

THE SEPARATION THESIS AND H.L.A. HART'S LEGAL POSITIVISM

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Abstract

The article aims to analyze Hebert Hart's legal philosophical thought, mainly with regard to the relationship between law and morality, proceeding to discuss the various criticisms that were made to his theory, in order to finally conclude on the foundations of his concept of law and its understanding of the place of morality in relation to law.

Introduction

In the 1950s and 1960s, H.L.A. Hart began to elaborate on the thesis of the separation of law and morals and established the school of the analytical jurisprudence. To avoid endless disputes about his legal positivism and find authoritative intellectual support for his general descriptive legal theory, Hart resigned from his Oxford professorship in 1968 and devoted himself to the study of Jeremy Bentham until his health deteriorated in 1991. Hart regarded himself as a follower of

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John Austin and Jeremy Bentham.² Hart recognised that Bentham's jurisprudence was of positivism that separated fact and value, and that it thus had the same philosophical basis as his own. Hart recognised Bentham as the originator of legal positivism.

However, things changed in 2003 when Philip Schofield, the director of the Bentham Project and general editor of *The Works of Jeremy Bentham*, made his professorial inaugural speech *Jeremy Bentham, the Principle of Utility and Legal Positivism*. In the speech, Schofield pointed out that Hart's contention was wrong that one of Bentham's objectives was to offer a morally neutral definition of law.³ In 2010, Schofield published the article *Jeremy Bentham and H.L.A. Hart's 'Utilitarian Tradition in Jurisprudence'* based on almost 30 years of special study of Bentham. Schofield concluded that Hart completely misinterpreted Bentham's jurisprudence. Bentham was not a legal positivist as Hart understood, and Bentham's linguistic philosophy was quite different from that adopted by Hart. Bentham's jurisprudence was one of naturalism, not positivism.⁴ **However**, Schofield did not explore the philosophical source that contributed to Hart's mistake. In this article, I will try to demonstrate the fundamental contradictions in Hart's legal positivism and identify the ultimate philosophical source of Hart's mistake.

Acknowledgement:

²Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, 2004, p.4.

³Philip Schofield, *Jeremy Bentham, the Principle of Utility, and Legal Positivism*. In M.D.A. Freeman, (ed.), *Current Legal Problems* 2003, Volume 56, 2004, pp.1-39.

⁴Philip Schofield, *Jeremy Bentham and H.L.A. Hart's 'utilitarian tradition in jurisprudence'*, in *Jurisprudence*, Vol. 1, No. 2, 2010, pp.147-167.

1. The Philosophical Nature of H.L.A. Hart's Legal Positivism

What is the fundamental theoretical claim of legal positivism? What is the philosophical nature of legal positivism? In the circle of legal philosophy, the term 'legal positivism' is a familiar one, and the school of legal positivism is a major school. It is natural to assume that the meaning of 'legal positivism' would be obvious. However, this is not the case. In the preface of *The Philosophy of Positive Law: Foundations of Jurisprudence*, James Bernard Murphy wrote, 'This is not a book about positive law, emphatically about legal positivism. I studiously avoid the whole complex and contentious question of legal positivism. Indeed, legal positivism turns out to have a contingent relation to the discourse of positive law. Some of the major theorists of positive law, such as Thomas Aquinas, have never been described as legal positivists, while some major legal positivists, such as Jeremy Bentham, almost never refer to positive law.'⁵ Stephan R. Perry's distinction can play a crucial role in clarifying the philosophical nature of legal positivism. According to Perry, legal positivism can be distinguished into two modes, including substantive legal positivism and methodological legal positivism: "Substantive legal positivism is the view that there is no necessary connection between morality and the content of law. Methodological legal positivism is legal theory can and should offer a normatively neutral description of social phenomenon, namely law. Methodological legal positivism holds, we might say, not that there is no necessary connection between morality and law, but rather there is no connection, necessary or otherwise,

⁵James Bernard Murphy, *The Philosophy of Positive Law: Foundations of Jurisprudence*, 2005, p. 21.

between morality and legal theory.”⁶ There is no ambiguity in Perry’s assertion on methodological legal positivism that ‘there is no connection, necessary or otherwise, between morality and legal theory’. However, there are multiple interpretations of Perry’s assertion on substantive legal positivism that ‘there is no necessary connection between morality and the content of law’. According to the conventional understanding, the substance of the law, or even its procedures, does not have to correspond to a particular set of moral principles – or, in the legal positivist’s words, bad law is law because law is fact. However, within that understanding lies the implied question of how to identify the content of a legal system. The answer provided by that understanding is that a law can be identified in a morally neutral way. Thus follows the question that whether the identification of a legal system itself is of value. So, the issue turns out to be not simple. Schofield pointed out that the core of substantive legal positivism was morally neutral⁷ – in philosophical terms, the separation of value and fact. Thus, it is necessary that legal positivism be interpreted from the more fundamental philosophical perspective.

Many important legal philosophers such as Perry⁸ and Jules L. Coleman⁹ have thus used the term ‘positivism’ instead of ‘legal

⁶Stephan R. Perry, Hart’s Methodological Positivism, in Jules Coleman (ed.), Hart’s Postscript: Essays on the Postscript to The Concept of Law, 2001, on pp. 311-13, 311-54.

⁷Philip Schofield, Jeremy Bentham and H.L.A. Hart’s ‘utilitarian tradition in jurisprudence’, in Jurisprudence, Vol. 1, No. 2, 2010, pp. 147-167.

⁸Stephan R. Perry, Beyond the Distinction between Positivism and Non-positivism, Ratio Juris, vol. 22, No. 1, 2009, pp. 311-325. Perry’s other works on legal positivism include The Varieties of Legal Positivism, in: Canadian Journal of Law & Jurisprudence, Vol. 9, No. 2, (1996) p. 361; Method and Principle in Legal Theory, in: The Yale Law Journal, Vol. 111, (2002) pp. 1757-1813; and Hart’s Methodological Positivism, in: Jules Coleman (ed.), Hart’s Postscript: Essays on the Postscript to The Concept of Law, pp. 311-325.

positivism’ to refer to the theory of legal positivism. Hart used both ‘positivism’ and ‘legal positivism’, but emphasised that his legal positivism was in the sense of epistemology, so he used ‘positivism’ more.¹⁰ Hart titled the milestone lecture he delivered at Harvard Law School in 1957 *Positivism and the Separation of Law and Morals*.¹¹ Lon Fuller, a major critic of Hart’s legal positivism, preferred ‘positivistic theory of law’ or ‘positivism’ to ‘legal positivism’.¹² Gerald Postema referred to ‘legal positivism’ as ‘positivism’ and argued that the fundamental issue of law was a philosophical one and that those who participated in the debate were philosophers and jurists: “Recent debates in Anglo-American philosophical and legal circles concerning the nature and foundations of law and the forms and limits of judicial reasoning (and theories of constitutional judicial review) have been decisively shaped by the history of our legal practice and attempts to understand it. A key piece of that history was written in seventeenth- and eighteenth-century Britain at the birth and maturing of two dominant legal ideologies: positivism and common law theory. The dispute between these two ideologies is not only historically interesting, it is philosophically fundamental.”¹³

⁹Jules L. Coleman, Negative and Positive Positivism, in *The Journal of Legal Studies*, Vol. 11, No. 1, 1982, pp. 139-164.

¹⁰In *The Concept of Law 2nd*, the term ‘legal positivism’ appears 13 times, while ‘positivism’ appears 45 times.

¹¹Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, 2004, pp.196-9.

¹²In the seminal book *The Morality of Law*, Lon Fuller did not use the term ‘legal positivism’; instead, he used ‘the positivistic theory of law’. In the famous critique article *Positivism and Fidelity to Law: A Reply to Professor Hart*, the number of uses ‘legal positivism’ is only one fifth that of the number of uses of ‘positivism’ and ‘positivistic’. See Lon L. Fuller, *The Morality of Law*, Revised edn., 1969 and Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, *Harvard Law Review*, Vol. 71, No. 4, 1958, pp. 630-672.

¹³Gerald J. Postema, *Bentham and Common Law Tradition*, 1986, p. viii.

It is obvious that the theoretical nature of legal positivism is simply the positivism in philosophy. For the convenience of investigation, I adopt Perry's distinction of substantive legal positivism and methodological legal positivism as the framework to examine Hart's legal positivism and identify how legal positivism developed with the application of the positivism in philosophy.

2. Positivism and Naturalistic Fallacy

Regarding the legal positivist separation thesis, Schofield wrote, 'The assumption that underlies both doctrines (substantive legal positivism and methodological legal positivism) is that there exists a conceptual separation between fact and value, or in other words between descriptive and normative language. This distinction can be traced to the concern of many twentieth-century philosophers to avoid the so-called naturalistic fallacy famously defined by G.E. Moore'.¹⁴ Schofield did not elaborate further on this distinction. It is thus necessary to investigate Moore's naturalistic fallacy. If it is indeed a fallacy, then legal positivism is justified; if it is not, then legal positivism is also a fallacy.

2.1. G.E. Moore's Naturalistic Fallacy

What is Moore's naturalistic fallacy? Moore wrote, '...Ethics aims at discovering what are those other properties belonging to all things which are good. But far too many philosophers have thought that when they named those other properties they were actually defining good;

¹⁴Philip Schofield, Jeremy Bentham and H.L.A. Hart's 'utilitarian tradition in jurisprudence', in *Jurisprudence*, Vol.1, No. 2, 2010, on p.151, pp. 147-167.

that these properties, in fact, were simply not “other,” but absolutely and entirely the same with goodness. This view I propose to call the “naturalistic fallacy”.¹⁵ For Moore, good could not be defined: “If I am asked ‘What is good?’ my answer is that good is good, and that is the end of the matter. Or if I am asked ‘How is good to be defined?’ my answer is that it cannot be defined, and that is all I have to say about it. ...That propositions about the good are all of them synthetic and never analytic; and that is plainly no trivial matter.”¹⁶ Moore’s direct argument against ‘naturalistic fallacy’ is that good is ‘simple, indefinable, unanalysable’.¹⁷ In ascertaining good as the subject-matter of Ethics, Moore adopted several sets of corresponding terms: simple and complex, adjective and substantive, intrinsic value and extrinsic value, end and means, good in itself and good as means, whole and part, and organic whole and mechanic whole. Moore accordingly held that good was simple, not complex; not a mechanic whole, but an organic whole that could not be separated into several parts. Good thus could not be defined by the various concepts of constituent parts and should be understood as adjective rather than noun because although ‘the good,’ ‘that which is good,’ could be defined, good in itself could not be defined.¹⁸ Moore argued that if someone thought that the colour red was good because it could make people happy, such a person had fallen into the naturalistic fallacy. Those who committed this fallacy endorsed the view that ‘good’ means

¹⁵G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, p. 62.

¹⁶G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, p.58.

¹⁷G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, p.72.

¹⁸ G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect 9.

a property of a thing, and they sought to identify such properties.¹⁹ ‘Good’ had intrinsic value, was universal, and could not change in different contexts or become ‘bad’. ‘Good’ itself was an end, not a means. Ends and means were quite different, and were neglected by many philosophers. Moore argued that the question ‘what is the right thing to do?’ consisted of two parts: what is ‘good’ and how this ‘good’ can be procured. Thus, ethical judgment was more difficult and more complex than the establishment of the laws of natural science. So the naturalistic fallacy oversimplified ethical judgments as natural scientific judgments. Ends had intrinsic value because they were universal, while means did not have intrinsic value. Accordingly, Moore argued that all of the ethics before him committed the naturalistic fallacy in that all of them tried to define ‘good’ by natural properties, which ran counter to the idea of good as an independent entity that was simple, indefinable, unanalysable, organic and of intrinsic value. Moore thus concluded that the naturalistic fallacy oversimplified ethics as pure experience or positive science.

Moore answered the question ‘What things have intrinsic value, and in what degrees?’²⁰ thus: “Good is not merely a bare cognition of what is beautiful in the object, but some kind of feeling or emotion. By far the most valuable things, which we know or can imagine, are certain states of consciousness, which may be roughly described as the pleasures of human intercourse and the enjoyment of beautiful objects. No one, probably, who has asked himself the question, has ever doubted that personal affection and the appreciation of what is

¹⁹ G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect.12.

²⁰ G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect.112.

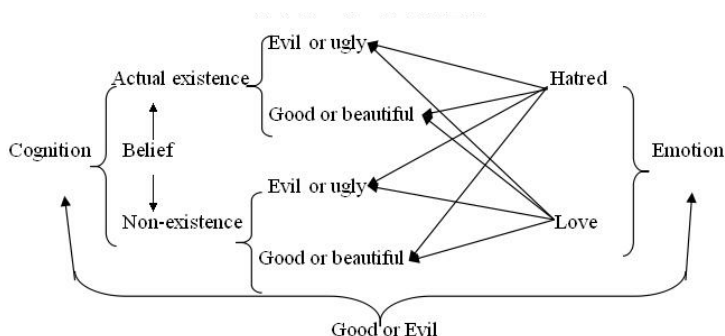
beautiful in Art or Nature, are good in themselves...That it is only for the sake of these things... these complex wholes themselves, and not any constituent or characteristic of them – that form the rational ultimate end of human action and the sole criterion of social progress: these appear to be truths which have been generally overlooked.”²¹ Thus, ‘goods’ are ‘complex wholes themselves’, the organic wholes of emotion and cognition.

Considering the question of ‘in what degree?’, Moore held that, as an organic whole, the amount of the intrinsic value of ‘good’ is not the total amount of the value of its essential constituents; rather, it is its value as the organic whole, for any constituent itself has little or no value. Moore wrote, ‘Aesthetic and affectionate emotions had little or no value apart from the cognition of appropriate objects, and that the cognition of these objects had little or no value apart from the appropriate emotion, so that the whole, in which both were combined, had a value greatly in excess of the sum of the values of its parts; so, according to this section, if there be added to these wholes a true belief in the reality of the object, the new whole thus formed has a value greatly in excess of the sum obtained by adding the value of the true belief, considered in itself, to that of our original wholes’.²²

What, then, are the constituents of ‘good’? As to the degrees of intrinsic value, what are the relationships between the correlations of the constituents and the whole? The following figure roughly illustrates the general picture of Moore’s thinking on this issue.

²¹G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect.113.

²²G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, p.247.



‘Good’ has two essential constituents: cognition and emotion. The degrees of the value of ‘good’, according to Moore, are determined by the correlation of these two essential constituents. Cognition is right or wrong, while emotion is either love or hatred. The varieties of the degrees of the value are thus determined in the corresponding correlations. The states of mind formed by those corresponding correlations are different. Moore wrote, ‘It is, however, important to observe that the very same emotions, which are often loosely talked of as the greatest or the only goods, may be essential constituents of the very worst wholes: that, according to the nature of the cognition which accompanies them, they may be conditions either of the greatest good, or of the greatest evil’.²³ Moore distinguished the states of mind into three varieties and offered analyses. He identified the states as ‘unmixed goods’, ‘evil’ and ‘mixed goods’. Constituents could have positive or negative values. If all of the constituents of the whole had positive values, then the whole was an ‘unmixed good’. If the cognition and the emotion in the whole opposed each other, the whole

²³G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect.125.

was ‘evil’. Moore distinguished three varieties of ‘evil’: loving evil or ugliness, hating good or beauty and the painful consciousness. If the whole had a positive value and some constituents had intrinsic negative value, then the whole was a ‘mixed good’. Accordingly, ‘mixed goods’ were distinguished into two varieties: loving evil or ugliness and sympathy.

In addition to these two essential constituents of cognition and emotion, which directly determined the degrees of value, Moore argued that belief was ‘a third essential constituent’.²⁴ He wrote, ‘It is commonly and rightly thought that to see beauty in a thing which has no beauty is in some way inferior to seeing beauty in that which really has it’.²⁵ He argued that when people saw beauty in a thing having no beauty, it was either because the beauty did not exist in actuality or because although a feeling of beauty did exist, the beauty itself did not exist. Moore wrote, ‘The former may be called an error of judgment, and the latter an error of taste; but it is important to observe that the “error of taste” commonly involves a false judgment of value; whereas the “error of judgment” is merely a false judgment of fact’.²⁶ Moore thus set ‘an error of judgment’ and ‘an error of taste’ in opposite positions. Moore took ‘an error of judgment’ as ‘a false judgment of fact’; if, then, he took taste as value, he put value and fact in opposite positions. However, the issue is not so simple, as Moore held that the ‘error of taste’ was not straightforwardly ‘a false judgment of value’

²⁴ G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect.124.

²⁵ G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sec.116.

²⁶ G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect.116.

but one that ‘commonly involves a false judgment of value’. Moore implied that in addition to judgment of value, taste also involved other constituents – hence the extraordinary difficulty of analysing the relationship between Moore’s fact and value. Then, what is Moore’s judgment of value? “Whenever he thinks of ‘intrinsic value,’ or ‘intrinsic worth,’ or says that a thing ‘ought to exist,’ he has before his mind the unique object – the unique property of things –which I mean by ‘good.’”²⁷ However, because good is the organic whole of cognition and emotion, judgment of value is actually the judgment of the complex correlations of cognition and emotion. What, then, is the relationship between cognition and emotion? The above analysis shows how degrees of value are determined by cognition, emotion and belief. Moore used the word ‘accompany’ regarding the correlation of cognition and emotion. Although good and evil are organic wholes of cognition, emotion and belief, cognition and emotion can maintain their independence. This gave rise to Moore’s definition of the naturalistic fallacy.

2.2. Naturalistic Fallacy, Positivism and Naturalism

Is the naturalistic fallacy defined by Moore really a fallacy? Are fact and value or cognition and emotion really separate? Is cognition purely independent?

2.2.1. Hume’s Is-Ought

²⁷ G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, Sect.13.

Modern positivists claim that the separation of fact and value comes ultimately from David Hume. Hume's most definitive statement on the separation thesis is as follows: "I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it."²⁸ Hume argued that 'is or is not' and 'ought or ought not' represented two quite different relations. However, Hume's statement is too concise, as it gives rise to multiple understandings. Thus, the question arises whether 'is or is not' is purely objective for Hume, lacking moral elements.

Generally speaking, there are two modes of interpretations of Hume's philosophy: empiricist and naturalistic. The philosophers Thomas Reid (1710-1796) and Thomas Hill Green (1836-1882) contributed most significantly to the mainstream empiricist

²⁸ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, pp.715-716.

interpretation, which H.O. Mounce considered the mainstream view.²⁹ Much later, Norman Kemp Smith (1872-1958)³⁰ and Mounce challenged the empiricist interpretation with the naturalist interpretation. Following Smith's naturalist interpretation, Mounce published his study *Hume's Naturalism* in 1999, in which he pointed out that while Hume's empiricist element and naturalist element were contradictory, naturalism was the fundamental element.³¹

For Hume, what is cognition? It is reason: "Reason is the discovery of truth or falsehood. Truth or falsehood consists in an agreement or disagreement either to the real relations of ideas, or to real existence and matter of fact."³² For Hume, what is emotion? In Hume's own words, 'passion' and 'emotion'. Hume sometimes used the two words together, 'passions and emotions',³³ and took them to mean nearly the same thing, with the only difference lying in their liveliness and force: "While those other impressions, properly called PASSIONS, may decay into so soft an emotion, as to become, in a manner, imperceptible."³⁴ At other times, Hume considered passion as a kind of emotion: "Of the second are the passions, and other emotions resembling them."³⁵ However, because for Hume both passion and emotion belong to 'those perceptions, which enter with most force and

²⁹H.O. Mounce, *Hume's Naturalism*, London and New York: Routledge, 1999, pp. 1-2.

³⁰Norman Smith, *The Naturalism of Hume I*, in: *Mind*, New Series, Vol. 14, No. 54, Apr., 1905, pp. 149-173; Norman Smith, *The Naturalism of Hume I*, *Mind*, New Series, Vol. 14, No. 55, Jul., 1905, pp. 335-347. Norman Kemp Smith, *The Philosophy of David Hume*, London, Macmillan, 1941.

³¹H.O. Mounce, *Hume's Naturalism*, London and New York: Routledge, 1999, pp. 1-2.

³² David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, pp.700.

³³ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, pp.17, 38.

³⁴ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, p. 430.

³⁵ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, p. 429.

violence’,³⁶ Hume’s passion and emotion are equivalent to Moore’s emotion. Hume wrote, ‘A passion is an original existence, or, if you will, modification of existence, and contains not any representative quality, which renders it a copy of any other existence or modification’.³⁷

As to the relationship between reason and emotion or passion, Hume wrote, ‘We speak not strictly and philosophically when we talk of the combat of passion and of reason. Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them. As this opinion may appear somewhat extraordinary, it may not be improper to confirm it by some other considerations’.³⁸ Thus, reason is not independent of passion, but is the slave or under the control of passion.

Let us revisit Hume’s ‘is or is not’ and ‘ought or ought not’. The separation of fact and value – the positivistic interpretation of Hume’s distinction of ‘is or is not’ and ‘ought or ought not’ – is a theory that Hume criticised and opposed. For Hume, ‘is or is not’ and ‘ought or ought not’ refer to two different relations: one is the object of reason, and the other is the object of passion. What, then, is the rationale of Hume’s assertion that ‘ought or ought not’ could not be deduced from ‘is or is not’? Hume elaborated, ‘Whatever, therefore, is not susceptible of this agreement or disagreement (an agreement or disagreement either to the real relations of ideas, or to real existence and matter of fact), is incapable of being true or false, and can never be an object of

³⁶ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, p.17.

³⁷ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, p.636.

³⁸ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, p.636.

our reason. Now it is evident our passions, volitions, and actions, are not susceptible of any such agreement or disagreement; being original facts and realities, compleat in themselves, and implying no reference to other passions, volitions, and actions. It is impossible, therefore, they can be pronounced either true or false, and be either contrary or conformable to reason'.³⁹ Because of this rationale, the first section of *Book III On Morals* is entitled 'Moral Distinctions not Derived from Reason'. For Hume, fact and emotion are not separate because emotion itself is a fact, an original existence. Hume distinguished between reason and emotion; he did not separate them.

According to Thomas Baldwin, Moore's definition of the naturalistic fallacy is 'standardly associated with Hume and the possibility, or not, of deriving an "ought" from an "is"'.⁴⁰ Moore separated cognition and emotion based on a misunderstanding of Hume's is-ought. Moore's definition of the naturalistic fallacy is thus itself a fallacy.

2.2.2. The Vicissitudes of Positivism and Naturalism

Mounce drew a picture of the vicissitudes of positivism and naturalism. From the 18th to the 20th century, Great Britain experienced severe struggles between empiricism and naturalism, with empiricism holding the advantage. In the 18th century, Hume's naturalism successfully destroyed arbitrary rationalism and facilitated the rise of naturalism in the 19th century. In the middle of 19th century, the empiricist J.S. Mill (1806-1873) criticised the leader of the Scottish naturalists, William Hamilton (1788-1856). Mark Pattison remarked,

³⁹ David Hume, *A Treatise of Human Nature*, Selby-Bigge (ed.), 1888, pp.700-701.

⁴⁰ Thomas Baldwin, Introduction, in G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, p. xviii.

‘The effect of Mr. Mill’s review is the absolute annihilation of all Sir W. Hamilton’s doctrines, opinions, of all he has written or taught. Nor of himself only, but all his followers, pupils, and copyists, are all involved in the common ruin. The whole fabric of Hamiltonian philosophy is not only demolished, but its very stones are ground to powder’.⁴¹ Empiricism regained dominance. In the later 19th century, due to T.H. Green’s critique of empiricism, naturalism experienced a brief revival. Bertrand Russell (1872-1970) and Moore (1873-1958), Cambridge philosophers, inherited the English tradition of empiricism and became the main figures of the empiricist analytic philosophy. A.J. Ayer and the logical positivists followed Russell, and empiricism flourished. However, the triumph of empiricism was a catastrophe for philosophy arising from a misunderstanding of Hume’s philosophy.⁴² Recently, naturalism has experienced another revival.⁴³

Positivism underwent many changes. Issac Newton made a distinction between phenomena and the ultimate reason, which George Berkeley took as the basis for differentiating the first philosophy and natural philosophy. In the early stages, positivism adopted Newton’s method. In the 19th century, physics achieved the preeminent status due to its swift and vigorous advances, and many people came to believe that physics was the comprehensive science. Thus, the difference between phenomena and their ultimate reasons were greatly reduced,

⁴¹Mark Pattison, Cf. Alan Bryan Introduction, in J.S. Mill, *An Examination of Sir William Hamilton’s Philosophy*, 1979, p. viii.

⁴² H.O. Mounce, *Hume’s Naturalism*, London and New York: Routledge, 1999, pp. 131-132.

⁴³ About the revival of naturalism, please see James Lenman, *Moral Naturalism*, <http://plato.stanford.edu/entries/naturalism-moral/>; Paul Thagard, *The Brain and the Meaning of Life*, 2010.

and the fundamental difference between them disappeared, leaving only the degrees of the difference. This way of thinking has persisted to the present. This view of natural science as the only reliable source of truth has been called scientific naturalism or positivism.⁴⁴ Thus, classical positivism evolved into a mutilated version of positivism that cut passion away from human experience.⁴⁵ This is essentially Moore's separation thesis.

2.2.3. The Intellectual Basis for G. E. Moore's Separation Thesis

From this general picture of the vicissitudes of naturalism and positivism, I will investigate the relationship between Moore and positivism. For Moore, Henry Sidgwick's influence was most important. When Moore was a student at Cambridge, he attended Sidgwick's lectures and read his masterpiece *The Methods of Ethics*. In *Ethica Principia*, Moore referred to *The Methods of Ethics* more than to any other work. The two core theses in *Ethica Principia* were actually a further development of the thesis in *The Methods of Ethics*. One was the thesis of the indefinable: in *The Methods of Ethics*, Sidgwick observed that the concept of practical reason was the mark of ethical thought, but was indefinable. Correspondingly, in *Ethica Principia*, Moore pointed out that 'good' was indefinable and that all previous ethical theorists had committed the 'naturalistic fallacy' of defining 'good' in terms of natural properties. The other thesis was intuitionism. Sidgwick endorsed the utilitarian account of obligation but emphasised that it needed to be supplemented by an intuitionist specification of the

⁴⁴H.O. Mounce, *Hume's Naturalism*, London and New York: Routledge, 1999, pp. 9, 18-19.

⁴⁵Mary Pickering, *Auguste Comte: An Intellectual Biography*, Vol. 1, 2006, p. 697.

ideal ends of action. Correspondingly, in *Ethica Principia*, Moore put forward ‘non-hedonistic ideal utilitarianism’ – that actions should have the best possible consequences rather than only maximising pleasure.⁴⁶ Sidgwick stated that his ‘first adhesion to a definite Ethical system was to the Utilitarianism of [John Stuart] Mill’.⁴⁷ Thus, Mill, Sidgwick and Moore comprise a line of intellectual development. That is, although Moore criticised all previous empiricist ethical theorists for committing the naturalistic fallacy, his intellectual source was positivism, which followed from empiricism – that is, the separation of fact and value. Yet Moore upheld the part of value, not fact.

Moore’s definition of the naturalistic fallacy was based on his own theory of the mind and on an interpretation of Hume’s distinction of ‘is’ and ‘ought’ that led him to separate cognition and emotion. However, the fundamental reason for Moore’s separation of cognition and emotion lies in his common sense philosophy. In lectures and articles, Moore used as an illustration ‘I know that here is my hand’. This was fiercely criticised by Ludwig Wittgenstein, who thought that Moore was not a profound philosopher.⁴⁸ According to Wittgenstein, ‘to know’ and ‘to believe’ were fundamentally different. ‘Knowledge’ and ‘certainty’ belonged to different categories; they were not mental states like ‘surmising’ and ‘being sure’.⁴⁹ ‘To know’ and ‘to believe’

⁴⁶ See Thomas Baldwin, Introduction, in G. E. Moore, *Principia Ethica*, Thomas Baldwin (ed.), 1993, pp. xiii-xiv.

⁴⁷ Philip Schofield, Sidgwick on Bentham: The ‘double aspect’ of utilitarianism, (Bucolo, P; Bucolo, G. (Trans.), In: Bucolo, P., Crisp, R. and Schultz, B., (eds.), *Proceedings of the Second World Congress on Henry Sidgwick: Ethics, Psychics, Politics*, 2011, pp.412-469.

⁴⁸ G. E. Anscombe, G. H. von Wright, Preface, in Ludwig Wittgenstein, *On Certainty*, G. E. M. Anscombe and G. Ho. von Wright (eds.), trans. Denis Paul and G. E. M. Anscombe, 1969.

⁴⁹ Ludwig Wittgenstein, *On Certainty*, G. E. M. Anscombe and G. Ho. von Wright (eds.), trans. Denis Paul and G. E. M. Anscombe, 1969, Section 308.

were not separate to Moore, and ‘knowledge is in the end based on acknowledgment’.⁵⁰ That is, reason is based on belief, and reason and belief are not separate. Thus, without a critical reflection of reason, Moore’s common sense philosophy is not far from the dilemma of John Locke’s ‘double existence’, that is ‘the idea of existence, of the external existence’ which is identified by Hume.⁵¹ In Moore’s view, common sense knowledge is the truth. This prevented him from further explorations. In light of this, Moore seems to be far from the profoundness of Berkeley, Hume, Bentham and Wittgenstein.

3. Fundamental contradictions in H.L.A. Hart’s Legal Positivism

Next, I will investigate whether Hart’s legal theory is consistent with the meaning of positivism.

3.1 The Minimum Content of Natural Law

Hart stated, ‘The still young sciences of psychology and sociology may discover or may even have discovered that, unless certain physical, psychological, or economic conditions are satisfied ... no system of laws or code of morals can be established, or that only those laws can function successfully which conform to a certain type’.⁵² Hart called the conditions by which laws or codes of morals could be established ‘necessary conditions’ and called the relationship between ‘necessary

⁵⁰ Ludwig Wittgenstein, *On Certainty*, G. E. M. Anscombe and G. H. von Wright (eds.), trans. Denis Paul and G. E. M. Anscombe, 1969, Section 378.

⁵¹ David Hume, *A Treatise of Human Nature*, David Fate Norton and Mary J. Norton (ed.), pp. 48-9, 65-6, 411, 425, 728.

⁵² H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, pp. 193-194.

conditions' and the legal system a 'causal connection'.⁵³ These necessary conditions are 'simpletruisms'⁵⁴ that comprise the following four 'natural facts'⁵⁵: human vulnerability, approximate equality, limited altruism and limited resources.⁵⁶ As to the causal connections of natural conditions and systems of rules, Hart stated, 'Causal explanations of this type do not rest on truisms nor are they mediated by conscious aims or purposes: they are for sociology or psychology like other sciences to establish by the methods of generalisation and theory, resting on observation and, where possible, on experiment'.⁵⁷ Hart concluded that sanctions were both possible and necessary in a municipal system – a *natural necessity* – and that the minimum forms of protection for persons, property and promises were similarly indispensable.⁵⁸ This is Hart's 'minimum content of natural law', which includes not only those conditions by which laws or codes of morals could be established but also a third category for an adequate description of law in addition to definitions and ordinary statements of fact.⁵⁹

In Hart's theory, human society is mechanical and of natural necessity, thus endowing the legal system with natural necessity.

⁵³ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.194.

⁵⁴ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.193.

⁵⁵ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.193.

⁵⁶ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, pp.194-196.

⁵⁷ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.194.

⁵⁸ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.199.

⁵⁹ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.199.

However, Hart emphatically argued that ‘the minimum content of natural law’ is the natural necessity for a human society. Thus, internal conflicts are brought about in Hart’s view of human institutions, and Hart’s sociology is inconsistent. In his discussion of the substantive content of legal systems, Hart constructed an edifice of legal positivism using such terms as ‘necessary condition’, ‘causal explanation’, ‘science’, ‘natural fact’ and ‘natural necessity’. However, Hart’s edifice has a weak pillar: ‘the minimum content of natural law’. For Hart’s legal positivism, however, ‘the minimum content of natural law’ is indispensable. Consequently, internal conflicts arise in Hart’s legal positivism, making it inconsistent. To alleviate the conflict, Hart called his legal theory ‘soft positivism’; however, his legal positivism was ultimately a failure.

3.2. External Perspective

Then I will focus on the core content of Hart’s methodology, combining external and internal points of view.

In the postscript of *The Concept of Law*, Hart stated, regarding his methodology, that ‘participants manifest their internal point of view in accepting the law as providing guides to their conduct and standards of criticism. Of course a descriptive legal theorist does not as such himself share the participants’ acceptance of the law in these ways, but he can and should describe such acceptance, as indeed I have attempted to do in this book. It is true that for this purpose the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the

insider's internal point of view or in any other way to surrender his descriptive stance'.⁶⁰ In brief, the descriptive legal theorist must understand as an insider but not give up his neutrality, thus facilitating a morally neutral description.

The idea that the internal perspective is the only feasible way to describe a legal system is not held by the legal positivists; it belongs to Ronald Dworkin, who steadfastly opposed Hart.⁶¹ Why did Hart adopt the combination of external and internal points of view instead of only the external point of view? Hart steadfastly opposed the purely external point of view, as exemplified in his article *Scandinavian Realism*.⁶² In his analysis of natural law theory, Hart adopted Mill's separation of the laws in the descriptive sense and the laws in the prescriptive sense: "The former, which can be discovered by observation and reasoning, may be called 'descriptive' and it is for the scientist thus to discover them; the latter cannot be so established, for they are not statements or descriptions of facts, but are 'prescriptions' or demands that men shall behave in certain ways."⁶³ Hart argued that the Scandinavian realism 'fails to mark and explain the crucial distinction that there is between mere regularities of human behaviour and rule-governed behaviour. It thus jettisons something vital to the understanding not only of law but of any form of normative social structure'.⁶⁴ Hart considered

⁶⁰ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.242.

⁶¹ Ronald Dworkin, *Law's Empire*, The Belknap Press of Harvard University Press, 1986.

⁶² H.L.A. Hart, *Scandinavian Realism*, in: *Essays in Jurisprudence and Philosophy*, 1983, pp. 161-169.

⁶³ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, pp.186-7.

⁶⁴ H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 1983, p. 13.

that the pure empirical realist method could not succeed in the study of law because it could not grasp the normative social structure of law. Thus, the internal perspective is necessary for understanding law. If a general and universal concept of law is brought about, theorists must separate themselves from a particular legal system and maintain moral neutrality for an objective description of law. This is Hart's external point of view.

This methodology of Hart was met with fierce criticism from Dworkin, who held that the nature of legal theory could not be general and descriptive but only contextual, interpretative and argumentative: "Legal practice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions."⁶⁵ Dworkin argued that the external perspective is not feasible and that 'Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective'. In light of this, *Law's Empire* 'takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face'.⁶⁶ With Dworkin's criticism as his main concern, Hart wrote the postscript 'to clarify what is obscure, and to revise what I

⁶⁵Ronald Dworkin, *Law's Empire*, The Belknap Press of Harvard University Press, 1986, p.13.

⁶⁶Dworkin, *supra* note 84, at 14.

originally wrote where it is incoherent or contradictory'.⁶⁷ Hart sought to endorse his own theory with a revised definition. However, Dworkin did not change his position. First, they had a fundamental divergence of opinion on the subject of legal practice and the nature of legal theory. Second, in Dworkin's view, because of the combination of external and internal points of view, Hart's methodology was not consistent. Dworkin called Hart's linguistic analytical methodology a 'semantic sting',⁶⁸ and 'plain-fact view of law',⁶⁹ as exemplified in Hart's rule of recognition. According to Hart, a developed legal system comprises primary rules and secondary rules. Primary rules are rules of obligation, which require the internal point of view to understand. Primary rules have three defects: uncertainty, stasis and inefficiency. The corresponding remedies for these defects are rule of recognition, rule of change and rule of adjudication. The validity of law depends on the rule of recognition, the ultimate and supreme rule of a legal system, which recognises the truth of propositions of law. The existence of the rule of recognition is a matter of fact.⁷⁰ As to the disagreements regarding the truth of propositions of law, Dworkin distinguished two kinds: empirical and theoretical disagreements. Empirical disagreement is easy to resolve, but theoretical disagreement is very difficult to resolve because it concerns the grounds of law, which relate to fundamental

⁶⁷ Hart, H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.239.

⁶⁸ Ronald Dworkin, *Law's Empire*, The Belknap Press of Harvard University Press, 1986, pp.45-46.

⁶⁹ Ronald Dworkin, *Law's Empire*, The Belknap Press of Harvard University Press, 1986, pp.6-11,15,20,31.

⁷⁰ H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, pp.91-110; Dworkin, *supra* note 84, at 6-11, 31-35.

political issues. However, the linguistic analytical method cannot cope with the fundamental political issue. Dworkin observed, ‘[Austin and Hart] said that propositions of law are in essence factual and therefore make, in themselves, no claim at all about what any official or citizen should actually do’.⁷¹ Dworkin put forward a quite different proposition: “A full political theory of law, then, includes at least two main parts: it speaks both to the *grounds* of law—circumstances in which particular propositions of law should be taken to be sound or true—and to the *force* of law—the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance. These two parts must be mutually supportive. ...A general theory of law therefore proposes a solution to a complex set of simultaneous equations.”⁷² Mainly in response to Dworkin’s attribution of semantic sting and plain-fact positivism to him, Hart wrote the special section ‘Soft Positivism’ in the postscript, stating emphatically that his methodology was not complete positivism and not necessarily exclusive of morality because, as he had elaborated before, ‘nothing can eliminatethis duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situationsunder general rules. This imparts to all rules a fringe ofvagueness or “open texture”, and this may affect the rule ofrecognition specifying the ultimate criteria used in the identificationof the law as much as a particular

⁷¹Ronald Dworkin, *Law’s Empire*, The Belknap Press of Harvard University Press, 1986, p.109.

⁷²Ronald Dworkin, *Law’s Empire*, The Belknap Press of Harvard University Press, 1986, p. 110.

statute'.⁷³ Hart necessarily reserved space for moral argument, as embodied in his acknowledgment of judicial discretion.⁷⁴ However, according to Dworkin, this would run counter to not only the fundamental political principle of separation of powers but also the rule of law that law cannot be retroactive.⁷⁵ The descriptive-explanatory method has not fully been carried out in the morally neutral sense in Hart's legal theory; instead, the method he adopted is conceptual analysis, which has value judgment as its basis.⁷⁶

3.3. The Fundamental Contradictions in H.L.A. Hart's Legal Positivism

Through his analysis of 'the minimum content of natural law' and 'the external point of view', it is evident that Hart, in his legal positivism, acknowledged that a legal system could be established only if some moral conditions were satisfied, although this means that law and morality cannot be separated. Hart also acknowledged judicial discretion, but this also means that law and morals are necessarily intertwined. Finally, legal theorists can offer objective descriptions of law with an outsider's morally neutral external point of view. Thus, it is obvious that in Hart's legal positivism, there arose fundamental sharp contradictions between his particular claims, including the necessary

⁷³H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, p.123.

⁷⁴H.L.A. Hart, *The Concept of Law*, P. Bulloch and J. Raz (eds.), Oxford University Press, 1994, pp.272-276.

⁷⁵Ronald Dworkin, *Law's Empire*, The Belknap Press of Harvard University Press, 1986, pp.37-39; Ronald Dworkin, *Taking Rights Seriously*, 1978, p. 81.

⁷⁶Stephan R. Perry, *Beyond the Distinction between Positivism and Non-positivism*, *Ratio Juris*, vol. 22, No. 1, 2009, p.315.

relation between law and morals and the separation of law and morals. Hart struggled to establish his legal positivism, robbing Peter to pay Paul due to the fundamental contradictions between his particular claims in his general legal theory.

4. Conclusion

From his publication of *The Concept of Law* in 1961 until his death in 1992, Hart revised his defence of his legal positivism. Despite long-time criticism from others and his own acknowledgement of inconsistency in his legal positivism, Hart steadfastly stuck to legal positivism. Why? I think there are two direct reasons. First, Hart thought his soft positivism had strong explanatory power for legal practice. Second and more fundamentally, Hart strongly believed in the theoretical basis of his legal positivism – that is, of the ordinary linguistic philosophy of which he was a co-founder. Despite his persistent and painstaking efforts, however, the edifice of Hart's legal positivism finally collapsed. The fundamental reason for this collapse was his mistaken understanding of the core issues of meaning and truth in philosophy, as exemplified in his misunderstanding of Wittgenstein's later philosophy.⁷⁷

Following Moore's separation of emotion and cognition, modern positivism cut passion away from experience and thus became a mutilated version of classical positivism.⁷⁸ Nevertheless, Hart went

⁷⁷In *The Concept of Law*, there are several references to Wittgenstein's later philosophy. But his understanding of Wittgenstein's later philosophy is obviously wrong. I will dedicate a special essay to address it.

⁷⁸Mary Pickering, *Auguste Comte: An Intellectual Biography*. Vol.1, Cambridge University Press, 2006, p.697; George Ritzer & D.J. Goodman, *Classical Sociological Theory*, 2004, p.82.

farther than Moore, not only cutting passion away from experience but also regarding necessary moral conditions as morally independent social facts, as thus ultimately leading to the failure of his legal positivism.

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