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Legal Thought in Enlightenment's Wake

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A review of Steven D Smith, *The Disenchantment of Secular Discourse* (Harvard University Press, 2010) 264 pp, Hbk £20.95, ISBN 978-0674050877.

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Public discussion of justice and morality, Professor Steven D Smith observes, is in a shrill, shallow, and shabby state. The opening chapter of Smith's most recent book, *The Disenchantment of Secular Discourse*, shows that he is not alone in this assessment. Public intellectuals like Ronald Dworkin catalogue a 'conscious degradation' in such discussions and warn that the absence of 'genuine public argument' threatens our very democracy (2, 3). Completing the circle, reviewers of books that criticise the state of public discussion find those very authors guilty of the bad faith they bemoan (4). Legal discussion is in a similar state of dysfunction, with the courts issuing strings of divided decisions written as if they were 'designed to wear the reader into submission as much as actually to persuade' (9).

Smith's particular diagnosis of this oft-noted malaise differentiates his work from contemporary critics, as do the humility and gentle humour of his analysis. This essay will not, however, focus on *Disenchantment*'s contributions to individual politico-legal debates or the broader argument about the practices and pathologies of the public square, or at least it will not do so directly. The aim instead is to draw connections between *Disenchantment*, Smith's prior work in legal thought, and contemporary debates in jurisprudence. The platform for this discussion is Smith's chapter concerning scientific thought. The catalyst for this essay's reflections is Scandinavian legal realism, a twentieth-century approach associated with thinkers like Axel Hägerström, Alf Ross, and Karl Olivecrona.[1] Considering these elements in tandem sheds light on both the limits and virtues of central ideas about legal obligation and authority in contemporary jurisprudence. Doing so also underscores important connections between *Disenchantment* and Smith's other work in legal theory. Such connections point to a broader argument that jurisprudential debates about methodology and concepts may be as much about how we read the universe as they are about how we understand law.

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1 For a helpful introduction, see Brian Bix, 'Ross and Olivecrona on Rights' (2009) 34 *Australian Journal of Legal Philosophy* 103.

I.

Before contemplating the cosmos, it is helpful to first understand Smith's argument in *Disenchantment*. Smith concurs with others about the poor state of public debate, though his explanation for this situation differs from those of other leading voices. Dworkin's *Is Democracy Possible Here?*, for example, claims that Americans share fundamental principles, but a divisive soundbite culture prevents consensus from coalescing around his reasoned elaboration of these core beliefs. Failure to listen to Dworkin's sweet reason, Smith suggests, is not the problem: if anything, Dworkin's approach is symptomatic of the pathology afflicting public debate since the Enlightenment. Enlightenment rationalists, Smith argues, sought to banish religious and teleological premises from argument in hopes of identifying general, universal truths revealed by unencumbered Reason (18–23). Secular rationalism was a boon for the natural sciences—and to a lesser extent for the social sciences—but according to Smith was a failure for resolving questions of private and political morality (24–35). French Philosophes, German idealists, and British empiricists alike sought to liberate society from the chains of inherited unreason, but in fact imprisoned modern man in Max Weber's 'iron cage' of secular rationalisation (23). Because the Enlightenment project failed to identify universal morality grounded in reason, it ceded the task of normative ordering to bureaucratic manipulation and instrumental efficiency.

The disenchantment persists to this day, Smith observes, but much current argument ignores the dour state of discourse. In the academy, the most prominent example of this failing is advocacy of 'public reason' (13–18). These zoning rules of the public square, as articulated by John Rawls and taken up by cognate theorists like Dworkin, would prohibit from public debate appeals to 'comprehensive doctrines', such as 'conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships'.[2] By design, public reason constrains us from expressing 'the full range of our values, intuitions, commitments and convictions' (24). Nevertheless, Smith argues, the rules of public reason do not exclude comprehensive doctrines so much as they sublimate them (23). Consciously or not, disputants maintain allegiance to such thicker beliefs, but cloak them in arguments under malleable terms like 'liberty' or 'equality'. To use Smith's phrase, public reason requires us to 'smuggle' in the critical premises that we cannot help but hold, yet the very act of smuggling frees us from defending or justifying those beliefs (34). As a result, the quality of argument suffers and mutual suspicion abounds.

To support this claim, Smith deconstructs contemporary political and legal discussion about assisted suicide, Mill's harm principle, freedom of religion, and human rights. In these successive chapters, Smith argues that familiar nostrums offered to justify positions in both political debate and legal reasoning do not withstand analysis. Take, for example, Mill's harm principle, which Smith and others contend is empty without a substantive baseline of harm. Allowing the baseline to be *subjective* would undermine the whole point of the harm principle, for govern-

2 John Rawls, *Political Liberalism* (Columbia University Press, expanded edn 2005) 13.

ment's reach would turn on the whims of the most sensitive person (77–82). An *objective* standard, however, requires us to choose among competing conceptions of the good, thus undermining the simplicity and neutrality that made the harm principle appealing in the first place (104–7).

Smith surmises that otherwise-smart people fall into the grooves of such approaches because they allow them to smuggle in comprehensive beliefs that violate public reason's limits on truth claims. Smith does not seem to claim those who disagree with him act in bad faith, or that justice and human rights are in fact empty ideas. His point instead is that intellectual culture cannot go on in its current fashion; meaningful argument about justice and rights requires us 'to be more open' about our premises, including metaphysical and even theological commitments (213). There is no guarantee that doing so will lead to greater agreement, Smith notes, but the status quo of public reason is a failure—one that disrespects deeply held commitments while also insulating their adherents from the burden of explanation and justification (224–5).

II.

The primary objects of Smith's criticism are ideas like the harm principle and public reason that have the appearance of normative bite but serve as empty placeholders. By contrast, his chapter 'Science, Humanity, and Atrocity' focuses on approaches that are unapologetic about their disenchantment. This chapter, a meditation on Joseph Vining's book *The Song Sparrow and the Child*, concerns totalising theories of science that lead proponents to claim, for example, that love is merely a 'temporary chemical imbalance of the brain induced by sensory stimuli' or that children, like mountain chains, are simply complex systems of 'physical particles in fields of force' (206, 190). The chapter is more than a variation on the Dostoyevskyian theme that without God, all horrors are permitted. Rather, Smith mines the significance of Vining's observation that the theorists in question *do not* treat their fellows as mere systems of matter. As in both *Crime and Punishment* and the *Brothers Karamazov*, Smith places law at the centre of the mystery and its solution.

In the wake of the so-called 'religious wars' in popular intellectual culture, there is a familiar response to the arguments of theorists like Daniel Dennett or Richard Dawkins about the triumph of science and the benighted character of belief in some author of, or overarching purpose in, the universe. Vining, according to Smith, adopts a form of such a response, which does not shun or disparage science and the scientific method, but maintains that naturalism alone is an impoverished worldview. Along these lines, one does not have to be a young-earth creationist or Darwin-denier to dissent from strong naturalism in its technical and popular forms. One simply has to believe that more than material objects and processes exist, and that naturalist terms do not exhaust legitimate modes of thought and meaning. Vining's main claim, while compatible with this familiar line of argument, goes further. He claims that a fuller audit of our lives, mundane actions, and responses to the world will reveal that we—including said scientists—really don't believe in

a totalising naturalism (194–8, 204–5). It is telling, in other words, that such advocates of substantive naturalism *do not* treat their children or (even their pets) as mere physical particles in a field of force and *do* recoil in the face of cruelty.

According to Smith, some of the evidence Vining accumulates for this approach is in what he calls 'openings'—experiences which offer a sense of reality beyond materialism. One of those 'openings' is the 'large fact of law' and our related belief in the distinction between the 'authoritative'—law that obligates because it is the product of a responsible mind—and the 'authoritarian'—commands that compel out of fear of force (206). In an amoral, materialist universe, this distinction is at most a fleeting, sensate blip, yet Smith sees meaning in this deeply felt, if mysterious, difference in kind between the toll collector on the turnpike and the gunman blocking the highway out of Mogadishu (206, 210). Smith hints at but does not unpack the implications of such an 'opening'—or its denial—for legal thought. This essay takes those further steps to illuminate critical debates in jurisprudence about legal authority and obligation, as well as Smith's broader project in legal thought.

A good starting point for such an examination is the work of the Scandinavian legal realists. Although not discussed in *Disenchantment*, these thinkers are a natural foil to Smith's understanding of law as a signpost to something more than social ordering. The Scandinavians placed no normative significance on, and at times denied, the distinction between the authoritative—valid law—and the authoritarian—merely factual social forces. They did so, moreover, in language anticipating Vining's naturalists. Much of this theorisation viewed law, at its core, as a social rule paired with an emotional, not rational, feeling of compulsion to conform.[3] Mind you, this understanding extends beyond the behaviour of ordinary citizens; legal decisions are explained by a *judge* having a feeling of compulsion to rule in particular ways in response to particular facts.[4]

The Scandinavian legal realists emphasise that we are to assign no significance to feelings of legal compliance. Where Smith sees 'the large fact of law' as an opening to something higher (206), Karl Olivecrona sees 'law' as 'fact'.[5] Full stop. To link this sensation to something more, like an authority's 'right to command … leads us straight into the sphere of natural law'.[6] To Olivecrona, even a positivist treatment of authority like Kelsen's *Pure Theory of Law* is 'permeated with' spooky 'natural law concepts' due to its focus on rights and duties.[7] Alf Ross agrees that many will try to point to the compulsion of law as tracings of transcendent authority rather than empirical 'functioning of the State machinery of force', but to succumb to such an impulse is to believe 'the illusions which excite the emotions by stimulat-

3 See Alf Ross, *Towards a Realistic Jurisprudence* (E Munksgaard, 1946) 176. Karl Olivecrona, as we will see below, was less inclined to theorise in terms of coercion, though in his later work he was closer to Ross on this score. See Karl Olivecrona, 'Legal Language and Reality' in Ralph A Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (Bobbs-Merrill, 1962) 151, 189; Bix (n 1) 10 fn 38.

4 See eg Alf Ross, *On Law and Justice* (University of California Press, 1959) ss 11–12.

5 Karl Olivecrona, *Law as Fact* (Humphrey Milford, 1939).

6 Karl Olivecrona, 'Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy' (1951) 26 *New York University Law Review* 120, 125.

7 *Ibid.*

ing the suprarenal glands'.[8] The 'opening' that law represents to Vining and Smith is for Ross is a 'temporary chemical imbalance' (206) of the adrenal gland induced by the sensory stimulation of social facts.

Accordingly, Ross described the concept of legal validity—an idea interwoven with authority—as a 'superempirical' notion that 'rational[ises] … certain emotional experiences' that can be explained as facts.[9] Ross similarly claimed that our use of the word 'right' in legal discussion is like the use of taboo concepts in primitive Polynesian society—at most a right is a semantic placeholder for consequences following from certain actions.[10] Like taboo, our use of this dummy variable 'is associated [with] indefinite ideas that a right is a power of an incorporeal nature, a kind of inner, invisible dominion' apart from the mere exercise of force. In fact, however, 'the core concept of a right has always been the power of coercion. The reality corresponding to this idea is the power of the holder [to] set in motion the legal machinery with the result that public power is exercised for his benefit.'[11]

Ross gravitated toward this mechanistic metaphor. He likened a lawsuit to 'pressing a button to set going the machinery of the law'.[12] Thus, the lawyer 'is to function as far as possible as a rational technologist … he simply places his knowledge and skill at the disposal of others, in his case those who hold the reins of political power'.[13] This legal machine does not run on reason. 'When rational arguments fail or have little directive force', Ross explains, 'the legal consciousness takes over the directing role'.[14] A consciousness, we recall, driven by our glands, social forces, and residual superstition.[15]

This stark empiricism seems the legal counterpart of the totalistic naturalism *Disenchantment* confronts. Ross denies any understanding of law as an 'opening' to a reality beyond the physical world. This opposition is not surprising. Hägerström, Scandinavian legal realism's founding father, took as his motto 'furthermore, we must destroy metaphysics'.[16] Ross saw metaphysics lurking everywhere in legal thought and language and aimed to purge this 'dualism and its unfortunate consequences'.[17] With their zeal to rid the law of any tinge of mystery, the Scandinavian legal realists obliquely credit Vining and Smith's focus on law as an 'opening' that suggests legal discourse is more than just talk backed by force. The Scandinavian legal realists would dismiss this appeal to a thicker ontology, but would agree about the stakes and the available options in the debate over the meaning and nature of law.

8 Ross (n 4) 34, 275.
9 Ross (n 3) 10.
10 Alf Ross, 'Tû – Tû' (1957) 70 *Harvard Law Review* 812, 818.
11 Ross (n 4) 266.
12 *Ibid*, 177.
13 *Ibid*, 377.
14 *Ibid*, 373.
15 cf *ibid*, 370 (legal consciousness is 'merely one empirical psychic fact among others [shaped by] powerful group interests, primitive instincts and traditional magic and religious ideas').
16 See John A Passamore, 'Hägerström's Philosophy of Law' (1961) 36 *Philosophy* 143.
17 Ross (n 3) 10; see also HLA Hart, 'Scandinavian Realism' in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 161, 162.

Indeed, reading *Disenchantment* alongside Ross's *On Law and Justice*, one almost sees Ross as Smith's Danish doppelganger, a man who draws similar conclusions about problems in conventional legal and political discussions, while differing on the critical metaphysical starting point and thus the implications of those problems. Ross echoes Smith's challenge to the harm principle, accusing Mill of being a closeted natural lawyer—a smuggler—because the principle is meaningless without a substantive baseline about the rights of persons.[18] Similarly, Ross argued well before contemporary critics like Smith (29–32) that general appeals to equality are empty without some other normative baseline.[19]

Ross's discussion of Enlightenment rationalism also comports with Smith's assessment in *Disenchantment*. Ross claimed that the Descartes of the world sought to identify timeless, universal laws of justice and morality, but in fact merely 'discovered' principles that were mere products of the felt needs of the thinkers and the age.[20] Along these lines, Ross would likely concur in Smith's assessment (166–85) of Martha Nussbaum's 'capabilities approach' to justice as question-begging in its identification of social obligations. And, while Smith is more charitable in describing the problems of contemporary disagreement, Ross anticipates similar criticism in describing a claim of justice as 'the same thing as banging on the table', adopting 'a militant attitude of a biological-emotional kind, to which one incites oneself for the implausible and blind defense of certain interests'.[21] Interests, perhaps, smuggled in beneath claims of universal right.

Smith and Ross seem to be identifying the same symptoms of an intellectual and cultural malaise, though they have irreconcilable ideas about the cause of the disease and its cure. Or, to use the phrase of a very different Dane, they describe the same chasm, but from opposite sides of an *Either/Or*. Or perhaps we are to understand the Scandinavian realists and Smith in terms of Alasdair MacIntyre's argument that Nietzsche and Aristotle provide the only remaining frameworks for the Western philosophical tradition.[22] Nordic grayscale might not tickle Nietzsche's aesthetic fancy, but Ross's analogy between legality and Polynesian taboo recalls *After Virtue*'s description of Nietzsche as the Kamehameha of the European tradition—unmasking the emptiness of normative language that maintained the form of a worldview long abandoned.[23]

III.

In Smith's framework, this parallel is apt. His previous book, *Law's Quandary*, suggests that contemporary legal thought is in a MacIntyrian crisis, and that enduring

18 Ross (n 4) 253.

19 *Ibid*, 285–6; see also Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537.

20 Ross (n 4) 248–9.

21 Ross (n 4) 274–5.

22 Alasdair MacIntyre, *After Virtue* (University of Notre Dame Press, 2nd edn 1984) ch 18 ('After Virtue: Nietzsche *or* Aristotle, Trotsky *and* St Benedict') 256.

23 *Ibid*, 112–13.

academic angst over law's coherence and determinacy is a product of scholars' abandonment of the richer metaphysical worldview that law presupposes.[24] I will not rehearse the myriad methodological responses to this crisis that *Law's Quandary* deconstructs, but the book suggests that deep scepticism (law as 'just talk' that masks politics) and thick belief (human law as link to higher law) are the two viable options. Smith then points to the persistence of legal practice *despite* these persistent doubts and failed resolutions as evidence that many of us—including academics who Are All Legal Realists Now—may be operating as metaphysical realists in fact.[25] Vining's notion of law as an 'opening' resurfaces as the cause—and solution—of the contemporary crisis of belief in the law.

The crisis that *Law's Quandary* addresses is doubt in American legal thought about the rationality and legitimacy of *adjudication*—how judges decide cases *within* the law. A different line of inquiry—one Smith explores in neither book—focuses on law's conceptual architecture, seeking to understand the nature or meaning of legal rights, validity, and authority, and to exploring the connection, if any, between law and morality. These questions are the focus of much contemporary analytic jurisprudence. And if, in the vocabulary of *Law's Quandary*, we are concerned about law's *ontology*, it pays to ponder predominant approaches to these basic underpinnings and delimitations of legal systems as a whole.

A.

Let us first return to the Scandinavian legal realists' attempt to disenchant the 'large fact of law'. Of note here is the response of mainstream analytic jurisprudence to the Scandinavian reductionism and how those responses fit into Smith's broader story of disenchantment. HLA Hart, while applauding the Scandinavian legal realists' rejection of natural law, objected to Ross's charge that any claim of legal 'validity' or 'rights' invoked the metaphysical ghost in the legal machinery.[26] Hart's response to Ross mirrors his critique of John Austin's positivism: to equate statements of legal validity with emotional feelings of compulsion is to leave out critical elements of the description. Most importantly, it misunderstands Hart's rule of recognition—the master rule that indicates which of various social rules count as law—as well as the internal perspective—the point of view of those who follow the law out of a sense of obligation, not compulsion.[27] A person with this internal perspective is not Holmes's 'bad man' acting only to avoid the falling axe of law, but the 'puzzled man' who wants to understand his legal obligations.[28] The rule of recognition and the internal perspective, Hart explains, are what distinguish 'being obliged' by a threat and 'legal obligation' to obey a valid law.[29] The internal

24 Steven D Smith, *Law's Quandary* (Harvard University Press, 2004) 157.

25 *Ibid*, 172–9; Steven D Smith, 'The (Always) Imminent Death of Law' (2007) 44 *San Diego Law Review* 47.

26 Hart (n 17) 162–4.

27 *Ibid*, 166–7; HLA Hart, *The Concept of Law* (Clarendon Press, 2nd edn 1994) 100–10; 89–91.

28 Hart (n 27) 40.

29 *Ibid*, 82–83.

perspective also forms a basis of criticism: a person who refuses to hand his wallet to a mugger may be imprudent, but he is not like a tax evader.[30]

Notwithstanding the echo of Vining's authoritative/authoritarian distinction, Hart's internal sense of legal obligation need not be an 'opening' to an understanding of higher law. The rule of recognition is a social fact that does not turn on moral criteria.[31] Further, to have the internal perspective does *not* require that the person follows the law out of a sense of moral obligation. Instead, one can have the internal point of view out of 'long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do'.[32] In short, the 'internal aspect' of law is more than Ross's mere sense of compulsion, but it is less than a moral judgment about a given law or legal system. To make the internal perspective morally thicker would cede the foundations of a legal system to natural lawyers.[33]

Yet it is hard to explain Hart's internal perspective in a way that does not collapse into either emotional compulsion of some form or moral judgment. 'Long-term interest' suggests a sophisticated variation on an Austinian theme, and following law out of a 'disinterested interest in others' hardly decouples legal and moral obligation. Appeals to the 'unreflecting … attitude' of rule followers and emotional conformists also does not seem the most promising approach to saving legality from sceptics like the Scandinavian legal realists. Nor is Joseph Raz's reconstruction of the internal perspective as 'statements from a point of view' obviously more persuasive.[34] It seems true that people can reason *as if* they accepted moral presuppositions, even when they do not. With sufficient study, I can advise a member of the Old Order Amish what her beliefs require in situations even though I am not of the plain people. Similarly, without treating the law as a moral imperative (or a threat of sanction), a lawyer can advise a client about what to do if she feels a moral obligation to follow the law (or wants to avoid liability).[35] Thus, Raz concludes, detached statements about obligation are hardly incoherent. The problem with this argument is that it seems to make the internal point of view derivative of the existence of those *who do* have a moral or Holmesian view of legal obligation. Arguments about the 'central case' or 'core' of the concept of law are not easy, but the central legal point of view is a strange one if its defining characteristic is acting *as if* one were an adherent of a collateral perspective on the law.

One suspects, then, that the intuitive appeal of Hart's internal perspective draws on some echo of a presumptive moral obligation to obey the law. Whether this notion of moral obligation is irrational residue or the root of the matter

30 *Ibid,* 90; Hart (n 17) 166.

31 Hart (n 27) 107–10.

32 *Ibid,* 203.

33 For an excellent analysis of this point, see Brian Bix, 'On the Dividing Line Between Natural Law and Positivism' (2000) 75 *Notre Dame Law Review* 1613. Hart's journals reveal his continuing struggle to offer a theory of legal obligation that slides neither into Austinian positivism nor natural law. See Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004) 228, 334–5.

34 Joseph Raz, *The Authority of Law* (Oxford University Press, 1979).

35 *Ibid*, 156.

depends on one's philosophical perspective, but some recent developments in analytical literature also challenge Hart's intermediate position as described above. Frederick Schauer has called for a return to, or at least renewed appreciation of, Austin's command theory.[36] Similarly, others read Hart's philosophy as 'naturalistic in spirit'[37] and argue that the best interpretation of Hart understands the internal perspective as a psychological fact, a feeling of obligation.[38] Indeed, Olivecrona's analogy between legal norms and paper money—we accept both not because of some foundational gold standard, but rather because everyone else acts as if they were[39]—offers a naturalistic understanding of the rule of recognition.[40] To the extent Hart believed it was something more, he failed to follow the implications of his naturalist premises.[41] Pulling the other way, Neil MacCormick and John Finnis argue that the most plausible understanding of the rule of recognition and internal perspective is in terms of moral criteria.[42]

B.

If Hart's theory of legal obligation tries to finesse the Ross/Smith divide through an untenable middle way, Joseph Raz's prominent theory of legal authority elides the choice by holding two conflicting ideas at the same time. Authority, according to Raz's pre-emption thesis, claims to give its subjects reasons for action that override any contrary reasons those subjects may have.[43] As a philosophical matter, law claims authority and thus purports to give reasons that pre-empt all others, including the subject's assessment of whether the law's command is moral. Despite making such imperial demands on behalf of law's authority as a concept, Raz is equally adamant that law's assertion of authority by itself does not impose a moral obligation on the subject.[44] According to Raz's 'normal justification thesis', law's authority is justified when a subject is more likely to act morally by obeying authority than by following her own judgment. There is no presumption that the law will satisfy that test, and in many cases it will not.[45]

36 See eg Frederick Schauer, 'Was Austin Right After All?' (2010) 23 *Ratio Juris* 1.

37 Brian Leiter, 'Naturalizing Jurisprudence: Three Approaches' in John R Shook and Paul Kurtz (eds), *The Future of Naturalism* (Prometheus Books, 2009); see also Kevin Toh, 'Hart's Expressivism and his Benthamite Project' (2005) 11 *Legal Theory* 75.

38 Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Skepticism' (2011) 31 *Oxford Journal of Legal Studies* 663, 671–73.

39 Olivecrona (n 5) 170–3. As Robert Rodes summarises, 'We can go on believing in the function of legal concepts even if we ceased to believe in the concepts themselves'. Robert E Rodes, Jr, *Schools of Jurisprudence* (Carolina Academic Press, 2011) 97.

40 Olivecrona (n 5) 215–16.

41 Leiter (n 38) 672.

42 Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) 266–7; John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd edn 2011) ch 1; Bix similarly identifies a migration of natural law argument to the level of 'theory construction'. Bix (n 33) 1619–21.

43 Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 59.

44 *Ibid*, ch 4.

45 *Ibid*, 54; ch 4.

Under Raz's theory, law claims authority of Hobbesian proportions while imposing a moral obligation weaker than that imposed by natural law theories that adopt a presumptive duty to obey legal authority.[46] The internal tension is palpable: To decide whether compliance with authority is more likely to lead to moral behaviour than individual choice, one has to assess the moral validity of the authority's command and the authority's competence in particular contexts. Law's claim to be an exclusionary reason for action, however, seeks to override all other reasons for action, including those based on a negative evaluation of an authority's guidance or competence. The normal justification thesis swallows the pre-emption thesis and vice-versa.

In this vein, Margaret Martin has argued that the source of this conflict is Raz's embrace of two divergent approaches to theorisation.[47] The pre-emption thesis is the fruit of analytic or descriptive jurisprudence: the philosopher identifies essential, universal features of legal systems without moral evaluation of those shared attributes. An essential feature of legal systems is that they claim authority to pre-empt subjects' other reasons for action. This description does not entail that any or all such claims are morally legitimate; such evaluation is not the role of legal philosophy. The normal justification thesis, Martin argues, flows from an evaluative, Aristotelian approach to identifying a concept: the philosopher identifies a 'focal' or 'core' example of a concept, which in turn helps us understand defective instances of the idea. Legal authority, in its fullest sense, helps citizens make better moral choices than they would on their own. Legal authority that steers its citizens to moral error or subverts the common good has some resemblance to authority in its 'core' sense (it purports to offer conclusive reasons for action), but it is a defective example of the species and thus has less of a claim on the citizen's allegiance. Unlike descriptive jurisprudence, this approach holds that one cannot understand authority without understanding its purpose, a purpose understood here in moral terms.

C.

This tension at the heart of Raz's theorising about authority tracks the difficulties facing Hart's theory of legal obligation. Raz's pre-emption thesis is the mirror image of the 'obligation/being obliged' dichotomy so central to Hart's internal point of view: a government enforcing an unjust law claims authority to demand compliance irrespective of the subject's other reasons for action, while the stick-up artist has no such pretensions.[48] Both exercises of force may cause injustice, but the state's imposition is accompanied by a claim that it has a right to demand compliance. This self-understanding, so to speak, of wielding authority—the right to rule—is the counterpart to the internal perspective of the law-abider. There is

46 Raz denies a *prima facie* obligation to obey the law. *Ibid*, 101–2.

47 Margaret Martin, 'Raz's Morality of Freedom: Two Models of Authority' (2010) 1 *Jurisprudence* 63, 79–83. The remainder of this paragraph is a précis of Martin's argument.

48 cf *ibid*, 82.

an inchoate sense of normativity that separates the state from the gunman but is not grounded in moral terms. The normal justification thesis, by contrast, reads the authority's claims in moral terms, much like Finnis's argument that the core case of the internal perspective involves a moral presumption of legal obedience to the law of a generally just state.[49]

	Naturalist	**Analytical**	**Evaluative**
Legal Obligation	Psychological fact of compulsion/fear of sanction (Ross/ Holmes)	Internal point of view (Hart)	Presumptive moral duty to respect laws of generally just state (Finnis, MacCormick)
Legal Authority	Factual ability to compel (Ross/Holmes)	Pre-emption thesis (Raz)	Normal justification thesis (Raz)

IV.

So we have an 'internal point of view' of legal obligation that is based on neither external compulsion nor morality, and a concept of legal authority that claims the right to override individual judgment without imposing any moral obligation on individuals. It may go too far to say we are confronted with the empty idea of legality,[50] but such efforts to account for law's normativity result in conceptions that seem impoverished or counterintuitive. Yet this line of argument has had great prominence, if not dominance, in contemporary analytic jurisprudence. If the criticisms above are sound, a good question is *why* this is the case. Any answer will be complex, but the broader argument in *Disenchantment* suggests a partial explanation.

A brief restatement will aid the comparison. Smith argues that Enlightenment thinkers failed to identify universal truths stripped of religious premises or inherited traditions that prescribed a particular form of the good life. Rather than moral scepticism or metaphysical reversion, however, the thinkers' response to such failure was to repackage their pre-existing moral beliefs in philosophical banalities and deem them the fruit of Reason. This approach continues today, Smith argues, with theories of 'public reason' foreclosing appeal to controversial beliefs about religion or *the* good life. Nevertheless, much contemporary argument smuggles in underlying, richer premises under empty terms like 'liberty' or 'equality'. Public reason gets the sheen of appearing objective and normatively rich without the work of explaining and justifying one's thicker, motivating premises (or, more sceptically, without admitting that one simply is expressing an emotive preference). *Disenchantment*, then, is a brief against a Goldilocks, 'just right' normativity that purports to

49 See eg Finnis (n 42) 246.

50 cf Westen (n 19); Laurence Claus, 'The Empty Idea of Authority' (2009) *University of Illinois Law Review* 1301.

offer more than the cold, hard facts of strong naturalism but none of the heated glow of teleology or theology.

We can also understand Hart's theory of legal obligation as seeking such a middle way. With his internal point of view, Hart claims to identify a transformative dimension of normativity more rich than the Scandinavians' reductionist account of legal obligation while denying that this dimension of obligation is best understood as part of a larger moral order. As argued above, however, there is good reason to question the coherence or even content of this thin conception of legal obligation. At most, the pull of moral obligation is one of many perspectives in an 'overlapping consensus' of views understanding legal obligation as normative in some inchoate sense.[51] At this level of abstraction, however, there is reason to fear that, like the harm principle or general appeals to equality, the 'internal point of view' is a rhetorically appealing but conceptually empty vessel for rationalising compulsion (per Ross) or building moral truth or transcendence into the law's architecture (per Smith). By the same token, Hart's internal point of view may also foreclose constructive thinking about legal obligation. It offers something for the naturalist/materialist—a firm anti-natural law stance—and something for those who believe in something 'higher'—a non-reductive claim of normativity. For many with conflicting intuitions grounded in both perspectives, the internal point of view may offer the appearance of closure while masking an untenable compromise.

Raz's theory of legal authority presents a similar compromise. The pre-emption thesis concerns the law's claim of *normative* power to override individual subjects' reasons for action. The pre-emption thesis, however, does not turn on any moral evaluation of the claiming state or its legal commands. To be sure, Raz's normal justification thesis places moral constraints on an individual's obligation to authority. He insists, however, that this constraint is a matter of moral and political philosophy, while the pre-emption thesis is a conclusion of legal philosophy properly practised.[52]

Notwithstanding this claim to separate jurisprudence and political morality, Raz has defended the pre-emption thesis on grounds that it can mitigate disagreement in pluralistic societies by providing 'common standards of conduct' at a level of generality acceptable to people of different opinions.[53] Law as an exclusionary reason, in other words, can bring peace to the public square by identifying or creating an overlapping consensus that ends interminable arguments about which form of the good life should shape public policy.[54] Threads of Hart's political and moral philosophy similarly connect to his conceptual analysis of law. His *Law, Liberty, and Morality* is dedicated to defending Mill's harm principle, and he remained

51 John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1.

52 See Martin (n 47) 71.

53 See Raz (n 43) 58.

54 Although this particular defence of the pre-emption thesis has an affinity to political liberalism, the perfectionist liberalism of *The Morality of Freedom* differs in that its respect for pluralism reflects the value of autonomy, rather than agnosticism about comprehensive doctrines. See generally Martha C Nussbaum, 'Perfectionist Liberalism and Political Liberalism' (2011) 39 *Philosophy and Public Affairs* 3.

agnostic about whether moral disputes were capable of objective resolution.[55] It is hard to keep these facts out of mind when reading Hart's rejection of jurisprudential methods that seek the 'focal meaning' of legal concepts in moral criteria. Such evaluative approaches, Hart objected, reintroduce 'obfuscating complexities' to jurisprudence, and the effort to understand the 'central case' of legal concepts through moral criteria is as much a 'distortion' of law as Marxist theories that identify law with the 'interests of a dominant economic class'. In light of the 'the hideous record of the evil use of law for oppression', Hart concludes, with Oxonian understatement, that evaluative jurisprudence is 'an unbalanced perspective'.[56]

In this light, evaluative approaches to jurisprudence pose three threats in light of moral pluralism. The first is conceptual: (1) making moral criteria necessary components of legal obligation will infect legal theory with the same indeterminacy we see in debates about the good life. The other two are practical implications of the first. (2) If law is to settle disputes among citizens who hold conflicting and possibly irresolvable visions of the good, we cannot build those very criteria into our understanding of legal obligation and authority. (3) If we conflate legality and morality, moreover, there is a risk that a particular, prescriptive vision of the good will intrude on an autonomous sphere of individual liberty—a sphere that is the proper response to the fact of moral disagreement. The sterile normativity of Hart's internal point of view may appear arid on its own, but is more comprehensible in the context of a broader, liberal political theory. If this is so for Hart, whose concept of law at least *permitted* systems in which moral criteria informed the rule of recognition, it seems all the more so for an exclusive positivist like Raz. This is not to suggest such jurisprudence is a surreptitious gambit to entrench political liberalism—Hart claims to describe liberal and illiberal legal regimes alike. The point instead is that this method of legal philosophy and the 'public reason' criticised in *Disenchantment* may tap the same intellectual and cultural root: a desire to sustain and universalise normativity while attempting to transcend or bracket disagreement and truth claims concerning the actual content and force of particular visions of the good life. The results are abstractions that distract more than they inform.

This fixation on the conceptualist centre in legal theory has a strong connection, by intellectual affinity if not logical entailment, to the disenchanted forms of discourse that have emerged in Enlightenment's wake.[57] Yet in recent years, Hartian conceptual analysis as traditionally practised has been challenged by partisans of naturalist and evaluative jurisprudence alike. Legal naturalists and Holmes revivalists have questioned the possibility and plausibility of such approaches.[58] On the other side, some in the analytic tradition have sought to understand law's norma-

55 Lacey (n 33) 259 notes that *Law, Liberty, and Morality* embraced 'a firmly Enlightenment and liberal vision of tolerance, a concern with human suffering, and a respect for human freedom, tempered only by limited paternalism'; see also Neil MacCormick, *HLA Hart* (Stanford University Press, 2nd edn 2008) 207.

56 Hart (n 17) 12.

57 To borrow John Gray's deliciously ambiguous phrase. See John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (Routledge, 2007 [1995]).

58 See eg Leiter (n 37); Claus (n 50).

tivity in moral and even theological terms, approaches that collapse the boundary between jurisprudence, political theory, and moral philosophy while requiring theorists to stake out a non-neutral stance about the good.[59] Finally, there is a revival in approaches that go beyond conceptual debate to address the *moral* benefits of legal settlement in accordance with posited, formal rules.[60] To some, at least, the 'conceptual' centre is not holding, or at least holds less interest on its own.

That said, any contest between legal naturalism and evaluative jurisprudence will incorporate these keystones of twentieth-century analytic jurisprudence and be more persuasive for it. From the naturalist perspective, the Scandinavians had appropriate metaphysical scepticism, but a focus on compulsion may reveal an unsophisticated understanding of legal phenomena. Hart's secondary rules and internal point of view do not glow in the dark with super-empirical normativity, but a naturalistic study of law will recognise as a matter of *fact* that some participants experience—or claim to experience—a feeling of direction and obligation apart from a threat of compulsion.[61] In turn, evaluative jurisprudence benefits from Hart's focus on the institutional facts and complexity of law as it exists and is promulgated by humans. Because positive law is necessary for the common good even when there is a shared vision of the good life, the institution is worthy of study in its own right.[62] Accordingly, imperfection in human law only *begins* a practical inquiry about legal obligation and authority, one more complex than the bare invocation *lex iniusta non est lex*.[63] From this perspective, everyday legal argument itself need not frequently invoke metaphysics or moral truth; rather such ideas provide a background grounding and justification for the more mundane tasks of resolving disputes and ordering public life according to law.

In short, Hart has introduced or helpfully re-emphasised much-needed nuance in jurisprudential discussion. Having done so, it may be time to face the bracing and clarifying choice that Smith poses about our understanding of law. *Law's Quandary* is an argument that contemporary anxiety about legal thought results from the abandonment of a worldview in which human law was understood as drawing on or flowing from a super-empirical order. *Law's Quandary* identifies the legal manifestation of the broader social and political crisis that *Disenchantment* describes. While *Law's Quandary* analysed theories of adjudication, this essay argues that prominent

59 Finnis (n 42); MacCormick (n 42); Jeremy Waldron, 'The Image of God: Rights, Reason, and Order' in John Witte, Jr and Frank S Alexander (eds), *Christianity and Human Rights* (Cambridge University Press, 2010). Waldron has not firmly embraced a theological basis for human rights, but his serious consideration of such a ground is remarkable compared to Hart's hostility to such approaches.

60 See eg Larry Alexander and Emily Sherwin, *The Rule of Rules* (Duke University Press, 2001); Frederick Schauer, 'Positivism Before Hart' (2011) 24 *Canadian Journal of Law and Jurisprudence* 455; Sean Coyle, 'Positivism, Idealism and the Rule of Law' (2006) 26 *Oxford Journal of Legal Studies* 257, 258–9.

61 See Brian Leiter, 'Science and Methodology in Legal Theory' in his *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) 182, 190–1.

62 On this point, positivists and natural lawyers can agree. See Scott Shapiro, *Legality* (Harvard University Press, 2011) 173–5; John Finnis, 'Law and What I Should Truly Decide' (2003) 48 *American Journal of Jurisprudence* 107.

63 See generally John Finnis, 'The Truth in Legal Positivism' in Robert P George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996).

theories of legal obligation and legal authority similarly fail to explain law's normativity without appeal to substantive, controversial theories of the good and law's place within it. If normatively thin conceptual analysis is unsatisfactory, those theorising about law's 'nature' may face a similar choice between legal naturalism and more evaluative approaches to jurisprudence.

The nature of this choice, as suggested by Smith, is in important ways ambiguous and underdeveloped. The dichotomy appears to place strong methodological and substantive naturalism on one side and some alliance of teleological and religious belief on the other. Regarding the latter half, Smith does not address disagreement among Aristotelians, Thomists, and other religious thinkers over whether belief in divinity is necessary to understand the moral shape of the universe. Attempting such arbitration, however, is probably unnecessary for Smith's argument; all parties in that debate see purpose in the universe that provides orientation for one's efforts to judge reasonably about how to live and live together. On the other hand, a non-Rawlsian liberal like Joseph Raz or a moral realist like Michael Moore may challenge the sharpness of Smith's divide or object that a critique of Rawls's approach leaves their approaches unscathed.[64]

One book can only take on so much, so these may be arguments for another day. Such caveats aside, the choice Smith's work suggests about jurisprudence is a pressing one, for law presents a central case of the disenchantment that Smith describes and that many, believers and sceptics alike, cannot help but confront.[65] To some, law—like music, love, and sunsets—can be understood as an 'opening' to transcendence or, 'spirit' as Vining labels it; for others law is mere fact for scientific study. So it is a critical ground for disagreements between empiricists and those of a more metaphysical bent. Scandinavian realists saw law and legal consciousness as important redoubts in their war on metaphysics. Aquinas, for his part, used our knowledge of human law to aid our understanding of *all* law, including natural law, and beyond that, divine law.[66] And, in a more Augustinian spirit, Smith's analysis may suggest that Hart was on to something by identifying interiority—the internal perspective—at the core of the concept of law.[67] The benefit of Smith's work is pressing the implications of that insight (and its denial) for our understanding of law, ourselves, the universe, and, perhaps, something more.

64 See eg Raz (n 43); Michael Moore, 'Moral Reality Revisited' (1992) 90 *Michigan Law Review* 2424.

65 See Yishai Blank, 'The Reenchantment of Law' (2011) 96 *Cornell Law Review* 633; Brian Leiter, 'In Praise of Legal Realism (and Against "Nonsense" Jurisprudence)' (2012) 100 *Georgetown Law Journal* 865.

66 See *Summa Theologica*, I–II, Q90.

67 cf Marilynne Robinson, *Absence of Mind: The Dispelling of Inwardness from the Modern Myth of the Self* (Yale University Press, 2010).