

TEACHING LEGAL THEORY WITH VENN DIAGRAMS*

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ABSTRACT: Venn diagrams, which are widely used in introductory logic courses, provide a convenient and illuminating way of presenting the various theories concerning the nature of law. When combined with the Aristotelian square of opposition, these diagrams show not only how the theories are related to one another, logically, which is essential to understanding them, but also which theories are compossible. One surprising result of this approach is that it shows the substantive compatibility of the theories of law set forth by H. L. A. Hart and Ronald Dworkin, who are usually pitted against one another. I show, through quotation and visual representation, that there is no essential disagreement between these jurisprudential stalwarts concerning the relation of law and morality.

A picture shows me at a glance what it takes dozens of pages of a book to expound.

— Ivan Sergeyevich Turgenev, *Fathers and Sons* (1862)

Every picture tells a story.

— Rod Stewart (1971)

I. Introduction

Teaching philosophy of law is a pleasure and a privilege, and for the most part its content is interesting as well as accessible to students. How could it not be? The basic legal concepts – rights, justice, liberty, equality, punishment, responsibility, and evidence, to name but a few – figure prominently in our daily lives. Newspapers, magazines, and television programs overflow with stories of civil and criminal trials, attorneys,

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judges, proposed or existing legislation, and how law as an institution interacts with science, religion, art, morality, and politics. For better or for worse, law is pervasive. It is the water in which we swim.¹

Despite the inherent interest of the field, one topic in the traditional legal-philosophy course perplexes even the best of students, and unfortunately it comes early in the course when students need reassurance of their philosophical competence. I refer to the nature of law, about which, as every instructor knows, there are many theories.² It is important that students understand this material – not only because failure to do so may erode their confidence and sap their enthusiasm for the remainder of the course, but because the topics to come (such as the obligation to obey the law) depend heavily on which theory of law is being presupposed. If the early material is not comprehended, the latter material will almost certainly not be apprehended.

After years of reflection and informal classroom experimentation, I have developed a technique for presenting this material that is both accurate and, according to my students, effective. It relies on Venn diagrams³ and the traditional (Aristotelian) square of opposition.⁴ Many students are familiar with these devices from their introductory logic courses; but if some are not, the instructor can devote a class period (or part of one) to explaining the underlying ideas. Taking things slowly at this early juncture is a wise pedagogical strategy, indeed an investment in the success of the course. As I hope to show, depicting the various theories of law on Venn diagrams shows students that two of the most recent, powerful, and influential theories of the

¹ I agree wholeheartedly with Andrew Altman (1996, xix) when he says that “Legal philosophy can be one of the most exciting areas of philosophy to study.” It is a sad fact about our age, or perhaps about our society during the present age, that many people lack a concept of intellectual excitement. Even fewer people, tragically, experience it. Those of us who spend a significant part of our time reading, writing, and thinking (especially about abstract matters such as the nature of law) are viewed as quirky and, if on the public payroll (as many of us are), parasitic. Perhaps this explains the trend toward “applied” or “practical” scholarship in many fields (including philosophy). It is a reaction by academics to forces that they find vaguely threatening.

² Many textbooks make the nature of law the first topic. Among these are Murphy and Coleman 1990 (Chapter 1, “The Nature of Law”); Johnson 1993 (Part 1, “What Law Is”); Feinberg and Gross 1995 (Part 1, “Law”); Schauer and Sinnott-Armstrong 1996 (Chapter 1, “What Is Law?”); and Adams 1996 (Chapter 1, “The Nature of Law and Legal Reasoning”). Other textbooks place the topic further in. These include Pincoffs 1991 (Part 3, “Law and Morality”); Smith 1993 (Chapter 2, “The Nature of the Judicial Process and the Concept of Law”); and Altman 1996 (Chapter 2, “Law and Morality”). No instructor is bound to teach the material in the order in which it appears in a textbook, of course, but in some cases deviating from the textual order creates other, more serious problems.

³ The name derives from that of the English logician John Venn. See Venn 1971, chaps. V–VII. The first edition of this work appeared in 1881.

⁴ Almost any logic textbook on the market today contains discussions of both Venn diagrams and the square(s) of opposition. See, e.g., Rafalko 1990 (unit 2, esp. 161–67, 180–223); Hurley 1994 (chap. 4, esp. 200–233); Flage 1995 (chap. 4, esp. 124–46); and Copi and Cohen 1998 (chap. 7, esp. 226–55).

nature of law, those of H. L. A. Hart and Ronald Dworkin, are substantively compatible rather than, as they are usually taken to be, incompatible.

II. Natural Law

I begin my classroom discussion, as do most textbooks, with natural-law theory, the basic idea of which – as reflected in Augustine’s dictum (1964, bk. 1, pt. 5, 11) that “a law that is not just is not a law”⁵ – is that there is a logically necessary and not merely contingent connection between law and morality.⁶ All legal systems, it is said, are such that the validity of a law – its status *as* law – depends on, or is a function of, its accordance with morality.⁷ Using Aristotle’s terminology, let us call this an “A” (universal affirmative) proposition and express it as follows: NL: All legal systems are legal systems in which legality is a function of morality.⁸ In classical propositional logic, what this says is that *as a matter of fact* there are no

⁵ Augustine’s actual words were “lex mihi esse non videtur, quae iusta non fuerit,” which Norman Kretzmann (1988, 101) translates as “that which is not just does not seem to me to be a law.” Aquinas, who (correctly) attributes the expression to Augustine, changed it to “a law that is not just seems to be no law at all” (omitting “mihi,” “to me”). See Aquinas 1952, vol. 2, pt. I of the Second Part, Treatise on Law, sec. 2 (“In Particular”), Question XCVI (“Of the Power of Human Law”), art. 4 (“Whether Human Law Binds a Man in Conscience”), 233. Somehow, during the intervening centuries, the original Latin phrase became “lex iniusta non est lex,” which is often rendered in English as “An unjust law is no law at all.” See, e.g., Murphy and Coleman 1990, 11. This latter expression, however, is paradoxical, for it both applies and withholds the predicate “law” from certain entities. Kretzmann does an admirable job of dispelling the confusion. His essay is highly recommended for anyone who teaches this material.

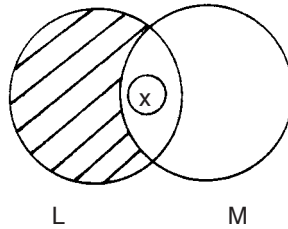
⁶ Conrad Johnson (1993, 3) refers to this as “the necessary connection thesis.” See also Feinberg and Gross 1995, 2. Kretzmann believes that Aquinas subscribed to this thesis. For Aquinas, he says, law has seven “inclusion conditions,” two of which are evaluative or moral and five of which are nonevaluative or formal. If a putative law satisfies the formal requirements but fails to satisfy either of the moral requirements, it is not a law. It has the *form* of a law, and thus might mislead someone into *thinking* it is a law, but it lacks the requisite *content* of law. This interpretation of Aquinas – which, truth be told, is more charitable than most – eliminates the air of paradox surrounding the expression “lex iniusta non est lex.” Saying that an unjust law is not a law, on this understanding, has the same nonparadoxical status as saying that a plagiarized term paper is not (really) a term paper, that a corrupt judge is not (really) a judge, or that fair-weather friends are not (really) friends. See Kretzmann 1988, 102–14.

⁷ The natural-law tradition includes such luminaries as Plato, Aristotle, Cicero, Augustine, Aquinas, and Blackstone, with Aquinas being the most prominent (largely by virtue of the amount he wrote on the topic). See Aquinas 1952. Modern-day proponents of natural-law theory include Joseph Boyle, Germain Grisez, John Finnis, Michael Moore, and Robert George. For a collection of essays on the topic, see George 1992. For a book-length treatment of the subject by a philosopher, see Finnis 1980. Finnis’s book has been described by one scholar (MacCormick 1992, 105) as having “brought back to life the classical Thomistic/Aristotelian theory of natural law.”

⁸ Two comments. First, the clumsy wording is necessary in order to put the categorical proposition into standard form. Second, “legality” – here and throughout the essay – means *legal validity*.

legal systems in which legality is not a function of morality. But natural-law theorists wish to make a stronger claim than this. They want to say not only that there *are* no such legal systems but that there *cannot* be. The very idea of legality (law, legal system) incorporates the idea of morality (or, more particularly, justice). So we need to read NL as if it had the word “necessarily” in front of it.⁹

The Venn diagram of this proposition looks like this (where “L” designates the class of legal systems and “M” the class of legal systems in which legality is a function of morality):¹⁰



We can think of this Venn diagram as a picture (depiction, representation) of one region of logical space.¹¹

III. Negative Positivism

If natural-law theory is the view that there *is* a necessary connection between law and morality,¹² then legal positivism is its denial, namely, that there is *no*

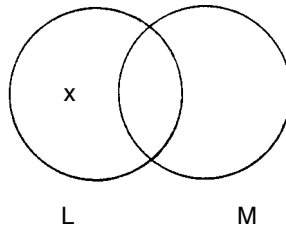
⁹ In Aristotelian terms, the property of being a legal system in which legality is a function of morality is not *proprium*. That is, it is not merely a *universal* property of a legal system (which could be an accident); it is an *essential* property.

¹⁰ Caveat: Shading (in logic, although perhaps not in fields such as mathematics) indicates that a class is empty, whereas an “x” in an area indicates that the class being represented has at least one member. Since we are interpreting NL in logical rather than material terms, shading means not that a class is empty *in fact* but that it *must* (logically) be empty – i.e., that it is not *possible* for it to have members. Thus, an “x” in an area indicates possible rather than actual class membership. A *circled* “x,” as here, indicates that a special assumption is being made. Ordinarily the assumption is existential – that at least one member of the indicated class exists. For us it is modal – that it is *possible* for at least one member of the indicated class to exist. This assumption is not controversial and begs no questions against any theory of the nature of law. Making the modal assumption allows us to use the traditional (Aristotelian) square of opposition rather than the trimmed-down modern (Boolean) square. For a discussion of the two squares and their presuppositions, see, e.g., Hurley 1994, 200–207, 220–27.

¹¹ Actually, since there are competing theories of the relation between law and morality, it is a proposal to see (i.e., conceive) things one way rather than another.

¹² The view I am calling “natural law” might more accurately be described as “legal essentialism,” since it maintains that there is an essential (necessary, conceptual, logical) connection between law and morality. Natural-law theory would then be one species or type of legal essen-

necessary connection between law and morality.¹³ Put differently, legal positivism asserts that it is *logically possible* for there to be a legal system in which legality is not a function of morality. Jules Coleman (to whom I am indebted for some of the ideas presented in this essay) refers to this version of legal positivism as “negative positivism” (Coleman 1988).¹⁴ We can express it as an “O” (particular negative) proposition, to wit: NP: Some legal systems are not legal systems in which legality is a function of morality.¹⁵ Using the same letters as before, we have the following Venn diagram:



tialism. The problem with natural-law theory (in the eyes of some) is that it has unacceptable metaphysical or theological commitments. Someone might wish to avoid these commitments without abandoning the essentialist thesis about the nature of law. See, e.g., Fuller 1969 (defending the view that law has an “internal [i.e., procedural] morality”). I follow ordinary usage throughout the essay in referring to the essentialist view as “natural-law theory.”

¹³ Conrad Johnson (1993, 5) refers to this as “the separation thesis.” See also Feinberg and Gross 1995, 2; Schauer 1991, 197. Hart (1994, 185–86), whose theory will be discussed at greater length below, takes “Legal Positivism” to mean “the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.”

¹⁴ Here is how Coleman characterizes “the separability thesis,” which he understands as “the denial of a necessary or constitutive relationship between law and morality” (Coleman 1988, 4): “[T]here exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for any proposition of law” (Coleman 1988, 5; footnote omitted).

In an essay published the same year (1982) as Coleman’s, David Lyons (1993, 68) set out what he calls “the Minimal Separation Thesis,” which has affinities to Coleman’s separability thesis. The Minimal Separation Thesis maintains that “Law is subject to moral appraisal and does not *automatically* satisfy whatever standards may properly be used in its appraisal” (emphasis added). If law and morality are essentially connected, as natural law asserts and as negative positivism denies, then law cannot be subject to moral appraisal. To say of a law that it satisfies moral standards would be to speak redundantly (like saying that a particular widow is female); and to say that a law fails to satisfy moral standards would be to contradict oneself (like saying that a particular widow is male). I should point out that Lyons thinks the Minimal Separation Thesis is *compatible* with natural-law theory. See Lyons 1993, 70–71. The most he has shown, however, is that two natural-law theorists, Aquinas and Fuller, can consistently accept the thesis. I believe that on a proper understanding of Aquinas (see the discussion by Kretzmann 1988) this is not the case; and Fuller, of course, is not a substantive natural-law theorist. For obvious reasons I cannot pursue the matter here.

¹⁵ As before, this is to be given a modal reading. It asserts not that there *is* (in fact) a legal system in which legality is not a function of morality but that it is *possible* for there to be such a system. This reading is necessary in order for negative positivism to contradict NL – which is a desideratum because, historically, positivism arose in contrast to natural-law theory.

This diagram, when superimposed on the previous diagram, shows that NP is incompatible with NL. One asserts precisely what the other denies.

IV. Positive Positivism

As Coleman observes, theorists who are traditionally classified as legal positivists (e.g., John Austin and Jeremy Bentham¹⁶) do more than deny natural-law theory. They take positions of their own on the nature of law. While their substantive positions differ, often considerably, they have the following in common: All affirm that *by its nature* law is distinct from morality.¹⁷ Law is one thing and morality another.¹⁸ While law and morality may converge with respect to which sorts of behavior are required or forbidden (think of the prohibition of murder), this is an ontological accident, as it were; morality is not the essence, quiddity, or sine qua non of law. This claim – what Coleman calls “positive positivism”¹⁹ – can be expressed as an “E” (universal negative) proposition: PP: No legal systems are legal systems in which legality is a function of morality. The associated Venn diagram is as follows:²⁰

¹⁶ Austin’s theory is advanced in Austin 1954. Bentham’s can be found in Bentham 1970. Other positivists besides Bentham and Austin are Hans Kelsen, Hart, Neil MacCormick, Joseph Raz, E. Philip Soper, Lyons, and Coleman.

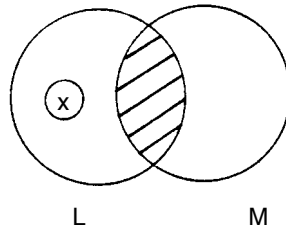
¹⁷ As Austin (1954, 184) put it, “The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” For a sympathetic exposition of Austinian/Benthamite positivism, see Hart 1958. For a critique of Hart’s essay, see Fuller 1958. For a discussion of the Hart-Fuller debate in the context of a larger project of understanding constitutional interpretation, see Burgess-Jackson 1989, chap. 7.

Lyons (1993, 83) comes close to capturing this sort of positivism with his “Explicit Moral Content Thesis,” which maintains that “law has no moral content or conditions save what has been explicitly laid down by law.” As Lyons points out, this thesis differs from the Minimal Separation Thesis. One could, for example, be a Minimal Separation Theorist – someone who believes that law is subject to moral appraisal – but not an Explicit Moral Content Theorist.

¹⁸ As Coleman (1988, 5–6) correctly points out, this expression is ambiguous. It has empirical, semantic, and epistemic meanings (interpretations). I use the expression in the semantic sense, as indicated in the text.

¹⁹ Coleman does not define the term, but it is clear from the context in which he uses it that a positive positivist makes an affirmative (“positive”) claim about law (rather than the purely negative claim made by a negative positivist). Specifically, a positive positivist “makes an interesting claim about the *essence* of law” (Coleman 1988, 10; emphasis added). Two pages later (12) Coleman says that what makes negative positivism “unsatisfactory” as a theory of law is that “it makes no assertion about what is true of law in every conceivable legal system.” The implication is that positive positivism (the contrasting type) *does* make an assertion about what is true of law in *every conceivable legal system* – and that this makes it a satisfactory (i.e., minimally adequate) theory. Coleman himself, having found problems with what he calls “law-as-hard-facts positivism,” defends a conventionalist version of positive positivism that he calls “law-as-convention positivism” (12–26). As he puts it, “the authority of law everywhere is a matter of social convention” (ix; see also 27) – i.e., “its acceptance by officials” (12).

²⁰ Again, the circled “x” indicates that we are making a special assumption, namely, that it is *possible* for the indicated class to have at least one member.



That there are two types of positivism can be seen by examining the diagrams for NP and PP.

V. Dworkin

This brings us to Ronald Dworkin, who almost singlehandedly revitalized philosophy of law during the past three decades.²¹ Dworkin is impatient with the universal claims made by natural-law theorists and positive positivists. He says (1978, 352) that his concern is with “a particular legal system with which [he and his interlocutors are] especially familiar,” namely, that of the United States. In this system (and perhaps others, such as that of Great Britain), whether a putative law is a valid law depends not just on the prevailing rule of recognition (as Hart and other legal positivists maintain) but on the principles of political morality that inhere in the system. Law, at least in *our* legal system, has an inescapable moral element.²² Dworkin’s view – dubbed by J. L. Mackie (1985) “the third theory of law”²³ for obvious reasons – can be expressed in Aristotelian terms as an “I” (particular affirmative) proposition, to wit: D: Some legal systems are legal systems in which legality is a function of morality.²⁴ The Venn diagram of this theory is as follows:

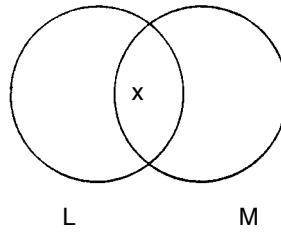
²¹ Dworkin’s main works are Dworkin 1978, 1985, 1986, 1990, 1993, and 1996.

²² For a subtle, charitable, and illuminating critique of Dworkin’s theory of “law as integrity” by a trained lawyer and philosopher, see Lind 1996.

²³ Mackie’s essay was published in 1977, the same year, coincidentally, that Dworkin’s first book (Dworkin 1978) was originally published. (Most of the essays in Dworkin’s book were published earlier, however.)

²⁴ Some commentators believe that Dworkin makes a stronger claim than this. According to Altman (1996, 48), Dworkin’s theory “posits an important and necessary connection between law and morality.” Altman (1996, 49) later says that, according to Dworkin, “law necessarily has a moral dimension that raises it out of the arena of pure power politics.” Of course, Altman might mean “necessary within a particular legal culture,” in which case Dworkin is *not* making a stronger claim.

Murphy and Coleman (1990, 46) observe that “Dworkin’s examples are all drawn from Anglo-American law, and so it is unclear whether he thinks that the law-morality union is a feature simply of our legal system or will be present, in some form, in any legal system.” In a note to this passage (63), Murphy (the primary author of the chapter) writes: “I think



The absence of shading shows that Dworkin makes no universal claim about the nature of law.

VI. Hart's Soft Positivism

One important legal theorist has been ignored to this point: H. L. A. Hart. Needless to say, the reason for the delayed entry has nothing to do with Hart's stature. It is that Hart's theory combines two other theories that needed to be presented first. Hart is *some* sort of legal positivist, but he does not share the view of Bentham and Austin that there cannot be a legal system in which legality is a function of morality. So he is not, in our

that Dworkin wants his model to hold for all legal systems, not just Anglo-American law. Take a rigid system of statutory rules. How are judges to apply these, asks Dworkin, if not in accord with the moral *principle* that like cases should be treated like [*sic*]?" (italics in original). The problem with Murphy's example is that this is a formal rather than a substantive principle, so it provides no support for the claim that morality provides a *substantive* test of legality in every conceivable legal system.

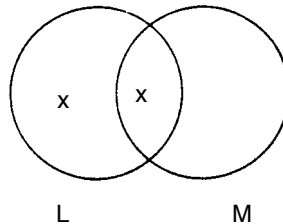
The issue arises again a few pages later when Murphy writes (50): "It is sometimes said of Dworkin that he is not, like Hart, offering a philosophical theory of law that would hold for all cultures but is really offering a philosophical theory or reconstruction of United States constitutional law." In a note to this passage, Murphy adds (64): "As indicated earlier . . . I think Dworkin has broader visions than this. His case discussion is limited neither to American cases nor to constitutional cases. . . . Simply a good moral theory of U.S. constitutional law, however, would be no mean achievement." I agree that Dworkin has greater ambitions for his theory than simply reconstructing United States constitutional law, but I do not see the support for the claim that Dworkin believes his theory to be universal.

Suppose, for purposes of discussion, that Altman and Murphy are correct; then Dworkin's theory is equivalent to NL, for it makes a claim about all legal systems rather than some (meaning, here, "at least one"). But I don't think they're correct. I think Dworkin wishes to leave it *open* whether every legal system (actual or possible) makes legality a function of morality. He says, for instance (Dworkin 1986, 102), that "Interpretive theories [such as his] are by their nature addressed to a particular legal culture, generally the culture to which their authors belong." For what it's worth, Hart and Michael Bayles share my belief about Dworkin's theory. In his 1994 postscript (Hart 1994, 239), Hart distinguishes his own theory, which "is *general* in the sense that it is not tied to any particular legal system or legal culture" (italics in original), from Dworkin's theory, which, he says (citing Dworkin 1986, 102), is not general. According to Bayles (1991, 380), Dworkin's theory "is particularistic. It cannot answer 'What is law?' across cultures." See also Bayles 1991, 367, 369, 379. I say more about Hart and Dworkin below.

terms, a positive positivist. It is also clear that Hart rejects NL, which makes him a negative positivist. So he is a negative positivist but not a positive positivist. He admits, however, that a particular legal system *might* make legality a function of morality. Here is one expression of this view:

In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality. (Hart 1994, 204; see also 247, 250)

In this respect Hart agrees with Dworkin. Hart's view can be characterized as follows: H: Some, *but not all*, legal systems are legal systems in which legality is a function of morality.²⁵ How do we represent H in a Venn diagram, since the view is not expressible as a standard-form categorical proposition? The answer is that we must combine Dworkin's diagram with the diagram for NP, as follows:



This view has been called “soft positivism,” a label that Hart (1994, 250) ultimately came to embrace (or at least accept).²⁶ Soft positivism is the conjunction of two other views: D and NP. While it is tempting to eliminate the terms “negative positivism” and “positive positivism” altogether in favor of “soft” and “hard” positivism, following Hart's lead, this would be a mistake, for soft positivism is neither identical nor reducible to PP or to NP. In fact, it is *incompatible* with PP (as the diagrams show). We could call PP “hard positivism,” but that would destroy the contrast

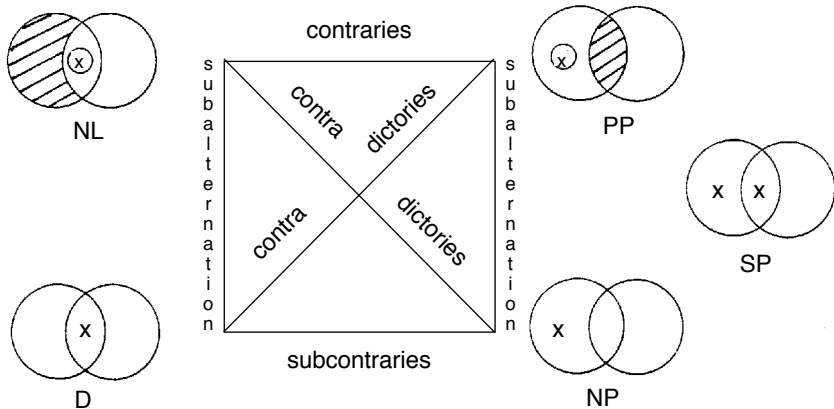
²⁵ This, as before, is to be read modally, to wit: It is possible for there to be a legal system in which legality is a function of morality *and* it is possible for there to be a legal system in which legality is not a function of morality.

²⁶ Lyons (1993, 100) appears to be a soft positivist as well, for he embraces what he calls “the Expanded Separation Thesis.” This is the thesis that “something can be law even though it does not meet moral conditions [compare NP]. This is meant as a point about law in general, not about the law of a particular system. For the law of a *given system* might impose (explicit or implicit) moral conditions on what can count as law [compare D]” (emphasis added). Lyons was a student of Hart at Oxford University.

with NP, and NP is aptly named because it negates (denies) what some other theory (NL) affirms. I see no alternative to using three labels, confusing as that may be to students: NP, PP, and SP (for “soft positivism”).²⁷ PP and “hard” positivism are identical, but there is no point in having two labels for the same theory.²⁸

VII. Deploying the Depictions

The main theories of law have now been stated, discussed, and depicted.²⁹ In order to explore their interconnections, let us introduce the Aristotelian square of opposition with the four Venn diagrams in their proper positions (Hart’s theory, SP, is depicted separately, since, as we saw, it is not expressible as a standard-form categorical proposition):



²⁷ Hereafter, “H” will be replaced by “SP,” since Hart’s version of SP is not the only possible version of SP and since we wish to talk about the larger class of soft-positivist theories.

²⁸ If I were to write on a clean slate, with no concern for historical or current usage, and with the aim of employing descriptively accurate labels, I would rename the theories as follows. NL would be called “legal essentialism” (since the claim is that law and morality are essentially connected), while its contradictory, NP, would be called “legal inessentialism.” D would be called “legal compatibilism” (since the claim is that law and morality are compatible), while its contradictory, PP, would be called “legal incompatibilism.” Alas, I hold out little hope that these recommendations will be taken to heart, but there it is.

²⁹ Needless to say, I have not covered all extant theories of law, which means that my title is somewhat misleading (although I hope excusable). I say nothing, for example, about legal realism, critical legal studies, feminist jurisprudence, or the economic analysis of law. But these theories – at least as usually understood – are not theories about the relation of law and morality. Perhaps, to be accurate, I should say that I have canvassed the main theories of law *that take a position on the relation between law and morality*.

The square of opposition shows how the various jurisprudential theories are related to one another, logically, which helps students understand certain otherwise puzzling features of the debate over the nature of law. The Venn diagrams reinforce these relations by providing a visual representation.

Notice first that if one is a natural-law theorist such as Aquinas (and assuming, as we have been, that at least one legal system is possible), one must *reject* PP, for the A and the E propositions (NL and PP, respectively) are contraries. As such, they cannot both be true. Both may, however, be false – and would be, for example, if some but not all legal systems make legality a function of morality (i.e., if SP is true). Notice further that natural-law theory (again, assuming the possible existence of at least one legal system) *entails* Dworkin's theory of law as integrity. This explains why Dworkin is often classified as a natural-law theorist³⁰ – and why, although he finds the label simplistic and misleading, he has not repudiated it.³¹

We also see that if Dworkin is wrong about there being some legal systems in which legality is a function of morality, then natural-law theory is false (an immediate inference from I to A). Finally, we see that a natural-law theorist must reject NP. A visual inspection of the Venn diagrams for these theories shows that they cannot both be accurate depictions; the theories explicitly contradict one another. Exactly one of them, therefore, is true and the other false. Moreover, since SP entails NP, natural lawyers must reject SP as well.

Turning to PP, we see that if one embraces this theory, one must reject both NL (again, assuming the possible existence of at least one legal system) and SP. We also see that PP entails NP. All positive positivists are negative positivists, in other words, but not conversely. It follows (by subalternation) that if NP is false, so is PP. Finally, we see that PP is the logical contradictory of D. This explains why Dworkin has devoted so much of his energy to criticizing PP.³² He realizes that any reason to embrace PP is *eo ipso* a reason to reject his own theory of the nature of

³⁰ By, e.g., Bayles 1990, 38 (characterizing Dworkin and Aquinas as “natural lawyers”).

³¹ According to Dworkin (1982, 165), “Natural law insists that what the law is depends in some way on what the law should be.” A few sentences later (165), Dworkin writes: “If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.”

³² Dworkin describes legal positivism as the first part of “the ruling theory of law” (utilitarianism being the second part). Legal positivism, he says (1978, vii), “holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, *and in nothing else*” (emphasis added). This would appear to be a claim about all rather than some legal systems, which makes Dworkin's target PP rather than NP. Much of Dworkin 1978 is devoted to overthrowing “the ruling theory of law.” Dworkin 1986 continues the effort, although by this time positivism has been renamed “conventionalism.” See Dworkin 1986, chap. 4.

law.³³ It also explains why Dworkin must do more than criticize Austin's (or any other) version of PP. Even if Austin's theory is the strongest version of PP (and few, I suspect, believe it is), it would not follow from the fact that *it* is unacceptable that PP is unacceptable (i.e., false as a characterization of law). It may only mean that certain features of Austin's theory (for example, his emphasis on commands) are mistaken or objectionable. To quote Coleman (1988, 11): "Legal positivism makes a conceptual or analytic claim about law, and that claim should not be confused with programmatic or normative interests certain positivists, especially Bentham, might have held."

This latter point is an important lesson for students to learn. Any theory, whether of the nature of law or something else, has both structure and content. Two theories may share a structure but differ in content. Austin, Bentham, and Coleman (to name just three theorists) are positive positivists, but the flesh they put on their respective theoretical skeletons differs. For Dworkin or any other theorist to repudiate PP rather than a particular instantiation of PP, he or she must demonstrate that the *skeleton* is defective. This task is both constraining and liberating. It is constraining in that one must get at the essence of a theory rather than its accidental features (a distinction not always easy to draw). It is liberating in that it allows entire classes of theory to be challenged (and overthrown) with a single argument. Suppose one refutes PP per se; then one has refuted every actual and possible instantiation of PP.³⁴

There is one other feature of the jurisprudential debate as we know it that the square of opposition brings into focus. Dworkin's objective, like that of any other protagonist in the debate, is to win acceptance for his theory of law. He can accomplish this in either of two ways. First, he can persuade the reader to reject PP. Since PP is the logical contradictory of D, the reader, in rejecting PP, would be committed to accepting D. Second, he can persuade the reader to reject NP. Since NP stands in the subcontrary relation to D, and since we are assuming the possible existence of at least one legal system, they cannot both be false. If NP is false, then D is true. It follows that if Dworkin can persuade his readers to reject *either* NP or PP, he succeeds in his argumentative task.³⁵

But this is not all. SP, as we saw, is a conjunction of NP and D. If

³³ Dworkin writes (1978, 352): "I appeal to complex, modern legal systems [e.g., that of the United States] to show that since, in these systems, the truth of a proposition about legal rights may consist in some moral fact, the positivist conception of legal rights must be false." Dworkin is here responding to criticism by E. Philip Soper (1977).

³⁴ Dworkin (1978, 22) consciously employs this strategy. "I want to make a general attack on positivism, and I shall use H. L. A. Hart's version as a target, when a particular target is needed." The risk, of course, is that Dworkin attacks a feature of Hart's theory that is not essential to positivism.

³⁵ Coleman implies in various places (1988) that Dworkin must do more than challenge NP, but this, as I have shown, is a mistake. Refuting NP is *sufficient* – although not necessary – for establishing D.

Dworkin were to criticize SP, presumably he would be criticizing the “NP” conjunct of the view rather than its “D” conjunct. But then, for the reason just given, he will have given reason to embrace D. The upshot is that Dworkin has at least three argumentative targets: NP, PP, and SP. Refuting any one of them – any of the three versions of positivism we have distinguished – suffices to establish his theory. The only theory that he *must* refute, on pain of seeing his own theory collapse, is PP.³⁶

VIII. Hart “versus” Dworkin

Let us turn to Hart’s theory. The Venn diagrams show that (1) he must reject NL; (2) he must reject PP; (3) he has no fundamental disagreement with Dworkin (since both theories can be true); and (4) he is a negative positivist (although not *merely* a negative positivist). The point about Dworkin may be puzzling, for as every student of the subject knows, Dworkin has devoted many reviews, articles, and book chapters to criticizing Hart. Indeed, Hart and Dworkin are often taken to be the main protagonists in the jurisprudential drama.³⁷ How could anyone seriously claim that their theories are compatible? Aren’t Dworkin and Hart merely the most recent proponents of rival theories, namely, natural law (Dworkin) and legal positivism (Hart)? It would seem that anyone who denies the antagonism between them has a heavy explanatory burden to bear.

Let me discharge that burden by pointing out just where and why Hart and Dworkin agree. Both believe that there is a legal system (that of the United States) in which legality is a function of morality. It follows that it is *possible* for there to be such a legal system. But that is D. Hart is a Dworkinian to that extent.³⁸ Hart also wants to say that the other alternative is possible: There can be a legal system in which legality is *not* a function of morality.³⁹ The rule of recognition of a particular society might make legality depend on historical factors, for example (what Dworkin calls a “pedigree” test). In short, Hart is ecumenical – pluralistic, open-minded – about what he allows as the test of legality. It is not clear, as I

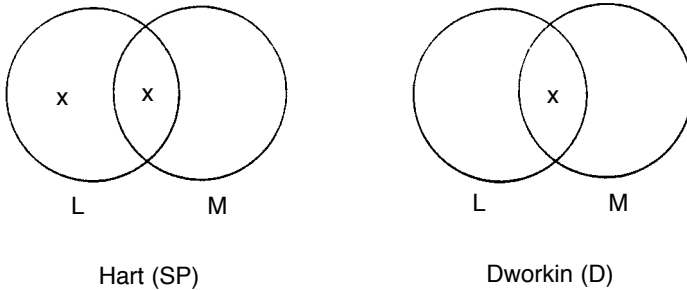
³⁶ Coleman (1988, 7, 8, 27) notes that Dworkin’s arguments are effective against PP but not against NP. I agree, but this does not affect the point being made in the text. In fact, it supports the point. Dworkin *could* have chosen NP as his target, but he chose PP.

³⁷ See, e.g., the title of Bayles 1991. *Res ipsa loquitur*.

³⁸ See Bayles 1991, 354: “Hart allows a rule of recognition to use content as a criterion; indeed, he explicitly recognizes that even *moral* content is a criterion in some systems” (emphasis added: citation omitted). See also Bayles 1991, 361: “Hart does believe that it is a question of fact what criteria are used in a country’s rule of recognition, but those criteria need not be factual.”

³⁹ See Bayles 1991, 377: “[Hart] does not believe that laws necessarily provide moral claims, even weak *prima facie* ones. That is the point of his denial that legal rights are a species of moral ones and the cornerstone of his positivism. That something is the law does not imply that it is even *prima facie moral*.”

suggested earlier in the essay, whether Dworkin would go along with this. There is, therefore, definite agreement but not definite disagreement between the two. This can be seen through a comparison of the respective Venn diagrams:



I should point out that in his most recent (and final) commentary on Dworkin's work, Hart expressed puzzlement that anyone would think the two theories incompatible. The theoretical aims of the two, he said, are very different. Hart's theoretical aim

was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect. (Hart 1994, 239; italics in original)

In contrast, Dworkin conceives of legal theory "as in part evaluative and justificatory and as 'addressed to a particular legal culture', which is usually the theorist's own and in Dworkin's case is that of Anglo-American law" (Hart 1994, 240; citation omitted).⁴⁰ So Hart's theory is general and descriptive whereas Dworkin's is particular and evaluative. "It is not obvious," Hart (241) writes, "why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conceptions of legal theory."⁴¹ Hart thinks that he and Dworkin are like ships passing in the night.

I believe Hart overstates the differences between the projects. While it

⁴⁰ Bayles (1990, 25) maintains that Dworkin's theory of law "applies only to liberal, common-law countries."

⁴¹ Bayles (1991, 380) made the same claim several years before: "[B]ecause it is limited to jurisprudence as it affects adjudication in particular legal cultures, Dworkin's view is not a rival to Hart's general theory." See also Bayles 1990, 37: "Dworkin's normative theory is to make sense of legal institutions and behavior for persons who believe such institutions and behavior are justifiable. It is a normative theory that simply bypasses the theoretical concerns of Hart."

is true that his theoretical aims and those of Dworkin diverge, it does not follow that there is no *convergence*, let alone no *substantive* convergence. Hart's "general and descriptive" theory of law allows for the type of relation between law and morality that Dworkin (the particularist) believes exists in the legal system of the United States. The fact that Dworkin's aim is to justify law, whereas Hart's is to describe it (albeit in a deep, illuminating way), is neither here nor there as far as this point is concerned. As I have shown, both Hart and Dworkin believe that a legal system can (and some do!) make legality a function of morality. Hart, in short, thinks the two theories are divergent in purpose, therefore *not incompatible*. I have shown that in spite of the divergent purposes, the theories are *substantively compatible*.

IX. Portraying Compossibilities

Having used Venn diagrams to shed light on the Hart/Dworkin dispute, let us return to the square of opposition, which portrays not just entailment relations but compossibilities. Which jurisprudential theories are logically compossible – that is, compatible with one another? It turns out that there are three compossible sets, two with two members and one with three.⁴² First, one can be both a natural-law theorist and a Dworkinian.⁴³ Second, one can be both a negative and a positive positivist. Third, one can be, simultaneously, a Dworkinian, a negative positivist, and a soft positivist (or any subset of the three). The third of these compossibilities may seem surprising in light of Dworkin's extensive and vociferous criticisms of positivism, but, as I have pointed out, it is not. We need to distinguish various types of positivism. As Frederick Schauer (1991, 197) notes,

a community could . . . establish as its law not only a set of norms dependent on moral correctness, but could even make its set of legal norms totally congruent with its set of moral norms. As long as the determination is made by the community, as long as it is a question itself of social fact, then there remains no *necessary* connection between law and morality. (italics in original)

Schauer's point, I take it, is that any such adoption or "establishment" by a community is itself a contingent fact about it. If some but not all communities (legal systems) make legality a function of morality, then both D and

⁴² There are no four- or five-member compossible sets (counting Hart's theory, SP, as one of the five theories).

⁴³ If we wish to speak semantically, we can say that it is possible for both NL and D to be *true*. Ditto, *mutatis mutandis*, for the other sets. If we wish to speak epistemically, we can say that one can consistently *believe, accept, or subscribe to* both NL and D. Ditto, *mutatis mutandis*, for the other sets.

NP are true. This seems to be Hart's position. Dworkin, therefore, *could*, without contradiction, embrace NP. Whether he does or wishes to – or should, all things considered – is another matter, one I hope to address in another essay.⁴⁴

X. Conclusion

I do not want to claim too much for the diagrammatic approach to the nature of law. I believe it captures the essence of the various jurisprudential theories that have come down to us, and my classroom experience is that it enhances student comprehension of the logical relations between and among them. More modestly, the approach shows the substantive compatibility of the theories of law articulated by Hart and Dworkin. That alone, given how Hart and Dworkin are usually depicted in the literature and in the classroom, might make it worthwhile as a pedagogical technique.

If I may be permitted a brief sermon, we instructors should neither say nor imply that the theoretical debate concerning the nature of law is set in stone, for that is false. The debate has a future as well as a past. It is dynamic, not static. On this point I agree with Neil MacCormick, who “regard[s] the issue of mutual opposition [between positivism and natural-law theory] as now closed and unfruitful.” “There are,” he writes (MacCormick 1992, 130), “elements from works in both schools which any sound theory of law has to embrace.”⁴⁵

In some ways, odd as it sounds, the debate over the nature of law has just begun. Figures such as Hart, having given brilliant performances, exit the stage, while others, with repertoires and skills of their own, assume their places. I encourage instructors who teach this material to offer amendments and corrections to the foregoing techniques so that this

⁴⁴ Tentative title: “Negative, Positive, and Soft Positivism.”

⁴⁵ The reader may wonder how NL and NP can be reconciled. As I have stated them in this essay, they cannot be, for they are logical contradictories. But according to MacCormick (1992, 108), John Finnis, a contemporary natural-law theorist, accepts the “thesis of the separation of positive law from morality.” Finnis, he says (108), does not claim that unjust laws are not laws; rather, they are “defective or substandard or corrupt instances of that which they genuinely are – laws, legal duties, legal rights.” Finnis’s work therefore represents a different sort of natural-law theory than that usually portrayed in textbooks – which may be a reason to revise the textbooks! On the other hand, it may be, as Kretzmann suggests, that Aquinas’s theory has been misunderstood and misrepresented all along.

Nor is MacCormick’s version of legal positivism the standard one. He maintains that while law and morality are conceptually distinct (the standard view), there are nonetheless several essential connections between them. For example, “certain moral aspirations are intrinsic to the very concept of law” (114). Also, both law and morality are “modes of exercise of practical reason” (120). The work of Finnis and MacCormick shows how the gap between natural law and legal positivism – a gap that has been so much emphasized in philosophical textbooks – might be bridged.

exciting and significant topic – the nature of law – becomes as stimulating to our students as it is to those of us who teach it to them.

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