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The Architecture of Jurisprudence

ABSTRACT. Contemporary jurisprudence has been dominated by an unhelpful interest in taxonomy. A conventional wisdom has grown up around these projects. This Article, the first in a three-part series, identifies two dominant claims of this conventional wisdom in jurisprudence—one substantive, the other methodological—and argues that both are deeply mistaken and must be discarded. Rather than construct a new taxonomy founded on different claims, this Article casts aside the taxonomical projects of jurisprudence in favor of a project of reconceptualizing jurisprudence in terms of a set of basic problems. In order to identify the fundamental problems of jurisprudence and to make progress on their resolution, an architectural framework for the field is required. Freed from the burdens of the conventional wisdom, the Article turns to putting in place a solid foundation on which a new architecture of jurisprudence can be erected and points both to the fundamental problems of jurisprudence and the direction in which progress on their resolution is likely to be found.

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INTRODUCTION

Two marks of a mature field of inquiry are that its central problems are well-formulated and that its conventional wisdom is sound. Even in the most mature fields, however, the conventional wisdom can sometimes be misleading and the central problems poorly cast. Unfortunately, this is the state of affairs in analytic jurisprudence. Progress can be made only if much of the conventional wisdom is displaced and its central questions are reframed.

This Article does just that. It characterizes two central tenets of the conventional wisdom in jurisprudence and argues that both must be discarded if progress in jurisprudence is to be made. Having discarded both tenets of conventional wisdom, the Article then demonstrates the progress that can be made and indicates the direction in which prospects for further progress have been enhanced.[1] We begin by loosening the grip of conventional wisdom.

I. THE CONVENTIONAL WISDOM AND THE SEPARABILITY THESIS

A. Its Place in the Conventional Wisdom

Though most academic lawyers are unschooled in the finer points of contemporary jurisprudence, nearly all are confident of their ability to distinguish legal positivism from natural law theory. They tell us that natural lawyers assert and positivists deny the existence of necessary connections between law and morality; that positivists endorse and natural lawyers reject what I have termed 'the separability thesis'.[2] Academic lawyers may even tell us that legal positivism is defined by its commitment to the separability thesis and natural law by its rejection of it. Finally, they may say that, among positivists, there has been no more ardent proponent of the separability thesis than H.L.A. Hart.

1. As a Torts teacher, I feel compelled to issue a warning; whether it is adequate to relieve me of responsibility is another matter. I pride myself on writing clearly and especially in having the ability to communicate difficult and technically demanding material in an accessible manner. I try to do the same here and for the most part, I believe, successfully. That said, the discussion in Part VI is very demanding, and I could find no way of getting the points across that makes for pleasurable reading. I believe, however, that anyone who is prepared to work through the argument can understand it (whether they agree with the conclusions or not). I have avoided the use of logical notation and technical jargon wherever doing so is at all possible. To be honest, it is not as if, but for Part VI, the Article reads like a summer novel, but it should provide no special barriers to comprehension beyond the need to read carefully and stay awake while doing so.

2. *See* Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 140-41 (1982).

There is a difference between the claim that the separability thesis is *compatible* with legal positivism and the claim that it is *essential* to it. Claims are compatible if they all *can* be true at the same time, and they are incompatible otherwise. In contrast, were the separability thesis essential to legal positivism, then it *would have to be true were positivism true*.

The separability thesis would suffice to distinguish legal positivism from natural law theory were it compatible with one of them—positivism—but not the other—natural law theory. Thus, the separability thesis need not be essential to legal positivism in order for it to distinguish positivism from natural law theory.

At the same time, the separability thesis could be essential to legal positivism yet fail to distinguish positivism from natural law theory. Depending on how all these views are to be formulated precisely, the separability thesis might turn out to be compatible with natural law theory despite being essential to positivism. In that case, its being essential to legal positivism would not be enough to distinguish legal positivism from natural law theory.[3]

Taken together, these considerations demonstrate that the conventional wisdom regarding the separability thesis actually consists in the conjunction of three related but nevertheless quite distinct claims. The first is that the separability thesis is essential to legal positivism. The second is that the separability thesis distinguishes legal positivism from natural law theory. The third is that the separability thesis distinguishes legal positivism from natural law theory *because* it is both essential to legal positivism and incompatible with natural law theory. Together, these claims comprise the conventional wisdom regarding the place of the separability thesis in jurisprudence. This much is conventional. Whether it is wisdom is an entirely different matter.

3. In a private correspondence, Ori Simchen has suggested that the *necessity* of the separability thesis in fact distinguishes legal positivism from natural law theory insofar as legal positivism is compatible with the necessity of the separability thesis, whereas natural law theory is not. That is, the separability thesis may be compatible with natural law theory, but its necessity is not. I do not disagree, but my claim is that the *separability thesis* (not the necessity of the separability thesis) is inadequate to distinguish legal positivism from natural law. Beyond that, as I demonstrate below, nothing in legal positivism requires the separability thesis, so it hardly can be essential to it. In fact, the most compelling arguments for certain forms of legal positivism rely on rejecting the separability thesis, not endorsing it—let alone its necessity!

B. Its Claims

1. The Coherence of Immoral Law

In order to assess the conventional wisdom, we need first to settle on an interpretation of the separability thesis. Unfortunately, this is easier said than done—a striking fact given how influential the separability thesis has been. Part—though not all—of the problem is that whereas the separability thesis is often taken to be a claim about the conditions of *legal validity*—that is, the conditions that must be satisfied in order for a *norm* to count as among a community's laws—it has also been taken to be a claim about the *existence conditions of legal systems*—that is, the conditions that must be satisfied in order for a *system of rules* (or norms) regulating affairs to count as a *legal* system.[4] The greater part of the problem is that in both cases, the claim that the thesis makes is open to several different and by no means equally plausible interpretations, few of which have been explicitly articulated and fewer still adequately defended.

The truth is that positivists have no one to blame but themselves for much of the confusion that has grown up around the separability thesis. In many ways, the main culprit may well be H.L.A. Hart, no doubt the most prominent positivist of the modern era who, as Leslie Green has correctly observed, endorsed a particularly broad interpretation of it.[5]

Though Green is right both to attribute to Hart a promiscuous interpretation of the separability thesis and to criticize him for it, there is no question that Hart emphasized a much narrower formulation of the separability thesis owed originally to Austin. As Austin put it, "The existence of law is one thing; its merit or demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."[6]

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4. *Compare* Fernando Atria, *Legal Reasoning and Legal Theory Revisited*, 18 LAW & PHIL. 537, 547 n.6 (1999) (describing the separability thesis as the proposition that "from the fact that a legal solution is morally objectionable it does not follow that it is legally mistaken"), *with* Kenneth Einar Himma, *Inclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125, 136 (Jules Coleman & Scott Shapiro eds., 2002) ("[T]he Separability Thesis asserts that there exists at least one conceptually possible legal system in which the criteria of validity are exclusively source- or pedigree-based.").

5. Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1040 (2008).

6. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), *reprinted in* THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE, xxiii, 184 (Hackett Publishing Co. 1998).

The claim that the 'law is one thing, its merit or demerit another' calls attention to the fact that valid laws can be either morally estimable or reprehensible: their moral character neither settles their legal status nor is settled by it. Neither natural lawyers nor legal positivists dispute the latter claim, so the focus of the dispute has been on whether the morality of a norm settles, in whole or in part, the legal validity of a norm. The view typically associated with natural law theory is that even if the morality of a norm is not sufficient to establish its legal validity, a norm cannot count as law unless it meets an appropriate moral test—unless, that is, it satisfies (or at least is not incompatible with) relevant moral demands. The standard way to put this is to say that, for the natural lawyer, morality is a necessary condition of legal validity. Positivists reject this claim, and in so doing, they endorse the separability thesis—the claim that morality is not a necessary condition of legal validity.

All this should be familiar enough, but even so, some slight but important modifications of the standard formulation of the separability thesis are required. The phrase 'conditions of legal validity' is so common and so much a part of jurisprudential discourse that it is easy to miss that the concept of legal validity is itself probably an artifact of jurisprudential theories and not a feature of law that such theories must explain or accommodate.[7] The concept of legal validity does not figure prominently, if at all, in many jurisprudential theories—Ronald Dworkin's most notable among them.[8]

It is an important but overlooked point that it is sometimes difficult to distinguish concepts that are essential to legal practice—and thus which call for explanation—from those concepts that are theoretical constructs employed to

7. The pervasiveness of the concept of legal validity attests again to the influence of Hart's *The Concept of Law*, in which there is a rule of recognition and other rules subsidiary to it. The authority of these rules as law depends on their validity under a rule of recognition that is itself neither valid nor invalid, but merely exists or not. *See* H.L.A. HART, THE CONCEPT OF LAW 94-95 (Penelope A. Bulloch & Joseph Raz eds., Oxford Univ. Press 2d ed. 1997) (1961). Following Hart, legal philosophers have invoked a way of thinking according to which a norm is a law only if it is *valid* and valid only if it satisfies appropriate criteria of validity. *See, e.g.*, Stephen Munzer, *Validity and Legal Conflicts*, 82 YALE L.J. 1140, 1148-50 (1973).

8. On my reading, Dworkin also resists the corollary idea that a legal system is a code of any sort—let alone a code of rules that must satisfy membership or validity conditions. Indeed, both Dworkin and Mark Greenberg have developed jurisprudential outlooks that do not rely on the idea of 'a law'—at least insofar as particular laws are to be identified with statutes, regulations, or particular authoritative acts of any sort. RONALD DWORKIN, JUSTICE IN ROBES (2006); RONALD DWORKIN, LAW'S EMPIRE 410-13 (1986); Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004) [hereinafter Greenberg, *How Facts Make Law*]; Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39 (Leslie Green & Brian Leiter eds., 2011) [hereinafter Greenberg, *Standard Picture*].

help us explain legal practice. Fortunately, we do not have to settle the general matter here, nor even must we determine the category to which the concept of 'legal validity' belongs. It is enough for our purposes that we are able to reformulate the separability thesis in a way that does not invoke the concept of legal validity (so as not to beg any questions against views that do not avail themselves of it) while capturing the gist of the disagreement about its truth.

Instead of formulating the separability thesis as a claim about the conditions of legal validity, we might express it in either of the following ways:

(a) The concept of immoral law *is* coherent; or

(b) Sentences asserting that a particular legal requirement or directive is immoral do not—*for that reason alone*—constitute contradictions.

Again, the conventional wisdom is that natural law rejects the separability thesis, which means that it rejects (a) and (b). Thus, natural law must endorse either (most likely both) of the following:

(c) The concept of immoral law is *incoherent*; or

(d) Sentences asserting the existence of particular immoral legal directives or requirements—for that reason alone—constitute contradictions.

Thus, *as a claim about laws*, the separability thesis is best represented as either (a) or (b), and if the conventional wisdom is sound, that means that positivism endorses either (most likely both) (a) or (b), whereas natural law endorses either (and most likely both) (c) or (d).[9]

2. The Existence Conditions of Law

As I noted, the separability thesis is often associated with a claim about the existence conditions for legal systems, and not exclusively with a claim about the conditions of legal validity. On this way of understanding it, the separability thesis is the claim that, whatever other constraints legal systems must satisfy, moral constraints are not among those conditions. There are, in

9. In putting the point in terms of the conceptual coherence of immoral law, I do not mean to be committing jurisprudence to conceptual analysis. The point I am making, in a way that is explicitly neutral about conceptual analysis, would go as follows. The natural lawyer could just as easily suppose (and a legal positivist deny) that the concept of immoral law is necessarily empty but not semantically incoherent (much like the concept of a water molecule applying to nothing as a matter of logical necessity), and a natural lawyer could just as easily suppose (and a legal positivist deny) that a sentence asserting a particular legal requirement to be immoral is necessarily false rather than contradictory (much like the sentence 'water is an element'). Again, I am grateful to Ori Simchen for this more precise formulation.

other words, no necessary moral constraints on the existence of a legal system or on the possibility of governance by law.

The idea that there are or could be moral constraints on the existence of legal systems can be understood in a variety of ways. For example, one idea would be that no scheme of governance could count as a legal system unless it had or pursued a moral aim. Another might be that no scheme of governance could count as law unless it had 'minimal' moral content, constituted a legitimate authority, or claimed to constitute such an authority. Shifting gears, another set of ideas might express the demand that no system of regulating human affairs could count as law unless its demands generally met the requirements of morality, its characteristic modes of lawmaking comported with moral demands, or its distinctive mode of governance embodied or expressed certain moral virtues or values. All of these formulations express moral constraints on the existence of legal systems.

While not denying that any or all of these constraints would render governance by law desirable, (the conventional wisdom has it that) positivism holds that no such constraints must be satisfied in order for a system of regulating human affairs to constitute a legal system. At the same time it attributes to the natural lawyer not just the view that legal systems that satisfy these constraints are desirable for their doing so, but that their doing so is necessary to their counting as legal systems. Because satisfying some or other such constraint is distinctive of law as a form of governance, the natural lawyer must reject the separability thesis that the positivist is committed to endorsing—or so conventional wisdom has it.[10]

We have now distinguished between the separability thesis as a claim about laws and as a claim about the existence conditions of legal systems (or the possibility conditions of governance by law). As a claim about laws, the separability thesis holds that the concept of immoral law is coherent; as a claim about the existence conditions of legal systems, it holds that there are no moral constraints that a scheme of governance must satisfy in order to count as a legal system. We turn now to assessing whether, conceived in any of these ways, the separability thesis is up to the task that conventional wisdom has set for it. We begin with the separability thesis as a claim about laws and thus with the assertion that the concept of immoral law is coherent.

10. *See, e.g.*, Kenneth Einar Himma, *Final Authority To Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism*, 24 LAW & PHIL. 1, 7 (2005) ("Classical natural law theorists . . . argue that there are necessary moral constraints on the content of the law. . . . In contrast, positivists hold it is the conventional practices of officials that determine the second-order legal norms which constrain judicial decision-making.").

II. ASSESSING THE CONVENTIONAL WISDOM: THE SEPARABILITY THESIS

A. Is the Separability Thesis Adequate To Distinguish Positivism from Natural Law? The Possibility of Immoral Law

As I noted at the outset, the separability thesis would suffice to distinguish legal positivism from natural law were it compatible with the former and incompatible with the latter (or vice versa). We therefore set aside for the moment the question of whether the separability thesis is *essential* to legal positivism and ask first whether it is *compatible* with legal positivism but not with natural law theory. Thus, we have to answer two questions: (1) Is the separability thesis compatible with legal positivism? (2) Is the separability thesis incompatible with natural law theory?

The separability thesis (as a claim about laws and not about legal systems) asserts that the concept of immoral laws is coherent (or that sentences expressing the existence of immoral laws are not contradictory). If the morality of a norm neither settles its legal status nor is settled by it, then it is possible for there to be legal norms that are not moral, just as there could be moral norms that are not law. In that case, immoral laws are possible, and if they are, the concept of immoral laws is coherent. This suggests that the conventional view is at least partially right in that positivism is compatible with the separability thesis.

This leaves us with the matter of whether the separability thesis is incompatible with natural law theory. At first blush the separability thesis appears to be clearly incompatible with natural law theory. After all, both classical and modern natural lawyers echo Augustine's famous assertion, reaffirmed by Aquinas, that "an unjust law is no law at all."[11] Taken literally, this amounts to the view that it is conceptually impossible for something to be both law and bad (i.e., immoral), and that entails the view that the concept of immoral law—a norm that is both law and morally bad—is incoherent.

If history is to be a guide, one cannot help but be struck by the fact that morally bad law is not merely conceptually possible but all too frequently realized. If natural law holds that the concept of immoral law is incoherent, then it is not simply false but foolish. No doubt, for many of its critics, these

11. AUGUSTINE, ON FREE CHOICE OF THE WILL bk. I, § 5, at 8 (Thomas Williams trans., Hackett Publ'g Co. 1993) (c. 400 AD); *see also* 2 THOMAS AQUINAS, SUMMA THEOLOGICA, question 96, art. 4, at 70 (Fathers of the English Dominican Province trans., 1915) (c. 1274) ("[A] law that is not just, seems to be no law at all.").

considerations provide ample grounds for dismissing natural law theory out of hand.

Worthwhile arguments are rarely that easily won. What we need to do, then, is to see if we can interpret the claim that 'an unjust law is no law at all' in a way that renders it plausible and potentially illuminating, rather than obviously false and uninteresting. In what follows, I provide several plausible ways of interpreting the claim (or the motivation behind it) that renders it compatible with the possibility of immoral laws and thus with the separability thesis.[12]

1. Making Sense

The phrase 'immoral law' makes sense insofar as we understand what a speaker using it intends to convey by it. Someone asserting the existence of immoral laws is claiming that there are norms that satisfy the criteria of legality that are nonetheless morally objectionable. True or false, there is no problem understanding what one who makes this assertion has in mind. Expressions can make sense, however, even if the objects to which they purport to refer do not exist—indeed even if the objects to which they purportedly refer could not possibly exist.

Because there is no problem understanding what someone who asserts the existence of immoral laws intends to convey, we should not interpret the claim that 'an unjust law is no law at all' as asserting that the phrase 'immoral law' makes no sense. Of course it does. The better interpretation is that the set of immoral laws is necessarily empty—that nothing can be both law and immoral at the same time. On this reading, someone asserting the existence of immoral laws would be in the same boat as someone asserting the existence of square circles and the largest prime number. When we understand his claim in this way, it should not surprise us that the natural lawyer is steadfastly unmoved by our protests that the concept of immoral law makes sense. For he does not deny that the expression has application conditions, only that those conditions could possibly be satisfied.

12. To be sure, one need not identify natural law theory with the claim that 'an unjust law is no law at all', and some important contemporary natural lawyers do not. In the case of some of these scholars, there is no question that natural law theory is compatible with the possibility of immoral laws, and so, I spend no time in what follows focusing on their work. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 360-63 (1980); MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS (2006). Instead, I focus on those versions of natural law theory that initially seem inconsistent with the possibility of immoral laws and take my task to be showing that, even in those cases, initial appearances are misleading.

Alas, this suggestion does not seem capable of rendering the claim that 'an unjust law is no law at all' either plausible or interesting. Far from being necessarily empty, the set of immoral laws suffers an embarrassment of riches. Strange that something unrealizable could be such a familiar part of our lives—and the source of so much misery and injustice.

The problem is that we are treating the natural lawyer's claim as if he were invoking the ordinary concept of law—when in fact he is not. In the ordinary sense of the term, there clearly are immoral laws, and it would be odd to treat the natural lawyer as somehow not noticing this obvious fact. The more charitable view is that the natural lawyer's claim invokes a distinctive concept of law that departs from the ordinary one. Until we specify more concretely the concept of law that the natural lawyer has in mind, however, we remain only part of the way to finding a charitable interpretation of the phrase 'an unjust law is no law at all' that renders it compatible with the separability thesis. We turn now to that task.

2. A Revisionist Concept

In the classical natural law tradition it is common to identify law with the category of norms that *necessarily bind the conscience*. The phrase 'a law that binds the conscience' is ambiguous. On the one hand, rules that bind the conscience might be ones that *necessarily motivate* compliance with them. On the other hand, rules that bind the conscience might be ones that *necessarily provide reasons for action*. A norm can create reasons to act that are inadequate to motivate compliance with the reasons it provides, as in the case of *akrasia* (weakness of the will). Or a rule that fails to provide reasons for acting, in virtue of its other features, can motivate compliance with it. Therefore, we need to disambiguate the expression 'law that binds the conscience'.

In doing so, we should be mindful of the emphasis that the natural law tradition places on the relationship between law and reason. Unless there are other considerations that warrant a different interpretation, the sensible place to begin is by assuming that, in restricting law to those norms that bind the conscience, the natural lawyer intends to limit law to norms that are necessarily reason-giving. Certainly, a well-motivated person will comply with laws that create compelling reasons for acting. Thus, we can assume that the natural lawyer holds that in the ideal or successful case, law that binds the conscience provides reasons and, as a result, motivates compliance.

However we disambiguate the expression, restricting law to norms that bind the conscience involves departing from the ordinary concept of law. That

concept is much more closely associated with a norm's distinctive human or institutional source or, to use Dworkin's term, its 'pedigree',[13] as well as with particular institutions like courts and legislatures and familiar relationships of authority between 'command-giver' and 'recipient'. Given the ordinary concept, it is an open question whether what the law directs us to do is something we ought to do and whether, if it is, we ought to do what the law demands *because* the law demands it. In other words, binding the conscience in any sense of the expression is no part of our ordinary concept of law; it is neither essential to the concept nor is it entailed by anything that is.

Someone proposing an alternative concept of law may allow that the ordinary concept is well-suited to both normal practical engagement with the law and to many theoretical projects in the social sciences—economics, political science, sociology, and anthropology. Research in those fields can proceed nicely with a thin concept of law that emphasizes law's institutional structure, social source, and coerciveness. Someone proposing a revised concept merely resists the view that the ordinary concept is suitable for jurisprudence.

Normally, revision of a concept is justified when the ordinary concept is misleading and confusing or when it does not serve theoretical or practical purposes well. The revised concept is offered as otherwise providing insight or being particularly well-suited to certain explanatory or justificatory projects. Given that the ordinary concept is adequate for both practical engagement and the theoretical purposes of the social sciences, it is natural to ask what is special about the projects of jurisprudence that calls for revision in the concept of law.

Among the aims of jurisprudence is to explain the distinctive forms of life that governance by law makes available. Jurisprudence engages law in its 'aspirational mode'. To understand law is to know what forms of achievement are distinctive of it. Without law, these forms of life would not be attainable, or if attainable, only incompletely so. It is an open question what those forms of life are and the aim of jurisprudence is to identify, characterize, and explain the way in which law helps create and sustain them.

One way of expressing the idea that jurisprudence must focus on law in its aspirational mode is to say the concept of law suitable to jurisprudence is a 'success concept'—that the term we use to refer to that concept, i.e. 'law', is itself a 'success term'. To say that 'law' is a success term is to say that the conditions of law's success are among the application conditions of the term 'law'. Because law's aspirations are part of the application conditions of the concept of law, no norm that fails to meet the standards of law's success is law in the full sense of the term. If we associate law's success with its binding the

13. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1978).

conscience, then a norm's failure fully to bind the conscience renders it 'defective' as law—as less law than it would be were it to bind fully the conscience of those to whom it is directed. In the same way as one cannot *know* something untrue or *deceive* someone without getting her to believe a falsehood, a norm cannot be law in the full sense without succeeding in binding the conscience: primarily by obligating those to whom it is directed, and secondarily by motivating their compliance with the obligations thereby incurred. This is the concept of law suitable for jurisprudence.

There are several ideas here that are very easy to confuse with one another. One is that law is essentially aspirational; the second is that the best way to capture this idea is to characterize 'law' as a success term. The third is that the standard of success appropriate to law in its aspirational mode is binding the conscience of those to whom the law is addressed. Fourth, to bind the conscience is necessarily to provide those to whom the law is directed with moral reasons for acting (which, if those to whom the law is addressed are rational or well-motivated, are sufficient, if not necessary, to motivate their compliance with it).

We have already explained the concept of binding the conscience. Part of the point of claiming that law is an aspirational concept is to emphasize that there is an essentially normative aspect of law. When we characterize a norm as law or a set of rules as a legal system, we are not merely describing it but expressing some form of positive evaluation. Its being law is a desirable, attractive, or valuable feature of a norm or of a system of norms—or so the argument goes. The claim that 'law is an aspirational concept', then, is part of a more general view about the essentially normative character of the concept of law. We take up this more general claim in a bit and so postpone discussing its merits at this time. Instead, we assume for the sake of the current discussion that the concept of law suitable for jurisprudence reflects an aspirational component and turn our attention to the suggestion that the way to express this aspirational dimension of law is to treat the term 'law' as a success term.

To say that 'law' is a success term implies that a norm's failure to satisfy its success conditions—whatever they are—entails that it falls short of being law. It is either not law, defective as law, or not law in the full sense.

We need to distinguish the claim that 'law' is a success term from the more familiar idea that there are standards appropriate to evaluating law and that law can be either successful or not depending on whether it meets those standards. Law that falls short of meeting its standards for success is law in every relevant sense. Because it is unsuccessful law, it is less valuable or

desirable than it would otherwise be; but it is fully and completely law, nonetheless.[14]

The difference we are emphasizing—between standards of success applicable to various things and treating the terms that refer to them as 'success' terms—is quite general and broadly applicable. We can assess the success of our team's performance without 'team' being a success term. I have aspirations for my essays—including this one—without the term 'essay' being a success term. So too law. One can quite appropriately inquire into the success of laws and legal systems—in particular or in general—without 'law' being a success term. Whatever the criteria for 'law' may be, it will always make sense to evaluate it as good or bad, desirable or not, fair or unfair, just or unjust, and so on. This does not make 'law' a success term, even though both laws and legal systems are apt for evaluation as successful or not.

Still, even if we grant that 'law' is a success term or that law embodies certain aspirations, it hardly follows that the natural lawyer's substantive revision must be accepted—namely, that law can be said to succeed *only if* it binds the conscience, and that fully to be law is to bind the conscience. After all, there are other ways of taking 'law' to be a success term or of characterizing law's aspirations. For instance, law might be thought to succeed to the extent that it coordinates large-scale human interaction or provides the framework within which individuals can make rational investments in their projects and pursue them with minimal interference from others.

While this way of understanding the natural lawyer's claim that 'an unjust law is no law at all' raises more questions than it answers, it is plain that natural law is compatible with the separability thesis. For in claiming that 'an unjust law is no law at all', we simply must take the natural lawyer to be holding that, in the ordinary sense of the term 'law', immoral law is possible, but in the sense appropriate to jurisprudence, it is not. Roughly, he insists that if in referring to norms as law our aim is merely to call attention to various formal or institutional features, then of course there can be and are immoral laws; but if our aim is to grasp law's aspirations, to inspire and not merely to report, then, in the sense of law suitable for those projects, immoral law is impossible.

14. This latter idea is suggested by the fact that law is a social construct, designed by persons to pursue certain aims and goals and measurable or evaluable in terms of whether it achieves them. In this sense the failure to succeed does not rob a norm or a system of governance of the status of law; it is merely a way of evaluating the law—as successful or not.

3. A Methodological Suggestion

Instead of treating the natural lawyer's claim as involving a proposed revision in the concept of law suitable for jurisprudence, we might reach what is essentially the same interpretation of the claim that 'an unjust law is no law at all' by understanding the natural lawyer as offering a *methodological* suggestion as to how jurisprudence should proceed. There is a wide range of cases of law and of legal systems. On which instances or cases of law ought jurisprudence to focus? The thought is that the central case of law is the successful one,[15] and the successful law is the one that imposes obligations on those to whom it is directed. Understood in this way, the natural lawyer is not suggesting that we abandon the ordinary concept of law in favor of a revised one suitable for the purposes of jurisprudence. Instead, his claim is that in order to understand even the ordinary concept of law we have to focus on the core or paradigmatic instantiations of it. The core instance of law is not law that fails, but law that succeeds—as measured by the standards of success, which, for this type of natural lawyer, is law that binds the conscience.[16]

By way of analogy, in order to understand what it is to be a heart, one would not look to all hearts to uncover what, if anything, they share. Rather, one would look to the successful heart to discover what is essential to its success. The successful heart pumps blood efficiently. Thus, we identify hearts as the organ that pumps blood with some minimal degree of effectiveness. Successful hearts perform this function well, unsuccessful ones less so, or not at all.

Like hearts, one might think that laws, too, have functions. When they perform their functions well, they do what they are designed to do. Among laws' functions is to bind the conscience of those to whom they apply. If so, then the core case of law—the appropriate object of study in jurisprudence—is law that binds the conscience. Understood in this way, the natural lawyer's claim that 'an unjust law is no law at all' is best understood as a claim about the core case of law—the proper object of jurisprudential inquiry.

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15. It is important to note that 'success' here is being used in its evaluative sense, not as a criterion for applying the concept. The assumption is that whatever the criteria for 'law' may be, jurisprudence should proceed by studying the cases in which laws do what they are designed to do—cases in which they succeed. Here, then, binding the conscience is a substantive claim about what constitutes success for law.

16. I take John Finnis to be a natural lawyer who adopts the general methodology of focusing on the central case and as someone who identifies the central case with the successful one. *See* FINNIS, *supra* note 12, at 9-16.

One might agree that jurisprudence should study the core case of law and that the core case of law is the one in which law succeeds at doing what it is meant or designed to do. It achieves its aim—whether the aim is instrumental or intrinsic to it. On the other hand, one might object that there is nothing special about binding the conscience that makes law's doing so—when it does—the core or paradigmatic case of law.

But the natural lawyer has the makings of a good response and one that has the ironic feature of enlisting the aid of the leading positivist of our time, Joseph Raz. Raz famously holds that law necessarily claims to be a legitimate authority.[17] To claim legitimate authority is to claim that one's directives provide reasons for acting that apply to those over whom one claims authority. If that claim is essential to law, then one could argue that the successful case of law is the one in which the claim law necessarily makes is vindicated. The proper object of jurisprudence is the case in which law's claim is true, not the many cases in which it is false.

If we understand the natural lawyer as offering a methodological suggestion about how jurisprudence should proceed, we need not read him as insisting on the impossibility of immoral laws. Nor should we read him as claiming that there is a distinctive notion of law that is suitable for theoretical inquiry into the forms of life and organization made possible through governance by law. Rather, he is suggesting that in the same way we will fail to grasp what hearts are if we focus on what all hearts have in common rather than on what makes for a successful heart, we will miss what is essential to law unless we focus on the cases of law in which its directives bind the conscience. None of this entails that immoral laws are impossible, however, and so there is no reason to think that a natural lawyer must resist the separability thesis.

4. Legality as a Normative Notion

We noted earlier that some might argue that law is an essentially aspirational concept. We indicated, as well, that such a view takes law to be a normative concept: that is, in addition to having a descriptive component, the *concept of legality has a normative component (or is an essentially normative predicate)*. To say that a norm is law is not merely to mark it as belonging to or being a part of a legal system, but also to *evaluate* it (presumably, positively) or to *endorse* it. Evaluation and endorsement are two different ways of making out the claim that legality is a normative notion. One can evaluate the law without endorsing it; to do so is to judge or assess the value or desirability of the law

17. JOSEPH RAZ, THE AUTHORITY OF LAW 28-33 (1979).

without accepting its moral presuppositions, taking on its characteristic point of view, or promoting or encouraging its fundamental aims.

Thus, we have two distinct versions of the claim that legality is normative: either that marking a norm as law constitutes a form of evaluation or that it constitutes a form of endorsement.

In saying that legality constitutes a form of evaluation, it is important that we distinguish between different possible objects of assessment: particular laws on the one hand and legal institutions or legal systems on the other. On the one hand, to identify a norm as law (on the view under consideration) is to assess it as valuable or desirable. A norm's having the property of legality—of being law—would imply something about its worth, desirability, or value. In this view, then, the moral worth of a norm would be settled at least in part by its having the property of legality. Someone pressing this view of the normativity of legality would have difficulty squaring it with a narrow formulation of the separability thesis, according to which the legality of a norm and the worth of a norm represent two distinct inquiries. So if we understand legality as a normative notion in *this* sense, the natural lawyer's position may not be compatible with the separability thesis.

Alternatively, in claiming that legality is a normative concept of assessment, one can be understood as calling attention to the idea that a system of law or a legal institution embodies or expresses a particular kind of political virtue. This, I take it, is an important feature of Ronald Dworkin's jurisprudence. For Dworkin, the distinctive virtue of law is not justice, but what he calls "integrity."[18] Indeed Dworkin can sometimes be read as claiming that a theory of law is a theory of legality, by which he has in mind an account of the kind of value or political virtue displayed by 'the legal'. Possessing the virtues distinctive of law, like possessing most ordinary virtues, is a matter of degree. Thus, legal systems can display integrity, for example, even if some of its laws are immoral. Integrity is the virtue that law strives to achieve but, as with the rest of us, often falls short of doing. Thus, understood in this way, the claim that legality is a normative concept is perfectly compatible with the possibility of immoral laws and thus with the narrow formulation of the separability thesis.

Let us turn now to the view that legality constitutes or expresses a kind of endorsement. The rough idea is that because laws are generally enforceable by the use of coercion, to mark a norm as law is to identify it as a suitable object of justified coercion. Thus, to mark a norm as law is unavoidably (at least provisionally) to endorse coercively enforcing it (if necessary).

18. DWORKIN, LAW'S EMPIRE, *supra* note 8, at 400-13.

With this conception of the endorsement feature of ascriptions of legality in hand, we can then understand the claim that 'an unjust law is no law at all' in either of two ways: (i) unjust laws are not entitled to the endorsement that being law normally warrants; or (ii) because unjust 'laws' are not fit for the endorsement that predicating legality of a norm warrants, they fall short of being law in the full sense—they are somehow defective as laws. Either view is compatible with the coherence of immoral laws and thus with the narrow formulation of the separability thesis.

To sum up the discussion of the relationship between the separability thesis and the claim that 'an unjust law is no law at all': I have offered several ways of interpreting the claim that 'an unjust law is no law at all' that are consistent with the possibility of immoral law. I considered first the idea that the most charitable interpretation of the claim that 'an unjust law is no law at all' takes the natural lawyer as offering a revision in the concept of law suitable for the purposes of jurisprudence.

According to the revised concept of law, the term 'law' is reserved for norms that bind the conscience in the sense of providing reasons for action for those to whom they are directed. The claim that 'an unjust law is no law at all' is just the claim that nothing can be both bad (immoral) and bind the conscience at the same time. The positivist interprets this claim in the light of the ordinary concept of law, but the natural lawyer does so employing the revised concept. Thus, rather than being engaged in a dispute in which, at most, one of them can be right, the fact is that they are talking past one another. Given the particular concept each employs, they can both be right at the same time, and that means that the separability thesis is inadequate to distinguish between them.

I next considered whether jurisprudence is better served by interpreting the natural lawyer's substantive claim as a methodological directive: a view about how jurisprudence should proceed. In order to uncover the nature of law, one should study law that succeeds, and law succeeds if it binds the conscience. Understood in this way, there is nothing in the natural lawyer's position that precludes the possibility of immoral laws. His point is simply that such laws are defective in an important sense and that by focusing on them, the legal philosopher misses more than he uncovers about the nature of law.

Finally, I considered the possibility that, in claiming that 'an unjust law is no law at all', the natural lawyer is looking to exploit the very different idea that legality is a normative notion: that certain kinds of legal statements are evaluations or endorsements. Whereas there are problems in rendering the claim that legal judgments are positive assessments consistent with the claim that the concept of immoral law is coherent, both the claim that a particular kind of political virtue is associated with law and the claim that legal judgments

convey an endorsement are compatible with any narrow formulation of the separability thesis. Understood in either of these ways, the claim that 'an unjust law is no law at all' is compatible with the separability thesis.

Thus, there is no reason to suppose that, charitably understood, the natural lawyer must reject the separability thesis understood as a claim about the coherence of immoral law. Both legal positivists traditionally understood and natural lawyers *charitably* understood can endorse the separability thesis understood as a claim about the coherence of immoral law. The next question is whether both can endorse the separability thesis as a claim about the existence conditions of legal systems. Before we take on that question directly, let's pursue some of the interesting ideas raised in this section concerning the relationship between law and endorsement.

B. The Internal Point of View and the Law's Point of View

Arguably, the natural lawyer claims that *no system* of norms can count as a legal system unless it satisfies certain moral standards or displays certain moral ideals or virtues. This is an importantly different claim from the one expressed by Hart, for example, that a legal system can exist only if the bulk of legal officials adopt a distinctive kind of *attitude* toward those norms.[19] He refers to this attitude as the "internal point of view."[20] In the previous discussion, we introduced the idea that there might be a connection between law and the concept of endorsement. We have two interesting ideas before us. The first is that the possibility of law depends on substantive moral constraints; the second is that it depends on a distinctive kind of attitude. The first question is how we should understand that attitude: as moralized or not. On Hart's view, it is enough that officials are disposed to treat legal norms in a characteristic way in their actions and in their practical reasoning. They need not regard the norms as morally legitimate. Alternatively, one can hold the view that the relevant practical attitude is moralized in that those who adopt the law's most fundamental norms regard them as morally legitimate. They endorse the law as legitimate, and their doing so is a necessary condition of legal governance. Let's begin our discussion by first characterizing this view.

As is often true, it is helpful to begin with Raz's familiar idea that law necessarily claims to be a legitimate authority. One way to understand the claim to legitimate authority is this: the law is, among other things, a 'point of view' about what is morally required and permitted. You and I can have

19. HART, *supra* note 7, at 55-57 (discussing the "internal aspect").

20. *Id*. at 89-91.

different or similar points of view about what reason or morality requires. Oddly perhaps, the law is no different. It, too, takes up or is a point of view about its directives, which is to say that it adopts something like an attitude towards them. It regards them as stating moral requirements and permissions. So as a first approximation, the claim to legitimate authority should be interpreted as the law asserting that—*from its point of view*—its directives always have the appropriate moral force; that is, they express true moral authorizations, permissions, and requirements.

Before pursuing this line of thought further, we need to dispense with a natural but misguided objection. Some might argue that the law is not a person and only persons can have a point of view and so the law has no point of view because it is incapable of having one.[21] Law is not a person, but that does not imply that it is not a point of view, nor does it imply that law cannot take up or express a point of view. Talk of 'the law's point of view' is a way of expressing an idea about law: namely, that there is an underlying moral theory that is implicit in the existence of law, according to which the law's directives not only turn out to be systematically connected to one another, and thus satisfy the demands of rationality and coherence, but also turn out to be morally legitimate. The requirement of systematicity is necessary in order that one can legitimately reason using the law—that is, draw inferences—and the requirement of moral legitimacy is responsive to the fact that law is to play a certain kind of role in practical reason: namely, as a ground for action for officials and those governed by law.

The law does not 'adopt' the law's point of view. It just *is* the law's point of view, or better, expresses a point of view—a way of regarding its norms—which others can adopt or decline to adopt. And if they do, then they accept the idea that there is such a moral theory according to which the law's directives are rationally connected to one another and express morally legitimate authorizations, permissions, and prescriptions. When Dworkin claims that jurisprudence is the silent partner in adjudication, we can understand him as saying that adjudication presupposes the existence of such a theory and judges are each charged with the responsibility of characterizing as best they can the theory that makes law systematic (or rational—his term is 'fit'[22]) and defensible.[23]

21. *See, e.g.*, Kenneth Einar Himma, *Positivism and Interpreting Legal Content: Does Law Call for a Moral Semantics?*, 22 RATIO JURIS 24, 26-27 (2009).

22. *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 8, at 247-66 (discussing the role of "fit").

23. Among the best discussions of the law's point of view are RAZ, *supra* note 23, at 140-43; and SCOTT J. SHAPIRO, LEGALITY 184-88 (2011).

It would be linguistically awkward to characterize the law as *endorsing* its directives, but in a sense that is what law implicitly does. It takes its directives, authorizations, and permissions as invariably justifiable and as appropriately enforceable through coercive means. It holds, as well, that those to whom the law is directed have good reason so to regard it, and it prescribes that they do so or at least that they act as if they had done so.

1. Adopting the Law's Point of View

With this interpretation of the law's relationship to its directives in hand, we can introduce the idea of 'adopting the law's point of view'. To adopt the law's point of view is to adopt the attitude the law takes toward its directives, which is to endorse them as legitimate: to regard them as legitimate and to dispose oneself to reflect that regard in one's actions and practical reasoning.

Our question now is whether the existence of law depends in any way on individuals adopting the law's point of view. The obvious subsidiary questions concern who, if anyone, must adopt the law's point of view. Though it may be desirable that ordinary citizens adopt the law's point of view—thus contributing to what some call the conditions of 'democratic legitimacy'—it is not obvious that ordinary citizens must regard the law as morally legitimate in order for the rules they follow to count as part of a legal system. Hart, for one, was sensitive to the importance of the distinction between citizen and official, for he argued that, in order for law to exist, it is necessary that the bulk of those to whom the law is addressed must comply with its demands, whereas the bulk of officials must adopt a distinctive attitude toward the law—what he famously called "the internal point of view." He also referred to the requirement that there be widespread compliance as an "efficacy condition" of law as opposed to a conceptual constraint on the possibility of law, thereby signaling the kind of significance given to compliance within his conception of law.[24]

If the existence of law depends upon some individuals adopting the law's point of view, those bound to do so are those charged with creating, enforcing, and adjudicating law—officials. It is not necessary that all officials adopt the law's point of view—only that most do. Alienation is not an idle possibility, but

24. HART, *supra* note 7, at 103-04. My view is that democratic legitimacy does not require that citizens adopt the law's point of view but requires instead an element of fidelity to law. Fidelity is expressed in terms of actions and attitudes displaying 'support' for political institutions: doing one's share to sustain them and to encourage them to act for the common good in accord with the demands of justice. All this is quite different from regarding the law's demands as stating moral requirements or permissions; that is a much stronger constraint.

a common and sometimes welcome and appropriate attitude to take to law—even for legal officials—and any theory of law must have the capacity to explain its possibility and perhaps help us to identify the conditions that are likely to foster it.

Still, law is not possible if *all* (or even if *most*) officials are alienated from it. The very possibility of law thus requires that the bulk of those authorized to exercise the power to constrain the freedom of others adopt the law's point of view. There can be no law if the majority of those situated by law to judge the conduct of others and to determine whether coercion is called for do not adopt the law's point of view—if, for example, they do little more than 'go through the motions' or act in bad faith. The possibility of law allows for alienation and bad faith, but legal governance cannot rest on a foundation of either. There is an important difference between action under the law and acting as if there were law—or so one might plausibly argue.

Particular legal judgments—statements of what the law is, what it requires, permits, or authorizes—may or may not convey an endorsement of its legitimacy. One can report what the law is without endorsing it and without adopting the law's point of view towards it. When such statements are made by someone adopting the law's point of view, however, they express an endorsement of the law's legitimacy and all that legitimacy in the circumstances implies. On the other hand, though adopting the law's point of view entails that those who do so are disposed to endorse its directives, it is not necessary that one adopt the law's point of view in order to endorse the law's directives. One can endorse particular directives—or indeed all of the law's directives individually—without having adopted a disposition to do so.

2. The Internal Point of View and the Law's Point of View

The suggestion to this point is that law presupposes that officials by and large adopt what I am calling the law's point of view, which is to say that they dispose themselves to regard the law's demands as morally legitimate. It is a good question to ask what the relationship is between the law's point of view, so understood, and Hart's notion of the internal point of view.

In Hart's account, law exists only if there is a rule of recognition that is adopted from the internal point of view by those whose conduct is regulated by it—namely, officials.[25] What is the relationship, if any, between this idea and

25. HART, *supra* note 7, at 116-17; *see also* SHAPIRO, *supra* note 23, at 93 (describing Hart's account of the internal point of view); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1164 (2006) (same).

the law's point of view? The internal point of view is a *practical attitude* in two senses of the term 'practical'. First, it is practical in the sense that to adopt the internal point of view towards a rule is *to employ the rule in one's practical reasoning in a distinctive way*. One who adopts the internal point of view towards the rule of recognition disposes oneself to treating the rule as a standard or norm for determining which rules count as legal standards, which act as authoritative, and so on. Secondly, the internal point of view is practical in that one who adopts it characteristically *acts* in a certain way. To adopt the internal point of view is to dispose oneself to engage in practices of reason giving—displayed in contexts of offering explanations and justifications. As a result, one who adopts the internal point of view towards the rule of recognition offers the rule as a reason for one's judgments of legality and as a basis of one's criticisms of others, and so on. Thus, to adopt the internal point of view is to dispose oneself to reason and to act in certain characteristic ways.

It looks as if there is no real difference between what I am calling "the law's point of view" and what Hart calls "the internal point of view." But this is a mistake as there is an enormous difference between the two. Once we see what the difference is, we can ask which, if either, is necessary for the existence of law.

To see the difference, recall first that in Hart's account one may adopt the internal point of view for a wide array of quite disparate reasons—from the basest of instrumental reasons to the loftiest of moral ones. Law depends on the existence of a collective practice of 'norm adoption' among officials. Hart's account is explicitly inattentive to possible constraints on the reasons officials might have for adopting the rule of recognition as their fundamental guiding norm.

The same cannot be said for adopting the law's point of view towards a rule in general or towards a rule of recognition in particular. To adopt the law's point of view is to be disposed to regard the rule as *morally legitimate* and to act accordingly. One cannot dispose oneself to regard norms as morally legitimate for any old reason. We have to distinguish between reasons (or considerations) of the right kind and reasons of the wrong kind for the adoption of attitudes.

Like belief, resentment, and indignation, both the 'internal point of view' and the 'law's point of view' are attitudes. Attitudes have standards of correctness. These standards identify the grounds for appropriately holding, having, or maintaining the attitude in question. The norms of correctness partially determine what it is to be the attitude in question. They enable us to distinguish between reasons of the right kind and wrong kind for having the attitude in question. Let's see how this works.

The objects of beliefs are propositions. The prevailing—if not universal—view is that the standard of correctness for belief is truth. The only good

reasons for believing a proposition are those that bear on its truth. Similar considerations apply to resentment: that is, only considerations tending to show that the person resented has wronged another are reasons of the right sort for resenting him.

Now consider the attitude of 'adopting the law's point of view'. In adopting the law's point of view, one is disposed to regard the law's demands as legitimate. In that case, only considerations that bear on the legitimacy of the law's directives are reasons of the right kind for adopting the attitude. Thus, it is plain that one cannot appropriately adopt the law's point of view for financial or self-interested reasons.

Not so the 'internal point of view'. While Hart tells us nothing about what the standard of correctness for the internal point of view is, he makes very clear that he takes all sorts of considerations for adopting it to be appropriate that would *not* be appropriate for adopting 'the law's point of view'.

If this is right, then the internal point of view is a very different kind of attitude than is the law's point of view. The question is, which, if either, is a necessary condition for the existence of law.

Hart and I differ on this. His view is that the possibility of legal governance presupposes that a sufficient number of officials adopt the internal point of view, whereas I am advancing the view that law is possible only if a sufficient number of relevant officials adopt the law's point of view. It is not enough, in my view, that relevant officials employ the rule of recognition or the other fundamental norms of the legal system in a distinctive way in their practical reasoning and display their adoption of it in characteristic behavior. Their doing so must be part of a practice in which they also regard the norms they are applying as legitimate.

What explains the difference between Hart's view and mine? One reason is that, like Raz and other positivists, I hold that the normative concepts that figure prominently in law—obligation, right, duty, and so on—are employed in their moral sense. Raz and I, for example, hold that legal directives are best understood as claims about what those to whom they are directed are morally required, authorized, or permitted to do.[26]

In contrast, Hart does not believe that the law's normative concepts are employed in their moral sense. He does not deny that law can make a moral difference nor does he deny that law, in fact, often makes a moral difference. He simply resists the idea that law's making a moral difference or its purporting to do so is an essential feature of it. So while those who are

[26] *See, e.g.*, RAZ, *supra* note 17, at 19 (discussing authority).

empowered by law to create, interpret, and enforce it must, by and large, adopt and be committed to the law's fundamental norms (including the rule of recognition)—a commitment displayed in characteristic behavior—there is no reason why this commitment must be moralized since the law makes no essential moral claims. Thus, Hart's account requires the internal point of view but there is no need to 'moralize' it by connecting it to what I am calling the 'law's point of view'.

Is there a positivist reason for adopting one formulation of the attitude towards law's fundamental norms over the other? A natural thought is that the requirement that officials adopt the law's point of view is inconsistent with positivism and thus unavailable to a positivist. After all, to adopt the law's point of view is to dispose oneself to treating the law's requirements as morally legitimate. How can a positivist insist that the existence of law depends on judges treating legal directives as morally legitimate? If that is right, then Hart's view—that officials must adopt the internal point of view—is best understood as a consequence of his being a positivist. This suggests that I am in the awkward position of being a positivist and yet insisting on the claim that legal governance requires that officials adopt the law's point of view.

Natural though it may be, this thought is seriously mistaken. Remember that to adopt the law's point of view is to adopt an attitude toward the law's directives. It is to regard those laws as morally legitimate and to act accordingly. This does not mean that the laws are legitimate or that their being law depends on their being morally legitimate. Requiring that individuals believe that propositions are true does not render them true. Requiring that individuals regard norms as legitimate does not render them so. Even if legal positivism were incompatible with requiring that norms be morally legitimate to count as law, it is hardly incompatible with positivism to require that officials regard or believe the fundamental legal norms to be morally legitimate.

The requirement that officials regard the law as having that legitimacy—even the requirement that officials regard laws as having that legitimacy entirely in virtue of their being law—is likewise compatible with positivism. The view I am suggesting is not simply that such a requirement is compatible with positivism. Rather, it is that if law is to play the role in our practical and moral lives that it does, then the bulk of those who are charged with making, interpreting, and enforcing law must endorse law as morally legitimate. There is simply no reason that positivism must resist the view that the social practice at the foundation of law is an essentially moralized one. If I am right, it is.

The argument of this Section is twofold: first, that law is possible only if, as a whole, those who are empowered by law and charged by law with its creation, modification, interpretation, and application adopt a moralized attitude toward law—that is, regard the bulk of its directives as morally

legitimate; and second, that the existence of such a constraint on legality is perfectly compatible with positivism. If there is a reason for choosing, as Hart does, the internal point of view over what I am calling (following others) 'the law's point of view', the reason cannot be because positivism requires it.

We turn now to two similar but importantly different concerns: First, does the existence of law presuppose substantive moral constraints on governance? Second, if it does, is its doing so compatible with positivism?

C. Is the Separability Thesis Adequate To Distinguish Positivism from Natural Law? The Existence Conditions of a Legal System

Does a scheme of governance count as a legal system only if it complies with certain moral requirements, embodies certain moral principles, secures or promotes certain moral ends, or some such thing? Are there substantive or procedural moral constraints on the possibility of governance by law? The separability thesis claims that there are no moral constraints on the possibility of governance by law.

Understood as a claim about the existence conditions of legal systems, the separability thesis was an important bone of contention among legal theorists in debates that arose after World War II surrounding the issue of whether Nazi Germany or Vichy France had legal systems. Historically, natural lawyers have insisted that neither had a legal system,[27] whereas positivists have been more inclined to the view that both were governed by law—evil law, but law nonetheless.[28]

Perhaps some self-identified legal positivists hold that there are *no* necessary moral constraints on the existence of legal systems. But without more, their doing so reveals more about them than it does about positivism. No doubt we can imagine some moral constraints on the existence of legal systems that would be at odds with positivism—for example, the constraint that nothing could be a legal system unless the legality of a norm was fully determined by its moral worth. But it hardly follows from the fact that positivism recoils at some moral constraints on legality that it must take a similar attitude to all such constraints. At the same time, we can be sure that natural lawyers endorse some moral constraints on legality—for example,

27. *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 633 (1958).

28. *See, e.g.*, H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1289-90 (1965) (reviewing LON L. FULLER, THE MORALITY OF LAW (1964)).

Fuller's so-called 'internal morality of law'. But it hardly follows that natural law endorses any or all possible moral constraints on legality.

If we are going to identify a dispute worth having—or even one worth exploring—we are going to have to identify a class of moral constraints on legal governance that natural lawyers are particularly concerned to endorse that, at least on first blush, one might think legal positivists are especially concerned to resist.

Without pinning the natural lawyer down too narrowly and thereby excluding without argument perfectly plausible formulations of his position, we can identify at least two kinds of relationships between morality and the possibility of law that natural lawyers have been anxious to press. The first is that there are moral principles or ideals that are constitutive of law or distinctive of governance by law. The second is that there are moral ends or aims that governance by law necessarily achieves or necessarily seeks to achieve.

Many legal positivists are quite sympathetic to the second kind of concern. Hart claims that law must have a 'minimal moral content'. Raz claims that law necessarily claims to be a legitimate authority. And Shapiro claims that law has a necessary moral aim. The real bone of contention, then, must be that natural lawyers believe that there are moral principles or ideals that are distinctive of governance by law whereas positivists demur.

Lon Fuller is the paradigmatic example of a natural lawyer who advances the view that there is a morality that is distinctive of legal governance: that is partially constitutive of it. He refers to this as the "internal morality of law": the morality that makes law possible.[29] It is defined by eight canons that include the requirements that the rules must be expressed in general terms, publicly promulgated, prospective in effect, understandable, consistent, capable of being complied with, and so on.[30] In Fuller's view, these canons express moral requirements and satisfying each of them (to some degree) is necessary to make law. The more fully the canons are satisfied, the better the substance of the law is likely to be. For Fuller, these canons represent a morality that is distinctive of legal governance and constitutive of the very idea of legality.

Fuller's view has been roundly criticized by positivists and anti-positivists alike. Critics have resisted Fuller's claims that the eight canons represent a moral ideal. Hart, for one, argues that the eight canons state norms of efficiency—that is, they are tools one should follow to make laws that are likely

29. LON L. FULLER, THE MORALITY OF LAW 33-94 (1964).

30. *Id.* at 39.

to work—not morality.[31] Effective laws can serve immoral—as well as moral—ends.

Fuller's critics are perhaps too quick to dismiss his claim that the eight canons constitute a morality of lawmaking. The fact that the canons express norms of efficiency does not mean that they do not also state requirements of fairness. Arguably, fairness, too, dictates that the coercive authority of the state can only be imposed on individuals for their failure to comply with norms that are, among other things, clearly expressed, capable of being complied with, and articulated in advance.

Even if Fuller is mistaken in thinking that the eight canons he identifies constitute the morality intrinsic to governance by law, the deeper question is whether his critics should be hostile to the idea that there is a morality or a normativity that is distinctive of governance by law. Fuller may or may not have been right in identifying the particular set of principles that are distinctive of legal governance, but he may well have been right in thinking that part of what is distinctive of law is a set of moral ideals, values, or norms partially constitutive of it.

Arguably, one of the ways in which law differs from other ways of regulating or impacting behavior—for example, pricing and sanctioning schemes—is that it reflects or embodies a range of moral ideals and principles. This is my view, for example.

I am inclined to think that part of what makes law the distinctive form of governance that it is—and therefore part of what distinguishes law from other schemes of regulating human affairs, including sanctioning and pricing systems—is that its normative structure reflects a distinctive form of address: a way in which those who make law address those governed by law and the way in which those who are governed by law regard one another. Following Stephen Darwall, I treat law as a system of accountability.[32]

Systems of accountability are characterized by a distinctive interrelated set of concepts—obligation, wrong, guilt, resentment, indignation, authority, and demand—and by modes of regarding one another as equals entitled to respect and concern. Being obligated to another confers on those to whom one is obligated a form of authority. In the first instance, it is an authority to demand compliance. In the event that compliance is not forthcoming, it is an authority

31. Hart, *supra* note 28, at 1285-87. Others may argue that those who, in making law, try but fail to comply with these canons need not be morally at fault for their failures; and if this is so, then the canons cannot express moral requirements.

32. *Cf.* Stephen Darwall, *Authority and Reasons: Exclusionary and Second-Personal*, 120 ETHICS 257, 257-61 (2010) (discussing accountability).

to demand an accounting, explanation, and, in many cases, redress or repair. The failure to measure up to one's obligations warrants in others indignation, and where appropriate, resentment. These are simply not features of pricing systems. One responds to a price and acts accordingly in a pricing system. One does not owe others an explanation for what one has done; nor is there a place for notions of redress, recourse, and restitution. Further, failures to respond to prices are not the source of appropriate reactive attitudes of indignation and resentment.

It is not unreasonable to suppose that part of what is distinctive of governance by law is that it embodies or expresses certain moral ideals, and that this is at bottom what distinguishes it from pricing and sanctioning systems. Whether such an argument can be successfully made is not our current concern, though it is clear that I am inclined to think that there is some such argument in the offing.

The existence of unjust laws and evil legal systems is perfectly compatible with law as a form of address that recognizes a person's capacity to respond to reasons and to act upon and for reasons, to respond to demands of compliance, and to redress in the light of the failure adequately to do so. I see no reason why positivism must hold otherwise, and if it must, then I see no reason to be a positivist.

There is an interesting symmetry in our discussion of the separability thesis understood as a claim about the coherence of immoral laws and as a claim about the existence conditions of legal systems. In the first case, our efforts were aimed at demonstrating that, contrary to conventional wisdom, there is no reason to suppose that natural law cannot allow for the coherence of immoral laws, and therefore no reason to suppose that it is incompatible with the narrow formulation of the separability thesis. In the latter case, we find ourselves in the opposite position, arguing that there is nothing in positivism that requires that it resist the possibility of moral constraints on the very possibility of governance by law.

The separability thesis is inadequate to distinguish legal positivism from natural law theory, either as a claim about laws or legal systems. The question that remains is whether it is nevertheless essential to legal positivism.

D. Is the Separability Thesis Essential to Legal Positivism?

Recall that the conventional wisdom consists of three claims. The first is that the separability thesis is essential to legal positivism. The second is that the separability thesis distinguishes legal positivism from natural law theory. The third is that the separability thesis distinguishes legal positivism from

natural law theory *because* it is both essential to legal positivism and incompatible with natural law theory.

The argument to this point shows that neither of the latter two claims is sustainable. Even if the separability thesis is inadequate to distinguish positivism from natural law theory, it may nevertheless be essential to legal positivism. Were it, the significance of its being so would be greatly reduced since part of the interest in its being essential to positivism is based on the importance that fact about it plays in distinguishing natural law from positivism. On the other hand, many take the separability thesis to be the defining characteristic of positivism, so this aspect of the conventional wisdom needs to be addressed as well.

Again, the conventional wisdom comes up short—at least insofar as it purports to represent wisdom. In the first place, I have just argued that legal positivism need not endorse the separability thesis as a claim about constraints on the possibility conditions of law. I argued that law involves a distinctive form of governance marked in part by its commitment to forms of 'address'. These forms of address are constitutive of modes of accountability, which, in turn, reflect certain ideals of equality and concern. To be sure, these ideals are more often than not imperfectly realized (at best) in actual legal systems, but they are constitutive nonetheless of the very idea of governance by law. They are, moreover, part of what distinguishes law from other modes of regulating human affairs, including, notably, pricing and sanctioning systems. If distinctive modes of moral address are a prerequisite of governance by law, then the separability thesis as a claim about the existence conditions of law or the possibility conditions of governance by law is mistaken—and there is no reason why a positivist should insist otherwise. If positivism about legal systems is compatible with rejecting the separability thesis, how can the separability thesis be essential to positivism? That is a rhetorical question.

But there is a much more powerful argument against associating legal positivim with the separability thesis that—at least to my knowledge—has gone unnoticed in the literature. Early on, we demonstrated that legal positivism is compatible with the separability thesis understood as drawing attention to the possibility of immoral laws. It is time to take notice that the arguments that demonstrate the compatibility of legal positivism and the separability thesis, in fact, leave open the possibility that legal positivism is also compatible with rejecting the separability thesis. If positivism could be both compatible and incompatible with the separability thesis, then the obvious conclusion is that legal positivism and the separability thesis have very little, if anything, to do with one another. And that would be a rather shocking conclusion.

In fact, legal positivism is perfectly as compatible with the falsity of the separability thesis as it is with its truth. How can that be?

Note first that legal positivism has been characterized in terms of either of two claims: (1) that an inquiry into the legality of a norm is one thing and that an inquiry into the moral worth of a norm is another; or (2) that the morality of a norm neither settles a norm's legality nor is it settled by it. Legal positivism may well endorse both of these claims (as may other jurisprudential outlooks), yet neither claim is adequate to guarantee immoral laws.

Suppose that there is a necessary constraint on legality, *C*, such that nothing could be law unless it satisfied *C*. *C* is *not* the constraint that 'nothing can be law unless it satisfies the demands of morality', but *C* is such that only moral norms satisfy or can satisfy it. In other words, any norm that satisfies *C* also has the property of being compatible or consistent with the relevant standards of morality.[33] In that case: (1) the inquiry into a norm's morality and into its legality would remain two distinct activities; yet, (2) no norm could count as law unless it satisfied the relevant requirements of morality. This means that, understood in the usual way, legal positivism is compatible with either endorsing or rejecting the separability thesis, and this is surely something of a surprise.

If legal positivism is compatible both with the separability thesis and its rejection, the separability thesis can hardly be an essential feature of positivism or otherwise definitional of it.

I have, thus, made good on all the claims with which the discussion began. For we have shown that the separability thesis is inadequate to distinguish legal positivism from natural law theory and that it is not essential to legal positivism. Much remains to be done, however. First, we must take up the second nugget of the conventional wisdom: namely, the view that substantive and methodological views in jurisprudence travel together. Second, we can ask, if the separability thesis fails to distinguish legal positivism from natural law theory, then what, if anything, does. Third, we can ask, once we have discarded the conventional wisdom, with what are we to replace it. The answer is a new architecture of jurisprudence.

33. We set aside the question of whether it is a necessary or contingent truth that any norm that satisfies *C* also satisfies the demands of morality.

III. THE METHODOLOGY OF JURISPRUDENCE

A substantive jurisprudence provides a (hopefully) unified set of solutions to fundamental problems that arise regarding law and legal practice. Though it is controversial which issues a jurisprudence must address, most commentators would agree the most basic issues concern the essential nature of law or our concept of it, the role law plays in our practical lives, and the relationship between the two. In contrast, a methodological jurisprudence is a view about the way in which these substantive issues should be approached—the methods apt for the inquiry at hand and the tools appropriate to those methods.

The conventional view is that substantive and methodological views in jurisprudence 'travel together'. Legal positivists about the nature of law are positivists (or descriptivists) about the methods and philosophical tools suitable to jurisprudence, and natural lawyers about law are 'normativists' about the methods appropriate to jurisprudential inquiry. Before we can assess the conventional wisdom we need to be much more precise about the differences between normative and descriptive or analytic methodologies in jurisprudence.

For expository purposes, let's suppose, along with Hart, that the main project of a substantive jurisprudence is to analyze or provide an account of the concept of law, and that to provide an account of the concept of law is to characterize what it is about law that makes it the thing that it is. Once we understand what it is that makes law the thing that it is, we would then be in a position to explain the ways in which it is both similar to—and different from—other mechanisms for regulating human affairs. And hopefully, we will have the resources to explain how it is that law plays the role it does in our practical lives. If this is not the entirety of jurisprudence or its main focus, it has been a large and important part of it, and thus provides a useful vehicle for distinguishing among different methodological approaches.

A. In What Sense Is Normative Jurisprudence Normative?

Unsurprisingly, there are a number of quite distinct ways in which a methodology can be said to be normative and so a good deal of clarification is in order.

Norms and criteria. In one sense, every philosophical theory of a concept,[34] whether otherwise normative or descriptive, has a normative dimension or ambition. After all, a philosophical account of a concept sets out criteria for its proper use. This is true of a theory of the concepts of liberty, justice, and law, but it is also true of the concepts of mind, truth, and knowledge. All theories of all concepts are thus necessarily normative in this limited sense, and if this is all one means by calling a theory of law normative, then all theories of law are normative. In that case, there is nothing of interest or importance in the distinction between normative and analytic or descriptive theories for the simple reason that all theories of concepts—including descriptive ones—are normative. There is no distinction worth making: no 'fight' worth having.

Norms and theory assessment. How do we choose among different theories of the nature of law or, for that matter, the nature of anything—liberty, law, justice, truth, knowledge, or mind? What are the criteria of theory assessment?

Criteria are norms and so there is a sense in which all theory assessment is normative. But criteria for assessing theories can be either theoretical or normative in a further sense. What is that further sense, and how does theory assessment that is normative differ from descriptive or analytic norms of theory assessment? We can illustrate the distinctions I have in mind if we focus for a moment on the concept of liberty.

On one conception of it, liberty is understood in terms of a capacity to impose a distinctive form of constraint, namely, self-regulation; on another, it is associated with the absence of constraint altogether; while on a third it is associated with the absence of a particular kind of constraint, namely, political coercion; yet, on still another, it is associated with the special place of agency in our lives; and so on. How would we choose among these (and other possible conceptions) as the correct or best account of the nature of liberty?

Descriptive or analytic criteria focus on theoretical grounds for assessing theories. These include a theory's predictive and explanatory prowess; its consilience, elegance, and simplicity; and especially its intuitive plausibility or relative invulnerability to hypothetical counterexamples—what Wayne Sumner calls "descriptive adequacy."[35]

Arguably, the way we think about certain fundamental ideas has an impact on how our lives go—individually and collectively. Ideas matter in the sense of

34. My emphasis is on philosophical theories of concepts, for we can imagine a certain kind of sociological theory of a concept whose ambition is merely to describe existing use, or differences among existing usages in different cultures. My claim that all theories are normative in this sense is confined to philosophical theories.

35. L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 10-20 (1996).

having practical consequences. To say that theories can be assessed normatively might be to say that they should be chosen by their political or practical consequences. The best theory of liberty is the one that has the best practical consequences: that is, the one that makes or is likely to make the biggest improvement in individuals' lives.

Concepts need not have practical consequences in order for the criteria of correctness for them to be normative. Instead, theories of concepts can be assessed by their fit within sound political arguments or theories. In this sense, the best theory of liberty falls out of the best political theory of the place of liberty in political, social, and economic life.

Norms and theory construction. We can distinguish the view that theory assessment must be normative from a related but nevertheless distinct view that *theory construction* must be normative. There is a familiar view in philosophy that an analysis of a concept should not beg any normative questions.[36] So, for example, an account of the nature of 'valuable', 'desirable', or 'blameworthy' should not exclude or beg the question against any plausible substantive view about what is valuable, desirable, or blameworthy. In the case of liberty, an account of the nature of liberty should leave open questions about whether liberty is valuable and, if so, why.

Others worry that to characterize liberty in a way that is removed from its place in the normative landscape cannot help but render our understanding of the nature of liberty fundamentally flawed or incomplete. Surely liberty is something of value and in order to determine the nature of liberty we must

36. It is common in philosophy to refer to the project of providing an analysis of a normative concept as metaethics. So to give an account of the nature of a normative predicate like 'good' or 'desirable' is not to determine which things are good or desirable. Thus, the view on which to say that something is 'desirable' or 'valuable' is to say no more than that 'there are reasons to desire or to value it' is a view that offers at least a partial account of those predicates. It is not to determine which things in the world are desirable or valuable. A theory whose aim is to provide criteria for determining which things, if any, are desirable or valuable is a normative, not a metaethical, theory.

Someone pressing the view that theories of concepts must be assessed by their normative consequences is implicitly asserting a view about the distinction between metaethics and normative ethics. For some, the claim is that the distinction is less precise or clear-cut than one might think, that normative considerations cannot help but to infuse metaethical issues, or that the boundary between the two is less firm than it appears. For others, the claim is much stronger—that there are no genuinely metaethical questions; ultimately every claim in ethics is ultimately a claim in normative ethics or substantially so. For a useful discussion of this issue, see Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996); and Simon Blackburn, Symposium, *Blackburn Reviews Dworkin*, BROWN ELEC. ARTICLE REVIEW SERV. (Nov. 11, 1996), http://www.brown.edu/Departments/Philosophy/bears/9611blac.html (reviewing Dworkin, *supra*).

begin with a working hypothesis of why having liberty is valuable to those who have it and why those who lack political and personal liberty are disadvantaged or wronged as a result.

If one accepts that the value of liberty partly makes liberty the thing that it is, then, in order to analyze what liberty is, one needs to identify the value that it has. It is one thing to say that liberty is valuable and another to identify what its value is. One kind of theorist might ascribe the Kantian values of self-regulation to liberty and then provide an account of what liberty is that picks out or privileges certain features of liberty in the light of the significance of liberty for self-regulation. A utilitarian might ascribe to liberty various values associated with maximizing human welfare and then illuminate the nature of liberty by picking out or emphasizing those features of it that are especially significant for liberty to contribute to maximizing human well-being.

Only with this value in place can we proceed to identify what is central to liberty or of what it consists. The account of liberty explains why it has the value that the theory assigns to it and, thus, cannot proceed other than by ascribing a substantive yet contestable value to it. The differences between conflicting theories of the nature of liberty can thus often be traced to the fact that theorists ascribe different values to having liberty or weigh the same or similar values differently.[37]

We can distinguish between narrower and broader forms of normativism about theory construction. Narrower versions restrict themselves to the claim that one must ascribe a value only to normative predicates or concepts in order to understand their nature or to uncover the content of the concepts that refer to them. Broader versions hold that the set of interpretive concepts extends beyond the set of normative predicates and that in principle most, if not all, philosophically interesting concepts call for normative theory construction.

Given this formulation of normativism in theory construction, how would we best characterize analytic or descriptivist alternatives? One form of descriptivism is simply unmoved by this alleged normativist insight and insists that normative concepts like liberty and law are no different from other philosophically interesting concepts such as belief, knowledge, mind, and truth. One does not have to ascribe a value to belief, knowledge, mind, and truth to analyze them, and the same is true of normative predicates.

To support his claim, the descriptivist may call attention to familiar debates in the metaethics of normative predicates that have little, if anything, to do with fundamental normative matters, and whose resolution does not depend in

37. Dworkin refers to concepts in which the ascription of value is essential to their analysis as "interpretive concepts." *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 8, at 49.

any obvious way on matters of first-order morality—that is, on matters of value, goodness, rightness, or the like. Here is an example of what he has in mind.

There is a familiar and important dispute among metaethicists whether something's being valuable or desirable is a fact about it that can be a ground or reason for valuing or desiring it. Some hold that it can be.[38] Others disagree. They hold what is nowadays called a 'buck-passer' view according to which to say that something is valuable or desirable is just to say that there are grounds for valuing or desiring it; it is to assert the existence of grounds or reasons, not to provide one.[39] Something is desirable if and only if there are good reasons for desiring it; something is valuable if and only if there are good grounds for valuing it; and so on.[40]

There is little reason to suppose that in order to resolve this dispute (or many others) in the metaethics of normative predicates one needs first to determine which things in the world are valuable and why. There is no pressure to ascribe a value to the valuable or to the desirable in order to work out accounts of these concepts. Surely, metaethics is possible. There is no reason to suppose that analytic or descriptive accounts of normative predicates in general are impossible and no reason to suppose therefore that they are unavailable for 'law' and 'liberty'.

In a way, this descriptivist is entirely unmoved by the difference between normative and other predicates. He sees no reason to abandon traditional metaethics in favor of the view that 'it is all normative or first-order ethics' all the way down. I do not mean to dispute this formulation of descriptivism, but it is not the only one that is available. It is possible to give the normativist more credit than this descriptivist does. For the normativist is surely right that liberty, for example, is something of value and to miss this fact about it is to distort the nature of liberty. The question is how to capture this feature of liberty—its value—in constructing an account of what liberty is.

38. *See, e.g.*, T.M. SCANLON, WHAT WE OWE TO EACH OTHER 97 (1998) (attributing this view to G.E. Moore); Pekka Väyrynen, *Resisting the Buck-Passing Account of Value*, *in* 1 OXFORD STUDIES IN METAETHICS 295-324 (Russ Shafer-Landa ed., 2006), *available at* http://www.personal.leeds.ac.uk/~phlpv/papers/buck.pdf; Wlodek Rabinowicz & Toni Rønnow-Rasmussen, *The Strike of the Demon: On Fitting Pro-Attitudes and Value*, 114 ETHICS 391 (2004).

39. *See, e.g.*, FRANZ BRENTANO, THE ORIGIN OF OUR KNOWLEDGE OF RIGHT AND WRONG 18-19 (Roderick M. Chisholm ed., Roderick M. Chisholm & Elizabeth H. Schneewind trans., Routledge & Kegan Paul 1969) (1889); SCANLON, *supra* note 38, at 97; Richard Brandt, *Moral Valuation*, 56 ETHICS 106, 113 (1946).

40. *See* SCANLON, *supra* note 38, at 96-98 (1998).

We begin by assuming that any theory of the concept of liberty must be responsive to liberty being something of value: those who have it possess something valuable and desirable; and those who have less, little, or none of it are missing something valuable or desirable. The normative methodologist believes that the way to represent this fact about liberty is to ascribe a contestable conception of its value as the first step in constructing an account of it.

This is not the only way to accommodate in theory construction the fact that liberty is valuable. As a descriptivist, I think there is a better way of responding to this fact about liberty. The better approach is to accommodate the fact that liberty is valuable by imposing an *adequacy condition* on a theory of the nature of liberty to the effect that in order to be adequate or persuasive, an account of the nature of liberty must have the resources to explain what is valuable about liberty. Just as consilience, predictive efficiency, explanatory power, and resistance to counterexamples are criteria for assessing accounts of liberty, so, too, is explaining its value. One might even argue that this desideratum of a theory of liberty is simply a consequence of the others—especially, perhaps, consilience and immunity to counterexamples.

To get a better idea of how this line of argument goes, recall Hart's powerful objection to Austin's theory of law.[41] Austin characterized law as the command of a sovereign properly so called backed by a threat of sanction.[42] Thus, the conceptual resources available in Austin's account include commands, threats, habits of obedience, and sovereigns, some of which—like the concept of the sovereign—are defined in terms of the others. Hart objected on the grounds that the concept of obligation is central to law and that the resources available in Austin's jurisprudence provide inadequate resources to draw the distinction law makes between being *obliged* to comply with a directive and being *obligated* to do so. At gunpoint, one can be *obliged* to do all manner of things one is under no obligation to do; indeed, one may be obliged to do things one is obligated *not* to do. This is the upshot of Hart's notorious 'gunman example'.[43]

In effect, I am making the same kind of argument about liberty that Hart makes about law. Among the phenomena that a theory of law must explain is the difference between being obligated (by law) and being obliged. The resources available in Austin's account are not up to that task and thus his

41. HART, *supra* note 7, at 18-25.

42. AUSTIN, *supra* note 6, at 13-33.

43. *See* HART, *supra* note 7, at 6-7 (arguing that treating laws as commands backed by threats collapses the distinction between being obligated and being obliged).

theory of law is unpersuasive. Among the phenomena that a theory of liberty must explain is its value or significance. A theory does not have to proceed as the normativist would have by assuming a particular contestable conception of its value. Quite the contrary, in fact, the theorist must confront the fact that whatever theory he offers, it must have the resources adequate to explain why liberty is valuable. Arguably, it is a comparative advantage of this form of descriptivism that the better accounts of liberty will be those that can explain why having liberty is valuable within a wide range of quite distinct political or moral theories, from liberalism to libertarianism to utilitarianism—all of which value liberty but do so for different reasons. In contrast, those who adopt the normative approach to theorizing about liberty begin by ascribing a *particular* contestable value to liberty, and then provide an account of liberty that is fit to *that* value—and not to the many different ways in which liberty is valuable according to different political theories.

We have now distinguished among three ways in which a normative jurisprudence could be normative: criteria of usage, assessment, and construction. The next step is to determine which notion of normative methodology is being presupposed by the conventional wisdom. All theories are normative in the first sense—as setting out criteria—and so this is not the sense of normative that can be at stake in the conventional wisdom. This leaves us with two options: the normativity that may or may not be suitable to theory assessment or the normativity that may or may not be involved in theory construction. The claim that theories should be assessed by normative criteria holds that the test of correctness for theories of the concept of law is 'normative', and that by normative, one could mean either 'best political consequences' or 'best political argument'.

In either case, the conventional wisdom that substantive and methodological theories 'travel together' would be ill-fated and could not withstand even cursory analysis. That is because many contemporary legal positivists defend positivism as the correct theory of law on straightforwardly *normative* grounds. And many defending versions of substantive natural law do so employing the traditional methods of analytic philosophy. Tom Campbell, Jeremy Waldron, and Gerald Postema fall into the first category;[44] Michael Moore, Nicos Stavropoulos, and Mark Greenberg fall into the second.[45]

44. *See* TOM CAMPBELL, PRESCRIPTIVE LEGAL POSITIVISM: LAW, RIGHTS AND DEMOCRACY (2004); GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 302-336 (1986); JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

45. NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996); Greenberg, *How Facts Make Law*, *supra* note 8; Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 LAW &

If there is a viable claim to be recovered from this piece of the conventional wisdom, it is that those defending substantive positivism adopt a descriptive or analytic methodology of theory *construction*, whereas those who defend a natural law substantive jurisprudence adopt the view that an account of law must proceed through substantive political theory. This is the only plausible claim that those who endorse the conventional wisdom could have in mind.

Is it accurate?

B. Do Substantive and Methodological Jurisprudential Views 'Travel Together'?

When it comes to substantive jurisprudence, Hart famously held the narrow formulation of the separability thesis and insisted on the distinction between inquiry into the validity of a norm and the norm's moral worth. And when it came to methodological matters, in the preface to *The Concept of Law*, Hart famously referred to his method as "descriptive sociology."[46] For Hart, to determine the nature of law one must inquire into its usage—the linguistic practices in which it figures. The analysis of the concept of law proceeds independently of and prior to the normative project of determining the distinctive value (if any) of governance by law. Thus, Hart is both a substantive positivist and a methodological descriptivist.

For Ronald Dworkin, the project of substantive jurisprudence is to settle on the grounds of law, the facts that are the truth makers for propositions of law. These necessarily include normative facts: facts about the distinctive value of law that purport to justify the use of coercion. When it comes to methodology, Dworkin holds that law is an interpretive concept and that one can understand its nature only in the light of the value one assigns to it. Thus, Dworkin is both a substantive and a methodological normativist. As for the conventional wisdom, then, so far so good. Unfortunately, the good news ends here.

There are many important issues that political theory addresses, few if any more pressing than the justification of coercion—the use of collective force in the name of all against some. A natural view is that political coercion is justified if and only if justice requires it. Though initially plausible, this answer simply will not do, for there are many valid claims of personal or private justice that are not the business of the state, while the state's power may be legitimately deployed for reasons other than justice

PHIL. 619 (2002); Stephen R. Perry, *Hart's Methodological Positivism*, *in* HART'S POSTSCRIPT 311 (Jules Coleman ed., 2001).

46. HART, *supra* note 7, at vi.

Dworkin's view is that a necessary feature of law is that it purports to answer the question what, if anything, justifies political coercion. From the law's point of view, the collective use of force is justified 'when the law calls for it'. This is both a way of expressing and of exploiting a view about law's possible connection to political coercion.

If law is connected to political morality in the sense of purporting to express the conditions under which political coercion is justified, law must be the sort of thing that in principle could justify coercion. This means that there must be some value associated with governance by law that could serve (in principle) to justify coercion. An analysis of the nature of law then proceeds first by ascribing a value to law presumably adequate or at least of the right sort to justify coercion. With that value in place, various features of law and their relationship to one another are explained by reference to it. The value helps to identify the features that are central to law, while weeding out less important ones. These features, once woven together, help explain the fact that law has the value that it does. The value ascribed to law is itself presumably adequate to justify the collective use of force. Different jurisprudential outlooks ascribe different, even conflicting values to law and thus identify somewhat different features of law as central to it.

The reader familiar with Dworkin's methodology will recognize that this is the core of his interpretive method.[47] While it should surprise no one that Dworkin adopts a normative methodology of jurisprudence, it surely will surprise many to learn that the leading contemporary legal positivist Joseph Raz also adopts a normative methodology of jurisprudence. Whereas for Dworkin the key legal relationship is coercion, for Raz, it is *authority*. According to Raz, law necessarily claims to be a legitimate authority.[48] Raz does not require that law's claim to authority be true, let alone that it be necessarily true. In fact, Raz believes that the state lacks authority over some

47. *See* DWORKIN, LAW'S EMPIRE, *supra* note 8. It is worth noting that the standard understanding of that method in which 'fit' and 'value' are taken to be not only distinct standards an interpretation must satisfy, but independent standards as well, is mistaken. For the features of law that must fit together are, in fact, partially determined by the value ascribed to law, and so, fit and value are not wholly independent. And it is certainly not true that first one applies the criterion of fit and then the criterion of value. Quite the opposite is the case. In any event, given our current purposes, the important point is that an inquiry into the nature of law proceeds through substantive political theory in the form of an account of the conditions that justify political coercion.

48. RAZ, *supra* note 17, at 28-33.

subjects.[49] Raz's point is that even if the claim is often false, it cannot be necessarily false—that is, it must be the sort of claim that could be true.[50]

If the claim to legitimate authority could be true of law—whether or not it actually is in a given case—then law must be the sort of thing of which the claim to legitimate authority could be true. Thus, the nature of law is constrained by the account of the conditions of legitimate authority; for whatever law is, it must be the sort of thing that could be a legitimate authority, whatever consists in being a legitimate authority. For Raz, the nature of law must be approached through first-order political philosophy—the theory of legitimate authority.

For both Dworkin and Raz, one must approach the nature of law by addressing a problem in first-order political philosophy: the justification of coercion in Dworkin's case, the conditions of legitimate authority in Raz's.[51] For our purposes, the important point is that Dworkin, the natural lawyer, and Raz, the substantive positivist, are both normativists when it comes to the methodology suitable for jurisprudence. Both hold that one can determine the nature of law only by first addressing a fundamental problem in first-order political philosophy. The nature or essence of law is accessible only by understanding law's relationship to fundamental issues of substantive political morality. Consequently, Raz, the substantive positivist, is a methodological normativist.

Thus, the nugget of conventional wisdom that substantive and methodological positivism travel with one another cannot be sustained. If the separability thesis does little more than distract us from the core issues of jurisprudence, shifting focus to the methodological dispute between descriptivists and normativists does even less to illuminate the important differences among jurisprudential views, and less still the fundamental problems of jurisprudence.

If I am right, then both nuggets of the conventional wisdom must be set aside. Freed from the grasp of the conventional wisdom, I want first to get clear the truth about the relationship between legal positivism and the separability thesis. The conventional wisdom is not only mistaken, but to an extent it actually has the relationship backwards. The most familiar and persuasive forms of positivism actually presuppose that law and morality are

49. JOSEPH RAZ, THE MORALITY OF FREEDOM 76-80 (1986).

50. Joseph Raz, *Authority, Law and Morality*, 68 MONIST 295, 301 (1985).

51. Coercion can be justified in the absence of authority. And authority (in my view) is essential to law in a way in which coercion (for all its importance) is not. These are points that to his credit Raz has long emphasized and exploited.

necessarily connected. That's right: they are based on rejecting the separability thesis, not on endorsing it. If discarding the conventional wisdom means that progress is to be made, let's start by making some.

IV. THE TRUTH ABOUT POSITIVISM AND THE SEPARABILITY THESIS

Let's start with a simple idea. Assume for a moment that legal statements are assertions—rather than, say, commands, orders, or expressions of attitudes. Assertions are distinguishable from commands since they can be either true or false. If I order you to close the door, the sentence, 'I ordered you to close the door' asserts something that can either be true or false (true if I did so order, false if I did not), whereas the sentence 'Close the door!' is not capable of being true or false. It is a command, not an assertion. For the purposes of the following discussion, we assume that legal sentences are assertions: they assert that one is prohibited from doing *X*; is authorized to do *Y*; or has the power to do *Z*; and so on.

Because legal sentences are assertions, they can be either true or false. They assert the existence of facts that, if they obtain, would make the assertions true. Legal sentences are true if true to the facts and false otherwise. But which facts make legal sentences true? The answer is the obvious one: the relevant legal facts. Legal facts are the truth makers of legal sentences. In some sense, this answer is surprisingly illuminating. If it is a fact in a particular jurisdiction, *J*, that individuals under the law possess the power to *Z*, then the sentence 'In *J* individuals are free under the law to *Z*' is true.

Legal facts are not basic facts, which is to say that they are facts that obtain in virtue of other facts obtaining. The idea is simple enough. Let's suppose that it is a fact in our imaginary jurisdiction, *J*, that individuals have the power and discretion to *Z*. They are neither required to *Z* nor does the law prohibit them from doing so. We might ask, what makes it a fact that in *J* people have the power to *Z* if they want to? Is it because it would be good for people to have that power? Is it because most people believe they have that power? Is it because a legislature gave them that power? Is it because people want to have that power? Is it because a court said they have that power? And so on. It is some or all of these other facts that create the relevant legal facts.

In philosophy, we typically express this idea in terms of the notion of supervenience.[52] Legal facts supervene on other facts. The facts on which legal

52. There are many definitions of supervenience. Supervenience is a 'dependence relationship'. *A* supervenes upon *B* implies that *A* depends on *B*. Supervenience is a distinctive kind of

facts supervene make legal facts the facts that they are. The most fundamental question in the metaphysics of law is: What kinds of facts can contribute to legal content—to the law having the content that it does? What are the facts on which legal facts supervene? A related question is: How do these facts come together to give law the content that it has? In this Article, our focus will be limited to the first of these questions.

Let's begin by distinguishing between two different views about the kinds of facts that can contribute to legal content—to the law having the content that it has. Let's use the examples already at our disposal. We are imagining that in jurisdiction *J*, it is a crime to *X* and also that everyone is free to *Z*. Now we ask ourselves: How are those the facts about the law in *J*? Is it the case that it is a crime to *X* because *X*-ing is a particularly bad thing to do? Or is it the case that it is a crime to *X* in *J* because the legislature acted in a particular way, i.e., passed a rule prohibiting *X*-ing or making it a crime to *X*? Similar remarks are in order regarding the power to *Z*. Is it the case in *J* that individuals have the power to *Z* in virtue of it being desirable, efficient, or wonderful that individuals be allowed to *Z*, or is it the case that persons are free to *Z* in *J* because a court recognized such a privilege or liberty or because a legislature conferred it?

On one view, the content of the law—what it requires, permits, or authorizes those to whom it is addressed to do—is fixed by facts about behavior and attitude: what individuals say and do and the attitudes (including intentions and beliefs) they and others have or take in response to or as part of those sayings and doings. This is the view that if it is a crime to *X* in *J* or if

dependence relationship that for our purposes we will characterize as: *A* supervenes upon *B* if and only if there can be no change in *A* without a corresponding change in *B*.

In *How Facts Make Law*, Mark Greenberg presents a serious and strong challenge to the idea that the relationship between legal facts and other facts is supervenience. Greenberg, *How Facts Make Law*, *supra* note 8, at 168. He distinguishes among a number of different ways of making sense of what we might think of as the metaphysical 'in virtue of' relationship. *See also* Greenberg, *Standard Picture*, *supra* note 8. The best paper I know of on this topic more generally is Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, *in* MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109 (Bob Hale & Aviv Hoffmann eds., 2010). This topic is extremely difficult and filled with serious controversies that I could not hope to take up and do justice to in this Article—without taking us very far afield and losing not just the target audience, but nearly everyone else but a handful of readers. Because I am making no substantive claim about the actual contributors to legal content—my claims are all, to coin a phrase, 'architectural'—I set these problems aside until the second essay in this series and proceed here putting the fundamental metaphysical relationship between basic and derivative facts in terms of supervenience. I am reasonably confident that nothing I say in this Article hinges on this expository decision, but I am quite sure that much of what I argue in the second essay does. Thus, I postpone discussion of these issues until I can give them the attention they deserve.

individuals have the power to *Z* in *J* it is because certain individuals (e.g., legislatures and courts) acted in a particular way. To be sure, a judge or legislator may have been moved to act in the requisite way—cast one's vote for the enactment of a statute for example—having been moved by the fact that *X*-ing is bad or that it would be good for individuals to have a power to *Z*. Still, it is the action that makes it the law, not the morality of *X*-ing and *Z*-ing. *X* may be a bad thing to do and *Z* a good option for persons to have, but unless and until legislatures or courts act, it is neither against the law to *X* nor a power under the law to *Z*. This is what it means to say that, on one view, legal facts supervene on social facts: facts about behavior, attitudes and beliefs. It is controversial whose behavior and attitudes count, but there is no reason for us to reach that question at this stage of the argument.

On another view, what the law requires of those to whom it is directed depends on what is *right*, *good*, *just*, *fair*, or *valuable* in addition to what individuals feel, say, and do.[53] We can distinguish between two versions of this view. According to the first, the law supervenes on normative facts alone. So in this view, if we wanted to know whether or not it is the law in *J* that it is a crime to *X*, we need only determine whether *X*-ing is wrong or otherwise undesirable or unsavory. The more familiar and promising version of the view at hand is that normative facts as well as social facts contribute to the law having the content that it does. On this view, it is not enough that *X*-ing is bad or *Z*-ing desirable to make the former criminal and the latter legally optional. In addition, the legislature or the courts must act. On the other hand, their acting is not enough to make it law either. The moral worth of the directives they issue bear on what the legal facts of the matter are.

We can say that on the first view, only social facts—facts about behavior and attitude—contribute to legal content; whereas in the second view, normative facts—including especially, moral facts—contribute to law having the content that it does.

We may put these distinctions more precisely:

(1) Only social facts can determine the content of law. Law has the content

53. Thus the view that what the U.S. Constitution requires or permits is determined not only by what the Framers said and did and what judges and Justices since the Founding have said and done, but also by how it is received within the community as a whole—what Robert Post calls the "constitutional culture"—falls into the first category. *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). A view that holds that what the law requires depends on what individuals *believe* is just or fair to demand of one another is also a view of the first sort. The view that the content of the law depends on what is in fact just or fair, right or wrong, etc., represents a view of the second sort.

that it does *in virtue of facts about individual (or group) behavior and attitudes: that is, in virtue of social facts*.

If only social facts can contribute to determining what the law requires of those to whom it is directed or what it authorizes or permits them to do, then moral or evaluative facts—facts about what ought to be done, what would be good to do or valuable (and the like)—cannot. This feature of (1) makes for a natural contrast with:

(2) Only normative (evaluative or moral) facts contribute to the content of law. Legal facts are the facts that they are—i.e., have the content that they do—in virtue only of certain moral or evaluative facts obtaining. What the law is—what it requires, permits, or authorizes—depends entirely on what is good, desirable, valuable, or ought morally to be done.

(1) and (2) do not exhaust the possibilities. Thus:

(3) Both normative and social facts contribute to legal content. According to this view, what the law is—how it is that it has the content that it does—can depend on either or both social as well as normative facts.

In *Negative and Positive Positivism*,[54] I defended (3) as consistent with the core ideals of legal positivism. I argued there that positivism is compatible with incorporating moral facts into law provided those facts are incorporated in a way that is consistent with positivism. The question is: What does 'incorporation consistent with positivism' mean? In that paper, I exploited Hart's idea of a rule of recognition. The rule of recognition is a social rule. A social rule is the conjunction of shared behavior and a shared attitude towards that behavior. The latter is Hart's notion of the internal point of view. So a social rule is constituted by social facts: facts about behavior and attitudes towards that behavior. Thus, I argued if the rule of recognition incorporates morality, its doing so is compatible with legal positivism because it is compatible with the idea that the foundation of all law is social facts or social practices. Law ultimately depends on what people do and say and the attitudes they have, and not on what is just, fair, good, right, or wrong.

So for now if we treat (1) as characterizing exclusive legal positivism, (2) as natural law theory, and (3) as inclusive legal positivism, we can uncover the truth about the relationship between positivism and the separability thesis.[55] And a surprising truth it is.

54. Coleman, *supra* note 2.

55. We will have occasion below to reconsider these characterizations and to make significant changes. The argument below is not impacted by whatever modifications in characterizing these notions we ultimately come to.

A. Judges Are People Too

Joseph Raz recently has offered an objection to the view that the law can incorporate morality and, thus, to the view that normative or moral facts can contribute to legal content. This objection is based on the obvious and uncontroversial fact that judges are people too.[56] In a nutshell, the argument goes something like this:

Judges are people, and people generally have the capacity for agency. To have the capacity for agency is to be responsive to reasons. Rational agency requires that one respond to the reasons that apply to him. The issue each agent faces is what to do—what action to undertake. The answer depends on the balance of reasons that apply to the agent at that time. This is true whether one is a judge or an ordinary citizen. It is the nature of morality that its reasons always apply to agents. That is, it is always the case that what one ought to do depends in part (or in whole, depending on one's view of normativity) on what morality calls for. Moral considerations may be silent in a particular case or leave one free to pursue an option of one's own choosing, but they always bear on the question of what is to be done.

If morality always applies to agents, then it is a confusion to think—as inclusive legal positivism does—that it is within law's power to make moral reasons apply to officials. In other words, if inclusive legal positivism were correct, then, short of the law incorporating morality, moral considerations would not bear on what a judge ought to do. But this cannot be right since moral considerations always bear on what one ought to do, whether one is a judge or an ordinary citizen to whom the law is directed. The problem with inclusive legal positivism is that it attributes to law a power that law simply could not possess. Morality's role in determining what a judge ought to do cannot depend on what the law has to say about it.[57]

56. Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1, 2 (2004).

57. In conversation, Alex Sarch has suggested a possible response to the Razian argument that I will not pursue in this paper, but that needs to be addressed more fully at some point. His argument is this:

> Against inclusive legal positivism (ILP), Raz in effect argues that: (1) If ILP is true, then in the absence of a practice among officials of 'incorporating' morality into law, moral considerations would not apply to them (i.e., would not constrain judges' legal decisions). (2) But moral considerations *do* apply to judges (since "judges are people too"). (3) Therefore, ILP is not true.
>
> Sarch suggests that a proponent of ILP might respond to this argument by rejecting premise (1). Perhaps he could say that even if there were no practice of incorporation, morality would still apply to judges, except that the (moral) reasons he would have to decide this way or that would be different, i.e., different from they would be had a practice of

B. Morality and Law's Place

Because morality applies regardless of the content of the law, it cannot be up to law to determine the nature and scope of morality's application to actions governed by law. If anything, rather than law incorporating morality, as the inclusive legal positivist would have it, morality 'incorporates' law. Whereas law lacks the power to incorporate morality, morality and only morality has the power to 'incorporate' law.

What does it mean to say that morality and only morality has the power to incorporate law? We can suppose that there are any number of different considerations that can bear on what one has reason to do—what one ought to do all things considered. Law, etiquette, self-interest, autonomy, and more can bear on what we have reason to do. So, too, can prices: if I have reason to feed my family as best as possible within my budget, then if the price of a luxury item increases, I have reason to buy less of it, other things being equal. A change in prices impacts what I have reason to do.

The question is whether and in what way law and other considerations bear on what we have moral reason to do. If we must always do what morality requires us to do, then the only time we would be permitted to act on the basis of considerations that appear to be 'non-moral' is when morality itself counsels us to do so. It follows that one should act on the basis of *the law's reasons* only when morality counsels that one do so.

Of course, this immediately raises the question of when morality so counsels. The answer is that acting on the basis of law's directives is required by morality only when doing so 'serves' morality—that is, makes it more likely that one will conform to the requirements of morality than one otherwise would. Law serves morality insofar as it creates new moral reasons for acting, identifies the action called for by the balance of reasons, or makes concrete, in a given set of circumstances, what morality requires. To the extent that law serves morality, morality provides a place for law. Morality defines the place of law within rational agency and for action based on law's demands. This is the sense in which morality incorporates law, and not, as inclusive legal positivism would have it, the other way around.

incorporation existed. Regardless of whether there is a practice of incorporation or not, morality would still direct judges to *do their duty*, i.e., to vigilantly and indifferently apply the law as given. The only difference is that without a practice of incorporation, the law to be applied would not contain moral tests, while *with* such a practice, the law to be applied would contain such tests. Thus, whether or not there is a practice of incorporation, morality would still "apply" to judges; i.e., it would direct them to do their duty and apply the law as given. It is just that the content of the law to be applied would be different depending on whether a practice of incorporation exists.

C. From Law to Positivism About Law

Working from the simple premise that judges are people too, we have been able to put in place two important and related ideas: the first is that it is not up to law to incorporate morality; the second is that the place of law is determined by morality. To this pool of resources we should add a proper formulation of Raz's claim about authority. In *Authority and Justification*, Raz provides a familiar formulation of the 'normal justification thesis'. He writes:

> [T]he normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[58]

With these elements in place, we can derive exclusive legal positivism as a conclusion of a valid argument employing the idea that law serves morality, the claim that law is a legitimate authority, and Raz's particular theory of authority.

(1) One should always act on the balance of reasons, which is to say that one ought to do what morality calls for (or permits).

(2) If one should always act as morality directs or permits, could one ever be justified in acting on something other than one's own assessment of the reasons that apply to oneself?

(3) Yes, one would be justified in doing so provided that morality counsels it.

(4) When would morality so counsel?

(5) Morality counsels one to act on the law's directives instead of acting on one's own assessment of the moral reasons that apply to oneself when doing so would actually make it more likely that one will fully comply with morality's demands.

(6) From the law's point of view, legal reasons always satisfy the requirement set out in (5). In other words, law claims that (in the areas where law applies) one will more fully comply with the balance of reasons by acting on law's directives than one will do by acting on one's own assessment of the balance of reasons.

58. Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3, 18-19 (1985) (emphasis omitted).

(7) (6) expresses law's claim to being a legitimate authority.

(8) Law *necessarily* claims to be a legitimate authority.

(9) The claim to being a legitimate authority may be false, but it *cannot* be necessarily false.

(10) If the claim to being a legitimate authority cannot be necessarily false, then it could be true (even if it is not—indeed even if it never is).

(11) Therefore law must be the sort of thing of which the claim to being a legitimate authority could be true.

(12) What would make the law's claim to being a legitimate authority true?

(13) The claim would be true if and only if one were in fact likely to do better complying with the balance of reasons by acting on law's directives than one would do by acting on one's own assessment of what the balance of reasons calls for.

(14) Whether the law can satisfy the condition in (13) depends on whether it is capable of functioning in the way authorities in general do.

(15) The essential feature of an authority is that it substitutes its judgment about what one ought to do for the assessment of those over whom it purports to exercise or claim authority.

(16) If one must appeal directly to the reasons that apply to oneself in order to determine what the law's directives are or what they call upon oneself to do, then in doing so one vitiates law's claim to authority.

(17) Why? Because if one must appeal directly to the reasons that apply to oneself in order to determine the nature or content of an authoritative directive or judgment, then determining its content would require one to engage in precisely the assessment of the balance of reasons that one must be turning over to the authority.

(18) Thus, the identity and content of law cannot be determined by appeal to reasons (that is, moral facts) and must instead be determined by social facts alone. This is the 'sources thesis', which is the core claim of exclusive legal positivism.

Neither the validity nor the soundness of the argument is our immediate concern.[59] For what is important for our current purposes is the nature and

59. For doubts about both its validity and soundness, see, for example, JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001). For doubts about its soundness, see, for example, Darwall, *supra* note 32; Scott Hershovitz, *The Role of Authority*, PHILOSOPHER'S IMPRINT, Mar. 2011, at 1; and Scott Hershovitz, *The Authority of Law*, *in* ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW (Andrei Marmor ed., forthcoming 2011).

structure of the argument for exclusive legal positivism, including especially the key premises from which it is thought to follow.

The first thing to note is that exclusive legal positivism is not a premise offered as part of an interpretation of legal practice. Instead, it is the conclusion of an argument whose central premises include a claim about the nature of law: namely, that law claims to be a legitimate authority.

The second (and for our purposes, even more important) thing to note about the argument is that exclusive legal positivism is the conclusion of an argument that relies on the premise that *law and morality are necessarily connected* in a distinctive way. Here, the idea is that the place of law is in general determined by morality, and that specifically its place is to serve morality. *Necessarily, law is an instrument in the service of morality*.

The third thing to note is that law serves morality through the mechanism of authoritative directives. Essential to law is its claim to being a legitimate authority—that is, its claim in fact to serve morality.

The fourth thing to note is that the argument requires that the claim to authority must be capable of being true even if, in fact, it turns out to be false.

The final thing I want to draw the reader's attention to is the fact that the substantive theory of authority—that is, the account of the conditions under which the claim to authority is true—ties the elements of the argument together and drives the inference to the sources thesis as the conclusion of the argument. Equally important, the conception of authority is itself normative and is defended on normative grounds.[60]

Taken together, these considerations reveal that the argument from authority is itself nested in a much deeper set of considerations that bear on law's place, and in particular, on the relationship between morality and law's place. For at the heart of the argument is the claim that law necessarily serves morality. And this means that the core premise in the defense of legal positivism is the idea that law and morality are necessarily connected.

Ironically, commentators (quite correctly) associate exclusive legal positivism with the view that moral considerations cannot bear on determining the identity or content of law: that, as regards these issues, morality and law must be separated. Yet the conventional understanding is that exclusive legal positivism is the natural and correct way of giving expression to the separability thesis. This is a natural mistake but a deep one. The Razian version of exclusive legal positivism is not a way of giving expression to the separability thesis for it derives from rejecting the separability thesis. It is only because at

60. We take up below the question of whether this renders Raz a normativist and not a positivist.

the most fundamental levels law and morality are necessarily connected that, at the level of determining the identity and content of law, they necessarily must be kept apart. If there is a more surprising conclusion in jurisprudence in the offing, I, for one, am unaware of it.[61]

D. Extending the Argument

This line of argument is not peculiar to Raz's version of positivism. Recently, Scott Shapiro has developed a very similar argument to roughly the same effect.[62] Shapiro argues that laws are plans and that legal activity is planning activity. The distinctiveness of law as planning activity is that it has a 'moral aim'; it aims to respond to or solve a certain category of moral problems. Law's legitimacy depends on its capacity to solve the problems it aims to solve. Thus, like Raz, Shapiro is committed to a necessary connection between law and morality and also to a service conception of that relationship. Shapiro then argues that plans cannot serve their function if those whom the plans are supposed to guide must appeal to moral considerations in order to determine what the plans require of them. In effect, Shapiro argues for positivism about plans, which is a version of the sources thesis about plans. Since laws are plans, Shapiro defends a version of exclusive legal positivism about law.[63]

Freed from the grip of the conventional wisdom, our first conclusion is that instead of the separability thesis being essential to legal positivism and its defining feature, the most familiar form of positivism is grounded in rejecting the separability thesis. Exclusive legal positivism does not deny that law and morality are necessarily connected. If anything, its plausibility turns on insisting that law and morality are necessarily connected.

V. WHAT ABOUT INCLUSIVE LEGAL POSITIVISM?

To be precise, I have not established that every form of exclusive legal positivism derives from rejecting the separability thesis. I have established,

61. One does not reach positivism by adopting the separability thesis. If anything, one is drawn to exclusive legal positivism only by rejecting the broadest forms of the separability thesis. It is no wonder that so many have missed this deep and important point caught in the grasp of the conventional wisdom, which would have us believe instead that nothing is more central to legal positivism than the separability thesis.

62. SHAPIRO, *supra* note 23.

63. *See id.*; Scott J. Shapiro, *Was Inclusive Legal Positivism Founded on a Mistake?*, 22 RATIO JURIS 326 (2009).

however, that the two most well developed versions of exclusive legal positivism—Raz's and Shapiro's—do. It is interesting that in the conventional wisdom the distinguishing feature of all forms of positivism is adherence to the separability thesis. In effect, the argument to this point goes some considerable way to turning the conventional wisdom upside down. All that is left would be to show that inclusive legal positivism also rejects the separability thesis. If it did, then we would not merely have discarded the conventional wisdom, but turned it on its head.

Ironically, one reason why some commentators have been suspicious of inclusive legal positivism's bona fides as a form of positivism is precisely that it allows normative as well as social facts to contribute to law's content. This encourages the thought that inclusive legal positivism is inconsistent with the separability thesis. Were that true, both inclusive and exclusive legal positivism would reject the separability thesis and that indeed would turn conventional wisdom on its head.

To be sure, inclusive legal positivism rejects the idea that normative or moral facts cannot contribute to the law's content, but it does not endorse thereby the claim that law and morality are necessarily connected. It holds that they can be connected: that there is nothing in positivism that precludes law and morality being connected. The deep point about exclusive legal positivism is that it holds that moral facts necessarily cannot contribute to legal content precisely because (among other reasons), at a more fundamental level, law and morality are necessarily connected. That is by no means a claim one can make on behalf of inclusive legal positivism.

If neither endorsing nor rejecting the separability thesis grounds or anchors inclusive legal positivism, what does? If natural law theory at some level insists that law and morality are necessarily connected (but not in a way that precludes the possibility of immoral law), then isn't exclusive legal positivism, which also insists that law and morality are necessarily connected more like natural law theory than it is like inclusive legal positivism? And how can that be? One can be forgiven for thinking that, having discarded the conventional wisdom, jurisprudence has lost its bearings entirely. Whatever its failings may have been, at least the conventional wisdom provided a good deal of structure and stability to jurisprudential inquiry. For all its failings, we are apparently in worse shape without the conventional wisdom to rely upon. Not only are we unable to identify any core claims that the various forms of legal positivism share with one another; it also seems that the main adversaries in the conventional story—exclusive legal positivism and natural law theory—have turned out to be bosom buddies if not kissing cousins. Talk about sleeping with the enemy.

Fear not. The next sections create order from the apparent chaos of living without a conventional wisdom. We do so by addressing each of these three concerns beginning with the last: If both natural law and exclusive legal positivism insist on the existence of necessary connections between law and morality, how are we to distinguish between them?

A. Exclusive Positivism and Natural Law: Redux

If asked to distinguish (exclusive) legal positivism from natural law, most commentators who had not read this Article would likely say, "That's easy; the latter asserts what the former denies, namely the existence of a necessary connection between law and morality." We have shown that such an answer would be mistaken, for as it happens, both natural lawyers and exclusive legal positivists insist that law and morality are necessarily connected.

Whereas both are committed to necessary connections between law and morality, they have very different accounts of the nature of that relationship. The exclusive positivist is committed to the view that the relationship is instrumental: law necessarily serves morality. The natural lawyer holds that the relationship is at least in part intrinsic; morality is intrinsic to the nature of law.

This difference has important implications. The exclusive positivist holds that in order for law to service morality there must be something of a firewall between law and morality. One is not free to consult the moral principles that justify the law when determining what the law requires. To do so, as we have seen, would vitiate the law's claim to authority. This is the reason why, for the exclusive positivist, the necessary connection between law and morality entails the sources thesis.

The fact that law and morality are intrinsically or constitutively connected implies for the natural lawyer that, in order to determine what the law requires, those to whom it is directed must be able to 'see through' the law to the principles that justify it. Rather than positing a firewall between law and morality, the natural lawyer takes the law to be translucent—if not transparent—regarding the principles that would justify it.

We turn now to consider the relationship between inclusive and exclusive legal positivism.

B. Exclusive and Inclusive Legal Positivism: Redux

Exclusive legal positivism is part of (or flows from) a comprehensive picture of the law and of its place in the normative landscape. Not so inclusive legal positivism. From the outset inclusive legal positivism or incorporationism

has always been much more a view about the nature of *legal positivism* than about the nature of law. I first introduced it as a way of meeting Dworkin's objection to Hart that positivism lacks the resources adequate to explain how moral principles could be binding legal standards.

There may be much to be said on its behalf as an account of positivism, but the more pressing question is whether there is much, or indeed, anything to be said for inclusive positivism as a theory of law—or as a way of understanding law's place in the normative landscape. Without a defense of it as flowing from essential features of law or of law's place in the normative landscape, inclusive legal positivism will always remain—in my view at least—'unanchored' as a jurisprudence. How might one defend inclusive legal positivism as a theory of law and not just as an alternative conception of legal positivism?

1. The Argument for Inclusive Positivism

The prevailing defense of inclusive legal positivism proceeds in two stages. First, one defends positivism as a general theory of law, and then inclusive legal positivism as the better formulation of positivism.[64] If we suppose that one could defend positivism as a general matter first then the argument on behalf of inclusive legal positivism must be that there are features of legal practice that can only be explained by it or which can better be explained by it than by the exclusive positivist alternative. What might those features be?

The standard view is that inclusive legal positivism provides a more natural interpretation than does exclusive legal positivism of the fact that many legal texts refer directly to moral principles and to moral considerations more broadly. So, for example, the Fourteenth Amendment to the United States Constitution has the famous Equal Protection Clause and the natural reading of it suggests that the Clause represents a moral constraint on legality: nothing that is unequal in the relevant sense can constitute valid law under the Constitution. Thus, the Fourteenth Amendment explicitly conjures a moral test

64. Alternatively, one might defend the view that moral facts are among the determinants of the content of the law. This rejects exclusive legal positivism, but then defends inclusive legal positivism as a better account of the way that normative facts figure in legal judgments. I am grateful to Scott Hershovitz for this suggestion, which he takes to be a more promising way of defending inclusive legal positivism. As we shall see below, I find none of these approaches ultimately persuasive because, on my reading, inclusive legal positivism is not an alternative or competitor to either natural law or to exclusive legal positivism. It has a different logical object. It answers a different set of questions. It purports to play a different philosophical role. In short, the view I defend here is that virtually everyone (including me) has mischaracterized the relationship between inclusive legal positivism and other theories—understood as accounts of the metaphysics of legal content.

on legality such that what the law is must be based on moral or normative facts about the nature of equality. This is no problem for the inclusive legal positivist who allows that substantive morality can be incorporated into law. The Fourteenth Amendment merely proves the point. In contrast, the exclusive legal positivist rejects the possibility of morality being incorporated into law and so must read all such putative moral constraints on legality as directives to officials to appeal to considerations that are not themselves part of the law in order to assess whether or not a norm counts as law. Morality has the same standing as the law of France would have in a conflicts case between French and German companies litigated in the United States (since both do business there). Suppose the relevant law in the jurisdiction holds that French law governs. In effect, the law directs the judge to appeal to French law in order to resolve the dispute. This does not make French law part of American law. It merely makes French law *binding* on officials in these cases. After all, our officials have no authority to alter French law, which is a power they do have over our law. The Equal Protection Clause is to be interpreted in the same way. It is a directive to officials to appeal to morality to resolve the dispute without it being the case that morality is part of our law.

Inclusive legal positivism allows us to credit the surface syntax of legal discourse whereas exclusive legal positivism requires that we treat the surface syntax as misleading with regard to its underlying semantics. Thus, the way to defend inclusive legal positivism is first to defend positivism and then to argue that inclusive legal positivism is the better version of the two because it provides the more satisfying explanation of the syntax of legal discourse.

The problem is that, if the argument for exclusive legal positivism is sound, this strategy for defending inclusive legal positivism is simply unavailable. The point of that argument is that the correct jurisprudential view is, as it were, thrust upon us by certain essential features of law or of our concept of it. As long as law necessarily claims to be a legitimate authority, where the legitimacy of that authority is expressed by the service conception, there is no room for normative facts to contribute to the law's content. Only exclusive legal positivism is compatible with law's claim to authority and so there is no choice among jurisprudential views to be had—positivist or otherwise.

In a sense, then, it is misleading to characterize the argument for the sources thesis as a defense of exclusive legal positivism. Rather, its point is that the essential nature of law entails the sources thesis. And if sound, this means that any plausible jurisprudential theory must begin not only with a laundry list of features of legal practice that it seeks to explain but also with the constraint that (whatever explanation is in the offing) it must be consistent with the fact that the content and identity of law is a matter of facts about behavior and attitude: social facts. Thus, if one offers up an account of the

nature of law that explains how law can be a source of moral obligations by arguing that part of what makes a norm law is its moral worth, then this account must fail because it violates the sources thesis. It offers an account of an important feature of law that is inconsistent with a necessary truth about law: namely, that its content is fixed by social facts alone

The better understanding of what we normally think of as the argument for exclusive legal positivism is that it is not so much a proof of the truth of exclusive legal positivism, but the demonstration of a necessary constraint on any jurisprudential view. If one insists on referring to the argument as a defense of exclusive legal positivism, then the most accurate way of characterizing the argument's conclusion is that all plausible jurisprudential theories are forms of exclusive legal positivism.

I cannot emphasize enough the significance of the argument in Part IV. If we think of the argument as a defense of exclusive legal positivism, then it demonstrates vividly that this particular form of positivism gets its traction by rejecting the separability thesis, not by endorsing it. Exclusive legal positivism is not a way of giving content to or expressing the separability thesis. It is an implication (in conjunction with other premises) of rejecting the separability thesis.

If we simply remove the labels and focus instead on what the argument (if sound) establishes as an implication of our concept of law (along with other premises), a metaphysical view about the sources of law's content results. In philosophy we draw a distinction between essential and other kinds of necessary features. The essential features of something are those features that make it the thing that it is. The essence of water is H_2O. Everything that is water is H_2O, and nothing that lacks that property can be water. There are other properties that are or can be necessary without being essential; they include the logical implications of essential properties, but need not be limited to those properties. So I tell the following "joke" to illustrate the point. I have never met a Canadian who is not a nice person. Of course, being nice is not what makes one a Canadian. There are presumably some formal criteria that determine whether one is Canadian; nevertheless, it is a necessary feature of anyone who is Canadian that he is nice.

Applying this distinction to the argument in Part IV, the essential feature of law that we are drawing on is its claim to being a legitimate authority. The necessary implication of it is the claim that the content of law must be fixed by social facts alone. So just as a theory of law is constrained by its essential features, it is likewise constrained by necessary implications of those features. The argument does not defend exclusive legal positivism so much as it purports to demonstrate that any jurisprudential theory must work with the constraint that legal content is necessarily a matter of social facts alone. If it is a

burden of a jurisprudence to show how law creates reasons for acting, then it falls to jurisprudence to explain how social facts can give rise to reasons. If it is a burden of a jurisprudence to explain the moral semantics of legal discourse, then it falls to all jurisprudential theories to show how a moral semantics of law can be compatible with a social facts metaphysics. The argument in Part IV (if sound) establishes necessary constraints on all jurisprudential outlooks. It does not merely establish the plausibility of one such outlook.

2. The Argument Against Exclusive Positivism

With so much at stake then, it is not surprising that inclusive legal positivists are moved to question the argument's soundness.[65] The argument relies on three basic claims. These are: (1) law necessarily claims to be a legitimate authority; (2) the claim to being a legitimate authority cannot be necessarily false, and thus, necessarily it must be capable of being true; and (3) the particular substantive theory of authority is the service conception.

In fact, all three premises are problematic.[66] Consider the second and third. We can agree that law's claim to being a legitimate authority is not incoherent or contradictory and thus that it is not necessarily false. Well, not quite: we can agree that the claim to legitimate authority cannot be necessarily false in virtue of incoherence or inconsistency—for it is neither. That does not mean that it cannot be necessarily false for other reasons—as it would be, for example, were anarchism true.

Anarchism is the view that no practical or political authority could be legitimate. Necessarily all authorities are illegitimate; thus, any claim to legitimacy is necessarily false. Surely one cannot argue that anarchism must be false because law's claim to being a legitimate authority must be capable of

65. And not just the inclusive legal positivist either. It is not enough for the natural lawyer to agree with the exclusive legal positivist that law and morality are necessarily connected and then to distinguish between different ways in which they are. If the argument in Part IV is sound, the natural lawyer's claim that the law must be transparent or translucent to the principles that justify it cannot be sustained. This does not mean that natural law theory is unavailable. If the argument in Part IV is sound, the forms of natural law theory that are available must accept the sources thesis.

66. I have also argued, notably in *The Practice of Principle*, that some versions of the argument are not valid—namely, that its conclusion does not follow even granting its premises. Roughly, the idea is this: even if appealing to the moral principles that would justify a directive would vitiate the claim to authority, it does not follow that appealing to other moral principles or facts would; and so it does not follow that all appeals to moral principles or facts to determine law's content or identity are inconsistent with law's claim to authority. *See* COLEMAN, *supra* note 59, at 103-19.

being true. That simply begs the question. Even if anarchism is not true, it could be true, and were it true, the claim to being a legitimate authority would be necessarily false. In that case, the premise that the claim to legitimate authority cannot be necessarily false would be incorrect.

In addition, the argument for the Razian version of exclusive legal positivism relies on the so-called 'service conception' of authority, which is to say that law's authority depends on its relative ability to service the demands of reason or morality. It is the service conception of authority that draws the necessary connection between law and morality. According to the service conception, a practical authority is legitimate when its claim to superior service is true. In claiming to have legitimate authority over *B* (in some domain of activity), *A* implies that *B* will do better in complying with the demands of reason that apply to him by following *A*'s directives than by following *B*'s own assessment of the balance of reason. In the service conception, the authority relationship is between agents and reasons.[67]

It is by no means clear, however, that the service conception provides the best or most illuminating way to think about the authority relationship, or that the argument for the sources thesis would go through with some other theory of authority in its place. At the very least, the service conception does not capture our ordinary notion of authority, which is a relationship between persons.[68] The service conception of authority makes authority a matter of 'competence'. The ordinary notion of authority is one of 'standing'.

If the argument for the sources thesis is unsound, then one does not have to treat the claim that legal content must be fixed by social facts alone as a constraint on all jurisprudential theories. At the same time, both inclusive legal positivism and natural law theory in their traditional forms remain options. But this leaves us with more work to do. After all, the conventional wisdom was framed in terms of conceptual claims about the relationship of law to morality, none of which could be sustained. Absent such claims, however, we are hard-pressed to identify what the core claim of any particular jurisprudential view is or must be. It is clear that the core claim of exclusive legal positivism is a claim about the metaphysics of legal content, and not a

67. RAZ, *supra* note 49, at 55-56.

68. My interpretation is that the Razian account is a revisionist account of authority. As I see it, his deep point is that when it comes to reason, no one has a status authority over anyone else. There are just reasons that apply to persons and the only 'status' anyone has with respect to anyone else is a matter of competence—capacities for judging or executing what reason requires. There is no place for a status- as opposed to a competence-based notion of authority.

claim about the relationship of law to morality—certainly not the claim about the relationship of law to morality that the conventional wisdom assigns to it.

We will go nowhere fast if we insist on characterizing a taxonomical project in jurisprudence in terms of any kind of conceptual claims relating law to morality. The simple truth is that there are necessary conceptual connections of some sort or other between law and morality, and there are some alleged conceptual truths about the relationship between law and morality that do not obtain. Further, it is impossible to distinguish among jurisprudential views in the light of their commitment to some of these and not to others. Every plausible jurisprudential view has no reason not to accept the true ones and even less reason not to reject the false ones.

If we want to make progress, then we should at least begin by shifting focus from conceptual claims about the relationship of law to morality to some other feature of law and legal practice. We might take note of the fact that the core claim of exclusive legal positivism is the sources thesis and that the sources thesis is a claim about the metaphysics of legal content: the facts that give law the content that it has. Perhaps then we should see if we can recast traditional jurisprudential views in terms of core claims each makes about the sources of legal content.

VI. IT IS ABOUT THE METAPHYSICS—MAYBE

As we have already noted, legal facts are not basic facts. They supervene on other facts. These other facts, the law's supervenience base, give law the content that it has. Arguably the most basic question in jurisprudence is a metaphysical one: What are the sources of legal content? Once we have an answer to that question, we can pursue a range of other related concerns. If, for example, only facts about behavior and attitude contribute to the content of law, then we may ask whose behavior, which of their behaviors, whose attitudes, which of their attitudes, and so on. If normative facts can contribute to law, then which normative facts? If both normative and social facts contribute to the law having the content that it does, then how do normative and social facts operate with or on one another to give law the content that it has? More generally, how do the facts on which the law supervenes come together to give law the content that it has?[69]

69. For an excellent discussion of precisely this issue, see Greenberg, *How Facts Make Law*, *supra* note 8.

What kind of stuff is 'legal stuff', or better, what is the stuff law is made of? What, in other words, is law's metaphysical foundation?[70]

A. Meet the New Boss, Same as the Old Boss!

We have already identified three distinct claims about the possible contributors to legal content.

(1) Only social facts determine the content of law. Law has the content that it does *in virtue of facts about individual (or group) behavior and attitudes: that is, in virtue of social facts.*

(2) Only normative (evaluative or moral) facts contribute to the content of law. Legal facts are the facts that they are—i.e., have the content that they do—in virtue only of certain moral or evaluative facts obtaining. What the law is—what it requires, permits, or authorizes—depends entirely on what is good, desirable, valuable, or ought morally to be done.

(3) Both normative and social facts contribute to legal content. According to this view, what the law is—how it is that it has the content that it does—depends on either or both social and normative facts.[71]

We have formulated (1), (2), and (3) as *contingent* claims. This is not the only alternative. Claims about legal content may express the idea that law's content *must* have a particular supervenience basis. In that case we get:

(4) Necessarily only social facts contribute to legal content;

(5) Necessarily only normative facts contribute to legal content; and

(6) Necessarily both normative and social facts contribute to legal content.

Thus, (4) claims that it is a necessary truth about law that its content must be determined by social facts alone, and (5) claims that it is a necessary truth about law that its content must be determined by normative facts alone. And, of course (6) claims that it is a necessary truth about law that its content must be determined by the conjunction of social and normative facts.

70. The discussion that follows is more demanding and requires more careful attention than any of the arguments to this point. I wish I could make it easier and more enjoyable to read, but it is more important that it be precise than that it be fun to read.

71. Still, however precise and technical the discussion in this and subsequent sections is, it necessarily remains partial and incomplete. In addition to setting aside the two biggest questions—whether the right metaphysical relationship is supervenience and how it is that facts come to make *legal* facts—we do not take up a wide range of other equally interesting and important issues: for example, whether social facts can also be normative; whether normative or moral facts are basic or whether instead they supervene on other facts—in particular, social facts; whether normative facts are reducible to social facts; and so on. Even setting these matters aside for now, there remains much work to do.

Propositions (1)-(6) represent alternative hypotheses about the supervenience base of law. Each offers a general claim about the facts that somehow come together to make law: to give law the content that it has. One important difference among them is that (4)-(6) assert that wherever there is law (whether in the actual or in any possible world), law is the kind of thing that must have a particular supervenience base. Propositions (1)-(3) make no such claim. While each gives a specific source of legal content, propositions (1)-(3) allow for the possibility that it could have been otherwise. It is actually true, but not necessarily true.

So (1) says, in effect, that law is what it is because judges, legislators, and perhaps ordinary folk have said, intended, or believed certain things. On the other hand, (1) is also consistent with the view that things could have been different from how they are; law would have the content that it does—not just because courts and legislatures acted in particular ways (and believed or intended certain things)—but also because the source of legal content is good, right, just, fair, desirable, and so on. In other words, (1) claims that the sources thesis happens to be true of law and thus that (2) and (3), for example, are false; but it holds as well that (2) or (3) could have been true of law, and may well be true of law in some possible world. Proposition (1), however, is true of law in our world. In effect, (4) shares with (1) the claim that the sources thesis is true of law in our world, but differs in that it claims, unlike (1), that the sources thesis must be true of law in all possible worlds. Thus, according to (4), it is not just that alternative accounts of the sources of law are mistaken about the nature of law in our world; they are wrong for all possible worlds.[72]

Having introduced these distinctions in the potential supervenience bases of law, the natural question to ask what the ultimate point is of doing so. What projects does this inquiry further? A natural and immediate thought is that we have introduced the metaphysics of legal content in order to recharacterize various forms of positivism and natural law theory. The old architecture is characterized by the separability thesis; the new architecture is defined by views about the nature of legal content. If our aim is to recharacterize positivism and natural law theories in terms of claims about the metaphysics of law, the natural thought would be that the distinguishing feature of legal positivism is that it endorses either (1), (3), (4), or (6) whereas natural law

72. The view that only social facts contribute to legal content is the sources thesis. The question is whether the sources thesis is best represented as (1) or as (4), or better, whether those who endorse the sources thesis endorse (1) or (4). The argument for the sources thesis in Part IV purports to demonstrate that it is a necessary implication of the premises and so it is reasonable to suppose that those who endorse the sources thesis endorse (4), not (1). Similar questions arise regarding (2) and (5), and (3) and (6).

endorses (2) or (5). Then we would distinguish inclusive legal positivists from exclusive positivists insofar as the latter endorse (1) or (4) whereas the former endorse (3) or (6).

Were this our main objective, succeeding in it would be an achievement, but a modest one. One could wonder what all the fuss has been about. Worse, a skeptic might wonder whether it is an achievement at all. Notice that while explicitly framed in terms of the sources of legal content, the distinctions among the various theories are all formulated in terms of the relationship of legal facts to moral and social facts. And if this is all the 'new architecture of jurisprudence' amounts to, couldn't one argue that the new architecture merely recharacterizes the separability thesis as a claim about legal content instead of as a claim about the concepts of law and morality, the conditions of legal validity, or the possibility conditions of law? In that case, we have not abandoned or discarded the separability thesis, my protestations notwithstanding; we have instead simply identified its proper domain. Meet the new boss—same as the old boss.

B. There Is Something Happening Here!

The concern is understandable but ultimately unwarranted. While it may be correct to identify exclusive legal positivism with (1) or (4), it is a mistake to identify inclusive legal positivism with either (3) or (6). It is also a mistake to characterize natural law theory in terms of (2) or (5).

By identifying natural law with either (2) or (5), one attributes to it the view that what judges and legislatures say and do cannot contribute to what the law is. This would leave the natural law tradition bereft of resources to explain the institutional nature of law. It may be one thing to attribute to the natural lawyer the view that others too easily dismiss or misrepresent law's normative dimensions; it is quite another to attribute to the natural lawyer a total disregard of law's social or institutional nature. In truth, the natural lawyer holds that normative facts in addition to—and not to the exclusion of—social facts contribute to legal content. If anything, it is more plausible to identify natural law with either (3) or (6) than with (2) or (5). But then if natural law theory is understood in terms of (3) or (6), how are we to characterize inclusive legal positivism? After all, didn't we characterize it as (3) or (6)? But if natural law is (3) or (6), inclusive legal positivism cannot be—unless it is indistinguishable from natural law theory!

Interesting. We begin by associating natural law with (2) or (5) and inclusive legal positivism with (3) or (6). But no sooner do we press on these

formulations that we come to see that, if anything, natural law holds (3) or (6) and not (2) or (5).[73] Of course, inclusive legal positivism also holds that social and normative facts contribute to legal content. So this suggests that inclusive legal positivism and natural law theory hold the same views of legal content. If that is so, what distinguishes them from one another?

The answer is that inclusive legal positivism is consistent with (3) and (6), but is not defined or characterized by either. If there is a plausible formulation of the core of inclusive legal positivism it is:

(7) Only *social facts* determine which facts contribute to the law having the content that it does; or

(8) *Necessarily,* only social facts can determine which facts contribute to the law having the content that it does.

Inclusive legal positivism is compatible with (3) or (6), one might think, because of its commitment to (7). Social and normative facts contribute to legal content if and only if social facts allow that to be the case. Isn't this the point I made in *Negative and Positive Positivism*,[74] which has been the calling card of inclusive legal positivism ever since? It is natural to identify inclusive legal positivism with (3) or (6) just because the point of inclusive legal positivism is that law *can incorporate* morality and, if it does, either (3) or (6) will obtain. And once one sees that, one realizes that it is really (7) (or (8)) and not (3) or (6) that represents inclusive legal positivism. But (7) and (8) are altogether different animals from (1)-(6). Let's see just how different.

C. A Brand New Day[75]

Taking the surface syntax of (7) seriously invites the thought that (7) merely specifies the conditions under which (1)-(6) obtain. That is, the content of the law is a matter of social facts only, (1), or necessarily a matter of social facts only, (4), when there are social facts (e.g., a rule of recognition) to the

73. Depending on how one thinks of natural law, a natural lawyer could adopt (1) or (4) as regards legal content. That is, one could in principle hold that the law depends only on what people say and do and yet claim that there are some necessary connections between law and morality. So, in fact, it is just not helpful at all to think that what we are doing is merely recharacterizing the conventional disputes between positivists and natural lawyers in terms of differences about the sources of legal content. We are doing something else altogether, as the remainder of this discussion makes very clear.

74. Coleman, *supra* note 2.

75. Much of the argument that follows was stimulated by a discussion with David Plunkett. I have no idea if he would agree with the claims I make in this section, but our discussion stimulated me to stake out the theses that are presented here.

effect that in the relevant jurisdiction only facts about what legal officials and others say, do, believe, and intend contribute to the law having the content that it does. Or, the content of the law is a matter of normative facts, (2), or necessarily a matter of normative facts only, (5), when there are social facts (e.g., a rule of recognition) to the effect that in the relevant jurisdiction only facts about what is good, right, valuable, just, and fair determine what the law calls for. Similar considerations would apply to the relationship between (7) and (3) and (6). (7) is a 'meta' claim in the sense that it is a claim about (1)-(6); in particular, it is a claim about when (1)-(6) obtain.

One consequence of interpreting (7) (and (8)) in this way is that there is no real conflict between inclusive and exclusive legal positivism. In either of its formulations, inclusive legal positivism would be the more fundamental claim. As a positivist, one would always be committed to the claim that social facts ground legal content, but one would interpret that claim along the lines of (7) or (8). Exclusive legal positivism would be the derivative and not strictly speaking alternative claim.

But can this be right? Can it really be the case that inclusive and exclusive legal positivism are not competing theories of law or of legal content? Can it really be correct that inclusive legal positivism is the core claim of positivism, and exclusive legal positivism subsidiary to it? If this is right, just about everything positivists and their critics have believed up until this point must be mistaken.

In fact, my view is that most of what positivists and their critics have believed about positivism and its alternatives is mistaken or, if not mistaken, terribly misleading. I include myself among the confused and misguided. Indeed, I include myself among those responsible for much of the confusion that has passed as insight. But this is the conclusion of the arguments that follow, and a *mea culpa* at this point is jumping ahead a bit.

Before we abandon the view that inclusive and exclusive legal positivism are not in fact competitors, we need first to capture why interpreting (7) and (8) as claims about when (1)-(6) obtain might be problematic. In order to do so, it will be helpful if we begin by simplifying the discussion a bit for ease of exposition. Instead of asking what the relationship is between (7) or (8) on the one hand and (1)-(6) on the other, let's restrict the discussion to the relationship between (7) on the one hand and (4)-(6) on the other. Why choose (7) rather than (8)? Why choose (4)-(6) rather than (1)-(3)?

The reason for choosing (7) rather than (8) is that, with the exception of Hart, I know of no inclusive legal positivist who holds that it is a necessary truth that the determinants of legal content are fixed by social facts. No inclusive positivist to my knowledge explicitly has argued that it is a necessary truth that social facts determine which facts contribute to legal content. All to

my knowledge—and certainly me in particular—introduce inclusive legal positivism as a way of characterizing positivism, not as a necessary truth about law. Again, Hart may be the exception. This is just another way of making the point I made before that inclusive legal positivism is unanchored.

There are several reasons for choosing (4)-(6) rather than (1)-(3). The first is that I know of no exclusive legal positivist who believes that it is a mere contingent fact that legal content is fixed by social facts. For example, the arguments that we attribute to Shapiro or a Razian, for example, demonstrate, if sound, that legal content is necessarily a matter of social facts. And the normativist who can be represented as holding either (3) or (6) does not merely claim that normative facts contribute to legal content, but that given the nature of law and its connection to morality, necessarily they do.

Even more important, given our current purposes, is that by focusing on the relationship of (7) to (4)-(6) we really heighten the burden on the inclusive legal positivist who claims that inclusive legal positivism is a claim about the determinants of the contributors to legal content. And that is because (7) and (4)-(6) differ in their modalities in important ways: (7) is a contingent claim whereas (4)-(6) express necessity claims. Thus, someone who holds that inclusive legal positivism is the ground of different claims about legal content is faced with the burden of showing how necessities can be derived from contingencies.

With these preliminaries out of the way, we can now express some of the reasons for thinking that the interpretation of the relationship between (7) and (4)-(6) as being about different things is likely to strike many as problematic. We can begin with the worry that the interpretation on the table does not do justice to the claims (4)-(6) make. Take (4) first. It is not claiming that the content of law is necessarily fixed by social facts *if and when social facts of a certain kind so determine it*! It claims that the content of law is fixed by social facts—full stop. The same holds for (5), which (rightly or wrongly) does not claim that the content of law is necessarily fixed by normative facts only *if and when social facts of a certain kind determine that to be the case*. Proposition (5) claims that necessarily legal content is fixed by normative facts alone—full stop. The same for (6).

Someone pressing the case may go further and argue that if any of (4)-(6) is true, then (7) must be false. To see this, suppose that (4) is true. If (4) is true, then necessarily legal content is determined by social facts alone. And if legal content is necessarily determined by social facts alone, then (5) and (6) must be false. And so it is not, as it were, optional for (7) to make them true. They cannot be true if (4) is. By the same token, if (5) is true, then (4) and (6) must be false, and if they are false, (7) does not have the power as it were to make them true. Same for (6): if it is true, then (4) and (5) are false, and (7)

simply has nothing to say about it. Proposition (7) cannot be the master claim that makes (4)-(6) true, when they are true. If one of them is true, the others are false, and there is nothing, as it were, that (7) can do about it.

If any of (4)-(6) is true, then (7) is false; and if (7) is true, (4), (5), and (6) are false. These considerations require that we abandon the view that (7) is a claim about when (4)-(6) obtain. If anything, they suggest that (7) is in the same boat as (4)-(6). If any one of them is true, the others must be false. That is what makes them competitive theories of the nature of legal content. If (7) is in the same boat as (1)-(6), then it is a substantive theory of legal content and a genuine competitor to exclusive legal positivism. These considerations suggest that (7)—one version of inclusive legal positivism—is incompatible with (4)—exclusive legal positivism—and that the standard view of their relationship—as competitors—must be correct. Despite its syntax, (7) is not about (4)-(6). It is just another claim about legal content on par with them: false, if any of the others are true.

But this is a mistake, one that virtually everyone has been guilty of—including me—and the time has come to correct it. Once we do we will be on our way to putting in place a solid foundation on which a new architecture of jurisprudence can be erected.

1. Semantics and Meta-Semantics

In the philosophy of language, there is an important distinction between the inquiry into the meaning of a term and the inquiry into how the term gets the meaning it has. It is the difference between the question, for example, of what 'gold', 'water', or 'law' refers to and the question of how it is that 'gold', 'water', or 'law' come to refer to the things to which they refer.[76] This is the difference between semantics and meta-semantics.

I want to suggest as a first approximation (that we will modify in due course) that the difference between exclusive and inclusive legal positivism is analogous to the difference between semantics and meta-semantics. Exclusive legal positivism or the sources thesis is a claim about the metaphysics of legal content; it is a claim about the determinants of legal content. Inclusive legal positivism is not a claim about the determinants of legal content. It is a claim about the grounds on which the determinants of legal content are determined.

76. I have explored this issue in great detail as regards 'law' in another paper, and I will not rehearse the arguments of that paper here. *See* Jules L. Coleman & Ori Simchen, *"Law,"* 9 LEGAL THEORY 1 (2003).

Inclusive legal positivism is, to coin a particularly ungainly phrase, a claim in meta-metaphysics.

Contrary to the prevailing wisdom, inclusive and exclusive legal positivism are not alternative jurisprudential views—either about legal content or the nature of law more generally. The problem is to spell out precisely what their relationship to one another is. In doing so, the first order of business is to meet the challenge posed in the previous section that (7) cannot be a claim about when (4)-(6) obtain. That worry has been in expressed in a variety of different ways, but they all boil down to one fundamental concern: How can (7) be a ground or an explanation of (4) when it obtains, (5) when it obtains, or (6) when it obtains? Proposition (7), after all, is a contingent claim. (4)-(6) express necessary claims. Even if we suppose that (7) were to make (4) true, to acknowledge that (7) is a contingent claim is to recognize that (7) could have grounded (5) or (6) instead of (4). This makes it seem that the fact that (4) obtains is a contingent truth about legal content—whose truth depends on what the social facts happen to be. But (4) asserts a necessity claim: How can a necessity claim's obtaining depend on contingent (social) facts? More generally, the worry, to put it starkly, is that necessity cannot depend on contingency.

The fact is that there is no problem in a contingent claim grounding a necessary truth. Let's make the idea concrete with an illustration. Let's take (7) to be instantiated by a Hartian rule of recognition. That rule, we can suppose, establishes criteria of legality such that only social facts contribute to legal content. In saying that (7) is contingent, we are committed to saying that the rule could have been otherwise; it could have incorporated normative facts as well as social facts. It is a matter of fact, not a necessary truth, that it makes law a matter of social fact alone.

So far so good. Presumably there is no problem were we to understand the claim that only social facts contribute to legal content to itself be a contingent claim, i.e., (1). After all, (7) is a contingent claim, and there is no special issue in seeing how it could ground another contingent claim. The rule of recognition makes it the case that only social facts contribute to legal content, but the rule could have been different, and so the contributors to legal content could have been different. The contributors to legal content are only social facts, but that is not a necessary truth; it could have been otherwise. Again, no problem.

The problem emerges if someone claims that (7) is a potential ground of (4)-(6), and one must make that claim in order to sustain the view that (7) purports to determine the sources of legal content and is not itself a claim about what those sources are. Proposition (7) must therefore be capable of determining (or explaining) (4), (5), or (6) when they obtain. Again, referring

back to our illustration, this means that the rule of recognition would have to be able to make it the case not only that social facts alone contribute to legal content, but that necessarily only social facts contribute to legal content. Necessity claims cannot follow from 'contingency' or 'could have been otherwise' claims—or can they?

They can, for the contingency of determinants of the determinants of *X* need not entail the contingency of the determinants of *X*. The determinants of my existence are contingent—those gametes could have failed to fuse—and yet my existence determines my self-identity as a matter of necessity rather than contingency. The determinants of the game of chess in its current state are contingent, and yet the game of chess in its current state determines the way the rook moves as a matter of necessity rather than contingency. Such examples are not hard to come by. 'Musts' regularly follow from 'could have been otherwise', and there is no reason why they could not in the case of legal content.[77]

There is no problem then in understanding (7) as a meta-metaphysical claim about the determinants of legal content. It is a putative hypothesis about how it is that some facts and not others contribute to legal content. The explanation it provides is that these facts and not those contribute to legal content in virtue of some set of social facts (7)—like Hart's rule of recognition, or Shapiro's collective planning practices. This explanation is perfectly compatible with the claim that these facts—and not others—contribute to legal content being a necessary and not merely a contingent truth.

This is a deep and important point. It removes the main obstacle to my claim that inclusive and exclusive legal positivism are not competitive theories of legal content. Propositions (1)-(6) are competitors with one another. In doing so, it raises the question: What are possible competitors to (7) other than (8)? In other words, what are some competing claims about how the determinants of legal content are themselves determined?

One obvious alternative to (7) would be:

77. For this point, I am grateful to Ori Simchen, who provides a way of making the same point when it comes to the case of legal content directly. Suppose (7) is true. It so happens as a matter of mere contingency that social facts alone fix which facts are to contribute to legal content: say that it is social facts belonging to some clearly demarcated class *C* of facts and that nothing more is thus determined—as a matter of mere contingency again—to be whatever is to determine legal content. It seems not so implausible to me to suppose that this contingent determination of *C* as whatever determines legal content also thereby fixes the nature or essence of legal content. If so, then it will not be merely contingent that *C* is whatever determines legal content—it will be necessary given the nature of legal content.

(9) Normative facts determine the determinants of legal content. (Let's call this normativism.)

Another alternative would be:

(10) Necessarily normative facts determine the determinants of legal content. (This is just a modally more stringent form of normativism.) Proposition (10) stands to (9) as (8) does to (7).

Yet another particularly interesting alternative to (7) would be:

(11) The determinants of legal content derive from truths about the essential nature of law. (For convenience, let's call this conceptualism.)

And so on.

We really do have two different kinds of questions here. The first is:

(A) What determines legal content?

The second is:

(B) What determines the determinants of legal content? In virtue of what set of considerations does it happen that these facts and not others constitute the contributors to legal content? What are the grounds of the determinants of legal content? Or even better perhaps, what explains why these facts and not others determine the content of law?[78]

Inclusive legal positivism, normativism, and conceptualism are all competing accounts at the metalevel: putative accounts of how it is that these facts (and not others) contribute to legal content. They are not competitors to (1)-(6). With respect to (1)-(6), whichever turns out to be the right account of the contributors to legal content, (7)-(11) are competitive accounts of how it is that that is the right account. If, for example, it turns out that necessarily both

78. The distinction I am emphasizing between the determinants of legal content and the determinants of the determinants of legal content invites two possible objections. The first is that the determination relationship is transitive and so the determinants of the determinants of legal content are themselves determinants of legal content. So the distinction collapses. The second objection takes the opposite tack. If the determinants of legal content have determinants, then so, too, do those determinants, ad infinitum. The second objection is in a form that does not lead to a serious objection. Whenever one claims that *A* is a ground of *B*, it is possible to ask what is a ground of *A*? So what?

In principle, the first objection is more interesting—at least at first blush. If being a shade of red determines something's being red, and its being red determines that it is a color, then it is true that its being a shade of red determines that something has a color. But this is a different kind of relationship, which is transitive; it is the relationship of greater specificity (being a shade of red) to lesser specificity (being red) to even lesser specificity (being a color). That is not the relationship we are after. The relationship between the first- and second-order determinants of legal content is a metaphysical notion of being a ground (or being the explanation) and this relationship is not transitive. Again, I am grateful to Ori Simchen for clarification of the relevant distinctions.

social and normative facts contribute to legal content, i.e., (6), then (7)-(11) offer conflicting accounts of why that is so. Proposition (7), for example, says that necessarily social and normative facts contribute to legal content in virtue of some other set of social facts, for example, the rule of recognition. Proposition (9) says, for example, that necessarily social and normative facts contribute to legal content as a result of some other set of normative facts, for example, that law is a moral good. Finally, (11), for example, would hold that necessarily social and normative facts contribute to legal content in virtue of some truth about the nature of law, for example, that law is necessarily a source of institutional moral reasons for acting.[79]

If all this is right, and I obviously believe that it is, inclusive and exclusive legal positivism are not strictly speaking alternative theories of legal content. And if that is right, they are not strictly speaking alternative formulations of positivism. Indeed, as we shall see momentarily, there may be no interesting unifying core idea that ties theories that have been labeled 'positivistic' together.

2. It Is Always About Everything—All the Way Down

There is no question that when it comes to matters of legal content there is an important distinction between problems at the object level and others at the metalevel. On the other hand, it is also true that whatever the differences, both questions concern the metaphysics of legal content. A full accounting of the metaphysics of legal content will answer both questions; it will provide an account of the contributors to legal content and how it is that these facts (and not others) determine why law has the content that it does. One consequence of this realization is that theories of law that appear identical or at least very similar because they provide the same or similar answers at the 'object level' can also provide very different answers at the metalevel. I want to illustrate this point by focusing on Joseph Raz's and Scott Shapiro's versions of exclusive legal positivism.

Both Raz and Shapiro adopt the sources thesis. Thus they are exclusive legal positivists and endorse either (1) or (4), and most likely (4). That is their first-order or object-level views. For Raz, the sources thesis follows from the conjunction of several premises, notably the assertion that law necessarily claims to be a legitimate authority, as well as his substantive view of the nature

79. The reader should note that I am not defending any of these arguments. I am merely identifying the kinds of arguments that would bear on answering these kinds of questions.

of authority.[80] For Shapiro, the sources thesis follows from the view that law necessarily aims to solve a distinctive class of moral problems and that it seeks to do so through a characteristic activity—a form of complex social planning.[81] The sources thesis follows from Shapiro's view of the nature of plans and how they work in practical reasoning.

Thus, both Raz and Shapiro adopt some version of (11): the determinants of legal content themselves derive from claims about the nature or essence of law or of our concept of it. For Raz, the essential nature of law includes the claim to authority and a distinctive account of the nature of authority. For Shapiro, the essential nature of law includes its having a 'moral aim' and its pursuing that aim through a distinctive kind of social activity: planning. The key concept is that of a plan. Together these ideas determine that necessarily only social facts contribute to legal content. Thus, they agree not only at the object level but also at the metalevel: at least this far up the meta-chain.

Because both agree on the first and second-order metaphysical claims, they reject the second-order claim that I am associating with inclusive legal positivism: namely, that social facts determine the determinants of legal content. Now, we have to be careful here. The standard view is that Raz, Shapiro, and those moved by their arguments actually reject inclusive legal positivism because, on their views of the nature of law, they are committed to the sources thesis. I am arguing that the standard view is mistaken (or very misleading). Their arguments against inclusive legal positivism are much more complex and interesting than that. They believe that the determinants of legal content derive from essential or necessary truths about law; they begin by adopting (11). Interestingly, Hart, the inclusive legal positivist, also adopts the view that contributors to legal content follow from necessary truths about law. This distinguishes him from almost all other inclusive legal positivists, who, like me, fail to anchor the theory in any fundamental claims about the nature of law. The differences between Raz and Shapiro, on the one hand, and Hart, on the other, have to do with what each identifies as necessary truths about law. For Raz, it is the claim to authority. For Shapiro, it is the conjunction of law's moral aim and the idea of plans. For Hart, it is the rule of recognition. The rule of recognition is a social rule, and thus, for Hart, (11) turns out to yield (7). The features of law that Raz and Shapiro pick out are incompatible with (7)—or so I have demonstrated. And that is why they reject inclusive legal positivism. It is not their commitment to the sources thesis (4) that explains their rejection of (7), but is instead the way they each spell out their

80. *See* RAZ, *supra* note 17, at 28-33, and accompanying text.

81. *See* SHAPIRO, *supra* note 23; *see also supra* text accompanying note 62.

commitment to (11). In fact, as I have also demonstrated, (7) is perfectly compatible with (4)! It turns out not to be on the views of exclusive legal positivists like Raz and Shapiro—but only because they accept (11) and understand law's necessary or essential features in ways that they believe preclude the truth of (7). But as I have also demonstrated, Hart, like Raz and Shapiro, accepts (11). The key, then, is what one's views are about law's essential features and what, if anything, follows from them!

There is even more to see if we now focus on the ways in which Raz and Shapiro go about defending and characterizing what each takes to be law's essential features. For they not only identify different features of law as essential to it, but they defend their claims in very different ways. In Raz's overall argument, the key idea is that of the service conception of authority, but it is well known that Raz's argument for that conception is explicitly normative. The Razian argument for the sources thesis, then, is really a mixture of conceptual claims and normative ones. The 'positivistic' claim about legal content ultimately rests on alleged truths about the nature of law and the nature of authority; importantly, whereas the claim about the nature of law is itself a conceptual claim, the claim about authority is a normative claim and it is defended as such. So we have a positivistic first-order metaphysical claim supported by a conceptual claim (about the nature of law) and a normative defense of another claim (about the nature of authority).

Not so for Shapiro. For Shapiro, laws are plans. But Shapiro's argument for laws as plans is not normative in the same way that Raz's argument for authority is. Nor is Shapiro's account of what plans are normative. Thus, in his case, we have the same 'positivistic' claim about legal content derived from conceptual claims about the nature of law and about the nature of plans. There is no normative argument in sight. No normative or moral considerations are doing any heavy lifting. In this regard, Shapiro is more like Hart than like Raz. Yet, unlike Hart who, like me, rejects the sources thesis, Shapiro, like Raz, endorses it.

What are we to make of this? One thing we could say is that Raz actually is committed to (9) and not to (11). To be sure, Raz holds that the determinants of legal content derive from claims about the essential nature of law, but at least some of those claims are, in his account, defended on normative grounds—as (9) would have it. And that means that in an obvious sense Raz seems committed to the view that the determinants of legal content are ultimately fixed by normative facts! If that is right, there is something to be said for the claim that Raz adopts (9), not (11). And what is the proper conclusion to draw from this? Is it that Raz is not really a positivist? And since

Hart adopts (6), not (4), does that imply that he is not a positivist even though he argues for (6) first through (7) and ultimately through (11)?[82]

Are we to say that at the end of the day Raz is not a positivist, and that to be a positivist is to start with the sources thesis and work backwards to its foundation without once ever invoking moral or normative considerations? Thus, Hart would only pass part of this test and the same at best would hold for me. Shapiro would be a positivist, but who else? Why care?

What is to be gained, what insights gleaned, by the labels: positivism, normativism, natural law, inclusive positivism, and so on? For my money, there is no one claim any theory makes or no one answer we can point to and say, "That is what makes this a positivist theory," or "That is what makes it a normativist theory or natural law theory." If the relevant question is, "What facts can contribute to legal content?" then Raz is a positivist as is Shapiro, whereas maybe Hart and I are not. The lesson is that there is no place in theory construction where we can draw a line to distinguish a positivistic jurisprudence from a natural law or normativist one. There will no doubt be pure forms of each kind, but they are likely to be rare and of no special significance.

They are of no interest because they are merely taxonomical concerns that do not point us in the direction of the right questions, let alone the right answers. What we have are questions in jurisprudence and theories that seek to answer them and to do so in a systematic way. The goal of jurisprudence is to identify the problems and questions of jurisprudence and to make progress in responding to and answering them. There is little reason to suppose that labeling any particular kind of answer will contribute much to our success at either. We need an architecture within which the right questions are asked and the prospects for progress on their resolution are enhanced. We have taken one big step—discarding the conventional wisdom—and a few smaller ones—including identifying the importance of the metaphysics of legal content and the difference among different kinds of metaphysical questions about content we can ask—in this essay. Our aim is to construct an architecture with a sturdy foundation. That foundation is the metaphysics of legal content. The question is: Where do we go from here? What lies ahead?

82. Remember, on my reading, which Hart himself accepts in the postscript to the second edition of the *Concept of Law*, (3) holds because of the rule of recognition, which is an instance of (7); further, the rule of recognition is a feature of the concept of law—an essential feature of law—which means that (3) ultimately derives from (11). *Cf.* HART, *supra* note 7, at 265 and n.59.

VII. A NEW BEGINNING

I want to close this Article by taking a look ahead to the next two essays in this series. The aim of both is to continue to pursue the projects of jurisprudence once freed of the conventional wisdom. As I understand it, the aim of jurisprudence is to identify its core concerns and problems and to make progress on their resolution. In my view, the core problems of philosophical, as opposed to say sociological, jurisprudence are very much the same kinds of problems that arise elsewhere in philosophy—as much in the philosophy of language and metaphysics, the philosophy of action, mind, social, and natural science as in ethics and political philosophy. The character of the problems is affected, no doubt, by the fact the subject matter is a distinctive kind of social institution, law. But the tradition in legal philosophy has been to isolate jurisprudence—to treat its problems as only marginally connected to the core concerns of philosophy more generally. This has been bad for jurisprudence because it has isolated those who work in the field from both lawyers and legal theorists of all stripes on the one hand and from philosophers more generally on the other. It has been even worse for jurisprudence because it has robbed the subject of the tools of philosophy more generally and the talents of philosophers in other areas of philosophy. Progress has stalled for all the wrong reasons: not because the problems are too hard or too deep, but because too much effort has been devoted to the wrong issues. One deepens and confirms the importance of jurisprudence not by displaying its 'uniqueness' but by showing the ways in which its problems are the problems of philosophy more generally. The question is: What are those problems?

A. Legal Content and Legal Semantics

One important problem concerns the relationship between legal content and legal semantics. A theory of legal semantics is a theory of the meaning of legal sentences. In the first instance it is an account of how to understand statements of the form: 'It is the law in jurisdiction *J* that *p*'. Some hold that such statements are not reports but actually *predictions* about what judges will do. This is certainly the view widely attributed to Holmes. Others hold that such statements are not reports but *authorizations* directing officials to impose sanctions on those who fail to *p* (at least where *p* is a prohibition or duty-imposing rule). Arguably this is Kelsen's account of the semantics of legal discourse. Still others hold the view that the law does not merely report the existence of a moral duty or an important moral reason to act; it should be understood as imposing such a duty. We can call this the 'moral semantics

view of legal discourse', some or other version of which is held by Raz, myself, and others.

The view that legal statements call for a moral semantics of this sort is thought to raise a particularly serious worry for those who adopt a broadly speaking 'positivistic' account of legal content. The problem is this: If legal facts are or can be only social facts, how can legal claims be moral assertions? Or to put it the other way around: If moral facts need not (my view) or cannot (Raz's view) contribute to the content of law, how can legal statements be claims about what one has (sometimes conclusive) moral reason to do? How can such a 'thin' metaphysics of law support a 'rich' moral semantics of legal discourse?

The problem may be particularly pressing for a positivist, but it is actually a quite general problem in jurisprudence: Namely, what metaphysics of law is adequate to support a given semantics of legal discourse? Indeed, this is a general problem in philosophy and not just in jurisprudence.

B. Hume's Problem

The second issue, often confused with the first, concerns the relationship between *propositional contents*. Again, let's begin with metaphysics of law. On the view that only social facts can contribute to legal content, sentences that express the facts in virtue of which the law is what it is are sentences describing behavior and attitudes: the judge did this or intended that or believed this and that, the legislature did that, and so on. Legal statements, however, express claims about what ought to be done or what one is at liberty to do: citizens must do this or are free to do that, and so on.[83]

Sentences asserting or characterizing what officials say and do (and the attitudes they have towards the sayings and doings) are descriptive; they are 'is' statements. In contrast, legal statements (on all but the 'predictive' interpretation of them) are normative; they are 'oughts' of one sort or another. The problem is: How can 'is' premises lead to 'ought' conclusions? How can one derive 'ought' from 'is'? This is Hume's problem, of course.[84] It is a problem about the relationship between descriptive and normative claims or the propositional contents of descriptive and normative sentences. It thus

83. One need not understand these statements as expressing *moral* oughts or obligations in order for the problem to arise. It is enough that they are normative in any sense.

84. *See* DAVID HUME, A TREATISE OF HUMAN NATURE, bk. III, pt. 1, § 1, at 456-70 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1740).

differs from the first problem, which expresses a concern about the relationship between the metaphysics of legal content and the semantics of legal discourse.

C. Directives and Reasons

The third issue is different from the first two but is all too often confused with either or both of them. Law claims to create reasons for acting. Some think that it claims to create a distinct class of reasons for acting—legal reasons. Arguably, Hart held the view that legal obligation constituted a distinctive kind of obligation which was not just a species of moral obligations. Others, again including positivists like Raz and me, believe that the law claims to have an impact on what we have moral reason to do. Sometimes law makes concrete what we already have moral reason to do and yet other times it creates moral reasons for acting that in the absence of law we might not otherwise have. For my part, I think it best to put the point as broadly and generally as possible. Law impacts what we have reason to do: reason, moreover, that is appropriately enforced by coercion. After all, a number of activities can impact what we have moral reason to do without those reasons being suitable objects of coercion. Promising is a good example. Arguably, my promising to meet you for lunch impacts what I have moral reason to do, but not in a way that normally calls for its coercive enforcement.

From the law's point of view, each of its directives has an impact on what we have moral reason to do. The law could well be wrong about this, but it would be odd for law to hold that it is justified in enforcing its directives through coercive means yet remain agnostic as to whether its directives bear on what we have moral reason to do. (The reader will recall that it is considerations of this sort that lead me to the view that, in order for law to exist, an appropriate group of officials must adopt the law's point of view and not merely the internal point of view.)

The question, therefore, is: How can acts of asserting and commanding—among the paradigmatic cases of legal activity—impact what those to whom they are addressed have moral reason to do? How can legal activity, the issuance of authoritative directives, and judicial opinions create moral reasons for acting or otherwise impact what we have moral reason to do?[85] Moreover, distinctive of law (but not unique to it) is that the law claims to give rise to content-independent reasons: that is, the law purports to make a difference in

85. In fact, the issue can be generalized and extended. The same problem arises for those who satisfy themselves thinking that law only creates 'legal' reasons and not moral reasons. After all, the issue is how commanding, asserting, and directing creates any sort of reason for acting, moral or otherwise.

normative space—in terms of what we have reason to do—quite apart from what the content of a particular legal directive or command is.

D. Law's Place

The third essay in this trilogy turns to a problem whose solution, for all I know, may forever elude us. For as long as I can recall, commentators have characterized law as a normative social practice—and that seems right. What these commentators have had in mind, more often than not, is what I address in the second essay. They claim that, due to legal positivism's impoverished resources (social facts), positivism cannot account for the normative semantics of law, law's capacity to create reasons for action, and the gap between 'legal is' statements and 'legal ought' statements. The second essay makes clear that I do not believe that any of these charges stick. A thin metaphysics can support a thick semantics. There is no special Humean problem in law. And legal activity can create moral reasons or impact more generally what we have moral reason to do.

On the other hand, there is something of a dual nature to law—its sociality and its normativity—that is a problem of much wider scope, one that cuts across the natural law/positivism divide. I am inclined (for now anyway) to frame the problem in the following way.

Law is indeed a normative social practice. An adequate theory of law will explain its sociality and its normativity. It turns out, however, that there is a major divide in jurisprudence between those who think that the primary project of jurisprudence is to explain the normative dimensions of law and those who think the project is to display the sociality of law, which they take to be the requirement of showing the ways in which law is continuous with other aspects of our social life.[86] For some, like Shapiro, this amounts to showing the continuity between individual intentional and planning activity to group action to group organization to complex organizations to law.[87] The normativity of law is then the normativity suitable to social organizations; this turns out to be largely the normativity of instrumental rationality. The worry that all such accounts invite is that the normativity of law is not the normativity of instrumental rationality. Is there more that can be said about ways in which

86. Hart, Shapiro, and I are among those who emphasize the sociality of law—Hart in emphasizing social rules, Shapiro in emphasizing plans, and I in emphasizing law's conventionality.

87. SHAPIRO, *supra* note 23, at 118-233.

law's normativity can be connected to instrumental rationality if not strictly speaking reducible to it?

But, of course, law is not just any old social organization, just more complex. The plans, rules, and directives of the law purport to—and sometimes, if not always, do—make a difference in what those to whom it is directed have moral reason to do. Other theorists, including natural lawyers, but not only natural lawyers—Raz, for example—think of law in terms of its continuity with morality. For them, to understand or to grasp law is to appreciate the ways in which law makes a moral difference. For them, the most fundamental feature of law is its continuity with morality and moral life more generally.

It should turn out to be no surprise that those who have focused on the difference law makes in moral space have said little about the social dimensions of law, whereas those who have emphasized law's continuity with social orderings more generally have been largely unconvincing in their accounts of the normativity of law.

The duality of law is the problem of law's place. An adequate jurisprudence is ultimately an account of law's place. The project of the third essay is to find law's place. Failing that, its aim is to provide us with a roadmap adequate to insure that we look for law's place in the right neighborhood.