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The Morality of Law

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A dissertation for the degree of Philosophiae Doctor – June 2022

To the memory of my father
Zimer Zimeri (1925-2016)

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Abstract

This thesis defends a unified theory of morality and law: the one-system view or the normative continuity between morality and law. The one-system view contends that law and morality belong to one normative domain: the moral domain or the domain of practical reason. As part of the moral domain, the law is and ought to be made, interpreted and applied within the limits of moral justification. Legal duties are moral duties because the law belongs to the moral domain; consequently, what cannot be morally justified cannot be justified legally. The possibility of having more than one morally right answer to a legal case does not contradict the moral thesis. However, it rules out the possibility of a law that cannot be morally justified. Contrary to legal positivism, which argues that anything, including wicked decrees, can attain the status of law, this thesis denies the legal standing to laws that cannot be morally justified.

Acknowledging or denying the status of law to 'wicked laws' is the bone of contention between legal positivism and legal non-positivism. There seems to be no middle ground and no possibility of sublating these two positions into a higher synthesis. One of the virtues of legal positivism is that it has highlighted the autonomy of positive law, which is inevitable and morally necessary for the validity of the law. Our disagreement is about the status of the morality of law: is law moral? I argue that the non-positivist legal theory defended here avoids the problems and the shortcomings of legal positivism that arise from denying the morality of law. The thesis, therefore, squarely situates itself within the tradition of non-positivism.

The thesis has four chapters. The first chapter presents and criticises the legal positivist understanding of the normativity of the law. The second chapter addresses the question of the morality of law through Dworkin's analysis of the relationship between law and morality. Finally, chapters three and four discuss the questions of the legal status of wicked laws and the justification for disobeying the law.

Acknowledgements

Many people, in different ways, have contributed to the completion of this dissertation. I have had the opportunity to present parts of this thesis to different learned and scholarly audiences in seminars and workshops. I have received professional feedback from known and unknown participants. I want to thank the energetic readers of my writings in Kosovo, Albania and Macedonia for giving me critical feedback on some of the ideas that have found their place in this thesis. In particular, I wish to thank my dear friend Arber Fetiu, a rigorous but fair critic and a great opponent of my ideas. He has significantly pushed me to clarify my ideas and make them more defensible.

I want to thank Professor Camilla Serck-Hanssen from Oslo University for her comments on an earlier version of this dissertation, and Professor Marcus Willaschek from Goethe University in Frankfurt am Main for inviting me to spend a year at Goethe University and for the help he gave me in making sense of specific obscure passages in Kant's Metaphysics of Morals. I would also like to extend my heartfelt gratitude to PhD fellows at the Institute of Philosophy and First Semester Studies in Tromsø, Morten Wasrud, Kerstin Reibold and Fredrik Nilsen, for listening and challenging my ideas. I owe the greatest debt of gratitude to my supervisors, Professor Beatrix Himmelmann and Professor Roe Fremstedal. They have been indispensable for the thesis. Professor Beatrix Himmelmann has gone over and above her duty to bring this dissertation to fruition. I owe her the dissertation as she stood by me, encouraged me and gave me insightful comments on all the drafts. She believed in me when I had lost all confidence in myself. It has been an honour and inspiration to have had both as my supervisors.

On a more personal note, I want to thank my partner Emma Zebrowska for accompanying me on this arduous journey from the beginning and for her emotional and intellectual support. She read every line of this dissertation and listened to me endlessly explaining why my Kant-inspired thesis, not legal positivism, makes sense and why Dworkin is a "closet Kantian". I could not have done this project without the selfless love and patience of my awesome daughter, Amalia Zimeri. I have no words to

describe the joy and happiness she brings to my life. In addition, the birth of my second daughter, Mia, coincided with the final stages of writing and gave me the push I needed to complete the dissertation. I also want to thank Marsela Murselovic, Amalia’s mother, for being flexible and accommodating of my schedule.

Introduction

Legal positivists argue that anything can become law, including deeply immoral or wicked statutes and decrees. Law is defined not by its moral source but by social facts, as the social fact thesis or the Sources Thesis claims (Raz 2009a), which argues that "identity and content of law is to be determined by social facts alone" (Coleman 2007, 586).[1] Therefore, the relationship between law and morality is not necessary but contingent at best. The lawgiver may choose to *incorporate* some moral norms into the law, but morality is not a condition of the validity of the law. In this thesis, I argue against this view. If anything can become law, then the law is in principle, if not in fact, indistinguishable from mafia rule and other non-moral social codes. I agree with legal positivism that law is socially grounded. Law evolves to fulfil specific human needs: coordination and planning needs (Finnis 1980, 2011, 2020; Raz 1975; Postema 1982; Gans 1981; Shapiro 2011); needs for justice and peace by impartially mediating disagreements (Waldron 1999; Rostbøll 2016) as well as providing authoritative services to its subjects by making them better comply with their own reasons (Raz 1986) and, minimally, satisfying the survival needs (Hart 1961). In addition, the law must be capable of being morally grounded.

This thesis does not deny that legal positivism has made valuable inroads into the study of law, but it contests its claim that only legal positivism can explain the law. It argues that legal positivism can explain positive law, but it cannot explain how law binds and how its normativity obligates those who do not want to be part of the legal "game". There is, therefore, a case to be made for the obligatory character of the law. Arguing that law is one thing and its moral merit another evades the issue, as it creates a false dichotomy between law and morality and between law and its subjects. I argue that law cannot be understood apart from morality because it remains just ink on paper or merely a tool of domination and exploitation in the absence of law's moral force. It is possible that one shrugs one's shoulders and accepts the law as it is: if the law says that children

[1] "In the most general terms, the positivist social thesis is that what is law and what is not is a matter of social fact" (Raz 2009a, 37). See also Green (2003), Lovenbook (2013, 75), Himma (2002, 126).

must be confiscated from their parents and raised in conditions of total anonymity, then that is the law. There is no reason why such a view must be accepted as an appropriate view of the law. Law entirely concerns normative issues, and as such, it is entirely dependent on how and for what purposes we make it. Therefore, arguing that 'law is law' and nothing can be done about it seems absurd considering that we can do a lot to improve it.

The relationship between law and morality

The relationship between law and morality is a question dating back to our earliest communities. We already find it well formulated in ancient Greece's written literary and philosophical form. Its most sublime expression is perhaps found in none other than Sophocles' famous play *Antigone* (441 BCE). The play tells the story of Antigone's defiance of the law that prohibited the burial of her brother Polyneices. Her brothers Eteocles and Polyneices fought against each other for the city's crown, where they killed each other. The king of Thebes, Creon, declared Eteocles a hero and Polyneices a traitor and ordered that Polyneices be left unburied as a punishment for his treason of allying with the enemy to capture the throne. The penalty for defying the king's order was execution (Sophocles 2020). Antigone defies the king and buries her brother. For her crime of defiance, she is sentenced to death.[2] The story is too well-known to need a longer resume, so I will only point out the obvious, that in every community, there exists a tension between the public laws of the community issued by an authority on the one hand and the laws of God (or gods), or the natural law, or the normative underpinnings of the positive laws on the other hand. In a word: There exists a tension between justice and positive laws. This dialectic is what underlies the very idea of law. The question is not to have or not to have a law, but what sort of law to have. We can understand the idea of "municipal" and "natural" law as expressions of a dialectic tension between what authorities lay down as law and what the law ought to be.[3]

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[2] Plato presents us with a different story in *Crito*, which recounts Socrates' last days in captivity. Unlike Antigone, Socrates refuses to defy the city's law and accepts the unjust punishment. Plato 1997, Crito, in *Plato: Complete Works*. Hackett Publishing Company, pp. 37-48.

[3] I believe that law plays an emancipatory role in society, as it emancipates us from multiple forms of domination embodied in customs, moralising myths, and beliefs that suppress freedom. Law, however, can also become a tool

If we consider Creon a legal positivist and Antigone a natural law theorist, we can unequivocally declare that legal positivism holds absolute sway over law in legal debates today. The natural law position is more outlier than a serious contender against legal positivism. Antigone's perspective appears as nothing but an irrational insistence on a personal, moralising belief. I certainly do not think Antigone should be taken as a paragon of legal non-positivism. I agree with legal positivism that only positive law is the law.

Nevertheless, I find this position incomplete because I consider the law a species of morality. In short, this means that law is an aspect of practical reason and that it is subject to moral rules.[4] Antigone's perspective can be seen as the perspective of practical reason, and Creon's perspective as the perspective of power, but the point is that both perspectives must be sublated into the singular perspective of the law. Power must be kept in check by practical reason, and practical reason must be guided by the considerations of what power can achieve.

Legal positivism cannot accommodate the demands of morality. This position is starkly expressed in Hans Kelsen, who categorically argues that anything can become law. Throughout this thesis, Kelsen is the adversary, the worthiest opponent against whom I constantly battle.

Can anything be law?

When I first read Kelsen's masterpiece, the *Pure Theory of Law* (1967),[5] it reinforced many of my preconceptions about the law. It reinforced my belief that law exists by an

of oppression if it is separated from morality. I am, therefore, not in agreement with the legal positivist story (Kelsen 1957, Hart 1982, Raz 1994) that law's emancipatory potential resides in its separation from morality, or in the words of Coleman and Simchen (2003, 4): "positivism, perhaps, [is] the most politically progressive of all jurisprudential views."

[4] Here I abstract from moral particularism, which denies that moral reasons are underwritten by general rules or principles. See Dancy, Jonathan (2021) "Three for the Price of Two," in Ruth Chang and Kurt Sylvan (eds.), *The Routledge Handbook of Practical Reasons*, London: Routledge, 214-225.

[5] First published in 1934 as *Reine Rechtslehre*, Deuticke, Vienna.

act of human will or decision and that it is thoroughly positivistic. When I hear the word "law", the first association is that of positive law, which is laid down as a law by the legislator. The intuition is powerful because it is simple and aligns with our experience of the law. Perhaps there is some connection between law and morality (understood as an ultimate criterion of proper conduct). Still, we have indubitable knowledge of wicked laws that have caused immense suffering and wide domination. It is disingenuous to argue otherwise. The Apartheid laws in South Africa, the Jim Crow laws, which existed for about a hundred years until 1968, and the Nazi laws of Germany, to mention some of the most obvious, are glaring examples of morally abhorrent laws.

In his magisterial study Kelsen argued that as regrettable as unjust laws may be, it is not contrary to law that it is wicked and causes unbearable cruelty and suffering. He kept this belief despite the horrors of Nazism (Haldeman 2005). In other words, there is no necessary connection between law and morality. Law is a normative, coercive order of human behaviour. There is no noticeable difference insofar as the subjective meaning of acts is considered between

> describing the command of a robber and the command of a legal order. The difference appears only when the objective meaning of the command is described, the command directed from one individual toward another. Then we attribute only to the command of the legal organ, not to that of the robber, the objective meaning of a norm binding the addressed individual (Kelsen 1967, 45).

Kelsen is acutely aware that this description, without an adequate justification, does not differentiate the legal order from the coercive order of the highwayman. We need a criterion or a demarcation standard to distinguish one from the other; we need to know why we should hand our money to the state agency in taxes but not to the robber, particularly since both represent coercive orders.

> But why do we interpret the subjective meaning of the one act as its objective meaning, but not so of the other act? Why do we suppose that of the two acts, which both have the subjective meaning of an "ought," only one established a valid, that is, binding norm? In other words: What is the reason for the validity

> of the norm that we consider to be the objective meaning of this act? This is the decisive question. (Kelsen, 1967, 45).

A few pages later, Kelsen answers these questions:

> An isolated act of one individual cannot be regarded as a legal act, its meaning cannot be regarded as a legal norm, because law, as mentioned, is not a single norm, but a system of norms; and a particular norm may be regarded as a legal norm only as a part of such a system. […] Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed (Kelsen 1967, 47).

We already sense the circular nature of Kelsen's argumentation: First, "it is only in relation to outsiders that the group behaves as a *robber* gang" (Kelsen 1967, 47). This suggests that as a group, even the robber's order must have some continuity and a set of norms by which the members regulate their conduct toward one another. Second, the crux of Kelsen's argument is that law is a system of norms, not a single norm. Law is different from a robber's order because, presumably, it has no system of norms. Third, this system of norms is held together by a presupposed basic norm (*Grundnorm*), which justifies the binding character of legal norms. Kelsen emphatically denies that justice as a moral value provides a criterion for distinguishing law from a highwayman's command.

> That justice cannot be the criterion distinguishing law from other coercive orders follows from the relative character of the value judgment according to which a social order is just… A legal order may be judged to be unjust from the point of view of a certain norm of justice. But the fact that the content of an effective coercive order may be judged unjust, is no reason to refuse to acknowledge this coercive order as a legal order (Kelsen 1967, 49).[6]

Kelsen presupposes a basic norm to explain how a legal system consists of binding norms and how the legal order differs from the robber's order. I am not sure whether

[6] "The scientific statement that a legal order is pacifying the legal community is not a value judgment. Specifically, this statement does not mean that the realisation of justice is essential to the law; this value, therefore, cannot be made an element of the concept of law and can therefore not serve as a criterion for the distinction between a legal community and a robber gang" (Kelsen 1967, 48).

Kelsen or legal positivism generally offers an adequate answer to it. Kelsen wrote the *Pure Theory of Law* to answer this question, but Kelsen failed to provide a good argument for this claim that law is different from the robber's order despite the ingenuity of the answer. The failure, however, is instructive. If the only difference between a coercive legal order and a coercive robber's order is that one presupposes a basic norm whereas the other does not, then it is doubtful that a legal order is different from a robber's order. Yet assuming that it is a sufficient justification, it does not answer a more fundamental question: Why must we accept a legal order?[7] This comes most clearly into view when Kelsen infers the logical consequence of the failure to distinguish law from a robber's order.

> The norm system that presents itself as a legal order has essentially a dynamic character. A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way – ultimately in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm. Therefore any kind of content might be law. There is no human behaviour which, as such, is excluded from being the content of a legal norm (Kelsen 1967, 198).

Now I wonder whether this is the case. I will argue that positive law to count as a law must be capable of being morally justified. The moral character of law does not negate its positive nature, nor does it seek to subordinate law to some presumed moral good existing independently of the law. Rightly understood, law does not enter a relationship with morality; it already finds itself *in* the moral domain, in the space of moral reasons where legality is an aspect of determining the moral reasons for a particular course of action. In being moral, the law does not seek to impart norms from outside its own domain, but rather it operates in the space of reasons that are morally sound and accepted in a community. Law originally interacts with moral reasons by seeking to determine that aspect of behaviour that can be coercively controlled. However, the legitimacy of the law is not dependent on a basic norm nor a rule of recognition (Hart 1961). The rule of recognition is procedurally essential in order to recognise what

[7] Kelsen can, of course, object that this is a moral, not a legal problem. However, precisely because it is a moral problem, the law must come to terms with it.

counts as law or demarcate law from non-law, but this is not the aspect of the law that is the most important or interesting. The procedural aspect is necessary and valuable, as the validity of the law depends on it (Köpcke 2019).

However, the law is valid only if it has a prior moral legitimacy. The argument here is that law has this legitimacy in virtue of being a part of the space of moral reasons. Once a reason is designated as legal, it takes a life on its own, and this journey can be studied quite apart from the moral foundations. Nevertheless, it does not follow that law severs its link from moral reasons. Law gains a certain autonomy and authority from the broader moral reasons, but its autonomy and authority are limited.[8] The criteria of discontinuity[9] are not, therefore, total or radical but merely methodological. They mark certain domains as appropriate for law while excluding others as improper. However, it does not follow that the demarcation excludes the law from morality. It merely assigns or delegates specific moral tasks to the authority domain that operates through law. The difference between law and morality is not qualitative but a *division of labour*, of marking a boundary to manage the solution of the problems effectively by a delegation

[8] There is no space in Kelsen for morality, and for me, this is tantamount to claiming there is no space for human beings. A legal subject is not equivalent to a moral subject. A moral subject is not comparable to human beings because, according to Kant, it is possible to be a disembodied moral subject in so far as the subject is rational. Pure rational beings are spontaneously subject to the moral law, whereas human beings only in the form of duty. There is a crucial difference between the moral and the legal subject. Rationality is not a requirement of legal subjectivity as it is required by moral subjectivity. Corporation, rivers, and cows can be legal subjects (Kurki 2019). This subjectivity is normative in a legal sense and can exist without any moral presupposition. The problem, of course, is that human beings perceive themselves as *moral* subjects and require a moral reason for why they ought to accept the law when it does not acknowledge their moral status. Human beings have no choice in accepting natural phenomena and occurrences. Still, they do have a choice or think of themselves as having a choice in whether they accept something that presents itself as purely normative. Therefore, excluding morality is an insurmountable problem for any legal theory. For what reason, we may ask, should we treat someone's commands as directives for us if they do not acknowledge our moral autonomy and independent will?

[9] As I understand it, legal positivism is a much narrower view of the law than the view of law as a branch of morality. The crucial difference is not in the demarcation criteria because these criteria are accepted as necessary even by the natural law theories. Rather, the difference pertains to the fact of understanding these demarcation criteria. In other words, should we understand the demarcation criteria as being continuous or discontinuous with morality? Legal positivism assumes that the demarcation criteria are discontinuing criteria. When something is designated as law by that act, it is lifted or removed or isolated from the domain of morality. However, there is a more radical understanding of legal positivism. Even the talk of discontinuity must be abandoned altogether, for it gives the wrong representation of the relationship between law and morality. The continuity-discontinuity dichotomy assumes, however vaguely, that law has its origin in morals. Then through specific methodological incisions, the law is removed from its original embedding into a separate domain of its own. A continuity-discontinuity dichotomy reinforces a moral understanding of the law in a way that makes law a progeny of morality. A radical version of legal positivism would seek to undermine this continuity altogether by postulating a domain beyond that of morality: I consider Kelsen's theory a radical attempt to rethink law completely outside morality.

of specific tasks to an authority capable of solving those moral problems better than we can solve them individually.

The practical relevance of this debate

The reader may wonder about the relevance of this topic and argue that whether positivists or non-positivists are right makes no difference to how the law is applied today. I beg to differ. This very perception is a positivist perception: because many of us uncritically accept the positivist picture of the law, that law is positive and bears no relevant relationships to morality, to the effect that it makes no practical difference to how the law is interpreted and applied. Ronald Dworkin has debunked this picture in relation to hard cases and others with regard to all law (Olsen and Toddington 1999, Allan 2020).

I briefly want to discuss a case relevant to the argument for the thesis, namely the illegal intervention of NATO in Serbia in 1999. The case is historical, but I want to discuss it as a *thought experiment*, not a historical reality. However, I chose the case precisely because it is historical and generated many discussions about the legality and morality of the so-called humanitarian intervention. The purpose of discussing the case is to highlight the role of morality in law.

On March 23rd, 1999, the North Atlantic Treaty Organisation (NATO) intervened to stop the ethnic cleansing of Albanians in Kosovo committed by Serbian aggression. Before the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), Kosovo enjoyed an autonomous status; although formally not a republic, it practically governed its own affairs. With the dissolution of Yugoslavia, Serbia moved in to annul the autonomous status of Kosovo and sent its paramilitary and military forces to crush any resistance. All Kosovo institutions were occupied and subsequently closed in the ensuing years, and Albanians were forced to live under a police state or fled to exile. The remaining Albanians refused to accept the abrogation of autonomy and created parallel institutions, a parliament, underground schools, an exiled government, and a

guerrilla army known as UÇK (National Liberation Army). After the escalation of conflict and oppression, killings and illegal detentions, NATO decided to intervene so as not to let Serbia commit another massacre of Srebrenica proportions.[10]

For such an intervention to be legal, it would have to be authorised by the UN Security Council. Attempts to achieve this proved impossible, considering that two permanent members of the Security Council, China and Russia, were resolutely opposed to military intervention. NATO thus stood before a moral dilemma: either do nothing and let the situation in Kosovo escalate to a greater war or intervene without legal cover. NATO chose the latter option. Even though the intervention was illegal under international law as it breached Article 2(4) of the UN Charter, it decided to intervene.[11]

NATO's intervention in Kosovo was, and remains, one of the most contested humanitarian interventions in modern history. Still, there was a strong moral case for many favouring the intervention. Unlike, for example, the US invasion of Iraq in March 2003, which was done under the pretence of disarming Iraq of its weapons of mass destruction (WMD) and removing a brutal dictator, where the moral case for the intervention was weak from the very beginning.[12] In retrospect, the charade of the mobilisation for war in Iraq looked not a mistake, but a calculated imperialist ploy, a case of display of power and of settling old accounts. Iraq was not involved in any terrorist activities on US soil or any other country. Even though Saddam Hussein, the president of Iraq at the time, was a brutal dictator, the political situation inside Iraq was stable. The most significant setback of the invasion was suffered by the Iraqi women,

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[10] Srebrenica massacre occurred in July 1995 when more than 7000 Bosniaks (Bosnian Muslims) were slayed by Bosnian Serb forces in the town of Srebrenica in eastern Bosnia and Herzegovina. https://www.britannica.com/event/Srebrenica-massacre
"Speaking on the day before Operation Allied Force was launched to the American Federation of State, County, and Municipal employees, the President [Bill Clinton] argued that the world had stood aside as Milosevic had committed 'genocide in the heart of Europe' against the Bosnian Muslims and that this could not be allowed to happen in Kosovo, since 'it's about our values'." (Wheeler 2000, 266).

[11] The article states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Charter of the United Nations and Statute of the International Court of Justice. San Francisco, 1945. For a concise summary of the debates around the NATO intervention see Nicholas J. Wheeler, *Saving Strangers*. Oxford University Press, 2000.

[12] Again, the case of Iraq is discussed illustratively and as a thought experiment only. I believe there was no moral justification for the war, and I will take this belief *as if* it were a proven fact to hammer the point home.

who were formally guaranteed equal rights under the Provisional Constitution of 1970.[13] All that was to change after the US invasion, as Iraq became a breeding ground for terrorism, both domestic and international.[14] The invasion created the human catastrophe that humanitarian interventions are meant to prevent. The moral case for the invasion of Iraq was thus non-existent or weak at best (Hinnebusch 2007; Butt 2019). To compound the error further, the invasion was also illegal. In my terminology, saying that the invasion was illegal means that it could not be justified morally.

The invasion of Iraq was thus both immoral and illegal. Not so, perhaps, in the case of NATO's intervention in Serbia. We may disagree about the legal nature of the intervention, but there was a strong moral case to be made in favour of the intervention. After the dissolution of Yugoslavia, the regime of Slobodan Milošević began an assault on Slovenia, Croatia, Bosnia and Herzegovina. The humanitarian consequences of the war were devastating. Slovenia and Croatia, and later Bosnia, had made up the Yugoslav Federation and no longer wanted to remain in the federation. The breakup of Yugoslavia would unleash ethnic nationalism on a scale not seen in Europe since World War II. Kosovo was not an independent republic of Yugoslavia, so legally, it did not have the right of secession from Serbia. In 1975 Josip Broz Tito, president of Yugoslavia (1951-1980), gave Kosovo an autonomous status that was equivalent to the status of the republic for all practical purposes. After the dissolution of Yugoslavia, Kosovar Albanians had their own aspirations for self-determination. In response, the Serbian regime decided to abrogate Kosovo's autonomy. In 1989, Ibrahim Rugova, leader of the Albanians in Kosovo, initiated a policy of nonviolent protest, and by 1996 the Kosovo Liberation Army (UÇK) emerged in response to the failures of Rugova's peaceful resistance.

[13] "It is important to point out that Iraqi women have been very much part of the 'public sphere' until a decade or so ago. Despite the context of general political repression by the Baath regime of Saddam Hussein, Iraqi women were among the most educated in the whole region. They were part of the labour force and visible and active on almost all levels of state institutions and bureaucracy. These days, however, women are prevented from leaving their houses by fear and a great sense of insecurity. Violent burglaries, mafia-like gangs that roam the cities at night, increased sexual violence, including rape, as well as militant resistance and US snipers have pushed women into the background" (Al-Ali 2005, 743).

[14] ISIS (Islamic State of Iraq and Syria) or *Da'esh,* was established in Iraq in 2004. See Fawaz (2016).

The critical aspect of the claim here is that this intervention was also illegal. I argued above that the invasion of Iraq was not only illegal but also lacked a solid moral justification. We can say that the invasion was a catastrophe that should not have happened. The situation in Kosovo was different. I believe there was a moral justification for the intervention. However, moral justification alone is arguably insufficient for intervention, particularly against existing law.

Nevertheless, we can see that the two cases are not similar. Whereas the Iraq invasion was a clear violation of moral and legal law, the Kosovo case was far more ambiguous. The status of ambiguity resides precisely in the space of moral reasons that support an intervention. As far as Kosovo was concerned, the international community knew what Milošević was capable of and that he was intent on ethnically cleansing Kosovo from Albanians.

I want to argue that if the law goes against our strongest moral reasons for a particular course of action, we have every reason to re-evaluate the law in light of those moral reasons. We have every reason because of the moral nature of law, i.e., because it operates in the moral space and is responsive to moral reasons. If the law is so incongruent with the moral reasons and the moral self-understanding of the community that it cannot be justified reciprocally and generally, it is a defective law. That law operates in the space of moral reasons also means that law regulates human affairs, which is the domain of morality, by recognising its subjects' normative authority and status as reason-giving and reason-deserving beings. A law that violates the normative standing of its subjects is a law that cannot be obeyed. It ought to be disobeyed.

Returning to our examples: Unlike the case of Iraq, where there was strong congruence between moral and legal reasons, in the case of Kosovo, there was an incongruence between moral reasons for the intervention and strong legal reasons against intervention. The case was decided, rightly, in my estimation, in favour of humanitarian intervention, but the way it was justified was problematic.

The NATO Secretary-General announced the commencement of the intervention in Serbia by declaring:

> We must stop the violence and bring an end to the humanitarian catastrophe now taking place in Kosovo. We have a moral duty to do so.[15]

"We have a moral duty to end the humanitarian catastrophe". In this context, this, I suspect, means that law is separate from morality, and when the two conflict, moral reasons trump legal reasons. In the words of Peter Cane (2012, 80):

> The function of providing individuals with ultimate standards for assessing human conduct is not only common to diverse understandings of morality; it also distinguishes morality from municipal law and from other social normative regimes whether or not they are understood to be legal. In practical deliberation about the right, the good and the virtuous, when a moral reason for action conflicts with a reason derived from another normative regime, the moral reason trumps the non-moral reason. More particularly, when a moral reason for action conflicts with a reason for action derived from the law, the moral reason trumps the legal reason because one of the functions of morality in practical deliberation is to provide ultimate standards for the assessment of law.[16]

This is a problematic argument and a dangerous one to boot. The first question immediately springs to mind: Is the law not supposed precisely to resolve such conflicts? Does not seeking resolution of the dispute outside the law render the law insignificant or moot? Moreover, seeking a solution outside the law cannot but appear cynical or disingenuous: we have the law to mediate between conflicting parties, using, when necessary, coercive legal means to prevent the violation of rights and administer just punishment. In the logic of the justification mentioned above, it is overruled normatively when the law is needed to provide a solution. This seems to be spurious, and it is spurious because it relies on a positivistic understanding of law as separate from morality, even when it gives morality an overriding power normatively.

[15] Javier Solana cited in Koskenniemi (2002, 161).
[16] See also Alexander, Larry and Frederick Schauer (2007).

The point of having a law is to solve conflicts. Hence when disputes arise, seeking solutions from outside the law is a danger that must be avoided. The way NATO justified the intervention is problematic because it justified the intervention in terms of the presumed superiority of morality over the law. In other words, the justification it provided is positivist: the law is too bad to be obeyed. This is problematic precisely because, in this understanding, the law is separate from morality. One weaponises morality in morally unjustifiable ways whenever one chooses to justify breaking the law by appealing to morality. We can safely assume that signatories to international law, whatever its content, agree that the law must be respected and implemented irrespective of its consequences; no party, based on moral reasons, has the unilateral right to break the law even if these reasons are valid. This kind of moral justification cannot but be perceived as a cynical manipulation of morality. The formalised law procedures are the only way to allow for peaceful coexistence within a pluralistic and international society. Therefore, one cannot unilaterally decide to break the law, even for a worthy cause.

In my understanding, this line of argumentation is a consequence of legal positivism. Lest I be misunderstood, I do not hold legal positivism responsible for the atrocities committed by totalitarian regimes under the cover of positive law. Like autocratic legalism (Scheppele 2018), autocratic morality can be used to justify atrocities. The point I am making is this: if we commence on a legal positivist path, where the law is only what is laid down as law regardless of its content, moral justification cannot but appear arbitrary, cynical and ideological. I agree with positivism that *if* the law is a separate entity from morality, *then* morality has no justificatory power in determining what the law is or what the law ought to be. Morality is no different from other practical normative concerns or issues. Moral justifications, therefore, should not be considered legitimate justifications legally, particularly not in international law.

Law, however, *is* moral, and in this sense, morality is not something that can be written off the law by a decree or by fiat. We are morally justified in breaking the law when the

law no longer is congruent and compatible with the moral reasons for the sake of which it exists. We can see this clearly in the two cases that I mentioned. The Iraq case lacked a proper moral and legal justification for an intervention. On the other hand, the Kosovo case had a moral justification, and although it had no legal warrant, it could have had a legal warrant, as a case could have been made that the existing law is incongruent with what it ought to be. One cannot argue that law is separate from morality, then use morality to subvert the law and expect those who believe in the rule "Gesetz ist Gesetz" (law is law) to play the game outside the law.

Law is open to moral justification because law operates in the space of moral reasons. Because it is not separate from moral reasons, it can be challenged, revised and reformed from within the moral space of reasons. Assuming that the case of Iraq could not have been justified morally, there could not be a legal justification for the intervention either. What cannot be justified morally, in the sense of being morally permitted (rather than required), cannot be justified legally. What can be justified or permitted morally can be justified legally, but it need not be so. The case of Kosovo could have been justified legally only on the assumption that all parties accept that law cannot stand aloof from moral justification.

The structure of the thesis

In this dissertation, I defend a conception of law as moral. Chapter one argues that a legal positivist conception of law is inadequate with regard to explaining and justifying the nature and the bindingness of legal duties. Legal positivism postulates a specific legal normativity, but this normativity, I argue, cannot explain how legal duties bind. And unless we can show how they bind, legal normativity remains no different from the normativity of any other normative order, coercive or non-coercive. Playing chess is also a normative enterprise, as one must be committed to the rules that *constitute and guide* the game of chess if one wants to play. Without respect for the rules of chess, there is no chess. The same applies to legal normativity. There is, therefore, nothing

special about legal normativity, although it is typically backed by state power. We must seek the principle of the bindingness of law elsewhere.

The second chapter argues that morality can provide the principle of bindingness for the law. Law is binding and creates moral obligations because the law is a branch of morality. The chapter defends a Kantian-Dworkinian conception of the morality of law, arguing that law is not independent of moral reasons. Dworkin illustrates this continuity by discussing the status of hard cases in law. In contrast, the issue seems to be more complicated for Kant, but ultimately Kant decided that law belongs to the moral sphere. The moral sphere is the sphere of freedom, and rules that regulate freedom are moral rules. The moral sphere is divided into Ethics and Right, and both deal with questions about how our freedom ought to be constrained so that it can be compatible with the requirements of practical reason.

Chapter three introduces and discusses the concept of wicked laws. Legal positivism claims that legal non-positivism cannot make sense of wicked laws. Any attempt to consider law moral would involve the idea of law in self-contradiction and would make it a moral duty to obey evil laws. Legal positivism claims that it escapes the dilemma legal non-positivism gives rise to. Perhaps positivism has a greater problem explaining how law binds, but legal non-positivism has an even greater problem explaining how to make sense of wicked laws. I argue that this is not the case and that the problem of wicked laws arises only if we accept the legal positivist idea of law, i.e., that anything can be law. However, according to a moral understanding of the law, not everything can become law.

The last chapter, chapter four, discusses the issue of disobedience to the law. It argues that the problem of disobedience is a complicated matter because we need a clear moral warrant to disobey the law. Moreover, it is not always easy to come by such a warrant. The chapter also offers a limited defence of Kant’s reluctance to allow any form of disobedience to the law. As moral, the law already enjoys general moral support, and it is categorically binding. I am sympathetic to Kant’s reasoning.

Nevertheless, I cannot follow his reasoning to its logical conclusion. Instead, I argue that when it is shown that law cannot be justified morally (as being permissible), that is, it cannot be justified reciprocally and generally, we must disobey it precisely because it lacks moral legitimacy. In other words, the law does not make a moral difference in our lives. I argue, therefore, that the case of disobedience to the law must be approached with extreme caution. If a law passes the moral test, i.e., it can be justified and permitted morally, we have no grounds to disobey it. Private reasons are not sufficient for disobedience. Rather, the law must be shown to be morally unjustifiable, in that it, for example, arbitrarily discriminates against some of its subjects. Law cannot override morality normatively precisely because it operates in the space of moral reasons.

Chapter One: What Is Law?

1.1. Introduction

This chapter will discuss two questions: first, what makes a rule, a command, a convention, or a norm into law, and secondly, how law binds. These questions are interrelated, and they set the stage for the ensuing discussion in the following chapters. Therefore, this chapter can be considered an introduction to the thesis that makes a case for the moral nature of the law by critically analysing the positive concept of law. I defend a moral conception of law, and I will argue that this is not only defended by outstanding authorities in the field (Kant and Dworkin) but that it is eminently sensible and intuitively plausible to treat law in its entirety as a department of morality in a wide sense.

I will present the positivist view of the law, which Dworkin has dubbed the two-system view, namely, that law and morality are two separate domains and that it is in the best interest of both law and morality that they stay that way because nothing but confusion will come by uniting them under one concept. This would be a sensible proposal if only it delivered what it promises: to explain and justify the normativity of law without any reference to morality. Unfortunately, I think it fails to deliver on its promise.

The task of this chapter is then to show how legal positivism fails to deliver on its promise[17] and that its failure has opened the way for the emergence of *non-positivist* theories of law like the New Natural Law (NNL) theory as a revision of Thomistic natural law theory (Grisez 1965; Finnis 1980; Grisez, Boyle and Finnis 1987; George 1999; Tollefsen 2008, 2016, 2017; Lee 2019, Murphy 2006) and *post-positivist* legal theories (Dworkin, 1986, 2006a, 2011a; Waldron 1997, 1999, 2009, 2013; Alexy 2002,

[17] Brian Leiter has issued a challenge to all non-legal positivists, particularly to Finnis and Dworkin, that they should come with a better theory to explain the nature of law. "Legal positivism," says Leiter (2018, 28) "as defined by the Social and Conventionality Theses, give illuminating and plausible accounts of the 'ordinary' concept of law, it does so in a way that can be deployed fruitfully in the empirical sciences, and it does so without controversial or incredible metaphysical assumptions. With respect to any analysis of a human artifact, it is hard to imagine how one could do better… But if there is a reason not to be a legal positivist today, it is incumbent upon the critics to identify the theoretical point on which positivism fails. Remarkably, the critics have failed to do so."

2021; Allan 2009, 2013, 2015, 2017, 2020a, 2020b; Greenberg 2014; Hershovitz 2015; Nye 2021a; Beever 2013, 2021; Weinrib 2013, 2016; Bertea 2009, 2019; Demiray 2015, 2016; Schaus 2015).[18]

1.2. Legal normativity

In the following chapter, I defend a version of the one-system view of law and morality. But before we embark on that project, we must discuss the legal positivist concept of law and its failure to explain legal normativity. This will set the stage for the next chapter, where a moral concept of law is defended. There is more than one legal positivist conception of law. I cannot possibly do this justice in an introductory chapter, so I will adopt an uncontroversial working definition of legal positivism based on two fundamental theses: the *social* fact thesis and the *separability* thesis.[19] One cannot be a legal positivist in any meaningful sense without subscribing to one of these two theses. Legal positivism seeks to explain law as a *distinct* domain from other social and moral conventions and proposes to do so descriptively (Bertea 2021).

Leslie Green offers perhaps the most comprehensive definition of legal positivism to date:

> Legal positivism is the thesis that the existence and content of law depend on social facts and not on its merits. […] The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It

[18] I speak of legal *non-positivism* and legal *post-positivism*, but this terminology is not precise. It would take a separate study to determine the differences between them, if any. One difference is that legal post-positivism claims to leave positivism behind whereas legal non-positivism can be understood as offering an alternative to positivism, without thereby claiming to supersede legal positivism.

[19] "All positivists share two central beliefs: first, that what counts as law in any particular society is fundamentally a matter of social fact or convention ("the social thesis"); second, that there is no necessary connection between law and morality ("the separability thesis") (Coleman and Leiter 2010, 228). See also Raz (2009a, 38), Shapiro (2011, 27), and Marmor (2021, 466): "The separation thesis amounts to the claim that there is a fundamental aspect of law, 'its existence' in Austin's formulation, that does not depend on morality". But it is not only Austin. The whole tradition of legal positivism stands behind this claim. Gardner (2001, 199) thinks that the distinctive proposition of legal positivism (LP) is: In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits." Legal positivism stands or falls with this proposition. Green (2021, 39-40) contends that although "it is hard to find a contemporary positivist who still hold that law is a command of the sovereign […] But one doctrine remains essential: any theory of law that *a positivist* would be willing to call 'positivist' endorses a version of the following claim: *All law is positive law*." Leiter (2021 79) endorses a Hartian-Razian interpretation of legal positivism, namely that "laws and legal systems rest at bottom on conventional practices of officials." See also Dickson (2012, 48-64).

> says that they do not determine whether laws or legal systems exist. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. (Green 2003)

Plunkett and Shapiro, however, present the debate between positivism and antipositivism in terms of *grounding* of legal facts, that is, a debate "about what grounds what: roughly, whether legal facts i.e. facts about the content and existence of legal systems) are necessarily grounded in social facts alone, or moral facts as well" (Plunkett and Shapiro 2017, 38). In Plunkett and Shapiro's view, the debate is not merely descriptive but also metaphysical: in virtue of what fact is law what it is?[20] The relationship is metaphysical determination, not simply a moral justification.

The question of grounding the law is the most complex and philosophically challenging problem of legal philosophy. Kelsen (1967, §34) 'grounds' it in a basic norm that must be presupposed to justify the law. Kletzer (2018), a vocal proponent of the pure theory

[20] The idea of grounding is interesting but not in the metaphysical sense that Plunkett and Shapiro use: to ground something needs not necessarily take the form of "x is dependent on y" such that "law is grounded in moral facts" becomes completely obscure: What is the nature of the moral facts in virtue of which a fact becomes legal? In his critique of moral conceptions of law, Marmor writes that "they [meaning Dworkin and non-positivists] fail to prove that legal content *depends on* moral truths" (2011, 84). But what does this mean? How does law *depend on* moral truths? Which moral truths? Metaphysical determination relations obscure a much simpler form of grounding that is not about the existence of law in social or moral facts but about the justification of norms and practices that go by the name of law or legal practices. Morality is a practice of justification. Law is *not* grounded in moral facts or truths, and because we insist on using this obscure and obfuscating terminology, we end up reproducing the problems that we should be solving. I would argue that framing the question of the relationship in terms of grounding instead of justification is responsible for the successive misunderstandings and talking past each other between positivists and post-positivists. Let's take Kant's and Dworkin's theories (which I explain at the end of this and the following chapter) seriously. We realise that the debate about "what grounds what" is misguided, and the sooner we abandon it, the sooner we understand that law is grounded neither in social nor moral facts.
Law belongs in the moral (*Sitten)* domain (Kant's *Metaphysics of Morals*) or the domain of value (Dworkin's *Justice for Hedgehogs*). The idea of grounding construes the relationships from an upside-down perspective: it puts the cart before the horse, as it were. It starts from the social facts (judicial decision-making, legislative decrees, etc.) and then struggles to explain its moral vocabulary (right, obligation, etc.). It then either is forced to postulate inexistent and queer moral facts or, after postulating them, denies that law is grounded in moral facts. Both the problem and the solution are mired in conceptual confusion because the initial question or the basic premise of this debate rests on inexistent grounds.

of law, goes so far as to say that law is based on 'nothing': "to claim that the law is source based means that the law is based on law, which means that the law is based on nothing" (Kletzer 2018, 120). Law has no ground or what amounts to the same; it takes itself to be the ground of itself. This amounts to normative self-constitution or bootstrapping. The law pulls itself out of nothing like Baron Münchhausen pulling himself and the horse on which he was sitting out of a mire by his hair. By any account, this is deeply unsatisfactory. Plunkett and Shapiro are right to argue that in this dilemma, we find the origin of the division of theories of law into positive and natural. They are both responding to this conundrum: how is law possible? Positivism tries to ground the law either in itself (Kelsen's basic norm) or in some *social* fact (Hart's rule of recognition, Austin's sovereign's command) and natural law theory in some other fact external to the law, either in natural law or in God's authority.[21]

To ground x in y seems to require a form of necessary metaphysical dependence that is absent from the relations grounded morally (*not* grounded in moral facts or truths), that is, that are justified morally. To justify morally can mean many things, but the sense in which I use it is that of universal justification (Kant 6:226)[22] or general and reciprocal justification (Forst 2012, 2014, 2020) or intersubjective justification (Bertea 2019). If it is merely based on social facts, then positivism is vindicated. Still, if, in addition, it is also grounded in 'moral facts', then anti-positivism seems to be vindicated. However, whether it is grounded in social or moral facts, these facts do not amount to much, particularly in explaining the binding character of law. To explain the normativity of law, we need not a fact but a concept of practical reason that wills the law into existence. (Korsgaard 1996, 2009). Indeed, we ought to distinguish two aspects of normativity, which naturally come apart but are not often distinguished.

[21] Even Kant is perplexed by the problem. See *Idea for a Universal History with a Cosmopolitan Purpose*, sixth proposition (Kant, 8:23).

[22] As is standard in Kant scholarship, parenthetical references to Kant's writings give the volume and page number(s) of the Royal Prussian Academy edition (*Kants gesammelte Schriften*), which are included in the margins of the translations. English translations are from the Cambridge Edition of the Works of Immanuel Kant.

According to the first conception of normativity, the law is normative because it can be identified with a specific rule or procedure that can be isolated from the rest of social rules and norms. Hart (1961), for example, argues that law is the unification of primary and secondary rules, or law is what is recognised as law by the rule of recognition. In this sense, the normativity of the law is what the rule of recognition provides as a reason for action. It is a type of formal normativity: for a rule or a norm or a command to be a law, it must comply with specific formal procedures; that is, it must be done in a legally proper way. If it is not done in a legally proper way, if a rule has not been endorsed by the parliament, for example, it is just a social practice but not a binding legal norm, and nothing legally follows from it. One cannot be legally punished for violating a rule or a norm that is not lawfully sanctioned. According to this account, "normative principles are in general principles of the unification of manifolds, multiplicities, or, in Aristotle's wonderful phrase, *mere heaps*, into objects of particular kinds" (Korsgaard 2009, 27). For a rule, a norm, or a command to become a law, it must be constituted as law by the principles that authorise law-making into an object of a particular kind. Korsgaard speaks of constitutive standards, "standards that apply to a thing simply in virtue of its being the kind of thing that it is" (Korsgaard 2009, 28).

This is not the type of normativity for which the moral conceptions of law criticise legal positivism. This constitutive standard is positive law, which is also the object of legal science and jurisprudence (Kelsen 1967; Hart 1961; Raz 2009a). As formal normativity, this is entirely independent of the 'moral' conditionings and other evaluative conceptions. Legal positivism is correct to argue that law has its own normativity. Legal normativity can fully explain what reason, obligation and right, constitutive of the legal norm, mean in a legal context. There is neither 'moral' nor practical necessity to explain this type of normativity by referring to standards that are not constitutive of the law. Therefore, the great debate between positivists and non-positivists ought not to be viewed as being about the autonomy of the law, understood in *this* constitutive sense of the rules and principles that make and guide the activity of the law.

Constitutive standards that apply to legal activity are called constitutive principles. "In these cases what we say is that if you are not guided by the principle, you are not performing the activity at all. In the case of essentially goal-directed activities, constitutive principles arise from the constitutive standards of the goals to which they are directed" (Korsgaard 2009, 28). Imagine a judge who, instead of referring to the law when handing her verdict, makes it up or randomly and arbitrarily chooses a non-legal norm and applies it as a law. The principles of the law do not guide the judge in this case, and in a sense, she is not performing the legal-judicial activity at all. She is not judging. Law should guide her judicial action; if it does not, her verdict is *defective* as a legal verdict. It can be appealed precisely because it did not respect the normative requirements of legality. Even if the judgment is morally sound, it is not legal, and as such, it cannot be enforced. As its constitutive principle, it is unconditionally binding, for otherwise, it will make the activity incoherent, mere *heaps*. Its bindingness, however, is constitutive, not moral: just like the laws of logic that govern our thoughts are unconditionally binding for the activity of thinking – illogical thinking is not thinking at all – the positive laws are unconditionally binding in precisely this sense. Korsgaard thus argues that "the *only* way to establish the authority of any purported normative principle is to establish that it is constitutive of something which the person whom it governs committed" (Korsgaard 2009, 32).

This, in a nutshell, is the formal or the constitutive normativity of the law. I use the adjectives "formal" and "constitutive" interchangeably because law consists of rules and is expressed in formal rules, so the constitutive principles of law are also formal. I will say more about how different legal positivists conceptualise the normative role of the law and its binding character. Still, I think Korsgaard essentially and conceptually captures the constitutive aspect common to all legal positivist conceptions of normativity. Whether we adopt Bentham's and Austin's command theory of law, Kelsen's norm theory of law, or Hart's rule theory of law, they all partake in this constitutivist conception of the normativity of the law. And the general point, or rather the critique, of all positivist schools is that precisely in their strength lies their greatest weakness. Formal normativity is a thin normativity akin to the normativity of different

games: there are 'normative' rules in the game of chess, by which all those who commit to playing chess must also commit to observing them because, as constitutive rules, they constitute the game as chess, e.g., the queen must move in straight lines. One only plays chess by applying the rules following some constitutive principle that regulates the moves in chess. If you want to play chess, you must learn the rules and use them as diligently as possible, but in all that, rules and principles define the game. Playing chess requires that constitutive, not moral, commitment. The rules possess the deontic power in the context of the game, which arise not from some moral reason independent of the game, but from the status function in the game.

I want to mention the pertinent point here, which I will also refer to below in Hart's theory of law: Hart had foreseen that legal normativity applies only to those committed to it, namely, legal officials. Legal rules can extend their normativity only thus far. But legality is a game that coerces even those unwilling to join into playing the game. Formal normativity explains how the law works and how law binds its officials. Still, it does not explain how law binds citizens as moral agents who have autonomy over their decisions and actions. We must remember that constitutive formal principles are unconditionally binding, but only on those who accept them, who decide to enter the game. If one wants to build a house, it is vitally important to follow the standard of building a house. Normative rules thus arise from the constitutive standards and principles of the specific object or domain. Constitutive norms ensure the constructed object's autonomy, integrity, and recognisability or distinctiveness belonging to a particular objective domain. We know the law because procedures, rules, and principles distinguish one norm from another. However, it is not sufficient to distinguish a rule from another similar rule. What is required is that one also takes this rule as a reason to act on that rule.

Here emerges the problem of the source of normativity: is it in the rules or somewhere else? The fact that there are rules of chess which are normatively binding for the chess player only shows that they are binding because of a particular commitment to the game. Chess rules are normative, but their normativity is about what makes a chess game. One

is not *obligated* to play chess whenever one encounters the game. No such claims can ever be made by chess. Its rules and principles are normative for those who commit to the game, but they are normatively inert for those who do not commit to the game. Hart thought the same applied to the law: legal officials are under the obligation to obey the law, but not the citizens. This is consistent with the explanation mentioned above of constitutive normativity because there is no normative warrant to extend it to citizens and non-citizens alike. It is the same principle that demarcates citizens and non-citizens or foreign citizens. The laws of country A do not apply to citizens of country B; consequently, citizens of country B have no obligation to obey the laws of country A. They are not normative for citizens of another country unless they move into the country in question's territory.

Legal positivism has no problem explaining formal legal normativity, the normativity of rules constitutive of the law. It is considerably more challenging to explain the second conception of normativity, namely, the moral normativity of the law. Moral normativity makes it binding and non-optional for officials and citizens to obey the law. Suppose the law is not capable of obligating its non-official subjects to the same extent it obligates officials. In that case, we face the difficult task of explaining how it is any different from any other normative coercive order. That law is necessarily normative in the constitutive sense is clear, but it might not be very interesting for the rest of the citizens beyond the officials' interest. The moral or justified sense of normativity is of considerable interest because it is the question of whether it is in the nature of law to obligate (Spaak 2018, 327).

To repeat the previous argument, it is not disputed that the law obligates officials who play its game. But the problem of normativity of law is much broader: does it bind the rest of us? This is the point that legal positivism cannot explain. It is essential to explain how law can obligate citizens, mainly since the obligatory character of law implies a coercive enterprise. Law as a moral concept has the conceptual resources to explain how law obligates, but before we move to that question, let us briefly consider Austin's

and Hart's legal theories to find a way to justify its coercive use of power. I will try to present the outlines of their views sufficiently enough to grasp the argument.

1.3. The command theory of law: Bentham and Austin

Hobbes (1985), Bentham (1843), Austin (1995), Holmes (1897) and Kelsen[23] (1967) provide what might be considered a *sanction-based account* of legal obligation (Green 2004, 517). Austin (1995, 21) stated that "Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command.* Or, rather, laws or rules, properly so-called, are a *species* of command" and "whenever a command is signified, a duty is imposed." (Austin, 1995, 22). And he explained the meaning of command as a "signification of desire". "If you express or intimate a wish that I shall do or forbear from some act and if you visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*" (Austin, 1995, 21). He called the evil that would be incurred if the command disobeyed a *sanction* or *enforcement of obedience*. Sanctions are there to enforce compliance in case the command is disobeyed. What distinguishes this type of command as a signification of desire from other commands is that it can be enforced if disregarded. For Austin, sanctions were essential to the idea of legal obligation because laws created obligations by backing their commands with threats.

Sanction theory provides an implausible account of a legal obligation. A command or "a rule can never be binding just because some person with physical power wants it to be so" (Dworkin 1978, 19-20). Even if we were to accept that a law is a command of the sovereign, this would not entail that we are also under an obligation to obey the order, for the command may be irrational, harmful, or immoral. This would entail a predictive account of obligation where the subject, like Holmes' bad man, tries to find out what the law is to avoid the likelihood of being sanctioned for failing to behave in the manner outlined in the law. On this account, the legal obligation is framed as a

[23] Kelsen's theory is nevertheless different. "That the law is characterized as a "coercive order" does not mean – as is sometimes asserted – that it "enforces" the legal, that is the commanded behaviour. This behaviour is not enforced by the coercive act because the coercive act is to be executed precisely when an individual behaves in the prohibited, not the commanded, manner" (Kelsen 1967, 35).

purely empirical notion: “something becomes obligatory simply in virtue of its being required under a system that can enforce that behaviour or in virtue of its being commanded by someone who has the power to force unwilling addressees to comply” (Bertea 2019, 51).

Hart (1961, 82-91) famously objected to Austin’s analysis of obligation in terms of being obliged by command because, in this case, *being obliged* is being forced or coerced to do something against one’s will. Yet an obligation exists independently of the question of coercion. A parent has an obligation, for example, to care for her children, irrespective of the sanctions a state may impose on her should she fail the obligation. Whatever sanction the state may impose on the parent who fails, the obligation is entirely independent of the question of obedience to the sovereign’s command. In this spirit, Hart (1961, 83) writes that “the statement that a person has an obligation, e.g. to tell the truth or report for military service, remains true, even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience.”

Hart’s critique of Austin builds particularly on the distinction he drew between the assertion that someone is *obliged* to do something and someone is *obligated* (has an obligation) to do something. The former denotes an action in which the subject merely responds to a threat and acts on that consideration alone. In contrast, the latter involves something more: the idea of obligation. The “statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which action was done. But the statement that someone *had an obligation* to do something is of a very different type and there are many signs of this difference. […] Moreover, whereas the statement that he had this obligation is quite independent of the question whether or not he in fact reported for the service, the statement that someone was obliged to do something, normally carries the implication that he actually did it” (Hart 1961, 83).

In Austin's model, an obligation to obey the law does not precede but follows the command, which issues an obligation subject to the threat of force. But law posits an 'ought' independent of the command; an ought that ultimately can be traced back to some reason that explains the norm.[24] If the law is only a command of the sovereign backed by threats of sanctions and obligation, the correlative concept of this command, then nothing in principle that distinguishes the legal order from a mafia order.

> The situation which the simple trilogy of command, sanction, and sovereign avails to describe, if you take these notions at all precisely, is like that of a gunman saying to his victim, "Give me your money or your life." The only difference is that in the case of a legal system, the gunman says it to a large number of people who are accustomed to the racket and habitually surrender to it. Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion (Hart 1958, 603).

As we will see, Hart's central critique centres on precisely drawing a demarcation line between law as a normative phenomenon that provides its subjects with obligations, and law as a gunman situation writ large, to which Hart denies it can be reduced. There are four ways in which Austin's theory fails, according to Hart:

> First, it became clear that though of all the varieties of law, a criminal statute, forbidding or enjoining certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute none the less differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others. Secondly, there are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as orders backed by threats. Thirdly, there are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription. Finally, the analysis of law in terms of the sovereign, habitually obeyed and necessarily exempt from all legal limitation, failed to account for the continuity of legislative authority characteristic of a modern legal system, and the sovereign person or persons could not be identified with either the electorate or the legislature of a modern state. (Hart 1961, 79).

[24] The status of this 'ought' is also not a settled issue. Is it a moral ought or a merely legal ought? Legal positivists claim that it is a legal ought generated by the practice itself. In contrast, natural law theorists say it is a moral ought that confers an obligation on the subject to obey the law. We follow the law as a matter of obligation not because the law says we must abide by the law but because there exists an independent duty to obey the law that comes not from the law but from morality or prudence.

This is how Austin's (and similar other) command theory of law fails. Hart, therefore, sets out to provide a new account of obligation to explain a crucial aspect of the law: its normativity and its binding character. The sanction concept of obligation could not explain the difference between law or a legal situation and the gunman writ large situation, which prompted Hart to seek an explanation elsewhere. Hart thought he could find an alternative interpretation in the rule account of the law and legal obligation. For Hart, Austin's root cause of failure was that he could not identify and elucidate the most elementary forms of law. It lacked, in other words, "the idea of a rule" (Hart 1961, 80). Therefore, Hart's basic premise is that law consists of rules, more precisely, of the union of primary and secondary rules. Primary rules establish standards of behaviour that impose legal obligations requiring human beings "to do or abstain from certain actions, whether they wish to or not" (Hart 1961, 81). Primary rules impose duties. Secondary rules are parasitic rules that rely upon the primary rules. Their function is to confer powers, public or private and establish conditions for the validity of the primary rules.[25]

The existence of a legal system, however, entails that someone recognises its existence: "the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone" (Hart 1961, 117). Hart claims that a necessary condition for the existence of a legal system is not the collective recognition of all private citizens but only that of officials. In simpler societies with no officials, the rules may be widely accepted as setting the standards for the group's behaviour. Still, in complex societies, officials' recognition of the rules passes the threshold of a social system being recognised as a legal system.

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally

[25] According to Hart, the law, is a system of rules. Rules are two types: a) primary and b) secondary rules. Primary rules are rules of obligation, and secondary rules are divided into three sub-rules. i) Rules of adjudication, ii) rules of change and iii) rules of recognition. The most important rule is the last one, as, through it, we identify the validity of legal rules. Law is what is recognised as law by the rule of recognition.

> obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour *by its officials* [my italics]. The first condition is the only one which private citizens *need* satisfy: they may obey each "for his part only" and from any motive whatever[26] . . . The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses (Hart 1961, 116-117).

Even if we were to accept Hart's condition of legality at face value, Hart presents no argument for his claim that only officials must accept rather than merely recognise legal rules. Nor does he offer any argument for the claim that citizens must satisfy only the rules of behaviour that are valid according to the system's ultimate validity criteria. Perhaps, as Beever (2021, 166) argues, the motivation for this claim is to secure the legal system's autonomy concerning society which it could not otherwise have. Therefore, for a legal system to ensure its autonomy *vis-à-vis* society, it must arbitrarily create a duality between officials and citizens. But it is unclear how the concept of obligation can be extended beyond the official's acceptance of rules from the internal perspective to the citizens who must obey the rules.

The rule of recognition is a formalisation of a social practice that recognises some people as legal officials. But the genuine answer, according to Beever, must be "collective recognition".

> It is vital to understand that the recognition of other officials is not sufficient. It must be the recognition of society as a whole (though not necessarily each individual). Unless the status of legal officials is recognised in society generally, the legal officials cannot exist as legal officials. I cannot just get a group of friends together, put on some fancy clothes and insist that we are judges, for instance, no matter how convinced of this we are ourselves. We get to be judges only if we can convince others that we are (Beever 2021, 169).

[26] As Beever has perspicuously noticed it is incoherent to say "obey from any motive whatever" because obeying a rule occurs only if the agent is motivated in certain ways. "Obeying is an intentional activity" (Beever 2021, 166).

Beever is right to extend the recognition from officials to the entire society, arguing that the foundation of a legal system lies not in the rule of recognition by officials (how did they become officials?) but in the collective recognition. Yet Beever's account suffers from the same weakness as Hart's, namely that even if there is a collective recognition of the legal system, a necessary precondition for any legal system, it cannot explain and justify the binding force of the law. The binding force of obligation must be sought elsewhere, namely, in practical reason. It is possible that people can be collectively manipulated and ideologically indoctrinated to accept rules that neither serve their interests nor can they be reciprocally and morally justified.[27] Nevertheless, Beever makes the apt observation that if we are to speak of a legal system, Hart's minimal conditions are insufficient and thus cannot give rise to obligations. So, Hart fails to explain how and in what sense obligation is possible. "In an extreme case", says Hart,

> the internal point of view, with its characteristic normative use of language ('This is a valid rule'), might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system. (Hart 1961, 117).

Even in extreme situations, the legal system would survive so long as the public officials recognised the general rules as obligatory and acted on them. Thus, although the rule of recognition is a social rule, if the community disavows the rule of recognition, the officials would still be officials because they recognise themselves as such and are thus under the obligation to act accordingly. Therefore, the rule of recognition is a rule of self-recognition, as it can exist even without collective recognition.

Hart started his critical journey by recognising the merit of Austin's sanction theory that it had the right insight, but it provided the wrong solution. It diagnosed the problem

[27] "Ideologies are justifications of relations of rule of domination that insulate themselves from critical challenge by distorting the space of reasons and presenting relations of rule or domination as natural (unalterable), 'God-given', or in some other way falsely, as sufficiently justified. Thus they absolve those in power from the effort of justification and offer powerful explanations that prevent criticism from arising. The analysis of 'Ideological delusion' does not require any problematic concept of 'genuine interests' but instead an understanding of the validity-claim to reciprocal justification whose satisfaction is thwarted" (Forst 2011, 970-971).

correctly, but it prescribed the wrong medicine. "It will be recalled that the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory. In choosing this starting-point the theory was well inspired, and in building up a new account of law in terms of the interplay of primary and secondary rules we too shall start from the same idea" (Hart 1961, 82).

1.4. Hart's Theory of Obligation

What sets law apart from other normative orders is not only coercion but also morality. Law is moral, and it is to this aspect of the law that we must return. Without understanding law as moral, we have no way of understanding law's *distinctiveness*. It may sound paradoxical, but I assume that law emerges as a distinct phenomenon because it is part of morality. This is how morality commands that we organise our social lives. And this is related to another highly profitable concept, indeed necessary, for understanding the law. It will be recalled that I have already mentioned Hart's inability to explain obligation and that for all practical purposes, Hart remains within the horizon of Austin's theory of obligation: the command theory of obligation.

To do justice to Hart, we would have to dwell deep into the discussions about the nature and the source of obligation both in moral and legal theory, which is beyond this chapter's scope. Nevertheless, I shall briefly examine Hart's view, not to criticise Hart but to transition into discussing the law's moral character. In showing that law is moral, we avoid many of the problems that Hart has difficulty explaining while simultaneously being aware that a new set of problems arise that require care and attention. I will devote the last chapters of my thesis to defending the moral theory of law.

I must immediately admit that Hart's presentation style is enchanting and descriptively precise. Hart does manage to bring out the qualities of obligation in ways which are true of any generic obligation. An obligation, for example, is independent of the subject's choices and desires and may even be against their interests (Hart 1961, 83). An

obligation is usually associated with pressure, sanction, coercion, reproach, blame and other forms of rational criticism that point out to the subject that he has committed a wrong by not doing what he ought to or should not have done. Common-sense morality blames people for breaching their obligations and sometimes for motivations that are entirely non-voluntary. A moral reproach on a selfish person implies that his actions are selfish and that being selfish is a moral blemish for which he can be criticised and blamed (Pink 2007, 412).[28]

Without going into detail, I want to get at the notion of obligation as the knot which binds law and morality. In many instances, we intuitively understand, even if we do not put it in terms of obligation, that we ought to do what we ought to do. Some people might object to this kind of talk in that they, for instance, have an obligation to care for their children or visit their dear friend in the hospital. These are matters that we ought to do because that is who we are: we do not need an obligation to know that we must visit the friend in the hospital, and we need not explain to the friend that although we did not feel like coming, we thought we would honour our duty and come to visit him. This way of speaking indeed does not reflect the bond of friendship or child-parent relationship. I care about my children because I love them, and I visit my friend because he is my friend and not because there is an independent duty to visit a friend when he is in the hospital (Korsgaard 2008, 179-180, 218).

I am not arguing that the above description is correct and that there is no place for the language of duty in such relationships. After all, moral relationships consist of duties and rights, but also more than that. We do generally not conceive of this relationship primarily in terms of duties and rights but in terms of love and care. I do what I do because I care and not because I have an obligation.

[28] "We blame people not just for the voluntary actions which their selfishness motivates, but for that very selfish motivation itself. We blame people simply for being selfish—for their lack of any concern for others; for their lack of any willingness and intention to respect and further the interests of others as well as their own. The wrong for which these people are being blamed, the breach of obligation, is quite clearly located in their motivations. We tell them that it is quite wrong of them to be so selfish; that it is quite wrong of them to be so lacking in concern for others" (Pink 2004, 165).

It is different in the case of the law. I do what I do not because I love doing what the law commands (I hardly believe anyone loves paying taxes) but because the law imposes obligations on me that I ought to perform. With the law, duty takes certain pre-eminence, whereas duty usually withdraws into the background in personal relationships. What explains this difference? I want to suggest that there is no fundamental difference between them. As moral relationships are both structured by concepts of duty and right, only in personal relationships does duty assimilate with the relationship itself to such a degree that it becomes incorporated in love and care. We do naturally what we ought to do morally. Duty takes the central stage and commands the subject's attention in impersonal relationships, where affections and love are somewhat absent.

Now, in both cases, there is duty. I have a duty to care for my child's well-being and respect her integrity. I have a moral obligation to care for the well-being and integrity of other distant people. Because they are not near me and thus fail to generate emotional connections that assimilate duty into the relationship itself, thus making it seem as if the relationship is pure affection, in distant relationships with others, with strangers to which no emotional tie connects us, it is difficult to relate by affection or love. That is why morality, in this case, is impersonal and has a command structure: act in such a way that your maxim can become a universal law. This is the idea that underlies duty. Human relationships must be structured to respect people's internal and external freedom. However, how these relationships are structured is not simply a matter of morality and duty. Regardless of how they are structured, we must find traces of duty in them, whether in the background or the foreground.

I am arguing that only one idea of duty underlies human moral relationships. There is a *continuity* between different forms of moral relationships and the oneness of the moral duty (Goodin 1988; Dworkin 2011; Greenberg 2014; Hershovitz 2015 Bacin 2016; Bertea 2019; Müller 2022). The question is, of course: what is a moral relationship? I can find no better response than saying that all relationships that raise claims of rights

and duties, respect for the agent's freedom, and relationships that can wrong the agent are moral. It is a relationship where "practical reason may address action not only as a mode of exercising rationality but also as a mode of exercising freedom" (Pink 2007, 428. A moral relationship is a type of relationship that requires that our actions should be subject to the demand of universal and reciprocal justification. The obligation is a prescriptive demand or requirement of practical reason that binds (from the Latin word *ligare* – 'to bind') the agent to whom the demand is addressed. Obligatory reasons carry distinctive validating and justificatory force, not property,[29] which specific reasons have. It is wrong to disregard them, although it may not be foolish or less sensible for us to disregard them (Pink 2004, 175; Bertea 2019, 33).

What does the explaining and justification here is neither the relationship itself nor the fear of the sanction and blame, but the notion of obligation. Obligation points to the fact that the omission of action or acting against the duty wrongs the others against whom one acts. This is the primary notion of obligation. And I argue that this moral notion of obligation underlies the legal obligation and any other form of obligation that we find in human relationships. In other words, the obligation is not dependent on specific forms of relationships or attachments. The closer the attachment, the greater the obligation, and the more distantly we are attached to the strangers, the lesser our obligation. The existence of duties is not predicated on the presence of practices. The existence of practices is normatively predicated on its relationship to practical reason that assigns obligations and duties to human beings to act in a certain way. Because human beings are by practical reason obligated to act in a particular manner, e.g. that we should treat

[29] Thomas Pink elaborates on how obligation is historically understood and argues that there are two main models of obligation. One is what he calls the "Feature model" of obligation and the other the "Force model" of obligation. The feature model assumes that obligation is a specific trait or property of actions: actions that have that trait are obligatory and those that lack it are not. If we identify the property, we identify the action as obligatory. This is the perspective of John Stuart Mill, Jeremy Bentham, Austin, and, on some accounts, Hart himself (Bertea 2019, 147), who generally identify obligation with its ability to impose sanctions. The force model, on the contrary, is based on the strength of the underlying reason on which basis an action is justified. There is no single feature that all and only obligatory actions have, but a special and quite distinct agency-specific justificatory force – the force of Demand. (Pink 2004, 171; 2007, 419). "The force of Demand is that force to disregard which, without excuse, is to be not foolish or less than sensible, but to be morally responsible for doing wrong. In other words, the force of Demand is that force to disregard which, without excuse, is to be bad. According to the Force model, for an action to be morally obligatory is for it to be justified with this force of Demand" (Pink 2007, 419).

human beings not merely as a means but at the same time as an end, or that we should respect the legal rights of others, the law has normative force only to the extent that it aligns with the duties that practical reason requires of its subjects.

I am not arguing that there are no specific duties (Goodin 1988) or that all duties are therefore moral, in the sense that they are ethical duties. What is being argued here is that something has the status of a moral obligation not because it is predicated on some practice or relationship but because it is predicated on practical reason. In Kantian terms, a duty is an imperative of practical reason that puts us under the *moral* obligation to act as the duty commands. The obligation is moral, and the failure to carry it out results in a wrong that must be rectified. We cannot explain the existence of duty by referring it to requirements of laws, rules, or even principles to the extent that they are understood as arising from certain social practices. The obligation is something that practical reason requires because that is the way reason asserts, and through it assures the moral worth of human beings. We ought to act a certain way because we are members of the moral kingdom of ends, and certain such forms of behaviour are unsuitable (wrong) for human beings. Kant's categorical imperative requires that maxims be universalised before we can act on them because maxims that cannot be universalised would result in forms of behaviour that wrong others and ourselves.

Let's backtrack. From this short and dense discussion, we reached two conclusions: i) obligation is not derived from blame or sanctions, though blame and sanctions are attached to obligations, and ii) obligation does not arise from a relationship but supervenes on relationships.

I think Hart's discussion of obligation fulfils neither of these two conclusions. As to the first point, Hart acknowledges that obligation cannot be reduced to blame or sanction. After all, this was his main criticism of Austin. Nevertheless, when he explains obligation, Hart relies on rules internal and external aspects. It is possible, says Hart, to be concerned with rules "either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides of conduct.

We may call these respectively the "external" and "the internal point of view" (Hart 1961, 89). This is not problematic when used merely to describe different rules-related attitudes. As an observer, I relate differently to a rule than a participant who adopts the internal point of view of the group. Relationships incur certain responsibilities that I do not have merely as an external observer. The problem begins when Hart shifts from the external to the internal perspective. Suppose the observer austerely keeps to his external point of view. In that case, says Hart, he will not be able "to give an account of the manner in which members of the group who accept the rules view their own regular behaviour," namely, in terms of obligation or duty. Rather the observer's view will be

> like the view of one who having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come. In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation (Hart 1961, 90).

Hart complains that the external observers cannot comprehend the normative aspect of the rules, namely "as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them, the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility" (Hart 1961, 90).

Thus, according to Hart, to understand a rule, you must assume the internal point of view of the group, which sees its rules not only as sanction-inducing but also as providing reasons for actions. This indicates that law is normative, but it does not explain the difference between different normative reasons themselves (not all normative reasons are obligations), nor *why* a duty can only be seen from the internal point of view of the rule. Moreover, it does not explain how the rules themselves impose obligations and why subjects treat them as imposing obligations. The merit of Austin's approach was that it could explain why the command was followed: because of

sanctions or the habit of obedience. Coercion can be a reason for people to comply with the law. This, however, only obliges but does not obligate, says Hart. In that case, what sets obligation apart from coercion? It cannot be a system of rules, as Hart argues, because one can create a system of rules that does not bind and cannot be taken as a reason to guide our conduct.

1.5. Legal vs moral obligation

Obligation is to be explained in terms of reasons that underlie a command, but what reasons underlie obligations? It is the type of reason that carries a special force absent from other reasons. I argued earlier that only moral reasons create obligations. All other reasons can recommend and advise, but the categorical imperative of practical reason creates obligation. Moral reasons can be universally and reciprocally justified (Forst 2012). It is, however, a type of reason to which a sanction can be attached if we fail to comply. Only the kind of moral reason to which sanctions can be attached is a reason that can obligate. It is a reason that indicates that its omission would create a wrong that must be addressed. In other words, it is a type of reason that gives the agent the responsibility of following the obligation and that failing to do so will result in some form of remorse, blame, or sanction. Blame as a form of criticism (Pink 2007) is not a cause but a consequence of not doing what is required by obligation. Obligation, however, is not dependent on rules but on what justifies following those rules. Evil rules could generate no obligation, although the rule of recognition validates them. The rule fails to generate obligation if it is not consistent with morality. If the law can be said to create any obligation, which Hart also accepts as the starting premise for his theory,[30] a satisfactory account of obligation cannot be provided without a moral theory of obligation.[31]

[30] "It will be recalled that the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory. In choosing this starting-point the theory was well inspired, and in building up a new account of law in terms of the interplay of primary and secondary rules we too shall start from the same idea" (Hart 1961, 82)

[31] Once the fact of a moral obligation is admitted on the Force model, we have all the rational justification for doing what is obligatory that we need namely, a rational justification which is sufficient. For we have sufficient rational justification for doing A rather than B if the available reasons and their force leave us rationally criticisable unless we do A. And in a conflict between self-interest and duty, where Recommendation may still leave our

Like all moral obligations, the legal obligation is a categorical, non-optional universal reason for action (Newhouse 2020). One ought to do what the obligation commands. It is conceptually connected to a necessity, making an alternative course of conduct ineligible and unwanted; when a legal obligation exists, just one course of action is, normatively speaking, available to the agent. In whatever sense we understand obligation, it involves a claim that one has, all things considered, a conclusive reason to act on it and that not acting on it is a wrong to which sanction or blame can be attached.[32] When the law, therefore, provides us with obligations to act a certain way, we take it that the law provides us with conclusive reason to act as it commands.

Moreover, obligations are fundamentally independent of our goals, desires, interests and projects (Bertea 2019, 210; Essert 2013; Himma 2013). A practical requirement "qualifies as an obligation if the reason why we should act accordingly is not essentially connected with what we happen to personally prefer, or what we might be naturally inclined to do" (Bertea 2019, 211). We ought to comply with obligations regardless of our personal preferences and plans.

So far, so good. But if this is so, then we should be able to explain the obligation from some general point of view and not simply from a legal point of view, the point of view internal to the law. The fact that law from an internal point of view declares a particular course of action obligatory means little if that obligation is not supported by reasons that are not, strictly speaking, legal reasons. I may have a legal duty not to trespass on the property of another. Still, it is highly suspectable that I do not trespass and help

options open, we will be subject to rational criticism unless we follow duty. On the Force model, there is no more a problem about why rationally we should ever do what is obligatory than there is a problem why rationally we should ever do the only sensible thing. (Pink 2007, 427).

[32] This must not be confused with the claim that the fact of a certain action's being legally obligatory constitutes a reason to perform that action (Essert 2013, 70-71). See also: Essert (2016, 259): "It is true, of course, that when A is legally obligated not to φ then (from the legal point of view at least) A has reasons not to φ. But the fact of the obligation itself is not among those reasons. Instead, the fact that A is legally obligated not to φ is verdictive or conclusory: A is legally obligated because of all the reasons (of the sort canvassed above) not to φ. So if one is legally obligated not to φ, it is true that one has (at least) a reason not to φ (again, from the legal point of view); it is just that the fact that one is obligated is not itself a reason."

myself to the fruits in the garden because the law commands so. If the law is to be more than a command of the sovereign, it must be capable of justifying itself by reasons that are not merely legal.

Here, I must explain what I am referring to when I claim that the law must provide or enlist non-legal reasons. The internal point of view is the point of view of the legal officials. When a judge decides on a particular case, let's say regarding my trespassing, she is obligated by the internal point of view of law to hand a decision that is consistent with the statute on which she bases her decision. For her, the legal reasons are what count in deciding the case. But the status of the legal obligation is nevertheless not established yet. Or, more precisely, its status is established (recognised) only for the judge as an official, not for the citizens. Therefore, when the judge sentences me to pay for the trespassing damages, my acceptance of the fine cannot be due to having the same obligation that motivates the judge. Presumably, she must sentence me to pay the fine, but I have no obligation to pay the fine unless I recognise that the law imposes the same duty on me. Since I cannot see how this is possible from the law's internal point of view, I cannot be said to be under a legal obligation to pay the fine or not trespass.

An obligation must explain that an omission of acting on command is wrong that the subject can understand. But for this to be possible, the reasons that make an obligation must be such that they are accessible from the internal point of the law and must also be accessible from the moral point, which is the point of reason. For example, I must refrain from trespassing because my action could not be justified according to some principle I accept as my own. Offering me an explanation to the effect that a statute in the law prohibits trespassing is no explanation that would satisfy me because I may think that private property is theft, and I do no wrong in trespassing. So, when the law punishes me, it coerces me into complying with what I think is wrong. I do not recognise the rule as legitimate, in other words. It may be that the judge must enforce the law, but I have no obligation to respect the law unless the law can prove its moral credentials.

The only way to do it is to show that the law obligates the official and the citizen. My claim is that the law cannot do this if it is not fundamentally related to morality: it must provide moral reasons and justification for why my trespassing is wrong. It must do this not from the internal perspective of the law, even if the law considers such a perspective to have a moral force (Shapiro 2011), but from the standpoint of morality that underlies the law. In other words, only if the law is moral can it present itself as legitimate, providing an obligation for its subjects to comply with it. If it cannot be shown that law is moral, it cannot be demonstrated that law lays an obligation on us to comply with it, and thus necessarily, it can only appear as coercive but not normative.

Therefore, morality ensures the obligatory character of the law, and this point of view is sufficiently general to be accessible to all its subjects. This does not deny the coercive nature of the law: but now the subject cannot simply declare that the law is only coercive and will not abide by its directives because although it is coercive, the reason why she ought not to trespass is not due to coercion but to the obligation that she cannot reasonably reject. She ought not to trespass not because the law is coercive but because the coerciveness of the law is justified because it is morally legitimate. Its coercion is not of the same type as the mugger's coercion, which, although it provides me with normative reasons to act one way rather than another (I'd better hand over the money than my life), it does not have the required moral legitimacy in the way that the law as a moral concept does. When I submit to the mugger, I submit unwillingly though not involuntarily, knowing that the mugger has no right, meaning that he has no reason that he can morally justify to me should I be brave enough to demand it from him. But the law must be capable of providing the reason that I require, and I, therefore, cannot reasonably object when the judge sentences me to pay a fine for trespassing.

Law is thus not merely a normative order but a normative moral order because only as such does it provide us with obligations whose "unconditional command leaves the will no discretion" (Kant, 4:420).

To make sense of legal commands as obligatory and not merely as obliging, the status of the law must be such that it is morally required, that is, morally legitimate, to use coercion. It does not follow then, however, that the reasons for the law must be sought outside the legal domain. Such an attitude would render morality external to the law and thus in the grip of the two-system view, which this thesis argues is mistaken. Because morality is about the unconditional categorical reasons (rational requirements) that can be justified universally and reciprocally, they must be capable of being justified from a legal perspective. This is all that the theory of morality of law requires: that its statutes can be justified intersubjectively.[33]

It follows from this line of reasoning that if it cannot be shown that legal obligation is not binding on citizens, it cannot be binding on the officials either. If the legal obligation is not moral, the judge cannot legitimately enforce it on others.

Imagine a mafia organisation regulated by strict codes and rules that have the character of obligations for its members. They have an internal point of view through which they evaluate and assess their actions and feel bound to the organisation. They see its rules as licensing not only reasons for action but obligations whose omission results in criticism and reproach. For all practical purposes, the members of the organisation are obligated to act as the 'constitution' of the organisation mandates. From the internal point of view of the group, its members would be justified in acting on its rules, holding each other accountable for any violation they incur and administering the appropriate punishment. As members, they have taken upon themselves the responsibility to act by the organisation's rules and thus should be willing to accept the consequences for breaching the rules that prescribe 'illegal' behaviour.

[33] Intersubjectivity must be understood here not as grounding but explaining obligation. An obligation is a command of practical reason which puts all others under the duty of submission. Indeed in the legal sphere the author of an obligation is the state, but we know we have an obligation when the statute or the directive is morally justified, that is it is intersubjectively justified. "The overarching principle of reason says that you ought to base your actions on reasons proper to justify them, depending on context, and in moral contexts that means that you have a duty of justification to provide morally justifiable – reciprocally and generally non-rejectable – reasons for actions that concern others in a morally relevant way" (Forst 2014, 173).

This is the internal point of view of the organisation. But suppose the organisation imposes its 'law' on people who are not members of its organisation. It now wants to punish them for not complying with its rules. Perhaps they are good rules, and maybe they are bad rules. It makes no difference to our argument. What matters is that the organisation now claims that based on its rulebook, it has the right to punish those who transgress against its rules. This, by any standard, is morally unacceptable, and it would be iniquitous to say that non-members should act like the rules of the organisation dictate. We were not as outraged when the organisation punished its members because we rightly assumed they had accepted their rules' internal point of view. But it does not follow that we who are not members must accept the same rules. Moral rules are no club rules.

1.6. Is the law just another normative game?

The problem with the non-moral account of normativity is that it is a loop where everything ultimately refers only to itself. Why should we punish criminals? Because the law sets specific punishments for its violation. It makes no sense to ask a further why question within this framework: Why should we punish criminals? It makes no sense because it is presumed not a legal question but a social or moral one. It is not the judge's business to pontificate and deliberate about why she should punish the criminal. If she has accepted the position of a judge and acknowledged that the law provides her with reasons to act one way rather than another, she is obligated by that very fact to punish the criminal. No further explanation can be provided for her that will replace the legal reasons. In this sense, legal reasons are conclusive and exclusionary for her.[34] She must decide consistent with the rules of the legal game, but these reasons need not be consistent with the rules of some other game. However, this is not a unique feature of law but is true of human, institutional life in general as it unfolds in distinct normative domains.

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[34] "The judge [who judges a man from the legal point of view] both regards … himself as justified in acting on some reasons to the exclusion of others. Hence, though it is true that judgment from the legal point of view is a partial and incomplete judgment it serves as a basis for action because this point of view includes an exclusionary reason requiring one not to act on reasons which do not belong to it" (Raz 1999, 144).

Elegant as this solution is, it misrepresents the 'nature' of the law. The misrepresentation of this explanation results not from its inability to account for the consequences of improving the world or to provide a functional explanation for the law (Ehrenberg 2016) but from not recognising the powerful intuition that the legal game is a *species* of the moral game: the game of demanding and giving reasons, which is based on the prior moral recognition of the autonomy or the dignity or the rationality or simply the moral standing of its subject as "ends in themselves" (Kant 4:428; Forst 2012, 2013, 2014; Caranti 2017, 86). In Forst's interpretation, human dignity "refers to a *status* that applies to human beings as human beings, regardless of their specific identity" (Forst 2014, 97). Dignity, moreover, endows human beings with *a right to the justification* of all actions and norms that affect them in morally relevant ways, "a right that grants persons a moral veto against unjustified actions or norms" (Forst 2012, 67). Forst, as Kant and Rousseau before him, is keen to emphasise that human dignity, as a moral right to veto against injustice and domination, the arbitrary rule of some over others, stands at the base of all moral relationships, hence also legal relationships. In this respect, the

> "basic question of justice is not *what you have* but *how you are treated*. […] The basic impulse that opposes injustice is not primarily one of wanting something, or more of something, but instead that of not wanting to be dominated, harassed, or overruled in one's claim to a *basic right to justification* (Forst 2014, 20-21).

Therefore, dignity as a moral status precludes certain forms of treatment as incompatible or simply wrong with regard to that status. Wrongful treatments treat a human being as one who does *not* count. The right to reciprocal justification is thus a right to dignity, to be treated in a way that is compatible with autonomy and freedom as independence. Legal normativity is fundamentally a type of moral normativity because the law is inherently implicated in certain forms of treatment of human beings. Legal obligations are moral obligations in that they must be compatible with the requirement of the moral status of human beings.

So here we see the first disanalogy between what we may call the 'entertaining' games and the 'reason-giving' games. The second disanalogy is in the 'purpose' of the games insofar as this purpose belongs intrinsically to the game.

Let's take the first disanalogy: chess, rugby, and football are all games that do not involve the exchange of reasons. The rules are set, and the players must follow the rules to be able to play the game. The questions about the reasons for following the game are out of place here. They are out of place precisely because this is not a game where the exchange of reasons is a part. One may have reasons to play the game, but the play itself is not reason-based: it could be just an arbitrary product of boredom, chance, or blind evolution. It may not have much intelligibility to it. It is just a game, as we say. As such, it is optional rather than binding on us.

Things are different with the law. Law is a reason-based game, i.e., fundamentally normative enterprise.[35] It requires that reasons be given for any move made in the game. Any given reason can, however slightly, disrupt and restructure relevant parts of the game because now the adduced reasons become their reasons for deciding other cases and legitimising other moves in the game. A judge looking at a similar case now has another reason to consider. Her decision can be contested by other lawyers and judges precisely because of that reason which now serves as a precedent. So, she is not free to discard a reason without providing a reason-based justification for her decision. All this is done in a moral context of exchange of reasons. So, unlike the other games, the law can only "be played" if reasons are part of the game. This means that its rules are structured so that a judge would not be considered a player in the judicial legal game unless she is committed to applying the constitutive rules and principles of the game.

[35] That law is normative is a common truth today accepted by both positivists and non-positivists: "So the law sets things straight: telling people 'this is what you should do and whether you agree that this is so or not, now that it is the law that you should you have the law as a new, special kind of reason to do so'. The law is a special kind of reason for it displaces the reasons which it is meant to reflect. It functions as court decisions do: the litigants disagree about what they have reasons to do. The court determines matters" (Raz 2009b, 7). "The prevalent view among legal positivists today is that law purports to govern conduct as a practical authority. The distinctive feature of law's governance on this view is that it purports to govern by *creating reasons for action*" (Coleman 2001, 71).

Because the legal game is reason-based, a justificatory enterprise, it follows that the law must be reasonable. It must be consistent with the requirements of practical reason, and what is not compatible with such requirements is not part of the game.[36] This is a requirement of reason, not expected from some external sources. If a reason consistent with the grounds of the law cannot be given for a legal decision, then the legal conclusion is not reason-based and thus finds no justification in the legal corpus. This casts doubt about its legality, which can be challenged in a higher court.[37]

As to the second disanalogy, it is evident that the law has a particular purpose. Unlike the games, which have the purpose of entertainment, broadly construed, the law's purpose as a reasonable activity is to resolve issues for which the law exists. It is generally understood and accepted that law decides the questions of justice by some principle of fairness. This is not to say that law stands in an external relationship to justice, as an additional moral value to which the law must orient itself and abide by its requirements. Justice is what law does because law settles the types of questions that require justice.

Law is, therefore, a game played on a moral field. Its rules are responsive to the requirements of morality, that is, the provisions of exchange of reasons determined by the standard of reason itself that can be shared by all those affected by a legal decision[38]. Therefore, there is no need to posit the question of the external purpose of the law, whatever purposes those may be, e.g., to make the world a better place. As Beever explains regarding tort law, the law definitively makes the world a better place, and it does so by realising justice. Nevertheless, "making the world a better place is not all

[36] I deliberately use the modal verb 'must' and not the normative 'ought' which is a weaker requirement, and it can be, occasionally at least, ignored. Law of course ought to be reasonable as well, but the requirement is stronger when expressed in terms of must, because being reasonable, however defined, is what makes the game of law possible.
[37] It does not therefore make much sense to argue that judges decide the cases sometimes based on what they have had for breakfast (Donnelly-Lazarov 2011, 293; 2012, 94-5; Raz 2004, 1-17). That may well be the case, but even that decision must be such that it is consistent with some legal reason, precisely because it can be challenged and overruled by other judges who make their decision based on what they had for lunch.
[38] One such standard is the *Universal Principle of Right* which states: "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (Kant, 6:230).

about creating desirable consequences. It is also about, and most fundamentally about, treating people justly" (Beever 2013, 335).

How is law related to morality, then? I see no other way to connect law to morality than placing law in a moral domain. The moral domain is simply the domain of asking for and giving reasons because of the underlying assumption that humans, as autonomous beings, have a right to justification. This is the point, as I understand, of both Kant's and Dworkin's treatment of law as a branch of morality. It is not anything mysterious and certainly does not deny the law's statutory autonomy and formality, that is, its constitutive rules and principles. The two-system view, in other words, rests on a fundamental misunderstanding of the relationship between law and morality because it assumes that law exists here and morality there, and somehow they relate to each other. They are related precisely by the fact that law is a 'game' of practical reasoning and, as such, *intrinsically* refers to morality, which is also a reason game. There is, thus, no need to ask further questions about the morality of the law because that type of question rests on a misunderstanding of the nature of the law.

In this respect, for example, by postulating a higher law, the natural law theory fails to address the moral nature of the law correctly. Positing a higher law renders the positive law, comparatively, non-moral. It assumes, just like legal positivism, that the positive law is just an instrument of the natural law, and its moral value is relative to and derivative from the good it serves.[39] But this cannot be right because the law is not merely an instrument of morality, but a necessary expression of morality, with its own set of constitutive rules which determine its working principles. Law is the formalisation of the *omnilateral* will of the people, and it is the only way for the persons'

[39] In short, the moral authority of the scheme of cooperation derives entirely from the practice of cooperation and not at all from the fact that the practice is legally stipulated. The goal, cooperation, is morally obligatory, but the law is not necessary for attaining it; other available means will do (Finnis 2011, 49). "Recent writings by, for example, Raz, Postema, Gans, and myself offer to explain law's authority by law's function as providing solutions to coordination problems" (Finnis 2011, 66). The main reason for wanting to introduce positive law and the Rule of Law is to resolve disputes within a political community about what morality (especially justice) requires, recommends, or permits (Finnis 2014, 140). Law arises from the moral need to decide what to do in given situations. This condition emerges quite early in our childhood when confronted with problems that seem to require moral solutions: Should I report the bully to the school's teacher, try to help the victim, or hope that the situation will resolve itself. Law has its origin in deliberations about situations like these.

wills to be aligned consistently with the categorical moral duties they owe to each other (Capps and Rivers 2018, 259). Without the moral doctrine, a merely positive or "empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain" (Kant, 6:230).

Moreover, as Kelsen so brilliantly demonstrates, natural law theory assumes that positive law is subordinate to the higher natural law,[40] but, natural law, if such a law exists, is wholly subsumed under, or assimilated in, the positive law. It can only exist as a law if it exists as positive law. This is inevitable because of the formal and constitutive rules of the legal game.[41]

We can appreciate the *attractiveness* of Kant's and Dworkin's claims, though they are often misunderstood as different versions of natural law theory.[42] Whereas natural law theory postulates a higher law, legal positivism postulates a complete separation of law from natural law. In this sense, legal positivism is a better theory than the natural law theory because, at the very least, it is in harmony with the principle of parsimony, that entities should not be multiplied beyond necessity. By Ockham's razor, legal positivism removes natural law as a principle of positive law.[43]

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[40] "Almost all followers of the natural-law doctrine assume, expressly or tacitly, that there exists a presumption in favor of the conformity of positive with natural law. The historical function of the natural-law doctrine was to preserve the authority of the positive law." (Kelsen 1957, 297). Yet the moral law is often used to limit positive law! A positive law that contradicts natural law is deeply problematic and immoral!

[41] "The doctrine that positive law, in order to be binding, must conform to the "objective law" created by the "social solidarity," is applicable only if this doctrine furnishes an answer to the question, who is competent to decide whether in a concrete case positive law is or is not in conformity with the "objective law," the true and just law. *This is obviously the decisive question.*" (Kelsen 1957, 300).

[42] Dworkin of course vehemently rejects this attribution and thinks that both natural law theory and legal positivism are extreme theories of law. (1978, 342).

[43] Allan Beever, who otherwise is an excellent Kantian legal philosopher and lawyer, in a critique of Finnis' moral understanding of the law, draws on the parallel between the rules of a game like chess and the rules of a game like the law to assert both the difference between law and morality but also to show how moral reasons defeat the legal reasons: "I know that the rule is that the queen must move in straight lines. That does give a 'sound reason' so to move the queen. But this reason is defeasible. If, for instance, so moving the queen will cause my opponent to have a nervous breakdown, then I should move it differently even if that means that I am not really playing chess anymore" (Beever 2021,301). This is odd, and how this relates to the law is unclear. Should the judge who is about to make a decision that changes the defendant's life forever empathise with the defendant who is about to have a nervous breakdown if she pronounces the judgment, or should she apply the law regardless? By the analogy, it seems as if Beever is arguing that the 'nervous breakdown' is a reason that can defeat the grounds of the law! But how is this possible, considering law's distinct normativity, which defines the rules by which a judge must decide? I am not arguing that legal rules can never be overruled or defeated because, unlike Kant and like Dworkin, I think that law can be disobeyed when legal reasons fail to be normatively authoritative, that is, when they fail to be reasons of law, and thus reasons of morality. The moral presumption of the authority of the law

However, the fact that natural law theory is wrong does not prove that legal positivism is right. They are both wrong. And one can only see this from the position developed less systematically by Kant and more systematically by Dworkin. Law is moral because the law is a 'game' of exchanging reasons according to some *universal rule*. In the remainder of this chapter, I will briefly offer an interpretation of Kant's argument, and in the next chapter, I will provide a restatement of Dworkin's position.

1.7. Morality as demand for justification

In the last section of this chapter, I defend an account of morality as a universal justification. Its contours are already well known from the work of Rainer Forst (2012, 2013, 2014, 2018), so little needs to be added here. Nevertheless, I find that Forst's account is not always consistent with the Kantian outlines of his theory.[44] I shall not engage critically with Forst here as that is not the topic of this chapter, although I shall sometimes use Forst's formulations, which I consider to be quite perceptive and concise. I shall endeavour to derive a definition of morality from reading the *Metaphysics of Morals*, particularly its three fundamental or "supreme" principles. I

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ensures that the law is morally justifiable. Still, if it is not possible to justify the law morally, then there is a presumption that the law is not properly legal and not only not moral. Once we do away with the distinction between law as it is and law as it ought to be, or between law and its merit, then we do away with the distinction in the case of defeasible reasons, between moral and legal reasons, only legal reasons can defeat legal statutes that fail to pass a certain threshold of legal validity.

[44] Although, mostly, Forst is consistent with the Kantian division of duties of right and duties of ethics, his understanding of ethical duties is nevertheless more Hegelian than Kantian. He writes: "While the ethical use of practical reason is about realizing the good for one's own life or behaving appropriately in relation to particular others, the moral use of practical reason is about being able to support one's actions with morally acceptable reasons" (Forst 2012, 17). Why is the ethical use of reason about realizing the good for one's own life and not the moral use of reason? I do not see what the difference between them is. The moral use of reason can also be about realizing the good for one's own life.

Moreover, I do not see why the ethical use should not also be about the same criteria Forst employs for the justification of morality, i.e., reciprocity and generality. Indeed, as we shall see in a moment, from the perspective of Kant's practical philosophy in the *Metaphysics of Morals,* such a division is entirely arbitrary because, for Kant, both the ethical and 'moral' use of reason are subject to strict universality, which can be construed along the lines of Forst's criteria of reciprocity and generality. I have no dispute with Forst's theory as *his* theory, but as an interpretation of Kant's moral doctrine, it is inconsistent with the way Kant presents the difference between moral and ethical 'uses' of reason. Ethics is about setting "ends", but these ends must be morally justifiable. There is no moral *vis-à-vis* ethical use of reason, but legal *vis-à-vis* ethical use of reason, as the moral, encompasses both legality and ethics. Nevertheless, I find deep affinities with Forst's theory because I also see morality as a matter of justification based on the criteria of reciprocity and generality (2012, 20: see chapter 3 of the same book).

shall also leave aside the controversies surrounding the relationship between the doctrine of right and virtue in the Kant scholarship.

Kant's *Metaphysics of Morals* has been controversial and subject to multiple readings and interpretations since 1797. The book contains two parts: the doctrine of right (*Rechtslehre*) and the doctrine of virtue (*Tugendlehre*). The controversy is whether these two doctrines belong together, as it seems that there is little that keeps them together. A persuasive case has been made that the doctrine of right does not belong to the "doctrine of morals" (Willaschek 1997, 2002, 2009; Wood 2002, 2014; Pogge 2002; Kervégan 2010). Others think they belong together (Guyer 2002, 2016; Laurence 2018; Moyar 2011; Baisau 2016; Höffe 1989, Kersting 1992, Nance 2012).

The divisive question is about how these two doctrines are related. What separates them, and what keeps them apart? I make no claims that I will solve this protracted conundrum. That is not the purpose of this section or dissertation, which also explains my decision to ignore these debates as much as possible. Instead, my goal is to provide a context for the claim that law is moral. For a very straightforward reason, I accept the reading that both doctrines belong to the "doctrine of morals" (Kant, 6:226). I understand morality as *the categorical duty to treat one another in a certain way*. The adjective 'moral' generally means "related to duty or obligation" (Dudley & Engelhard 2011, 121). Morality, in other words, is about how we *ought* to treat one another as human beings. This is quite a broad conception of morality but is the most basic. We shall narrow it to a specific form of treatment concerning Kant, but even a narrower definition is built on this broad definition of morality. This is the definition operative in Kant's moral philosophy and in competing non-deontic moral theories. According to this broad definition, I shall go on to argue that law is moral. But I argue the point from the Kantian and Dworkinian perspectives.

The Dworkinian (2011) perspective, which I will discuss in more detail in the next chapter, treats law as belonging to the domain of value instead of the domain of fact. It argues that law is an interpretive concept, and integrity is its primary value. Dworkin

argues that law is moral because it belongs to the moral sphere – the domain of value – and morality requires us to act by specific moral values.

Kant's perspective is more stringent than Dworkin's, but he also puts the law in the moral domain. From this, one can argue that as part of the moral domain, it makes sense to treat law as subject to the normative requirements of morality and that law ought to be assessed by the criteria of morality. In this sense, the law is subordinate and grounded in morality without being entirely derived from it.

Let's use Kant's practical philosophy for a narrower definition of morality. I argue that we can make a case for justifying the wide definition of morality on more limited Kantian grounds. The "fundamental law of pure practical reason" (Kant, 5:30), in the guise of the categorical imperative, "as such only affirms what obligation is" (Kant 6:225). Morality is about how we ought to treat one another according to the fundamental law of pure practical reason, or the doctrine of morals which requires that the maxims of our actions be universalised. Its form is: act on a maxim which can also hold as a universal law. Let's explain what this means.

In the *Metaphysics of Morals,* Kant speaks of three principles of practical reason.

1. "The supreme principle of the doctrine of morals is, therefore, act on a maxim which can also hold as *a universal law* [my italics]. Any maxim that does not so qualify is contrary to morals" (Kant, 6:226), by being morally impermissible.
2. The supreme principle of the doctrine of right: "Thus the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with *a universal law* [my italics], is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom *is* limited to those conditions in conformity with the idea of it and that it may also be actively limited by others; and it says this is a postulate that is incapable of further proof. When one's aim

is not to teach virtue but only to set forth what is *right*, one may not and should not represent the law of right as itself the incentive of action" (Kant, 6:231).

3. "The supreme principle of the doctrine of virtue is: act in accordance with a maxim of *ends* that can be *a universal law* [my italics] for everyone to have" (Kant, 6:395).

As we see, both the doctrine of right and virtue are branches of practical reason.[45] They have in common with morals (*Sitten*) the requirement that a strict standard justifies (permits, not requires) them, a universal law. This is a formal requirement for the moral justification of maxims of actions. Therefore, to justify morally means to justify the maxims as subjective principles of action by a standard that can hold as a universal law. The requirement of justification is central to both duties; in this sense, they are both moral duties. The source of the duties is practical reason.[46]

Any maxim that cannot be universalised is morally impermissible. Whatever the differences (Newhouse 2020) between the doctrine of right and the doctrine of virtue, they are differences *within* morality, not outside of it. Morality consists of the two doctrines that encompass the moral domain. Therefore, when one refers to morality, one refers to either one of these two doctrines separately or both doctrines conjointly. Put differently, relationships under these two doctrines are moral and, therefore, should be judged accordingly. Law is moral, but it does not require that it be obeyed for that reason (Kant, 6:231).

Nevertheless, what is required is that it can be justified as a universal law. To qualify as legal, my actions must be such that they can coexist with the freedom of everyone in

[45] I shall consider the doctrine of morals as the doctrine of practical reason.
[46] "Everyone must admit that a law, if it is to hold morally, i.e. as the ground of an obligation, must carry with it absolute necessity; that the command: thou shalt not lie, does not just hold for human beings only, as if others rational beings did not have to heed it; and so with all remaining actual moral laws; hence that *the ground of the obligation here must not be sought in the nature of the human being, or in the circumstances of the world in which he is placed, but a priori solely in concepts of pure reason* [my italics], and that any other prescription that is founded on principles of mere experience – and even prescription that is in some certain respect universal, in so far as it relies in the least part of empirical grounds, perhaps just for a motivating ground – can indeed be called a practical rule, but never a moral law" (4:389).

accordance with universal law (Kant, 6:230). My action must be capable of being justified to all those it may affect by restricting their freedom. This principle applies in the context of justice. If my act limits your freedom of choice so that it cannot be justified universally and reciprocally, then my action is contrary to morals and thus contrary to right. It generates no obligation to which we must submit ourselves. The principle of virtue is also universalisable, but what is universalised through it is the *end,* not the unrestricted use of choice. Here human beings themselves must be considered an end, and one must make maxims that are compatible with that end like one should never use human beings merely as a means but should at the same time always treat them as ends.

Despite Kant's convoluted argument, it is reasonable to read the doctrine of morals as a doctrine of justification of i) the *choices* that we ought to make insofar as they affect the choices of others and ii) the *ends* that we ought to adopt. We ought to make choices compatible with universal law and adopt ends that can qualify as universal laws. Treating human beings merely as means, notably, is not an end that can be adopted as a universal law.

Morality requires that we act on maxims that we can justify to others. Suppose, for example, in a context of justice, where cooperation of all is needed, that we treat some people as not deserving equal pay. However, their contribution is fundamental to society. "Justice requires that those involved in a context of (positive or negative) cooperation should be respected as equals. That means that they should enjoy equal rights to take part in the social and political *order of justification* in which the conditions under which goods are produced and distributed are determined" (Forst 2014, 11).

There are two questions to consider: first, why should we care about whether our maxims are justifiable according to a universal law and, secondly, why is it important that they must be justified according to moral criteria?

As to the question of why we should justify our choices to those whom we can dominate, the answer is that the contrary would be a negation of the moral autonomy of the individual, which constitutes her moral standing and dignity[47] among human beings, based on which she can demand to be treated as an equal among equals. The demand for justification arises because of the recognition of her moral autonomy and authority over herself: "the concept of autonomy… lies at the foundations of all actions of rational beings, just as the law of nature lies at the foundation of all appearances" (Kant, 4:452-453). The presupposition of autonomy underlies all other moral relations, legal and ethical. It also underlies any conception of duty and responsibility to act according to duty. "Duty and what is owed are the only names that we must give to our relation to the moral law" (Kant, 5:82).

Therefore, moral law is what grounds and requires both right and ethics. The relationship is not one of dependence or independence but one of *grounding* and providing the standards according to which human beings ought to treat one another. To ground a choice means to justify it according to some standard, in virtue of which we then say that the action is right or wrong. In the moral context, such standards can only be universal and categorical for human beings because of the conception of autonomy that underlies these requirements. Therefore, the supreme principle of the doctrine of morals (Kant, 6:226) covers all moral relations. The only difference is that in the legal sphere, it requires that the choice be harmonised with the universal law.

In contrast, in ethics, the end should be universalisable. Morality is about how we treat one another, and from this perspective, the perspective of the doctrine of morals, there is no difference in respective imperatives. There is a duty to act according to the categorical imperative, but the duty is coercively enforceable only in one domain, i.e. the domain of right. On the other hand, it cannot because the ends cannot be coercively imposed. But the underlying force of duty holds in both spheres.

[47] "[T]he dignity of humanity consists in just this capability, to be universally legislating, if with the proviso of also being itself subject to precisely this legislation" (Kant, 4:440).

1.7.1. Right is not applied ethics

It is equally evident that although the standard of justification is the same: as the universal law, what is universalised is not the same. In the sphere of right, what is universalised is the freedom of choice, whereas, in the sphere of ethics, it is the end. So, it would be a grave misunderstanding to confuse the two, to speak of the morality of law with a conception of morality that applies only to the doctrine of virtue. The matter or the subject of the universal law is different in each case. So, these doctrines are separate and cannot be combined without misunderstanding their inner logic. One ought to be virtuous and act in such a way as to keep a promise, abstain from lying, treat others with respect, and so on. But none of this can stand as a justification for the duties of the doctrine of right. The justification of right is not related to the duties of virtue, and any attempt to reduce or derive law from the doctrine of virtue will inevitably fail. Virtue is not a requirement for the justification of the doctrine of right.

We may develop an argument that they are complementary but not that they are dependent on each other. They are nevertheless dependent on the doctrine of morals as practical reason. Lucy Allais has persuasively argued that in situations of injustice, even when one acts from the duty of virtue, one may nonetheless find oneself acting in a way that is not wholly in conformity with the duty of right because the "conditions of injustice undermine the possibility of having a properly ordered will … we are wrongfully related to people and hence cannot treat them fully in accordance with right, even if we do our duty." There thus emerges a contradiction of right: "I am entitled (have a right), for example, to defend my property, but when we are not in conditions of justice all ways of doing so wrongfully disregard entitlements of others: this would mean that I simultaneously recognize that I am entitled to enforce some right while recognizing also that I am not entitled to enforce it, because this would wrong others" (Allais, 2018, 96-7).

In the absence of the juridical condition, one can only 'halfway' act morally because one is not acting entirely rightfully in a state of injustice. As Adorno put it memorably

in *Minima Moralia* (2005, 39), “Wrong life cannot be lived rightly”. Wrong life in the Kantian account would be one outside the rightful condition where one cannot act on duties of right: “If then my action or my condition [*Zustand*] generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me *wrong*, for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law” (Kant, 6:231). If the action, however, because of the absence of the rightful condition cannot coexist with the freedom of everyone in accordance with a universal law, then “human beings do *one another* no wrong at all when they feud among themselves; for what holds for one holds also in turn for the other, as if by mutual consent (*uti partes de iure suo disponunt, ita ius est).* But in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence” (Kant, 6:308).

The condition of lawlessness is the condition where one cannot fully act morally, even when one acts from the moral duties of virtue. One half of morality, so to speak, is still missing, and in this sense, the idea of prioritising one over the other, of arguing that virtue is more important than right or vice versa, is a mistake because, as part of the moral realm, both are equally important and necessary for the moral life. Although both doctrines are moral doctrines in that their condition of justification is stringent, it does not follow that the content of their duties is the same. There are different duties in each of these domains and different ways of solving its problems. As far as the content of these duties is different, they are normatively independent of each other. These domains involve considerations, values, concepts, and actions that are distinctive for that domain of activity (Maynard and Worsnip 2018, 761).

This leads me to believe that Raymond Geuss’ scathing critique of political moralism (politics as applied ethics) is right. However, his critique of Kantianism, which he considers the best-known instance of this approach, is mistaken.

> Kantian ethics is supposed to be completely universal in its application to all agents in all historical situations […] Kantianism is at the moment the most influential kind of "ideal" theory […] The view I am rejecting assumes that one can complete the work of ethics first, attaining an ideal theory of how we should act, and then in a second step, one can apply that ideal theory to the actions of political agents. As an observer of politics one can morally judge the actors by reference to what this theory dictates they ought to have done (Geuss, 2008, 7-8).

Similar views have also been expressed by Williams (2005), Philp (2010), Newey (2010), and Sleat (2013, 2014). Sangiovanni (2008, 157), for example, writes,

> The crucial point is that [political disagreements] are not merely about moral, ideological, interpretative, or evaluative questions. They are not merely disagreements about sentiments or beliefs - X is right, good, true, best, genuine - but, more fundamentally, about how those sentiments or beliefs justify the exercise and command of political power."

In defending the distinctive normative domain of the political, Rossi and Sleat have argued that

> If ethics could effectively regulate behaviour in political communities… we would not require politics. We need politics in part precisely because of the ubiquity of moral disagreements about what we collectively should do, the ends to which political power should be put, and the moral principles and values that should underpin and regulate our shared political association. As such, politics cannot be a domain that is straightforwardly regulated by morality (Rossi and Sleat, 2014, 691).

I agree, and this is not Kant's position. Right and ethics are independent of each other, even though they are not independent of the doctrine of morals.

1.8. Conclusion

In this chapter, I have presented and discussed the question of what makes a rule or a norm into law and how law binds. I have argued that legal positivism does not adequately answer the law's bindingness. Legal normativity explains why legal officials treat law as reason-giving: they have already accepted to play the legal game. But the

subjects of law, viz., the citizens, have not necessarily agreed or accepted to play or treat the law as a reason-giving reality for them. Even if we agree with Hart that the law is binding for the officials, it does not follow that law is binding for the non-officials. This raises the problem of the legitimacy of the law and the problem of how to distinguish the rule of law from a gunman situation writ large to use Hart's terms.

This chapter has argued that legal positivism, in principle, cannot answer this question. Therefore, although it creates autonomy for the law, it cannot explain how the law is reason-giving for its subjects. In a certain primitive sense, it is evident that law is reason-giving, just like a robber with a gun is reason-giving for his victims. This is not how we understand normativity, however. A norm gives reasons for actions independent of the sanctions attached to the norm. A norm must create independently binding reasons for its addressees, which the agent should not disregard even if they speak against her interests. Therefore, the validity of those reasons can be recognised as legitimate and acted on by the agent.

I have argued that only a moral reason has the power to bind the agent unconditionally, and the law has the binding capacity if, and only if, it is expressive of a moral reason. We have a reason to act as the law commands, not because the law has its reasons; instead, we have reasons to act on the law's directives because the law has the moral force of regulating, and thus guiding, agents' behaviour in society. Law regulates intersubjective relationships, directing behaviour according to an authoritatively prescribed norm and preventing domination. None of this can be explained by legal positivism.

My claim has the advantage of explaining the difference between law and a gunman situation writ large. Although the gunman provides me with a reason to act as he orders me (your money or your life), that reason can never be binding for me even if I would be well advised to heed it to save my life. Kelsen's answer to what differentiates a gunman situation from a legal situation is that "law … is not a single norm, but a system of norms". True, but many systems of norms are indistinguishable from the gunman

situation writ large. The only correct answer is that the law is different because the law is moral, whereas the gunman's 'order' is anything but moral. As subject to the law, we must be capable of recognising that the law is binding on us irrespective of its sanctions: We have seen that both Kelsen and Hart are deeply aware of the problem (of a legal obligation), but I have argued that neither provides an adequate answer to it.

Chapter Two: Law as a Department of Morality

2.1. Introduction

In this chapter, I present and defend the view that law is moral, that law and morality are part of the same normative system: the one-system view of morality and law. The morality of law is defended primarily by non-positivist legal theories, and this thesis belongs to that tradition. Contrary to legal positivism, it argues that law is moral. However, unlike many non-positivist legal approaches (Finnis 1980, 2000, 2020, Alexy 1989, 2002, 2017, 2019a, 2019b, 2020, 2021), it does not contend a necessary relationship between morality and law. The argument defended here is Kantian-Dworkinian. I will briefly explain what the hyphenated compound 'Kantian-Dworkinian' means because it is not obvious that the two names stand for the same view.

Dworkin's late writings are quite Kantian in spirit, but he is by no means a transcendental idealist philosopher. Kant is a social contract theorist in political philosophy, whereas Dworkin (1975) criticises social contract theories.[48] Moreover, Kant is republican, whereas Dworkin is liberal. Since liberalism and republicanism draw on different sources and provide different conceptualisations of freedom, it is even less obvious that they have much in common. In his late writings, Dworkin approvingly draws on Kant's moral philosophy; nevertheless, it would be a stretch to argue that Dworkin is a Kantian philosopher.[49] Nothing, however, in my argument hinges on proving that Dworkin is a Kantian philosopher. I argue that in the question of the relationship between law and morality, they both defend the morality of law in quite similar terms. Both Kant and Dworkin consider the law to be part of morality in a wide sense. Kant thinks right (*Recht*) is a part of the metaphysics of morals, so the law is not only contingently related to morality. Instead, it is metaphysically associated with morality. I do not intend to enter a debate on whether metaphysical readings are of any

[48] "A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all" (Dworkin 1975, 18).

[49] It is my informed belief that Dworkin is a "closet Kantian" philosopher, but I cannot pursue this topic here.

interest today, though I think that metaphysics is inevitable. Perhaps a non-metaphysical reading of Kant's *Metaphysics of Morals* is possible, but for the argument of this thesis, whether we provide a metaphysical or non-metaphysical reading has no bearing on the argument. Dworkin is not metaphysical in the Kantian sense, but they reach similar conclusions.

In this chapter, I primarily engage with Dworkin's theory because he is generally considered the leading proponent of the morality of law thesis. In contrast, many commentators dispute that Kant held a doctrine like Dworkin's. It is beyond the scope of this chapter to present their arguments, but suffice to say that Kant's position is open to multiple interpretations. I favour the reading that considers law as part of the metaphysics of morality: there is *continuity* between law and morality. I will not be pursuing Kant in great detail in this chapter. However, we will have occasion to familiarise ourselves with Kant's position in the two following chapters, where I discuss the problem of evil laws and the question of disobedience to such laws.

This chapter, therefore, presents the morality of law using Dworkin's one-system view as the most sophisticated defence of the relationship between law and morality. Now, I must immediately underscore that what differentiates Kant and Dworkin from other legal non-positivists, mainly from natural law theories, is that other legal non-positivists remain caught in the positivistic social *imaginary*[50] that law and morality are two different spheres. After postulating that law and morality are two different normative domains, they then seek to explain the relationship in modal terms: it is either necessary or contingent and protean. The very fact of speaking of a relationship is what must be

[50] I borrow the concept of social *imaginary* from Charles Taylor (2004, Chapter two) to designate not only a difference in argument but a difference in the vision that different schools have of law and its role. Taylor defines social imaginary as: "something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking, instead, of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are usually met, and the deeper normative notions and images that underlie these expectations (2004, 23). Legal positivists imagine law one way, and legal non-positivists imagine it another way. One cannot get to the bottom of their differences without understanding how they imagine law and morality. Leiter (2007), for example, has a Nietzschean view of morality, so it is sensible for him to adopt legal positivism as the right interpretive strategy. As a Kantian, this is not open to me. Positivism and non-positivism differ, therefore not only in their arguments but also in their imaginaries. Their arguments defend their social imaginaries.

jettisoned if we are to make progress in understanding law and morality. Both Dworkin and Kant offer us interpretations that avoid this duality. Dworkin calls this non-relationship a “department of morality” (2006a 34) or “a branch, subdivision of political morality” (2011a, 405). There is a relationship, but it is internal to morality, not external, as imagined by legal positivism. In other words, law and morality are two sides of the same coin.

Before commencing with Dworkin’s theory, I want to preface this chapter with another story. I want to discuss the republican notion of freedom as nondomination briefly. Unlike Dworkin, Kant and I belong to the republican tradition. Therefore, it is essential to consider freedom as nondomination or independence to apprehend better how the law relates to morality. Dworkin does not make the republican argument, and I consider this a fundamental weakness in Dworkin’s view because it would have strengthened his idea that law is moral. For Dworkin, “law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state” (Dworkin 1986, 97).

In contrast, for the republican tradition, the law protects freedom as nondomination or independence. Kant offers a republican conception of freedom, and law is moral because law ‘serves’ freedom. Therefore, we need to introduce the republican notion of freedom to understand better what is being defended here. The purpose of commencing with the republican idea of freedom is to highlight my disagreement with Dworkin and provide a background for the two last chapters.

This chapter is divided into three sections. Section one presents the republican conception of freedom and its significance for the morality of law. In section two, I positively appraise Dworkin’s theory, arguing that despite his theoretical and political background, Dworkin captures the core of Kant’s insight that law is moral. It is a topic for another paper to compare Dworkin’s interpretivism with other non-positivist legal theories. Still, I find Dworkin closer to Kant and his insights, though not necessarily his

arguments, closer to republican traditions. Finally, in section three, I briefly consider some objections to the theory and argue that Dworkin's insight stands.

2.2. Freedom as nondomination

The republican concept of freedom as *nondomination* (Pettit 1997, 2002, 2014, 2021; Skinner 1998; Lovett 2009, 2010, 2016, 2018, 2020; Rostbøll 2014, 2015; Lukes 2021; Forst 2013, 2014; Shapiro 2012, 2016; Gädeke 2020a, 2020b, 2022; Ronzoni 2012; Laborde 2008) or as independence (Kant 6:238; Ripstein 2009) best captures the point of the law. It will take me far afield to attempt to provide a detailed justification of the republican ideal (Shapiro 2016). Still, in the following, I shall accept Rousseau's basic insight that human beings in society engage in relations of dependencies on and vulnerabilities to each other. While being dependent on each other is an inevitable condition of being part of a society, if unregulated by law, this condition leads to domination (Rousseau 1997, 176):[51] In *Emile,* Rousseau writes the following illuminating account of the ill of dependence and the way to overcome it:

> There are two sorts of dependence: dependence on things, which is from nature, dependence on men, which is from society. Dependence on things, since it has no morality, is in no way detrimental to freedom and engenders no vices. Dependence on men, since it is without order, engenders all the vices, and by it, master and slave are mutually corrupted. If there is any means of remedying this ill in society, it is to substitute law for man and to arm the general will with a real strength superior to the action of every particular will. If the laws of nations could, like those of nature, have an inflexibility that no human force could ever conquer,

[51] In the *Discourse on the Origin and Foundations of Inequality Among Men*, Rousseau explained that "in the relations between man and man the worst that can happen to one is to find himself at another's discretion." (1997, 176). To submit to another's choice was "to debase one's Nature, to place oneself at the level of Beasts that are the slaves of instinct, to offend the Author of one's being". This Rousseauian insight forms the background against which we must understand our conception of domination and freedom as nondomination or freedom as independence. I consider this insight fundamental and an *ineliminable* condition of human beings in society. It is not an insight that originated with Rousseau; Aristotle had already defined human beings as *zoon politicon* and argued quite explicitly that "anyone who cannot form a community with others, or who does not need to because he is self-sufficient, is no part of a city-state—he is either a beast or a god" (Aristotle, *Politics* 1253a28–30). But Rousseau does something radical with this insight: he makes it the foundation of his philosophy of freedom and the state.

> dependence on men would then become dependence on things again. (Rousseau 1979, 85).[52]

Kant, always a faithful follower of Rousseau, made similar comments:

> Find himself in what condition he will, the human being is dependent on many external things . . . But what is harder and more unnatural than this yoke of necessity is the subjection of one human being under the will of another. No misfortune can be more terrifying to one who is accustomed to freedom, who has enjoyed the good of freedom, than to see himself delivered to a creature of his own kind who can compel him to do what he will (to give himself over to his will) (Kant 2005, 11).

Both Rousseau and Kant agree that being dependent upon things is a matter of natural necessity. Still, dependence on another human being is a problem for human beings, as that may subject their will and their choices (their moral autonomy) to the *arbitrary* or unjustified[53] will and choices of others. Rousseau thought that in the state of nature, we were decidedly independent of the choices of others, and inequality did not have the moral significance that it later, with the establishment of a political community, acquired. Independence from the will of others meant that human beings did not need others' *recognition* of their moral status and autonomy. In the state of nature, which Rousseau describes as a state of "perfect independence" (Viroli 1988, 142), people were *different* (in bodily strength, wit, and beauty), but they were independent.[54] Inequality

[52] "Without needlessly drawing out the details, everyone must see that since ties of servitude are formed solely by men's mutual dependence and the reciprocal needs that unite them, it is impossible to subjugate a man without first having placed him in the position of being unable to do without another." (Rousseau 1997, 159).
"Looked at in another way, man, who had previously been free and independent, is now so to speak subjugated by a multitude of new needs to the whole of Nature, and especially to those of his kind, whose slave he in a sense becomes even by becoming their master; rich, he needs their services; poor, he needs their help." (Rousseau 1997, 170).

[53] Forst interprets arbitrariness as domination as an unjustified and unjust form of intervention. "Arbitrary rule is the rule of some people over others without legitimate reason, that is, *domination* … The underlying impulse that opposes injustice is not primarily that of wanting something, or more of something, but of not wanting to be dominated, harassed or overruled any longer in one's *basic right to justification* (Forst 2013, 157).

[54] There is a sense in which they were neither equal nor unequal but simply different because equality and inequality are moral concepts that emerge as a consequence of establishing relations of dependence and hierarchy. So no one could enslave or exact obedience from a natural man in his solitary life. There were natural differences in mind and body, but inequality emerged with the political order, which assumes a status of hierarchy that replaces the perfect equality of the natural state. In a solitary state, men do not need to compare themselves to others, but as they enter society, they begin to compare themselves with others, and other people's opinions become important. The dynamics of esteem place each individual in a different slot, according to the value placed upon him (Viroli 1988, 73). Nevertheless, In the *Discourse of Inequality,* Rousseau speaks of two kinds of inequality: "I conceive that there are two kinds of inequality among human species; one, which I call natural or

was not a problem or a threat to untrammelled freedom as independence. The fact of natural inequality has no moral significance before one joins a hierarchically structured political community, where the desire for self-esteem, *amour-propre* (self-love),[55]and the opinion of others acquires a whole new significance. In the civil condition, one inevitably becomes dependent on others, but in such a way that, while in the state of nature, natural differences could not threaten freedom – I could always move somewhere else-, in the civil condition, freedom is immediately threatened by the significance attached to these differences which engender hierarchical and unequal relationships. Inequality threatens independence in such a way as to negate people's autonomous moral status in society.

Joining a political community, therefore, presented human beings with a problem: the natural independence that human beings enjoyed in the state of nature could not be reproduced in the political community, as the condition of joining a political community is that of accepting that freedom must be restricted by some rule. That rule is *equality*: we must *all* surrender our natural freedom as untrammelled freedom to the same extent that everyone else surrenders theirs. For the first time, inequality becomes a moral problem for human beings because now that they are members of a political community, they find themselves in a situation where they are dependent on others. The dependence on others is just another fact: it could be enabling and empowering, as it could be disempowering and dominating. The evil of dependence consists of being dominated and deprived of equal freedom. Therefore, the manifest need to secure freedom from being overtaken by those who have the power to control access to resources arises. Law and legal systems are the solutions to the problem of domination; they ensure that our material dependence does not licence any form of domination that cannot be justified

physical, because it is established by nature, and consists in a difference of age, health, bodily strength, and the qualities of the mind or of the soul: and another, which may be called moral or political inequality because it depends on a kind of convention, and is established, or at least authorised by the consent of men. This latter consists of the different privileges, which some men enjoy to the prejudice of others; such as that of being more rich, more honoured, more powerful or even in a position to exact obedience" (Rousseau in Bobbio and Viroli 2003, 68). For a detailed reconstruction of Rousseau's critique of inequality, see Neuhouser (2014).

[55] *Amour propre* should not be confused with *amour de soi-même*. On the difference between the two see Rousseau's *Discourse on Inequality* (1997, 218); Neuhouser (2014) and Kolodny (2010).

on the grounds of equality. Equality is the rule according to which we all must be accorded the same freedom as any other member of the political community.

For Kant, the state of nature (Kant, 6:312) is not as idyllic as Rousseau's, and Kant certainly provides a different grounding of freedom and equality. Nevertheless, he recognises the dangers of inequality in political society. Like Rousseau, Kant thinks freedom is independence from the will and choices of others, and he thinks equality is the necessary presupposition of freedom: One cannot be free while being dependent on the will of another human being.

> *Freedom* (independence from being constrained by another's choice) insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. – This principle of innate freedom already involves the following authorisations, which are not really distinct from it (as if they were members of the division of some higher concept of right): innate *equality*, that is independence from being bound by others to more than in turn one can bind them; hence a human being's quality of being *his own master (sui iuris),* as well as well as being a human being *beyond reproach (iusti)*, since before he performs any act affecting rights he has done no wrong to anyone" (Kant 6:237-238).

Freedom as independence conceptually authorises i) equality, ii) being one's own master and iii) being beyond reproach. Therefore, without these authorisations, one cannot be independent in one's choices. When not subject to the general will, dependence creates relations of inequality and domination. In this dependence conception, another can *arbitrarily* interfere in our choices and thus undermine our normative authority.[56] Both Rousseau and Kant recognise that material dependence is inevitable and ineliminable in civil society. Both recognise that in the absence of a system of rights, inequality (of status and power) threatens our natural freedom and moral autonomy: "If there is any means of remedying this ill in society, it is to substitute

[56] "Normative authority requires not only being taken seriously as someone who reports facts about the objective world and avows beliefs and desires and makes a pledge and thus speaks authoritatively about oneself. It also extends to the third kind of validity claim that we raise, following Habermas, when communicating with others, namely the claim to normative rightness and thus to the decidedly intersubjective world of justification." (Gädeke 2020a, 29; Gädeke 2020b). See also Forst 2012; Forst 2013.

law for man and to arm the general will with a real strength superior to the action of every particular will." (Rousseau 1979, 85).[57]

Compared with republicanism, liberalism offers a different solution: we are free if we are left to do whatever we want, if no one interferes with our choices (List and Valentini 2016; Hobbes 1985; Berlin 1969).[58] This is implausible as a view of social freedom; it is idealistic in that it cannot account for the fact that we are unavoidably dependent on one another,[59] and that freedom as nondomination is the solution to the problem of a denial of equal status. Moreover, and crucially, it cannot account for the fact of domination, of the forms of non-interference that nevertheless restrict our freedom (Thompson 2018, 2020; Jugov, 2019, 2020; Gädeke 2020b). It is these forms of non-interference, choices that are made by others with greater power, which set the stage for domination, that, from behind the veil, dictate our options without any direct intervention, and so make the exercise of universal freedom as non-interference highly unlikely (Koltonski 2021a). In a word, freedom as non-interference completely disavows any structural or systemic limitations that do not take the form of interference

[57] Contemporary republicans also share the same view. Pettit, for example, writes: "According to the republican picture, the laws and norms that establish you as a free person provide you with freedom in the way that antibodies in your blood provide you with immunity. Once you have antibodies against a certain disease, from that moment on, you enjoy immunity from it. The antibodies don't have to do anything causal to make you immune; they don't bring about your immunity, as they might bring about a distinct effect. They make you immune just by being there; they constitute your immunity just by providing you with protection against potential invasion. In the same way, the laws and norms that give you the status of a free person—provided they are effective—do not bring about your freedom, as they might bring about a distinct causal effect. They make you free in a constitutive manner, just by being there, insofar as they provide you with protection against potential interference in the sphere of your basic liberties. From the moment they are in place, they incorporate you in a protective and empowering force field and establish you in the enjoyment of your freedom." (Pettit 2014, 25) See also Lovett 2020.

[58] "A free-man is he that, in those things which by his strength and wit he is able to do, is not hindered to do what he has a will to." (Hobbes 1985, chap. 21.2.). "Law is always a fetter, even if it protects you from being bound in chains that are heavier than those of law, say some more repressive law or custom, or arbitrary despotism or chaos" (Berlin 1969, 3).

[59] Dependence on the other is an *ineliminable* fact about our social existence. Moreover, dependence is also necessary for our mutual recognition as moral subjects (Ferrarrin 2019; Honneth 2016; Cortella 2016). In his *Elements of the Philosophy of Right*, Hegel (1991) defines civil society as "a system of all-round interdependence" of individual persons (§183). This system is based on two principles. The first states that a "concrete person who, as a particular person, as a totality of needs and a mixture of natural necessity and arbitrariness, is his own end." The second principle, which to some extent runs counter to the first, is that "this particular person stands essentially in relation to other similar particulars, and their relation is such that each asserts itself and gains satisfaction through the others, and thus at the same time through the exclusive mediation of the form of universality" (§182). "We can summarize the various components of the original human relatedness in the notion of recognition, and more precisely in the need to be recognized. Ever since birth, human beings need not only to be cared for, fed, nourished, but also to be supported, encouraged and loved. And this is a need that characterizes not only the initial stages of our existence but is prolonged in all subsequent ones, such as need for affection, friendship, cooperation, sociality" (Cortella 2016, 172).

with our freedom. Reducing the importance of dependence to a bare minimum, to a non-relevant factor for freedom, allows it to exert the greatest possible restricting force on freedom. Liberal and libertarian conceptions of freedom negate the essential connection between liberty and domination by neglecting dependence, which can threaten both freedom and equality (Hartley & Watson 2021, 33). Nondomination is possible only if the ineliminable fact of dependence is acknowledged. An individual who is not dependent on anyone cannot be dominated and cannot be free.

In a liberal conception, the law is a form of restriction (Bentham, 1843, 503; Berlin 1969, 3)[60] of individual freedom. The Republican perspective is the opposite: the law is a form of freedom. Of these two conceptions, the republican, viewed from the standpoint of domination as the main problem of societies centred on dependence, expresses most thoroughly the nature of external freedom. The fact that we need law shows that its absence creates conditions where natural and social dependence slides into domination because of entrenched social and political inequalities.

The republican conception of freedom requires that the state and laws secure us the condition of nondomination. In the liberal vision, freedom requires non-intervention, but it ignores how intervention can help freedom. In a society where everyone is dependent on and vulnerable to the other, whether economically, emotionally, or intellectually, to exercise external freedom, the individual must be afforded certain conditions that ensure the protection from domination (Hasan 2018). The fact that one is left free from intervention in her choices is not always an indicator of her freedom, equal to the freedom of all others. It could be that she is denied the right that she has to freedom, like the freedom of all others. Imagine a highly skilled and educated society where x is illiterate by the standards of this society. In such a society, she will be dominated precisely when she is left free to do as she pleases. The problem is that she does not enjoy equal freedom, equal to the freedom of all others, but is dependent on

[60] Bentham (1843, 503): “As against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore . . . and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.”

the choices of others, not only in a way in which the dependence is asymmetrical. But also, she is not even aware of her dependence as such. Therefore, non-intervention cannot be the hallmark of freedom because if that were so, we could only be free alone, or perhaps in Rousseau's state of nature.

Freedom is of two types: i) *Internal freedom*, or ethical freedom, is freedom in the sense of independence from sensible desires, impulses, and inclinations. To be free from pathological predispositions, reason must act autonomously on its own laws. In this sense, duty *is* freedom, and there is no inner freedom outside moral duty. Freedom is possible and thus emerges only if we assume the prior fact of dependence of human beings on natural and psychological causes. To be free is to live under one's own laws, that is, autonomously self-legislated laws. This means that my own will is not determined by my sensible desires, for if it were, "my will would not be my own but the will of nature" (Kant 27:1322). This inner freedom differs from ii) external freedom from the domination of another. However, Pauline Kleingeld argues that "Kant describes freedom of the will in terms of the republican contrast between dependence and independence, freedom and slavery, being one's own master and being subservient to another" (Kleingeld 2020, 112).[61] There is thus "remarkable similarity" between i) inner freedom or the freedom of the will and ii) *outer freedom* as both are conceived of in republican terms of freedom as independence (*Unabhängigkeit*) from being compelled (*Nötigung*) by another (by another person or by sensibility, respectively). Practical reason, or the will, is "the capacity to act on the basis of the representation of laws, that is, of principles" (Kant, 4:412). Thus, acting freely is to act on principle under the laws of reason.

Inner freedom is morally significant, but it does not settle our questions about external freedom. In the case of inner freedom, independence is achieved by self-control, by the will's determination to rein in the desires and inclinations. In the case of outer freedom,

[61] "As a rational being, hence as one that belongs to the intelligible world, a human being can never think of the causality of his own will otherwise than under the idea of freedom; for independence from the determining causes of the world of sense (such as reason must always ascribe to itself) is freedom." (Kant, 4:452).

this is achieved by law which limits our actions consistent with the freedom of others. In a fundamental sense, then freedom does not exist independently of us in society but must be constructed collectively as a demand of practical reason. Although these are two distinct and separate spheres, they are two aspects of the same practical reason (Bacin 2016; Bertea 2019).

2.3. The appeal of legal positivism

The dualism of law and morality gives legal positivism its appeal and makes the separation thesis possible (Kelsen 1967; Hart 1961; Raz 1986; Shapiro 2011). In this picture, the law is law, and its moral merit or demerit is not a matter that concerns the validity of the law.[62] Whether or not the law is morally valuable is a question that the lawyer and the legal scholar can set aside *entirely* because that is a separate question. It does not mean it is less critical of a question for the moral philosopher, but it is not essential for the lawyer and the legal scholar. The law can be studied from a purely scientific perspective of legal positivism that suspends and brackets all questions about the law's value. In this respect, the law is not different from biology. When a biologist studies biology, she brackets all the questions of the value that may have brought her to the study of biology. She would be a poor biologist were she to confuse questions of value with questions of fact that determine the subject of her research. Indeed, questions about why it is essential to study biology play an essential role in motivating the study, but they play no role in the study itself. A scientist would make a conceptual error to confuse the two and perhaps fail to illuminate her research subject.

If we remain captive to this picture, it is difficult to unseat the incredible power of persuasion that legal positivism holds over us. This sway over our minds is not merely due to its argumentative superiority but because the picture it presents us with aligns

[62] In his 2018 Tang Prize lecture, *The Law's Own Virtue*, Joseph Raz made the following comment regarding the virtue of the law: "It's not a virtue to be law. It has to be a good law to be virtuous. Just to be law, like being a bottle, ok, it's a bottle, but that doesn't make it a good bottle. To be a good bottle it has to be more than just a bottle. And to be law it has to be more than just law; it has to be law with some merit to it. And maybe some merits happen to many laws or to all laws but the capacity for guidance in itself if it's just necessary is not sufficient." (TangPrize 2019)

with our understanding of how science works. Since Kelsen's publication of his masterpiece *Reine Rechtslehre* in 1934, legal positivism has presented itself as a scientific enterprise that seeks to understand and articulate the phenomenon of law in isolation from moral values that it perceives as external to the law itself. As a methodological matter, I think the legal positivist approach is indispensable. We must seek to understand the law as an autonomous field of study with its cannons and methods. Legal positivism is inevitable because the law is a practice that cannot be studied using methodologies and approaches tailored to other fields.

Nonetheless, two questions are inevitably raised at this juncture and complicate the dyadic picture that holds us captive. The first is the question we have already raised: what type of phenomenon, or thing, is law? Is law something like biology (or hard sciences generally) or like the objects of human sciences and literature? Positivism, particularly Kelsenian positivism,[63] believes that law is more like the object of hard sciences than the objects of humanities and literature. If that is the case, it makes sense to approach the law as much as possible from a perspective that brackets all human values, except the values necessary to study the law. These scientific values comprise the scientific methodology. Law stands apart from both society and the scholar who studies it. This separation is methodological because neither the law nor the scholar stands apart from the community in which they exist. If the law is more like the object of social sciences and literature, which are not entirely independent of society's values and its interpreter, then the law would appear to be different from what legal positivism thinks it is. Suppose the law is a matter of interpretation, and interpretation is never entirely separated from the values of the scholar. In that case, it is, in principle, impossible to study the law as if it were a natural object standing entirely apart from the world of values that is a creation of human beings. (Dworkin, 1986)

[63] "The Pure Theory of Law, as specific science of law, is directed toward the legal norms; it is not directed toward facts; it is not directed toward the acts of will whose meaning the legal norms are, but toward the legal norms as the meanings of acts of will. And the Pure Theory is concerned with facts only so far as they are determined by legal norms, which are the meanings of acts of will; and these meanings and their mutual relations are the subject of the Pure Theory of Law" (Kelsen 1967, 102).

Positivism objects to Dworkin's approach claiming that the law is a human artefact (Burazin 2018) and is no obstacle to studying it as a natural object or treating it as a natural object. Human artefacts can and ought to be reviewed independently of society's moral and other values and those of interpreters.[64] If this were not the case, we could not objectively study human artefacts. We could not communicate what we understand to the other because such an interpretation would be entirely subjective and perhaps incommensurable with anything else. Since this is not the case, the law can be studied as legal positivism maintains. It is indeed not the case, and it would be fallacious to argue otherwise, that just because the law is a human artefact, a human creation, it cannot be methodologically isolated from other human artefacts and studied as if it were a natural object or for its own sake. Its constructive nature is not a problem for legal positivism. Because the law is made by humans, 'made by fools', as Montaigne claimed, we study it as a positive fact. So, what is the problem then?

Positivism seems to confuse the studying of law with the law itself. Yes, our study of law must presuppose the legal positivistic methodology, but not its ontology. To understand the law, we must approach it as if it were possible entirely independent of human values. Still, we must also clearly work under the assumption that this is a *methodological* presupposition valid only for studying law. It is the observer's perspective (Alexy, 2002, 28). But although the observer's view is necessary, it is not sufficient; and should we not also incorporate the internal perspective of the subject of the law, it would not only remain incomplete but may also give us a distorted picture of what type of thing law is.

If we assume that law is not just a set of rules that have been constructed by following specific procedures but that it is *a branch of morality* - in the sense that it is an aspect of practical reason because humans have a moral need for the law, not only a social or instrumental need for it -, then the characterisation of law as moral necessarily raises questions about the truth of the concept of law as it is conceived by legal positivism. If

[64] "Laws are often made by fools […] but always by men, *vain authorities* who can resolve nothing" (Montaigne, quoted in Delacroix 2006, 17).

the law is a branch of morality, then legal positivism must widen its scope[65] and study the law not only as a set of rules and how the law is made from an external point of view but must also study its purposes and its ends viz., its moral nature. The law as an artefact embodies the purposes for which it is made, and those purposes cannot be neglected if we are to form a complete picture of what law is. Legal positivism has studied law as a social phenomenon, which it undoubtedly is, but it is also a moral phenomenon. There is no inconsistency between the social fact thesis of legal positivism and the law as a practical reason thesis (Duke, 2019, 7). But legal positivism does not study moral phenomena because its study net cannot capture the law as a moral phenomenon. As mentioned above, it can at best treat morality as an external point of view or that, in the words of Leslie Green (2008, 1050), the law is 'justice-apt' because it is "*apt* for inspection and appraisal in light of justice". But if we accept that law is not only, but also, a moral thing and that morality, in the sense that I will explain shortly, is not something external to the law, but its very essence, then any account of law that disregards its moral nature is incomplete at best and incoherent at worst (Finnis 2000, 2011).

2.4. How can it be that law is related to morality?

According to legal positivism, law's relationship to morality is contingent, not necessary. The criteria for deciding what law is are internal to the legal sphere. These are usually procedural criteria: in a parliamentary system, the parliament passes the law, and in a monarchy, the king or the queen's approval is required. In this procedural conception, anything can be law,[66] or law can have any content whatsoever, and morality may or may not be included in the consideration. Morality is not even an optional variable in the determination of the laws. As Shapiro puts it, morality can never be a condition of legality because morality is inconsistent with the logic of planning.

[65] An objection can be raised that legal positivism might not want to widen the scope and study the law as a moral phenomenon. I do not find the objection plausible because if the law is a moral phenomenon and not simply a positive artefact, then studying law as only an artefact devoid of moral dimension and presenting the partial picture of law as *the* picture of law is a not a scientific, but an ideological reading of the law.

[66] As I stated above, this is not true for the law is formal so strictly that, logically speaking, not everything can be law. Some things cannot be law.

The "existence or content of the law can only be determined by social facts [which] are determined through empirical observation, not moral deliberation" (Shapiro 2009, 334). Shapiro[67] defends a position in legal philosophy known as exclusive legal positivism. As the name indicates, this type of positivism *excludes* morality from the validity of the law. "Deliberation on the merit would violate the logic of planning because it would unsettle precisely what the plan aims to settle (Shapiro 2009, 334).

Inclusive legal positivism (Hart 1994; Coleman 2001; Kramer 1999, 2000; Waluchow 1994, 2021; Himma 2002, by contrast, maintains that moral norms can be incorporated into the law because the law, after all, addresses and *re*solves the problems and disputes that people face, and some of the issues that the law addresses are also moral problems. So, according to this view, when the law addresses moral issues, it incorporates moral norms. The law must address practical issues, and it is in the interest of the law to consider or incorporate moral norms. But the moral norms, or reasons, do not have a *determining* role in this account. Moral reasons[68] can be considered, but they may also be set aside in favour of purely prudential or other considerations. Moral reasons are mediated by and are subservient to legal reasons. Legal reasons are reasons internal to the law. We have a legal reason every time we reference a law as a reason for doing or not doing something, for acting or not acting in a certain way.

In this sense, however, the reasons why legislators make laws are never legal reasons but moral or prudential reasons. Legal reasons emerge only after a case has been handled or a dispute settled. Before that, an issue can be political or moral, taking a legal dimension once the case is processed and determined by some authority. The question is more complicated concerning the judicial interpretation as the judges are bound by the reasons of the law (Olsen and Toddington 1999, 40**)**. But even here, it is

[67] Other prominent defenders of exclusive legal positivism are Raz (1980, 1985, 1986, 2009), Shapiro (2001, 2007, 2009, 2011) Marmor (2006, 2019, 2021), Leiter (1998, 2007).

[68] By moral reasons, I mean reasons that apply reciprocally and universally to all people in similar circumstances. Moral reasons relate to us only because we are rational beings and have a will. It follows that one cannot make an exception for oneself in a moral judgment.

not as simple as it looks, and Dworkin (1977) has already made the case that judges must appeal to moral reasons in hard cases.

Prudential reasons are reasons stating that one can make an exception for oneself. Suppose we argue that torturing people is morally wrong.[69] If the premise and the conclusion are granted, acting contrary to it would be morally wrong and perhaps irrational.[70] You cannot argue that torturing people is wrong, but not wrong in a particular case. If you believe torture is morally wrong, then the moral verdict "one ought not to torture" applies to everyone without exception. Moral reasons are categorical and overriding. But from a prudential perspective, this may not be the case. You may argue that it is not good to torture the captives because the information obtained is not always reliable, as people under torture would say anything to avoid pain. Given time, we can get more reliable information using other methods. However, since the bomb is ticking, you decide to torture the prisoner who you believe has the information about the bomb's whereabouts. With this information at your disposal, you may reason to the conclusion that torturing the prisoner to extract the information you need is *justifiable* in this case, and perhaps in all other cases that involve similar scenarios. Judging prudentially, you can make an exception for the greater good (saving countless innocent lives). Acting prudentially need not mean that you are acting selfishly serving your own interests; one can also act selflessly for prudential reasons. When you decide to commit a moral transgression, e.g., torture somebody, you may do this not because you personally benefit from the action but because you believe it is your (patriotic, political, legal) duty, as a police officer or a judge or a legislator, to protect citizens who are in danger; you think that the damage otherwise would be so great that it would overshadow the act of the moral transgression. Judgments like these are not unusual for those charged with applying the law.

[69] For a good discussion of why torture is wrong, see Fried (2010). For a defence of absolute prohibition of torture see Waldron (2005).
[70] The irrationality of immoral behaviour is a contested issue, but whatever position one takes, it does not affect our claim here. For a discussion, see Philippa Foot (1972).

Morally things are more complicated. Moral reasons are bound by reciprocity and universality. Torture disregards moral autonomy and the humanity[71]of the subject being tortured. Suppose that the tortured victim does not know the bomb's whereabouts or that he is completely innocent: a case of wrongful conviction. Would he be able to accept as his own the reason that whenever a prosecutor cannot get the information using the legal techniques, he should resort to torture, even though the investigator does not know whether the prisoner has the information the investigator needs? As a moral being, he obviously cannot accept that an innocent be tortured. So, there are grounds to reasonably reject as morally wrong that an innocent be tortured.[72] The question is: if torture is morally wrong, can it be legally right? Can we have a law that legalizes torture, at least under certain limited circumstances? Technically such a law can exist, but can it be valid? When legal agents resort to torture, they resort to extra-legal means of obtaining information, which must remain secret, and the governments publicly renounce all knowledge or intention of torturing prisoners. They may do it but cannot make a law that legalizes torture. They cannot do it because there is a moral reason against torture: torture cannot be justified morally. Should a government pass a law that makes torture legal, it would be a technically valid law, insofar as an authority issues it. However, such an authority can be questioned whether it has the right to make laws.

Another way to argue about the relationship between law and morality is to maintain that morality is present whenever we make judgments about legal matters. Morality is not incorporated in the law because such incorporation would be superfluous since human beings are moral beings and moral considerations are always relevant. Judges and legislators, as human beings, cannot set morality aside when they legislate but

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[71] Humanity, according to Kant, is the capacity by which we set ends to ourselves (Kant, 6:387; 6:392). Humanity is an end in itself which ought to be respected unconditionally: "So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means." (Kant, 4: 428).

[72] See Scanlon (1998) for a contractualist theory of morality based on reasons that cannot be reasonably accepted or rejected. "When I ask myself what reason the fact than an action would be wrong provides me with not to do it, my answer is that such an action would be the one that I could not justify to others on grounds that I could expect them to accept." (Scanlon, 1998, 4). Similarly, Rainer Forst comes to the same conclusion that, "in the moral context, norms which state that every person has a duty to do X, or to refrain from doing X, raise a claim to categorical, unconditionally binding validity, the acceptance of which agents can *reciprocally* and *generally* (in the sense of universality) demand of one another. The force of moral validity claim is that nobody has good reasons to question the validity of such norms; any person can in principle demand that any other person should follow them" (Forst, 2012, 49).

consult it to reach a judgment or a morally correct verdict. The problem with this conception is that we know that although judges and legislators are moral beings, they can be swayed by prejudices and ideologies that block their moral outlook. For example, a judge can decide to make an example of a person found guilty of a particular crime even if the sentence is disproportionate to the committed crime. Suppose we rely on this weak standard about the morality of the judges and the legislators. In that case, the law cannot be prevented from being immoral because, again, like other people, the judges and the legislators, for prudential reasons, can decide to proceed in morally illegitimate ways.

Moreover, we are not talking about the morality of judges but that of the law, which means that moral considerations must constrain the law. No law should be considered a law if morality is not a determining factor in the making and implementation of the law. I will return to this point later in this chapter.

There is the position of interpretivism developed by Dworkin in his magisterial work, *Law's Empire* (1986). As we have already seen, according to this position, law and morality are not two separate domains but one domain, the moral domain, with the law as a subdomain. Dworkin's position is perhaps the most subtle and consistent effort to interpret the law as a moral enterprise. I follow Dworkin's thesis on the law as integrity, to which we will now turn.[73]

[73] Another theory that is close to Dworkin's is the Moral Impact Theory (MIT) developed by Mark Greenberg (2014, 1288-1342; 2011, 39-106; 2004, 157-198). According to MIT legal obligations are a certain subset of moral obligation. Legal obligations are thus genuine moral obligations because legal institutions change the moral profile of society. "By changing the relevant circumstance, legal institutions can improve the moral situation in a variety of ways- for example by simplifying, clarifying, and making determinate our moral obligations. Consider again the example of a tax scheme: There is pre-existing problem, and, consequently, important moral reasons to help to solve it. But those pre-existing moral reasons do not determinately and clearly support one particular solution. The legal system's action of publishing a particular scheme, setting up implementing mechanisms, and making others' participation likely changes the morally relevant circumstance (Greenberg, 2014, 1341). Dworkin and Greenberg's theories are thus quite similar in many points though they also differ in many others. Still, for our purposes, we can set aside the differences and treat them as one or as having one orientation. They both treat law as moral because it cannot be understood as existing outside morality. For a good comparative overview of the two systems see Bustamante (2019, 5-43) and for a critical review of Greenberg's theory see Himma (2005, 132-164).

2.5. Law as integrity

Dworkin's oeuvre is extensive and multifaceted, so any attempt to give a comprehensive review is bound to distort and go beyond this chapter's capability. Such a presentation would be schematic, overly condensed and not particularly illuminating. Therefore, my focus is on Dworkin's understanding of law and morality mainly as it appears in his two main great works: *Law's Empire* (1986) and *Justice for Hedgehogs* (2011a).[74] There is a debate whether Dworkin changed his views from his early work in the 1970s when he first took on legal positivism in his essay *The Model of Rules I* (1977). I think there is a noticeable change how he defends the relationship between law and morality, which Dworkin acknowledges.[75] In the *Model of Rules I*, which also forms the substance of Hart's reply to Dworkin, where Hart considers Dworkin himself to be a legal positivist - 'This seems indistinguishable from legal positivism' (Hart 1982, 151) -, Dworkin was still working under the theoretical presuppositions of the two-system view, namely that law and morality are different systems of norms, and the crucial question is how they interact. A few contradictions[76] that we find in Dworkin, some of which Hart exposes so competently (Hart 1982, 151) beset Dworkin's theory because although he has the right insight, he did not yet have the right description of the 'relationship' between law and morality.[77] One can particularly see this in the way Dworkin responds to his critics' accusations that he is a natural law theorist. He considers the critique to have no merit because the "absurd [natural law] view that the

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[74] But also in *Sovereign Virtue* (2000), *Justice in Robes* (2006a), and *Is Democracy Possible Here* (2006b).

[75] "When more than forty years ago I first tried to defend interpretivism, I defended it within this orthodox two-systems picture. I assumed that law and morals are different systems of norms and that the crucial question is how they interact. So I said what I have just said: that the law includes not just enacted rules, or rules with pedigree, but justifying principles as well. I soon came to think, however, that the two-systems picture of the problem was itself flawed, and I began to approach the issue through a very different picture. I did not fully appreciate the nature of that picture, however, or how different it is from the orthodox model, until later when I began to consider the larger issues of this book" (Dworkin 2011, 402; 2006, 234).

[76] An early view is Dworkin's defence of judges' recourse to lying and falsely reporting what the law is in order to avoid implementing nasty laws: "I said that in some cases it might be the judge's duty to lie and falsely to report what the law is, and that description supposes that law may not be what it should be" (Dworkin 1977, 341). See also Dworkin (1986, 219), and for a critique of Dworkin's 'confusions' see Allan (2009).

[77] Danny Priel espouses the view that it is more apposite to understand Dworkin's changes of view as "successive attempts to explain broadly the same view, one that Dworkin held fairly consistently from the early 1970s until his death. Virtually all the key elements of the interpretive approach to law, supposedly a novel development in *Law's Empire*, appear, albeit in less detailed form, in Dworkin's first book" (Priel 2021, 9). For a similar view, see Nye (2021a). I agree with Priel and Nye that Dworkin was always critical of the two-system view, but his one-system view is not equally present in his earlier views. See Cornell and Friedman (2010, 40) for a perspective sympathetic to mine.

law is always morally sound" and the positivist view "that it is always just a question of fact what the law is" (Dworkin 1978, 341) are both extreme and mistaken.[78] He finds nothing in common with any of these theories; nevertheless, his own views remain half-baked and, in many instances, inconsistent with the premises of his own arguments. Some aspects of these inconsistencies have continued even after the publication of his last major work, *Justice for Hedgehogs*, where he systematically lays out the final shape of his early intuition that there is only a one-system view of morality and law (Dworkin 2011a; Allan 2020, Nye 2021a), namely, that law is part or a branch of morality. As has been noticed by Cornell and Friedman (2010, 90), this claim is deeply rooted in Kant's philosophy: Right is a moral concept, and so, in a fundamental sense, the law is a branch of morality.[79]

Dworkin would not consider himself a Kantian philosopher. Nevertheless, their projects intersect on many points. Although they argue their cases quite differently and, in many cases, are as far from each other as it is possible to imagine (the case of civil disobedience is one such notable case), there is one fundamental point of agreement that overarches all other differences. It is that both consider law to be a department of morality.

The main upshot of comparing Kant's legal theory to Dworkin's theory is not to find allies for Dworkin's or indeed my claim but to bring out the fundamental similarity between their legal views.[80] There is also a pragmatic reason because, as we will see

[78] "In some cases," says Dworkin, "the answer to the question of what the law requires may depend on (though it is never identical with) the question of what background morality requires, so that it is a mistake to describe the first question as simply a question of fact… But of course it does not follow from any of this either that the law is always morally right, or that what is morally right is always the law, *even in hard cases*" (1977, 342).
[79] "In *Justice for Hedgehogs,* Dworkin has embraced Immanuel Kant's work and defends his two principles as an interpretive approach to Kant's moral philosophy. Dworkin also clearly states that law is inseparable from the political morality embodied in its principles. Although he does not use Kantian language in defending the realm of legality as that of the sphere of external freedom, his final point is like Kant's -law is ultimately an interpretive moral project as it is inseparable from morality of the society in which it is embedded" (Cornell and Friedman 2010, 90; Kant, 8:372).
[80] I do not want to be understood as arguing that Kant and Dworkin have similar philosophical orientations. Kant is a transcendental philosopher and an unrepentant formalist, whereas Dworkin is a moral realist and interpretivist in moral philosophy. Nevertheless, I contend that despite all their differences, the law as morality or law as a branch of morality is what they have in common. They reach their conclusions via different argumentative routes, but the result is the same.

later, although I agree with Dworkin and Kant about the moral nature of law, I think Dworkin is more liberal in his defence of civil disobedience. However, my approach is more Kantian, particularly in relation to the justification of disobedience to law, because I think Kant's position is more consistent with the underlying moral conception than is Dworkin's. The moral thesis requires that, once established as a law it should be respected, and that authorities are fully within their rights to enforce it. If that is so, then citizens have no right to oppose the law, only a duty to obey it.

Nevertheless, Dworkin has written more extensively on legal philosophy than Kant, and his ideas have been subject to intense debate in legal and practical philosophy in general. Going with Dworkin is thus more a matter of convenience than argument, and because his arguments are known and discussed more widely than Kant's (outside Kantian circles). Moreover, Kant's arguments often appear cumbersome and difficult to follow, so perhaps avoiding them would evade overblown deflections from the main claims. Finally, if Kant's arguments are in much dispute even in Kantian circles, this is not the case with Dworkin's: he is the leading proponent of the moral thesis, so there is no danger of mistaking him for anything else. In the following, therefore, I will put some flesh on the basic principles and explain why Dworkin's theory makes more sense than legal positivism.[81]

I fully endorse Dworkin's thesis as far as the normative unity of law and morals is concerned. However, my moral presuppositions remain Kantian, as I believe that Kant's exposition of the moral law remains unparalleled in moral philosophy. So, when I speak of morality, it must be understood in Kantian terms. It is not reducible to the

[81] I am aware of the internal debates in Kant scholarship between those who argue that *Recht* is a moral concept and those who say that it is independent of morality. It will take me far afield to engage in that discussion now; suffice it to say that I do not find the independence position persuasive and that the argument to the effect that Kant is a legal positivist seems to be mistaken for the fundamental reason that so far no one has managed to explain the rationale for why Kant puts the *Doctrine of Right* in a book about the metaphysics of morals or how to explain the concept of duty in the absence of the categorical imperative. For those interested in this dispute between Kantian scholars, the following literature can be consulted: On the independence of right from morality, see: Wood (2002, 2014), Willascheck (1997, 2002, 2009), Flikschuh (2013, 2021b), Kervégan (2010), Ripstein (2009), Horn (2016); On the dependence of right on morality see; Habermas (1996), Kersting (1992), Höffe (1989), Seel (2009); On the derivation of right from freedom see: Guyer (2002, 2016), Nance (2012), Pauer-Studer (2016), Laurence (2018), Moyar (2011), Varden (2008).

historical development of nations, or political morality in Dworkin's sense. Kant's morality avoids the charge levelled against Dworkin's theory that political morality can be so corrupt that referring to it may be morally worse than simply considering the law positive (Christodoulidis 2008). Morality is the categorical imperative that commands universally and categorically: duty is what morality commands, and it is not something that we can renounce or change at will. We may choose to act or not to act on duty, but we cannot choose whether something is a duty. The normative bindingness and validity of duty remain independent of the empirical circumstances and forms of relationships where it is actualized; its force is an unconditional moral *ought*, based on practical reason *alone*, which accepts no higher authority. It is precisely here that we see the emancipatory and liberating capacity of the moral law. It can liberate us from all traditions and customs that infringe our duties which reason commands universally and categorically. Kantian morality, the unconditional moral ought, always transcends and goes beyond "every form of *Sittlichkeit*" (Forst 2021, 23) and requires that we subject all norms and beliefs to critical reason. I will come to this topic later in the chapter, where I try to assimilate Dworkin's philosophy into Kant's philosophy.

Dworkin seriously wounded legal positivism when he first demonstrated in his 1967 article *The Model of Rules I* that law consists not only of rules but also of principles. Rules are quite relevant to the law, but without principles that underlie them, any characterization of law is bound to be defective, a mischaracterization of it. Unlike many other critiques, Dworkin's critique of legal positivism strikes at the heart of legal positivism. It administers a blow so severe that legal positivism has not been able to recover ever since (Pino 2014, 196). In showing that law is not only a set of rules but also a set of principles,[82] particularly the principle of the integrity of law (Dworkin 1986), that law must speak in one voice, as if created by a single author, Dworkin manages to show that law is a moral phenomenon, or as he characteristically puts it, the

[82] This must not be understood, as it is usually *mis*understood, "that 'the law' contains a fixed number of standards some of which are rules and others principles. Indeed, I want to oppose the idea that 'the law' is a fix set of standards of any sort. My point was rather that an accurate summary of the considerations lawyers must take into account, in deciding a particular issue of legal rights and duties, would include propositions having the form of and the force of principles, and that judges and lawyers themselves, when justifying their conclusions, often use propositions which must be understood in this way" (Dworkin 2006, 234).

law is a *department* of morality. He does not criticize positivism's doctrines separately but mounts a general attack on positivism as such (Dworkin 1967).[83]

2.6. The chain novel

"According to law as integrity," writes Dworkin (1986, 225), "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." In order to express a coherent conception of justice and fairness, the law must speak as if a single author created it. The core idea of integrity, writes Postema, is the coherence of action and principle (Postema 1997, 826).[84] Because integrity is an essential principle of law, the judges will see their role differently from merely applying the law; they will see themselves as interpreting the law along two dimensions, or two separate strings of reason: the dimension of fit and the dimension of justification (or morality) (Dworkin, 1986, 230-39). The dimension of fit requires that a legal interpretation or decision conforms to the existing legal material. The judge cannot simply invent an interpretation; instead, his interpretation must fit the previous interpretations. However, the interpretation must be morally sound and satisfy the dimension of justification.. The second dimension of interpretation requires the judge "to judge which of these eligible readings makes the work in progress the best, all things considered" (Dworkin, 1986, 231). Law as integrity is the unfinished dialectical interplay that results from balancing the two dimensions. Law is never finished but remains a work in progress, dynamic and open to change and improvement restricted only by the dimensions of fit and justification. Law does not exist in a political vacuum but expresses the best interpretation of the community's legal practice. Dworkin

[83]According to Dworkin, positivism makes two crucial and related claims: "The first argues that it is characteristic of a legal system that some more-or-less mechanical test provides necessary and sufficient conditions for the truth of propositions about what the law is, as distinct from propositions about what the law should be". "The second claim is most clearly put in the following way: We may suppose propositions of law to be true or false, accurate or inaccurate, without thereby accepting any ontology beyond an empirical ontology. The truth of a proposition of law, when it is true, consists in ordinary historical facts about individual or social behaviour including, perhaps, facts about beliefs and attitudes, but in nothing metaphysically more suspicious" (Dworkin 1977, 347-48).

[84] Postema identifies six components of the idea of integrity. 1) It is a norm of unification, 2) it calls for internal justification, 3) the principles sought by integrity are principles of justice, 4) it calls on officials to view their practice as the expression of a coherent set of principles, 5) integrity is essentially historical, and 6) integrity requires officials to seek *common, public* principles of justice in their common past (Postema 1997, 826).

illustrates his conception of law as integrity by creating an artificial genre of literature he calls the chain novel:

> In this enterprise a group of novelists writes a novel *seriatim;* each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity (Dworkin 1986, 229).

Dworkin imagines that law functions in a similar way. The judge is in the position of an author in this outstanding chain novel called law, and he is bound by the legal practice that precedes him. However, this must not be *mis*construed to mean that he must repeat the previous interpretations and decisions verbatim. Since he is an author in the chain of decisions, he has considerable freedom in shaping the interpretation he will give to the law, but not as great as completely reinventing a new law that stands in a discontinuous relationship with what came before it. The scope of freedom that allows for greater creative interpretation is determined both by the novelty of the cases or their lack thereof and the principle of integrity as a "comprehensive interpretation of legal practice" (Dworkin 1986, 226), expressing a coherent conception of justice and fairness. Simply put, the judge is part of a tradition to which he contributes, but he also modifies it in light of both the precedent and the principles that underlie the legal practice in order to make the law the best it can be.

Law as integrity instructs judges to see the law as if emanating from a single author and as if it speaks with one voice. Looking to the past and the precedent is not done to satisfy some conservative impulse to fight against all novelty, but it "pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for the present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did […] in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future" (Dworkin 1986, 227-

28).[85]In the conception of law as integrity, the law does not exist outside the community's values, and it is certainly not simply reducible to a set of rules that are then mechanically applied by the judge; rather, the law is an ongoing project of interpretation constrained by the dimension of fit, that is, the precedent, and the dimension of justification which comprises the moral principles of justice, fairness and procedural due process.

There can be different right moral decisions for a single case, as there can be different right moral decisions for similar cases in non-legal contexts. This is so because integrity requires that a decision fit with past political and legal decisions. Since all decisions are, however slightly, different, there will be, however slightly, different morally right decisions. Nevertheless, if there is one overriding principle that guides the process of interpretation of the law and other moral enterprises, it is the principle that it must seek the correct answer, which is to make the decision the best it can be. Brian Bix (1993, 109) therefore exaggerates when he writes that "in the final analysis, Dworkin's scheme results in there being *for each judge that considers a case* one right answer."

The best interpretation is often the interpretation the judge provides. However, a judge cannot stray far from the interpretive legal tradition so long as the principle of integrity guides his interpretation. In interpreting the law, the judge cannot *always* know in advance what the final verdict will be, as the final decision is contingent on factors that are not determined merely by moral reasons. In this sense, Dworkin's moral interpretation of the law is more flexible than Kant's, though the flexibility is restricted by principles of justice, fairness and integrity. Whenever we are engaged in the process of reasoning that must culminate in a moral decision, to the extent that we are agents,

[85] Precedent in law (*stare decisis*) can restrict the judge's freedom to interpret the law as she may wish, but it also ensures *continuity* and, thus, integrity to law. However, following precedent does not entail that the judge must make the same mistake repeatedly. On an integrity-based view, following a precedent is conditional on the overall integrity of the law, that judges strive to exhibit integrity in their practice of decision making, and that for principled reasons, when a precedent cannot be reconciled with the law's integrity, it can be overruled. See Scott Hershovitz (2006).

we ought to guide our decision by the reasons that offer themselves as considerations that count in favour of a certain action or inaction.

Furthermore, the past practice ought to be considered so that our decision does not appear *ad hoc*, unfair and arbitrary, but as part of a chain of reasons that seek to provide the best answer to a moral quandary.[86] It is possible for a judge, as it is possible for any other agent confronted with a course of action that requires a decision, to issue an irrational verdict, that is, a verdict that is made not based on the facts available and the reasons that recommend it, but on the whims of the judge. The judge may even get away with making irrational, irresponsible judgments in the sense given above. They do not correspond with the facts on the ground. However, we perceive such a model of judgeship as an abuse of power. It is a form of corruption of the law. No one would rationally accept *that* as a model for how the law ought to be applied.

Moreover, with clarity often obscured in such cases, that the law cannot be anything the judge or the legislator wants it to be. It must *minimally* respect certain moral conditions without which the law would be *unrecognizable* as law.[87] *Law, in other words, is inseparable from what it ought to be* although it is never what it ought to be. Law ought to be reasonable, fair and just, and these principles cannot be considered external to the practice of the law or external to what the law is. When correctly interpreted in the light of its guiding precepts of equality and dignity, the law is morally what it ought to be (Allan 2020a, 595).

Law cannot exist as a set of rules made arbitrarily. It is hard to imagine an unintelligible or senseless statute becoming a law (Allan, 2013, 120). Law thus must at least minimally respond to reasons; that is, it should be practically reasonable (Finnis, 2011,

[86] See Dworkin's story about the family morality in *Justice for Hedgehogs* (2011, 407-409).
[87] "Lawyers are apt to speak as though the legislature is omnipotent, as they do not require to go beyond its decision. It is of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by legislature. But from the scientific point of view, the power of the legislature is of course strictly limited. … If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they should submit to it" (Leslie Stephen in Dicey 1915, 33).

2020). An unreasonable law is no law. In analogy, we could say that unjust law, that is, a law that does not even minimally respond to the principles inherent to the law, is no law. What is striking about this is that even an unjust law must assume the form of justice and appear as if it is serving justice. It cannot but appear as such. According to Alexy (2002, 36) legal systems and legal decisions necessarily lay claim to correctness. "A system of norms that neither explicitly nor implicitly makes this claim is not a legal system." (Alexy 2002, 36). It cannot but appear as fair, just, right, or as Dworkin (1986) memorably puts it, as the best decision or the best interpretation of the law. It must appear as such because of another principle, that of integrity. If the law allows for one judgment in one case, another unrelated judgment in another similar case, and another unrelated judgment in a third case similar to the previous, the law will suffer moral injury because it will become so unpredictable and incoherent that it will defeat its own purpose.

Dworkin has been misunderstood to be claiming precisely the opposite: to deny the values of certainty and predictability to the law. We cannot predict anything by law, because law relies completely on interpretation.[88] Brian Leiter (2018, 22-25; 2011, 676), for example, articulates this odd charge by stating that Dworkin's theory "not only can it not explain why any judicial reference to morality is not in fact legally binding,[89] it even entails the bizarre and counter-intuitive possibility that no one in any legal system actually knows what the law is on any point, since it may be that no one has figured out the best constructive interpretation yet." Leiter's critique of Dworkin's theory of law as integrity entails that no one might actually know what the law is, which is unreasonable. This is far from the case, as Dworkin's theory of law as integrity precludes any such entailment from occurring as a real possibility. Dworkin, one may say, is obsessed with finding the *right* answer precisely in order to avoid the uncertainties that arise in connection with the interpretation of the law. However, this

[88] See the discussion in the next chapter.
[89] Notice how Leiter's critique merely reproduces the positivist dogma that a juridical reference to morality is not legally binding. This only makes sense on the assumption that law and morality are not only separate but independent systems. Leiter's critique, therefore, misrepresents Dworkin's theory of the law as a department of morality.

does not negate the fact that law requires interpretation. If the law does not allow interpretation, then it would enable, and not only occasionally but regularly, injustices that the law is created to redress. A law which does not recognize principles[90] is a law in contradiction with itself, with its own image, with what it formally claims to be. Law thus includes principles that are constitutive, but also regulative, of the functioning of the law. They are constitutive because, without them, the law would not be law: they partially constitute the law. However, they are also normative, because they provide the law with standards and direction, with what the law ought to be and aspire to be. (Bertea 2013, 2019, Ferrero 2009, 2019).

2.7. Legal anarchy vs legal certainty

Let us dwell a little longer on the value of legal certainty in the law, as this seems to be a significant point of disagreement between positivism and non-positivism. The idea is that law must be determinate in a way that Dworkin's interpretivism cannot permit or authorise. A determinate law supports legal certainty, whereas an indeterminate law supports disagreement, which leads to uncertainty about what the law requires. As a branch of morality, the law is dependent on moral arguments. If so, moral arguments would inevitably lead to the demise of legal certainty and undermine the moral duty to obey the law.

Dworkin famously identified law not by "territory or power or process" (Dworkin 1986, 413) but by a protestant attitude which "makes each citizen responsible for imagining what his society's public commitments to principles are, and what these commitments require in new circumstances" (Dworkin 1986, 413). According to Faggion (2020, 325), this "makes the legal validity of norms dependent on moral arguments" (Faggion 2020, 325), thus leading to legal anarchy and the defeat of legal certainty.[91] Identifying law

[90] Once we allow principles to be part of the law, interpretation follows suit. One cannot think of the law consisting of principles yet denying that law requires interpretation. Legal certainty accordingly must be interpreted in such a way as to allow for interpretation of the law consistent with the principle of integrity.
[91] Faggion comes to this conclusion through the discussion of two theses endorsed by Dworkin: first, that there is always a unique right answer to an interpretive question that objectively determines the right answer (the right answer thesis) and second, that "each participant in the interpretive debate must consider her own belief to be true and take action in conformity with that belief" (Faggion 2020, 326). Call this the protestant thesis. Faggion argues

by attitude seems to confirm the worst fears of legal positivism, namely, doing away with legal certainty and formalism. So, what remains of law if the law is understood to be a branch of morality? Not much, it seems.

However, appearances can be deceiving. Although Dworkin could not produce an algorithm for the courtroom or the citizens, it does not follow that the interpretive concept of law could not attain a reasonable degree of legal certainty. Principles are more comprehensive than rules, and function as directives. Also, the law is constrained by moral rules, which are generally reasonably invariant. The legal traditions that Dworkin criticised illegitimately assumed that law can be completely determined by appealing to rules or the plain meanings of words. The laws had a core settled meaning and penumbra of meanings, and judges were supposed to apply what was clear and interpret or make laws where the meaning was unclear.[92]

Dworkin showed that this is not the case and that judges do disagree profoundly not only about marginal cases but about the very essence of the law: "They disagreed about what makes a proposition of law true not just at the margin but in the core as well" (Dworkin 1986, 43). Legal positivism, according to Dworkin, cannot explain the existence of fundamental disagreements about what the law requires. If positivism were correct, then the only disagreements among lawyers would be about the margins of

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that if this were true, this would lead to a sort of judicial anarchy because each participant would rightly consider their own opinion or interpretation the right interpretation. That would lead to the collapse of the law. Therefore, when coupled with the right answer thesis, the protestant attitude leads not to obedience but the disobedience of the law. Hence, Faggion argues, Dworkin fails to ground obedience to the law and thus, it undermines his thesis that law is moral. Green (2004, 276) makes a similar critique. For a rebuttal of Green's view, see Dworkin (2004, 279).

[92] Here is the paradigmatic formulation of this position: "When a judge of an established legal system takes up his office he finds that though much is left to his discretion there is also a firmly settled practice of adjudication, according to which any judge of the system is required to apply in the decision of cases the laws identified by specific criteria or sources. This settled practice is acknowledged as determining the central duties of the office of a judge and not to follow the practice would be regarded as a breach of duty one not only warranting criticism but counter-action where possible by correction in a higher court on appeal. It is also acknowledged that demands for compliance would be regarded as proper and are to be met as a matter of course. The judges not only follow this practice as each case arises but are committed in advance in the sense that they have a settled disposition to do this without considering the merits of so doing in each case and indeed would regard it not open to them to act on their view of the merits. So though the judge is in this sense committed to following the rules his view of the moral merits of doing so (at least so far as the rules are clear and provide him with determinate guidance) is irrelevant. His view of the merits may be favourable or unfavourable, or simply absent, or, without dereliction of his duty as a judge, he may have formed no view of the moral merits. Raz indeed seems to admit as much by conceding that pretending to believe or the avowal of belief in the merits, is enough (Hart 1982, 158-9).

application of vague concepts. In contrast, many disagreements between lawyers touch on their core and central meaning (Priel 2006, 35). However, disagreements are an ineliminable feature of any legal system and as such do not undermine the law or the rule of law. Uncertainty about the right answer need not lead to solipsism or legal and judicial anarchy. It could lead to a productive and dynamic legal system. As Huemer has recently argued,

> To rationally pursue a given value, it is not in general necessary that one have certainty, or anything close to certainty, about what promotes that value. One need only have reasonable assessments as to which courses of action are more and less likely to promote the value. Thus, suppose I value wealth. I may pursue wealth by investing in the stock market, despite having nothing approaching certainty that this will increase my wealth. My behavior is rational as long as I am able to make some reasonable judgments about which courses of action are more and less likely to promote wealth. Similarly, to rationally pursue justice, it is not necessary that one have certainty concerning what justice demands. One need only have some reasonable judgments about which courses of action are more and less likely to be just (Huemer 2021, 274).

The objection that failing to separate law from morality threatens legal certainty is, thus, overstated. Morality provides the law with an internal order, a requirement of consistency and integrity that would not be possible on the voluntarist understanding of the positivity of law. Tuori (2021) has made the case that legal positivism poses a threat to the order of law:

> Legal Positivism's voluntarist understanding of the positivity of law poses a serious threat to the order of law. Positivity becomes a menace to order when 'positivity' starts to denote, instead of historicity, the changeability of law through explicit legislative decisions. The legislator does not prioritise systematic considerations but produces ever-new normative material which endangers the consistence and coherence of law. Legal Positivism does not seem to be left with any other possibility to conceive of the order of law than to shift the emphasis from substantive to formal criteria. Yet formal criteria cannot respond to law's call for internal order; it is a call for substantive coherence rather than logical consistence (Tuori 2021, 136).

In describing the law as moral, we introduce a certain moral and rational intelligibility to the law, an order that is an immanent requirement of the law. However, like any order, the legal order requires not only formal but also substantive moral reasons. As an order, it has a certain logic, normativity, rules and principles, and a mechanism for resolving disputes and conflicts. None of this is random but is connected by a system that relates all parts to a single whole to make historical, moral, and intellectual sense to its subjects. There is indeed little to be gained from legal positivism so long as it remains tied to the surface level definition of the law. Order is the keyword here. Without order, the law cannot exist, but the order will restrain both the legislator's and the judge's decision to interpret the law in any way they see fit. The law is not a free-floating speech act (Marmor 2021) but emerges from the inner depths of the order, bearing within itself the whole history of the order.

Law has a certain intelligibility that belongs to the order of the law, what we call the rule of law. The idea, therefore, that introducing morality to the law would make it less certain or more prone to the idiosyncratic interpretation of the judges is erroneous. Morality is what requires that law ought to be a certain way, that certain principles and rules constrain it, and that it seeks to uphold a specific substantive order of right. Hence, it is odd to see legal positivists arguing that morality threatens the law's autonomy and determinacy. (Alexander 2021). As a moral concept, the law is open to interpretation (Tuori 2016; 2021, 138, 180-182), and there is little we can do to avoid this inherent indeterminacy of the law.

The positivist critique blames Dworkin for erasing the distinction between law and morality, but the question is: was there any such distinction to begin with? Law did not emerge from the will of the sovereign but grew from the experience of living together guided by practical reason, and it seems reasonable to assume that when people found themselves disputing with one another, usually about a property, they came to an agreement that some rules with coercive character must be instituted. Law emerges to solve particular problems that individuals living together face but cannot solve as individuals. It is eminently reasonable to assume that law developed historically in a

long process of trial and error. Law is inherently pluralistic because it reflects a specific historical trajectory that is now part of its tradition.

Therefore, we must ask: Is it necessary that law should be applied with mathematical exactitude (Kant, 6:233) across the board? It is understandable that, in some contexts, mathematical exactitude is required of law. However, it is not self-evident that this must or ought to hold in all legal matters. In fact, in certain circumstances, such exactitude seems to be precisely what must be avoided (Beever 2004). Therefore, the claim that the law must be as determinate as possible across all legal circumstances is untenable from a fallible human perspective and an empirical-historical perspective where laws are interpreted differently.

So, while it is legally required that the law be applied as precisely as possible to the stated meaning of the law, that meaning is subject to interpretation. While some mechanism of controlling the interpretation of the law from possible or actual idiosyncrasies, biases and prejudices, personal quirks and interests of judges is mandatory (Føllesdal 2021, 130; Waldron 2021), the law *does not apply itself*, and this inevitably excludes complete meaning determinacy of the law.

Flikschuh has argued, rightly I think, that positive law is ultimately subject to human judgment, both in its making and interpretation.

> The impartiality and exactitude of law counteracts the partiality and infirmity of human judgment. Nonetheless, the law plainly cannot apply itself - to the contrary, each actual application of the law constitutes an act of final human judgment. In that sense, the law can guide human judgment and agency, but it cannot ultimately replace it. But if the law cannot ultimately replace human judgment - if, to the contrary, law depends on human judgment in its application (and, indeed, in its design) then man-made-law, too, ultimately is finite and fallible. In that case we should not, perhaps, place too much confidence in the law's precision and exactitude (Flikschuh, 2021a, 131).[93]

[93] "Thus, he [Kant] also rejects any blind and rigid application of law and moral duty, because only a certain use of prudence and a certain concept of happiness are incompatible with morality. Therefore, Kant's position indicates that the law should be applied in the same way to friends and enemies, even if this may conflict with certain conceptions of happiness. It does not mean, however, that the law should be applied in an overly strict

This leads me to conclude not that anything goes but that whatever restrictions we put in place will not secure absolute exactitude in all legal cases. I agree with Raz (1979, 214) and Waldron (2011, 338) that "the basic intuition from which the doctrine of the rule of law derives [is that]: the law must be capable of guiding the behaviour of its subjects". However, it does not follow that a less exact law is incapable of guiding our behaviour.

In a certain sense, therefore, the problem of exactitude and certainty is a false problem or an exaggerated problem. We seek to know the law, but legal practice shows that certainty is not easily attained. We consult lawyers when we are uncertain about what the law requires, but we are not necessarily more certain of the law after the consultation. Perhaps we now know more about the loopholes in the law and which direction a court decision most likely will go, but there is no a priori guarantee that we know what the decision will be, should the case go before the court. Not because we do not know the law, but because it is the judge and not the law that makes the final decision.

The idea that law guides us is, therefore, correct with qualifications. Nevertheless, since we share practical reason, we can reasonably, in most everyday cases, determine what the law requires of us. A sign that says "no trespassing" or "parking not allowed" leaves little to the imagination. In everyday situations, the law can guide its subjects and coordinate their behaviours splendidly because it assumes, correctly, that as rational beings, citizens have the rational capacity to understand the law. Law is, after all, rational and capable of being understood rationally.

2.8. Law as a moral enterprise: Dworkin's view

According to Dworkin, the law is a moral enterprise. It is a branch of morality (2006a, 34, 2011, 405). However, what does it mean to say that law is a department of morality?

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manner, as this might lead to the frustration of the moral ends for which the law itself is striving" (Klein, 2021, 94).

In the rest of this chapter, I shall examine the idea that law is a branch of morality in more detail. The idea conveys two things: i) that law is a moral phenomenon, and ii) that, as a moral phenomenon, the law is inherently or integrally part of morality. In other words, the law cannot be adequately understood unless it is understood as a moral phenomenon. As a moral phenomenon, the law is not determined by morality – rather, the opposite may be the case[94] - but provides the framework through which the law is interpreted. Before Dworkin's theory, the relationship between law and morality was conceived in modal terms: contingency and necessity. Law is either necessarily or contingently related to morality, depending on the legal school. Dworkin opens the possibility of doing away with the modal interpretation by conceiving the relationship in terms of the embeddedness of law in morality. Alternatively, what he calls a tree structure (Dworkin 2011a, 405): the law is a branch, a subdivision of political morality.

Nevertheless, how should we understand the law metaphor as a department of morality? The shortest answer is: that a moral phenomenon is any phenomenon that cannot be understood without invoking moral principles as fundamental to its constitution. In describing the law as a moral phenomenon,[95] we do not simply mean that the law is morally valuable or even morally necessary, the way Finnis (2003, 112, 2011, 28) presents the law.

> For the sake of justice and a flourishing community of people in good shape and doing as well as extrinsic circumstances permit, we need the set of rules, arrangements, processes, institutions, and persons with responsibility and thus authority, the set that is completely called law, legal system, and so forth. For the sake of justice, we need rules to be public, clear, general, stable, capable of being complied with, an explicable to any fair-minded person… (Finnis 2003, 112).

[94] Larry Alexander (and Emily Sherwin) (1999, 530-565; 2001; 2008) has argued that law comes into the scene when moral disputes due to disagreement, lack of expertise or simply inefficiency cannot be resolved. The law *authoritatively* settles moral disputes, assuming that by moral disputes, we mean disputes that are related to the claims of right: who has the right to what? Who has the right to the piece of land under dispute? Who has the right to the distribution of the money? Who has the right to inheritance, and so on? In this sense, right is prior to law and the good. Law does *not* decide what is right but authoritatively *determines* the moral claims to what (or who) is right in a particular situation. The law finds its *raison d'être* precisely settling moral disputes that cannot be resolved otherwise. This mode of the justification of the law has a long history, beginning with Hobbes via Kant until today. See also Gregory S. Kavka (1995, 1-18) and Finnis (2003).

[95] Morality is necessary though not sufficient for the law.

Finnis' argument shows why we need the law, but it does not show that the law itself is moral. We can say the same about science: it is morally required because it is morally valuable and helps humanity immensely. However, science is not a moral phenomenon because it does not fall under the moral description as does the law.[96] Unlike science, the law falls under a moral description (morality in the wide sense as practical reason): it falls under the laws of freedom. Laws of freedom are related to that aspect of our agency called practical reason and its supreme principle, the Categorical Imperative.[97] Moral laws bind us because we apperceive ourselves as rational beings who stand under the laws that reason prescribes Therefore, a moral phenomenon puts us under obligation or a system of duties to others or ourselves.[98]

2.9. The tree structure of morality

To explain the tree structure of law and morality, which Dworkin uses to replace the traditional two-system picture[99] with a one-system picture, Dworkin (2011, 409) uses an example of family morality that shows how practical reasoning, in this case, moral reasoning, is fundamentally the same regardless of what sphere of human activity it operates in. He tells the story of a parent who must decide on a family dispute between siblings. The older sister has promised her younger brother to take him to a sold-out and much-heralded pop concert. The sister, however, receives a call from someone she has been eager to date and, at the last minute, offers the place to him instead. The younger

[96] Science is morally valuable, but the disappearance of science would not adversely affect the moral quality of intersubjective human relationships. The disappearance of the law would adversely affect the moral standing of human beings. Law is a moral requirement whereas science is only morally valuable.

[97] The Categorical Imperative: "requires that we reject action on principles that cannot even be adopted (not enacted!) by all." (O'Neill 2018, 61). I work with a Kantian conception of morality, but one need not adopt a Kantian conception to realise that morality makes universal and binding claims.

[98] Morality is a set of standards, principles, laws and norms that bind categorically, hold reciprocally and universally among human beings *qua human beings*, and originate in our reason. Morality operates in the form of principles, duties, standards, and laws and evaluates human practices in terms of those principles as required or prohibited. In the words of Forst (2012, 44): "Moral norms represent categorically binding answers to intersubjective conflicts, answers that must be justifiable to all concerned persons alike as what is morally required, prohibited, or allowed in a particular situation".

[99] In the two-system picture, morality and law are seen as composed of separate systems of norms, with no neutral standpoint from which the connection between them can be adjudicated.

brother, visibly upset, goes to his parent and wants him to make his sister keep her promise.

What should the parent do? Do parents have legitimate associational authority to tell their children what to do? Do children have the distinct associational obligations to do what their parents tell them to do? As authorities, do they have the right to impose sanctions on their children? If so, do they have to resort to similar cases in the past? If there has been such a case, should it be followed to the letter, or should the parents consider the new circumstances? If so, under what principle? Perhaps in the past, the parents thought promises must be kept no matter what, and they enforced the decision on their children. However, now, they think differently and believe that other considerations can overrule promises on certain occasions. If so, how would they justify their decision to their children? Whatever decision is reached, it must be a decision that is informed and guided by the principle of integrity.

> If you made a decision now that did not respect those structuring principles—for example, by imposing a standard on G that you refused to enforce in her favor on some earlier occasion—your decision would be not simply surprising, like wearing a tie to a picnic, but unfair. Unfair, that is, unless some new and better interpretation of those principles shows why it is not unfair. And, of course, any new interpretation of these principles, like any interpretation of social history, is itself a moral exercise: it calls on moral conviction. These facts certainly do not erase the distinction between what the family morality is and what it should have been. The best interpretation of the structuring principles may well require that some decision now regretted nevertheless be followed as a precedent. Fresh interpretation of these principles might well mitigate the difference between family and more general morality. But it cannot erase the difference. You may well feel obliged to command what you wish you did not have to command (Dworkin 2011, 409).

These actions fall under a moral description, and moral judgement is the appropriate form of judgment in these contexts. It makes no difference for the moral judgment whether these actions occur in the legal sphere or the family context. What determines their morality is not the context or the domain where they occur. They are moral because they are about how we should treat one another as human beings and what we are authorised or forbidden from doing to one another. Moral rules are about how we should

treat one another, whereas rules of other games are about how we manage objects in a specific domain. Law is moral because it regulates and adjudicates intersubjective relationships. It is no different from family rules that regulate intersubjective relationships between family members. Moral relationships are judged by moral standards and norms, e.g. we should be treated with respect and dignity. Whatever rules we make must be made in accordance with the moral standards because of the nature of the intersubjective relationship. Morality regulates these relationships by providing principles and regulations that cannot be circumvented without harming the moral status of human beings in those relationships and, thus, ultimately destroying the sphere in which moral norms are skirted. Take friendship as an example. Friendship is a moral relationship because whatever rule is constitutive of the friendship relationship is also amenable to moral judgment, that it is morally apt. One cannot have a friendship with someone one refuses to treat as morality demands.

Wherever these values appear as indispensable and as an integral part of a specific action, whenever they cannot be excluded from these actions except arbitrarily, we are dealing with a moral phenomenon, irrespective of what domain they appear in; be that in the family domain (what misleadingly used to be called "the private sphere"), in friendship, or the political domain at large.

I would like to end this chapter with a reflection on Scott Hershovitz's remark that we "mark moral obligations by their source all the time" (2015, 1187). However, the source he has in mind is the legal practices by which a moral obligation is generated. In this sense, then, we speak of legal obligations because the legal practice generates them, but it is unclear to me how a practice generates obligations and how they can be binding. How do legal practices generate moral obligations? Hershovitz argues this is so because we would not have these obligations but for our legal traditions. Without relevant practices no moral obligations. However, he also suggests that in a context of a family obligation, "you have an obligation of the ordinary moral sort, which arises in the context of your family" (Hershovitz 2015, 1187). This suggests that obligation is practice or relation-independent and that relationships instantiate the obligation, not that

they are the source of the obligation. Hershovitz is unclear, but his argument nevertheless supports the claim that the source of obligation is practice. Thus, although there are no distinct normative domains of legality or family, the duties in these domains are moral. This argument seems to rely on confusion about the source of moral obligations. If it is in practice, then it is not obvious how a practice can generate obligations, and if it is independent of practice, where is its source?

The same confusion also underpins Greenberg's conception of a legal obligation, which argues that legal obligations are the moral obligations brought about by the actions of legal institutions in a *legally proper way* (2014, 1321). Since a legal system, according to Greenberg, is supposed to change the moral situation for the better, legal obligations must be brought about only in a legally proper way. For example, suppose a government prosecutes a minority group. In that case, such "government actions are likely to have the effect on the moral profile of producing an obligation to protect or rescue the minority group, to disobey the directives, to try to change the policy, and so on. It is intuitively clear that an obligation that comes this way is not a legal obligation, despite the fact that it is the result of actions of legal institutions" (Greenberg 2014, 1322). This is true of the one-system view proposed by Dworkin and defended here. The fundamental fact remains that obligations come about through legal practice. Greenberg distinguishes between pre-existing moral obligations (obligations such as not to harm or kill) and those that come about in the legally appropriate way. Law can reinforce pre-existing obligations, but they are not legally generated. The importance of this distinction is not immediately evident. If the law is moral, then it follows that all legal obligations are genuine moral obligations that pre-exist legal practice *as the source of their bindingness*.

I think Dworkin provides a better conception of a legal obligation. As we saw from the tree structure, moral reasoning is entirely independent of its embeddedness in a specific practice. Whether it occurs in legal practice or family settings, the source of morality is independent of the practice itself. So, while I agree with Hershovitz that there is no distinct legal domain of normativity, this follows from the one-system view; I think

Hershovitz cannot explain how law becomes moral, thus binding. He is right to argue that legal obligations are moral obligations, and to this extent, his argument is fully compatible with Kant's, as I interpret him. However, whereas Kant has a robust moral theory behind it, capable of explaining how law binds, Hershovitz and Greenberg do not. In the absence of such a theory, it is difficult to see how the one-system view can be maintained from collapsing into mere dogma.

2.10. Conclusion

In the last section, I argued that, unlike Hershovitz's and Greenberg's theories of a legal obligation, Dworkin's theory is rooted in an independent source of morality. Bertea (2019) has argued that Dworkin's theory faces the same problem as the theories of Hershovitz and Greenberg. According to Bertea, although significant for its marked advance over Hart's, Dworkin's conception falls short of explaining the bindingness of legal obligations. Dworkin's conception of political morality is also practice-dependent. What is morally right or wrong depends on the criteria of fit and justification. If a law can be provided with a moral justification per the conception of political morality, then it is binding on its subjects. However, this is not sufficient for grounding obligation because there is a possibility that some practices which are not morally acceptable can be justified by political morality. Bertea objects that because Dworkin does not provide an independent standard of morality that grounds legal obligation in the institutional arrangement of political practices, its justification is not strong enough for legal obligation. "This means that legal obligation is a kind of moral obligation – indeed, it is a special variant of moral obligation in that it specifically arises out of certain institutional arrangements and political practices" (Bertea 2019, 115).

However, this is not entirely correct because, for Dworkin, moral principles are independent of the force of political principles. This is most obvious in the way Dworkin justifies law as integrity. It must fulfil two requirements: precedent and morality. For the law to give rise to an obligation, it must be morally justified; it must stand the moral scrutiny of its practices. I understand that Dworkin does not provide a

Kantian justification of law as moral[100] because Dworkin understands morality differently. For Dworkin, legal obligation as moral obligation need not be understood as having an independent source in reason but in two principles of dignity: self-respect and authenticity (2011a, ch. 9). Dworkin writes that "moral standards prescribe how we ought to treat others; ethical standards, how we ought to live ourselves" (2011a, 191). Morality, says Dworkin, is essential for living well. In *Is Democracy Possible Here?* (2006b) Dworkin elaborated on his two principles of human dignity:

> I believe that almost all of us, in spite of our great and evident differences, share two very basic such principles:
>
> The first principle—which I shall call the principle of intrinsic value—holds that each human life has a special kind of objective value. It has value as potentiality; once a human life has begun, it matters how it goes. It is good when that life succeeds and its potential is realized and bad when it fails and its potential is wasted. This is a matter of objective, not merely subjective value; I mean that a human life's success or failure is not only important to the person whose life it is or only important if and because that is what he wants. The success or failure of any human life is important in itself, something we all have reason to want or to deplore.
>
> The second principle—the principle of personal responsibility— holds that each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him. […] These two principles—that every human life is of intrinsic potential value and that everyone has a responsibility for realizing that value in his own life—together define the basis and conditions of human dignity, and I shall therefore refer to them as principles or dimensions of dignity (Dworkin 2006b, 9-10)

I agree with Bertea that a transcendental grounding of morality is a more potent form of justification than merely a practice-dependent one. Still, Dworkin gets morality right: it is about how we ought to treat others and ourselves, and it seems obvious that law is also about how we ought to treat others. In this sense, the law is moral, and only moral forms of argumentation and justification are appropriate. The rational force of legal

[100] Dworkin instead writes of "law as morality" (2011a, 405), and this can be confusing because the law is not morality but a branch of morality or morals. I assume this is an oversight on Dworkin's part, but unfortunately, many of his followers have taken it verbatim (Schaus 2015).

obligations is proportional to the force of moral obligations, neither less nor more.[101] Moral obligations bind not because they enjoy greater public acceptance or because the requirements for the justification of obligations are more robust than the requirements for the justification of non-moral requirements. Instead, moral obligations bind and have stronger requirements for justification because of their source in practical reason. Dworkin does argue that morality is categorical, only that he provides a different justification for it.

> I therefore propose a different understanding of the irresistible thought that morality is categorical. We cannot justify a moral principle just by showing that following that principle would promote someone's or everyone's desires in either the short or the long term. The *fact* of desire—even enlightened desire, even a universal desire supposedly embedded in human nature— cannot justify a moral duty. ... We need a statement of what we *should* take our personal goals to be that fits with and justifies our sense of what obligations, duties, and responsibilities we have to others. This characterization seems to fit Kant's moral program, or so I will suggest later. His conception of metaphysical freedom is most illuminating when it is understood as an ethical ideal that plays a dominant justifying role in his moral theory. Our own interpretive project is less foundational because more evidently holistic. We look for a conception of living well that can guide our interpretation of moral concepts. But we want, as part of the same project, a conception of morality that can guide our interpretation of living well (Dworkin 2011b, 2).

The force of moral obligation is not derived from a particular institutional arrangement of political practices. Rather these political practices on the integrity account flow from the power of moral principles. Any other configuration would conflict with Dworkin's two moral principles that law ought to take the structure that Dworkin thinks it ought to take in the integrity approach. It may be that Dworkin does not explain accurately what he has in mind, but I think we can safely read Dworkin as detaching moral principles from political principles. There is a possibility that Dworkin means that moral principles emerge from political principles, but that is unlikely. Even the consistency with precedent is consistency not with precedent as such but consistency in principle with

[101] The consequences of the legal obligations differ, however. Violating a non-legal moral obligation invites blame, whereas violating a legal obligation can be sanctioned

the standards embodied in that practice (Cornell & Friedman 2010, 15; Hershovitz, 2006).

Chapter Three: Principled Disobedience to Evil Laws

> The touchstone of whatever can be decided upon as a law for a people lies in the question: whether a people could impose such a law upon itself. . . . But what a people may never decide upon for itself, a monarch may still less decide upon for a people (Kant 1784, 8:39).

> Remove justice, and what are kingdoms but gangs of criminals on a large scale. What are criminal gangs but petty kingdoms (Augustine, *City of God,* IV.4, 139).

3.1. Introduction

Shapiro (2011, 102) has objected to the natural law theory that it cannot explain the existence of wicked laws and evil legal systems. "By insisting on grounding legal authority in moral authority or moral norms, natural law theory rules out the possibility of evil legal systems. [. . .] Just as theologians have struggled to explain how evil is possible given the necessary goodness of God, the natural lawyer must account for the possibility of evil legal systems given that the law is necessarily grounded in moral facts." (Shapiro 2011, 49). It would be a significant drawback for legal non-positivism if the problem of evil laws were analogous to the problem of the possibility of evil that theology struggles to explain. Fortunately for us, unlike theological evil, legal evil is a matter of how we define our concepts.

In theology, God is all-powerful and beyond human control; the reality of evil presents a radical challenge to the omnipotence and goodness of God. There is no way to avoid the challenge except by accepting that God either does not exist or that he is not omnipotent or not good and so evil is beyond his control. The alternative of denying evil is not a serious alternative. There is a structural dissimilarity between evil legal systems that we know are products of human intention and the evil that escapes God's control. Theodicy, incapable of rebutting the challenge, will arguably always remain on the defensive. Even if it could prove that God is all-powerful but does not stop evil from

happening, it would only have succeeded in proving that God somehow permits evil (or perhaps God himself is evil). Either way, nothing can be done to rein in God's evil.

It is different with evil legal systems: i) we can, implausibly, deny that a legal system is evil – perhaps, unbeknownst to us, a greater good is being served, which would put us on the defensive and in a morally untenable position. There are evil legal systems and laws, and a legal theodicy does not seem to be a good prospect for the justification of evil legal systems. Or ii) we can *repudiate* the *legality* of those laws. Even if we deny that law is necessarily moral, we cannot deny that it is necessarily normative: that it professes to give us reasons for action. Evil legal systems are evil systems that contradict the very idea of legality. Legality must be crossed out because it cannot be dissociated from the idea of the moral responsibility of its subjects. My argument is that some laws and legal systems are so evil that they forfeit their claim to being legal. The circumstances of legality, which include justice and freedom, must underlie every law if it is to count as a valid law. I will explain below what this means and how I think it can be realised.

I will not, however, directly pursue Shapiro's objection because I have already shown that it is not the same problem that theology faces. Evil legal systems are a human creation, and there is neither the natural nor practical or normative necessity of acknowledging the legality of evil statutes or commands. In denying the quality of legality to evil systems or laws, we neither engage in self-congratulatory praise nor indefensible forms of reasoning. In denying legality to evil laws, we do not deny the evil of these systems. We just deny that they are legal and normative for us, so that we are not under any obligation to obey these evil laws. Precisely because the law cannot be evil, evil systems are unimaginable as systems of law. Legal evil usually manifests itself in violence and terror, which are the opposite of what legal systems are and exist for.

Shapiro's objection is plausible only if one accepts the tenets of legal positivism uncritically. I, however, have argued in this thesis that legal positivism faces greater

problems than the problem of evil legal systems faced by legal non-positivism. My rebuttal of the objection is to turn this objection on its head: it is legal positivism that cannot make sense of wicked laws without destroying the law's normative bindingness or making the law normatively inert. I do not think that Shapiro has raised any serious objection to the moral grounding of law. In refusing to call an evil statute a law, legal non-positivism does not commit any fallacy or a logical contradiction, nor does it deny the law its normativity. However, accepting positivism's definition of the law creates a logical dilemma (that I will explain below) for legal positivism, and so far, it has not been able to resolve it. Instead, it dogmatically insists that law is law no matter the possible evil of its content.

This is the plan for this chapter: In the first part, I argue that a truly morally wicked law cannot be a law. Morally evil law is an absurdity, and as such, it forfeits its legality because it lacks the moral substance that grounds it as legitimate law. To this effect, I revisit the idea of the morality of law. I argue that without the possibility of a moral justification, the law is simply the gunman situation writ large (Hart 1961, 7). Part one begins with Hart's insight that law is something other than the gunman's situation writ large and argues that Hart cannot reconcile this insight with his own theory. Perhaps Kelsen will do better with his argument that law is sovereign over itself. I think Kelsen's theory is the philosophically most challenging positivist theory and entirely consistent; unfortunately, other problems make his theory unfeasible. I end this chapter with a critical review of one objection that is levelled against a moral grounding of law: that Nazi legal scholars were also anti-positivist and blamed positivism for the ills of German culture and economy. This argument is not directly relevant to the claim defended in this thesis. Nevertheless, legal non-positivism must be completely dissociated with any image that may tarnish its reputation.

In the second part (chapter four), I argue that two consequences follow from denying these wicked laws the status of law and the legal systems their legality. Regarding wicked individual laws, disobedience is morally permitted and, in some cases, obligatory because we are under the moral obligation to obey the law, not arbitrary

commands that deprive us of the right to legal personality. It is implausible to postulate a general duty to obey the law if that law has any content whatsoever, being wholly dependent on officials' will or whim (Allan 2020a, 585). Regarding evil legal systems, popular resistance becomes a duty as the systems no longer represent the moral achievement of the civil condition. It is instead a case of barbarism, where the law makes no moral difference to its subjects. In this thesis, I discuss only the question of disobedience. I argue that disobedience is permitted only when we can establish that the law has forfeited its legal character. Obligation to obey the law is owed not to the authority but to the community which follows the same laws.

3.2. Law is surely not the gunman situation writ large

I take Hart's dictum that "law is surely not the gunman situation writ large" (1961, 7), that is, that law is something other than the gunman situation writ large, as a premise for the argument of this section. From chapter one, we know that Hart and legal positivism cannot explain how law *binds*; the discussion of this chapter will show that Hart and legal positivism, more generally, cannot explain how the law differs from the gunman situation writ large. The doctrine of legal positivism is inconsistent because it maintains simultaneously two contradictory dogmas: that anything can be law – evil law is law, and that *not* anything can be law – the gunman situation. In contrast to Hart, Kelsen is consistent to the end. However, as I will argue in the section devoted to Kelsen's critique below, Kelsen can only maintain his unity by completely severing the link of law not only with morality but also with reality. Hart, however, has broader ambitions, but his positivist framework does not permit him to step out, as it were, from his own presuppositions. Hart admits that law must have some minimum content of Natural Law, as that is necessary for our survival:

> Reflection on some very obvious generalizations - indeed truisms - concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control. With

> them are found, both in law and morals, much that is peculiar to a particular society and much that may seem arbitrary or a mere matter of choice. Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law… The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible (Hart 1961, 194).

The minimum content of Natural Law is *necessary* because of the type of beings we are; had we been a different type of being, we would perhaps not have needed these universal rules. Thus, the necessity of the minimum content of Natural Law is *contingent* on human nature and the nature of the world we live in. If humans, for example, were not vulnerable to murder, the command "*thou shall not kill*" would vanish (Hart 1961, 195). Moreover, Hart accepts the dictum that the very existence of rules guarantees a minimum of justice:

> It may be said that the distinction between an excellent legal system which conforms at certain points to morality and justice, and a legal system which does not, is a fallacious one, because a minimum of justice is necessarily realized whenever human behaviour is controlled by general rules publicly announced and judicially applied. (Hart 1961, 206).

He goes a step further and concedes to Fuller that if the law is to be possible, "the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retroactive, though exceptionally they may be" (Hart 1961, 207). Yet, Hart cannot take the further step and accept that if the law must include some minimal morality, surely this would licence the conclusion that law is minimally moral or, at the very least, that some evil laws cannot be laws. On the contrary, Hart argues that it is a form of an oversimplification to "withhold legal recognition from iniquitous rules" (Hart 1961, 211). And so triumphantly, he concludes: "A concept of law which allows the invalidity of law to be distinguished from immorality, enables us to see the complexity and variety of these separate issues;

whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them" (Hart 1961, 211).

The fact that law is something other than the gunman situation writ large is the right moral and sociological insight that Hart clearly understood but could not consistently justify from within his own theoretical paradigm. Because such insight requires a moral component that legal positivism cannot accommodate, we must turn to legal non-positivist theories.

'Something other than gunman situation writ large' by necessity excludes some laws that Hart says retain their status as law: too wicked to be obeyed, but they remain laws (Hart 1961, 210). But then we lose the distinction between a gunman and a legal authority. And this distinction is crucial if we want to understand the law and the legal system. Here are two options: we either i) relax the distinction between law and morality. In that way, we boldly distinguish the gunman situation writ large and the legal situation. Certain laws are so immoral that it would be an affront to morality to consider laws. Or ii) if we must insist on the separation thesis, we cannot secure, or indeed explain, the distinction between legality and the gunman situation. There is no third option: the law is the gunman situation writ large without morality. Hart acknowledges that much, but with his minimum content Natural Law thesis, he cannot conceptually vindicate the moral thesis. So, he relies on the contingencies of human nature and counterfactual scenarios to justify why the law must nevertheless include a minimum of moral content. This is right, but if the law includes a minimum moral content, it must exclude laws that cannot be made to conform to the minimum moral content of the law.

The function of morality is not constitutive but purely instrumental here: to secure the approval of its subjects. An extremely unjust or inhuman law is a bad law because it will not ensure the conditions of its success; its legality is nevertheless secure. Morality is not considered because law without morality would not be valid, but it nevertheless

is deemed prudent if the law abides by some general moral norms. A law that fits morality is more coherent all things considered than an evil law.

Contrary to Hart, the minimum moral content concession must be understood as a restriction to limit the unlimited prerogative of the authority to make any law it wants. Morality is thus already an internal condition of the possibility of the law, the distinguishing feature that sets the law apart from a gunman situation writ large. If this is so, then it follows that morality is necessarily invoked in legal judgments, particularly regarding the cases relevant to the minimum moral content.

The moral thesis maintains that law is moral not because morality is needed to contain the worst excesses of the law - a law with such excesses is *indistinguishable* from the gunman situation writ large. Morality is required to make sense of legality as intrinsic to it. When a law demands our compliance, it is understood that its demand is morally legitimate and can be reciprocally and generally *justified* to its subjects.[102] This dimension of justification is the dimension of morality that must be presupposed as a condition of the legitimacy or legality of the law. This does not preclude the possibility of legislating unjust laws; it is, however, intended to prevent evil laws by denying them their legality.[103]

What is my argument in a nutshell? The argument is Fullerian:[104] as a condition of its validity, the law must *respect* our moral autonomy (our moral right not to be treated as

[102] Below, I explain the two stages of the moral justification of law.
[103] I know no non-positivist legal theorist who denies the claim that bad laws can be laws without any qualification. See Soper (2007) and Fuller (1969).
[104] Fuller, as is well known, maintains that there are eight principles of legality which are inherent in the idea of law: generality, promulgation, non-retroactivity, clarity, noncontradiction, the possibility of compliance, constancy through time, and the one which he took to be the most important, congruence between official action and declared rule. According to this idea of law, the bar for what counts as a law is relatively low, and it would not automatically exclude the possibility of unjust laws. As Hart (1961, 207) remarked, it is compatible with great inequity. Many bad laws can infiltrate the legal system, and we have no reason to discount those as laws. Injustice does not automatically disqualify a law if it fulfils the legality criteria. But it would also exclude several laws that do not fit the condition of legality, that they are forced into the system, although the system, when interpreted correctly, would reject them as its parts. In this sense, Fuller's theory is fully compatible with *Radbruch's formula*, that only evil laws lose their standing and status as law. This seems to be inherently reasonable because the law must fulfil certain formal conditions to be a law. Even if we assume that law serves no moral purpose, these criteria of legality screen out and restrict the range of content that can pass through it; it will not stop all oppression and domination, all injustice and corruption. Still, it will nevertheless rule out extreme forms of injustice as

a thing and used only as a means) and *secure* our right and access to equal external freedom. To the extent it refuses to respect our autonomy and ensure our external freedom it forfeits its legal status as a law. The "recognition of and respect for the moral capacities of the legal subject simply come with the territory of legality itself" (Rundle 2009, 124). Fuller makes this point quite explicitly:

> I come now to the most important respect in which an observance of the demands of legal morality can serve the broader aims of human life generally. This lies in the view of man implicit in the internal morality of law. I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. *It cannot be neutral in its view of man himself* [my italics]. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent (Fuller 1969, 162).

Legality, for Fuller, as for Dworkin,[105] Ebbinghaus and Kant as we will see in a moment, relies on the recognition of the moral agency and responsibility of its subjects which is not only prior to any other type of moral respect towards which the law might be instrumentally directed but also not *contingent* on any conscious respect that the lawmaker might hold for the legal subject (Rundle 2009, 115).

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incompatible with the legality requirements. The requirement with the eight principles would thus make *a positive moral difference* to all legal systems, including the wicked ones. For a similar interpretation, see Rundle (2009). Raz also accepts, although only contingently, that legality is valuable because it provides "stable, secure frameworks for one's life and actions": "A legal system which does, in general, observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations" (Raz 1979, 221).

[105] I had initially planned to adopt Dworkin's concept of law as integrity to explain that evil law cannot be considered law, but after certain deliberation, I concluded that a Fullerian perspective is better suited to the task. According to Dworkin, the law as integrity precludes evil laws because they would be considered an aberration from the tradition to which they belong. If generally, the legal system is just and respects the principles of justice and fairness, the appearance of an evil law would be like cancer in a healthy body. True, cancer may overwhelm the body and finally kill it, but precisely because it is out of fit with the law, it has no place there. As such, therefore, it cannot be considered a law. Dworkin himself has hesitated to take this route. Still, it seems this is eminently not only a reasonable interpretation of the doctrine of law as integrity but that it follows directly from his doctrine. So, in a way, Dworkin's theory is much more elegant than Kant's and Fuller's; nevertheless, there is no contradiction between Dworkin's position and the position I defend here. See Allan (2009, 2015, 2020) for a Dworkinian defence of this position. On Dworkin's concept of legality, see Dworkin (2006a, 170-77).

Whether we call it a failed law, or a non-law, makes no conceptual difference because in withholding equal legal recognition, the law declares moral agents legally inexistent, excluding them from the space of lawful reasons that it otherwise bestows on others. In such a statutory declaration, the law withholds the right to freedom from legal recognition of its subjects. A statute that declares some people, or most people, to be outside the legal space of reasons, where they are denied the right to be equal to all others in dignity and freedom excludes them from legal justification altogether and denies them legal personality. This is the point Ebbinghaus (1953, 21) makes about the laws that violate humanity: a law that treats its subjects as things fails to be a law because to be a law, it must minimally recognise the moral agency of its subjects. Laws that violate humanity are not only unjust but inhuman.

> Those positive laws which we have accused of violating the law of humanity are laws which reduce men to the status of material things…The same type of violation would be involved in a law which annulled the right of specified persons to enter into contracts legally binding on others; or again, in any law which condemned men to death for their religious creed or their racial origin. For here also it is evident that such laws deny to the persons concerned all possibility of legal action. And in the latter case the denial is particularly monstrous, since *what is denied is the legal possibility of life itself* [my italics]. Their very life is made illegal, because the acts whereby it might acquire legality are not within their power. It is as little within the power of a man's will to become convinced of what he does not believe as it is to change his racial origin. Such persons therefore are condemned to death unconditionally; for they are deprived, in principle, of any power at all to restrict the liberty of others in such a way that they could live among them. (Ebbinghaus 1953, 21).

For Ebbinghaus, legality is a system of equal freedom in which each person may engage in any action that is consistent with the freedom of others. The system secures the freedom of each person by placing reciprocal limits on their conduct. Because these limits are determined by general rules that apply to all persons, Ebbinghaus calls this system of equal freedom the law of humanity (Weinrib 2013). Laws that are not consistent with the condition of legality, or the law of humanity, forfeit their title as law. Ebbinghaus's position is Kantian,[106] and it shares with Kant the central

[106] Fuller also independently develops his conception of legality as the morality of the order: "there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the

presupposition of right, that it is "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom" (Kant, 6:230). Under Nazi laws, the choices of Jews could not be united with the choices of non-Jews in accordance with the law. To put it bluntly, there were laws, but they were not legal, as the condition of legality makes a moral difference to the subjects who occupy that condition. They were laws in a non-lawful condition. There is no one-to-one correspondence between right and law or legality and law because right can be multiply realisable in law. Right is the "sum of the conditions", but the law is what must secure that freedom of choice can be united with the choice of another, as only by ensuring does it maintain the conditions of right. A law that fails to be fully compatible with the "sum of the conditions" of right is still a law because, in non-ideal conditions, such shortcomings are inevitable.

The republican constitution, which is "the only constitution of a state that lasts, the constitution in which *law* itself rules and depends on no particular person" (Kant, 6:341),[107] comes closest to embodying the universal principle of right. However, although right's partial realisation is a sufficient condition for the legitimacy of the law, the constitutional authority is "under the obligation to change the kind of government gradually and continually so that it harmonises *in its effect* with the only constitution that accords with right." (Kant, 6:340). Nevertheless, Kant reportedly said that "there must be passive obedience if there is to be a lasting form of government. In the greatest tyranny there is still some justice" (Kant, 27:1392). Law forfeits its legal character when it is such that no justice is possible in the law, that law severs all links with the conditions of right.

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morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality, - when all these things have become true of a dictatorship, it is not hard, for me at least, to deny to it the name of law" (Fuller 1958, 660).

[107] It is crucial to notice that in the republican constitution, the law is separated from any person and given a reality of its own: Republicanism is, therefore, a system of the rule of law, not of men. And the law must, of course, conform to the condition of right. In *Perpetual Peace,* Kant writes: "A constitution established, first on principles of the *freedom* of the members of a society… second on principles of the *dependence* of all upon a single common legislation … third on the law of their *equality* … is a *republican* constitution (Kant, 8:349-350).

A condition of legality is that it interpellates moral subjects into legal subjects. It bestows on them legal personhood to hold them legally accountable and that they may keep each other to account. Law constitutes the human subject as a free subject by regulating her external behaviour. Law does this even with corporations on which it bestows legal personality to hold them accountable before the law. Suppose the law withholds legal recognition from moral subjects by depriving them of their legal rights, but it nevertheless, like in Nazi Germany, holds them responsible for any legal wrongdoing[108] (Rundle 2009). In that case, it becomes a tool of domination by one group over another. It thus fails to secure the rightful condition as a legal space where citizens are secure from domination. Authority, then, could do whatever it wants to them, as they would be in the position of the paradoxical figure of *homo sacer*,[109] the one who may not be sacrificed yet may be murdered with impunity. Denying them legal personality prevents them from seeking legal redress or justice in the law because, as a thing, they can have no rights. Therefore, in relation to the law, they are in the state of nature. In Arendt's canonical formulation: it denies them *the right to have rights* (Arendt 1951).[110]

It is difficult to overstate the moral importance that the law must stay impartial regarding subjects' disputes, transactions, and conflicts. The contradiction here is

[108] Nazi power conceived of Jews as possessing a strange form of legal personality in which wrongs could be imputed to Jews, but Jews could not suffer wrongs. Wrongs could be attributed to Jews because Nazism recognised that Jews could owe duties. Jews could not suffer wrongs because Nazism denied that Jews had the moral capacity to have rights. As beings without rights, Jews lacked the legal status to restrain the conduct of others with respect to them. This conception of the legal personality of Jews pervaded the adjudication of private disputes by Nazi courts. Contracts between Jews and Germans could be voided at the latter's request. Divorce proceedings invariably gave custody of the child to the Aryan parent despite a law that held that custody was to be awarded to the innocent partner. While the landlord-tenant law indicated that a lease could be terminated only "if the behavior of the tenant is such that a continuation of the lease would represent an unreasonable hardship for the landlord," Nazi courts held that the 'racial qualities' of the tenant itself constituted such a hardship. It soon became "pointless for Jews to appeal to [courts] for the protection of their rights." Turning from the denial that Jews were capable of having rights to the Nazi conception of their duties, Nazi power sought not to prohibit particular actions but to deny the legality of particular actors by making their very existence wrongful. Laws that prohibit what one is rather than what one does cannot be followed because agents cannot abide by norms that render their very existence wrongful. The barbarism of Nazi power consisted in the denial that Jews could be treated wrongfully by others and in the insistence that they did wrong independently of their actions (Weinrib 2013, 85).

[109] See Agamben (1995 and 1999).

[110] And which during Arendt's time is instantiated in the figure of the refugee, See Agamben (2008) for a radicalization of Arendt's dictum.

between legality as the condition of right and the denial of the right to be *treated as free and equal* in that space. Suppose we imagine society as a Rawlsian cooperative scheme where each must cooperate in a certain capacity. In that case, it is expected that all are judged by the same moral standards and principles and that the law ought to reflect this moral standard to avoid treating them as *people who do not count* (Forst 2014, 98). We are invited to imagine that in this cooperative scheme of society, where all contribute according to their capacity and skill, all ought to be judged by the same standards. Any deviation from these moral standards must be justified to those affected. There are degrees of departure, and not all would be morally problematic. Still, some deviations would require urgent moral justification, and, if none can be provided, the lawyerly claim that law is law fails to do justice to the law and the legal condition. Authority does not have the right to make such laws because they arbitrarily exclude those equal members of the civil state from the space of legal reasons.

A society is not simply the number of people that make it. It is unified by a shared interest, in which all have something at stake, something to lose if they are not treated as equal. Being treated as equal means being treated as an equal in a particular enterprise: those aspects of our identities – call it our ethical identities - unrelated to the enterprise itself are morally irrelevant. The law should not consider them. The moral interests the law protects are that of equal freedom and justice of all members who make up the society. When a law judges someone by a different standard, say for being a Jew or a Christian, and treats one favourably and the other unfavourably, it treats them unequally. But this is not yet a case where the law has wholly excluded a member of society from the considerations of legality. Law loses its quality as law when the citizens as community members are deprived of the right that the law ought to afford them. Because the law manifestly expels them from the legal space where they ought to be judged as equal members of society, the law that excludes them on account of who they are is a threat to legality, the condition regulated by the universal law of right. In other words, this law undermines the state of right by withholding the recognition of equal moral status to its subjects. Those whom the law excludes are effectively in a *status naturalis.* Their duties regarding this law are no different from any member living

in a lawless society: they are under no obligation to obey it. They are thus justified in acting under the conditions of lawlessness. As Kant says regarding the state of nature:

> However well disposed and law-abiding men might be, it still lies *a priori* in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples, and states, can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about it (Kant, 6:312).[111]

A legal condition is a condition of lawfulness (of the rule of law, not of men), in which fundamental human rights, which in the state of nature are merely *provisional,* are secured by laws. In becoming part of the lawful condition, a person does not sacrifice "a *part* of his innate outer freedom for the sake of an end, but rather he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will" (Kant, 6:316). The state of nature as a state of lawlessness is inherently violent precisely because in it "each [individual human being] has its own right to do what seems right and good to it" (Kant, 6:312). The law cannot ensure the innate right to outer freedom to its commonwealth members if it denies it by arbitrary arrest, wrongful imprisonment, targeted discrimination, disproportionate sentencing for the same crime, or complete denial of their legal personality. Therefore, the law contributes not to securing the rightful condition but to reversing it, to bringing about the *status naturalis* where rights and freedom are insecure.

3.3. The criterion of a possible consent

Thus far, I have tried to weave together different argumentative threads to defend the intuition that some laws ought not to be considered laws because they fail to include

[111] "No is bound to refrain from encroaching on what another possesses if the other gives him no assurance that he will observe the same restraint towards him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their masters (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning)?" (Kant, 6:307).

some human beings in the space of legal reason. The argument implies that these laws ought not to be enforced (and obeyed), not because they are unjust but because they are not laws. They are also unjust, but it is essential to keep this distinction because not all unjust laws lose their legality by being unjust. The intuition is clear, but equally clear is the legal positivist intuition that wicked laws are laws. Even Nazi laws were laws, and people generally did consider them to be laws and regulated their lives accordingly. And if one operates with a broad conception of morality that includes reasons of self-interest, then possibly, one has self-interested moral reasons to obey even wicked laws. This was the case for many Germans during the Nazi period, according to one interpretation (Atiq 2020, 8).[112]

Therefore, I am not arguing for a condemnation of the entirety of Nazi laws, as any wicked system contains morally good laws. The problem with Nazi laws is not that there were no good laws that even the Jews had an obligation to obey, but that as a system of laws, they jeopardised the condition of legality by undermining the legal rights of an entire people. They created a black hole (*status naturalis*) inside their legal system that eventually swallowed everything. The lesson of wicked legal systems is that circumstances of legality cannot incorporate a *status naturalis* without destroying itself.

I want to end this chapter by formulating a criterion by which we can deny the law its legal character. I find no better help than to turn to Kant.[113] As we will see later, he has the most rigorous argument against any form of disobedience, which is not based on conservative dispositions against change or some notion of the state as an organic unity having value over and above individuals. Instead, his argument is based on an appeal to considerations of justice: "I may not claim a moral right to do anything if I am not prepared (as a rational man) to extend to others the right to act in a similar fashion in

[112] "The moral reasons of self-protection are reasons to follow even Nazi laws. But it would be perverse to overstate the case. While there may be some (non-decisive) moral reason to follow a rule that causes extreme harm to others, that reason is vastly outweighed by competing considerations that militate against obedience. So, a German citizen might have had overwhelming moral reason to resist the laws of Nazi Germany, but this would not diminish the moral fact that she had some (albeit very weak) moral reasons, having to do with the good of self-protection (impartially construed), for following Nazi Rules" (Atiq 2010, 8).

[113] Since this thesis situates itself in the republican tradition, and Kant also develops a republican conception of both freedom and constitution, I find it natural that Kant should be central to this thesis.

similar circumstances" (Murphy 1994, 116). In his *Theory and Practice*, Kant speaks of a social contract as

> *Only an idea of reason*, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will. For this is the touchstone of any public law's conformity with right. In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it (as, e.g., that a certain class of subjects should have the hereditary privilege of ruling rank), it is unjust; but if it is only possible that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent (Kant, 8:297).
>
> *What a people cannot decree for itself, a legislator also cannot decree for a people* (Kant, 8:304).
>
> What a people (the entire mass of subjects) cannot decide with regard to itself and its fellows, the sovereign can also not decide with regard to it (Kant, 6:329).

The criterion of a *possible* (not hypothetical) consent asserts that a law is unjust if a whole people could not possibly give their consent to it. Of course, this is a criterion of the injustice of public law, not of its invalidity. Still, one may reasonably see this as an extreme form of injustice that invalidates and nullifies the law. So, although Kant does not here speak of the law's invalidity, it is evident that such a law is no different from a gunman situation writ large. If the whole people could not possibly consent to it, and the possible consent is the condition of the validity of the law, then this law is, for all practical purposes, not a law. It fails to be a law because, as a law, it commands categorically. And it is inconceivable for any juridical law therefore to command what is morally impermissible. In the *Metaphysics of Morals,* Kant writes:

> There is a categorical imperative, *Obey the authority who has power over you* (in whatever does not conflict with inner morality) (Kant, 6:371-72).

He makes the same point in *Religion within the Boundaries of Mere Reason*:

> As soon as something is recognized as duty,[114]even if it should be a duty imposed through the purely arbitrary will [Willkür] of a human lawgiver, obeying it is equally a divine command. Of course we cannot call statutory civil laws divine commands; but *if they are legitimate* [my italics], their *observance* is equally a divine command. The proposition, "We ought to obey God rather than men, means only that when human beings command something that is evil in itself, (directly opposed to the ethical law), we may not, and ought not, obey them (Kant, 6:100).

We have an unconditional, *categorical* duty to obey the law, except for those that conflict with inner morality and those directly opposed to ethical laws. We can translate this into a contemporary idiom: we must obey all laws except the illegitimate ones. One may object that there is no ground to interpret Kant the way I do because all he says here is that people cannot possibly consent to it, but their consent is a separate issue from the law's legality. Unless consent is a condition of legality, and thus of the validity of the law, its validity remains unscathed. But consent is the condition of the law, and Kant says that much: we abandon the state of nature because of the moral obligation to enter a lawful, legal condition and the assurances that we get from the authority that the laws be congruent with the conditions of right. We obey authority because authority is necessary for the constitution of the rightful condition. Still, authority itself is bound by the social contract idea of reason, "namely, to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen as if he has joined in voting for such a will" (Kant, 8:297). Authority should only make laws consistent with the social contract, and people have a categorical duty to obey them because they can be consented to. Kant claims that the legislator *cannot*[115]make laws that conflict with human beings'

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[114] I want to draw the reader's attention to this part of Kant's text as here in non-equivocal terms Kant states that duty is recognised, "something is recognised as a duty". He is not arguing that the lawgiver creates a duty on account of his status, rather that we have independent reasons to obey the duty even if that duty is imposed through the arbitrary will of a human lawgiver.

[115] The modal verb "cannot" here does not mean that a legislator cannot use his power to make such laws: A powerful and tyrannical ruler obviously can make any law he wants. However, he cannot make such laws normatively valid and thus cannot make them morally binding because the social contract binds him as any other citizen. We must keep in mind the two meanings of the modal verb because by equivocating between them, we miss the crucial distinction between a normative and an empirical *ought*. John Austin makes a similar mistake: "To say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is ...to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. *Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God ...the Court of Justice will*

inner morality or dignity because such laws cannot impose a duty of obedience on its subjects, contrary to the law that sets such a duty. Law as a type of moral law, an unconditional rational requirement (Kant, 6: 214), is a categorical imperative for its subjects. A law that does not obligate is a contradiction in the law: because it commands categorically, and the subjects must obey it as a law. Still, since it is contrary to inner morality, it is deprived of the moral ground to impose the duty of obedience. In other words, this is a law that is not law because only as a law does it command categorically.

3.4. Legality and legitimacy: A critique of Kelsen

Kelsen perhaps provides the most robust defence of the autonomy or the sovereignty of law[116] and legal normativity as a closed corpus of norms authorised by the *posited* basic norm (*Grundnorm*). As such, it is not subject to the same critique that Hart's insight was subjected to above. That anything can be law is not a problem for Kelsen's legal theory, as the pure theory of law, unlike Hart's theory, does not need any content of Natural Law. The normative autonomy of the legal system ensures that law can and ought to be pure: no moral norm is required in order to justify its content. Kelsen is consistent to the end and never wavered in his conviction that law is entirely sovereign. Even after the traumatic experience of the Third Reich - Kelsen fled from Nazi persecution because of his Jewish origins - he stuck to the formal argument that any act, no matter how morally repugnant, could be legally valid[117] (Haldeman 2005, 167).

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demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity" (Austin 1995, 185). This is based on an equivocation of the word law: Any bandit with enough power can play the role of the court of justice and demonstrate the inconclusiveness of my reasoning by hanging me up. They have only shown that they have the power to impose their will on me, not that they have the right to do so or that their choice carries the force of law. If a mad king were to demonstrate the falsity of general relativity by law on pain of the death penalty for those who disobey, no sane scientist would dare contradict him. But it has not been proven that the theory is wrong or that the law is binding. It is simply violence parading as law.

[116] "After all, legal science – as cognition of particular object – can only be possible if one *assumes the sovereignty of the law* (or, which is the same, of the state), i.e. if one takes the legal order as an independent system of norms which is not dependent on any higher order." (Kelsen 2015, 18).

[117] "A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm. Therefore any kind of content might be law." (Kelsen 1989, 198)

In an early essay published in 1919, "Zur Theorie der juristischen Fiktonen: Mit besonderer Berücksichtigung von Vaihingers Philosophie des Als Ob,"[118] Kelsen presents and defends to its logical conclusion the autonomy of the law. Law, argued Kelsen, is fiction. From the "very beginning it is nothing actual. There is no part of natural reality which can be called law. And even if one wanted to disregard this fact and wanted to still consider the law *as if* it were an ought-norm, the question emerges, what an ought norm actually *is*? Well, nothing actual, but itself a fiction. And the fiction here does not only consist in the 'as-if' formula, but also in that, to which the law is likened by means of a fiction" (Kelsen 2015, 20).

I consider Kelsen's theory in the context of a discussion about the forfeiture of law's legality because my critique of Hart's insight does not apply to Kelsen. However, Kelsen's theory is vulnerable at its strongest point: treating law as sovereign severs all links with actuality or human behaviour that it seeks to regulate (Tuori 2021, 127). The law is a fictional self-enclosed entity because the legislator can posit anything, any content it desires within the framework of the legal ought. Should he want to make people walk on four legs, he can do it by making a legal norm to that effect. He is, after all, within his realm, almighty (Kelsen 2015, 13) and positing a norm is an act of his will (Kelsen 2015, 9). However, the law is not only about making and positing legal norms, but these legal norms also have *coercive* character. In this sense, it seems, they establish a connection with subjects as moral subjects. Paradoxically, coercion opens the self-contained normative theory of law to the actual world. Otherwise, it would be indistinguishable from any other fiction or metaphysical system with no relation to human beings. So, the law on one side and people on the other. It seems the reason people are ever willing to subject themselves to positive law as an arbitrary human order (Tuori 2021, 132) is coercion. If the legislator is almighty and can do within his realm anything he wants without any consequences to himself, as he can absolve himself by positing a norm that does just that, then the only possible bridge between law and its subjects is coercion.

[118] Published in English translation in 2015 under the title: "On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy".

It is safe to presume that very few people willingly obey such norms. Coercion is therefore not so much conceptually necessary but a means of ensuring the efficiency or translatability of the legal system against the resistance of its subjects. The law operates according to Kelsen in legal fiction, and these fictions have no counterpart which would falsify them or prove the need to correct them.

> Only if one ignores the difference between is and ought (as two distinct forms of cognitions) and takes the possibility of being actual as a conditions of an ought-statement, only then the illusion is created that there existed a contradiction between the statement, which posits that something ought to be, and the statement, which claims as a matter of fact that this something is actually impossible; only then the following error emerges: that a certain content (the action which ought to occur) has to be actually possible, the actor thus has to be feigned to be free, in order to make possible the statement of ought, and thereby to simultaneously make possible the duty to act and maybe even the duty to act differently than one actually acts, differently than one actually must or can act (Kelsen 2015, 17).

Therefore, in a fundamental sense, the law needs coercion to exit itself and establish contact with moral subjects. The law without coercion is not a lesser law or a non-law but simply a fiction that remains incapable of establishing a connection with human behaviour. I can declare myself a king of dominion and create all the norms that I need to rule, but to rule over someone and not simply in fiction, I must at least find someone over whom I can rule.

In Kelsen's theory, the law can deprive anyone of legal personality and rights as quickly as anyone can be deprived of non-legal fictional attributes. I may be bestowed with imaginary honours and then instantly be deprived of them without changing anything (or everything) in my reality. But *the law does make a difference*, and this difference results from the loss of status in a legal system that confers rights and power on us. One can lose one's freedom, but one expects that those instances correspond to some actions that justify such loss and that it is not done arbitrarily. Suppose the law deprives me of my legal personality status and considers me a thing. That has grave consequences not only for my legal but also for my moral status. It undermines both. In depriving me of my legal personality, the law treats me as a t thing, meaning that it can deprive me of

all my rights or enslave me. What stands between the legislator and me is morality which gives me the status of a person. This determination is not legal but purely moral, and it cannot be taken away by legal fiat. But since legal personality is the condition of having certain rights in society, then being deprived of legal personality means one's moral autonomy is compromised as one is no longer capable of living under one's own law and interacting as an equal member of the same legal system. But this only shows that morality in a narrow sense, corresponding to Kantian virtue (*Tugend*), is a necessary and partially constitutive element of law. Still, other parts of the law rely on morality in the wide sense of *Sitten*.

Only the law itself can be the standard of correctness is true, but the problem that this normative closeness engenders is that it is applied to actual, real people, "otherwise it hovers in mid-air" (Kelsen 2015, 20). The law can claim that it does not take its normative clues from outside, but it is hard to see how this can be of any use to those who are its subjects. And even if it is true, as Kelsen maintains, that law is concerned with legality and not utility,[119] this only explains what happens inside the fictional reality of the law. Still, it says nothing about the relationship of this fictional reality to people as subject to moral norms. So even if we grant, for the sake of argument, that law has its own normative structure, its relation to people as moral subjects and not merely as posited legal personalities requires a different mode of justification. It may not be juridical, but if the law claims (though Kelsen denies that law claims anything, instead law *posits* – Kelsen 2015, 12) to regulate the people's affairs, it must justify the grounds of such positing. On what grounds does the law require that I do what the law commands me to do as a legal person if the law clashes with my moral self-understanding as an autonomous being?[120]

[119] "After all, the "correctness" of legal application can only mean legality, and not utility. The fiction that the warped line is a straight line is a mathematically correct result. It would have to be a legally correct, i.e. a lawful result which is reached by means of the analogous-fictitious interpretation. Now, the legality of this result can only be measured against the legal order itself; however, the contradiction to the legal order in the case of a fictitious analogous application of law is not merely a provisional, correctible one, but a definite one, one which cannot be corrected in due course." (Kelsen 2015, 15).
[120] As I argued above, Kelsen's only available answer is *coercion*: No wonder that he gives such a prominent place to coercion in his legal theory, because without coercion his theory hovers in mid-air. Coercion therefore is the bridge that connects the domain of law to morality.

Kelsen's thesis is strangely incomplete, despite his insistence to the contrary that it is an independent system of norms,[121] because to be complete, it must establish the ground that connects the law to morality. Coercion cannot ground voluntary obedience without establishing a relationship of congruity between law and morality. In other words, the law in its inner sanctum of sovereignty must include a norm of legitimacy: it must include a moral norm to justify its right to coerce morally autonomous beings and regulate their intersubjective relations legally. It must contain a relevant moral norm that legitimises its claims to its subjects. It may well be that law is an act of the sovereign's will, but this act requires legitimacy to be accepted. The law does not need any external input as a self-contained whole: it can sustain itself indefinitely through its norms and legal fictions. It posits norms and legal entities, like the legal personality, which is not to be confused with moral personality. So, the legal person is subject to the legal norm, not the moral norm. And the legal person can be subjected to any norm the legislator wills. Therefore, the legal subject is fiction, an abstraction that does not contradict reality. Indeed, in the fictional universe of legal norms, denying someone legal status has no bearing on the moral status of human beings. Kelsen relies on a broadly positivistic contrast between facts and values that seems problematic today. Practical normativity in law or ethics need not represent any fiction, as recent developments in metaethics and metanormativity more generally indicates.

Kelsen is right that law is sovereign and can decree any norm it wills in its universe since the legal subject on whom the norm applies is also a legal construction.[122] The

[121] "After all, legal science—as cognition of a particular object—can only be possible if one assumes the sovereignty of the law (or, which is the same, of the state), i.e. if one takes the legal order as an independent system of norms which is not dependent on any higher order. Otherwise only a moral science (ethics) or theology would be possible, depending on whether one takes the law to be a result of morality or religion. (As long as we consider the law to be an order, a complex of norms, we do not need to consider here a possible natural science or sociology of law, which clearly would also have to be considered a science of law)" (Kelsen 2015, 18).

[122] Kelsen's position may seem extreme, particularly if compared to Hart's soft positivism, but positivism has nevertheless not moved away from Kelsen. Here is what Marmor as recently as 2019 wrote: "Law is not just a compound artefact, more importantly, it is an artefact of the kind that shares some important features with **fiction**; they are both compound expressive artefacts. And that is so, because in both cases, as in some others, *the saying so makes it so* [my italics]. Fiction is created by telling a story, that is, by expressing sentences in a natural language. And notice that the story told is constitutive of the truths in it. *If the fiction asserts that the moon is green, then the moon is green, in the fiction. Law is created by performative speech acts. And those speech acts constitute what the law is, they constitute what is true in the law* [my italics]" (Marmor 2019, 157). "All over the spectrum we create and modify the law by performative speech acts." (Ibid, 158).

problem is that this legal subject is *inseparable* from the individual who is also a moral person.[123] Therefore, the legal ought affects the legal personality *and* the moral and physical integrity of the individual who happens to be one and the same. If the legal norm seeks to regulate the actions of the legal person, who is embedded in the physical individual, it must include *legitimacy* in its corpus of norms as an internal standard of the positing and applying norms.

I reluctantly admit that what I have said about Kelsen's theory does not prove that Kelsen's theory is vulnerable to the critique developed here. Because of the normative presupposition of Kelsen's view, evil laws remain legally valid. That they are not in congruity with morality is to be regretted, but immorality does not affect their validity. Nevertheless, Kelsen's theory remains an extreme theory that cannot accommodate the legal-political circumstances of how the law is made and enforced. As I have argued above, Kelsen's approach may be internally consistent, but consistency itself does not prove that it is true of law. Therefore, there is no necessity to accept Kelsen's presupposition that law is sovereign in the way he thinks it is. Should we refuse to accept those premises, his theory hovers in mid-air.

The alternative is the view that legal norms are – at least in part – a *subset* of moral norms, and that the legal personality is a moral presupposition to determine the content of the actions that fall under the jurisdiction of legal norms. There is thus a moral substrate that underlies legal norms. This does not undermine the sovereignty of the law, but it constitutes it as a morally legitimate legal domain. Morality is not an external element that seeks to limit the law from outside as there is nothing beyond the law; the law is what morality requires to regulate the actions of moral persons. There is no need to postulate a basic norm independent of moral supervision because the right to exist belongs not to legal reason but to moral reason. Law is what morality requires, and because it is a moral product, it can only be in a certain way; its content is limited by

[123] Legal personality moreover can be attached also to other than human beings, such as corporations, rivers, and things generally. (Kurki 2019). In this sense legal norms are different from moral norms that apply only to rational beings.

the moral requirements of justice and fairness. It can go rogue and begin to demand what is contrary to morality, but it then exposes itself to internal moral critique. Morality is necessary and partially constitutive of the law because it filters the content of what can become a law. Law has limited normative freedom outside moral legitimation. The limitedness of the normativity of law does not preclude the fact of its sovereignty; for example, the judge must make judgements based on legal material. However, this is possible because morality has already set the formal limits to what can be considered law. When we obey the law, we already presume that the law is morally filtered and legitimate and have no reason to doubt its legitimacy unless something is gone awry. We accept the law because we have good moral reasons to think that the law as an independent order displays certain intelligibility, independent of the authority that issues those laws. Therefore, the rules that constitute the legal order are not morally neutral with respect to its content, but they do not simply determine its content.

In conclusion, even if we were to grant Kelsen that law is an autonomous domain of fiction and sets its own rules, the problem is that we have no way of explaining how the law ought to interact with those *outside* its realm. [124]In his *Pure Theory of Law*, Kelsen

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[124] Kelsen can reply that this misunderstands the nature of legal norms and the legal system. When a legal norm is posited, it also simultaneously posits the legal subject to whom the norm applies. The legal personality does not precede the legal norm – this would be a moral presupposition - as *there is no outside to the legal norm*. The concept of "outside" is not only immaterial to the legal norm but also incoherent, and that is why it does not have to posit any theory of freedom or legitimacy, as that is a domain of moral (ethical) fiction. Law, in this sense, is not only an independent system but also a *total*itarian system which, through its norms, brings into existence legal personality, legal relations, legal power, and legal coercion. Law perpetually creates its own world out of nothing but the sovereign's will. Nothing can escape the law because nothing exists outside the law. But even if we assume the burden of making the concept of outside intelligible, Kelsen can still deny that it plays any significant role in his theory. Morality, after all, in the domain of law, is subjective and relative but, more importantly, subordinate to law. This is an inevitable consequence of Kelsen's pure theory of law, and it is thus understandable that he cannot make a place for morality in his system. Kelsen's justification for his thesis is that it is a presupposition of the legal science; that is, the object-study of the legal science must be assumed to be sovereign (Kelsen 2015, 18). That is true, but there is no denying that it is also a metaphysical and metanormative claim about what the law is. Law creates its reality, and in that reality, it is sovereign. Law coerces the legal subject, not the moral subject; as for the consequences or the *impact* of the law on moral subjects, that is a question for morality, not the law, to answer. In this sense, the law is not accountable to morality (and one can argue that morality is nothing but a different name for accountability – Darwall 2017; Setiya 2021) or to people at all. Law is "accountable" only to itself as it must, at the very least, be coherent and capable of communicating the legal norms to its subjects. It may seem that Kelsen vindicates the infamous thesis that anything can become law and that the only thing that prevents this from happening is perhaps resistance from other quarters. Still, in principle, there is no prohibition against it. The sovereign may be a decent human being, of limited imagination, or religiously pious. So, he will *not* make laws that offend the moral conscience of its people. However, that is simply a contingent fact of the sovereign, not a necessary fact of the nature of law. A different ruler can make wicked laws, and there would be nothing to stop him from making those laws. Moreover, since there is no outside to the law, the moral arguments carry little

argues that law as a legal order possesses two characteristics: i) it is an order of human behaviour, in the sense that it regulates human behaviour, and ii) a coercive order. As a coercive order, it reacts against events "regarded as undesirable because [they are] detrimental to society" (Kelsen 1967, 33). Kelsen has no problem speaking of legal order as a social order of human behaviour, but that is not the contentious issue: what is controversial is the justification of the legal order, which Kelsen provides by postulating or *presupposing* a transcendental basic norm, which is a kind of higher norm and whose final validity cannot be derived from a further higher norm. "All norms whose validity can be traced back to one and the same basic norm constitute a system of norms, a normative order" (Kelsen 1967, 195). I have explained the logic of this type of normativity in the first chapter by using Korsgaard's constitutive analysis and arguing that it requires a moral grounding if it is to be justified to its subjects. Kelsen's theory is perhaps the paradigmatic positivist theory that is entirely self-enclosed.[125] It follows logically that "any kind of content might be law. No human behaviour is excluded from being the content of a legal norm. The validity of a legal norm may not be denied for being (in its content) in conflict with that of another norm, which does not belong to the legal order whose basic norm is the reason for the validity of the norm in question" (Kelsen 1967, 198).

Insofar as the theory is fictional, it remains insulated from my critique. It is pure interiority. Kelsen argues that it is an order of human behaviour. Still, it is difficult to see how Kelsen's legal normativity can be justified to humans whose behaviour it seeks to regulate. I have argued that Kelsen cannot maintain the law as an order of human behaviour without introducing the coercive order. Only through a coercive order can it be enforced on its subjects. In that case, however, the justification of legal normativity provided by Kelsen plays no significant role in recognition of the legal order. My critique of Hart does not, therefore, apply to Kelsen's theory; this is not, however, a mark of the superiority of Kelsen's theory. Rather, it is a sign of its inferiority because

weight in making the law. Even if the legislator includes moral reasons in his legal decision, this does not make morality a substitute for the law.

[125] Yet he appeals to extra-juridical considerations such as being "detrimental to society"!

while the presupposition of the basic norm seems to explain the law as a normative order that is subject only to a legal ought, it simultaneously severs all the normative links from the same human behaviour that it seeks to regulate. Hence, it necessarily posits the law also as a coercive order.

In a nutshell, on Kelsen's theory, a wicked law is a law; it makes no difference, from the legal perspective, whether the law is evil or not, because legality, on Kelsen's understanding, precisely lacks those categories that enable it to draw those moral distinctions. The wicked law is a moral category, not a legal one. If this is so, it follows that any content can be law, but it also follows that a theory that has no place for such essential moral distinctions in its normative corpus is of little significance to moral agents. Ultimately, Kelsen's positivism fares worse than other legal positivist theories. In enclosing itself normatively, it cuts the normative and justificatory links with human behaviour only to establish them through coercion.

3.5. The Nazi legal scholars' anti-positivism

In this last section, I will examine one objection raised against the moral grounding of law: National socialist legal scholars were anti-positivists and blamed positivism for the ills of German culture and economy. This argument is not directly relevant to the argument of this thesis. Nevertheless, legal non-positivism must be wholly dissociated from any image that may mar its reputation. Nazi legal scholars were not legal positivists, as non-legal positivists claim. Rather, they wanted to abolish legal positivism, particularly its separability thesis, as only by uniting law and morality could they hope to achieve their political goals.

Jens Meierhenrich, who has studied the legal discourses of Nazi legal theorists, argues that "all Nazi legal theorists desired an ideological state. All of them sought to overcome the separation of law and morals, which they portrayed (erroneously) as the common denominator of liberal theories of the Rechtsstaat" (Meierhenrich 2018, 103). Nazi legal scholars

> wanted to jettison the procedural concept of law that had dominated the late nineteenth and early twentieth centuries and establish in its stead a substantive concept of law, one infused with Nazi ideology. […] The regime's legal theorists embraced antiformalism as a way to undermine the constraining effects of legal norms and institutions. The institutional validation of the Führer in Nazi legal theory was, among other things, a denigration of Kelsen's concept of the *Rechtsstaat*, in which "Führerlosigkeit," or lack of leadership, was a defining feature (Meierhenrich 2018, 103).

Moreover, "according to virtually every Nazi legal theorist writing at the time, the emphasis on formality and generality, on logic and abstraction, were quintessentially Jewish preoccupations that deserved to be condemned and eradicated from the theory and practice of law" (Meierhenrich 2018, 108).

Similarly, Pauer-Studer, in her most recent book, *Justifying Injustice* (2020), and in her earlier work (2014, 2015), claims that Nazi legal scholars blamed legal positivism for the presumed ills of the German people. In support of her claim, she cites Roland Freisler, who argued that "there can be no divide between a requirement of law and a requirement of morality. For requirements of law are requirements of decency; but what is decent is determined by the conscience of the Volk and its members" (Pauer-Studer 2020, 205).

> We recognize today the independence and neutralization of law, the separation and opposition of law and state, law and politics, law and the people's intuition (Volksanschauung), law and morality as the core of this evil [that is, the positivism-induced degeneration of law]. Overcoming these antagonisms and creating unity within law is virtually a precondition for a true renewal of our legal life (Georg Dahm quoted in Pauer-Studer 2020, 205). In eliminating the difference between legal and ethical norms, the NS state's authority encompassed not only the sphere of outer freedom but also the sphere of inner freedom – that is, of personal ethical values, convictions, and attitudes. The state now impinged upon a normative territory that is (ideally) foreclosed to it in a democratic system (Pauer-Studer 2020, 210).

The Nazi regime wanted to blend law and morality under one perspective, perhaps in a one-system view.[126] As such, it violated legal positivism's creed that morality remains an external standard for assessing legal systems and legal norms. Likewise, Pauer-Studer reads Kant as a legal positivist when she enlists him in supporting the criticism she mounts against the Nazi moralised conception of the law.

> Kant provides a careful justification of why we may not confound ethics and law. Respect for personal and public autonomy requires keeping the two normative spheres separate. Other than ethics, which is directed at an agent's inner freedom, law should preserve an agent's external freedom – his or her autonomy in the public sphere. Thus, the larger message we can derive from Kant's practical philosophy is that law should be an enabling condition for free agency. That is to say, in normatively proper circumstances, law is directed at preserving an agent's inner as well as outer freedom (Pauer-Studer 2020, 213).

I cannot but agree with this assessment, but Pauer-Studer adds the following claim, which amounts to a *de*legitimisation of the whole moral enterprise of the law:

> With their seemingly innocent call for the unification of morality and law, NS jurists supported a major normative transgression: the state's deliberate demand upon its subjects' ethical self-obligation. NS legal ideology required an individual not only to comply with legal norms, but to abide by the state's orders and legal rules out of inner ethical commitment. The strategy of dispensing with the state's neutrality toward an agents' motivating reasons for obeying law enhanced the state's possibilities of exercising political control. The attempt to eliminate any distinction between morality and law strengthened the regime's power. An attitude of inner commitment and loyalty served the goals of the Führer state more than mere obedience of the laws (Pauer-Studer 2020, 213).

[126] As seen in the second chapter, Dworkin has also been accused of wearing rose-coloured glasses, particularly for his inability to account for the "irreducible exteriority of suffering" (Cornell and Friedman 2010, 20). The critique is that some legal systems, such as the Apartheid legal systems, but also certain landmark US Supreme Court decisions that upheld the constitutionality of some wicked doctrines, like the doctrine of "Separate but Equal", which was enunciated in *Plessy v Fergusson* (1896); the collection of state and local statutes that legalised racial segregation known as Jim Crow laws and which existed for about a 100 years from the post-Civil War era (1861-1865) until 1968 are so wicked that the very idea of seeking the integrity in these legal systems becomes suspect because one ends up legitimising an evil legal system. Hart makes a similar critique in another context, but it misses the point concerning Dworkin. The idea of integrity must be balanced against two dimensions: that of fit with the precedent and with the dimension of morality, which is reducible to the idea of human dignity. If a doctrine cannot be morally justified, the fact that it fits with a precedent is insufficient for its justification. Dworkin is not always consistently exposing his doctrine, but others have done it for him: See Allan (2009, 2016, 2020).

As long as this remains a particular instance of the Nazi legal ideology, no consequences follow for the argument that law is moral. Still, the claim is generalisable and could support a significant normative transgression: the state's deliberate demand upon its subjects' ethical self-obligation. This is legally unjustifiable as a general statement and critique of the unification of law and morality doctrine. No state, including the Nazi state, can legitimately make such demands because citizens can easily *feign* their inner ethical commitment. That requirement is impossible, and as such, it only proves that the Nazi ideology had no proper moral theory of law. No state can compel its citizens to obey its orders out of inner ethical commitments. This is a conceptual impossibility, as inner commitment is a matter of conviction and motivation, whereas outer compliance is a matter of mere conformity.[127] In addition, an attitude of inner commitment is not necessarily a moral-ethical commitment.

If it is true that the Nazi State required an inner ethical commitment, then this shows that they were deeply confused about the relationship between law and morality. Any conception of the law to the effect that the state can require people to act ethically rests on a deep confusion, a misunderstanding of the law's moral nature. If there is one sound argument for the moral character of the law, it is the acknowledgement of the separation of ethics from the law (but not of laws from morality), which recognises the impossibility that a state, no matter how powerful, can ever make people act out of inner ethical convictions. On the contrary, one can argue that the separation of ethics and law is necessary precisely to normatively disqualify any law that demands an attitude of inner conviction.

Law is moral in the straightforward sense that it must respect the moral autonomy of its subjects by keeping out of their inner convictions. It must respect their autonomy to act immorally if they so want, so long as their actions do not violate the outer freedom of other people. Ethics in this sense is beyond the reach of the law, and any attempt to reach there undermines the law. What is meant by the moral nature of law is not that

[127] "I can indeed be constrained by others to perform *actions* that are directed as means to an end, but I can never be constrained by others *to have an end:* only I myself can *make* something my end" (Kant, 6:381).

law must be obeyed out of an inner ethical conviction, as this would render law subordinate to ethics, but that law displays its moral nature by precisely confining itself to its sphere. Law must stay within the limits of what is morally permitted: that it does not *occupy* other spheres. In other words, the law's morality is not a matter of making people obey it for the right reasons, which is the domain of ethics, but *that it is the right reason*, i.e., *that it is eligible for being obeyed for the right reason* and that it can be justified to its subjects as compatible with their ethical autonomy. The requirement to obey the law out of ethical convictions can only mean that the law is worthy of being obeyed, but it is up to its subjects whether they so obey it. Therefore, a law that is not objectively worthy of being obeyed is not a law because it cannot be justified to them.[128]

Meierhenrich maintains approximately the same point in support of legal positivism, rhetorically asking.

> Could it be that John Austin had a point, when he exclaimed in *The Province of Jurisprudence Determined*, 'the existence of law is one thing; its merit or demerit another'? Fraenkel's ethnography of Nazi law unearthed compelling evidence to back up this assertion and to invalidate Radbruch's formula with which I opened this book. Regardless of the violence that the law of the Third Reich helped to inscribe, legitimate, and unleash, Fraenkel showed that, in Neil MacCormick's words, '[l]aws don't exist by virtue of being just, and don't stop existing by virtue of being unjust.' From the Nazi debate about the Rechtsstaat to the empirical vignettes drawn from the entire universe of legal practices in the Third Reich, I have marshalled evidence to show that, *pace* Radbruch, the idea of lawlessness is ill-suited for understanding the logic of Nazi dictatorship (Meierhenrich 2018, 252).

[128] In this sense, I understand Kant's division of the metaphysics of morals into duties of right and duties of virtue. Morality is a broader category than ethics and right, with their own specific duties. *Morality demarcates our standing in the world regarding ourselves and others.* So, both right and ethics fall under the broad category of morality in the sense of the moral standing we are expected to hold ourselves and others. Ethics is up to us, whereas a state apparatus must enforce *ius* (Kant, 6:389). The reason for this fundamental division is the following: ethical duties are such that if we fail to act on them, we wrong ourselves: they harm our self-esteem and our standing in the eyes of the moral law. Duties of right harm others or, in the Kantian vernacular, they wrong others. They injure the status of the others, so they must be enforced by coercion if necessary. If we pay closer attention to the incentive (Kant, 6:219), it instantly becomes evident that failure to act on ethical duties does not wrong the moral standing of the others. Failure to act on the juridical duties can result in wronging others, e.g. depriving them of their freedom as nondomination. Hence, ethics and right are *necessarily* continuous.

It is conceivable that the idea of lawlessness is ill-suited for understanding the logic of Nazi dictatorship, a point that has been made by several other legal scholars (Pappe 1960; Dyzenhaus 2016; Rivers 1999). However, it does not follow, nor is it entailed, that Austin (as a representative of one strand of legal positivism) was right that law is one thing and its merit another. As a general critique, this is unpersuasive; first, because it operates with a conception of morality that is deeply ideologically distorted and secondly, the falsity of the moral unification thesis does not prove the truth of legal positivism.

These authors argue that Nazi lawyers were critical of legal positivism and wanted to give morality a greater role in law. They were not only anti-Semitic but also anti-formalists. This is true, but it is beyond the point. We must ask: what did the Nazis understand by morality? Or which morality did they have in mind when they criticised legal positivism? If they meant "Nazi morality", whatever that means, then obviously, that is undesirable because it goes against the fundamental rights of other human beings. As Dworkin commented about Lord Devlin's morality: his position that homosexuality is a moral issue is correct, but his morality is reprehensible: "What is shocking and wrong is not his idea that the community's morality counts, but his idea of what counts as the community's morality" (Dworkin 1977, 305).

3.6. Conclusion

In this chapter, I have defended the thesis that a truly morally wicked law cannot be law. I used Fuller's perspective to investigate Hart's insight that law is different from a gunman situation writ large. I have also discussed Kelsen's complete separation of law from morality and argued that while internally coherent, such a perspective fails to explain how law connects to moral subjects. In conclusion, I have briefly discussed the Nazi legal scholar's anti-positivism case to avoid any possible misunderstanding regarding the thesis defended in this dissertation.

Chapter Four: *Gesetz ist Gesetz*: Reasoning Against and in Favour of Disobedience to the Law

> When there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law", it lacks completely the very nature of law (Gustav Radbruch 1946, 7).

4.1. Introduction

This chapter must be read together with the preceding chapter, which made a case for denying legal status to evil laws. It concludes that an evil law, by lacking a legal status that it must have to be considered law, cannot morally bind its subjects. Therefore, the legal subject is under no obligation, moral or otherwise, to obey such a law. For prudence, she may comply with the law and seek to avoid any confrontation with the authorities. Nevertheless, she will be under no moral obligation to obey it. If she could get away with breaking the law, she would have incurred no responsibility to society as one cannot do wrong by being right.

In the first part of this chapter, I argue that disobedience to the law must be separated from broader political disobedience questions as much as methodologically possible. Although I do not discuss the case here, noncompliance with widely criticised policies, environmental degradation, massive poverty, unjust wars, regulations and mandates that exceed legal authorisation requires a different justification, one that need not meet the stringent conditions that disobedience to the law must satisfy. Also, concerning disobedience to law, I argue that the critical question is not how it is done, whether it is disobeyed civilly or uncivilly, but whether it can be justified.

In the second part, I engage with the arguments for and against disobedience to the law. Now, since I think that Kant is the most vocal opponent of all forms of resistance to law, I mainly engage with Kant's arguments and the way his arguments have been criticised and defended. Essential for this discussion is the relationship between legitimacy and justice and whether justice is required for the legitimacy of the law.

In the last part, I present my take on the question of disobedience to the law. I argue that we must side with Kant regarding the duty to obey the law, but following the argument of the previous chapter, I conclude that a law that loses its legal status cannot bind its subjects. Instead, the law must make a moral difference in people's actual lives, by which I mean that the subject ought to recognise that obeying the law results in the moral improvement of her own and others' situations.

4.2. *Un*civil disobedience

I begin by making two remarks regarding the topic of *political* disobedience. First, I will remain agnostic regarding the question of democratic disobedience. My aim is narrower, as I engage *only* with the moral justification of disobedience to the law, which can be democratically and non-democratically legislated. The legitimacy of political systems is a separate question that requires a different form of justification from the one I provide for disobedience to the law in this chapter. The second remark is closely related to the first in that I will avoid the current debates about whether disobedience ought to be civil or uncivil (Delmas 2018, 2020, 2021; Lai 2019).[129] The substantive issue is disobedience, whereas whether it is done civilly or uncivilly is essentially a matter of political calculation, prudential evaluation, strategic thinking, means-ends relationship and, most importantly, respect for the moral rights of *all* people. I would argue that it is imprudent to be uncivil when civility is a better alternative. As a rule of thumb, violence impoverishes experience by undermining the capacity for collaborative action and the ends to be achieved. It is generally an ineffective and imprudent use of force.[130]

[129] I do not want to give the impression that the way one disobeys the laws has no moral significance, but only want to state that one can methodologically dissociate those questions from an analysis of the reasons for disobedience. One may begin disobeying the law peacefully but because of confrontation with the law enforcement agencies end it in violence. It is unlikely that anyone who seriously considers breaking a specific law intends to cause violence and destruction of property, as that would be against the objectives one aims to achieve.
[130] Uncivil disobedience, understood as the use of violence stands in an independent relationship to the end it wants to achieve and thus stands independently from the moral end it seeks to realise. Violence is excess of force in relation to ends, "force running wild" (Dewey, in Livingston 2017, 525).

It would be an understatement to say that disobeying the law is a serious matter. There are profound moral, political and legal reasons that discourage such conduct not only as uncivil but also as morally wrong, and not because it *undermines* the authority of the state to make and apply the law. That as well, but the main reason is that law is moral and commands categorically. Making and applying the positive law is the sole prerogative of the state, and no one has the right to take over the role of the state in making and enforcing the law, except in those areas where the law authorises us to act as lawmakers. Since it is the state's role to make and apply the law, subjects are under the duty to obey the law and act accordingly.

Are we then permitted ever to disobey the law? From a legal perspective, one can never engage in acts of resistance. There is no instance in a rightful condition where citizens are permitted to defy the law.[131] However, in some cases where a situation is so intolerable that instances of substantial and clear injustice (Rawls 1971, 326) occur, not taking the law into our hands would be a serious *moral* wrong because we would be complicit in allowing the situation to get worse and thus endanger the rule of law. Admittedly, these situations are rare. We then have the duty to stop the government from undermining the juridical condition and the rights that depend on it.

Rawls, the *bête noire* of many contemporary political discussions on civil disobedience, in his *Theory of Justice,* defines civil disobedience as a "public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government" (Rawls 1971, 320).[132] However, critics have argued that Rawls' conditions make civil disobedience too

[131] "For a people to be authorized to resist, there would have to be a public law permitting it to resist, that is, the highest legislation would have to contain a provision that it is not the highest and that makes the people, as subject, by one and the same judgment sovereign over him to whom it is subject. This is self-contradictory, and the contradiction is evident as soon as one asks who is to be the judge in this dispute between people and sovereign (for, considered in terms of rights, these are always two distinct moral persons)" (Kant, 6:320).

[132] Similarly to Rawls, Habermas defines civil disobedience as "a morally *justified* protest which may not be founded only on private convictions or individual self-interests; it is a *public* act which, as a rule, is announced in advance and which the police can control as it occurs; it includes the *premeditated transgression* of legal norms without calling into question obedience to the rule of law as a whole; it demands the readiness to *accept* the legal consequences of the transgression of those norms; the infraction by which civil disobedience is expressed has an exclusively *symbolic character*— hence is derived [*sic*] the restriction to *nonviolent* means of protest" (Habermas 1985, 1009).

restrictive[133] (Celikates 2016a, 2016b, 2021; Brownlee 2012; Delmas 2014, 2018, 2020, 2021; Pineda 2021; Aitchison 2018a; Lai 2019) or too permissive (Jubb 2019).[134] I am generally sympathetic to these critiques; however, my interest lies elsewhere. I intend to avoid these debates because they detract from the real issue, namely, the problem of justifying disobedience to the law.[135]

I cannot adopt their grounding of civil disobedience because of the core tenet of this thesis, that law is inherently moral, and that obedience to law is not morally optional. Suppose I adopt a non-moral concept of law, identifying law with the factual content of officially authorised rules and rulings. In that case, it would be considerably easier to justify disobedience to the law, although it is very hard to account for a moral obligation to obey the law. All that would be required to justify it is a sober political assessment of the conditions of injustice. If the law were not moral, then the idea that one should obey the law would require a proper political and moral justification. However, it is implausible to postulate a general obligation to obey the law if that law may have any content whatsoever, wholly dependent on officials' will or whim (Allan 2020a, 585). In that case, it should be taken as given that one has a right to disobey any law that, in one's estimation, does not protect one's interests or is stupid or wicked. I have avoided discussing the issue of obedience because it is only relevant on the assumption that law is not moral, in which case one must justify why one should feel obligated to obey it.[136] This prompted Feinberg to write the following critical comment on the positivist account of legal validity:

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[133] As it fails to include many of the actions which we commonly today consider acts of *un*civil disobedience: Edward Snowden's and Julian Assange's illegally obtained and published classified information (whistleblowing), the suffragette's destruction of property, hacktivism, ecotage, etc.

[134] "Rawls' (1971, 343) theory is permissive because he treats any political order which is not 'at least as just as it is reasonable to expect under the circumstances' as 'a kind of extortion, even violence' to which even consent cannot bind us" (Jubb 2019, 956).

[135] Delmas (2014), for example, justifies disobedience based on the same principles that political philosophers routinely use to defend an obligation to obey the law, namely, the natural duty of justice, the principle of fair play, on Samaritan duties to rescue others from peril, and on the associative duties generated by "dignitary political membership". Aitchison (2018a) justifies disobedience based on freedom and democratic self-determination, given the pervasive reality of power asymmetries, social division, and ideological biases within actually existing states.

[136] The fact that law is moral does not automatically ground the requirement to obedience, and one can take a sceptical stance towards the very presupposition that morality is unconditionally binding. I am avoiding these controversies because it is not the place here for such discussions, but my position, which I believe I could reasonably defend, is that morality is and ought to be categorical and overriding.

> The positivist account of legal validity [...] is hard to reconcile with the [claim] [...] that valid law as such, no matter what its content, deserves our respect and our general fidelity. Even if valid law is bad law, we have some obligation to obey it simply because it is law. *But how can this be so if a law's validity has nothing to do with its content?* Why should I have any respect or duty of fidelity toward a statute with a wicked or stupid content just because it was passed into law by a bunch of men (possibly very wicked men like the Nazi legislators) according to the accepted recipes for making law? (Feinberg 1979, 159).

Feinberg's assessment is slightly exaggerated as not all legal positivists think there is an obligation to obey the law.[137] However, it is correct as a general critical remark of the tenets of legal positivism.[138]

4.3. Democratic disobedience

Unsurprisingly, there is no consensus regarding the disobedience of democratic authority. On the one hand, Estlund (2008), Christiano (2008) and Viehoff (2014), among others, are of the view that "democracy yields moral reason to obey the law"

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[137] Raz (1979, 233-249) thinks no such duty exists. In his view, one ought to comply with the law when the subject is likely better to comply with reasons which apply to him. To the extent that law does have authority, it is only in the sense of giving people a reason to act but not an obligation to obey. "I shall argue that there is no obligation to obey the law. It is generally agreed that there is no absolute or conclusive obligation to obey the law. I shall suggest that there is not even a prima facie obligation to obey it. In other words, whatever one's view of the nature of the good society or the desirable shape of the law it does not follow from those or indeed from any other reasonable moral principle that there is an obligation to obey the law" (Raz 2009a, 233). "My starting point is the assumption that there is no general obligation to obey the law, not even a prima facie obligation and not even in a just society" (Raz, 1981, 103). David Enoch (2019, 65-86) also denies that law has full-blooded normativity to justify anything like a moral duty to obey. Law can of course be normatively relevant, but so can etiquette, and no one will argue that there is a moral obligation to follow the rules of etiquette. For an excellent discussion of Raz's account of legal obligation, see Mark (2016). See also May (1997), Durning (2003) and Marmor (2021, 475), Batnitzky (1995) and Aiyar (2000).

[138] This should not be understood as if I am advocating for a separation of law from larger political forces in society. This thesis certainly takes leave from such fanciful positions. Nevertheless, we must draw a line between questions of legality and policy questions. Legal questions are narrower than the political questions, including questions about the legitimacy of the very political system, the economic system on which it stands, the environment and global distribution of wealth, and the questions about how best to realise those policies. There is no ground for any argument that law is outside the political boundaries of a given society. Still, we can see the law cementing values that have greater stability over time and are necessary for protecting those values from various policy considerations that would want to undermine them to achieve some political victory. Therefore, law enjoys autonomy even from a democratic authority. The subjects of the law can always appeal to the law against the democratic authority should it infringe their rights. In this sense, I also defend the institution of judicial review. On the political nature of the law more generally see Priel (2013b)

(Estlund 2008, 7).[139] While they acknowledge some limits to democracy,[140] they seem to think that the conditions for disobeying the law are very stringent, almost non-existent. In a Kantian-sounding argument,[141] Christiano says that although his argument gives only sufficient ground for the duty to obey democratically made law if it does not violate public equality (Christiano 2008, 255), only by following the democratically made choices can citizens act justly (Christiano 2008, 252).

> Someone who refuses to obey the democratic assembly on the grounds that it has passed controversial legislation with which he disagrees cannot deflect the charge of treating people publicly as inferiors by some alternative action. For example, he cannot deflect the charge by trying to treat people in accordance with his own favored conception of substantive justice. This is because that conception is controversial and within the bounds of reasonable disagreement and so the imposition of his view on others constitutes a form of inequality against the background facts of diversity, disagreement, fallibility, and cognitive bias and the interests associated with these (Christiano 2008, 253).[142]

Democracy protects the value of equality, which is incompatible with universal rights of disobedience: "Given the pervasiveness of disagreement about justice, every minority would be allowed to disobey or find some nondemocratic means for changing the outcome. But this would be incompatible with there being collective decision making at all. So how is this incompatible with equality?" (Christiano 2008, 253).

[139] Of course, their approaches and justification for how this is possible differ. Viehoff, for example, builds his argument on Scanlon's suggestion that "being moral involves seeing a reason to exclude some considerations from the realm of relevant reasons (under certain conditions) just as it involves reasons for including others" (Scanlon 1998: 156–7), and considers that what is important is not the fairness argument defended by Rawls (2001), but the reasons that democratic deliberation excludes from considerations: "to justify democratic authority, we must ask not what considerations we treat as reasons if we obey democratic decisions, but what considerations we *avoid* acting on if we do" (Viehoff 2014, 352).
[140] A "democracy cannot have the legitimate authority to act in a way that undermines basic democratic rights or basic liberal rights" (Christiano 2008, 278).
[141] The Kantian arguments for this position are, among others, systematically developed by Flikschuh (1999, 2000), Hasan (2018), Sinclair (2018), Stilz (2009, 2013), Varden (2008, 2010), Pallikkathayil (2010), Ripstein (2009, chap. 6). For a critique of these arguments, see Christmas (2021) and Huber 2016.
[142] "Each human being has a fundamental and natural duty to treat other human beings as equals and this implies that each person must try to realize the equal advancement of the interests of other human beings. But this duty is only fully realized among persons when each person attempts to treat others publicly as equals. Hence, each has a duty to attempt to bring about, and to conform his actions to, those institutions that publicly realize the equal advancement of interests" (Christiano 2008, 249). The basic idea then is that one owes it to others, by virtue of the principle of equality and the fundamental interests of each in having her judgment about justice accorded respect, to comply with the decision of the majority about how to establish justice (Christiano 2008, 254).

On the other hand, Markovits (2005), Aitchison (2018b), and Delmas (2018), among others, propose to defend a more radical democratic form of disobedience, something that Markovits calls "*democracy-enhancing* disobedience or, more simply, *democratic* disobedience", which "aims to render plausible the counterintuitive claim that disobeying the laws of a democratic state can serve democracy. Indeed, the argument casts democratic disobedience as an unavoidable, integral part of a well-functioning democratic process" (Markovits 2005, 1902). Furthermore, Aitchison defends democratic disobedience, arguing that tactics that frustrate, obstruct, and reverse the application of particular laws and policies are justified against authoritarian regimes and in more open and democratic societies. Specifically, coercive resistance is justified as a surrogate and remedial form of political action where domination is severe and entrenched. Here, coercive measures are not simply an attempt to influence deliberation but an attempt to directly impact political decisions by applying sanctions to some course of action and changing the incentive structures within which decisions are made. This is justified based on freedom and democratic self-determination, given the pervasive reality of power asymmetries, social divisions and ideological biases within existing states (Aitchison 2018, 60).

My position is closer to the position defended by the first group, but I recognise the persuasive power of the argument that Markovits, Delmas and Aitchison defend. There is a real threat that democratic procedures, instead of undermining inequality, reproduce social and status inequalities[143]and various forms of political and economic domination and exploitation.[144] However, there is a real possibility that these forms of disobedience, by disregarding the established procedural channels of communication and political participation, exacerbate the same conditions they want to alleviate and thus undermine

[143] On different forms of equality, see David Miller (1997).

[144] "Republican and democratic theorists … have shown that, far from threatening democracy, much civil disobedience purports to invigorate democratic institutions, for instance by combatting the rigidifying tendencies of state institutions and highlighting democratic deficits. These theorists often use alter-globalization, anti-nuclear, and Occupy activism to illustrate this potential of civil disobedience. They make two important points. First, civil disobedients often protest precisely a lack of democracy, such as their exclusion from collective decision-making processes, and thus promote democratic causes. Second, civil disobedience should be conceived as an exercise in political participation to which citizens are morally entitled, not as an extra-institutional form of action that is only appropriate when normal political processes fail." (Delmas 2018, 26).

the political authority of the democratic institutions and the value of equality they seek to realise.[145]

I will argue that there is no moral right to disobey the law but shall agree with Raz that "if there is such a moral right, then there is a presumption for giving it legal recognition" (Raz 2009a, 262). Since such legal recognition rests on a self-contradiction, legal recognition cannot be given at least on Kant's account. Yet the idea that one may engage in nondemocratic forms of disobedience to protect democracy has advocates also in the sphere of law.

> No doubt disobedience and obedience to the law are not equivalent; they cannot be put on the same level by institutions. But the fact is that without the possibility of disobedience, there is no legitimate obedience. […] It is thus a matter, in the end, not of weakening legality, but of reinforcing it, even if this way of defending the law against itself (or against its discretionary application by the government, the administration, the magistrates) can only be legally considered illegal, even criminal—at least from the classic institutionalist perspective for which there can be no difference between the legal order and the state order (Balibar 2014, 175-176).[146]

The idea is familiar with civil disobedience movements and their protagonists. Sometimes the only way to defend the idea of law and the rule of law is by disobeying specific laws or resisting abusive enforcement. Respect for the law is respect for citizens' rights, but respecting an unjust law is disrespect for the victims of the law. "If the system incorporates a number of unjust laws, then expressing positive feelings and maintaining loyalty toward it would amount to expressing *disrespect* toward those who are systematically exploited. If mutual respect is genuinely what grounds the respect for

[145] For a broader discussion of the disobedience of democratic laws see Cervera-Marzal (2020).

[146] Similarly, Lai argues that obeying the unjust law would amount to giving up on numerous opportunities to promote justice: "Obeying the law and concealing such secrets might eliminate the possibility of correcting, punishing, or preventing severe wrongdoings. The cases of Chelsea Manning and Edward Snowden fall into this category. In such cases, obeying the law would seem to be positively detrimental to the substantive values underpinning the law, while whistle-blowing would seem to contribute most effectively to the realization of these values. Correcting and punishing seriously unjust activities seems to amount to responding to reason better and to promoting justice, while preventing severe wrongdoings would be demanded by our duty to rescue, especially when the wrongdoings endanger people's lives" (Lai 2019, 98).

law, when respecting the law expresses disrespect toward others, we ought to refrain from respecting the law in order to respect persons" (Lai 2019, 107).

4.4. The case against disobedience

Disobedience seems wrong because we are morally required to *obey* the *law*. If there is a law, we are not permitted to disobey it, regardless of what we may think. We may think it is unjust, disrespectful, and even morally unsettling, yet our obligation remains: law must be obeyed. By obedience, I do not mean any mechanical obedience that undermines our reason and personality, but the obedience that is based on the practical and moral necessity of having a system of law to secure freedom as nondomination. Obedience is not blind but reasoned. It reflects the responsibility of moral agents and citizens of a particular polity to keep the legal system from disintegration. The moral responsibility is unconditional, as the system depends entirely on the obligation to uphold the law.

Because of this fundamental obligation to uphold the law, resistance to it must be discouraged as much as possible. My argument is premised on the existence of a legal system. There ought to be a legal system that society recognises and accepts as the only legitimate way of addressing and solving a segment of its social and moral problems. The idea is that law mediates and provides a roadmap that citizens must follow to stabilise their expectations and know their rights. Disobedience in this context means that some people are unwilling to play by *the same rules*.

Law is what consolidates the rightful relationship between citizens. Although this relationship may fall short of the ideal republican and democratic norms, it remains rightful and non-negotiable as long as the law enjoys moral recognition. Disobeying the law is not simply wrong because it violates the rules everyone else accepts and acts on, which are vital for the continuation of the reciprocal relationship between its members and reasons of fairness. It is wrong because sustaining the juridical condition depends on the citizen's readiness to act by the law. This is, of course, a moral argument. As an

empirical matter, some people who disobey the law or engage in illegal activities are unlikely to undermine the whole juridical condition.

This presupposition rests on the argument that justice is inseparable from the law, not because realising justice is a function of law, but because the law is justice recognised. One way of putting this is to say:

> The law does not take the demands of justice and attempts to work out a system that, without referring to those demands, mirrors them; it simply takes and adopts (*not* adapts) the demands of justice. For instance, the law does not see that fairness between the parties calls for a person to be found negligent in certain circumstances and then invent the standard of care, with its objective approach, in order to pick out those circumstances. Rather, the standard of care, with its objective approach, is itself an immediate demand of fairness as between the parties. The content of this aspect of justice is the content of the standard of care. In other words, the standard of care is not a test for justice in the way that litmus paper tests the pH of lemon juice; it is itself the juice (Beever 2011, 237-238).

Kelsen makes an apt observation regarding the conjunction of law and order: "The saying that the purpose of law is to establish order, creates the illusion that there are two things, the law on the one hand and the order on the other. But the law is itself the order to which those who speak of 'law and order' have in mind" (Kelsen 1957, 289). I think this is true of law and justice as well. One can say that the purpose of the law is justice, but that saying also creates the illusion that there are two things: law and justice. What it fails to recognise is that law *is* justice.[147]

We get the same insight from Kant's understanding of morality, duty and freedom, particularly his concept of acting from duty. Acting from duty, or acting morally, is not a means towards accomplishing some end (Kant, 4:415-416), say, freedom or happiness or making the world a better place, as in consequentialist ethics. Instead, in acting

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[147] In another context regarding the institution of the free market, Buchanan makes the same exact observation: "market" or market organization is not a *means* toward the accomplishment of anything. It is, instead, the institutional embodiment of the voluntary exchange processes that are entered into by individuals in their several capacities. This is all that there is to it. Individuals are observed to cooperate with one another, to reach agreements, to trade. The network of relationships that emerges or evolves out of this trading process, the institutional framework, is called "the market." (Buchanan 1999, 38).

morally, one is free; in acting morally, one treats people as deserving respect; or in acting morally, one makes the world a good place, the place it ought to be. There is thus a fundamental *unity* between moral *action* and a certain state of *being*. In other words, morality has its own concept of what it means to be good, what a good world is, and what respect means. To separate the value of acting morally from the value of freedom, from leading a good life, or the value of respect is precisely to misunderstand the *integrity* and unity of morality. It is not the case that on the one side, we have morality, and on the other, we have freedom; or that on one side we have morality and on the other, we have a conception of what a good life is. In acting morally, one is living a good life, and the split between leading a moral life and having a good life comes either from misunderstanding what morality is or from the fact that one disapproves of the moral worldview (perhaps intoxicated with power and preferring to dominate instead of treating everyone as equal to oneself). Morality as a coherent set of norms dictates a particular worldview where notions of goodness, respect, and freedom are integral parts of that worldview or, to use a discredited term, of the metaphysics of morality. In acting morally, we bring forth otherwise morally desirable consequences, although one ought not to act from duty to bring forth the desirable outcomes. By acting morally, we act freely.[148]

The same applies to freedom: external and internal freedom is not something over and above independence from internal pathological causes and the arbitrary and unjustified external domination represented in the choices of others (Kleingeld 2020). Freedom is, in other words, subjection to the law. One is free only when following the law because

[148] I find it puzzling that some find this idea of *morality as freedom* puzzling. They usually focus only on the phenomenological side of morality as a constraint, or even a puritanical self-repression, and forget to ask the follow-up question: What does it constrain us from? It constrains us from precisely the behaviour that undermines our freedom as the capacity to act on reason or the ability to act autonomously. For this, two forms of constraints are necessary: internal, in the form of ethical duties, and external, in the form of legal duties. Therefore, freedom is constructed from these rules: the categorical imperative and the universal principle of right. There is no freedom outside these normative constructions; looking for freedom outside the law is to have misunderstood freedom: it is like looking for friends outside friendships. Friendship and its duties emerge from being part of a φιλία relationship between friends. One would look in vain for friendship outside *this* relationship. Friendship emerges by entering this relationship, and it exists only if the relationship exists. To keep the relationship, one must avoid at any cost forms of behaviour that undermine it, that are not sanctioned by friendship, even if one ultimately wants to save the friendship. Only the spear that caused the wound can also heal the wound, as Hegel would have said. This, *mutatis mutandis*, applies to other forms of normative relationships: there are no legal duties and rights before entering the legal sphere, and thus no political freedom.

the law creates the freedom we seek. Freedom is not a mere idea or a value to be promoted, as is the case in, for example, Guyer (2002, 26), Pogge (2002), Alexy (2020), Waldron (1996), Ripstein (2009), Byrd and Hruschka (2010), where the law is reduced to an instrument for promoting freedom, peace, legal certainty, security from interference or repairing the defects of a state of nature such as unilateralism, lack of enforcement and indeterminacy. Freedom as independence concerns what it means to be free among a multitude of people whose choices and actions may obstruct one another. It is not possible to conceive of this freedom independently of the assurances given by a public legal order; that is, it is not possible to *think of* freedom for a multitude of persons in space without *thinking of* the rule of law as a system of positively enforced individual rights (Rostbøll 2019, 62). Seeking freedom outside the law is like gambling with freedom itself because "the consistent exercise of the right to freedom by a plurality of persons cannot be conceived apart from a public legal order" (Ripstein 2009, 9). Therefore, the law makes one free because it is the only condition under which universal external free choice is possible (Capps and Rivers 2018, 268).

From this deontic insight, it logically follows that disobedience of law is a morally grave matter. *Prima facie,* there is no right to disobedience if the purpose of disobeying the law is not justice or freedom. If there is no freedom and justice outside the law, then it is not possible to act justly by breaking the law. Law creates freedom by following the moral constraints, so to depart from the law in order to rectify injustice is, as Kant argues, "self-contradictory" (Kant, 6: 320). Justice is achieved only in civil conditions that require an authority to legislate and adjudicate matters of *in*justice. Taking the law into our own hands would be equivalent to taking justice into our hands and thus, in that very moment *exiting* justice, acting as if the civil condition did not exist. The failure to recognise and accept the authority of the legislature and judiciary, which has the right to make and adjudicate the laws, is a failure to recognise the absolute necessity and the validity of the lawful condition[149].

[149] It is for this reason, I think, Kant grants any form of government political legitimacy as we will see below. There is no government without legitimacy because, as an authority, it is a necessary component of the constitution of the rightful condition and thus of justice and freedom.

Taking the law into our hands is thus never justified because it means, at the same time, imposing our private will on the rest of the people. It is, therefore, an attempt at domination (Tamara 2020). Domination, however, is precisely the opposite of justice, and by entering relations of domination, one eradicates conditions of justice secured by law, as I argued in the second chapter. Law, just like morality, is constitutive of justice and freedom. It goes into making freedom possible. Its task is not to control agents' actions but to make freedom as nondomination possible. It also makes it possible to hold one another accountable: In the absence of law, which provides the framework and the contours of what we expect from one another, in any case of disagreement, one's judgment inevitably comes into conflict with the judgments of others. This is because the agent defies the equality of freedom and decides the matter unilaterally for all others. Therefore, there must be law if the citizens are to be able to play the 'game of right'. Authority serves the same function the umpire plays in a baseball game: "because the umpire is not a player, no player is subject to the authority of any other player" (Koltonski 2021b, 300).

If there is hope in justifying disobedience to law, the legality of the 'laws' that cannot be morally justified must be repudiated. What does it mean to forfeit legality? It means this: If society cannot give disobedient agents a reason why they ought to obey the law that disrespects and does not recognise their moral standing as equal to all others, then one cannot rationally accept that as law. If the law is freedom, but no freedom emerges from the law, then the law is suspected not to be what it claims to be. In cases like these, a justification that the legal order and security depend on their obedience is incompatible with their moral standing. Obedience is a sign of respect for the law, but one cannot respect a law that offends one's integrity. This cannot be a law, so it should not be a law. As such, it deserves neither respect nor obedience. The disobedient agent, of course, ought to make her stance public to draw attention to the act of disregarding the positive law and *demanding*, not giving, an explanation as to why a law that treats her unequally should be obeyed! What does she owe the society that she should sacrifice her moral integrity for it? Why should she accept to be dominated when the very existence of law signifies and gives reality to the twin ideals of freedom and equality?

There must surely be a reason why society is willing to subordinate and dominate some of its members. If this is what the law entails, then society owes her an explanation, not the other way round, as to why she must obey the law.

4.5. Should we obey the unjust law?

We remember from chapter one the legal positivist argument that law is independent of justice and that unjust laws are still laws. Indeed, all legal schools, from positivism to natural law theories, accept the position as self-evident. For Aquinas, tyrannical law "strives to make citizens good inasmuch as it partakes of the nature of law" (Aquinas, 2014, 634).[150] Finnis, similarly affirming the position of the Natural Law tradition, writes:

> Far from 'den[ying] legal validity to iniquitous rules', the tradition explicitly (by speaking of 'unjust laws') accords to iniquitous rules legal validity, whether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules, or on both these grounds and in both these senses. The tradition goes so far as to say that there may be an obligation to conform to some such unjust laws in order to uphold respect for the legal system as a whole. (Finnis, 2011, 365)

Gustav Radbruch likewise argues that injustice as such is not a reason to disobey the law:

> The positive law, secured by legislation and power, takes precedence *even when its content is unjust and fails to benefit the people*, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks

[150] "A tyrannical law, since it is not in accord with reason, is not a law, absolutely speaking. Rather, it is a perversion of law. And yet such a law strives to make citizens good inasmuch as it partakes of the nature of law. For it only partakes of the nature of law insofar as it is a ruler's dictate for his subjects to strive to make them duly obedient, that is, to make them good in relation to such a regime, not absolutely good" (Aquinas 2014, 634).

> completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law. (Radbruch, 1946, 7).

Kant also does not accept any form of disobedience to the law simply because it is unjust:

> If a human being values the right of humanity as the highest priority then he would rather endure all tyranny than defy it. A people will never be in complete agreement; even then they would be permitted only to say, "We will not obey you." Thus only a few are able to take up arms and they have no right to take up arms against the state and the others, in fact often a monarch is led to tyranny this way. The rebellion brings about a *status naturalis* which is *bellum omnium contra omnes* (a war of all against all). Thus there must be passive obedience if there is to be a lasting form of government. In the greatest tyranny there is still some justice (Kant, 27:1392).

MacCormick, who is generally sympathetic to non-positive doctrines of legal theories, in no uncertain terms claims that unjust laws remain laws:

> There can indeed be unjust laws, and what is alarming about this is that they are perfectly genuine laws, upheld and enforced through the coercive power of the state. 'An unjust law is a corruption of law' – yes, but it is real law that is corrupted (MacCormick 2007, 271).[151]

This seems to be the undisputed doctrine between all schools of legal thought, whether positivist or non-positivist, that an unjust law is a law. Law should embody and express justice, and a law that does not incorporate justice is a law that *ought not to exist*, but *it is nonetheless still a law*. It is *an unjust law*. Injustice does not render the law a non-law. Justice is not a criterion of the validity of the law, so the fact that a law is unjust, for example, explicitly discriminates against certain groups of people, e.g., homosexuals, is not a reason to deny its status as law. According to these schools, if a law discriminates against a group of people, the proper response is not to deny that this

[151] See also (Dickson 2009, 161-183).

is a law but to note that it is an *unjust* law and then perhaps work to change it. Moreover, the court and the police will be *justified* in applying that law. Justice and law belong thus to two different registers (Sadurski 1985): justice is a moral ideal, whereas law is something issued by authority.

One may regret that a law is unjust and may want to change it, but the right way to change it is to ascribe to it the reality it has. The fact that we want to change the law recognises its reality *as* a law. One would not change a non-law, and one cannot disobey a non-law. The discourse about disobedience makes sense only because unjust laws are treated and recognised as laws. Without such recognition, the discourse and practice of disobedience would be incoherent. It would assert the existence of the law whose status it denies as law. For a law to be disobeyed, its reality as a law must be acknowledged.[152]

This, however, is not the only way to understand the relationship between law and justice. I have already made the case in chapter three that at least some laws forfeit their legality and cease to be laws. Nevertheless, we can accept the *institutional reality* of the law and yet deny its *moral validity*. A law may indeed exist and be enforced by the state, but from a moral perspective, which is the perspective of the law, it may nonetheless not be a law. This ought to be so not only because, as this thesis argues, the law is fundamentally a moral entity but also because the reason for disobeying it must be internal to the law. Only if justice is internal to the law can civil disobedience be justified morally. If justice, as the morality of law, remains external to the law, its position is not different from any other evaluation that concerns private interests. One can argue, for example, that the law is economically imprudent and must be changed. The question of justification is always: whose economic interests are considered in this judgment?

If we treat justice as an external evaluation standard, the same objection can be raised against those who disobey the law because of some alleged injustice. The fact that the law is unjust appears then to be a matter of perspective: some people claim that it

[152] For a contrary view see Soper (2007) Fuller (1969) and Beever (2021, Ch. 16).

discriminates against them and would like to change the law. Nothing, however, hinges on the description of the law as unjust that overrides other considerations. Assume that we accept those people have a reason to disobey the law, as it does not give their interests sufficient weight. Why should those who benefit from such a law consider the perspective of justice to be weightier than their perspective that aligns with the unjust law? This would be a reasonable objection to the claim that the law is unjust. It is like saying the law is imprudent, stupid, or harmful to their material interests. The evaluation criteria remain external to the law, and because of that, the authority may dismiss the objection as immaterial or not weighty enough to change the law. For example, a law can be economically imprudent, but this is a matter of perspective. Even if one accepts that law is economically imprudent, it does not change the fact that it remains the law. The question is: why should justice be any different? Can an authority justifiably and without undermining its own legitimacy respond by claiming that it is unfortunate that you are treated unjustly? Regardless, other concerns require that you be treated unjustly. If justice is simply another reason that ought to be weighed against other considerations, then the authority is justified in adopting this perspective.

I have two reasons for departing from this perspective and for arguing that justice is not an external criterion of evaluation but an internal criterion of the law's legitimacy, if not its validity. To begin with, injustice is a matter of how citizens are *treated* by the state (Forst 2014, 98). It is a matter of *dignity*. Furthermore, and secondly, justice is a matter of *morality*, and morality holds categorically and absolutely. If I describe the law as economically unsound, I may be correct, but someone else may have a different opinion. If, however, I describe the law as unjust in Forst's sense, I am saying something about how the law *as* law *ought not to be*. I do not say that my interests are not protected; I do say that such a rule cannot occupy the place of law, that it stands in contradiction to its inherent principle, that how it affects me as a moral person and the treatment it accords me is not in accordance with the requirements of the law that everyone is treated equally by the law. These are not just external reasons that can be justifiably disregarded without the law losing its legitimacy and becoming indistinguishable from a gunman situation writ large, even though prudential reasons may counsel against such dismissal.

When the law is unjust, particularly to an extreme degree, it wrongs not only the interests of those against whom it discriminates. It wrongs the dignity and legal status of members of the same juridical condition. It causes moral injury. In other words, while one can accept, though grudgingly perhaps, that one must act contrary to one's self-interest, one cannot accept that one surrenders one's *moral standing* to the interests of others.[153] The two claims are not equivalent and cannot be compared in strength to each other. The law does not bind because it is valid in the legal positivist sense; it binds because it is legitimate and morally acceptable.[154]

4.6. Two pictures of justice

I have argued that unjust law, in Forst's sense, is substantively different from an economically imprudent law. An economically imprudent law is fundamentally different from an unjust law. Economics remains *external* to the law: the law must respond and incorporate economic reasons, but its necessity is conditional on the context where the law will be applied. Economic reasons will be dominant in specific contexts, and other reasons will be predominant in others. There is nothing mysterious about the way the law incorporates external reasons. Unlike economics, justice is internal. Whatever law the authorities make, they must consider moral reasons as they make the law, just as the judges must consider moral reasons while interpreting the law.

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[153] That authority can force me to abide by that law is not an argument for the validity of the law but speaks against it.

[154] Validity is a matter of justifying or grounding the law. But no rule can be justified simply by referring to its procedures because then we would not be able to reconcile the authority of the law with the moral authority of the agent to make her own decision required by the moral law. Freedom and responsibility require that the agent makes her own decisions about her actions. Otherwise, they will *not* be her actions, and consequently, she could not be held responsible for her actions. If this is the case, then either the authority of the law or the authority of the moral agent will be undermined. However, the law can have no authority unless its decision accords with a recognitiuon that the agent *could* make it, although she may choose not to make it. This is the *minimal* condition of the validity of the law. But this is a substantive, not procedural, claim. Hence, the legal positivist claim that law is valid regardless of its content and outcome, legal norms need to be understood as 'closed boxes' (Priel 2011, 9), has to be rejected as lacking sufficient justification.
Legal validity is necessary to recognise the law as law, but it is insufficient without moral validity. When the two are combined, we have an adequately justified law to which moral agents must submit as citizens. We must also bear in mind that modern legal positivism departs substantively from the classical legal positivism of Hobbes, Bentham, Mill and Kant. Their positivism is tied to a metaphysical worldview about the place of human beings in society as moral agents. They saw theorising about law as part of theorising about morals and politics. For interesting discussions about the differences between classical and modern legal positivism, see Beever (2013, 2021) and Priel (2005, 2011, 2015).

However, in non-ideal conditions, even just laws can give rise to injustice. Sadurski (1985) discusses the Biblical parable of the landowner who hires workers to work in his vineyard. The landowner goes out early one morning to hire labourers for his vineyard, and after agreeing to pay them the usual day's wage, he sets them off to work. He repeats the action of going out to hire labourers at noon, afternoon and one hour before sunset. The workers are paid the same amount at the end of the workday. This leads those early workers "who have sweated the whole day long in the blazing sun" to complain about receiving the same wage. The landowner replies: "My friend, I am not being unfair to you. You agreed on the usual wage for the day, did you not? Take your pay and go home. I choose to pay the last man the same as you. Surely I am free to do what I like with my own money. Why be jealous because I am kind? Thus will the last be first, and the first last" (Sadurski 1985, 33).

Sadurski comments that here we have a case of an action that is both legally just (conforming to the rules of the law) and socially unjust (the distributive quality of those rules is unjust). The owner held his part of the bargain (contract). Yet, the complaint of the early workers was not legal but moral: They have got their due in the legal sense, and yet they feel morally wronged because, as compared with latecomers, their contribution was not reflected in their share of the total benefit distributed (Sadurski 1985, 34). Sadurski is correct to say that the owner's action was legal (assuming that was the law of the day) and unjust (on a distributive conception of justice). However, it was not unjust that the landowner deliberately picked them for discrimination,[155] as Sadurski's comment suggests when he calls the early-comers Blacks, while those who only worked one hour, Whites.[156] There is another fundamental aspect of justice whose basic question is not what you have but *how you are treated* (Forst 2014, 20).[157]

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[155] The selection was a matter of accident as the early workers could have easily been the late workers.

[156] "Let us call, for brevity, those workers who worked the whole day, Blacks, and those who worked merely one hour, Whites" (Sadurski 1985, 33).

[157] "The basic impulse that opposes injustice is not primarily one of wanting something, or more of something, but is instead that of not wanting to be dominated, harassed, or overruled in one's claim to a *basic right to justification*" (Forst 2014, 22).

There are two pictures of justice: distributive justice and justice as a right to justification or nondomination. Domination is understood as "rule 'without justification' and it is assumed that a just social order is one to which free and equal persons could give their assent" (Forst 2014, 34). According to the first distributive aspect, the workers' pay is distributed 'unjustly'. I make no claim here that law captures justice entirely or that all injustice can be corrected by law. Some forms of injustice are inevitable, considering the unequal distribution of power, which law cannot rectify. However, it is not a social versus legal justice question because legal justice is social or relational justice in the moral conception of law.

The failure to differentiate between justice in the distributive sense and justice that is about affirming the equal dignity of workers as entitled to some form of compensation for their work, thus a legal recognition, leads to confusions of the sort that we see all over legal debates about whether a just law is a law.[158] The distribution of wages is undoubtedly arbitrary[159] and gives a cause for complaint, but not for disobedience, as the workers voluntarily accepted the terms of employment. However, on the presupposition that the landowner is the law, he did not intentionally discriminate against the early-morning workers because they happen to be early-morning workers. From the parable, it seems clear that he hired people standing there, waiting to be hired by someone: "Why are you standing about like this all day without nothing to do?" "Because no one has hired us", they replied; so he told them, "Go and join the others in the vineyard" (Sadurski 1985, 33).

4.7. The possibility of reform

[158] The failure to distinguish between the two senses of justice necessarily leads to confusion about whether an unjust law is a law. One must always clarify in which sense justice is being used here because, although in both senses it requires some corrective action (either through legislative or judicial corrective interpretation), it is only in the sense of how one is treated as a human being that an unjust law loses its legality. Of course, distributive injustice can result from the injustice of how one is treated. In that case, distributive injustice functions as a symptom of the more profound injustice. In that case, the law also forfeits its legality. But this is not always the case, so we must keep them sharply separate.

[159] This is generally the condition under Capitalism.

The same failure to differentiate between the two senses of justice is evident in Flikschuh's reading of legitimacy and justice in Kant. In her critique of Korsgaard (2008), she argued that Kant sharply distinguishes between legitimacy and justice. A state can, according to Flikschuh, be legitimate but unjust, but the opposite does not follow. An illegitimate state cannot be just or unjust. Justice is a function of the legitimacy of the state.

> For Kant, most existing states are legitimate yet more or less unjust. The legitimacy in our existing state is grounded in our *a priori* duty to enter in the civil condition with one another. The degree to which a given state is just is a function of the extent to which its public law-making accords with the idea of the general united will. Logically as well as morally, the possibility of a state becoming more just depends on its subjects' acknowledging its basic legitimacy. […] So there can be legitimacy without justice, but there can be no justice without legitimacy (Flikschuh 2008, 139).

I agree with Flikschuh's assessment that there can be no justice without legitimacy. However, it does not follow that a state can attain legitimacy without justice. As Flikschuh is aware, justice is a scalar concept: a law can be more or less just, while legitimacy is non-scalar: a law is *either* legitimate *or* illegitimate. Legitimacy and justice thus differ modally. For all that, however, *legitimacy cannot exist without justice.* For the simple reason that the transition into a civil state is justified not on legitimacy but on the grounds of justice: *the state is a requirement of justice.* One cannot request or demand the institution of a state because of legitimacy; but for a state to be a state, to have the opportunity to claim legitimacy, it must claim to uphold justice. A state that claims legitimacy while disregarding any relation or imperative of justice is an unlikely entity, a contradiction. Such a state cannot be a legitimate state. We cannot wholly conceptually separate legitimacy from justice as, in such cases, justice and legitimacy would be forfeited.

There is another reason why legitimacy and justice cannot be separated as Flikschuh separates them. Flikschuh is making an argument against Korsgaard, who argues that sometimes, despite the legitimacy of the state, a good or virtuous citizen must make the hard decision of taking the law into her own hands, even though she cannot legally or

morally justify her decision (Korsgaard 2008, 233-261). The revolution's success will retroactively justify her decision, but she will be tried as a common criminal and punished accordingly if the revolution fails. I do not think Korsgaard gets it right, as the virtuous citizen's decision to disobey the law must have moral legitimacy. Nevertheless, Korsgaard does not argue that we should – in Kantian terms – prioritise duties of virtue over those of right or that the *bindingness* of the moral law is up to us so that we can unbind ourselves when things get tough. Flikschuh's argument, perhaps for rhetorical purposes to prove a point, is inflated; but it misrepresents both Korsgaard and the relationship between legitimacy and justice. Any discontinuity between legitimacy and justice would not only render all kinds of governments legitimate,[160] an argument which also Korsgaard makes for another purpose, but would considerably weaken the possibility of reform, to which both Kant and Flikschuh subscribe.

One can rightfully, and thus unconditionally, demand that the state reform itself and abstain from further injustice only if justice is already a condition of its legitimacy. A doctrine that argues that any state, regardless of its justice record, is legitimate has no *obligation* to reform-though it might have prudential reasons to consider reform as it has prudential reasons to consider other non-moral reasons-because reform remains not an internal, constitutive standard, but an external, non-constitutive aim. Reform is only obligatory because the legitimacy of a state depends on how well it fulfils the moral duty of justice. Because Flikschuh, but not necessarily Kant (as what is being contested here between Korsgaard and Flikschuh is precisely what Kant's view is),[161] separates justice from legitimacy so sharply, she also undermines the project she defends, as it is not possible to reform a government without holding it responsible for the injustice of its laws.

An argument can be made that Kant defends a similar position to the one defended here. He argues, for example, that we cannot think that the sovereign wants to inflict evil onto his subjects. Instead, we must assume that the sovereign who makes laws thinks of the

[160] A claim equivalent to the legal positivist thesis that all law is valid regardless of its moral content.
[161] In a moment, I will discuss other views that present diametrically different interpretations of Kant's view.

interests of his subjects. “A nonrecalcitrant subject”, says Kant, “must be able to assume that his ruler does not *want* to do him any wrong” (Kant, 8:304;[162] Flikschuh 2008, 149).

Why is this an argument for both justice and legitimacy conjointly? Because it shows that Kant was not arguing that the two are separate the way Flikschuh maintains. As a citizen, I must assume that the sovereign does not want to do *me* wrong. The sovereign’s legitimacy depends on her subjects being secure that no *intentional* wrong will come to them from their ruler and that the sovereign will treat them as they deserve to be treated, viz. justly. Interestingly, Flikschuh uses the exact quote to argue that the relationship between the ruler and her subject is not one of antagonism but one of “common venture”. It is correct that Kant’s argument indeed entails that much, but this is not an argument that legitimacy and justice are two completely different categories.[163]

For the state to reform itself, it must contain the principle of justice within itself. For a state to possess legitimacy, it must fulfil the conditions of legitimacy. Since justice is one of its conditions, no state can possess legitimacy without justice. To what extent a state should have justice before it can claim (or lose its) legitimacy is a question that rests on a misunderstanding and confusion of the two senses of justice. It must necessarily possess Forst’s sense of justice, while there can be latitude in the distributive sense. So, we must disregard as an aberration any justification of the legitimacy of a state without the incorporation of justice. If, by this standard, Kant argues that justice is not a condition of legitimacy, then Kant would be wrong, and his condemnation of all resistance would have failed to ground the alternative of reform. However, there is a profound reason to believe that Kant accepts that justice is a constitutive feature of legitimacy. I will address Kant’s point below; for now, it is sufficient to merely declare

[162] The full quote reads like this: “A nonrecalcitrant subject must be able to assume that his ruler does not *want* to do him any wrong. Accordingly, since every human being still has his inalienable rights, which he can never give up even if he wanted to and about which he is authorized to judge for himself, while, on that assumption, the wrong that in his opinion is done to him occurs only from the supreme power’s error or ignorance of certain consequences of his laws, a citizen must have, with the approval of the ruler himself, the authorization to make known publicly his opinions about what it is in the ruler’s arrangements that seem to him to be a wrong against the common wealth” (Kant, 8:304).

[163] This is a standard view even among the writers of the republican tradition. Bellamy (2019) defends a similar idea. For a critique of Bellamy’s theory, see Gädeke (2022).

that the state exists because of the duty of justice. It would be self-contradictory to make justice the ground of the state but then withdraw justice from the condition of its legitimacy. Legitimacy, argues Amanda Greene, who defines it as "quality assent" (2019, 71),[164] is worth preserving even without the full measure of justice (Greene 2019, 84). Still, some measure of justice must nevertheless be presupposed as a *sine qua non* condition of its existence.[165]

4.8. Legitimacy as a requirement of justice

Not all Kant scholars agree with Korsgaard (2008), Flikschuh 2008, and Waldron (1996) that legitimacy is absolute (Wood 2002; Ripstein 2009; Varden 2008, 2010, 2020; Rostbøll 2019; Alexy 2019; Whelan 2021).[166]Nevertheless, there is a reason why legitimacy must be prioritised over distributive justice concerns. Without legitimacy, the state would be indistinguishable from anyone with sufficient power to impose his will. Moreover, because of the concern for the legitimacy of the state, Kant puts up quite stringent conditions under which one might be justified in disobeying an unjust law.

By *argumentative necessity*, this follows directly from the requirement of legitimacy; Kant denies any right to resistance. We certainly have a duty to eliminate all relations of domination, but how we discharge this duty depends on whether we are in the state of nature *or* the civil state. Civil status obligates us to use civil institutions to address

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[164] Suchman (1995, 574) defines legitimacy as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions".

[165] Bernard Williams spoke of a *Basic Legitimation Demand* as a primordial political question. Williams argued that a political order differs from an 'unmediated coercive' order. It seeks to satisfy the 'Basic Legitimation Demand' (BLD) that every legitimate state must satisfy if it is to show that it wields authority over those subject to its rule. To meet that demand, the state 'has to be able to offer a justification of its power to each subject whom by its own lights it can rightfully coerce under its laws and institutions' (Dyzenhaus, 2021).

[166] Regarding basically legitimate states, commentators argue that when one deems specific laws illegitimate, one's duty to achieve freedom is discharged once one exhausts legally permissible avenues of reform (Varden 2020; Ripstein 2009). Even if the sovereign is unwilling to alter putatively illegitimate laws, pursuing illegal action to force a change is impermissible; one would be attempting to unilaterally coerce others to conform to one's private judgments regarding the conditions of freedom (Kant, 6:320; Kant, 8:304). This point notwithstanding, it remains the case that individuals have a duty to eliminate relations of domination found in the state of nature (Kant, 6:307). Importantly, Kant defines the state of nature as the absence of external freedom (Kant, 6:306; Whelan 2021, 3).

the problems of domination. In refusing to use civil institutions, we declare ourselves outside the civil condition, giving the state the right to coerce us back into the civil condition. If there are civil institutions, and for as long as there is a civil condition, we are not free to use non-civil means to correct civil institutions. This would defeat the purpose of the institutions. Considering all this, it is reasonable to argue that *any form of behaviour that does not conform to the civil condition is part of the state of nature*. If the state of nature is the state of domination, then the individuals who do not conform to the civil condition would be acting as dominators to others.

However, the juridical status regulates not only the behaviour of citizens but also that of the state. The state is bound by the same rules and ought to act compatibly with its status. Its legitimacy depends on the rule of law in maintaining a juridical condition. In acting other than what the juridical condition requires, the state declares itself to be in a state of nature. In this respect, the state is not different from the citizen who, in acting illegally, declares herself to violate the law and thus to be in the state of nature regarding that law. These are considerations that matter because of the moral status of the legal condition. The moral status of human beings precludes certain forms of behaviour towards them. The moral status of the civil state also prevents specific forms of behaviour as wrong in the juridical condition.

Not all Kantian scholars are absolutist about legitimacy, however. Some argue that the legitimacy of law is conditional on its realising external freedom. Otherwise, *right* becomes indistinguishable from *might* (Varden 2020, 289). Whelan (2021), among others and most recently, has developed the argument that according to freedom as independence (Kant, 6:230), laws that are not compatible with freedom as independence are illegitimate and thus give ground not only for disobedience but also for active fighting to institute the rightful condition. The duty to leave the state of nature obligates individuals to use "*whatever* force is necessary" to achieve freedom. This, however, raises the problem of private individuals acting as sovereigns regarding the choices of others, thus licencing acts and relations of domination. Kant cautioned against disobedience to avoid such acts of domination, as only judgments of the General Will

codified as laws are sufficiently impartial to prevent domination. Kant's reasoning seems to be that even if specific laws are incompatible with the principle of freedom and right, disobedience is nevertheless wrong, as it subjects others to relations of private dominations (Koltonski 2021a). Not so, argues Whelan:

> The possibility of clearly illegitimate directives suggests a distinction between individual judgments that reflect a private will and those judgments that retain a public character as they are judgments all Kantians should assent to. The import of this argument is that in cases where sanctioned procedures of legislative reform have failed to alter clearly illegitimate laws, *employing non-legal or illegal means to achieve change does not amount to domination*. Such conduct is non-dominating as the verdict of illegitimacy does not rest on private deliberation regarding the merits of the directive and so it does not subject anyone to private convictions about the basis of freedom (Whelan 2021, 12).

Perhaps using illegal means to change a law does not amount to domination, though this is doubtful. I agree with Whelan that one must develop an account of disobedience to laws based on the principle of freedom as independence. As I argued in chapter two, the realisation of freedom as independence is why we must leave the state of nature. Nevertheless, Whelan's account relies on an illicit argumentative move: from the fact that we ought to leave the state of nature as a state of domination (Tamara 2020), it does not follow that the same argument can be used for countering illegitimate laws in the civil condition. A juridical condition is already in place, and unless the state, as its constitutive organ, has wholly forfeited its legitimacy, it retains its juridical status. As I argued above, the state loses its legitimacy when it severs all its links with justice or freedom as nondomination. Some states lose their legitimacy by reverting to a state of nature where the law is nothing but a tool of domination of one group over another. In that case, the laws of the state of nature apply. However, one cannot justifiably disregard the juridical condition as the condition of the legitimation of laws because we are justified in using all means necessary to change them in the state of nature.

My disagreement with Whelan is not about disobedience to illegitimate laws but whether the fact that a law is unlawful gives us sufficient reason to use all the necessary means to change this law. I am sceptical and argue that giving a blank cheque to citizens

to disobey illegitimate laws is what exacerbates, not eliminates, the relations of domination. I am not convinced that Whelan provides a sound argument.

> In judging a state of nature to exist, one is claiming that the current exercise of political coercion is incompatible with external freedom. In turn, the duty to leave the state of nature requires all to eradicate the threat to freedom, where this obligation may justify violent resistance aimed at overthrowing the regime (Whelan 2021).[167]

There are cases – e.g. a pandemic – where the government is obligated to restrict external freedom to protect its citizens' health. Perhaps this cannot be justified by the principle of freedom as nondomination. Still, it would be a stretch to argue that the citizens may use violent resistance to overthrow the regime. This may not be an example when one considers the legitimacy of disobedience to law, but it shows what can go wrong with this argument.

We may surmise that Kant is reluctant to consider any departure of the law from its right track because two wrongs do not make a right. Just like the maxim "might makes right" is contrary to right, the maxim "two wrongs make a right" is also contrary to right. Suppose the law departs from the principle of right and freedom as nondomination, and the legal agents use any means necessary in order to rectify the law. In that case, they seek to correct a wrong by committing another wrong. Even if, for the sake of argument, we accept that using illegal means does not necessarily amount

[167] Klaus Vieweg argues that Hegel, building on Kant's idea of "second coercion" or "hindering of a hindrance to freedom" (Kant, 6:231) and on a right of necessity (*Notrecht*) which is based on the right to self-preservation, develops and defends a view that is opposed to Kant's prohibition of resistance. For Hegel, there is a right of resistance against violations of the principle of modern freedom. "The foundation for the legitimacy of a political right of necessity consists in the right to oppose the first unlawful coercion with a second coercion. The legitimacy of the second coercion, and this has been hitherto neglected, founds the inversive right of resistance" (Vieweg 2018, 161). There, therefore, "exists a right to resistance against the violations of the principle of freedom, of the individual freedom of individuals in all their dimensions, a right to correct the shortcomings of modern society, a right to indignation at regressions from modern principle of right; that is, the right to revolt against recently established totalitarian systems, against ochlocratic and oligarchic forms, and so on. Such a right does not necessarily have to be explicitly expressed; it follows of necessity from Hegel's understanding of right and freedom" (Vieweg 2018, 167). Although Whelan is not drawing on Hegel, he employs the same Hegelian principle of interpretation of right and freedom. Using the principle of right with its second coercion and the principle of freedom, one can consistently, as did Hegel, argue that resistance, to the extent that it wants to restore the rule of law, is not only permissible but that we have a right to such resistance. Of course, Kant knows that, but he has other concerns that make him reluctant to draw the same conclusion that Hegel, Vieweg, and Whelan draw. I think Kant has some weighty reasons that must not be dismissed lightly.

to domination, it nevertheless amounts to a distinct wrong. When Kant categorically refused to justify illegal resistance to law, he knew what freedom as nondomination requires. Nevertheless, Kant never disavows his uncompromising stance on prohibiting all forms of resistance to so-called illegitimate laws.

It is worth deliberating on Kant's uncompromising stance, mainly since neither the universal principle of right[168] nor the principle of innate freedom[169] refer to the civil state or the natural condition. As *a priori* principles of reason, they are neither bound nor conditioned by external circumstances. Taken in their generality, one can, or indeed, one must, read them as applying to all conditions, civil or natural, equally. And they do; yet in the natural conditions, they yield only *provisional* rights, whereas, in civil conditions, they yield *conclusive* rights. What defines an action as right or what constitutes freedom is the same in both situations: the same act cannot be right in civil and wrong in natural conditions. Therefore, one would be right to assume that a straightforward reading of these principles in their generality would also be the best reading.

However, this is not how Kant reads them: For the story of right and freedom gets complicated, depending on where these two principles are applied: Because the state of nature is devoid of justice, it needs an authority to render a verdict having a rightful force, and people may impel each other by force to enter the civil condition (Kant, 6:312). The natural condition is where the use of force is legitimate as it is the only way to protect provisional rights. Nevertheless, because of the problem of assurance and the problem of unilateralism, one cannot be sure, in the absence of law, that the action coexists with everyone's freedom. If we could be sure, we would not need a law, and the distinction between the state of nature and the civil state would be meaningless. So, while the principles remain the same, only in the civil condition can freedom and rights

[168] "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law" (Kant, 6:230).
[169] "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every human being by virtue of his humanity" (Kant, 6:237).

be defined omnilaterally, thus avoiding the inherent problem of violence and domination in the natural condition.[170]

There is a qualitative difference between the juridical and natural conditions, which consists of the natural condition being a condition *devoid of justice* (*status iustitia vacuus*)[171] and thus of freedom as nondomination. The principles of right and freedom exist, but neither rights nor freedom are possible outside the rightful condition. Freedom as independence is only possible through the institution of law, so the moment one steps out, one is already in the state of nature. Moreover, the problem of the state of nature is *the problem of unilateralism*, which is an unlawful form of dealing with legitimate disagreements. Because rights have not yet been established in the state of nature, "individuals don't know to what degree they wrong or dominate others by raising unilateral claims" (Tamara 2020, 99). The problem is not that private citizens cannot make correct public judgments. In such cases, the publicity of those judgments by appeal to standards of correctness and established rights can easily be ascertained and recognised as accurate. The criteria of generality and reciprocity ensure that a judgment satisfies the moral and public criteria of its correctness. By straightforwardly reading Kant's two principles, I know what freedom is and what right requires.

Nevertheless, a condition of having a civil state is that one must refrain from unilaterally deciding for others. Unilateralism is inevitable whenever one makes a judgment of right about others, and this is due to the inherent indeterminacy of right – people can reasonably disagree with each other about what right requires in specific conditions or

[170] "It is not experience from which we learn of the maxims of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not some deed that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it, and not to be dependent upon another's opinion about this" (Kant, 6:312).
[171] The state of nature, said Kant, is not a state of injustice but a state *devoid of justice* (*status iustitia vacuus*) in which "when rights are in *dispute* (*ius controversum*), there would be no judge competent to render a verdict having rightful force. Hence each may impel the other by force to leave this state and enter into a rightful condition; for although each can acquire something external by taking control of it or by contract in accordance with its *concepts of right*, this acquisition is still only *provisional* as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect" (Kant, 6:312).

regarding specific items: does the fruit of my tree hanging over your property belong to you or me? Do you have a right to prune the branches of my tree that hang over your property? Pallikkathayil (2010) has argued that even the contours of one's right to one's body are indeterminate. For example,

> would playing my music in your vicinity so loudly that it gives you a headache count as violating your right to your body? And … no matter how precisely rules are specified, the possibility of reasonable disagreement remains. Finally, one's right to one's body is also subject to a derivative indeterminacy problem stemming from the indeterminacy surrounding our property rights. Suppose that you and I are in the midst of a border dispute and I come over to what you regard as your land. If you have a property right to the land, you have the authorization to use force to defend your property right. But, whether or not you have a property right is just what is in dispute, and hence your right to use force and my rights to my body are similarly a matter of disagreement (Pallikkathayil 2010, 138).

However, as Rostbøll (2019, 64-65) argues, disagreement does not explain the need for law in Kant, for one can decide to leave disagreements unresolved or solve them by force. It is instead the right "not to be dependent upon another's opinion about [what is right and good]" (Kant, 6:312). Kant maintains that only after a public legal order has been established are subjects free from the dependence on the choices of others. Even if one can, purely epistemically, determine what is right and what is required of moral agents in relation to one another, there is the possibility that my choice remains dependent on the opinion of others. After all, there are different right ways to resolve a disagreement. Nonetheless, one ought to consider that right is analytically related to coercion, so if someone unilaterally determines the indeterminate right, one also acquires the right to coerce those who resist.[172] When a right is unilaterally determined,

[172] "Because on Kant's account a right to a thing includes the authorization to coerce, that we each have a right to our respective shells would mean, in part, that we each may use coercion against the other should that other try to take our shell. The problem is that in this situation you may have available more power to coerce me than I have to coerce you (or vice versa). If you do, your greater coercive power is a powerful incentive for me to respect your claim, but at the same time, your greater power means that you lack a similar incentive to respect my claim. You are thus able to secure your shell for yourself and against me while I am unable similarly to secure my shell for myself and against you. And so, were we both authorized by right to use coercion to defend our rights ourselves, this inequality of coercive power would make it such that only you can take advantage of this authorization: you can oblige me to respect your right to your shell in a way that I cannot in turn oblige you" (Koltonski 2021a, 190-191).

as in the state of nature where "each has its own right to do *what seems right and good to it*" (Kant, 6:312), then violence is inescapable, regardless of how "welldisposed and law-abiding human beings might be" (Kant, 6:312).

A straightforward interpretation of the universal principle of right does not guarantee the existence of rights because, unless one curbs violence, neither rights nor external freedom are secured and enjoyed. Moreover, as Koltonski has perspicuously remarked,

> when a person in a state of nature acts on her own responsible judgment of right, one that admits of responsible disagreement, she cannot help but claim that *she* is the mechanism for the authoritative resolution of any disputes arising from such disagreement and, consequently, that her judgment of what the conduct rules of right say decides what counts as right. This assertion of unilateral authority means that she cannot help but deny the equal freedom of others (Koltonski 2021b, 302; 2021a).

Therefore, it is not simply a matter of correctly interpretating of the universal principle of right but also understanding under what conditions right is realisable or enforceable. In unilateral declarations and decisions of right, one fails to act precisely as right requires, namely as equal to all others: to treat all people, particularly citizens, as free, equal, and independent people (Kant, 6:314). One lacks independence when the security of one's rights depends on others' unilateral choices (Pallikkathayil 2017, 44). One cannot do this in the sphere of right, even if one has a correct understanding of the principles of right and freedom, without claiming for oneself and one's judgment unilateral authority over fellow human beings: that one's judgment and will is unilaterally lawgiving for those with whom one interacts. By exercising the right to determine what right there is or what right requires, one denies others the same right, thus putting all others under the obligation to follow one's judgment. For example, a unilateral right to settle the indeterminacy of problems or adjudicate disputes would give one person authority over others. Hence such a right would be inconsistent with the equal freedom of all. When confronted with such a unilateral declaration, it is always legitimate to ask: on what grounds do you assume the right to decide for me?

In summary: What Kant is getting at when he does not simply offer a straightforward interpretation of the universal principle of right and the principle of freedom that would justify disobedience to unjust laws is that such decisions ultimately remain unilateral, hence inconsistent with the principles of freedom and equality. Kant's argument is a powerful warning, particularly to those who disobey the law because of reasons of right, against the presumption that some law is incompatible with right and with external freedom. Kant argues that the alternative of obedience to law is not a rightful condition where rights and freedom are secured but one where they stand under the threat of private unilateral impositions.[173]

However, this logic has its limits. Unlike Kant, I do not think that *every* case of disobedience challenges the whole system. So it is not the case that disobedience commits us to the position of usurping of the right of the authority to make law. We are generally capable of assuming the moral point of view of justice. We can make a judgment about a law that is not only incongruent with the decision of the authority but conclusively shows why that law ought not to exist.

The argument is as follows: Using criteria of moral evaluation, reciprocity and generality, we can publicly show and defend the view that a particular law or command is illegitimate, that it blatantly fails to constrain subjects impartially and reciprocally; and therefore, we are under no duty to obey this law because what cannot be justified

[173] There is a long-standing debate between statists and non-statists in Kant scholarship. In *Against the Kantian Statism*, Billy Christmas (2021) argues that it is possible to correctly determine the right answer to legal disputes without the need for authority. "When private judgment aligns with right, justice is done. It is of course true that subjecting another to one's judgment of right subjects them to one's will, but when one's will is coextensive with right, this subjection is no longer contrary to right. […] Agents of the civil condition are the same as agents of the state of nature; they are not presumed to be infallible or the mechanistic arm of the omnilateral will. […] Where there is an objective fact of the matter that is in principle available to all actors, it is possible for them to make correct interpretations and judgments of right, and therefore the unilateralism of that judgment is no longer a problem because it can be brought into alignment with right and be an act of justice. No departure from statelessness need take place for this to be so. So long as there is an objective standard of correctness, there is recourse in the case of faulty judgment and the possibility of right judgment". This is a false dilemma and has a sound Kantian solution. The best one of which I am aware of has been provided by Daniel Koltonski (2021a, 2021b) who argues, particularly against Enoch, that due to the very nature of right one cannot make such judgments as a private citizen without invoking claims of unilateralism.

publicly by using the criteria of generality and reciprocity cannot be considered legitimate. All subjects of the law can see that the law is illegitimate, even if they benefit from such a law. They may not want to change the law, but they cannot argue that it expresses the people's general will. This allows disobedience because the state cannot legitimately demand that we obey a law that does not represent the general will but only the aggregate will of the majority or some group of people. To determine whether the law expresses the general will or merely the will of some people, it must be subject to public scrutiny and open discussion. All legal means must be used to convince the authority that the law does not protect some people from domination or that it exposes them directly to the domination of others. Those disadvantaged by the law must seek to convince and persuade the authority to alter the law; but if they should fail to achieve their objective, all they can do is refuse to obey the law and publicly disobey it.

To recap, there is no legal right to disobey the law, even unjust law. However, I have left open the possibility that disobedience can be justified morally and that, in some instances, the agent is justified in breaking the law. I will later speak of the moral difference criterion, but first, I want to consider Joel T. Klein's (2021) defence of Kant's view against any form of resistance.

4.9. The extremist position

Joel T. Klein defends the thesis that Kant is a legal positivist,[174] and to that effect he subjects much of what Kant says to overinterpretation (Eco 1992). My aim is not to disprove the claim that Kant is a legal positivist but to reject some of Klein's claims on behalf of Kant. This is particularly important since we both agree that Kant did not permit any form of resistance to the law. Consider the following quote:

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[174] For Kant unjust law is still a law, though morally problematic, and this seems to suggest to some scholars (Klein 2021; Waldron 1996), though not to others (Rostbøll 2016, 66; Corradetti 2017, 413; Wood 2002, 6; Bertea 2019, Beever 2021), that Kant was a legal positivist. We must be cautious of not making too much of the positivity thesis as Kant is certainly not a positivist in the sense of the modern legal positivism tradition. He is closer to Hobbes' and Bentham's legal positivist tradition which saw theorizing about law as part of theorizing about morals and politics, which was a metaphysical inquiry about human nature, than Kelsen's and Hart's legal positivism which is completely post-metaphysical (Priel 2015; Beever 2021).

> Kant is stating the obligation to respect positive law, even when it cannot be understood as coming from practical reason, in the sense that the agent would rationally agree with it. Positive law implies exactly the situation in which we are under an obligation *to obey a law that we, as rational beings, are not able to consent to*. Thus, unjust law is still law, and we are obliged to obey it (Klein 2021, 83).

I find this interpretation difficult to understand. Two strong objections speak against it. First, Kant is known for his austere position on disobeying the law. Still, even in his most extreme positioning, there is no evidence that he ever held the view that we ought to obey what we as *rational* beings cannot consent to. This, arguably, could be the position of contemporary legal positivism. However, even that is not certain as we know that many positivists find no problem or inconsistency in recognising that wicked laws are laws, but we ought *not* to obey them (Hart 1961, 181-207, esp. 199-200 and 205-207). Others argue that there is no moral obligation to obey the law as such (Raz 1979, 233-249); still, others argue that law binds only occasionally, and "it binds least where morality is least in need of assistance of providing for a responsible course of action" (Reeves 2015, 266).

Second, there is an equivocation in the concepts of rationality and justice here: Is a law that we as rational beings cannot consent to unjust, or is an unjust law a law that we as rational beings are not able to consent to? One can accept the latter without accepting the former, as the former does not entail, and so cannot be derived from, the latter. We can rationally consent to unjust laws and thus are obligated to obey, which is not the case with a law that cannot be rationally consented to. It could be an evil law or a law that is simply absurd or demands the impossible. Thus, we cannot be obligated to obey it. In the following, I will only address an objection to the rational consent claim as I think the second claim can be dismissed as confusion.

Can Klein's interpretation of Kant be ascribed to Kant? Two reasons, which I think are decisive, show that such a view is foreign to Kant. The first one concerns the question of the *original contract* (*contractus originarius* or *pactum sociale*) and the question of consent. How do we understand a social contract when we have never signed any?

There is no historical evidence that such a contract has existed or that we have been part of a state of nature. The idea Kant wishes to communicate is not that it is a historical reality but an *idea of reason*.[175] The first thing that must be noted here is that this is an idea of *reason*, which, at the very least, must be interpreted as holding the (minimum) condition that whatever the social contract requires of us, it must be *minimally* compatible with reason, that is, it must be reasonable: it cannot be irrational, contrary to reason or beyond what reason can legitimately demand of us. Such a demand cannot be placed upon us, not in the name of the law nor the name of God. Whatever is required of us must be at the very least in accord with reason because any obligation we have is due to reason or to our understanding of it as required and justified by reason. That we should be under a duty to obey a law that we cannot possibly consent to rationally is an absurdity. But what does Kant say? He contends that a social contract is an idea of reason. As rational beings, we could all accept it as an idea to which we can rationally consent. If we could not rationally consent to it, we could not possibly be required to obey it because it could not be an idea of reason adequately understood.

The second argument comes from *Religion*. Kant's strict position on the obligation to obey the law needs no introduction or justification; nevertheless, it is more complicated than the claim that he is categorically and in all circumstances against disobedience. He says: "The proposition 'We ought to obey God rather than men,' means only that when human beings command something that is evil in itself (directly opposed to the ethical law), we may not, and ought not, obey them" (Kant, 6:100).[176] There are certain constraints beyond which not even God can make demands because such demands would be utterly capricious. Even in despotism, where there is law but no freedom

[175] "It is instead *only an idea* of reason, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will. For this is the touchstone of any public law's conformity with right. In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it (as, e.g., that a certain class of *subjects* should have the hereditary privilege of *ruling rank*), it is unjust; but if it is *only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent" (Kant, 8:297). However, the point that we should keep in mind is that if reason commands something, it is possible to be accepted. See Walla (2017, 318).

[176] In the *Metaphysics of Morals,* he reiterates the same point: "There is a categorical imperative, *Obey the authority who has power over you* (in whatever does not conflict with inner morality)" (Kant, 6:371-72).

(Kant, 7:330-331), the law must be rationally capable of being consented to. Even in the greatest dictatorship, there cannot be a law that commands torturing children for fun. The very concept of law implies a limit on the capricious behaviour of the despot. The sole fact that despotism requires a law shows that despotism seeks some form of legitimacy for itself. It can only achieve this by respecting, at the very least, some fundamental moral truisms and intuitions. Otherwise, it would collapse into barbarism, the condition of force without law and freedom (Kant, 7:330-331).

For Kant, the law is needed because it is the only way to introduce justice in a civil condition. Law provides 'service' to justice. Without law, there would be no justice. Without law, we would not know justice, and without justice, we would not know the law. This does not suggest the identity of law and justice, that law is justice or that justice is law without any remainder because both law and justice can come apart. Law can be perverted, and justice can be presented in the guise of injustice. This is a possibility, yet there is no other way to determine justice in civil conditions.

Kant's position is undoubtedly quite radical. I do not want to argue that we can soften or make it compatible with liberal attitudes to civil disobedience and, even less, with uncivil forms of disobedience. Kant's position was problematic for his own contemporaries as well. Since Kant made his views about the prohibition of the right to revolution known in his essay on *Theory and Practice* in 1793, it has baffled and surprised his followers. Ludwig Heinrich Jacob memorably wrote that "I cannot, however, imagine that he really means it that way. An unconditional suffering obedience [*leidender Gehorsam*] contradicts Kant's moral system through and through" (quoted from Maliks 2012, 648). However, none of the critiques deterred Kant's conviction that law commands absolutely[177]and that the subject must not disobey the law.[178]

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[177] "And this ban is *absolute,* so unconditional that even though that supreme power or its agent, the head of state, may have broken the original contract, even though in the subject's eyes he may have forfeited the right to legislate by empowering the government to rule tyrannically by sheer violence, even then the subject is allowed no resistance, no violent counteraction" (Kant, 7:299).

[178] According to Kant, the attributes of *citizens of a state* are: "lawful *freedom*, the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recognizing among the *people* any

Kant is argumentatively right; his conclusions follow his arguments' premises. If we accept those premises, then we cannot reject the conclusions. The premise is that remaining in the state of nature is wrong to the highest degree. Whatever threatens the juridical state is to be suppressed because if a state of nature were to become a reality, no rights could ever be secured against domination. Through its coercive laws, the state gives "equal assurance" (Kant, 6:307) to its subjects that imperfectly rational beings like us have good reason to obey the law: it is preferable to endure injustice than resist the law. There are no conclusive rights in the state of nature and no peaceful and legitimate way to resolve disputes and disagreements. The people must use the *freedom of the pen* as "the sole palladium" of their rights (Kant, 8:304) to express their discontent and grievances, but there cannot be a right to take the law into one's hands. People do not have the right to resist, though they have the right to criticise and propagate their views and discontent. Moreover, if people were permitted to fight the sovereign and disobey the law, "this way of doing it (adopted as a maxim), would make every rightful constitution insecure and introduce a condition of complete lawlessness (*status naturalis*), in which all rights cease, at least to have effect" (Kant, 8:301).[179]

Raz (1986b, 102) has argued that the worry of disorder is quite exaggerated and melodramatic,[180] but the melodrama does not detract from the sound principle underlying it. If one could resist the law anytime one disagrees with it, it is quite possible there would remain neither law nor civil condition. Arguably because we live in well-established systems of relatively just laws, where citizens' rights are respected and protected by the state, and the state does not frequently engage in clandestine behaviour that cannot be publicly acknowledged (we know from Wiki Leaks that our

superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other; and third, the attribute of civil *independence*, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people" (Kant, 6:314). It would have come as no surprise if Kant had concluded from this that civil disobedience to laws that one cannot give one's consent to is legitimate.

[179] "But this desperate leap (*salto mortale*) is of such a kind that, once the issue is not that of right but only of force, the people may also try out its own force and thus make every lawful constitution insecure" (Kant, 8:306).

[180] "But it is a melodramatic exaggeration to suppose that every breach of law endangers, by however small a degree, the survival of the government, or of law and order. Many acts of trespass, breaches of contracts, violations of copyright, and so on, have no implications one way or another for the stability of the government and the law" (Raz 1986, 102).

democratic states nevertheless do engage in illegal activities), Kant's views appear radically extreme. However, imagine a politically volatile situation where the citizens engage in their own private justice, frivolously disregard the law that inconveniences them or judge that the existing law is unjust and therefore ought not to be obeyed. This prospect would vindicate Kant's radical position. Of course, once Pandora's box is opened, there is no way to know the consequences.[181] Nevertheless, it is plausible to presume that they will not be conducive to rightful relations.[182]

I argued in the previous chapter that law could lose its legality when it creates the conditions of a *status naturalis*. Law then forfeits its right to command absolutely because it can no longer be considered law, and thus the subject is released from the obligation to obey it because there is no law to follow. Therefore, it is *null and void* (Kant, 8:305).[183] At this stage of Kant's argument, I would have expected to see him take a different direction because if the law is "null and void", such that a people cannot be its author and it is not to be regarded as the genuine will of the sovereign, then it follows that a people cannot be required or expected to obey that law. Indeed, in many passages where he speaks against all forms of resistance, Kant comes very close to the position Klein attributes to him. The reason why a subject of law is not permitted any resistance by way of countering force is that:

> In an already existing civil constitution the people's judgment to determine how the constitution should be administered is no longer valid. For suppose that the people can so judge, and indeed contrary to the judgment of the actual head of state; who is to decide on which side the right is? Neither can make the decision as judge in its own suit. Hence there would have to be another head above the head of state, that would decide between him and people; and this is self-contradictory (Kant, 8:300).

[181] Kant's justification is not consequentialist, so the negative consequences do not undermine Kant's position. His point is that disobedience is wrong because it cannot be squared with the moral obligation to obey the law.
[182] One can only think of the sorry state of the Arab Spring and its aftermath.
[183] "Thus the question is, for example: Can a law prescribing that a certain ecclesiastical constitution, once arranged, is to continue permanently, be regarded as issuing from the real will of the legislator (his intention)? then it will first be asked: *May* a people itself make it a law, that certain articles of faith and forms of external religion, once adopted are to remain forever? And so: *May* a people hinder itself, in its posterity, from making further progress in religious insight or from at some time correcting old errors? It then becomes clear that an original contract of the people that made this a law would in itself be null and void because it conflicts with the vocation and end of humanity; hence a law given about this is not to be regarded as the real will of the monarch, to whom counterrepresentations can accordingly be made" (Kant, 8:305).

Kant thus provides at least two arguments against disobedience: one is that justice requires that there be an impartial judge as no one can be a judge of their own case. However, Kant does not seem to ground the necessity of an impartial judge on the requirement of fairness but the logical principle of self-contradiction. A civil constitution thus, purely logically requires the existence of an authority that will conclusively settle matters of justice. This principle is supplemented with the second pragmatic principle that if people were to be their own judges, that would make every rightful constitution insecure (Kant, 8:301; 8:306).

These are reasonable considerations, but Kant himself has nevertheless restricted their scope by requiring a decree to be rationally acceptable. What people may not accept, the sovereign may not decree. This suggests that the ultimate standard by which the authority is to legislate and adjudicate is not up to authority itself but the principle that what *"a people cannot decree for itself, a legislator also cannot decree for a people*" (Kant, 8:304-305).[184] I think this is the constitutive limit of the legality or the lawfulness of the civil condition: authorities have discretion in legislating and adjudicating laws, but this discretion is limited by what people as moral subjects can accept.

Stated differently, an argument can be made that the authority can become the threat that undermines and erodes the civil condition. Such a threat obligates the subjects to law to prevent the downfall of the civil condition.[185] Citizens are morally obligated to uphold the juridical state, which consists of their own external freedom. Still, they cannot act on this duty if they are complicit with the government that undermines it. In this respect, preserving the civil condition takes absolute precedence over the duty to obey the law that creates the conditions for its downfall. Admittedly, these are rare

[184] Similarly, in the short essay: "What is Enlightenment?" (1784) Kant writes that "the touchstone of whatever can be decided upon as law for a people lies in the question: whether a people could impose such a law upon itself" (Kant, 8:39).

[185] There is an argument made by Ripstein (2009), Varden (2008) and Maliks (2012, 2013) that Kant allows resistance when the state becomes barbaric.

occasions but not unimaginable. The symptom of this deterioration is the injustice[186] that subjects suffer.

4.10. Conditions of barbarism

Many Kant scholars (Ripstein 2009; Varden 2008, 2020; Maliks 2012, 2013) have argued that in the conditions of barbarism or "a period of barbarism that follows the destruction of a rightful condition" (Ripstein 2009, 348), there is no obligation to obey the law. The description of barbarism is taken from Kant's *Anthropology from a Pragmatic Point of View,* where Kant distinguishes four combinations of force with freedom and law:

1. Law and freedom without force (anarchy).
2. Law and force without freedom (despotism).
3. Force without freedom and law (barbarism).
4. Force with freedom and law (republic) (7:330-331).

The distinctive feature of barbarism is "its violation of the postulate of public right, not only of the idea of the original contract. Any condition that violates the postulate of public right thereby (by default) violates the idea of the original contract, but its failure to satisfy the postulate makes it a state of nature, rather than a defective rightful condition" (Ripstein 2009, 340). No one can reasonably disagree with the conclusion that in the conditions of barbarism (force without freedom and law), there is no obligation to obey the law because, by definition, there is *no* law to obey. In the absence of a rightful condition, people are obligated to institute the rightful condition.

The question, however, is: ought the citizens do nothing while the rightful condition is destroyed right before their eyes? Kant's argument for the prohibition of the right to resistance was that it would render the civil condition insecure. Point taken. But why

[186] "[I]f a public law is so constituted that a whole people *could not possibly* give its consent to it (as, e.g., that a certain class of *subjects* should have the hereditary privilege of *ruling rank*), it is unjust; but if it is *only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent" (Kant, 8:297).

should it be any different when the government renders the same condition insecure? If remaining in the state of nature is wrong in the highest degree (Kant, 6:308) and one reason why disobedience and resistance are prohibited is that it may undermine the rightful condition, it seems implausible to disregard the threat that unlawful behaviour by the state should be tolerated, or "put up with" even if it threatens to bring a defective state into a barbaric one. Therefore, the argument must be that whatever brings down the rightful condition must be resisted, regardless of the agent of destruction. One ought not to postpone acting until after the collapse of the civil condition because then one would have failed to act to protect the civil condition. This raises the problem: who is to stand in judgment of the government, which is constitutive of the civil condition?

4.11. Epistemic disagreement vs the experience of injustice

We saw above that this is a complicated question, as it raises further moral issues that establishing a state and a civil condition is meant to resolve. Nevertheless, there are moments when one cannot avoid disobeying the law, even though one knows that such a position from the perspective of right remains problematic. It remains problematic but not irredeemable. When a subject decides to take the law into her own hands, she has a considered opinion which may be grounded and justified on a violation of her rights by the law, on the fact that she is the *victim* of a violation, that is, her *status* as a moral being is infringed. It is not merely a theoretical exercise for her but a matter of having her moral status protected. It is against a human being's moral standing as an autonomous being and paternalistically condescending to disregard her experience of injustice and victimhood. As a moral and rational being, she can make a moral judgment for herself. Any argument to the contrary must show why she cannot make such an independent moral judgment regarding justice and moral violations of her rights. Suppose the law is unjust, and it offends her dignity. In that case, it is doubtful that her interpretation is epistemically void while that of the sovereign or the court is epistemically right. We do not lose our capacity to judge correctly when subjecting ourselves to law. Epistemically, a subject of law may be capable of providing cogent, just, and rational justification or critique of the law.

My argument, however, is that the matter for the victim of injustice is *not* purely theoretical, where we are required to judge the epistemic value of interpretations. A disobeying citizen's consideration has a unique value, and it calls for special attention, not because she is the better judge of the law. However, that is not to be excluded a priori. Rather her consideration has unique value because she is the victim of the *injustice* of the law. If she judges and experiences the law as unjust, then the others and the authority are obligated to attend to her complaint because they are responsible for the injustice committed against her. Here – but not in other cases – victimhood is a manifestation of the denial of the law of her equal moral standing in the community. By depriving her of the right to be treated as equal to all others in dignity, the law effectively makes her a victim: it refuses to extend to her the same freedom that it extends to others and thus considers her as someone who does not count (Forst 2012). She is an object, not a subject, of law.

In the same quote where Kant speaks of the nonrecalcitrant subject that we cited earlier in our critique of Flikschuh, Kant also speaks of the inalienable rights that the subject cannot give up "even if he wanted to, and about which he is authorized to judge for himself" (Kant, 8:304). This is the dimension that I, following Forst, have identified as the dimension of justice, inherent to law, which cannot be infringed and of which the subject herself is authorised to judge for herself. This aspect of justice does not require an external authority or a judge, as it rests entirely on the moral authority of the subject herself. If a wrong is done to me (if my right to be treated with dignity is violated), I have the right to ward off or protect myself against forms of injustice that assail my inalienable rights.

Here we can draw an important distinction between the right to defend oneself even against authority or against illegal law and the right to disobey the law that affects the rights of others. In the former case, the subject is morally authorised to disobey and resist any regulation which wrongs her. Since no law that wrongs her can be legitimate in the fundamental sense of justice, she is justified in defending herself against a law

that assaults her inalienable rights. Call this the *particular* wrong against the subject. In the latter case, where disobedience to the law infringes the rights of others, one cannot be permitted to disobey the law without the approval of *all* others subject to the same law. This is so because the wrong is general, not directed at any subject in particular. It equally affects the rights of all others negatively. Here I cannot be a judge on matters that concern the rights of others, and unless explicitly authorised to act on their behalf, I cannot simply assume that I am justified in disobeying the law. No such authorisation follows from the general wrong. The general wrong must be addressed only by legal means, whereas the particular wrong can also be addressed by illegal means.

Epistemic disagreement about the law is not a sufficient condition for disobedience to the law. To justify disobedience, a further step is required, namely a demonstration of the fact that a law is such that it cannot be universally and reciprocally justified. A good indicator is usually the *experience of injustice*. A moral being can make epistemic mistakes about a particular interpretation of the law. She may misunderstand its import or meaning or over- or under-interpret it. She may give the statute or the law a biased meaning.

Nevertheless, even if she interprets it correctly, that does not rule out another interpretation. Law is always epistemically open to disagreement. However, one can hardly argue that she is mistaken about her own repeated experience of injustice that the law inflicts.

Epistemic disagreement is an insufficient ground for challenging the law and disobeying it. What is needed is the condition of being a victim who may not even need to have an alternative interpretation to challenge an existing law. All she needs to show is that the law treats her unjustly, wrongs her, and robs her of her dignity, which consists, according to Kant, in the capability to be "universally legislating" (Kant, 4: 440). She can do this because she has the moral authority to challenge the injustice she is suffering as a particular moral wrong. She can point to this fact to show what is wrong with the law. No authority has the right to coerce a moral subject into obeying the unjust

law without falling into the paradox of denying its own legitimacy to rule. Of course, she may not be a law expert, and should she venture into juridical interpretations, she may find herself ill-prepared to argue with the lawyers. However, she is never ill-prepared to show that the law makes her a victim, which obligates the authority with the burden of justifying a law that violates her moral dignity.

The authority cannot order an agent to obey a fundamentally morally flawed law, and it cannot justify why she ought to accept the loss of her moral status as universally legislating (Kant, 4:440). The authority can coerce her into complying with the law by threats of violence and punishment. Still, once the authority resorts to punishment that it cannot morally justify (as *a hindering of a hindrance to freedom*) (Kant, 6:231), it forfeits the legitimacy to rule.[187]

If the law is such that people cannot accept it, it is self-contradictory for the moral subject to believe that she is under a moral obligation to obey the law. There is no law to follow, although the condition is not complete barbarism, but one that leads to barbarism if not reformed. Every commonwealth must obey laws, but "there must also be a spirit of freedom" (Kant, 8:305). The fact of injustice has shown that law does not always have a justification, yet all moral beings are owed a justification on account of their rational nature. If a law cannot be justified to them, it is a law without legitimacy, and the authority would be enforcing it only through violence.[188]

[187] Islamic law, for example, has a different structure. It is called the jurist's law: the jurist based on the sources of the law makes the law, whereas the authority executes it. The authority to make the law belongs to the jurist, not the ruler. This shows that the jurist is better prepared to make the law than the authority, but the authority is needed to dot the i's and cross the t's.

[188] This makes me question Rawls' claim that a civil disobedient must accept punishment for her disobedience. This would be admitting to becoming a double victim of the law, and I see not how this can be acceptable to a victim. She is disobeying the law because the law is unjust, and in defying it, she has shown a willingness not to respect, what is an illegitimate law. Now, as a reward, Rawls says to her: 'you must nonetheless accept to be punished, that is accepting that what you did was wrong'. But it is precisely the status of this wrong that is in dispute. Two wrongs do not make a right, and she would be justified to refuse punishment because she had done no wrong when she disobeyed a law that makes her a victim. Punishing her would be making her a victim for the second time. An authority can do this not by right but only by might.

4.12. The moral difference criterion[189]

I want to conclude by formulating a criterion by which we can, *in extremis*, decide to disobey the law. I have argued that we have a categorical duty to obey the law, but some laws are so unjust that any notion of obligation would be preposterous. I have also argued that we have the same obligation to use our judgment regarding extremely unjust laws, and subjective experience of injustice is a good indication for beginning to deliberate about the status of the law. I say 'extremely unjust law' because not any unjust law qualifies for disobedience. It must be such that a) its injustice has a disabling effect on our very moral agency, and b) its subjects cannot rationally consent to it. Injustice would have to be such that we are no better off than in the state of nature, even in the presence of the law. Obeying the law does not afford us the protection that the law ought to supply us with. Whether we obey or disobey, the law changes little in our own objective situation. Still, our disobedience does change the situation of those who benefit from the unjust law.

The argument is that law must be obeyed, but in certain extreme circumstances, law forfeits its validity as law and thus can no longer morally bind its subjects. We follow the law because it makes a moral difference, and living under the rule of law is morally superior to living under no rule of law: our rights and external freedom are guaranteed. This moral difference is seen in the practical results that we see in our lives, particularly in the form of stability and peace that the law makes possible.[190]

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[189] "Sometimes, moreover, the values to be secured by the genuine Rule of Law and authentic constitutional government are best served by departing, temporarily but perhaps drastically, from the law and the constitution. Since such occasions call for that awesome responsibility and most measured practical reasonableness which we call statesmanship, one should say nothing that might appear to be a 'key' to identifying the occasion or a 'guide' to acting in it" "Finnis 1980, 275).

[190] K. Westphal (1992) has argued that "Kant's ultimate grounds for membership in and obedience to actual states are pragmatic, conditional, and rest only indirectly on his fundamental moral principles. On these broader principles, one is obligated to obey an actual, imperfect state *only to the extent that obedience to it serves to improve one's moral character* [my italics]. If a regime is so corrupt that it degrades its citizens' characters more than anarchy or the grave hazards of revolt, then Kant offers no grounds for contending that anyone is obligated to obey it" (Westphal 1992, 411). I do not think obedience to the law is related to improving one's moral character. Still, improving the civil condition makes a positive moral difference to its subjects. It can be that as a result, one's moral character is also improved, but that cannot be the reason why one obeys the law. See also Bernstein (2018) and Filieri (2021, 163-164): "Whenever and wherever human beings are not treated as ends in themselves, no formal constraint may demand to count as universally valid and accepted. It would then be unmoral not to rebel or not to try changing positive laws."

Making a moral difference is not simply about disobeying one unjust law or several unjust laws. It is not about the number of laws. Several unjust laws could make no moral difference in our lives. However, they might make practical differences, make our lives unpleasant or frustrating, or inconvenience us somehow. Yet, these laws do not call for disobedience because any law creates inconveniences for some people. Should we accept the inconvenience as a reason to disobey the law, no law would ever be obeyed by all its citizens. Therefore, the question of disobedience would not even be raised as philosophically or morally challenging.

However, there could be only one law, one court ruling, or one *Vorschrift* that makes the moral difference for us and thus justifies our decision to disobey the law. One need not wait to fall into the condition of barbarism to disobey the law.

We have no right to destroy the civil condition, yet we do precisely that in obeying an extremely unjust law. As a result we contribute to the erosion of the rule of law, which has uncontested moral authority. Individual laws are authoritative only to the extent that they strengthen the rule of law, but if they undermine it, like the bill of attainder,[191]we cannot be morally tasked to uphold those laws (Allan 2020).

Korsgaard proposed a similar argument, but she did not develop it in terms of a moral difference, and, unfortunately, she interprets disobedience to law rather idiosyncratically as a determination of justice by the virtuous person who must finally, when faced with perverse laws, take the law itself under her protection (Korsgaard 2008, 254-261). I think my approach avoids her pitfalls as I do not believe that the moral law leads us to uphold laws that make no moral difference. However, it is understandable why even a scholar of Korsgaard's stature would opt for such a reading, considering that all forms of government for Kant are legitimate.

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[191] The bill of attainder is the paradigm example of a measure that singles out persons or groups for adverse treatment on arbitrary grounds – grounds that cannot plausibly stand as reasons of public interest, consonant with any morally defensible account of public good (Allan 2020a, 580).

The criterion of moral difference is internal to the legal condition, and it functions as a protector of individual rights and the legal system itself. One cannot have one without the other. One cannot have the rule of law without the protection of rights because the rule of law is about protecting individuals' rights, and individuals have reasons, in turn, to preserve the law because it makes a moral difference to them. Their disobedience is in substance, if not in form, an affirmation of legality: they demand adherence to the law as the legal order defines it, namely, not to sit in judgment of others' rights and freedoms.

This ultimately requires agents to be judges of political decisions regarding the moral status of their rights. Indeed, they cannot enforce their judgments unilaterally, but that does not mean that decisions are unjust or that their judgment is epistemically and morally wrong. There are different legal determinations of a given moral course of action, which is why authority is required. However, we can exclude some reasons as morally wrong, even if the judge should promulgate them. A plurality of determinations does not preclude that some determinations are morally dubious and others wrong.

4.13. Conclusion

Citizens and states have a moral responsibility to uphold the civil condition, meaning they must obey its laws. The criterion of right ensures that laws are at least minimally just: they, for example, apply equally to all. In cases where such applications do not happen, the law fails to be what it ought to be; and although I have argued that this by itself is no reason to disobey the law, it is a reason to reconsider it in light of the principles of right. However, suppose the law positively contributes to undermining the civil condition. In that case, any comparative claim that the citizen's disobedience is worse than the state's departure from the principle of right cannot be coherently upheld. Citizens must uphold the law because they have a duty to maintain the civil condition, a condition of right. Certain minimal moral criteria determine what laws we should legislate. So, when a law departs radically from these criteria, it can hardly be called a

law. Refusing to obey that law is an obligation of right which is ultimately based on the moral justification to uphold the civil condition.

The same condition applies to subjects of law and the agents of the law, particularly judges who interpret and enforce the law. They must also consider the circumstances of justice in interpreting and applying the law. There are no two sets of rules: one for the judges and one for the citizens. This is even more important when the judges decide whether disobeying the law should be punished. The fact that a disobedient thinks she has a moral right to disobey the law does not automatically confer the right to break it and, therefore, avoid punishment for such disobedience. Instead, the court ought to decide whether the disobedient has overriding moral reasons to disobey the law; that is, whether the disobedient has proven her case that the law is unjust and contributes to the erosion of the rule of law.

Proving this is a daunting task that may not succeed, but unless such an enterprise is undertaken, we would not be able to decide whether our disobedience is justified. It may be that our actions are not justified, in which case we would have to accept the punishment, but we cannot know that before an open and honest discussion in the court where such cases are adjudicated. However, when the morality of the law is in question, we cannot expect the judges to act on the legality of those disputed laws. Even if we should unquestionably accept the positivist principle that the judges ought not to interpret the law according to their moral views, that is, in other words, their interpretation must be driven by some criteria determined by the legal practice independent of morality, perhaps originalism, it does not follow that in *this* case, it is the right procedure of adjudication.

Conclusion

Morality vs legality

In this dissertation, I have argued that law is fundamentally moral and emerges as a requirement of morality. I understand the relationship between morality and legality in terms of inclusion or, more precisely, the scope of inclusion of law by morality. Morality includes, or covers, the law; law is one aspect of morality, "a department of morality" (Dworkin 2006a, 34) or "a branch, subdivision, of political morality" (Dworkin 2011, 405; Allan 2020b). The term "moral" has broader scope and significance than "legal". We say, for example, that we are morally responsible for global warming, but we cannot entirely legally encompass this moral responsibility. To be legally responsible means not only that one is a direct cause of global warming, that is, that one contributes to the pollution of the air, the contamination of the drinking water, the depletion of resources that are vital for life on earth, and so on. Law has this in common with morality: to be morally responsible, one must be the cause of the action. It also means that the society of which we are members assigns legal consequences (in the form of coercion and punishment) to specific actions that it deems too significant or too big to be left to the individual moral responsibility.

There is a distinction between legal and moral responsibility. On the one hand, moral responsibility requires that we ought to do something about global warming as it is our actions that cause it. On the other hand, moral responsibility does not translate into a legal responsibility without authority. As shown in the examples above, one can be morally responsible without being legally liable. One can also be both morally and legally accountable. If one is legally responsible, however, one is also morally responsible. Morality includes legality under its wings: if something presents itself, say, as a moral dilemma, it may, but it need not, become a legal issue. We may all be morally responsible for global warming. Still, it does not follow that everyone is equally legally responsible because such responsibility can be assigned only by the community through its legal system.

I am certainly morally responsible for global warming to the extent that I consume products made by corporations that heavily contribute to global warming. I am morally accountable, and I ought not contribute to global warming. I have thus two options: first, I ought to do what I can as an individual to prevent global warming. For example, instead of using a car, I should use public transport or bike to work. I can make choices that contribute to decreasing global warming.[192] It is evident that some problems cannot be solved this way and that a stronger agent is required. Therefore, we ought to use the law, which represents us as a collective agent, to resolve the problem. Law is a mode of discharging the moral responsibility towards ourselves and others. In principle, the authority could assign numerical legal responsibility to my consumption and hold me legally responsible. I would be legally obligated to do as the law commands. But I will also be morally obligated to act as the law commands because now a moral problem has a determinate legal solution. Therefore, legal problems are moral problems as they determine specific moral issues that ought to be resolved legally. The moral responsibility is still the same, only that this time I can be coerced into acting by the community's solution to the moral conundrum.[193]

"Legal" is thus a concept narrower than "moral", but it partakes in the moral nature of a problem. Legality stands in a relation of determination to morality. In speaking of legal determination, I do not presume that morality is indeterminate and that it needs the law to determine it from the outside. Rather, the law is morality's own mode of

[192] The same applies to global poverty. Although, as individuals, we have a limited possibility to change the global structural inequalities and power imbalances that produce dire poverty, this fact does not relieve us of the duty to do something to alleviate global poverty. Our moral obligation requires that we do our part, which is left to the discretion of everyone's moral deliberation. Still, the duty exists for as long as debilitating poverty undermines freedom as nondomination.

[193] In my opinion, obligation springs from the moral law, not from the specific nature of relationships. I am obligated, for example, to respect the humanity of human beings regardless of what sort of relationship I enter. This is a categorical moral obligation that remains constant in all possible relationships. The police are morally obligated to respect the moral autonomy of the detainee as the detainee is morally obligated to respect the moral autonomy of the police. There is *reciprocity* at the very heart of morality, and moral obligation is categorical and thus universal because of this reciprocity. I cannot demand of you what I would not accept myself. Whatever is moral is reciprocal and universal. This precludes forms of relationships that cannot be justified reciprocally. I cannot enslave you because I cannot justify this act to you or others.

determining the right moral course of action. Law, however, determines morality only about those moral issues that require coercion and the protection or assurance that, for example, contracts will be held. Morality already sets the obligation to perform (we ought to do something to stop global warming or end world poverty). But, since the problems have such magnitude that individuals alone cannot resolve them, it requires the community's resources or global resources to discharge the moral duty. Law will not cover moral responsibility entirely. Nevertheless, the fact that law leaves a moral residue does not mean that its solution is not moral. It merely indicates that law does not encompass the whole of the moral sphere.

Therefore, the law is what falls under a description of morality, namely that the problems that exceed the individual capabilities ought to be coordinated by law. Take the traffic laws as an example. We all have a moral obligation to drive safely and not endanger ourselves or the other drivers. But it is exceedingly difficult to do so in the absence of clear legal regulations that efficiently and prudently coordinate the traffic. Law neither cancels nor overcomes the moral duty to drive safely and not endanger ourselves and others. Rather, this moral obligation is now determined legally. I still ought to drive safely, and the moral considerations are still behind the legal force, and they should command my reasoning and decisions. Nevertheless, the law does not require that I respect the law for moral reasons (Kant, 6:232); it cannot hold me morally responsible for not acting from duty. I am perfectly within my right to act in full conformity with the legal requirements for non-moral reasons.[194]

Law as freedom from nondomination

Law is conceived in this thesis as being in the service of freedom, freedom as independence or nondomination. Following in the footsteps of the republican tradition

[194] 'Law does not require us to love our neighbors; it does not ask us to befriend lonely hearts; it generally does not require us to rescue people in distress; rather, it quibbles over whether we should be Good or Bad Samaritans; it does not ask us to be exemplary husbands, wives or parents, or siblings; it does not ask us not to cheat on our spouses; it does not asks us to strike friendships; nor does it facilitate the operation of friendships once they are struck; it does not ask us to be good employees or employers. The list goes on. Little wonder that Aristotle called law "intellect without passions."' Taiwo (1996, 181).

(Rousseau 1997 [1762], Kant 1996 [1797]; Pettit 1997; Forst 2012; Ripstein 2009; Kleingeld 2020), I understand moral freedom as *independence* from internal and external arbitrary, that is, non-justifiable, heteronomous interferences. This freedom is opposed not to natural determinism but slavery as a paradigmatic expression of unfreedom. Freedom is autonomy: the laws we ought to obey are *our own laws* "rather than the heteronomous dictates of a despot" (Kleingeld 2020, 112). In virtue of our rational nature, we can control our inclinations, but it is not possible to control other people's choices that curtail our freedom. This external aspect requires an agency, the law, to prevent the domination of others by my choices. Morality thus ensures that I act in accordance with my own autonomously taken decisions, and that requires the possibility of freedom, both internal and external.[195]

Law, however, can be perverted (Korsgaard 2008).[196] This "perversion" is the subject of the last two chapters of this dissertation. Law is fortified by formal procedures, institutions, clerks, systems, and officials that, in a fundamental sense, make law independent of the needs for which it exists. It can forfeit its origins in morality and govern as if it has no relation to morality. Freedom as nondomination or independence from the arbitrary (discretionary) power of another requires the rule of law; but the law can be corrupted, and freedom abrogated. Disobeying the law is a serious matter, but ultimately freedom must prevail against its perversions.

[195] The Liberal tradition has a different understanding of the relationship between law and freedom: Isaiah Berlin (1969, 170, footnote 3), for example argued that "Law is always a fetter, even if it protects you from being bound in chains that are heavier than those of the law, say some more repressive law or custom, or arbitrary despotism or chaos. Bentham says much the same"

[196] Korsgaard (2008) also argued that law could be perverted, and the state can use the law itself to threaten freedom. This is perhaps the most devastating blow to freedom and the law as a moral phenomenon. The law turns into a mechanism that destroys itself and thus exposes itself to being the most threatening enterprise of freedom and morality. It is like a virus that occupies the body and makes it work against itself.

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