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ABOUT THE JOURNAL

This is our third edition of Epistemei, an undergraduate philosophy journal with a focus on short, original, philosophical work done by undergraduates from universities across the country. We believe that many undergraduates do their best work in shorter papers, which get assigned for most classwork. By focusing on these papers, we can showcase some of students' best work and elevate the importance of everyday philosophy.

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DEDICATION

To the University of Minnesota Philosophy department, and students of philosophy everywhere regardless of their formal education.

“It’s what you think that makes you who you are”
– A second grader from John Muir Elementary School

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NON-RATIONAL COGNITIONS IN PLATO'S *PHAEDRUS*

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Introduction

Plato's definition of the soul has been well-established through existing dialogues and *the Republic*. He divides the soul into the rational part and the non-rational (the appetitive part and the spirited part) parts. As their name indicates, the non-rational parts are not capable of reasoning. In his *Phaedrus*, however, these non-rational parts seem to have some cognitive abilities, including the abilities to form beliefs, to communicate, and to learn. In this essay I will first show that the non-rational parts of the soul embody these abilities. Then I will show the difference between the rational and the non-rational parts of the soul by examining Plato's definition of rationality in *Phaedrus*, which is to have real knowledge. Finally, it shall be concluded that without rationality, the non-rational parts of the soul are still able to practice cognitive abilities.

1. The abilities of the non-rational parts

The non-rational part of the soul, particularly the spirited part, is capable of forming beliefs shared with the rational part. In *Phaedrus*, this ability is illustrated through the chariot allegory when the soul encounters a beautiful boy. The chariot is an analogy for the human soul, composed in three parts: the rational part, represented by the charioteer, and two horses that represent the non-rational parts. The obedient horse stands for the spirited part and the uncontrollable horse stands for the appetitive part. When it sees a beautiful boy, the appetitive part desires sexual pleasure from the boy while the other two parts, believing such action to be wrong, try to stop such pursuit:

At first the other two [the spirited part and the rational part] resist, angry in their belief that they are being made to do things that are dreadfully wrong. (254b)

This paragraph specifies that the spirited part is capable of sharing beliefs of rightness and wrongness with the rational part. When the appetitive part is eager to pursue sexual pleasure, the spirited part gets angry after recognizing such pursuit (of “jumping on the boy”) as a shameful act (253e-254a), since it desires honor (253e). Since shameful acts are believed to be “dreadfully wrong” as indicated in the above passage, they should be restrained. Therefore, acting on this belief of wrongness, the spirited part, together with the rational part, “pulls back” the appetitive part instead of solely following the command of the rational part (the charioteer). Such a “belief-action” mechanism requires some level of cognitive power that motivates the soul to act. Thus, the spirited part must also be able to form motivational beliefs about right and wrong based on its desire for honor, even if it does not comprehend honor’s nature.

The separately formed beliefs of each part of the soul are motivational enough to generate actions, but they would not be formed without communication. As mentioned in the above passage, some (second-order) beliefs are formed by one part as responses to a (first-order) belief previously formed by another part. Therefore, in order for second-order beliefs to exist, the different parts must be engaged in some forms of communication. Examining the case of the beautiful boy again, the appetitive part communicates its desire with the other two parts in an indirect way:

At last, however, when they [the rational part and the spirited part] see no end to their trouble, they are led forward, reluctantly agreeing to do as they have been told [by the appetitive part]. (254b)

In this passage, the appetitive part communicates its desire through the act of resistance, which causes the other two parts of the soul to compromise temporarily and “reluctantly agree” to follow the lead of the appetitive part passively. Although such communication seems to be too strenuous and tormenting for all three parts to be efficient, this is still undoubtedly serving the purpose of delivering information since the other two parts are able to comprehend and respond to the appetitive part’s message directed at them. The non-rational part is also capable of conducting a more direct and effective form of communication. After the rational part is reminded of the Forms¹, it stops the soul from approaching the boy. Then the appetitive part communicates with the other two parts in the form of accusation:

...the other--once it has recovered from the pain caused by the bit

¹ There are various interpretations of the Platonic Forms. In *Phaedrus*, the paradigm view would be more preferred.

and its fall--burst into a torrent of insults as soon as it has caught its breath, accusing its charioteer and yokemate of all sort of cowardice and unmanliness for abandoning their position and their agreement. (254c)

Although lacking rationality, this part of the soul actively responds to the actions taken by the other parts instead of intentionally disobeying them, so in this situation, it is engaging in a more direct form of communication.² Notably, Plato also indicates that there is some form of agreement existing between the three parts of the soul, which the rational part and the appetitive part are accused to be abandoning in this situation. Without the capacity of communication, especially the ability of persuasion and being persuaded³, it would be impossible for each of the non-rational parts to form any sort of agreement with the other two parts. In this agreement of pursuing truth specifically, the non-rational parts have to be able to be persuaded by the rational part in some ways without understanding the notion of truth. Therefore, all three parts, including the two non-rational parts, must all have the ability to communicate.

Then, Plato suggests that the appetitive part is capable of learning through repeatedly experiencing pain imposed by the rational part.⁴

...he [the rational part] violently yanks the bit back out of the teeth of the insolent horse, only harder this time, so that he bloodies its foul-speaking tongue and jaws, sets its legs and haunches firmly on the ground, and ‘give it over to pain.’ When the bad horse has suffered this same thing time after time, it stops being so insolent; now it is humble enough to follow the charioteer’s [the rational part’s] warning, and when it sees the beautiful boy it dies of fright, with the result that now at last the lover’s soul follows its boy in reverence and awe. (254e)

The appetitive part here is able to learn from experience. Learning requires some degree of cognitive ability. After being held back by the rational part

² Interestingly, unlike the example of communication examined previously, which was conducted in a purely non-verbal approach, this is an example of verbal communication between the parts. Although it is clear that the Chariot allegory should be treated as an allegory and not too literally, it is still interesting to remind oneself of the usage of “logos” in Greek during Plato’s time. One may even be motivated to ask a more deep-rooted question in Plato’s texts: why is the spirited part able to recognize the rational part’s preferences as good and/or correct? Maybe the distinction between the rational and the non-rational parts is not as clear as it appears to be.

³ And one may also argue that persuasion itself is an even more advanced form of communication that must involve thinking. Then it seems absurd for me to claim that such form of communication may appear when rationality is lacking. But Plato may have already provided us the solution to this question in his *Timaeus*, when explaining the role of the liver. This point will be expanded later in the essay.

⁴ Arguably, this process is highly similar to the psychological process of conditioning or motivate learning through negative reinforcements.

through experiencing pain repeatedly, the non-rational part is able to change its action: it is no longer “insolent” to the control of the rational part and becomes “humble.” It “dies” seeing the beautiful boy, no longer having the strong urge for sexual pleasure. Without the ability to learn, the appetitive part would repeatedly pursue sexual pleasure relentlessly, not knowing the painful result of such pursuit. Its action would never have changed. But because it is able to learn⁵, it eventually acquires the belief that pursuing its sexual desire would only generate painful result. Since the appetitive part desires pleasure and not pain, it stopped pursuing the boy. Therefore, the appetitive part must have the ability to learn.

Hence, I have argued that the non-rational parts have the ability to form beliefs, communicate, and learn. All of them, as discussed above, require some level of cognition. But considering that the non-rational parts lack certain capacity since they cannot reason, how is it possible for them to have such cognitive abilities? I will now answer this question by first examining the differences between the rational and the non-rational parts of the soul to find Plato’s definition of rationality. Then I will show how the absence of rationality in the non-rational parts of the soul does not prevent them from having these cognitive abilities.

2. Plato’s definition of rationality in *Phaedrus*

In *Phaedrus*, the rational and the non-rational part of the soul are differentiated by the rational part’s ability to access “real knowledge”. Real knowledge, according to Plato, is of truth--perceptual knowledge is not. Therefore, only the rational part can obtain real knowledge because it desires the truth.⁶

First, it is important to note the distinction between real knowledge and perceptual knowledge in *Phaedrus*.⁷ By describing the realm of Forms, Plato specifies that real knowledge is of the truth:

What is in this place is without color and without shape and without

⁵ And learning here involves two parts: retaining and adjusting. First, the appetitive part must be able to remember its repeated experiences. Then it must be able to adjust its behavior in order to avoid pain.

⁶ It is also important to realize that during the time of Plato, rationality is widely considered as distinctively human. If animals are also able to think, then thinking itself must not be necessarily rational. This may also help to explain why the definition of rationality in this essay may appear to some to be too narrow.

⁷ Plato emphasizes more on this in *Republic* Book 5-7, *Symposium*, *Phaedo*, and many other works. What I am referring to as truth in this paper is identical to the concept of Forms in *Republic*. Real knowledge then, would only be of the Forms. In *Republic*, Forms are always stable and thus infallible. On an epistemic level, it cannot be accessed by perception but is only intelligible. (477d-e) These characters of the Forms are mentioned (as I will show in this paper) but not explained in *Phaedrus*. Therefore, this paper will not explain why truth (and real knowledge) has these characteristics but focus on its connection to cognitive activities.

solidity, a being that really is what it is, the subject of all true knowledge, visible only to intelligence, the soul's steersman [the rational part of the soul]. Now a god's mind is nourished by intelligence and pure knowledge, as is the mind of any soul that is concerned to take in what is appropriate to it, and so it is delighted at last to be seeing what is real and watching that is true, feeding on all this and feeling wonderful...On the way around...it has a view of Knowledge--not the knowledge that is close to change, that becomes different as it knows the different things which we consider real down here. No, it is the knowledge of what really is what it is. (247c-d)

For Plato, truth is never changing. A piece of knowledge would only be wrong if the corresponding fact changes and the "knower" is unaware of such change. But since truth never changes, real knowledge of truth must be infallible. Such knowledge is also only intelligible because truth is only "visible to intelligence." But perceptual knowledge (or what Plato refers to as "knowledge down here" in this passage) is different from real knowledge. It is what we take to be real in our world but are actually fallible. Since perceptible objects in this world are subject to change, our perceptual knowledge formed on such changeable reality must be fallible.⁸ For example, appearance, as one form of perceptual knowledge, is always changing. The beautiful boy can appear beautiful when he is young but ugly when he gets old, or beautiful from one perspective but ugly from another. In these cases, it would be wrong to conclude that the boy is beautiful based on perceptual knowledge. But the real beauty represented by the beautiful boy is not subject to change since it is always beautiful.⁹ To conclude, for Plato, real knowledge is of the infallible truth that is solely intelligible; perceptual knowledge is only perceptible and is subject to change, thus it does not grasp the truth.

Therefore, since real knowledge is only of things that are intelligible, it can only be accessed by the rational part of the soul. But what is special about the rational part for it to be the only part that has access to real knowledge? Plato offers an explanation when describing the "realm of Forms." He states that the rational part of the soul desires truth because it is what nourishes and benefits the entire soul¹⁰:

The reason there is so much eagerness to see the plain where truth

⁸ This point is introduced from Plato's understanding of the perceptible objects in *The Republic*. (479a-c) In *Phaedrus*, he only mentions that earthly knowledge is close to change without developing the relations of truth, knowledge, and perceptible objects. So, I am borrowing more support for my point from *Republic*.

⁹ I am giving an example that is similar to Plato's example (of the flower) which he used to contrast perceptible beauty to the Form of Beauty in *Symposium*.

¹⁰ There is more evidence in *The Republic* Book 4 that suggests the rational part desires what is good for the entire soul. I am borrowing that point to draw a connection to my argument here.

stands is that this pasture has the grass that is the right food for the best part of the soul, and it is the nature of the wings that lift up the soul to be nourished by it...a soul that has seen the most [truth] will be planted in the seed of a man who will become a lover of wisdom. (248b-d)

Because the rational part desires the truth as its nourishment, it “sees” enough truth in the realm of Forms and inhabits a human body. Therefore, the rational part of the soul has access to truth because it has been in contact with truth before, which enables it to distinguish truth from perception on Earth.¹¹

An interesting question¹² asks whether the desire of truth gives the rational part the ability to obtain truth. If so, how? More importantly, what is rationality? Is it the ability to acquire truth, the desire to come into contact with the truth, or the knowledge obtained of the truth? In *Phaedrus*, it seems that rationality may not solely be the ability. It should include the desire as well. In fact, it may be easier to understand rationality as a causal chain of one motive generating its corresponding actions. But I argue that the ability to acquire knowledge itself is sufficient for the rational part to have its power. What it implies is that truth itself is good.¹³ For there is no need to show that the soul as a whole desires what is good.¹⁴ If truth entails goodness, then it would not be surprising that the ability to acquire truth itself is sufficient for the rational part to be motivated to conduct such an acquisition, for the ability to acquire truth must entail the ability to recognize truth as what it is, including its goodness. For example, the ability to pursue a beautiful boy must entail the ability to recognize the boy as beautiful. Similarly, if the rational part is able to acquire truth as what it is, it must realize its goodness even before such acquisition. The rational part has an innate desire for what is good, and it is this desire that allows the rational part to acquire it. But this is not a desire exclusive to the rational part.

So, I conclude that rationality for Plato is the ability to obtain truth. In the example of the boy, when a rational person sees the boy, the boy’s beauty only reminds her of the real Beauty. Then, she comes into contact with truth (which in this case would be the Form of Beauty). Her soul is nourished and “lift(ed) up” from the perceptible realm to approach the realm of Forms. Rationality provides her the access to real knowledge--what is truly

¹¹ It can also be interesting to consider where such natural desire rises from: can the soul desire something it has never been in contact with, or is even unaware of? How is such desire possible? But this question is not the main concern of this paper, so I shall not investigate this issue further here.

¹² My sincerest thanks to Professor Jessica Moss for posing these questions and giving other essential suggestions to this essay.

¹³ If we look back to the *Republic* 517b, the Sun outside the cave is the Form of the Good, for it gives light and enables souls to see all the other Forms.

¹⁴ As mentioned in the *Republic* and various other dialogues.

beautiful, while a non-rational person would have no such access and only obtain the perceptual knowledge of beauty (that the boy is beautiful), which would not nourish her entire soul but only satisfy her appetitive part.¹⁵

3. How can cognitive activities be reason-less?

I will now argue that being unable to obtain truth does not prevent the non-rational parts of the soul from having cognitive abilities: namely forming beliefs, communicating, and learning. I will examine each of the abilities by assessing if an understanding of truth is required in conducting them.

During the formation of its belief, the non-rational spirited part does not need to know the truth, although it should have a (unnecessarily correct) notion of truth. Beliefs can be either true or not true, correctly justified or incorrectly justified. The formation of a belief only requires the believer to believe that some proposition is true without requiring the proposition itself to be true. Still, the spirited part, in order to form beliefs, needs to have the concept of truth value. But it does not need to know what is really true (and in fact it can never have any knowledge, since it has no access to truth) to form a belief. In this case, the spirited part believes that the appetitive part forces it to do wrong things. Such belief of wrongness is generated by 1) the fact that the spirited part is being pulled to approach the beautiful boy for sex, and 2) that it feels shameful to do so. Believing a shameful act to be wrong does not require the believer to know if that shameful act is actually wrong or not, or to know the reason that justifies its wrongness. Therefore, the spirited part forms its belief without access to real knowledge. Although such belief can be wrong or unjustified, it still should be considered as belief.

Similarly, I argue that communication does not require the ability to grasp truth. In the case of the spirited part accusing the other two parts, or the case when the appetitive part relentlessly urges the other two parts to approach the boy, truth is not involved. For the spirited part's accusation, such communication is mainly an emotional response to the act of the other two parts. There is no reasoning involved in justifying its response. When the appetitive part is forcing the other two parts, causing them to give up resisting and to eventually compromise, the appetitive part simply needs to insist on approaching the beautiful boy for sex. In fact, it relentlessly drags the other two parts of the soul along with itself to approach the beautiful boy because it does not have any understanding of what is really beautiful. However, the

¹⁵ This definition may appear to be quite stringent at first. Implications derived from the above conclusion may suggest that not all thoughts are rational, and that all rational thoughts must be aimed at truth. But these implications are not as counterintuitive in Plato's setting when thoughts are differentiated from assertions and other reason-less propositions obtained by the mind, and when truth itself is only intelligible—namely, can only be approached through thinking.

agreement formed between all three parts of the soul implies that the non-rational parts can conform to truth to some degree without knowing what it is. In order for the rational part and the non-rational parts to form any kind of agreement, they must be able to understand each other. The rational part of the soul is of what is intelligible, while the other two parts are not. So, their communication must not be conducted in a purely intelligible form. But this does not raise an issue, since the rational part also has access to perceptible knowledge. In the case of the boy, the rational part is able to realize real Beauty by seeing perceptible beauty. If it does not have access to perceptible knowledge, then it can never be reminded of real Beauty. So, the rational part can communicate with the non-rational parts through perceptible messages which do not require real knowledge to comprehend.¹⁶

Learning is a more interesting case to distinguish from having real knowledge, and maybe less obviously independent from it compared to the other two abilities. But still, the specific type of learning the non-rational part participates in does not require real knowledge. In the example of the appetitive part learning to be humble and ceasing to pursue sexual pleasure, it ends up being able to “follow the charioteer’s [the rational part’s] warning.” But learning to obey does not require knowing the truth. The appetitive part does not actually know *why* it should not pursue sexual pleasure when seeing a beautiful boy. It only knows that it should not do so because such an act would generate pain. It cannot and does not need to understand why the rational part would impose such pain on it. Still, learning in this sense involves two parts: retaining and adjusting. First, the appetitive part must be able to remember its repeated experiences. Then it must be able to adjust its behavior in order to avoid pain. Forming memory, quite directly, does not require knowing the truth. But adjusting behavior according to the current situation seems to be more interesting for it also involves two parts: making predictions and checking for response. Although this may appear to be a process requiring understanding, it is not aiming at understanding the truth, but only the mechanism of how a particular system works. Hence, this type of sensory conditioning is still restrained in the realm of perception. The appetitive part is learning by pain instead of learning by getting into contact with truth.

¹⁶ Though at this point, an interesting question may be raised: perceptible messages may not require knowledge for comprehension, but it still requires reception and understanding. Then how is the receiving of truth a different process from the receiving of an image? More importantly, if a person is able to understand something, why is he not able to understand the truth? But this question is answered before even being raised. Perception appeals to the senses, while knowledge appeals to the mind. Senses are of the body while mind is of the soul. Therefore, the process of understanding these distinct types of information must also be very different.

Conclusion

To conclude, in this paper, I argue that the non-rational parts of the soul in Plato's *Phaedrus* have cognitive abilities to form belief, to communicate, and to learn. Then I explain that by comparing the differences between the rational and the non-rational parts in *Phaedrus*, rationality is the ability to have real knowledge--because real knowledge is only of truth, which is never changing and only of the intelligibles. To have cognitive abilities does not mean one needs to know what is true. Beliefs can be false. Communication of the three parts can be done by having the rational part delivering its message in ways comprehensible by the non-rational parts (e.g. through sensory input). Learning can be done through conditioning, which requires memory but not truth. Therefore, the non-rational parts can have these cognitive abilities without knowing the truth.

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PHENOMENOLOGY'S DISTINCT DOMAIN: THE NORMATIVE POTENTIAL OF THINKING ABOUT THE NATURAL ATTITUDE

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Introduction

Husserl's classical phenomenology produces two epistemic frameworks: one that produces theories about the creation of meaning and identity and is more likely to be collaborative with the social sciences, and one that aims only to bring our attention to fundamental facts of human experience. This second framework seems to have epistemic value outside of the explanatory ambitions of science, which are demonstrated in critical phenomenology. In this paper, I will document what I take to be conclusive arguments against phenomenology's claim to be epistemologically foundational vis-a-vis scientific practice. But then I will argue that Husserl's analysis of the natural attitude, understood within the context of the phenomenological epoché, offers valuable resources for normative decision-making in a way science cannot. Finally, I consider Gayle Salamon's construal of the critical phenomenological method to highlight the distinct epistemic value of this static phenomenology.

A great deal of literature focuses on the relationship between phenomenology and science,¹ most of it assuming that a grounding relation is at stake. Recently, the consensus in this literature has weighed in favor of

¹See: Edmund Husserl, *Cartesian Meditations* (1960); Merleau-Ponty, "What is Phenomenology?" (2002); Sebold, "Phenomenology and the Scientific Image: Defending Naturalism from its Critics" (2016); Zahavi, "Naturalized Phenomenology" (2009); Gallagher, "Phenomenology and Non-Reductionist Cognitive Science" (2009)

naturalism, or scientific naturalism.² While some philosophers might contest the epistemological dominance of scientific naturalism, by employing phenomenological or non-phenomenological arguments, the focus of this paper will be different. Instead, I argue that the phenomenological method can produce a particular epistemic value that does not pertain to the explanatory function of scientific practice. Specifically, I argue that the phenomenological method offers a means of bringing attention to fundamental facts of human experience, the explication of which helps inform normative decision-making and the analysis of characteristic human activities. Then, I will argue that recent developments in critical phenomenology demonstrate this specific epistemic value of phenomenology.

This paper will proceed in four parts. First, I will survey the debate surrounding phenomenology and science, focusing in particular on Richard Sebold's recent account of the relationship, ultimately retaining Sebold's argument that phenomenology's claim to a foundational role vis-a-vis scientific practice is unsustainable. Next, however, I will argue that a scientific absolutism about knowledge is undesirable, which opens up a distinct, non-foundational role for phenomenology; this role pertains to normative decision-making. In the third section, I will employ Husserl and other phenomenologists' accounts of the natural attitude and the functions of reflection in order to clarify this role. Finally, I will use Gayle Salaman's characterization of the critical phenomenological project to suggest the currency of this narrow variant of phenomenology, both for critical phenomenology and philosophy more generally.

Phenomenology and Science

Several authors have commented upon the comparative prospects of phenomenology and science as foundations for knowledge-gathering activities. Richard Sebold contends that the arguments available to a phenomenologist fail to hold up given several developments in our understanding of science, or more specifically, scientific naturalism.³ Scientific naturalism can be understood as advancing two separate theses: 1) Metaphysical naturalism, which holds that all entities are natural entities, understandable in the context of our best scientific theories; 2) Methodological naturalism, or the view that the best way to know the world is through scientific methods, or "the techniques of hypothesis formation, prediction, observation, data analysis, and theory formation, and would include theoretical virtues such as consilience, explanatory depth, and

² Sebold, "Phenomenology and the Scientific Image"; Zahavi, "Naturalized Phenomenology"; Gallagher, "Phenomenology and Non-Reductionist Cognitive Science."

³ "Phenomenology and the Scientific Image"

parsimony”⁴ Since this paper is concerned with the possibility of foundational epistemological role for phenomenology, I will focus on arguments for phenomenology’s grounding relation vis-a-vis methodological naturalism. It seems like this is the position phenomenologists are more likely to hold in the current day-and-age, at least according to Sebold’s cursory account:⁵ they accept that we live in a world of the ontological sort that science posits, but they contend that naturalistic knowledge-generation is contingent upon a constituting subjectivity and/or intersubjectivity, which itself must be understood in order for naturalism to make sense.

In *Cartesian Meditations*, Husserl contends that scientific naturalism’s accounts of the world “are the products of an ingenious theoretical technique, but the intentional performances from which everything ultimately originates remain unexplicated.”⁶ Husserl’s objection to methodological naturalism, then, can be interpreted as such: by immersing its characteristic forms of investigation in noematic (i.e. object-oriented) content, science fails to appreciate the ways in which noetic structures, or the constitutive roles of consciousness in intentional acts, shape its employed meanings, terms, and, subsequently, its conclusions. This stems from a basic philosophical commitment for Husserl and other phenomenologists, namely, that investigation into the origins of the meanings of important concepts we employ in discourses like science is paramount. And these origins, phenomenologists contend, are necessarily dependent on the genesis of understanding, which, in turn, compels a rigorous examination of the features of subjective experience (i.e. noetic structures) that figure into this genesis.⁷ And the meaning of a thing depends on both the actual features of a thing and, crucially, our particular subjective experience of the thing. Thus, investigation into our scientific concepts requires investigation into structures and features of our (scientific) subjective experience. So, for example, Husserl takes it to be an unwavering feature of conscious experience that we can only come to know facts about the world through direct confrontation with those facts: to be accepted as existing, a thing must be directly verified.⁸ Of course, “I” do not directly verify everything I know. But, thanks to the fact that humans have a shared “primordial” constitution⁹ and, subsequently, a shared

⁴ “Phenomenology and the Scientific Image,” 46

⁵ “Phenomenology and the Scientific Image,” 48

⁶ “Phenomenology and the Scientific Image,” 153

⁷ *Cartesian Meditations*, 36

⁸ *Cartesian Meditations*, 57-58

⁹ Very roughly, a set of facts characterizing conscious experience that is shared by others with a similar physical constitution, i.e. other humans. So, for example, our shared constitution makes it that I can understand the nature of someone’s spatially specific perception (e.g. of a cup that is out of my view) without actually occupying their spatial position. (*Cartesian Meditations*, 123.)

mode of spatial navigation,¹⁰ I can come to learn other facts via the direct verifications of others—or, as is often the case, via the communication of facts that have once been verified.¹¹ Whatever the means of this dissemination, the basic point still stands: knowledge is always derivative of some direct human experience.

This point forms the basis of Husserl's critique of science, then. Scientific practice is inescapably predicated on direct experience and intersubjective communication. As a result, it will produce conclusions that are, on the one hand, specific to the particular subjective condition in which we find ourselves, and, on the other, built on the institutions of human communication, which might be liable to certain translational problems as well as distorting influences. Science surely produces something consistent and rigorous in Husserl's eyes, but its attempts to assert facts about the fundamentals of reality go astray insofar as they are not connected to any intelligible or meaningful human experience. If this phenomenological critique succeeds, then belief in the reality of the objects posited by scientific laws and theories might wane. Such objects might be better understood as mere constructs that help us make sense of observable effects. This approach might prescribe an anti-realism with respect to the existence of atoms, for instance. A foundational role in the generation of knowledge would thus be established, insofar as phenomenology (and only it) would give us insight into the experiential verification that would be required to admit new facts (proposed by science) into our conception of reality.

However, as Sebold points out, this critique of the epistemological foundations of science does not give phenomenology a privileged position lest one takes a strict verificationist view of meaning. One can agree with Husserl and other phenomenologists on the fact that the origins of¹² our employed terms and references come from subjectively experientiable verifications and subsequent syntheses, but deny that these origins place any restriction on the things science can discover.¹³ Scientific naturalism searches for causal relations, and non-experienced entities like atoms prove crucial in explaining these relations. We start with what the phenomenologist might delimit as "objective reality," but, in order to make sense of this surface of appearances, we necessarily go beyond this realm and find necessary structures and causal relations that do not figure into our initial experiences.

The phenomenologist might insist on a weaker form of the argument against the all-encompassing, foundational role of methodological naturalism. They could admit that science discovers necessarily existing aspects of the world but suggest that our description of those aspects can be

¹⁰ Such that our sensory faculties are attuned to the world in a similar way.

¹¹ *Cartesian Meditations*, 127-130

¹² "Phenomenology and the Scientific Image," 54

¹³ "Phenomenology and the Scientific Image," 55

bettered through phenomenological reflection. This phenomenology-as-conceptual-analysis approach¹⁴ is advocated for by Merleau-Ponty when he writes, “if we want to subject science itself to rigorous scrutiny...we must begin by reawakening the basic experience of the world of which science is the second-order expression.”¹⁵ But a crucial question remains: if the meanings and terms employed in science are subject to error and criticism, why is going back to the things ‘themselves’ the exclusive solution? As Sebold notes, the phenomenologist has to make a positive argument here, and not merely point out the important, but practically unactionable insight that such terms originate from direct experience.¹⁶ That is, phenomenology must make an independent case that the flaws identified in scientific concepts can be remediated by the phenomenological method. Methodological naturalists would point out here that a feature *internal* to scientific practice solves the problem of conceptual adequacy. Specifically, scientists have to rework their concepts in order to account for salient properties of the phenomenon in question. If we cannot explain a phenomenon, we will not be able to predict it, either. Nor will we be able to build up larger explanatory frameworks if our concepts were lacking. For a simple example, consider cells. If we conceived of cells as the irreducible locus of biological function, we would miss out on features with causal importance, like DNA. In turn, less emphasis would be placed on genetics, which would ultimately give us less explanatory power. So, science cannot naively employ terms and concepts and leave phenomenology as the only practice that can give us true knowledge of existence. Though concepts and terms might be rethought to gain more predictive power, the process of rethinking them is internal to the scientific method.

Two Phenomenological Purposes

The phenomenologist might insist on one more foundational role with relation to empirical scientific practice, namely, as a constraint with relation to psychology. This is a main concern of Husserl’s in *Cartesian Meditations*. Whereas the data of psychology are taken to be the “psychic components of a man,” the “parallel data” of phenomenology are considered in the context of “undeviating observance of the transcendental reduction.”¹⁷ That is, the posited mechanisms and components of psychology are taken to be contingent upon structures of consciousness, which can only be clarified by the transcendental reflection central to Husserl’s phenomenology which allows us to explicate intentional experiences that give rise to the properties that psychology describes. Take the empirical conclusion that humans act in

¹⁴ Sebold, “Phenomenology and the Scientific Image”

¹⁵ “What is Phenomenology?” IX

¹⁶ “Phenomenology and the Scientific Image,” 63-64

¹⁷ *Cartesian Meditations*, 32

self-interest. One may be able to use phenomenological analysis to argue that 'self-interest' results not from an innate disposition, but from the phenomenological fact that one never experiences from another's perspective. In this sense, then, phenomenology might be taken to be epistemologically prior to human-related science, insofar as it has a special purchase on illuminating the first-person perspective.

One could also take a bidirectional tack in arguing for the epistemological importance of phenomenology for psychological practice. Relenting the paradigmatic utility of scientific naturalism, Dan Zahavi argues for a revised version of Husserl's anti-naturalized psychology. Rather than seeing phenomenology or science as constraining one another, Zahavi advocates for "letting phenomenology engage in a fruitful exchange and collaboration with empirical science."¹⁸ Phenomenology's first-person perspective would assure "mutual enlightenment" with psychological and cognitive science.¹⁹

However, the scientific naturalist might still resist the importance of phenomenology insofar as they would question the value of first-person perspectives in producing data for empirical psychology. Sebold's response to this first-person perspective argument for phenomenology's importance is particularly telling, indicating an understanding of knowledge-generation that fixes the opposition between phenomenology and science. Sebold does not deny that a first-person perspective can and does play a methodological role in science, but he questions the extent to which it provides special access to conscious life such that it should be privileged over third-person perspectives. He quotes Eric Scwitzgebel, who concludes based on findings from cognitive science that "we make gross, enduring mistakes about even the most basic features of our currently ongoing conscious experience (or 'phenomenology'), even in favorable circumstances of careful reflection, with distressing regularity."²⁰

Here, then, the first-person perspective is discredited as an explanatorily powerful tool: but what does this entail, exactly? It seems like there are two responses available to the phenomenologist. First, they can simply pushback against this first-person skepticism—and, subsequently, against doubts about phenomenology's importance vis-a-vis the empirical sciences—by pointing to substantive theories developed by phenomenological philosophers on the nature of perception, embodiment, memory and other psychological phenomena that could govern empirical work.²¹ Gallagher notes developments heading in this direction, such as neurophenomenology and

¹⁸ "Naturalized Phenomenology," 8

¹⁹ "Naturalized Phenomenology," 9

²⁰ Scwitzgebel 2008, 247; Sebold, "Phenomenology and the Scientific Image," 60

²¹ Zahavi, "Naturalized Phenomenology"

front-loading phenomenology.²² The former focuses on the use of the epoché, or bracketing of judgements, in order to obtain a clearer first-person report on subjective experience. Gallagher notes that experimenters such as Lutz et al. (2002) have found success with this method.²³ Front-loading, by contrast, aims to incorporate phenomenological insights into experimental design.²⁴ It involves “a dialectical exchange between phenomenological insights and preliminary trials that will specify or extend these insights for purposes of the particular experiment or empirical investigation.”²⁵

But another route might be to question the very premises of the debate. Thus far, the discussion has assumed that either phenomenology or science has to ground all possible knowledge-generating activities. This is an assumption in Husserl, who writes of “grounding science absolutely.”²⁶ But Sebold seems to hold this view, too, writing that his “principle task is then to elucidate why these anti-naturalist arguments are deficient and to intimate how this might cause a problem for the continued need of the phenomenological method.”²⁷ This statement suggests the view that insofar as phenomenology, as an independent method, is not needed to ground the knowledge that science identifies, then it could lose its status as an independent knowledge-gaining method altogether. However, in suggesting the empirical superiority of the third-person perspective, Sebold excludes a very real field of knowledge relating to the lived experience of being a subject. Of course, the methodological naturalist might consider the state of scientific inquiry as Sebold presents it and conclude that a strong eliminativism of the mental is warranted, counting on cognitive science to give us more sophisticated theories about the self. Yet, in lieu of such a readily available theory, the immediacies pertaining to subjective experience will just be dismissed. This seems to be a problem insofar as one takes the felt experience of subjecthood to be the basis from which any normative decision-making can arise: science may be able to provide us with a consistent (naturalistic) criteria for comparing the relative goodness of different states of affairs, but the desirability of such states of affairs and the decision to act for the sake of them is predicated upon subjective experience. More specifically, a subjective experience in which it makes sense to judge something as desirable, worth doing, and so on.

Thus, there is a need to understand subject-specific knowledge, which cannot be covered with the explanatory tools of empirical science. A key feature of this knowledge has to do with normative decisions and, in

²² “Phenomenology and Non-Reductionist Cognitive Science.”

²³ “Phenomenology and Non-Reductionist Cognitive Science,” 24

²⁴ “Phenomenology and Non-Reductionist Cognitive Science,” 27

²⁵ “Phenomenology and Non-Reductionist Cognitive Science,” 27

²⁶ *Cartesian Meditations*, 8

²⁷ “Phenomenology and the Scientific Image,” 52

particular, with the ability to judge that something not currently in existence is desirable. In what follows, I will argue that Husserl's description of the transcendental reduction and its opposite, the natural attitude, clarifies this ability in meaningful ways. Then, I will provide an overview of Gayle Salamon's critical phenomenological method to demonstrate how this narrow employment of phenomenology can tie into important epistemological and social functions.

The Natural Attitude and its Suspension

As Lanei Rodemeyer notes in their book chapter on the subject, the natural attitude might be the only straightforward concept in Husserl's writings.²⁸ Nevertheless, it is vital for understanding the phenomenological project. Indeed, it seems like the transcendental reduction can be best understood in contrast to the natural attitude. In the latter, I assume a position, or orientation, to the world that is determined by practical immediacy; it is characterized by "the non-intuitive processes of meaning objects, the judgments, valuing, and deciding, the processes of setting ends and willing means."²⁹ By 'non-intuitive,' Husserl means that these subjective processes are shaped by some distorting factor. They involve intentional states in which the objects of consciousness are seen from the lens of a particular position, rather than in full clarity.³⁰ More precisely, it seems like these processes of meaning objects are fixed according to what is practical and conducive to my various aims as a psychophysical being.

The phenomenological epoché, or the method by which one explicates transcendental subjectivity, is in radical opposition: whereas the natural attitude continually presupposes the existence of the world, the epoché is characterized by abstention from believing in the being of the world.³¹ The only thing that I cannot doubt is the experience of phenomena. Those phenomena may or may not exist, but they do not fade away from experience, from subjective processes: "everything meant in such accepting or positing processes of consciousness... is still retained completely—but with the acceptance-modification, 'mere phenomenon'."³² This gives me the ability to, at the very least, imagine the distinction between cogitatum, or those objects accepted by me, and my interconnected cogitationes, or my subjective processes that shape my intentional investment in relation to cogitatum.³³ As such, I reveal the constitutive importance of my consciousness in my perceiving of the world; I reject the notion that I am

²⁸ "The Natural Attitude"

²⁹ *Cartesian Meditations*, 20

³⁰ *Cartesian Meditations*, 58

³¹ *Cartesian Meditations*, 18

³² *Cartesian Meditations*, 18

³³ *Cartesian Meditations*, 37

determined in whole by the objects I confront.

So, the thesis brought out Husserl's discussion of the phenomenological epoché is two-part: First, by bringing attention to the constitutive function of my subjectivity, I bring the natural attitude to light, or reveal that orientation to the world in which I complacently take my naturally given experience to be the only possible mode of experiencing; Second, and flowing out of this realization of various modes of experiencing, I find agency over the way in which I orient myself to what I previously took to be an immutable, given reality. One might very well ask, however, whether the phenomenological epoché is merely giving name to a common insight, one that is obviously true, and, as such, whether Husserl's "discovery" of the natural attitude is all that important.

But one can hold that the suspension of the natural attitude is a process common to subjective experience without subsequently asserting that a phenomenological treatment of it is useless; in fact, insofar as the suspension of the natural attitude is a crucial feature of subjective experience, that makes it all the more important to try to understand it from a well-developed philosophical perspective. As Rodemeyer points out, abstention from natural assumptions and the "general positing of existence" is a necessary condition for our ability to create fiction.³⁴ In order to construct a story about a fictional character, I must be able to imagine the existence of a person who does not actually exist; I must be able to see my interactions with actually existing others as phenomena that could be ordered and constructed otherwise. Husserl's construal of the epoché clarifies the fiction-making process, here: I am abstaining from thinking of objects only in the mode of their givenness, but, as a subject who is continually confronted with the being of the world, I have only this being (i.e. the world) as my material for alternative constructions.

Moreover, and more importantly, the epoché, as a reflective method, has an effect on our orientations to the world that differ from regular reflection. An example can help. It is common knowledge that the death of a loved one, or even an acquaintance, can provoke one to consider the brevity of life. It seems like a more critical stance towards the natural attitude that is common to life arises in such circumstances. To better understand what is going on here, we can distinguish between what Husserl calls "natural" reflection and "transcendental" reflection. In natural reflection, subjective experiences are reflectively made into objects, but this objectifying move is an orientation for the practical purposes of the natural attitude.³⁵ So, when I hear of an acquaintance's sudden death, an overwhelming feeling of displacement comes over me: my immersion in the natural way of perceiving

³⁴ "The Natural Attitude," 238

³⁵ *Cartesian Meditations*, 34-35

the world—in which my purpose is assumed—is interrupted by the news. My ability to “make sense” of this subjective experience only arises in reflection, in which I can identify that out-of-the-ordinary feeling and give it some sort of object status. This provides me with some sort of practical construct, like “the news of death disorients me,” which I can employ to make sense of a similar situation in the future.

Transcendental reflection, however, does not immediately relate back to the natural attitude. Instead, it relates one back to the fact that one, as a constituting consciousness, is the acceptance-basis of phenomena.³⁶ Given the natural reflection performed, I can take the objectification “the news of death disorients me” and inquire further into the presuppositions and meanings that make this object possible. I might conclude that the necessary conscious structure of immanent time, in which all my subjective processes are related back to one, continuous experience of time flow, creates a specific sense inherent to the natural attitude. My subjective processes are the only data points on which my knowledge of the world rests. As a result, I cannot imagine not having my conscious experience, which leads me to presuppose the indefinite continuity of my own existence. When I am reminded of the fact of death, however, I can become critical of this assumption in the natural attitude via transcendental reflection and see how a different assumption—that my subjective processes will come to an end—would lead to a different nexus of meanings. In this fashion, I perceive the ways in which my intentionally invested life, my natural attitude, could be different; and, by virtue of this perception, I can change that attitude.

Thus, phenomenology provides another lens on our everyday experience, showing the investment we have in the world—and the meanings attached to existing objects accompanying that investment—to be optional, contingent on a particularly positioned self. But there is an important question to be asked here, too: why should we trust that, in making the transcendental reduction, we are reflecting in a way that gets at the truth or reality of the natural attitude? If we accept the pervasiveness of the natural attitude, wouldn't we be wiser to expect that an attempt at such a reflection would inevitably be restricted by the distorting habits of such an attitude?

Dan Zahavi takes up this challenge in *Subjectivity and Selfhood*. Using the works of the psychologist Natorp, he formalizes the objection: in trying to reflect on our natural, subjective attitude, we necessarily objectify our subjectivity, producing something much different than the actual subjective experience we try to capture.³⁷ Here, however, is where a scientifically informed phenomenology proves important: while one can admit that reflection—both transcendental and natural—is a new lens on one's

³⁶ Cartesian Meditations, 35

³⁷ “Reflection and Attention,” 74-77

experience, one, contra Natorp, can argue that we should expect such lenses to be useful. If we think that our epistemological activities are shaped by what proved to be evolutionarily useful for our ancestors, as the scientific naturalist would propose, then the ability to objectify our experiences and, further, to suspend our belief in the givenness of certain phenomena, would have to be helpful in some way. As Zahavi writes:

Reflection is a precondition for self-critical deliberation. If we are to subject our different beliefs and desires to a critical, normative evaluation, it is not sufficient simply to have first-personal access to the states in question... The reflective distancing is what allows us to relate critically to our mental states and put them into question; it ultimately forces us to act for reasons.³⁸

Thus, skepticism about reflection is again only warranted insofar as one wants to explain certain facts about the mind; reflection internal to experience, as a method of achieving subject-centered goals, seems to be quite helpful.

Moreover, one can challenge this objection to reflection on conceptual grounds. For the skeptic's objection is that reflection of a transcending, world-bracketing sort is characterized by the same biases inherent to the natural attitude. But to make this objection is to presuppose a perspective from which the natural attitude can be conceptualized. The scientist who points to the pervasiveness of various cognitive biases, for example, necessarily adopts a scientific perspective, which, at the very least, aims towards the neutralization of such biases. In similar fashion, transcendental reflection, while perhaps not free of the natural attitude and the assumptions and significations contained therein,³⁹ does produce a significant transcendence of the natural attitude, insofar as it identifies it and takes methodologically rigorous steps to produce as neutral a description as possible.

In any case, the scientific naturalist will not be satisfied yet. Sure, they might say, the phenomenological method can get us to critically evaluate our natural way of approaching the world. And this evaluation might even be reliable. But it's not clear why this gives phenomenology an epistemologically necessary role outside of science. For, if one accepts both metaphysical and methodological naturalism, then it seems like both the natural attitude and any reflective attitude we can take towards it will be fully explained and supplemented by a developed cognitive science. In order to argue for an epistemologically necessary role for phenomenology, then, we will have to provide an account in which phenomenology's relation to the natural attitude is of urgent importance.

³⁸ "Reflection and Attention," 91

³⁹ Which is illuminated by the fact that the insights found within it ultimately relate back to the orientation one takes to the world

Critical Phenomenology as a Paradigm Example

In “What’s Critical About Critical Phenomenology?,” Gayle Salamon makes clear the epistemic value of phenomenology in relation to the natural attitude; in fact, her account suggests a necessary epistemic role for phenomenology. By putting our natural attitude and usual way of approaching the world into relief, phenomenology allows us to see further possibilities of subjectivity, thereby giving us the means to contest current forms of intersubjective practices and worldviews.

In considering the prospects of a critical phenomenological method, Salamon pushes back against two views that might hinder the development of such a method. First, Salamon fields the solipsistic charge against phenomenology, leveled especially against its classical, Husserlian form.⁴⁰ This charge contends that in privileging subjectivity as the transcendental condition of all experience, phenomenology promotes a false picture of the self: I am taken to be the sole arbiter of my meanings and practices and, in turn, my possible experiences. One can imagine a person clinging to the transcendental epoché, fostering a sense of objects and object relations that do not cohere with the actual world with which they are confronted. More dangerously, the phenomenological epoché might legitimize refraining from taking part in morally urgent matters by permitting the belief that one is not dependent upon others.

Salamon offers a significant shift in the phenomenological schema as a response: even if one takes the social world as constituting our identities and, as such, determining the sense and pre-delineating the possible meanings which might arise in the phenomenological epoché, one can still, nevertheless, turn back to oneself as an acceptance-basis of the world, and the effect is noteworthy with relation to the (socially constituted) natural attitude. As Salamon writes, “the world does not dissipate or disappear as the intentional threads that bind us to it slacken, rather, we feel it newly “springing forth” as our constituting consciousness is replaced with receptive being. Our stance of certainty is transformed into one of wonder, and our relation to the world is one of felt openness.”⁴¹ I am mired in social and cultural meanings that might very well fix the possibilities for my sense of self; but the continuous fact that I have a sense of self with possible modes of being, which includes a reflective mode that aims toward openness and wonder, allows me to critically engage, if only partially and gradually, with the intersubjectively constituted meanings that confront me.

Is it right to speak of intersubjective constitutions as “confronting” me? After all, Husserl explicitly argued that, insofar as transcendental

⁴⁰ “What’s Critical About Critical Phenomenology?,” 9

⁴¹ “What’s Critical About Critical Phenomenology?” 11 (author’s italics).

intersubjectivity (i.e. structures of shared subjectivity which make for shared intentional structures) is the condition of conceiving of an objective world, I am mired in an “objectivating equalization”: I am an active member of the intentional community of persons, rather than a passive recipient of intersubjective discourses and norms.⁴² However, parts of Husserl’s discussion of intersubjectivity can give us a starting point for how to think of the social world as potentially alienating. For example, he writes “my psychophysical organism is primordial for the constitution of the Objective world of mutual externalities, and, in accordance with the oriented mode of givenness of this world, enters it as the central member.”⁴³ Here, my primordial being, or embodied self, is what allows me to engage in the Objective world, but it is also what differentiates me from other beings, insofar as it is *central* for me and not for anyone else. As such, certain features of one’s embodied self (i.e. certain features of myself as perceived by others, like my race) could be given interpretations that one must grapple with but that are out of touch with one’s felt experience but the different orientations of other subjects makes it such that those meanings are perpetuated as “objective.” In order to account for this, then, one will have to critique how these meanings come into being in the first place.

But the second challenge to critical phenomenology problematizes this, coming from a perception of critique as a necessarily negative endeavor. Here, critique is construed as an effort to merely explain away what appears. Some forms of Marxism might be categorized this way: the political life of a state, which appears lively and ideologically diverse, is “explained away” as bourgeoisie contestation on the basis of economic interests. However, this view of critique holds only if one stops short of accounting for the productive power of that which one is critiquing and the possibilities of replacing that power. But, if one adopts a view of the phenomenological method as having a direct epistemic relation to the natural attitude, as pertaining to an always-immanent form of knowledge-gathering, this complacency is out of the question. Critical phenomenology is precisely the type of critical mode capable of producing knowledge about other possibilities of subjective experience—knowledge that is demanded in the vacuum left by the negating aspect of critique. For Salamon, this explication of the openness of being—of the possibilities of (inter)subjectivity—is an important, if not the most important, point at which phenomenology and critique converge: “it is that...gesture of opening, where the phenomenological and critical projects find what is arguably their strongest resonance. Surprisingly enough, for critique—just as for phenomenology—that opening is revealed through the

⁴² *Cartesian Meditations*, 129

⁴³ *Cartesian Meditations*, 134

work of description.”⁴⁴

For Salamon, then, critical phenomenology is a descriptive, reflective method that deals with subjectivity as experienced in the natural attitude and, in doing so, works to open up subjective possibilities that offer liberatory potential. In all of this, the phenomenologist does not take herself to be Husserl’s unprejudiced onlooker; rather, she too is critical of that which might circumscribe and particularize her own reflectiveness.⁴⁵ In this way, the phenomenological⁴⁴ method is given a distinct epistemic role outside of the explanatory project of scientific naturalism. As a subject, I necessarily take up a position towards the world. But I can also reflect on this position, either in a natural, objectifying way, or in a more fundamental way, in which I critically engage with the meanings I invest in the world. In doing so, I can gain the ability to see that my natural attitude can be otherwise. And, in a world characterized by uneven power dynamics and practices that strip many of any positive sense of self, such methods of reorientation are necessary.

I have argued that phenomenology, in its reflection upon and suspension of the natural attitude, can open up ways of approaching the world that contest and possibly transform intersubjectively constituted oppressive meanings. This indicates a role for phenomenology that is distinct from scientific naturalism, insofar as the latter seeks to explain facts about the world, even at the cost of eliminating the first-person perspective. The first-person perspective is inescapable, playing an important role in normative decision-making; it is this perspective alone from which I can assess what is desirable *for me* in the immediate way that becomes necessary when one is immersed in the chaotic flow of meanings and perceivings inherent to social life. One helpful, and perhaps liberating way of making normative decisions, made explicit by Husserl’s method of bracketing the natural attitude, is claiming agency over the way in which I view the world and relate to the meaning-invested social world confronting me. As science seeks to account for an ambitious, and increasingly convincing, naturalistic view of the world, there is still the *fact* of my lived experience, and, within this, the fact that I have *some* position towards the world. Thus, phenomenology, by identifying this natural attitude and considering how it could be otherwise, retains an indispensable epistemic role.

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MEANING AND THE SOCIAL SCIENCES: FRAMING THE NATURALISM/ INTERPRETIVISM DEBATE

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Introduction

“Social” sciences and “natural” sciences differ in various ways. They study different objects and systems; their theories (arguably) do not have the same level of predictive power. It is more difficult to conduct controlled experiments in social sciences because among other considerations, there are far more variables and unknowns. Does that mean that social sciences should not attempt to copy the natural sciences in their methods?

Naturalism answers that social sciences should resemble natural sciences in as many ways as possible. Although social phenomena and natural phenomena differ in many respects, naturalists argue, none of these differences justify the idea that social science should aim to differ from natural science in any fundamental way.

Interpretivism, in contrast, claims that we can find *epistemically significant differences* between social and natural sciences. That is, differences which justify the adoption of different principles, methods and/or goals in social sciences. In particular, interpretivists argue that the study of the social realm should, for an important part, consist in an attempt to *understand the meaning of social phenomena*. But what could be the “epistemically significant” differences which would justify the interpretivist approach?

Interpretivists, I argue in this paper, can provide two kinds of answers to this question, one negative, one positive, so to speak. The negative kind of answers are of the form: “The significant difference is that the approach required by naturalism *cannot* be applied to the study of social phenomena.” The more “positive” kind of answers are of the form: “The significant difference is that social phenomena have *meaning*.” I argue that framing the naturalism/interpretivism debate in the light of the “positive”

answer is more fruitful.

Section 1 – Naturalism and Interpretivism

A) Disagreements on method

Naturalism can be roughly defined as the idea that the practice of social science should follow the model of natural sciences as much as possible. If naturalism is correct, then, there are no epistemically significant differences between social and natural sciences. Interpretivism, on the other hand, states that there are differences between social and natural sciences that justify the adoption of different practices for studying social phenomena; social objects and systems, interpretivists argue, should be analysed by way of *interpretation*, rather than by following the model provided by natural sciences.

As Steel (2010) remarks, there are a number of different ways in which the contrast between these two positions can be drawn. Steel claims, for example, that the naturalism/interpretivism debate has traditionally been framed in terms of the *methods* used in social sciences. The crucial question from this perspective is that of whether social sciences should emulate the methods of natural sciences. One way to illustrate the differences between naturalism and interpretivism in this context is to compare the views of Hempel (1994, pp443-53) with those of Collingwood (1994, pp 163-171)., Hempel writes that the process of determining truth in the subject of history should resemble the methods used in natural sciences :

in history no less than in any other branch of empirical enquiry, scientific explanation can be achieved only by means of suitable general hypotheses, or by theories, which are bodies of systematically related hypotheses. (Hempel 1994, p.49)

Hempel defends this naturalist approach against what he describes as the “*familiar view*” according to which the proper explanation of historical events should rely on a subjective grasp of historical agents’ reasons for acting in the way that led to such events.¹ This “familiar view” rejected by Hempel is best expressed by Collingwood, who writes:

The processes of nature can therefore be properly described as sequences of mere events, but those of history cannot. They are not processes of mere events but processes of actions, which have an inner side, consisting of processes of thought, and what the historian is looking for is these processes of thought. All history is the history of thought. But how does the historian discern the thoughts which he is trying to discover? There is only one way in which it can be

¹ This – interpretivist – approach corresponds to what Hempel calls “the method of sympathetic understanding” (Ibid.).

done: by rethinking them in his own mind. (Collingwood 1994, p169)

Here, the disagreement between Hempel and Collingwood is essentially one about the methods of enquiry that historians should use. For Hempel, there is no difference between history and natural sciences which could justify the use of different methods. For Collingwood, on the other hand, *there is an epistemologically significant difference* between the two, namely, that the importance of “thought” in history justify the use of radically different methods for explaining historical phenomena.

B) Disagreements concerning generalizations

Steel criticizes this way of presenting the debate on the grounds that it presupposes “*an implausibly strong unity of method among the natural sciences*” (Steel 2010, Abstract). Steel himself prefers framing the debate in terms of what he calls the “Enlightenment ideal of science”, that is, the question of whether social science “*can deliver generalizable knowledge that can serve as a basis for improving society*” (Steel 2010, Section 2). On that reading of the problem, the crux of the debate between naturalism and interpretivism concerns *generalizations*. Naturalists will argue that social science can (and should aim to) provide valid generalizations across different social phenomena, whereas interpretivists will deny this.

One way to illustrate Steel’s interpretation of the naturalism/interpretivism debate is to compare the views of Kincaid (1994) with what Steel takes to be Clifford Geertz’s position. Kincaid argues that there is a place in social sciences for “social laws” and “generalizations” – typically in the form of *ceteris paribus laws* – which can be safely generalized across different cases.² Geertz, on the other hand, seems to argue that looking for “laws” or “generalizations” across different cases is misplaced (in the case of anthropology at least). He writes:

[T]he general task of theory building here is not to codify abstract regularities but to make thick description[s] possible, not to generalize across cases but to generalize within them. (Geertz 1994, p. 228)

² See Kincaid (1996, pp. 78-80) for an analysis of Paige’s “*Agrarian Reforms*” hypotheses as a successful example of *ceteris paribus* “*causal generalizations*” in anthropology. In this context, a “*ceteris paribus* generalization” or “*ceteris paribus law*” can be roughly understood as a generalization with a (potentially open ended) qualifying phrase attached to it, indicating circumstances in which the “law” in question might not hold (see Steel 2010, p20). A generalization such as “*Ceteris Paribus, the lack of vitamin C causes scurvy*”, for example, should be read as “the lack of vitamin C causes scurvy... except under certain conditions.” The exact nature of *ceteris paribus* generalizations (and their scientificity) is a matter of controversy; for a discussion of these issues see Lange (1993), Earman & Roberts (1999).

So, it seems that from Geertz's perspective, research in anthropology should be "local" in nature and should not attempt to build even *ceteris paribus* generalizations that could be applicable across different cases. On this view, the anthropologist's primary goal should be to provide *interpretations* of the cultural phenomena she aims to study. Ideally, she should be able to present the culture she studies from the point of view of its members (Prinz 2011, Section 1). Interpretivist approaches of this kind (according to which social science is fundamentally *local*) are in clear opposition with *naturalist* conceptions such as Kincaid's, according to which generalization across cases must be a fundamental element of social research, as it is in natural sciences. This opposition highlights another important dimension of the debate between naturalism and interpretivism.

C) Disagreements concerning the role of laws

Another way of presenting the disagreement between naturalism and interpretivism is to frame it as a debate about the role of *laws* (not just *generalizations*) in social science. Steel rejects this way of contrasting the two positions, but for our purposes it will be useful to consider it. If the issue is really to do with laws, the naturalist argues that natural and social sciences should both have the same aim of uncovering *laws of nature*, and/or make use of such laws for explaining/predicting events and regularities in the world. The interpretivist, in contrast, will argue that even if we grant that natural sciences should indeed aim to discover laws (and provide law-based explanations/predictions) in the way naturalism contends, social science should not have the same aim.

Hempel's view of history, which has already been discussed above, can also be interpreted in the context of this debate. Hempel (1994, pp45-46) argues that explanations in history, as in "*any other branch of empirical science*", are scientific only to the extent that they are based on "*universal empirical hypotheses*" (i.e. law-like generalizations). Hence social sciences should aim as much as possible to discover laws, or at least to explain/predict phenomena in terms of law-like generalizations. An interpretivist, in comparison, will argue that social scientists should not try to discover laws or to produce law-based explanations of phenomena, insofar as other modes of inquiry – i.e. interpretation – might be more suited for studying the social world.

Section 2 – The meaningfulness of social phenomena as an epistemically significant element of social science

A) The problem with arguing that social sciences simply *cannot* follow the model of natural sciences

The previous section suggests that most naturalist theories follow a certain pattern. First, naturalists identify – in the natural sciences – a certain

method or goal or assumption which they see as essential to the practice of science as a whole (e.g. a certain set of methods; the goal to discover regularities; the belief that explanations should be law-based; etc.). Second, they argue that this element is as essential to the practice of social science as it is to the practice of natural sciences. In other words, what naturalists claim is that *there is no difference between natural and social sciences which could justify that the element identified by the naturalist should not be essential to the practice of social sciences as well.*

One reply made by interpretivists to object to this conclusion is to argue that whatever element discussed by naturalists simply *cannot* be incorporated in the practice of social science. For example, interpretivists can try to argue that the complexity of social phenomena is such that, in the social realm, we cannot discover law-like regularities or provide causal explanations based on laws. Or they might try to argue, more generally, that social sciences simply *cannot use* “the methods of natural sciences.” Or they can argue, contra Kincaid, that we cannot make useful causal generalizations about social phenomena. Other examples of this line of argument are provided by Charles Taylor when he argues that natural sciences differ from social sciences partly because “*exact prediction is radically impossible*” in the latter (Taylor 1994, p208).

This kind of response to naturalism corresponds to what I called – in the introduction – the “negative answer” to the question of what justifies the interpretivist approach. On that account, the epistemically significant difference between social and natural science is that there is something about social phenomena which renders the naturalist approach unworkable.

But there is a significant problem with the negative answer of interpretivism: as a response to some versions of naturalism, it is implausible. Consider Kincaid’s version of naturalism, according to which social sciences, just like natural sciences, can and should aim to discover causal generalizations across phenomena (most notably in the form of *ceteris paribus* laws). Maybe interpretivists can argue that the discovery of such generalizations is impossible in some areas of the social world (e.g. anthropology). But they can hardly argue that the study of social phenomena can *never* give rise to plausible causal generalizations similar to those found in the natural sciences. Well-established *ceteris paribus* laws in economics, criminology or the sciences of education, Kincaid shows, are no less confirmed and useful than the “laws” of ecology or evolutionary theory are (Kincaid 1994, pp124-126). In the light of Kincaid’s arguments, the epistemically significant difference between natural and social sciences cannot be said to be: “valid causal generalizations can be derived from the study of natural phenomena, but not from the study of social phenomena.” Interpretivists should not try to argue this.

The general problem with the “negative answer”, it seems, is that it forces interpretivism into the rather strong conclusion that research in

“social” fields *cannot* resemble research in “natural” fields. And this leads to the problem we just evoked, namely, that this conclusion is implausible given the fact that there are some fields in social research (e.g. some areas of economics, political science, and even anthropology) which are not very different from areas of research in natural science (e.g. ecology, evolutionary theory, palaeontology).

B) The meaningfulness of social phenomena

What is the alternative, then? Can we defend the interpretivist approach without having to argue that research in social sciences must *systematically* be radically different from research in natural sciences?

One possibility is to argue that, even if we admit that the methods/goals/principles of natural sciences can be usefully applied to the study of the social realm, there is no way these methods/goals/principles can reveal everything there is to know about social phenomena. To adopt this line of argument, interpretivists must show that although social phenomena have properties which can be analysed by following the model of natural sciences, they also have a special kind of property, which cannot be analysed unless we adopt a radically different approach from that of the natural sciences.

The “special kind of property” needed here corresponds to what interpretivists already identify as one of the essential differences between the social and the natural realm: *meaningfulness*. Social phenomena – unlike natural phenomena – have meaning. When a group of workers go on strike, it has meaning, including an explanation, motivations, thoughts, plans, effects, and more. When Tuareg men begin to cover their faces with a veil once they reach maturity, it has meaning. When I raise my hand at the right moment in a meeting in order to vote for a motion, my action has meaning. Defining what “meaning” is in this context is a difficult task and I will not attempt to do it here. What suffices for our purposes is to notice the two following things about the meaningfulness of social phenomena.

First, it is something which draws a sharp contrast between social and natural phenomena. While many (if not most) social events/objects/systems seem to have some kind of meaning, the same is not true of natural phenomena. An atom of hydrogen does not have meaning. A particle of light being emitted by a star and reaching someone’s retina does not have meaning either. Even my action of raising a hand in a meeting, understood as a series of mechanical events leading up to the muscles in my arm being activated, does not have meaning independently of the meaning I, and the other people in the meeting, attribute to it.

Second, given the nature of meaning, it is extremely unlikely that we – as people who want to gain as much knowledge as possible about social phenomena – can gain understanding of the meaning of any social

phenomenon by simply following the methods/aims/principles that are typically used to study natural phenomena.

To illustrate this second point, let us consider an example. Suppose a country, *X*, has suffered a sudden increase in the number of violent protests in every major city over the last few months. The protests have followed a series of austerity measures undertaken by the government.

There are probably many things that we can learn about this situation by following the advice of naturalists. Following Kincaid, we can certainly use statistical analysis to derive a number of “social laws” about the protests, e.g. “all things being equal, protests are more deadly in bigger cities than in smaller cities”. Or we can follow Hempel and explain the riots in terms of a universal empirical hypothesis, e.g. “given the fact that economic austerity is systematically correlated with a rise in violence, and given the government’s policies, the rise in the rate of violent protests in *X* was inevitable.” And in the case of our imaginary country *X*, those findings might be perfectly sound and scientific.

The problem, interpretivists will argue, is that the naturalist mode of research leaves out an important dimension of the social phenomena it aims to analyse, namely, the meaning that agents participating in or reacting to the phenomena will attach to it. For example: maybe the participants do not see the protests as a reaction to economic policies but see it as essentially a fight for more democratic control over their institutions, or against the corruption of their government. And therefore, an alternative but equally valid type of explanation for the phenomena might have the form “people protest because they want more democracy” (to put it roughly).

What this example illustrates is that, in order to understand the meaning of social phenomena, the methods/aims/principles found in natural science are unlikely to be sufficient. What we need are other methods/aims/principles which will allow us to *interpret the meaning* of such phenomena.

Recognizing this fact does not entail that the methods/aims/principles of natural science cannot be used to reveal things about the social world. It entails, however, that naturalism is wrong, *in the sense that* there is an epistemically significant difference between social and natural sciences which justifies, *for some dimension of social phenomena*, the adoption of modes of research which have no real equivalent in the natural sciences. The epistemically significant difference which justifies this is that social phenomena, unlike natural phenomena, are sometimes meaningful. The meaningfulness of social phenomena, therefore, is the epistemically significant element of social science which justifies interpretivism against naturalism.

Conclusion

Naturalism can take a number of different forms. In this essay I explored two ways in which we can argue against naturalism generally. One strategy is to argue that social and natural sciences must be different from each other because the methods/aims/principles of natural sciences cannot be used to study the social world. I argued that this line of reasoning is problematic.

A better strategy, I suggested, is to argue that since social phenomena can have *meaning*, there is a dimension of social phenomena that the naturalist approach cannot analyse. So insofar as this dimension of social phenomena is concerned, we should privilege a different approach, i.e. interpretivism.

Hence, the difference between natural and social sciences which I think has the greatest importance in the naturalism/interpretivism debate, is the meaningful character of social phenomena. If my analysis of the central divergence between these two families of positions is correct, it makes them complementary in some rough sense. Naturalism is right in claiming that the so-called social sciences should attempt to emulate the methods and practices of the so-called natural sciences as much as it is possible; but it is wrong if it claims that all knowledge about social phenomena is best derived through the application of such methods and practices. Since we can have knowledge about the meaning of social phenomena, and that this kind of knowledge is best derived through a method of interpretation, interpretivism is right if it is understood as the claim that there is room for interpretative methods in the study of the social realm.

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DOES LEGAL VALIDITY DEPEND ON MERIT? A DEFENSE OF DESCRIPTIVE LEGAL POSITIVISM

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Thesis

Throughout this dissertation I will argue for a weak¹/descriptive form of legal positivism. I will defend proposition (LP): legal validity depends on source and not on merit. Additionally, I will argue there is at least one necessary connection between the law and morality. This being that the law necessarily deals with moral matters.

Introduction

In the first section of this paper, I will clarify concepts and definitions relevant to the rest of my discussion beginning with an exposition of Natural Law Theory and Legal Positivism. Related to positivism, I will cover the Separation and Separability theses. In the second section, I will begin discussion in favour of my position—(LP) that legal validity depends on source, not on merit— which I argue is descriptively true. By descriptively true, I mean that (LP) *is* the case. This discussion attends to the particular source upon which validity depends, and to why I claim the proposition is descriptively true. Furthermore, as my thesis particularly concerns a theory of legal validity, I will also consider validity as potentially separable from a theory of adjudication. In the third section, I will address why I argue for a weak form of positivism, where I claim there is a necessary connection

¹ Often weak forms of positivism are labelled ‘soft positivism’, but I wish to use the term ‘weak’ here as I believe it better characterises positivism that is descriptive but normatively inert.

between the law and morality. I will discuss what it means to make positive and negative claims about a necessary connection and explore a particular connection that I believe can be made; that the law necessarily has a moral aim.

Chapter 1: Concepts & Definitions

In this chapter I will generally outline the relevant theories in order to introduce some key concepts: Firstly, I will broadly outline ‘Natural Law Theory.’ For the purpose of this essay, natural law theory will function as an opponent to descriptive legal positivism. I will use the classical natural law of St. Augustine and the more contemporary natural law theories of Lon Fuller and Ronald Dworkin to help illustrate natural law. Secondly, I will broadly outline ‘Legal Positivism,’ using works by John Austin and John Gardner to help illustrate. Thirdly, after providing a brief outline of both theories, I will provide some cautionary remarks to bear in mind when comparing the two legal theories. Finally, I will explain the significance of the ‘Separation Thesis’ and the ‘Separability Thesis,’ and subsequently explore two varieties of legal positivism—‘Exclusive’ and ‘Inclusive’—using the positions of Joseph Raz and H. L. A. Hart to illustrate the theories respectively, alongside some useful definitions from Wilfred Waluchow.

(1.i) Natural Law Theory

Natural Law Theory most prevalently claims that the law’s validity depends on its moral content. Necessarily, the law’s validity and morality are conceptually connected. The law cannot be reduced to a concept explicable in non-normative terms; there must be some evaluative aspect to how the law is validated. For many natural law theorists, there must be a moral merit to law in order for it to be considered valid: ‘an unjust law is no law at all’ (St Augustine in King, 1963). However, the source of merit differs between different theorists. Classical natural law may hold that the law has a necessary connection to morality because God endowed the world with natural laws and man with natural rights, with which man-made laws must conform. Moral considerations must feature in legal validation, and the appropriate moral considerations adapt and develop due to their discovery from the use of man’s rational faculty. Other natural law theories hold that the connection between law and morality is not on the level of individual laws, but rather on the legal system as a whole, which acts as a moral instrument to guide behaviour. Morality is conceptually internal to law ‘not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be’ (Fuller, 1969. p. 97). If the legal system exists in order to benefit society, it has a moral aim, and thus the way that system functions must conform to certain moral standards.

Alternatively, natural law theories might claim that legal validity depends on morality because the legal system is composed of both laws and supportive legal principles, the latter of which contain moral considerations (Dworkin, 2013 ed. p. 42).

(1.ii) Legal Positivism

Legal theorists characterise 'Legal Positivism' as divergent from natural law theory. Legal Positivism claims the law's existence and validity are matters of social fact. What the law *is* is that which is posited as law by a particular law-making authority, perhaps a sovereign or group with sufficient *de facto* power (Austin, 1995. pp. 281-283). Legal positivism often reduces the law to a concept explicable entirely in non-normative terms, making the law's validity independent of what that law *ought* to be. Notions of morality and justice might be very relevant to a society's legal system and shape the content of new laws, however according to positivism, it is not these notions or ideals that validate the law itself. To illustrate, Austin states that: 'the existence of law is one thing; its merit or demerit is another' (1995. p. 157). The law is a human construct that did not exist prior to human invention and implementation. Laws² adapt according to different accepted standards both between cultures and within cultures over time. Laws do not have any relevance outside a human construct, because the creation of laws depends fundamentally on human beings being able to understand and codify important social practices, adding to the positivist claim that the law is a social phenomenon, rather than a natural one.

An example³ that is often used to help distinguish legal positivism from natural law is the unjust Nuremberg Laws which were posited by the Nazi Party during their occupancy of Germany. These laws denied many civil rights to the Jewish population. Despite the laws being unjust (I will make this assertion as an assumption for the purpose of the discussion), according to positivism, they were nonetheless accepted by most Germans and implemented by accepted authorities. Natural law theory would deny that the Nuremberg Laws were valid in the first place, due to their unjust moral content.

(1.iii) Cautionary Remarks

After provisionally outlining the two theories, I will provide some cautionary remarks. Although the two theories have been generally defined, different legal philosophers advocate for various adaptations of each theory.

² 'Laws' in the sense of official rules bound by a legal system to regulate the actions of a society, rather than laws in any physical sense.

³ Although this example is useful in terms of making a preliminary distinction between the two theories, it is extremely simplified and not particularly insightful for this essay's discussion.

As Joseph Raz notes, when examining legal theory, it is a common mistake to ‘not discuss anyone's views, but a family of views. This allows one to construct one's target by selecting features from a variety of authors so that the combined picture is in fact no one's view’ (Raz, 2009. p. 373). To avoid falling victim to this problem, I will stipulate for the purpose of this paper an agreement with John Gardner, and I will treat only one proposition as being necessarily distinctive of legal positivism:

(LP) 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. (Gardner, 2001. p. 199).

This stated, I will not attempt to compare the different features within various positivist theories against the different features within various natural law theories. In any case, such a discussion would be beyond the scope of one dissertation. Rather, I aim to discuss (and ultimately assert) the truth of proposition (LP) as a description of legal validity, without making the normative claim that (LP) ought to be the case. It is partly for this reason that I label my position as a weak form of positivism; I do not offer evaluation by claiming positivism is a *good thing*.⁴ For the sake of differentiation throughout this essay, I will take the following as the relevant proposition distinctive of natural law theory:

(NL) 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 merits.

(1.iv) Separation & Separability

Now that I've provided (LP) as the relevant proposition distinct to legal positivist theories, this section outlines the ‘Separation Thesis’ and the ‘Separability Thesis’. The Separation Thesis is the stronger of the two theses, and can be defined as follows:

(ST₁) As a matter of conceptual necessity, the legal validity of a norm can never be a function of its consistency with moral principles or values (Waluchow, 2001. p. 3).

A weaker alternative is The Separability Thesis:

(ST₂) It is conceptually possible, but in no way necessary, that the legal validity of a norm is in some way a function of its consistency with moral principles or values (Waluchow, 2001. p. 3).

⁴ Those who I would call strong/normative positivists are those who believe (LP) ought to be the case. For example, those who claim that the legal system can *best* fulfil its moral aims when individuals themselves are not required to make moral judgements in order to find out what valid law is. Jeremy Waldron (in Coleman, 2001. Ch. 12) discusses such views. In addition, I would label Neil MacCormick as a strong/normative positivist— who claims (LP) ought to be the case because if legal validity depended on merit this would violate freedom of conscientious action (1985).

For the purpose of this dissertation, I will take (ST₁) as the relevant thesis to 'Exclusive Positivism' and (ST₂) to 'Inclusive Positivism'. Both are compatible with proposition (LP). The key difference is that exclusive positivism rejects the claim that moral considerations can ever feature in the validation of the law. A norm is legally valid due to its source and *never* its merits. While inclusive positivism accepts that moral considerations *can* feature in the validation of the law, but they do not need to. Thus, on both accounts there is a conceptual separation of law and morality; morality is external to the law's validation. However inclusive positivism permits the possibility of morality playing a role in validation. Moral considerations are not required to validate the law, but moral considerations are not prohibited from being involved in legal validation either (Waluchow, 2001. p3).

To delineate inclusive and exclusive positivism further, I will use the legal philosophies of Hart and Raz respectively to show key features of the two positivist variations. In accepting proposition (LP), both Hart and Raz claim legal validation does not rely necessarily upon moral considerations, however Hart's position is more lenient with regard to which norms can be legally valid in virtue of some merit-based reason. For example, as put by Gardner, inclusive positivists such as Hart might permit the legal validation of certain norms based on 'source-based tests of their merits' (Gardner, 2001. p. 200), where a distinct, valid law x might instruct that only meritorious laws ought to be adhered to. In other words, merit may feature in legal validation if a legally valid norm (or a set of legally valid norms) specifies that merit is relevant to legal validity (Hart, 1994. p. 250). In Hart's particular version of inclusive positivism, he permits that a society's 'rule of recognition'⁵ could stipulate society's moral principles as a criterion for the legal validity of legal norms (1994. p. 250). I will go into more depth about the rule of recognition in chapter (2).

To the contrary, Raz adopts an exclusive form of positivism, and claims that such moral considerations can never feature in the legal validity of norms. Even if a valid law x specifies that merit is relevant to legal validity and instructs that only meritorious laws ought to be adhered to, this law x is insufficient to validate other laws based on their merit. Legal validation must depend exclusively on social fact, and this validation must be describable in completely value-neutral terms, without appealing to moral argument (Raz, 1979. pp. 39-40). In essence, the content of a specific law cannot be a factor amending or contributing to the validation of another law. Whatever the content of valid law, that which has the legal-validating authority cannot be a moral consideration.

⁵ A meta-rule that determines which rules in a given society are legally binding. *The Concept of Law*, 1994. p. 94. I discuss this further below.

Chapter 2: Legal Validity

Here I will discuss legal validity: what it means for a norm to be legally valid, as opposed to be a mere command. I argue legal positivism provides a better descriptive account for legal validity than natural law theory. I mostly refer here to a well-known debate between two legal theorists: H. L. A. Hart and Ronald Dworkin, who defend legal positivism and natural law theory respectively on the subject of legal validity. I agree with Hart concerning his defence of a descriptive form of positivism.

As I have previously mentioned, the aim in this dissertation is to assess and ultimately assert the truth of proposition (LP) as a description of legal validity. Thus, I am not going to attempt an in-depth assessment of Hart and Dworkin's debate. As proposition (LP) describes legal validity as dependent on source and not on merit, I will first discuss what 'source' this proposition might refer to. Subsequently, I will discuss proposition (LP) as a purely descriptive account. Finally, I will examine what it would mean to isolate a theory of legal validity from a theory of adjudication.

(2.1) The Source of Legal Validity

To begin, in order to defend (LP)— that the legal validity of a norm depends on its sources, not its merits, it is important to consider which sources could legitimately validate laws, and why they can do so. Hart, in a divergence from other positivists who claim the source of legal validity is presupposed norm (Kelsen, 1945) or the command of a sovereign (Austin, 1832 in 1995; Bentham, 1782), claims that legal validity depends on the existence of a social rule that is practiced by a particular society (Hart, 1994. p. 100). It is insufficient for a sovereign or authoritative group to implement a norm and it be legally valid without society *recognising* that norm as being legally valid. For Hart, legal validity must be grounded in social conventions about which authorities can implement norms that are legally binding. Thus, in defence of proposition (LP), Hart claims people recognise the legal validity of a particular norm on the basis of a given source. Hart calls the societal rule that dictates which source can make valid laws the 'rule of recognition' (Hart, 1994. p. 94). Such a rule can either be an officially documented rule that states who the appropriate law-making authorities are, such as in the UK: 'whatever the Queen in Parliament enacts is law' (Hart, 1994. p. 107), or the rule can be the tacit consent of a society about who can implement valid law. I will illustrate the rule of recognition with some examples:

Let's take a given nation state such as the United Kingdom. If some authority commands that 'all citizens under this authority who identify as homosexual are to be imprisoned', this is not in itself sufficient to be a valid law. Firstly, the authority must have the appropriate type of power, and be identified as having such power by society; it cannot be that any person or group with some authoritative status can implement valid laws. So, if this

authority commanding that all homosexuals be imprisoned is a local town council, despite having local authority, it does not have the appropriate *type* of authority because law-making is outside the local council's domain. Thus the 'law' commanding homosexuals to be imprisoned would be nullified. Moreover, even if the authority commanding homosexual imprisonment does have the appropriate type of authority; such as a state ruler or other leader with *de facto* power, this is still not in itself sufficient for homosexual imprisonment to become valid law. Depending on the state and how their law-making system works, many norms have to be reviewed by other government officials or bodies in order to be passed as valid law. Hart adds an additional qualifier: an authority must be considered the appropriate type, the proposed norm must pass the necessary means to become a law, and it can only be said to be a valid law if it passes the tests of the society's rule of recognition (Hart, 1994. p. 103).

A rule of recognition regulates the rules that are already customary within a society. It would make little sense to have a rule of recognition if a society did not already have some degree of agreement over their standards of conduct. The rule of recognition is in place so that the conduct of individuals conforms to an already existing pattern (Perry, 2006. p. 1171). Only groups with a high number of members would need such a rule of recognition in order to conform to their society's behavioural customs. For example, in a small group of people, if each individual conforms to the customary, social rules enacted by the group, any changes to those customs could be made by mutual deliberation and discourse. There would be no need for some meta-rule to regulate who is justified in changing the customary social rules; the group members could just deliberate any changes together. However, in a large-scale group such as a nation state, a discussion about change of custom cannot feasibly take place. There needs to be something to officially regulate the behavioural rules. Social rules are regulated by the meta-rule of recognition, which is in place to state who can posit rules as valid laws, so that a society conforms to the customary pattern (Perry, 2006. p. 1178). Thus, this meta-rule could be interpreted as being the very source of legal validity: a law is only valid when the rule of recognition states it has been posited as such by the appropriate law-making authority.

Hart's rule of recognition is accepted by many as something that really does exist in societies' legal systems,⁶ so in this sense, Hart's position describes the source of a law's validity. Furthermore, understanding the nature of law and legal validity in terms of social and legal rules offers an understanding of why the law has the authority that it does. Rules of any kind

⁶ For example, it is taken in the United Kingdom as a 'rule of recognition' that valid laws are those that are passed through the House of Commons, the House of Lords, and finally receive Royal Assent.

exist in order to regulate behaviour, whether these rules are considered good or bad, are followed or not, does not stop them from existing as rules. For example, there are social rules such as etiquette that directs people to say ‘please’ and ‘thank you’ when requesting and receiving. Although there exists the custom to say ‘please’ and ‘thank you,’ etiquette rules are not authoritative like legal rules. What makes such rules different from laws is that there is no meta-rule that states these rules of etiquette are valid laws (Shapiro, 2009. p. 244). The law is the ‘union of primary and secondary rules’ (Hart, 1994. p. 79), and it is this union that perhaps provides law with its authority; it legitimises rules that are already in place in virtue of being rules of social custom. Once again, Hart’s rule of recognition could be seen as the source of legal validity because it endows certain persons or groups with legally-validating authority. Although Hart’s notion of the rule of recognition carries considerable weight, there is a significant objection to this being an ultimate source of legal validity. As I mentioned at the start of this section, I am not going to attempt an in-depth assessment of the Hart-Dworkin debate. However, it is important to consider natural law’s defence against proposition (LP), and I will use some of Dworkin’s criticisms against Hart in order to do so.

Dworkin rejects a wholly rule-based understanding of legal validation that claims the source of legal validity is a meta-rule of recognition in union with primary (or legal) rules. Rather, he claims Hart’s doctrine of the rule of recognition, a ‘pedigree’ thesis,⁷ ignores that alongside social and legal rules, there are social and legal ‘principles’, which are distinct norms yet essential to discuss in relation to the source of legal validity (Dworkin, 2013. p. 42). Rules can be seen as conclusive statements and are either functionally important or unimportant: if a rule is valid, it cannot conflict with another valid rule within the same system of rules— one of these cannot be valid. For example, in a given legal system there could not be two valid legal rules that state ‘all primary school children are entitled to free school meals’ and ‘only primary school children with a parent in receipt of income support are entitled to free school meals’. One of these legal rules could not be valid, as applying either the former or latter would yield a different outcome for the same situation. However, legal principles differ because they are often supportive rather than conclusive. Consequently, valid principles can conflict— it makes sense to ask *how* important or ‘weighty’ a certain principle is within the same system (Dworkin, 2013. p. 43). For example, let’s take the example used by Dworkin of the 1889 legal case *Riggs v. Palmer* (in Dworkin, 2013. p. 39). In this case, a man had named his grandson an heir in his will, however the man was murdered by that same grandson. Legal rules could

⁷ Dworkin uses the term ‘pedigree’ to capture that Hart’s rule of recognition is a test of social authority rather than a test of the law’s content.

only be applied to an extent in order to judge whether or not the grandson could inherit anything from his grandfather's will. Legal rules concerning the effect of wills and rights to inheritance were applied, which themselves would allow the grandson to inherit from his grandfather's will, however after applying the legal principle: 'no one shall be permitted to profit from his own wrong', the grandson did not receive his inheritance.

The above principle that 'no one shall profit from his own wrong' certainly contains moral considerations but must be a legally valid norm in order to have an authoritative or adjudicating capacity. Thus, according to Dworkin, not all legal norms are valid in virtue of being customary rules validated by a meta-rule of recognition; they are not all valid depending on source alone, because legal principles often contain considerations of merit. To affirm the claim that legal principles often depend on merit, and thus support the claim of proposition (NL), Dworkin shows that legal principles are not simply created by an adjudicator when difficult cases arise before the court— cases where legal rules are insufficient to apply in adjudication. Rather, he claims legal principles originate from:

a sense of appropriateness developed in the [legal] profession and public over time. Their continued power depends upon this sense being sustained. If it no longer seemed unfair to allow people to profit by their wrongs ... these principles would no longer play much role in new cases, even if they had never been overruled or repealed. (Dworkin, 2013. p. 58).

In other words, often legal principles occupy the legal role that they have because they are viewed as having merit-worthy content. If they were not merit-worthy, they would not be utilised. The existence of legal principles depends to some degree on their conformity to moral principles. Accordingly, Dworkin provides some argument to reject proposition (LP); that it is not the case that legal validity depends on source rather than merit, because there are legally valid norms— legal principles— that do not depend wholly on source, and do depend on merit. Something I think is worthy of credit is Dworkin's identification of the relevance of legal principles to legal validity; something Hart does not attend to. Legal principles are of particular relevance when we consider how legal rules or official legislations are not exhaustive of the law. The law needs to be actually applied, and not all cases can legal rules be applied on their own. Legal principles are required in the adjudicative process.

(2.ii) Descriptive Legal Positivism

Furthermore, even though Dworkin does account for legal principles as valid legal norms, something Hart does not specifically address, it could be argued that this is no real criticism of Hart's positivist account of legal validity, as an inherently descriptive account. Carey notes that it is

possible to avoid considering Dworkin's claims against Hart as effective criticism, by claiming that Hart and Dworkin are considering two different points— descriptive and prescriptive accounts of legal validity— and are really just 'talking past each other' (2009. p. 1170).⁸ Hart's positivism is intended as a descriptive account of legal validity, and in Dworkin's response, he introduces claims concerning what the law *should* be, rather than what it *is*. For instance, Hart aims to describe the source that legally validates a norm— a rule of recognition. On the other hand, Dworkin aims to argue why legal principles that are used in adjudication and contain moral considerations should be considered part of the system of legal validity. In this way, Dworkin begins to discuss the normative part of legal theory rather than the purely descriptive.

However, even if Dworkin begins to discuss the normative aspect of legal theory, this is not in itself a reason to dismiss a distinct descriptive criticism he advances. Robert Yanal offers a clear exposition of the descriptive criticism Dworkin seeks to make against Hart: alongside legal rules, and the rule of recognition, there are legal principles which contain moral considerations for adjudication; and these principles are either valid or they are not valid (Yanal, 1985. p. 392). Only one can be descriptively true. If legal principles are legally valid, then valid law includes these principles and thus depends on moral considerations— this rejects proposition (LP) and Hart is wrong. If legal principles are not legally valid, then valid law does not contain these principles and thus commits to making arbitrary judicial decisions. But the law does not commit to making arbitrary judicial decisions, so the law must contain legal principles (Yanal, 1985. p. 392). If valid law contains legal principles, it depends on moral considerations, and therefore Hart is wrong, and we can accept proposition (NL) as descriptively true.

Furthermore, there is another, related claim that Dworkin could use against Hart; this is concerning the rule of recognition as being the ultimate source of legal validity. If legal principles are not in fact valid and are not contained within the law, what meta- rule could stabilise these external principles? Dworkin claims there could be no wholly source-based rule that could regulate the adjudicative use of legal principles. There must be a degree of merit to consider when describing what validates the law, because no meta-rule could regulate which legal principles should be applied in cases where legal rules cannot be applied. Legal principles are not conclusive statements like rules are. A rule of recognition could not regulate these principles, and thus it is an adjudicator's duty to determine which supportive legal principles are to be applied in the more difficult legal cases (Dworkin, 2013. p. 48). It is *not* in an adjudicator's discretion to simply determine the outcome of difficult

⁸ Although Carey claims this line of response is possible, he notes that dismissing Dworkin's argument is not a very compelling response.

cases. As an adjudicator cannot always refer to purely source-based rules to determine the outcome of a case, this outcome must depend somewhat on merit-based considerations, found in legal principles. These principles are not regulated by a rule of recognition, but nonetheless must be valid. Therefore, proposition (NL)— that legal validity depends on merit— is descriptively true according to Dworkin’s account.

However, a problem for Dworkin arises in a deeper examination of what exactly constitutes a legal principle. Although Dworkin provides the example of the principle ‘no man shall profit from his own wrong’, it seems the majority of legal principles do not possess the same degree of clarity. There is something about the above principle that directs itself to relevant cases— where ‘profit’ is concerned. If all legal principles did have similar clarity, perhaps they could be regulated by a meta-rule of recognition. If this were the case, Dworkin’s criticism of Hart would have much less momentum. Therefore, legal principles must have certain qualities that render them impossible to regulate. What these qualities might be, however, is rather vague. Dworkin identifies shared qualities that legal principles have which prevents them from being captured by a meta-rule of recognition: they have no unifying features, and they are too many, too controversial, and too changeable. However, Soper claims these qualities would not necessarily prevent their regulation (1977. p. 484); perhaps what Dworkin means to say is that legal principles are too flexible to be captured by a rule of recognition. It could be said that legal principles have the flexibility to fill any gaps that legal rules do not cover. So if a legal principle is a flexible, supportive (but not conclusive), changeable legal standard , it is problematic to attempt to make room for legal⁹ principles in an account of legal validity— a legal principle might not be considered valid because it is too vague as to when it should be applied, and it is also too vague as to which principle should be applied.

However perhaps it is exactly the point that qualities of legal principles *are* vague. Dworkin’s attempt to account for what it is about legal principles that renders them impossible to regulate does not need to be a precise account, because there is no precise account of what exactly constitutes a legal principle. It could be sufficient to simply state that legal principles— those standards that in some way support legal rules in adjudication— exist. In the fact that they do exist and are necessary in adjudication, warrants their validity and thus their place within a description of legal validity. In the sense that legal principles contain moral considerations for their existence, proposition (NL) would be accepted.

⁹ ‘Legal standard’ is an all-encompassing term that can refer to both legal rules and legal principles, or any other legal norm. Soper makes a similar clarification (1977. p. 481).

(2.iii) Validity & Adjudication

As we have seen, arguing for the descriptive truth of (LP) seems to encounter many obstacles, particularly when we begin to consider more difficult cases where legal rules cannot be applied to yield a conclusive decision; cases that require adjudicative attention. In order to defend proposition (LP) as descriptively true, we should consider ways to avoid adjudication being considered a problem. According to David Brink, this comes from recognising and affirming that there is a distinction between theories of legal validity, and theories of adjudication (1985. p. 365). Theories of legal validity are those that explain the conditions under which a norm can be considered valid law. Brink posits a particular triadic theory of legal validity that coheres with the positivist proposition (LP). It includes the existence of ‘first order legal standards’ (such as valid legal rules), ‘second order legal standards’ (such as principles of political morality), and Hart’s rule of recognition (that which recognises who can implement first order legal standards).

It is important to go into further detail about what Brink considers to be *second order legal standards*. These standards are the ‘moral’ principles that are considered to motivate or quasi-justify¹⁰ first order legal standards; the principles that do not inherently have any legal validity, however, provide rationale for why first order legal standards are implemented. Because it is these second order standards which include principles of morality that provide the rationale for first order standards, and because they are included as valid legal standards, it might seem like this description of legal validity is committed to proposition (NL). However, there is nothing committing second order legal standards to satisfying any demand of merit (Brink, 1985. p. 371). Second order legal standards could be inherently unjust, yet still provide the rationale for first order standards. Thus, despite underlying first order standards, second order standards are only valid legal standards *after* the implementation of the first order legal standards by the right authority, according to the rule of recognition.

After clarifying what Brink means by second order legal standards, and after identifying the triadic account of legal validity as a purely descriptive, positivist account, we can identify what it is to be a theory of adjudication. Although Brink begins to outline what comprises a theory of adjudication, I believe better clarification on the subject comes from Leiter (1996. pp. 255-262). A theory of adjudication aims to account for both descriptive and normative judicatory functions; it describes how judges

¹⁰ Brink uses the term quasi-justify to explain how although second order legal standards provide rationale for first order legal standards, they do not *justify* them, as this might imply that these first order legal standards are just. However, in light of the positivist claim that legal validity depends on source rather than merit, it is possible that valid laws are unjust.

actually do decide cases, and how they ought to decide them— it ‘makes explicit the rules that govern and explain judicial decisions’ (1996. p. 255). So, a theory of adjudication goes beyond a purely descriptive account of an aspect of the law and does not itself have any effect on the truth or falsity of proposition (LP). Rather, a theory of adjudication addresses a different, unique topic about judicial decision making, not about what does or does not validate the law. Therefore, upon making the distinction between theories of legal validity and theories of adjudication, we can argue that Hart addresses the former and Dworkin addresses the latter, however their criticisms of each other take place somewhere in between the two.

Considering the separation of the two types of theory, we could take Hart and Dworkin to be simply asking and answering different questions, however there is still more to discuss concerning Brink’s triadic account of legal validity. Dworkin’s earlier criticisms of Hart’s position begin to break down when we consider the relationship that second order standards bear to first order standards. It is not that moral considerations do not feature in legal standards; they do play a role because moral considerations quasi-justify first order legal standards. However, the relationship is of quasi-justification, not validation. Legal validity still depends wholly on source and not merit, and thus we can maintain that proposition (LP) is correct as a description of legal validity.

Furthermore, if legal principles are assumed to be valid legal standards, they would be first order legal standards, because although they are supportive rather than conclusive legal norms, they are quasi-justified by prior moral considerations. Therefore, what Yanal claims above (1985. p. 393) about Hart being wrong if legal principles are considered valid legal standards is a mistake. The argument for proposition (LP) advances even if legal principles are valid, because legal validity depends on source and not on merit, even when merit provides the rationale for the existence of legal principles. What merit or moral considerations do is provide the motivation for implementing legal standards, something necessary as it would be absurd for a legal system to have no rational basis and to implement laws arbitrarily. However, this necessary motivation behind implementing legal standards does not require any necessary accordance with accepted moral principles. The fact that, in many legal systems, morality and legality do tend to correspond says nothing about legal validity. What this correspondence does is allows us to identify the rationale underlying legal validity; where this validity is entirely source based.

However, entirely separating theories of legal validity from theories of adjudication seems unusual, because it is apparent that these two sorts of legal theory are interdependent. For instance, perhaps it would not make much sense to have a theory about what validates the law without bearing in mind that valid law requires real application in court to often very difficult

cases— where the moral considerations of legal principles are necessary. Furthermore, perhaps it would make little sense to have a theory about how cases should be decided without judges being aware that judicial decisions are not merely moral decisions, but rather must cohere with valid law. Although theories of legal validity and theories of adjudication are separable, an attempted separation might still present a problem for a descriptive account of legal validity. For proposition (LP) to be true there must be something that can account for the moral considerations involved in adjudication, but which does not ignore the dependence connection between theories of validity and theories of adjudication, without claiming validity depends on moral considerations themselves.

Thus, perhaps separating the two sorts of theory only superficially removes the problem of merit being internal to legal principles. It is plausible that moral considerations quasi-justify legal standards, but do not validate them. It is also plausible that moral considerations are nonetheless necessary for adjudication. However, accepting these claims might imply that judges have a sort of moral authority that written law does not. Yet the law could hardly regulate social behaviour if the ‘moral’ considerations that quasi-justify the law did not cohere with the moral considerations of legal principles applied by judges— however a separation of adjudicative and validity theories would mean this could be a possibility. Take the following example: Imagine the law in a given state prohibits abortion for certain moral reasons, yet when an illegal abortion case is brought before court, the judge, magistrates or jury claim there is no charge because, in accordance with accepted legal principles, the prohibition of abortion is considered immoral. Although it might be possible, it is highly unlikely that judges could apply moral considerations so divergent from the considerations that quasi-justify the valid law on abortion. Thus, even though theories of adjudication go beyond a purely descriptive account of the nature of law, their important connection with theories concerning legal validity makes me reluctant to consider the two sorts of theories as entirely distinct. So perhaps simply claiming that (LP) is true for a theory of legal validity wholly separate from a theory of adjudication is descriptively inadequate.

As I have stated, I defend a form of legal positivism by claiming proposition (LP) is descriptively true, but I do not attempt to pass normative judgement on (LP). I regard Hart’s account as the most convincing description of legal validity in order to assert proposition (LP), yet an attempt to isolate legal validity from the moral considerations involved in adjudication is problematic. Therefore, in order to assert that legal validity depends on source and not on merit, I believe it is important to consider the ways in which legal validity and morality are connected. The following section will be devoted to showing that although I assert proposition (LP) as descriptively true, I do not resort to claiming there is no necessary connection between

law and morality. It will be evident that (LP) can account for the merit of legal principles.

Chapter 3: 'Necessary Connections'

Throughout the debate on legal positivism and natural law, there is a lot of disagreement over the phrase 'necessary connection'.¹¹ On a superficial understanding of proposition (LP), it seems to assert what proposition (NL) denies; that there is 'no necessary connection' between the law and morality. However, I choose not to defend such an understanding. This is because there is too much ambiguity over what 'no necessary connection' really refers to—I will discuss this further below. The reason I have delineated the 'Separation Thesis' and the 'Separability Thesis' earlier on in this essay is to support my claim that (LP) is descriptively true of legal validity. This is because, although both theses support (LP), the latter thesis permits moral considerations to feature within legal validation. Furthermore, whilst the phrase 'no necessary connection' can be interpreted in a much weaker sense than implied by the Separation Thesis, the phrase is further rejected by showing that there is at least one necessary connection between the law and morality.

I will discuss separation and separability in terms of defending proposition (LP), with help from Coleman who distinguishes between 'positive' positivist claims and 'negative' positivist claims. I will then further clarify my rejection of the 'no necessary connection' statement, because I believe the law necessarily has a moral aim.

(3.i) Positive & Negative Claims

Coleman states that he understands all forms of positivism as being committed to the view that the morality of a norm is not necessarily a condition of its legality, however, does not rule out that in some legal systems, the validity of a norm can depend on its moral worthiness (1991. p. 716). We might interpret this in terms of Hart's rule of recognition. Hart is associated with the separability thesis rather than the separation thesis, as his view would permit moral principles to feature in a society's rule of recognition. This is evident as he writes:

the existence and content of law can be identified by reference to the social sources of law (e.g. legislation, judicial decisions, social custom) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of that law (Hart, 1994. p. 269).

Something Coleman recognises is that the key feature of the separability

¹¹ 'Necessary Connection' is a phrase used by Hart (1994), Coleman (1991), Green (2003) and many others, and interpreted in various ways—including ways both welcoming and dismissive.

thesis is that it makes a negative positivist claim rather than a positive one; it denies that morality is necessarily a condition of legal validity, rather than claiming something *is* necessarily a condition of legal validity (Coleman, 1991. p. 717). By making a negative conceptual claim, it can be maintained that (LP) is descriptively true— that legal validity depends on source and not on merit— but not contradictory to claim it is possible that in some society, that society’s rule of recognition states morality is a condition of legal validity. What I think is attractive about this position is that, by only making a negative claim rather than a positive one, (LP) is necessarily descriptively coherent. This is because the separability thesis makes no positive assertion about what constitutes a legally valid norm. It makes a very weak claim, however I only argue that legal positivism is true in a weak/descriptive sense.

Something I further appreciate about the weak claim implied by the separability thesis is that it responds to Dworkin’s objections concerning legal principles being valid legal standards. As I mentioned earlier, I am reluctant to strictly separate a theory of legal validity from a theory of adjudication, and it seems Dworkin is even more reluctant to do this— as to form the basis of his rejection of Hart. To quickly recapitulate, legal principles— the principles that contain moral considerations and are applied by judges to determine the outcome of a case— must either be valid legal standards or external to legal validity. Dworkin claims that legal principles must be legally valid otherwise this would entail judges constantly make arbitrary decisions in legal cases, which they do not (2013. p. 146-147). Therefore, Dworkin claims (LP) is false, because legal validity does depend on merit; the merit internal to legal principles. Now let’s again consider the claims implied by the separability thesis. On a negative conceptual interpretation, this thesis states that merit is *not necessarily* a condition of legal validity, yet it is nonetheless *possible* that merit is a condition of legal validity. This negative claim entails a second, less abstract claim: that proposition (LP) allows for merit to feature in a society’s legal validation process, such as, as a condition of validity according to the rule of recognition. So, in response to Dworkin’s critique, the separability thesis means that legal principles which appeal to merit could be valid. Valid at least in the sense that a rule of recognition, the source of legal validity, could permit that legal principles used in adjudication are valid legal standards when they adhere to appropriate moral considerations. This maintains that (LP) is descriptively true; legal validity depends on source and not on merit because a society’s rule of recognition is still that which determines what is and is not valid law.

Accordingly, defending (LP) as descriptive of legal validity does not necessarily prevent moral considerations from being involved in legal validity. Coleman notes that although the negative positivist claim is descriptively true, it is not a particularly interesting claim to make (1991. p. 717). What it does is make a very weak claim; that legal validity depends on source, yet this

source may still permit moral considerations to contribute to legal validity. A criticism might be that by making such a weak positivist claim, the significance of (LP) seems to vanish. Firstly, upon a conceptual understanding of the weak separability claim for (LP), it is not conceptually incoherent to have an immoral, valid law. This should not be surprising, as I noted at the very start of this essay the Nuremberg Laws are often an example to distinguish (LP) from (NL) where, according to the former, these immoral laws would be valid. Secondly, upon the same conceptual understanding of the weak separability claim, it is not conceptually incoherent to have no immoral valid laws, if all societies' rules of recognition—the source of validity—state that only meritorious laws can be valid laws. Thirdly, on a conceptual understanding of the weak claim, for (LP) to be true it is sufficient that in just one possible world, morality is not a condition of legal validity (Coleman, 2007. p. 583). Consequently, upon the weak separability thesis for proposition (LP), no assertive claim needs to be made at all in order for (LP) to be true.

Although Coleman claims such a negative positivist assertion is uninteresting, I disagree. I believe it does actually provide insight. By making no *conceptual* positive claims about the necessary connection between legal validity and merit, the weak separability thesis still allows for us to make a different positive claim. That there is at least one necessary connection between law and morality. Therefore, although my position is weak in the sense that it is descriptive and makes no normative claims, and weak in the sense that it makes no positive conceptual claim, it could be considered strong in another sense. I assert the following positive claim: that necessarily, the law has a moral aim.

(3.ii) A Necessary Moral Aim

The form of legal positivism I wish to advocate allows for at least one positive necessary connection claim. Firstly, we might claim the following: that necessarily, law deals with moral matters. Leslie Green acknowledges this claim (2003. § 4.2), and I will expand upon it here. First off, Green states that this connection goes right to the heart of the concept of law. I agree with this, as it states the external purpose of the law itself, without making any claims about whether the 'moral matters' referred to are what internally validate the law.

Of course, the claim that, necessarily, the law deals with moral matters needs some defending itself. This is because it is not clear that the law actually does deal with moral matters a lot of the time. For instance, take constitutional law which concerns matters such as the country's official currency or the side of the road that we drive on. These are not moral matters, so it does seem wrong to claim the law *necessarily* deals with moral matters. However, I maintain that this is nonetheless true. Firstly, arguing along

similar lines to Thomas Aquinas' *determinatio* (1271-2. Part I-II), it could be argued that although constitutional law does not directly address moral matters, the laws concerned do still relate to moral matters. For example, it is not a direct moral matter whether a given country's official currency is the Euro, the Pound or the Shekel, but it might become a moral issue if the particular currency wasn't authorised by law. Unofficial currencies might only be usable in a very small number of places, meaning people might not have sufficient access to resources depending on location. In addition, currencies unauthorised by law might also lead to employee wage abuse. Furthermore, although it doesn't matter morally whether or not a country's law specifies they drive on the right or left side of the road, it would be very dangerous if there was no law about it. Thus, in this sense, it could be argued that seemingly non-moral laws deal with moral matters on some level, even if not directly.

However, if this is not wholly convincing, I argue a weaker claim can be made. Rather than considering whether individual laws actually deal with moral matters, it can be argued that the legal system as a whole necessarily deals with such matters. In other words, the legal system has some intentional objective, and this must be a moral objective. So, on this interpretation, 'the law' in the statement 'the law necessarily deals with moral matters' is a term to denote the overarching concept of law, rather than the individual laws that comprise it. However, someone might nonetheless reject that the law *necessarily* has a moral aim. Rather, perhaps it is conceivable that there could exist a legal system that had a different, amoral objective. To the contrary, I argue that it is this necessary moral aim that differentiates the legal system from other normative systems. The law has the ability to claim universal authority over citizens, which other rule-based systems do not, such as: language rules, etiquette rules, employee rules, criminal organisation rules (Shapiro, 2011. p. 215).

I will elaborate further. Let's take the example of employee rules. What is it exactly that prevents these systems of rules being considered legal systems? These rules claim authority like the law does, and even some employee rules have a moral aim, such as the rules of a police officer—the moral aim to protect, to prevent crime, to pursue justice. The essential quality the law has is universal, morally directed authority. There is not the opportunity to 'opt-out' of being bound by the law, however there is this opportunity for other systems of rules. A police officer can resign from their position and then will not be bound by their previous employee rules; the officer is only bound in virtue of being a police officer. Similarly, other systems of rules only apply to a capacity. For instance, the rules of a game only apply during game-play, the rules of a language only apply to those who can or want to speak a particular language. The above systems are not universalised for a moral purpose, and rather they either deal with matters

outside the moral sphere, or deal with some moral matters but without moral intention or without universal authority. The legal system necessarily deals with moral matters because, if it did not do so necessarily, it wouldn't have a moral aim. If the legal system didn't have a moral aim, it would not have the authoritative quality that, conceptually, a legal system has.

Moreover, although I argue that necessarily the law deals with moral matters, this does not imply that the law is necessarily good at dealing with moral matters. Rather, it is descriptively true without attempting to make any evaluative comment about the moral efficacy of the legal system. Furthermore, the claim shows what actually makes the law *the law* (Shapiro, 2011. p. 214); it necessarily has a moral aim.

An authoritative system that posits rules to guide behaviour must have an end goal in order to explain why rules to guide behaviour are needed, however the actual end goal does not need to be absolutely specified. That the law has a moral aim does not mean that the law has a particular moral aim; it is intentionally ambiguous because it is not an evaluative statement. Rather, the law necessarily aims at moral matters equivocally. Here, proposition (LP) remains descriptively true; legal validity depends on source and not on merit, yet what valid laws outwardly aim at is necessarily to deal with moral issues. It is not necessary that valid laws contain a threshold level of morality in order to have this moral aim.

Perhaps it is useful to examine this last point slightly further. Why is it not necessary that valid laws have a threshold level of morality to have a moral aim? Surely if the law has a moral aim it would make sense that legal validity depends somewhat on morality to more successfully fulfil this aim. A response is yes perhaps the law would more successfully fulfil its moral aim if legal validity depends on morality, however just because validity doesn't depend on morality, it does not mean that it doesn't tend to conform to it. As Brink earlier acknowledges (1985. p. 367), moral considerations quasi-justify legal rules and principles because they provide the rationale for their implementation. When the law does conform to morality, it is better directed towards its moral aim. When the law does not conform to morality, it is subject to condemnation and often changes in order to conform better to society's current moral attitude. Whether or not this conformity between the law and morality occurs, it is not morality itself on which legal validity depends. Therefore proposition (LP) is maintained—in a given legal system, whether a norm is legally valid depends on its sources, not its merits. Yet this does not assert that there is no necessary connection between the law and morality. There is at least one positive necessary connection: the law necessarily deals with moral matters, in that it has a moral aim. Thus, I defend a somewhat weak version of legal positivism; one that is descriptively true but normatively inert. However, I do make the strong claim that there is a positive necessary connection we can make between law and merit, just not

one of validity dependence.

(4) Conclusion

To conclude, in this dissertation I have clarified important concepts and definitions relevant to this discussion on an area within the philosophy of law. I have clarified Natural Law Theory, Legal Positivism, and the Separation and Separability theses within positivism. I have then discussed arguments in favour of my thesis that proposition (LP) is descriptively true: that legal validity depends on source, not on merit. This has involved discussion concerning the source of validity, the descriptive nature of proposition (LP), and how a theory concerning validity might be separable from a theory concerning adjudication. I have then considered why I claim that legal validity does not depend on morality whilst claiming there still remains a necessary connection between the law and morality. This has involved looking at the difference between making positive and negative claims about necessary connections. I have argued there is at least one positive necessary connection—the law necessarily has a moral aim.

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