to political morality — a contingent fact about Anglo-American jurisprudence rather than a necessary feature of all legal systems.<sup>7</sup>

It was Dworkin's response to this second suggestion for putting a positivist gloss on his theory that led to the first explicit statement of the thesis that Waluchow calls "exclusive positivism." Positivism, according to Dworkin, could not invite judges simply to use moral standards to decide cases and still remain positivism. That is because positivism

is connected to a more general theory of law — in particular to a picture of law's function. This is the theory that law provides a settled, public and dependable set of standards for private and official conduct, standards whose force cannot be called into question by some individual official's perception of policy or morality.<sup>8</sup>

Two features about morality, according to Dworkin, prevent a positivist from counting moral standards as part of the law: first, because moral standards are inherently controversial, they could count as "law" only by abandoning the positivist's central thesis about law's essential function; second, even if one thinks moral standards rest on objectively determinable "moral facts," that claim about the status of moral judgments is itself controversial; the whole point of positivism, according to Dworkin, is to provide a theory of law that is "independent of any controversial theory either of metaethics or of moral ontology."<sup>9</sup>

As noted, Dworkin's claim about the legal status of moral standards under positivism initially was tendered simply as a response to critics of his theory; it was not the result of a full-fledged argument about the "essence" of positivism. But, then, neither was Hart's contrary suggestion. Hart's remark that legal norms could incorporate moral standards seemed almost an offhand, casual way of responding indirectly to some of the arguments of his main antagonist at the time, Lon Fuller. Fuller's emphasis on the role of purpose and reason in the interpretation and application of legal rules would be consistent with the denial of a necessary connection between law and morality if the appeal to such standards were sim-

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7. This argument, which Dworkin labeled "Soper-Lyons positivism," also has been made by Jules Coleman. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 348 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977); David Lyons, *Principles, Positivism and Legal Theory*, 87 YALE L.J. 415 (1977) (reviewing DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra*); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

8. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 347. Waluchow discusses Dworkin's argument at pp. 182-90.

9. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 349.

ply the result of a contingent incorporation of morality in legal provisions.<sup>10</sup>

In his later work, Dworkin repeated his claim about the essence of positivism. By now the version of positivism that Dworkin thought inconsistent with the “essence” of positivism had assumed a new name — “soft conventionalism.” “[S]oft conventionalism instructs judges to decide according to their own interpretation of the concrete requirements of legislation and precedent, even though this may be controversial . . . . [S]oft conventionalism is not really a form of conventionalism at all . . . . It is, rather, a very abstract, underdeveloped form of law as integrity.”<sup>11</sup> Despite the new name, Dworkin’s defense of the view that soft conventionalism could not be a “true” form of positivism remained, at that point in the debate, still too cursory to be much more than an assertion rather than a full-fledged argument.<sup>12</sup> Moreover, although Hart never returned publicly to the debate before his death, the postscript published with the most recent edition of *The Concept of Law* seems to confirm, in some respects, Hart’s continued endorsement of a more relaxed form of positivism — a form that Hart called “soft positivism.”<sup>13</sup> On the question whether standards could count as “law” if they were too controversial or uncertain, Hart seemed to say that the question was one of degree: legal systems could tolerate some uncertainty and still provide the kind of guidance and social control that was an important, though not necessarily a “paramount and overriding,” concern for a positivist theory.<sup>14</sup> As for Dworkin’s second objection — that positivism required a theory of law that remained independent of controversial questions about the status of moral judgments — Hart seemed to agree: “I still think legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open, as I do in this book, the general question of whether they have what Dworkin calls ‘objective standing.’”<sup>15</sup>

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10. Compare HART, *supra* note 1, at 204 (making the point about legal systems incorporating moral principles: “If this is what is meant by the necessary connection of law and morals, its existence should be conceded”) with *id.* at 207 (referring explicitly to Fuller’s “inner morality of law”: “Again, if this is what the necessary connection of law and morality means, we may accept it.”).

11. DWORKIN, *LAW’S EMPIRE*, *supra* note 2, at 125, 127-28.

12. For a critique of Dworkin’s refusal to recognize soft conventionalism as a form of positivism, see Philip Soper, *Dworkin’s Domain*, 100 HARV. L. REV. 1166, 1177-79 (1987) (reviewing DWORKIN, *LAW’S EMPIRE*, *supra* note 2).

13. See HART, *supra* note 1, at 250-54. It is not clear whether this second edition of Hart’s book, which was published in 1994 with the additional postscript, was available to Waluchow before the appearance of his book.

14. See *id.* at 252.

15. *Id.* at 253-54 (citation omitted).

It remained to Joseph Raz to provide, in contrast to this rather casual exchange of views between Dworkin and Hart, the first fully sustained argument in defense of the view that law could not include moral principles among the tests for legal validity. Raz called this thesis the "strong social thesis" or, simply, the "sources thesis."<sup>16</sup> As Waluchow characterizes it, this is the view

that the existence of a valid legal rule is solely a function of whether it has the appropriate source in legislation, judicial decision or social custom, matters of pure social fact, of pedigree, which can be established independently of moral factors. In addition, the content of a legal rule can be determined, Raz believes, by establishing facts about human beings (e.g. their legislative actions and intentions) that can be ascertained without the use of moral arguments. [p. 82; footnote omitted]

In defending this view, Raz affirmed Dworkin's vision about the essence of positivism but, of course, argued that his own vision was a better theory of law than its alternatives — particularly Dworkin's.

The point of rehearsing this background is that it enables one better to appreciate Waluchow's contribution. Like Raz, Waluchow also provides a full-fledged inquiry — the only one apart from Raz's of which I am aware<sup>17</sup> — into the question whether law can include moral standards. Unlike Raz, Waluchow endorses Hart's original suggestion: soft positivism — "inclusive" positivism for Waluchow — is a viable form of positivism and preferable to Raz's exclusive form. But whereas Raz's endorsement of exclusive positivism meant that he did not need to confront Dworkin's claim that soft positivism was really not positivism at all,<sup>18</sup> Waluchow cannot avoid Dworkin's challenge. Thus, he devotes a significant portion of his book to explaining why, contrary to Dworkin's view, inclusive positivism does not collapse into a form of natural law or law-as-integrity. It is to these two arguments that I now turn.

## II. EXCLUSIVE POSITIVISM

### A. *The Central Argument*

John Austin began his famous lectures on jurisprudence with the observation that law, in its most general sense, "may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."<sup>19</sup> Though he hardly could have

16. See RAZ, *supra* note 4, at 47.

17. For an earlier, but briefer, exploration of this question, see PHILIP SOPER, *A THEORY OF LAW* 101-09 (1984).

18. Raz's view on this issue was that soft positivism "is on the borderline of positivism and may or may not be thought consistent with it." RAZ, *supra* note 4, at 47.

19. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 18 (Wilfrid E. Rumble ed., Cambridge University Press 1995) (1832).

anticipated the debate that was to occur 150 years later over the implications of his theory, Austin's simple statement indirectly explains the appeal of exclusive positivism. To count as law, a standard at a minimum must be able to serve as a *guide* to human conduct. The point has less to do with the peculiarly "legal" than it does with the prerequisites for speaking of a system of social control in the first place. Only standards that are reasonably able to convey to subjects what they are expected to do can serve as means of social control.

Although Waluchow confronts this basic claim about the function of law head on, he does not always seem to appreciate its force. In part that is because he is, if anything, too catholic in his willingness to examine each and every argument for exclusive positivism made by, or implied in the writings of, its main proponent, Joseph Raz. Thus Waluchow confronts the "linguistic argument," the "argument from bias," the "institutional connection argument," the "argument from explanatory power," the "argument from function," and the "authority argument" (pp. 103-40). While Waluchow does not suggest that each of these arguments is equally plausible — and, by and large, his critique of these arguments is persuasive — the effect of his wide-ranging survey and meticulous criticism is to detract from the central argument, the argument from function.

To illustrate how the central argument eclipses the others, consider, for example, the argument from authority, to which Waluchow devotes the most attention. Raz believes that law claims authority, even though it does not always have authority.<sup>20</sup> In order even to claim authority, however, legal systems must satisfy the logical preconditions for authority. Relying on an analogy to arbitration, Raz explains that these conditions entail that when the authority makes a decision, the factors that went into that decision are then excluded from reconsideration by those who are subject to the authority. The authority represents the "executive" stage of decisionmaking that follows deliberation. There could be no authority if those subject to the authority could go behind the decision to reconsider the reasons on which the decision was based. So, too, with law and morality. Whenever an institution, judge, or legislator makes a decision based on moral factors, those underlying moral factors are excluded from the factors that "guide" the citizen; what remains as "law" is the decision itself — the legal norm or rule identified by the social fact of the decision.

Waluchow's discussion of this argument (pp. 129-40), which examines in some detail Raz's account of exclusionary reasons as it relates to his concept of authority, seems an unnecessary diversion for two reasons. First, it is not clear that law does claim authority in

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20. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 70-105 (1986).

Raz's sense.<sup>21</sup> If law makes no such claim, or in any event if this issue is controversial, then the argument for exclusive positivism — to the extent that it depends on insisting that law claims authority — will be equally controversial. Second, and more to the point, it does not matter whether or not law claims authority because before law can do so it first must explain what is to be done. It first must provide guidance about the act to be done before it can attach to that act any further claims about the spirit in which the act is to be done, for example, in response to a claimed obligation to obey, or simply in order to avoid a sanction. Guiding action, in short, must come first; if standards are incapable of doing this, they seem a fortiori incapable of serving as the basis for a claim of authority, or a command, or a norm, or a piece of advice.<sup>22</sup>

The metaphor that has figured in so much of the debate about the nature of law — that of the gunman — illustrates the point. Imagine a mugger who gives me the following order: "Hand over your money if it is the just thing to do." Should we say that this gunman has given a rather vague order? Or should we say instead, as the exclusive positivist presumably would, that this gunman has not yet given any order at all? If one thinks that the simple instruction "do justice" is too indefinite to provide a guide to expected conduct, several remedies are possible. The most obvious is to await further clarification by the speaker. Once a decision is made — in the above case by the gunman about what *he* thinks I should do, or what *he* thinks justice requires — doubt about what is expected dissolves. Another possibility, which requires switching from the metaphor of the gunman to an analogy with common law courts, is this: repeated decisions about what "justice" requires may begin to accumulate in a way that permits extrapolating from past cases to a conclusion about what consistency would require in the instant case.<sup>23</sup> In either case one needs something more — clarification or context — before one can tell what is expected.

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21. For a defense of the view that law makes a weaker normative claim than that entailed by the "claim of authority," see Philip Soper, *Law's Normative Claims*, in *THE AUTONOMY OF LAW* (Robert George ed., forthcoming 1996).

22. As another recent supporter of Raz's view suggests, "law is the determinations of authorities of what ought to be done." Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 357, 359 (Andrei Marmor ed., 1995).

23. In previous work, I suggested that one could view the common law in just this way. Starting from the simple rule of recognition that "[a]ll disputes are to be settled as justice requires," one might build up a body of case law that, together with the requirement of consistency (treat like cases alike), would produce a fairly determinate system of law. See Soper, *supra* note 7, at 512 & n.129. For an arguably similar view of the common law, see Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 *S. CAL. L. REV.* 913, 963-93 (1989). Waluchow here follows Dworkin in rejecting such a rule of recognition as too indeterminate to function as a "legal system." See p. 185. In doing so, he ignores the point that the system could become determinate over time. He also seems to ignore his own willingness elsewhere to accept that moral standards may be more determinate depending on

## B. Critique of the Central Argument

Waluchow considers the argument from function as it appears both in Dworkin's claims about the essence of positivism as well as in Raz's more elaborate theory. In both cases, his response is essentially the same. First, Waluchow claims that even if relative certainty in guiding conduct is an important goal of law, it need not be viewed as the "essential" or only goal; law can serve other functions. For example, law may have "educative" functions (p. 132) that accept some uncertainty in return for the value of having judges and litigants think and argue in substantive moral terms (pp. 121-22, 134-35). Second, even if relative certainty is a major characteristic of legal standards, some moral standards are sometimes relatively certain, or at least no more uncertain than some of the social facts that the positivist counts as law.

The first of these objections leads to the problem of definition that has always haunted this field: How are we to resolve disputes about the "essence" of a concept and, thus, about whether the concept of law is "essentially" connected to the concept of certainty?<sup>24</sup> I shall return later to this objection. For now, it is the second objection that most directly challenges the sharp distinction that the exclusive positivist draws between moral and legal standards. That distinction assumes that a clear conceptual or practical difference regarding certainty justifies distinguishing social facts from moral standards and warrants allowing only the former to serve as candidates for legal standards.<sup>25</sup> In order to assess this issue, it may help to confront an ambiguity that hinders the discussion: What kind of uncertainty is at stake?

### 1. Uncertainty and Indeterminacy

Waluchow notes that there is a distinction "between uncertainty (an epistemic property) and indeterminacy (a logical property)" (p. 238). Standards that are indeterminate do not admit of "cor-

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how "mature" the legal system is. See p. 203 (discussing Dworkin's view that an advanced system of law, "thick with constitutional rules and . . . dense with precedents," may produce right answers by reference to moral and political theory). Waluchow also states that

It would be a serious mistake to think that reasoning about moral rights and freedoms, whether private or public, can take place independently of contextual considerations. What one is entitled to expect from government, other public institutions, and indeed from other private citizens, depends in large part on shared understandings, expectations, historical circumstances, and so on . . .

P. 145.

24. For the suggestion that questions about the connection between law and certainty almost have become more critical to legal theory than the traditional question of the connection between law and morality, see SOPER, *supra* note 17, at pp. 101-09.

25. At times Waluchow's response to this issue seems to proceed on the level of simple assertion and counterassertion (the exclusive positivist: "moral standards are too uncertain"; Waluchow: "no they aren't — and anyway, social facts can be equally uncertain").

rect" answers, even in theory; thus indeterminacy entails uncertainty. But the converse is not true; a standard whose application is uncertain may, nevertheless, have a single correct answer, even though that answer is controversial and difficult to ascertain.

Which of these concepts is the critical one for theories of law that stress the importance of law's ability to guide conduct? If legal standards must be able to answer questions about what one is expected to do, one might think that uncertainty is the critical concept. Standards that fail to guide, either because they admit of no single correct application *or* because the correct application is inherently controversial, are equally incapable of constraining judges and guiding citizens. In both cases, then, a judge applying such standards must be making law, not finding it.

Although he is not always clear on this point, Waluchow seems to accept indeterminacy rather than uncertainty as the critical, limiting concept in deciding whether we are dealing with "law." The relationship between these two concepts and Waluchow's views on its implications for a positivist theory of law can be found in the following three conclusions that he seems to support.

First, indeterminacy is inevitable in any legal system, both because some moral standards that one tries to enact as law may have no determinative answer (pp. 186, 223) and because of the open texture of language in most legal standards.<sup>26</sup> In these cases, there is no law until a judicial decision is made, and judges in such cases must be seen as legislating.

Second, moral standards do "sometimes provide correct and uncontroversial answers to questions of legal validity" (p. 226). In such cases, moral standards can be counted as law, consistent with the function of providing guidance.

Finally, as to moral questions that might be thought to be inherently controversial, these standards could also qualify as law for a positivist as long as they still can be said to have a right answer (p. 224). In other words, only those moral standards that entail indeterminacy fail to qualify as law; uncertainty alone is not disqualifying. It is this last conclusion that seems to indicate that Waluchow — like Dworkin, on whose arguments Waluchow here relies — views indeterminacy, rather than uncertainty, as the critical factor governing whether moral standards can count as law. As to the objection that uncertain standards, even if they have right answers, cannot provide the guiding function critical to law, Waluchow's re-

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26. Waluchow, in a sensible discussion of Hart's views on the issue, suggests that the question of whether standards are determinate is a matter not only of the "plain meaning" of the language, but of purposes and background understandings that often supplement language to yield determinable results. In the end, however, even with these supplemental, interpretive aids, "indeterminacy will be encountered somewhere along the line." P. 250.

sponse seems to be that guidance, though important, is not that important — it is not essential to the concept of law.

### C. *Positivism and Metaethics*

Whether readers will agree with Waluchow's claim that moral standards can be certain enough to count as law will, of course, depend on one's views about the underlying problem of moral philosophy: What is the status of moral judgments? That question, in turn, leads to a more basic puzzle in connection with Waluchow's attempt to defend moral standards as legal standards in a positivist account: What has happened to the second objection, raised by Dworkin, according to which positivism must be seen as committed to a theory of law that is independent of the controversial issues of moral ontology and metaethics?<sup>27</sup>

It now appears that we have three different claims in the literature about the relation between positivism and metaethics. The first is a claim of complete independence of the sort originally made by Dworkin and developed by Raz — that positivism must remain "independent of any controversial theory either of meta-ethics or of moral ontology."<sup>28</sup>

The second position appears to be the position Hart endorses:

I still think legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments and should leave open . . . the general question of whether they have what Dworkin calls 'objective standing.' . . . Of course, if the question of the objective standing of moral judgments is left open by legal theory, as I claim it should be, then soft positivism cannot be simply characterized as the theory that moral principles or values may be among the criteria of legal validity, since if it is an open question whether moral principles and values have objective standing, it must also be an open question whether 'soft positivist' provisions purporting to include conformity with them among the tests for existing law can have that effect or instead, can only constitute directions to courts to *make* law in accordance with morality.<sup>29</sup>

Hart's position here is somewhat curious: it leaves the question of the status of moral principles open, but then it seems to accept as a consequence that one must also leave open the question whether these principles really are law. Far from being independent of metaethical issues, this view seems to lead to a legal theory that is

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27. Although "metaethics" is often used to refer to inquiries into the meaning of moral terms, I shall use it to refer generally to the entire related range of problems in moral theory that Dworkin originally suggested a positivist theory must avoid: controversial questions about moral ontology (the status of moral judgments) as well as questions about the meaning and application of moral terms.

28. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 349.

29. HART, *supra* note 1, at 253-54 (citation omitted).

dependent on the resolution of metaethical issues; the theory remains aloof from the question of the status of moral judgments, but as a result the legal theory itself will remain incomplete until that issue is settled.

In contrast to both of these positions, Waluchow seems to claim that positivism need be neither independent of, nor aloof from, questions of metaethics. Instead, as noted, Waluchow simply asserts that moral standards are sometimes determinate and capable of guiding conduct, thus apparently committing himself to a position in favor of the objectivity of moral judgments.

The problem with Waluchow's position is that it seems to require arguments that the book really does not contain, arguments defending the objective status of moral judgments. Unfortunately, the most that we get in the way of argument is the assertion, at various points, that "not all moral questions are inherently unsettled" (p. 115). As evidence for this assertion, Waluchow cites the fact that no one could doubt, for example, that a statute purporting to enslave citizens would be held to violate constitutional or Charter provisions that protect equality and similar "moral" rights (p. 115). But this evidence does not help Waluchow. When there is a clear consensus on a moral issue, the exclusive positivist can also accept the Constitution's reference to equality as a legal standard because it refers to a social fact, a fact about people's beliefs.<sup>30</sup>

It seems that Waluchow is in something of a quandary. If he relies on well-settled moral views to "prove" that moral standards can serve as legal standards, he only will aid the exclusive positivist by appearing to make social facts the test for law. If, on the other hand, he claims that moral standards can count as law even when they are not well-settled, he must defend the apparent willingness to claim objectivity for such standards despite their controversial nature — a task in metaethics that he does not undertake.

There is, I think, a possible way out of this dilemma, but it is one that requires a return to a position of independence or aloofness from metaethical questions. I have been suggesting that Waluchow takes a position on the controversial question of the objectivity of moral judgments. In fact, however, Waluchow provides a disclaimer at the outset that suggests a somewhat different approach to the question of the relationship between legal theory and metaethics:

I do not wish to become embroiled in any conflicts there might be as to the nature and objectivity of moral standards . . . . We will merely assume that people do appeal to standards like the principles of equality, liberty, fairness, and justice in assessing social institutions and their products; that these activities are not totally nonsensical as

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30. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 348.

some radical moral nihilists might argue, but are open to at least some degree of rational argument and assessment; and that it is these kinds of standards that we have in mind when we ask about the possible role of political morality in determining the existence and content of valid laws. [p. 2 n.3]

This passage helps clear up the question of Waluchow's position on the connection between legal theory and metaethics. Although Waluchow is not always consistent,<sup>31</sup> the best interpretation of his view is that he himself does not take a stand on the question of the status of moral judgments any more than Hart did. Rather, his claim about the reality of moral judgments is a claim about how the law sees itself, a claim about the view of judges and other officials who are engaged in the practice of law. Legal systems that invoke moral standards assume what moral philosophers endlessly debate, namely, whether moral standards are sufficiently objective and capable of determinative answers to qualify as legal standards.

This interpretation — that Waluchow is describing and reporting on the implicit assumptions of law rather than defending a metaethical claim of his own — is reinforced throughout the book. At almost every critical juncture, Waluchow turns to the arguments and opinions of judges to demonstrate his claims about how legal systems invoke and apply moral standards. This interpretation helps make Waluchow's position consistent, but it has implications for positivism that he fails to appreciate. I shall return to those implications at the end of this review. First, it is time to look at the second issue: How does Waluchow's position differ from Dworkin's?

### III. IS IT STILL POSITIVISM?

We have just noted that Waluchow's method of argument relies extensively on the evidence of judicial decisions — descriptions of how judges invoke and respond to moral standards they are required to apply. This method bears an obvious resemblance to Dworkin's, which also relies on the way that judges write opinions as evidence for claims about the connection between moral and legal theory. The similarity in method, as well as the similar conclu-

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31. Waluchow's position may be that moral standards are (sometimes) "determinate" but not necessarily "objective" and that only the former is necessary to qualify as law. In this way, he could continue to remain detached from questions about the status of moral judgments. But this position would also require much more in the way of defense and exploration into metaethical questions than Waluchow provides. For example, if moral standards are determinate only because of certain facts — facts about human beliefs or social conventions — he will not have made a case for going beyond the exclusive positivist's "social fact" theory of law. The best interpretation of his position thus seems to be that he believes that moral statements are (sometimes) determinate because of moral facts — not social facts — which seems to be a commitment to some sort of claim about the objective status of such judgments.

sion that moral standards can be legal standards, leads to the second major argument of the book: The incorporation of moral standards in law is consistent with positivism and distinguishable from Dworkin's version of natural law.

Two central ideas figure in this part of Waluchow's argument. First, Waluchow separates theories of adjudication from theories of law (p. 56). Dworkin finds the key to law in the rights litigants have before courts — moral rights to particular judicial decisions that are the consequence of both political morality and previous legal facts. Waluchow, in addition to suggesting technical difficulties with this account,<sup>32</sup> has a "simpler" suggestion for explaining these rights. These rights, he argues, are not the result of a theory of adjudication that somehow has independent legal or moral status; rather, all such rights derive, in the end, from their source in a rule of recognition or similar "pedigree" of a positivist sort. After all, how judges decide cases is itself a matter of the instructions that judges receive, and those instructions can be altered by legislators in a manner consistent with positivism. Second, the pedigree that makes the theory positivist is a social fact — like Hart's rule of recognition — that can, but need not, identify moral standards as standards judges should use in deciding cases. We already have seen that this view distinguishes Waluchow's theory from that of the exclusive positivist, who insists that validity is determined by pedigree alone without reference to content, as would be required with moral standards. The same view of the kind of pedigree that determines legal validity distinguishes Waluchow's theory from natural law theories as well. The latter theories insist that some reference to content or morality is always necessary in determining legal validity; for Waluchow, it remains a contingent question which moral standards, if any, a particular legal system will choose to incorporate by reference in its basic pedigree.

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32. Waluchow suggests that Dworkin's theory leads to the odd result that the law will be different depending on whether one is in a lower court, which cannot overrule a binding precedent, or a higher court, which can. See pp. 46-58. This result, he says, is inconsistent with Dworkin's insistence on personifying the legal community in a way that requires it to speak "with one consistent voice." See p. 53.

Waluchow's argument seems to overlook the possibility that the political principles that explain why lower and higher courts have different powers will themselves be part of the "law" and thus will explain "with one voice" why the *results*, but not the law, are different in different courts. Nothing in Dworkin's theory, in short, prevents his incorporating Waluchow's varying "institutional forces of law" as part of what courts must consider in deciding what legal rights citizens have.

## IV. IS IT STILL LAW?

A. *The Limits of Pedigree*

With one exception, the above account justifies Waluchow's claim that he has defended a theory of law that is at least as consistent and, arguably, as plausible as the main alternatives he considers — the exclusive positivism of Joseph Raz and the rights theory of Ronald Dworkin. But Waluchow's own argument contains an unexplored hint about the limits of even the best form of positivism. Waluchow's theory is primarily a pedigree theory of law. The pedigree has been modified to permit incorporation of moral standards, but the basic positivist claim — that law is a matter of source, with content serving as the test for validity only contingently as source permits — is the core of the theory.

Even if this is still positivism, it may not be all there is to law. The real debate, after all, is not over the concept of positivism but over the question of which theory of law best reflects our understanding of what law is. By Waluchow's own account, as we have seen, that question requires paying attention to how officials responsible for creating and applying legal norms view what they are doing. Waluchow finds that the practice of referring to moral standards reveals an implicit assumption of objective status for morality that allows for a contingent connection between law and morality. But if this is the test for law, then one must also provide some account for the other normative claims *about the concept of law itself* that the practice reveals. What are those normative claims, and how do they limit the ability of a pedigree theory to account fully for law?

Actually, it was positivism itself that first called attention to this normative posture of legal systems, and both of the positivists whom Waluchow examines most closely — Hart and Raz — are identified closely with this view, in contrast to the more classical coercive account of Austin and Bentham. Waluchow, presumably, does not advocate returning to a view of law as essentially coercive. If, however, law is essentially normative, then it must be true that a standard, in order to count as law, must do something besides guide conduct. It also must be capable of supporting certain normative claims that are made about it.

Most of Waluchow's consideration of this issue is confined to what he calls a "theory of compliance." In the same way that Waluchow separates theories of adjudication from theories of law, he also suggests that theories of compliance should be separated from theories of law. He argues that Dworkin invites confusion by trying to account for "wicked law" as law in one sense ("the fact of law") (p. 59), but not in another sense (it does not "morally license coercive force") (p. 61). This argument seems at odds with

Waluchow's own approach to the issue of metaethics. It may be confusing *to the legal theorist* to try to combine theories of compliance and theories of law, but the question is not whether separating these notions makes for a simpler or easier task for the legal philosopher. The question is rather whether this "confusing" combination of "law as fact" and "law as norm" is itself a reflection of how insiders, whose concept we are explicating, think of legal systems. Just as Waluchow avoids entangling himself in questions of metaethics by noting that judges and officials act as if moral standards are meaningful (however uncomfortable or odd that conclusion may be for the skeptical moral philosopher), so too he should consider more carefully what officials say about the normative nature of the concept of law itself: Law guides conduct, not in the way that coercive orders do, but rather in the way that normative judgments do, or purport to do.

### B. *Including Law's Normative Claims in Legal Theory*

There are two reasons, I think, for Waluchow's failure to see that the normative claims made by law place limits on any pedigree-based account of legal validity. The first reason is his exclusive focus on morality in the sense of particular legal standards that courts contingently are invited to apply. By making this question central — what standards can and do courts apply in judicial decisions — he unduly slights the larger question concerning the moral connections insiders attach to the concept of law itself.

Second, when Waluchow does consider the suggestion that law may be a concept that refers both to the source of legal standards (the pedigree) and also to certain normative claims about those standards, he does not distinguish between two different kinds of normative claims that one might think are essential to law: claims about compliance and claims about the justification of coercion. Thus, in discussing Dworkin's mixing of theories of law and theories of compliance, Waluchow treats the claim that law justifies coercion as apparently the same as the claim that law justifies compliance. The difference between these claims, however, is important and worth a brief exploration.

#### 1. *Justifying Compliance*

If only standards that actually created moral obligations to comply were to count as law, we would have a connection between legal and political theory of the strongest possible type. In fact, however, the question whether there is even a *prima facie* obligation to obey law remains controversial, and the suggestion that the obligation to obey law is absolute has few or no supporters. These features suggest that considering how insiders view the concept of law lends

some support to Waluchow's claim that we should and do separate theories of law and theories of compliance.<sup>33</sup>

## 2. *Justifying Coercion*

There is, however, a second claim about legal standards that cannot be separated from the concept of law so easily. When officials impose sanctions simply because pedigreed rules have been violated, they implicitly claim that the coercion is justified. This basic claim, which I have described elsewhere as the minimal claim that all legal systems make,<sup>34</sup> differs from the claim that compliance is required in two significant respects. First, there is little disagreement that legal systems are justified in enacting and enforcing norms. The whole point of the state, after all, is to make decisions about what is to be done. Only an anarchist, who denies the state's right to exist in the first place, could fail to recognize that the state's right to interfere with a citizen's ability to do whatever he would otherwise be doing in a state of nature is a fairly easy first step for any political theory. It is only the separate and additional claim that citizens have duties to obey the state that is controversial. Second, this claim about the justification of state coercion attaches to law qua law — just because of its pedigree. It is a content-independent claim about the state's moral justification in acting, in good faith, on its own lights in determining how to govern society. These two features — the widespread acceptance of the minimal normative claim and the fact that the claim is connected to the concept or practice of law itself — make it more difficult to separate this moral claim from a theory of law.

## 3. *The Essence of Law*

To see why it is so hard to separate this moral claim about law from legal theory, let us see what happens if we try. What would be the consequence of claiming that we should identify law purely by its pedigree without concern for the separate question of whether standards so identified can serve as the basis for justified coercion? Why is it that this moral question cannot be separated from the fact of law in the same way that Waluchow separates theories of compliance from theories of law? To return to Waluchow's consideration of this issue in his critique of Dworkin, imagine a case of truly "wicked" law in which the conclusion is reached that no moral theory could justify enforcing the law. In other words, standards that appear to have the proper pedigree are nevertheless sufficiently un-

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33. For the contrary view, see SOPER, *supra* note 17, at 101-07.

34. See Soper, *supra* note 21; see also Philip Soper, *Legal Systems, Normative Systems, and the Paradoxes of Positivism*, 8 CANADIAN J.L. & JURISPRUDENCE 363, 375-76 (1995) (book review).

just that even insiders — officials charged with enforcing the law — agree that no plausible moral argument can justify coercing those who fail to comply. Can one still claim, nevertheless, that such standards are law simply because they continue to carry the same pedigree as other legal standards that are not so unjust? Because law is a practical concept, some practical conclusion, it seems, should follow the identification of a standard as “legal.” Otherwise, as Dworkin notes, “we are suddenly in the peculiar world of legal essentialism.”<sup>35</sup> But the only practical conclusion that is left in the case of such wicked standards is the prediction of coercion or force — not justified force, but simply power to carry out the sovereign’s will. Is this still law?

This ultimate question returns to the problem of the essence of a concept that always has haunted this field of jurisprudence. Without attempting a resolution of that question, one can note at least that the new direction in positivist thinking marked by Hans Kelsen and Hart — and carried through by Raz and other “modern” positivists — has been consistent in rejecting a purely coercive account of law as an adequate explication of the concept. Moreover, the force of these modern theories of positivism rests largely on the same evidence on which Waluchow bases his arguments for viewing moral standards as potential legal standards, namely the descriptive accounts of the practice of law revealed by the way that insiders use and refer to the concept of law. That we would be puzzled about what to call standards that have no moral consequence at all is some evidence that the moral qualification is not contingent but part of the essence of law. The case for natural law, it turns out, does not depend on complex theories of adjudication, à la Dworkin, nor does it depend on claiming that moral standards must always be among the standards courts use, along with tests of pedigree, to determine legal validity. The simplest case for natural law starts where Waluchow ends — essentially with a pedigree theory of law. It notes only that this pedigree, though it *usually* will be sufficient to determine legal validity, will fail as a test for law in certain extreme cases — extreme cases of the sort that bring to mind the Nuremberg principles and the gradual international recognition of moral limits on the power of positive law to have any practical effect other than that of pure coercion. Even if we start with positivism as the basic model and use pedigrees of either the exclusive or the inclusive type to identify law, we still must admit the qualification that if the law so identified is too unjust, it is not law and can be nothing but pure force.

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35. Ronald Dworkin, *A Reply*, in RONALD DWORIN AND CONTEMPORARY JURISPRUDENCE 259 (Marshall Cohen ed., 1984).

I assume that Waluchow did not mean to return positivism to the classical view of Austin, but rather to continue a dialogue within the modern version of positivism that Raz and Hart endorse.<sup>36</sup> If my assumption about Waluchow's intent is correct, his contribution serves as a welcome addition to the debate within modern positivism. But it also serves as a subtle, if unintended, reminder of the limits of pedigree theories of law.

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36. Ultimately, the classical view may be the most consistent version of positivism and the inevitable position for those who insist on separating law as social fact from even the minimal normative claim insiders make about law.