“Impartialist Liberalism and Inclusive Legal Positivism”

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Introduction

This paper is part of a larger work whose concern is to analyze the relationship between a liberal impartialist conception of the state and the tradition of legal positivism. To identify this concern is to invite a series of clarificatory questions: What is an impartialist conception of the state? What is its relationship with the law? What is legal positivism? Again, why have I focused my attention there? Why would an impartialist liberal be drawn to the notion of a positive system of law? Finally, what is the precise nature of legal positivism’s relationship with impartialist liberalism? In the larger work these are questions I pursue through sustained reflection on the writings of ‘liberal’ theorists, notably John Rawls; and on ‘legal positivists’, notably H.L.A Hart. This larger work also discusses (more) contemporary legal positivists, including Joseph Raz, Jules Coleman, and Matthew Kramer. My goal in this paper is more modest; it is to investigate whether one particular version of contemporary legal positivism - inclusive legal positivism - can be understood as satisfying what I take to be the demands made of the law by a liberal impartialist conception of the state. I will say more about inclusive legal positivism and liberal demands of the law as I go.

Since the publication of Rawls’ A Theory of Justice in 1971,¹ there have been numerous publications devoted to elaborating or refining Rawls’ conception of ‘liberal’ political philosophy and many others since the publication of The Concept of Law which have performed a similar function for legal positivism.² Indeed, it is striking that many of these publications have been produced by the same people. But this makes it all the more surprising that there is so little work connecting these two fields of study. Some might conclude that the two simply have different objects of concern and leave the matter there. But this paper is not content to do so. It delves a little deeper into the relationship between the two, and asks


² Hart, H.L.A., The Concept of Law, (1994), Clarendon Press, Oxford. I don’t mean to claim that there have not been publications before these works, but for my interests these are the relevant foundational texts for most contemporary speculation.
whether, how far, and in what way liberal impartialist political philosophy and legal positivism are connected.

Impartialist liberalism is a particular form of liberal political philosophy. Its development can be understood as a response to what Rawls called “the fact of reasonable pluralism”. It is characterized by a commitment to treating people as equals, and to the claim of ‘justificatory neutrality’; that is, to the claim that the justification of the use of state coercion in a liberal society must not depend on any particular (set of) comprehensive conception(s) of the good. Such an account of liberalism, I argue, can plausibly be seen as assigning to the law the function of respecting fundamental liberal values.

Legal positivism is a legal theory that developed out of writings of Bentham, and which owes its modern form to Hart. Legal positivism claims that law is a system of primary and secondary rules, a claim that embodies in its terms two fundamental commitments. The first commitment is to the so-called separation thesis, the second to the so-called social fact thesis. The separation thesis, first articulated by John Austin, maintains that what the law is is a separate and distinct question from the question of what the law ought to be. This does not mean that the legal positivist denies that moral considerations can be incorporated into the law, only that an answer to the question, does the law exist may be settled without reference to such considerations: it may exist without being all that it might be wished to be. That is to say, moral or other normative considerations are not necessarily connected to the existence of a legal system. The social fact thesis maintains that the sources of legal validity are matters of social fact. In other words, what distinguishes legal norms from non-legal norms is that legal norms instantiate a peculiar property that makes reference to some social fact. It is the occurrence of that fact which explains the existence of a legal system. Now, in my title I have employed the label ‘inclusive’ legal positivism. I will get to this distinction in a moment, but for now it is important to underscore the foundational assumptions of the jurisprudential tradition of positivism in general: legal positivism assert that normative claims are not a necessary


5 I employ the term values here intentionally. Throughout this paper I take the terms value and right to capture the same meaning, the meaning that I am endeavoring to convey. As will be seen when we get to Lyons’ argument for the role of law for a liberal, he employs the term ‘rights’. I would like to use these words interchangeably throughout the paper.

feature of the law. This idea, as we shall see, falls into a harmonious pattern with some of the characteristic claims of impartialist liberalism.

So, having offered brief accounts of both impartialist liberalism and legal positivism and introduced some key terms, I move to my argument. I argue that impartialist liberalism assigns to the law the function of respecting fundamental liberal values. I claim that inclusive legal positivism can be adopted in an impartialist liberal system as structure of its legal system. This is so because inclusive legal positivism can successfully accommodate terms the function assigned to the law by the impartialist liberal. This is because inclusive positivism is receptive to normative demands, not least (though not only) the impartialist liberal’s demands. As we shall see in the section of the paper that discusses inclusive legal positivism in more detail, the so-called rule of recognition - the source of authority and validity for a legal system - can accommodate the normative demands made of the law by impartialist liberals without compromising its legal positivist character. But this technical point will be explained in what follows.

Thus, the paper proceeds through the following stages: first, it unpacks the idea of impartialist liberalism a little and explains its relevance for my argument. Second, it identifies what inclusive legal positivism is, what its arguments are, and why it is this form of jurisprudence that, I argue, can accommodate the demands made of the law by impartialist liberals. My discussion of legal positivism is indebted to many sources, but to none more than the work of Matthew Kramer, specifically In Defense of Legal Positivism and Where Law and Morality Meet. The paper culminates in a series of reflections concerning the implications of this argument. On the one hand, it questions if an impartialist liberal conception of the state is in fact impartial. On the other, it considers some possible difficulties with an impartialist liberal employing an inclusive positive system of law, including the argument that, in accommodating the impartialist liberal, inclusive legal positivism disqualifies itself as a truly ‘positive’ theory of law.

From these reflections and the preceding discussion, at least two conclusions emerge. The first is that impartialist liberalism, as I have argued for it here, can discover a viable structure of law in inclusive legal positivism. Inclusive legal positivism’s ability to accommodate the demands the impartialist liberal makes of the law allows it to present itself as one (but possibly not the only) candidate for explaining how the law functions under an impartialist liberal conception of the state. The second is that inclusive legal positivism can provide wider support to the impartialist liberal. As will be stated in the implications section of the paper, inclusive positivism, because of its positivist foundation, fits with impartialist argu-
ments for reasonable pluralism. Inclusive legal positivism does not fall into the trap of being a theory of natural law. It does not make the commitment to normative claims a ‘two way street’ and create normative demands beyond the fundamental liberal values that it is charged with respecting. In other words, it allows for reasonable pluralism by making no substantive claims that impartialist liberalism cannot accommodate. Hence, impartialist liberalism can maintain its commitments to reasonable pluralism and justificatory neutrality in its understanding of the law. Inclusive legal positivism’s ability to ‘include’ only those fundamental values that the impartialist demands be included supports the pluralist argument that impartialist liberalism wants to substantiate. This makes inclusive positivism a complementary explanation of the structure of law that impartialist liberals would do well to adopt.

*Impartialist Liberalism*

As described briefly in the introduction to the paper, impartialist liberalism developed from the work of John Rawls. As Rawls’ writings are vast and complex, and subject to millions of words of commentary, I shall not dwell on them much here. Instead, what I wish to do in the first section of this paper is to expand a little on what I mean by ‘impartialist liberalism’. Next, I offer a discussion of how that impartialist theory assigns to the law the role of respecting fundamental liberal values. In the final part of the section, I will give a brief account of what I mean by a fundamental liberal value. This account is necessary in order to understand just what it is the law is supposed to respect. I have chosen impartialist liberalism because of its strength as a theory of political philosophy. Furthermore, as noted in the introduction, many liberal political philosophers are also legal positivists, which is what pricked my interest in attempting to connect the two theories in the first place.

Impartialist liberalism has certain commitments that make it distinctive. The most important of these is its commitment to ‘justificatory neutrality’. This, as noted above, is the commitment to the claim that the justification of state coercion must not depend on the claims of any particular (set of) conception(s) of the good. The precise argument comes in a number of forms as is clear from the quotations below:

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7 I would like to note here that I employ the term ‘impartialist’ throughout this paper, when I am aware that the term ‘justificatorily neutral’ might also embody what it is I am trying to argue for. I use the terms interchangeably and do not wish to get caught up in a debate about the distinctions between them.
A) “the view that the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued.”

B) “government is neutral between different conceptions of the good, ‘not in the sense that there is an agreed public measure of intrinsic value or satisfaction with respect to which all these conceptions come out equal, but in the sense that they are not evaluated at all from a social standpoint’.”

C) Or, as a critic of liberalism, Michael Sandel, has it:

“A liberalism in which the notions of justice, fairness, and individual rights play a central role… an ethic that asserts the priority of the right over the good… [with the core thesis being] society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not themselves presuppose any particular conceptions of the good; what justifies these regulative principles above all is not that they maximize social welfare or otherwise promote good, but rather that they conform to the concept of right, a moral category given prior to the good and independent of it.”

If this is what characterizes impartialist liberalism, what is the connection between liberalism (of which this is a kind) and the law? Perhaps the most obvious starting point in answering that question is John Stuart Mill’s On Liberty. Mill famously contends that “[T]he burden of proof is supposed to ith those who are against liberty; who contend for any restriction or prohibition… The a priori assumption is in favour of freedom…” That is to say, as two commentators gloss it, that “freedom is normatively basic, and the onus of justification is on those who would limit freedom… law must be justified, as [it] limit[s] the liberty of citizens.”
It must be said that there is a great deal going on in these last two quotes. In employing concepts like ‘justification’, ‘restriction’, and ‘prohibition’ a degree of complication is introduced which could well lead to a range of misinterpretations. A more concise gloss, not only of Mill, but of the liberal position in general on the subject of the law, is offered by David Lyons. Lyons gives an account of an important element of what the liberal assigns as the ‘role of law’. Law, he writes, “is expected to respect rights and is unjust when it fails to do so.”12 This, I believe, captures one role that the liberal, and in particular the impartialist liberal, assigns to the law. For a liberal the law must respect fundamental liberal values whatever else it does. In what follows I shall defend this claim, which finds support in Rawls.

In a long passage, Rawls gives an interpretation of a liberal concept of law and its connection with what I take to be, and am calling, a fundamental liberal value – in this case liberty:

“No now the rule of law is obviously closely related to liberty. We can see this by considering the notion of a legal system and its intimate connection with the precepts definitive of justice as regularity. A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just, they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties… What distinguishes a legal system is its comprehensive scope and it regulative powers with respect to other associations. The constitutional agencies that it defines generally have the exclusive legal right to at least the more extreme forms of coercion. The kinds of duress that private associations can employ are strictly limited. Moreover, the legal order exercises a final authority over a certain well-defined territory. It is also marked by the wide range of the activities it regulates and the fundamental nature of the interests it is designed to secure. These features simply reflect the fact that the law defines the basic structure within which the pursuit of all other activities takes place.”13

Here Rawls wants to connect two ideas. First, he sets out his notion of what a legal system is. This, as we shall discover in the implications part of this paper, is exactly what the legal positivist is trying to do: separate the law as it is from the law as it should be. But second, Rawls adds that his conception of legal system is connected to what he calls the ‘precepts of justice as regularity’. This is a vital argument, for it bridges the gap between what the law is to what the law ought to be. But before the legal positivists lose interest in this line of argument, I want to pause for a moment to explain why it is important: why legal positivism should not write this off as an argument that can be done away with by the separation thesis.

“A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct…”: this conception of what law is will be relied on throughout this paper. For this definition captures what Rawlsian liberals hold to be central to the rationale of a legal system. But notice how similar this conception is to what Hart, the quintessential legal positivist, offers as his conception of what a system of law is. “The most prominent general feature of the law at all times and places is that its existence means that certain kinds of human conduct are not longer optional, but in some sense obligatory.”

Therefore, it may be enough to claim that legal positivism can endorse this liberal description of a legal system. It is a statement about what the law is, not about what it should be.

Rawls continues:

“Given that the legal order is a system of public rules addressed to rational persons, we can account for the precepts of justice associated with the rule of law. These precepts are those that would be followed by any system of rules which perfectly embodied the idea of a legal system. This is not, of course, to say that existing laws necessarily satisfy these precepts in all cases. Rather, these maxims follow from an ideal notion which laws are expected to approximate, at least for the most part. If deviations from justice as regularity are too persuasive, a serious question may arise whether a system of law exists as opposed to a collection of particular orders designed to advance the interests of a dictator or the idea of a benevolent despot.”

Given the arguments for the role of law and the idea of justice as regularity that Rawls provides, I interpret the role of law within impartialist liberalism thus: (a) the law is a system

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of rules; (b) the law is to uphold certain precepts, and in doing so instantiates respect for those fundamental liberal rights that are assigned to it through this process. For Rawls, the precepts of law provide a more ‘secure basis for [the fundamental value that is] liberty’. However, it is not necessary to limit the case to liberty. Even were one – perversely – to reject liberty as a fundamental liberal value, one can still accept that these precepts will allow for the legal system to uphold whatever values are taken to be fundamental. For example, consider equality, which Dworkin identifies as the most basic liberal value. If the role of law is to respect the fundamental value of equality, it is still the case that the system of rules and the precepts of that system must be upheld for equality to be respected.

Impartialist liberalism holds that one role of law must be to respect fundamental liberal values. And Rawls’ picture of law as securing ‘fundamental interests’, through upholding certain precepts in his justice as regularity argument, amounts to the requirement that the law respect fundamental liberal values. It is important to remember that there is no conclusive agreement as to what those fundamental values are, but this can be set aside for present purposes. What matters is not which specific fundamental values are to be respected, but rather that the role of the law is to respect what are agreed to be the fundamental liberal values whatever these turn out to be. If the law does not carry out this task - not speaking to either Mill’s requirement justifying the limiting of liberty, or Rawls’ concept of securing fundamental interests – then it is simply not what a liberal holds to be a functioning conception of the law, properly so called.

Before we leave this discussion, consider what might make a shortlist of fundamental liberal values. I do not want to get caught up in a discussion of what should be on the list and what should not, for that is not my concern here. However, I would like to give some sort of a sense of what might be the law’s role. In Inclusive Legal Positivism, Waluchow notes in passing some of the more obvious candidates: “We will assume that people do appeal to standards like the principles of equality, liberty, fairness, and justice in assessing social institutions and their products; that these activities are not totally nonsensical as some radical moral nihilists might argue, are open to as least some degree of rational argument and assessment; and that it is these kinds of standards that we have in mind when we ask about the possible role of political morality in determining the existence and content of valid laws.” It is these types of values (liberty, equality, fairness) that I have in mind when discussing fundamental liberal

16 ibid, p. 208
values. But let us now turn to inclusive legal positivism and to the question of whether or not that philosophical theory of law will be able to accommodate the demands made of the law by impartialist liberalism.

**Inclusive Legal Positivism**

The best description of inclusive legal positivism is given in the following (lengthy) quote:

Inclusive Legal Positivism... consists in the following thesis: it can be the case, though it need not be the case, that a norm’s consistency with some or all of the requirements of morality is a precondition for the norm’s status as a law in this or that jurisdiction. While such a precondition for legal validity is not inherent in the concept of law, it can be imposed as a threshold test under the Rule of Recognition in a particular legal regime. That test, which can be applied by the officials in such a regime to all the legal norms therein or to only some subset of those norms, is one of the criteria which the officials use for ascertaining the law. Insofar as a threshold criterion of that sort does prevail in any particular legal system, then, some degree of moral worthiness is a necessary condition for the legally authoritative force of each norm that is validated as a law within the system. Inclusive Legal Positivism, which readily accepts the possibility of such a state of affairs, is inclusive because it allows that moral precepts can figure among the criteria that guide officials’ ascertainment of the law. Inclusivist theorists reject the view that every criterion for law-ascertainment in every credibly possible legal system is focused on nonnormative matters of provenance. At the same time, the Inclusivists are positivists because they also reject the view that every credibly possible legal system relies on moral tests among its law-ascertaining criteria. An Inclusive Legal Positivist insist that such tests are contingent features, rather then essential features, of the systems of law in which they are applied.18

Kramer nicely summaries the key point that inclusivists maintain the possibility of a moral component in the conditions of legal validity. I should note here that Kramer is not

alone in maintaining this position, there are many others including most notably W.J. Waluchow in *Inclusive Legal Positivism*.\(^\text{19}\) And, of course, the inclusivist position develops from the position Hart called ‘soft positivism’; a position developed partly in response to the criticisms of Ronald Dworkin and discussed in the ‘Postscript’ to the 2nd Edition of *The Concept of Law*.\(^\text{20}\) In that piece Hart makes clear: “I expressly state both in this book (p.72) and in my earlier article on ‘Positivism and the Separation of Law and Morals’ that in some systems of law, as in the United States, the ultimate criteria of validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.”\(^\text{21}\) Or again, “… the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values.”\(^\text{22}\) It is as a result of arguments such as these that Kramer claims the contemporary school of inclusive legal positivism finds its ‘firmest grounding’ within Hart’s work.\(^\text{23}\) But, again, it was not Hart alone who was responsible for laying the foundations of inclusive legal positivism. As noted above, Ronald Dworkin played a part in the development of a positive system of law that could nonetheless include moral values. Dworkin’s arguments are said to have spurred the creation of contemporary forms of legal positivism, both inclusive and exclusive, as defenses against his criticism of the positivist tradition.\(^\text{24}\) Whatever the origins of inclusive legal positivism, what is important is to establish what Kramer, following Hart, is trying to get at. To do this, let us break down the inclusive thesis, as given above, into its component parts which can then be examined individually.

The first point worth considering is the way in which Kramer employs his language throughout the argument, notably, the first sentence: “it can be the case, though it need not be the case, that a norm’s consistency with some or all of the requirements of morality is a precondition for the norm’s status as a law in this or that jurisdiction.” This use of language will have vital implications at the end of this paper when we discuss inclusive legal positivism as a truly positive legal thesis. For now though, the point to underline is that Kramer presents the inclusive thesis as an option as to what law *might* look like, rather than as an account of what it *must* look like. Inclusive Legal Positivism at no time commits itself to any one particular


\(^\text{20}\) ibid, p. 247

\(^\text{21}\) ibid, p. 250

\(^\text{22}\) *WLMM*, p. 4, also see *ILP*, p. 4

\(^\text{23}\) *WLMM*, p. 4
form of what the law must look like. It merely asserts that there can be a moral element in the law, not that there need always be one.

The second claim in the inclusive thesis concerns where this moral element might find its place, if it in fact does so, in the law. Hart, Waluchow, and Kramer all maintain that there is only one way in which this might happen in a theory of positive law, properly called. Furthermore, they all concur in thinking that the possible inclusion of a moral element cannot be regarded as inherent in the concept of law itself. Again, this point will be discussed in more detail in the ‘Implications’ section at the end of the paper, but for now it is important to reiterate that there is no necessary moral element in the inclusive legal positivist conception of law. Instead, the process of including morality in the law is through the employment of a particular moral principle (or set of moral principles) within the legal system’s rule of recognition.

A legal system’s rule of recognition “refers to the array of criteria that empower and oblige the officials in a legal system to ascertain the existence and contents of legal norms in accordance with standards specified by those criteria (which are largely, if not exhaustively ranked). The Rule of Recognition in any legal system is a framework of normative presuppositions that underlie the law-identifying behavior of the officials in the system.”25 In laymen's terms, the rule of recognition in a positive system of law is the underlying rule that gives validity to all the other rules of the system. It is the rule that legal officials employ to substantiate those rules of the system and to make sense of the legal system generally. In Hart’s words, it is “a rule for the conclusive identification of the primary rules of obligation.”26

Kramer next formulates a necessary condition clause for the inclusion of morality in the law: “Insofar a threshold criterion of that sort does prevail in any particular legal system, then, some degree of moral worthiness is a necessary connection for the legally authoritative force of each norm that is validated as a law within the system.” This sentence is vital in understanding the ‘sides’ in an intra-positivist dispute concerning morality and the law. The Inclusive/Incorporationist debate, which is beyond the scope of this paper, revolves around this point. For present purposes it is important merely to understand that Kramer maintains that a moral element can come about as a necessary condition (and only as a necessary condition, as opposed to a sufficient condition) of legality through its employment in the rule of

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25  *WLAM*, p. 2
26  *CL*, p. 95
recognition. This will allow Kramer to avoid some of the difficulties from which Jules Coleman’s theory\(^ {27}\) is said to suffer.

The next part of the inclusive thesis speaks to the motivation for my inquiry. Kramer, following Waluchow,\(^ {28}\) claims that an inclusive legal positivist can argue the thesis is inclusive because of the very point that moral “precepts [or ‘Political Morality’ in Waluchow’s terminology] can figure among the criteria that guide officials’ ascertainment of the law. Inclusivist theorists reject the view that every criterion for law-ascertainment in every credibly possible legal system is focused on nonnormative matters of providence.” In addition, “Inclusivists are positivists because they also reject the view that every credibly possible legal system relies on moral tests among its law-ascertaining criteria.” The second of these statements will be analyzed further below. The first statement fits with what I want to argue is the reason why an impartialist liberal can embrace the inclusive thesis as delivering what she demands from the law.

If in fact the inclusive thesis can maintain that moral precepts can figure among the law-ascertainment criteria of a legal system, is that enough for my form of impartialist liberalism to accept it as a viable conception of the legal framework? Will the inclusive thesis be amenable to the normative demand to respect fundamental liberal rights? I believe so. But I would also like to maintain, as any good legal positivist must, that the inclusive thesis need not live up to the liberal impartialist demand of respecting fundamental liberal values. This point is vital for inclusive legal positivism to maintain its strength as a purely positive theory of law. Therefore, while I argue it is true that an inclusive legal positive structure of law can accommodate the function assigned to it by an impartialist liberal state (respecting fundamental values), it is equally true that it might be so designed that it could not perform this function. Of course, this would be at the cost of no longer being a suitable form of law for the impartialist liberal. But my concern is with the ‘can’ aspect of this argument.

It must be true that the inclusive thesis would be open (at least contingently) to an ‘impartialist liberal’ reading of an inclusive rule of recognition. What I mean by this is that the way in which inclusive legal positivism can take on impartialist liberalism is to incorporate the latter’s demand for the law to respect fundamental liberal rights as part of its “framework of normative presuppositions that underlie the law-identifying behavior of the officials in the system”; that is, as part of the rule of recognition. I cannot see why an inclusive rule of rec-

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28 *ILP*, p. 2 - 3
ognition, as I understand it, would not be able to complete the task of including normative elements in an inclusive rule of recognition. Waluchow would agree: “A distinguishing feature of inclusive legal positivism is its claim that standards of political morality, that is, the morality we use to evaluate, justify, and criticize social institutions and their activities and products, e.g. laws, can and do in various ways figure in attempts to determine the existence, content, and meaning of valid laws. Political Morality, on this theory, is included within the possible grounds for establishing the existence and content of valid, positive laws.”

Taken together these arguments substantiate my claim that the inclusive legal positivist thesis allows that moral precepts can be imported into the inclusive rule of recognition. Furthermore, these arguments give inclusive legal positivism the flexibility as a legal theory to be employed within an impartialist liberal system; an ‘impartialist liberal’ inclusive rule of recognition will be the foundation of a legal system that can adhere to the liberal’s demand that fundamental liberal values are respected.

Implications

The arguments that I have presented here are freighted with several implications. But I want to start with this thought: both impartialist liberalism and legal positivism stem from similar motivations. Impartialist liberalism seeks to remove many substantive normative commitments from political philosophy, creating a ‘level’ playing field for people to be able to choose their conception of the good life, in which the state remains neutral among those conceptions. Legal positivism aims for something very similar. Their goal is to remove substantive normative issues from the questions of what the law is. Hence, bar some minimum level of substantive values that make both systems possible in the first place (perhaps the fundamental liberal values in the first case and certain procedural values in the second), both seek to put distance between their theories and any particular set of necessary moral values. The questions that flow from this line of thought are: a) can impartialist liberalism really remain impartial if it assigns to the law the function of respecting fundamental liberal values? And, b) if inclusive legal positivism accommodates the demand to respect liberal values made by impartialist liberalism, does it not violate its commitment to being a truly positive theory of law? In this section of the paper I explore these two questions.

29 Ibid

30 Famously Hart argues for what he calls ‘the minimum content of natural law’ in The Concept of Law, which refers to the minimum substantive values that I mention here.
Impartialist liberalism has been subject to a number of criticisms, but one strikes me as particularly fundamental. The issue concerns impartialist ideas of the state matching the commitment to reasonable pluralism. Does implementing an impartialist liberal regime - founded upon the notions of justificatory neutrality and reasonable pluralism - that employs a legal system charged with the core responsibility to respect fundamental liberal values, violate that very 'pluralist'-'neutralist' foundation? Is the neutral conception of the state neutral at all? Kekes puts this dilemma another way: "The reason why this [is] a dilemma is that insofar as liberals are pluralists, they must reject overriding values, while insofar as they are committed to the overridingness of fundamental [liberal values], they must reject pluralism."\(^{31}\)

These are tough questions for an impartialist liberal to answer. Nevertheless, there are a number of possible responses: first, an impartialist liberal would not want to claim that a neutral state is valuable as an end-in-itself. Second, she would argue that non-neutral states commit a number of errors, the most serious of which might be the violation of individual autonomy.\(^{32}\) Third, impartialist liberals claim to be neutral in relation to the various conceptions of the good that are held by people. They endorse "neutrality of aim or justificatory neutrality. This version of neutrality maintains that the justification for a law or policy should be neutral. It should not presuppose, for example, values particular to one conception of the good."\(^{33}\) Given this focus on the importance of individuals’ conceptions of the good, liberals understandably are concerned with those fundamental liberal values and rights that need be in place if people are to have the opportunity to form a conception of the good life in the first place. Note, I am not arguing about what those fundamental values would have to be, but a sample might be: liberty, equality of opportunity, toleration of others, and values of this sort. Without these, the individual would not be able to form for herself a conception of the good life. Put differently, "by remaining neutral among conceptions of the good life, the neutral state will ensure the inviolability of citizens’ basic rights and freedoms [fundamental liberal values in my terms]."\(^{34}\)

Therefore, the objection to impartialist liberalism - that it is self-contradictory with respect to its pluralist roots because it implies a specific conception of the good - fails. The


\(^{33}\) Ibid

\(^{34}\) Ibid
objection fails because liberals are, within limits given by fundamental liberal values, indifferent to the form of the good life individuals choose. The only requirements in a liberal system are that the fundamental liberal values are in place (respected by the law), in order for individuals’ choices among differing conceptions of the good life to be possible. Without these fundamental values the autonomy of the individual would be violated and citizens’ ability to choose between conceptions of the good would be eviscerated.

The second question in this section is, ‘will an inclusive positivist remain true to his positive commitments if he takes on the demand of respecting the fundamental liberal values’? This is an equally interesting and difficult question. The natural place to start with this question is with the criticisms that exclusive legal positivists have made of inclusive positivists concerning the inclusion of normative considerations. Considerations that are not dissimilar to the impartialist liberal’s I argue for throughout the paper. Again, this threatens to be a highly technical discussion, so it seems prudent to begin with an illustration of what exclusive legal positivism is, then to proceed to depict its arguments against inclusive positivism. I finish this part with Kramer’s robust responses to the exclusive positivist’s objections, through which he maintains that inclusive legal positivism is in fact a truly positive theory of law.

Within the split that Dworkin’s arguments led to in contemporary legal positivism, we have inclusive positivists on the one side, and exclusive positivists on the other. A ‘crude’ illustration of an exclusive theorist’s claim would be to say that “legal validity is exhausted by reference to the conventional sources of law: all law is source based, and anything which is not sourced based is not law.” Marmor goes on to give a less crude illustration of some of the main tenets of an exclusive theorist: “exclusive positivism denies, whereas inclusive positivism accepts, that there can be instances where determining what the law is, follows from moral considerations about that which it is there to settle… a norm is never rendered legally valid solely in virtue of its moral content. Legal validity… is entirely dependent on the conventionally recognized sources of law.” Fundamentally, an exclusive positivist denies what an inclusive positivist has been argued to support (see above). One claims to account for a moral element in a positive theory of law and the other denies that any such element can be included.

There are two lines of argument that the exclusive camp make in response to any inclusive argument, whether that of Jules Coleman, Wilfred Waluchow, or Matthew Kramer. The first line of argument has been presented powerfully by Joseph Raz in texts as, *The
**Authority of Law, Ethics in the Public Domain**, and many others. The argument is that a system of law that includes factors such as morality when determining validity cannot claim authority. Or so a very short statement of this very strong argument goes. The second argument that the exclusive camp makes is the ‘conventionality’ argument noted above. This argument has it that since law requires constitutive conventions in order to function and any inclusion of moral factors will not allow those conventions to operate, their inclusion is incompatible with a functioning legal system. For ease of exposition I will start with the second argument. This is done simply because this is how Marmor has organized his piece, and it makes it easier to follow. Of necessity, this discussion will be very brief, and it only scratches the surface of the inclusive/exclusive debate. But by the same token, if it is important as an implication of the paper’s thesis, it is not crucial to the paper’s central argument.

“[I]t is an essential element of such a social practice like law, that it is founded on constitutive conventions, namely, on a set of conventions which determine what the practice is, and how one goes about engaging in it. The rules of recognition of modern legal system define the ways in which law is to be created, and they define them in ways which tie the creation of law to certain conventionally established sources.”37 Before we get into this quote, two questions: what is a constitutional convention? And, why is morality excluded?

 Regarding the first, Marmor states that “they [constitutive conventions] constitute practices of making law, changing it, applying it to novel cases, and the like… [And] that constitutive conventions have no role to play in determining that we should act according to moral reasons. Moral and other practical reasons are there to be acted upon, regardless of conventions. Conventions can constitute part (but only part!) of what it means to act morally in this or that situation. But they cannot constitute reasons for acting according to reasons.”38 Constitutive conventions are illustrated as something that morality cannot employ as a complete account for being reason-giving. Morality can employ conventions in part, but they cannot be the be-all and end-all reasons for action, morality demands more. This will be explained more in answering my second question.

 So why cannot these conventions address the law when it considers to moral argument? Marmor deals with this question specifically in his text. “[I]t cannot be the case [that conventions constitute law through moral argument] because there is nothing the conventions could constitute there. There is no role constitutive conventions can play in determining that people should act according to moral reasons. Politics, morality, ethics, and similar consid-

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37 Ibid, p. 106
38 Ibid
erations bear on our practical reasoning regardless of conventions. Constitutive conventions can make a difference only by determining specific ways in which such moral, political, and other types of concerns become part of law, that is, part of a conventionally established social practice.  

Hence in discussions of moral reasons for action, constitutive conventions have no place, and visa versa: in discussions of the established social practice of making, changing and the application of law, moral considerations have no place. “[C]onventions cannot constitute a practice which consists in the expectation that people who engage in that practice do that which they would have reason to do regardless of the practice.” Therefore, exclusive theorists reject morality as amongst the validating factors of the law. Or so the ‘conventionality’ argument goes.

The second argument I would like to sketch is Joseph Raz’s ‘authority’ argument. The argument is that law is an authoritative institution, but not just any authoritative institution; it is one that asserts legitimate authority. Furthermore, it must be true for this line of reasoning, that if law does not claim legitimate authority then it is not law, properly speaking. But what does legitimate authority mean? “…[I]t is a necessary condition of an authority’s legitimacy that it be able to prescribe for its subjects reasons for action that the subjects would be better off complying with, as compared to their attempts to act on those reasons directly, without the mediation of the authority’s directive.” Raz and Marmor both call this ‘authority’s essential mandating role’. Which means: “for something to be able to claim legitimate authority, it must be of the kind of thing capable of claiming it, namely, capable of fulfilling such a mediating role.” This is the core of the exclusive positivist argument for the authority of law.

There are two necessary conditions for the authority argument to work. First, “…it must be the case that its directives are identifiable as such, [authoritative directives], without the necessity to rely on those same reasons which the authoritative directive is there to replace.” This is so because the law is charged with the responsibility to make a ‘practical difference’ to the subject’s conduct. “Authorities are there to make a practical difference, and they could not make such a difference unless the authority’s directive can be recognized as such without recourse to the reasons it is there to decide upon.”

The second necessary condition is that “…it must be the case that the authority is capable of forming an opinion on how

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39 Ibid
40 Ibid, p. 108 - 109
41 Ibid, p 109
42 Ibid
43 Ibid
its subjects ought to behave, distinct from the subject’s own reasoning about their reasons for action.”

I realize that I have covered a lot of ground here very quickly. But what I want to highlight is only the exclusive positivist’s claim that “…a norm is legally valid (i.e. authoritative) only if its validity does not derive from moral or other evaluative considerations about that which it is there to settle.” Combine Raz’s claims for legitimate authority in this quote with Marmor’s arguments concerning conventions above, and one can get a taste of why the inclusive thesis that I have argued for throughout this paper stands in direct opposition to exclusive positivism. What needs to be addressed now is how the inclusive positivist might respond to the exclusivist objections concerning the role of morality in the law.

Kramer responds in kind to both the ‘authority’ argument and the ‘conventions’ argument. Let us begin with the ‘conventionality’ argument. In chapter three of *WLMM* Kramer expresses the problems that he has with Marmor’s position about conventions. Instead of offering a defense against the attacks of the exclusive positivist, he goes on the offensive and exposes (what he takes to be) the limitations to the ‘conventional’ argument presented above. Kramer offers two rejoinders.

First, Kramer questions if every law can be as Marmor claims it must be: “…even if it were true that law is essentially conventional in Marmor’s sense, it would not necessarily be true that every law is a norm which officials have no sufficient convention-independent reasons to invoke. One could accept that every legal system is a product of constitutive conventions, while also affirming that any such system can contain some laws that would be binding as outcome-determining mandates even in the absence of the conventions that form the system in which they exist as laws.” This rejoinder is aimed at the specific and the question as to whether each and every law can be as Marmor wants to maintain.

The second line of thought does not attack the specific concerning the claim that every law cannot be a constitutive convention. Instead, it attacks the general and asserts that it is doubtful that every system professes constitutive conventions at their core in the first place. “[O]ne need not grant that every possible legal system is indeed a product of constitutive conventions. To insist on the conventionality of law is not perforce to concede that that conven-

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44 Ibid
45 *WLMM*, p. 79
tionality must invariably be as Marmor describes it. Even a thoroughly Incorporationist legal regime is conventional in that it consists in sundry convergent modes of behavior (on the part of the officials), which sustain a Rule of Recognition with a content that would have been different if the officials’ convergent modes of behavior had been different.” What Kramer is getting at here is that “… [Legal officials] might base [their] law-ascertaining determinations solely on those convention-independent considerations notwithstanding that he also has convention-dependent reasons for the very same determinations.” This flies directly in the face of Marmor’s ‘convention’ argument and his claims about the way legal officials come to ascertain what the law is.

In chapter four of IDLP Kramer takes on Raz’s conception of authority and the conclusion that inclusive legal positivism, with its contingent claim concerning the inclusion of moral factors into the validity process of law, cannot account for the type of authority law must demand, properly understood. Kramer strikes back at this claim in a number of ways. I do not want to list all those responses here. Instead, I wish to concentrate on only one, his response to the question of what happens when we analyze evil regimes.

At the start the chapter Kramer points to a slightly different way of illustrating Raz’s argument that law must be held to claim legitimate authority, and that all legal claims to authority are also moral claims to authority. “The decisive argument concerning the meaning of statements of legal duties is that the law claims for itself moral force. No system is a system of law unless it includes a claim of legitimacy, of moral authority. That means that it claims that legal requirements are morally binding, that is that legal obligations are real (moral) obligations arising out of the law’ (‘Moral Rights’, 131).”

Kramer contends that this is not the case at all: “[that] officials in an evil regime might not concern themselves with morally justifying their decisions when they pass judgment on a variety of issues. They might instead be preoccupied with reinforcing incentives for compliance with their regime’s wicked laws. The officials may well explain their heinous decisions by reference to people’s legal obligations, but their purpose in doing so will not nec-

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46 In this context Kramer and I can be understood to be describing the same form of legal positivism. Though it should be noted that in this chapter he is discussing two forms of ‘incorporationism’, the extreme and mild, as he labels them. For my purposes regarding this small point it is sufficient to say that this distinction is not vital.

47 WLAM, p. 80

essarily be to demonstrate the decisions’ moral worthiness; rather, their purpose might be to make clear that violations of applicable legal requirements will indeed trigger punishments and that punishments are not inflicted on anyone who abstains from such violations. In emphasizing the connection between the breaching of duties and the incurring of penalties, the officials need not be motivated by a desire to establish that their rulings are fair. They may simply want to sustain people’s incentives for conformity to the law’s evil demands.49

The contention here is a good one I think, that judges can have concerns other than purely positivist ones when passing judgment. And in other places in the text Kramer argues convincingly that they do; namely, that they may have prudential reasons for coming to a particular judgment. The main point to convey is that Raz’s argument for the ‘authority’ thesis is not as damming to the inclusive positivist as he (or the exclusive camp) would like it to be.

This, then, is one implication that inclusive legal positivism has to respond to in order to offer itself as a truly positive system of law for the impartialist liberal. This is not the end of the inclusive/exclusive debate, but for my purposes it demonstrates that inclusive legal positivism is in fact a substantial theory of positive law, and that it remains so even with the inclusion of normative considerations such as are demanded by liberal impartialism. This is important for a couple of reasons. First, it is vital to the claim that inclusive legal positivism is a theory of positive law, as has been discussed. And second, it is important to impartialist liberalism. Mentioned in the introduction to the paper is the idea that inclusive legal positivism gives impartialist liberalism some advantages because of its positive nature. Essentially, the fact which asserts the claim, a positive theory of law does not bring with it any heavy normative baggage. Instead, as has been illustrated, inclusive legal positivism will take on only the fundamental liberal values assigned to it. This is vital for the impartialist argument discussed at the beginning of this section. Impartialist liberalism could not, I contend, embrace natural law whilst maintaining its status as a truly impartial theory of political philosophy. Inclusive legal positivism, construed the way I have construed it throughout the paper, complements the impartialist liberal’s arguments for justificatory neutrality and reasonable pluralism. Thus it has a part in a system that allows individuals to choose between various conceptions of the good and helps facilitate the role of the state as a neutral actor in this process.

Conclusion

49 Ibid, p. 90
The goal of this paper has been to analyze some basic questions. First, I have tried to demonstrate what I understand impartialist liberalism to be; expressing its deep commitments to ‘reasonable pluralism’ and ‘justificatory neutrality’. Furthermore, I have tried to demonstrate that it is the role of the law in a liberal system to respect fundamental liberal values. As to the question of what those values are specifically, I make no attempt at a comprehensive list. Instead, I leave you to decide as you like. Second, I have given a depiction of what I understand inclusive legal positivism to be. I have argued that this form of legal theory can accommodate the demands the impartialist liberal makes of the law: to respect fundamental liberal values. Crucially, it can carry out this function without violating its core commitment as a truly positive theory of law. The paper finishes by raising more questions for both impartialist liberalism and inclusive legal positivism. I argue that impartialist liberalism is in fact impartialist even though it demands that the law respect some (set of) fundamental liberal values. And I also maintain, against the arguments of exclusive legal positivism, that inclusive positivists, even those who accommodate such values, are nevertheless adherents of a positive theory of law. Finally, I finished the section with an argument about why the maintenance of this positive thesis is important not only for inclusive positivism, but also for impartialist liberalism, which thus has reason to take a close interest in inclusive positivism.