

Legal positivism as an idea about what morality might be

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...[the] old confusions between law and the standards appropriate to the criticism of law.

—H.L.A. Hart, Essays in Jurisprudence and Philosophy.

Introductory

1. Is there a necessary connection between morality and law? Anyone who has studied legal philosophy knows that — in *some* sense of this question — legal positivists say no, and non-positivists (or natural lawyers) say yes.¹ The question remains the “litmus test” for classifying legal theories, as Joseph Raz once put it,² and a focal point of the philosopher’s preoccupation with law. Our undergraduate textbooks are organized around it. On the first day of Philosophy of Law, the student is apt to encounter both the beautiful saying of Thomas — *Lex injusta non est lex* — and the sober de-mystification of Austin: “This existence of law is one thing; its merit or demerit quite another.” The stage for the semester is set by noticing that one seems to assert what the other denies.

Raz was rightly complaining about the terms of the question. For there are of course many conceptual connections between law and morality which everyone would agree to. For example, it may be that there is always some moral good in the mere existence of a legal system. Or that the law always makes moral claims, such as the claim to legitimate authority.³ More seriously, posing the question as one of “necessary connection” seems to issue an open invitation for anyone to elaborate *a* sense in which law is or isn’t connected to morality, and thereby to claim victory in the debate. Who could blame our undergraduates if what they hear is:

– there is no necessary connection between law and morality, says the positivist; laws can be unjust.

– of course, says the critic, but people have moral reasons for creating and maintaining systems of positive law.

¹ The formulation of the question as one of “necessary connection” stems from H. L. A Hart. See The Concept of Law, p. 17 (“...the rival claim that law is best understood through its ‘necessary’ connection with morality is an older doctrine which Austin, like Bentham before him, took as a principal object of attack”)

² Joseph Raz, “About Morality and the Nature of Law,” 48 Am J. Juris (2003).

³ See John Gardner, Law as a Leap of Faith [cite].

– sure, says the positivist, but that doesn't mean that the existence and content of the law can't be identified without recourse to such reasons.

– *naturally*, says the critic, for the moral reasons in question are reasons for creating legal authority. Nonetheless, judges must often resort to moral argument to decide cases.

–of course, says the positivist, for the law has limits (it is not all the considerations judges should use in deciding cases); since judges have to render a non-arbitrary decision, they need morality.

– *no doubt*, says, the critic, but when judges extend the law, they don't simply become legislators, nor would that be tolerable; they appeal to principles which rationalize the existing law.

-- whoever said that all law-creation was the same? Making case law is different than legislating, says the positivist

– *well*, says the critic, the central point is this: the law has a moral task to do, and so the central case of law is one in which it is successful; for to understand what the law is we need first to understand why it is good to have law.

– say what you like about focal cases, says the positivist; it doesn't follow that the law is always a morally valuable institution, or that there is always a moral obligation to obey the law.

And so on.

Of course, a dialogue like this only shows that orienting legal theory around some master question concerning “necessary connections” between law and morality isn't very helpful overall. Unfortunately, things go on today to some extent as if *one* of the points of connection or disconnection must really be the decisive one, but there are different ideas about which one, and why.

2. My foray into this territory picks up the part of the debate which, after Dworkin, is described as the relation between morality and the *grounds of law*. The question is whether the content of the law in force ever depends on what is morally true. I call this the *guiding question*.

This is the region where we find: **(1)** two species of self-identified “positivists,” one who answers “sometimes” (it all depends on society's practices for recognizing law), and the other who says “never” (whatever the practice, there is *no such thing* as legal norms depending on what is morally true); and **(2)** a “non-positivist” who rejects both of these two positions by saying “always.” Aside from the in-house conflict between the positivists, this is also the issue which Austin's dictum appears to be joining with Aquinas. Or at least that is how things get construed. Part of my aim will be to suggest that this reading of the tradition makes little sense,

and to sketch a different way to hear the conflict. In fact, my approach will be unorthodox in several ways.

First, most writers seek to defend one of the positions, but I want to see if I can manage to blur things a bit and perhaps even to make the guiding question a little less interesting.⁴ This is my approach in part because I agree with Liam Murphy’s conclusion that we lack compelling reason to prefer one of the positions, and that all of the currently available arguments carry less conviction than do “the basic positivist or non-positivist pictures for those in their grip.”⁵ Murphy doesn’t say what he means “pictures,” but I take this to mean something like someone’s starting sense of how things should be represented, as motivated by something it strikes one as important to stress in an account of the law.⁶ Consider in this regard Hart’s assertion that a “wide” concept of law — i.e., one including even barbarisms like Nazi rule — is what is “most needed in order to make men clear sighted in confronting the official abuse of power.”⁷ That provoked a long chapter of debate. But the assertion already transparently places the whole issue outside of philosophy. For the effect of what philosophers teach about law surely depends on many factors local to a time and place (and do misunderstandings count in measuring those effects, or just correct understandings?).⁸ It isn’t the business of philosophy, anyway, to engage in such predictions. And if it were, I myself might propose that the best “critical reflective attitudes” towards law would be achieved by continuing to teach *all* the current options

⁴ If you don’t find the guiding question interesting, then good for you. My starting point is a certain philosophical pre-occupation, which has its starts and stops, but certainly hasn’t found any resolution.

⁴ Liam Murphy, What Makes Law: An Introduction to the Philosophy of Law. Cambridge University Press, 87; see also 88, 103, 44. In addition to not seeing, along with Murphy, an argument that would resolve the debate, I also find it hard to maintain a steady grip on why it matters. It seems clear that judges and lawyers don’t need a theory which tells them when they are doing law and when they are doing morality. Perhaps it matters from some other point of view? I’m not sure I know what that point of view is. On this, see Joseph Raz, “The Problem About the Nature of Law” in Ethics In he Public Domain.

⁶ See, e.g., Murphy’s remark, that the exclusive positivist has a strong sense of law’s validity being entirely distinct from its goodness: “If no one had this initial conviction about the nature of law, I doubt that the very idea of positivism would have emerged.” What Makes Law, Op cit., p. 44

⁷ H.L.A. Hart, The Concept of Law (Oxford, 1961), p. 206. This echoes Bentham’s assertion that non-positivism is apt to foster either quietism or anarchism. Hart further develops the idea in “The Separation of Law and Morals,” Harvard Law Review.

⁸ The experience in 19th Century England (which found legal positivism allied with liberal reform) seems to be reversed, in the accounts of many writers, in other times and places (pre-civil way America, Nazi Germany, South African Apartheid). See, e.g., Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press 1975); David Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford: Clarendon Press, 1991).

(and their criticisms of one another), which is just what actually happens in survey jurisprudence courses. (I.e., Leibniz was right — this *is* the best of all worlds.)

My inquiry is unorthodox in yet another way. I'm going to begin by sketching the normative story to be told about one department of law, the law of torts. This is un-orthodox because the guiding question is supposed to be a formal one. It is said to belong to a field called "analytic jurisprudence," and you are supposed to be able to get results in this field without incurring any commitments to "normative jurisprudence," which looks at the principles which govern (or ought to govern) particular departments of the law. (Jules Coleman: "Legal positivism makes a conceptual or analytic claim about law, and that claim should not be confused with programmatic or normative interests certain positivists, especially Bentham, might have had.")⁹ Those who draw this distinction say that the two sets of questions (the nature of law/ what justifies the law) are mutually irrelevant and, specifically, that the question of positivism, and its correct formulation, doesn't depend on any normative interpretations of substantive law.¹⁰ Nothing here will amount to a suggestion that this distinction is incoherent, though I do hope to raise a doubt about this purely formal approach.

Lon Fuller anticipated my view in a brief remark. He began The Morality of Law by observing that "when law is compared with morality, it seems to be assumed that everyone knows what the second term of the comparison embraces."¹¹ That isn't quite right. Fuller should have said: "It seems to be assumed that it *doesn't matter* what the second term embraces." The only things you need to know to get the guiding question going are just that critical morality can be brought to bear in criticizing the law, and that what critical morality says is *always right*. That is, unlike social morality, which is a matter of people's attitudes, critical morality doesn't stand before any higher court of appeal. Critical morality is an un-judged judge.

Actually, the guiding question might be said to presume even less than this. Obviously, it has become intellectually respectable to doubt that there is any such thing as divine commands.

⁹ Jules Coleman, "Negative and Positive Positivism," 11 J. Legal Stud. 139, 147 (1982)

¹⁰ Besides Coleman op. cit., see, e.g., John Gardner, "Legal Positivism: 5 1/2 Myths," 46 Am J. Juris. 199 (2002); and Scott Shapiro, Legality, pp. —. Among analytic positivists, there are a variety of ideas about what sort of other normative commitments are "methodologically" involved in theorizing law, but the distinction between Coleman's two divisions is all that concerns me here.

¹¹ Lon Fuller, The Morality of Law, pp. 3-4. The entire passage (which deserves a longer commentary) continues: "Thomas Reed Powell used to say that if you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind." In the present case, it has seemed to me, the legal mind generally exhausts itself in thinking about law and is content to leave unexamined the thing to which law is being related and from which it is being distinguished."

So today you don't find the guiding question formulated with the unjudged judge being *God's law*. Aquinas and Suarez do make learned inquires about the relation between human law and divine law, but you're bound to lose your audience today if you follow too closely in their tracks. Similarly, it has become obscure, in recent philosophy, whether, within practical reasoning generally, there is any deeply distinctive part to be called *moral* reasoning — say, for example (on one version) the application of principles which are special in being universal, necessary or supreme — principles, as Kant might say, which have the *form of law*. So, although it is common for our debaters to ask whether a judge's "moral reasoning" is always / sometimes / never outside the limits of law, it seems understandable that we now begin to hear an even more formal version of the question, i.e., in terms of how legal norms stand in relation to our "normative reasons." "Normative reason," like Austin's "merits,"¹² is a term for what is normatively basic, and the guiding question is meant to be a question about law's relation to whatever is normatively basic, whatever that might be. The point is just that you don't even have to know. The analytic treatment of the nature of law is officially agnostic not only about what morality might be, but about whether "morality" is any important category at all.¹³

Now, evidently, many people now say they don't see why this debate matters. There is some feeling of impasse and exhaustion, and even a proposal now to eliminate the guiding question, if not simply to ignore it.¹⁴ Ignoring somehow never works in philosophy, alas. And the perplexity gains traction from the fact that almost everyone agrees that —notwithstanding the high-sounding importance of "knowing what the law says" — lawyers and judges don't need a theory of the grounds of law. The problem doesn't appear from the professional or practice point of view, where people move between law and morality with careless indifference to where the borders might lie.¹⁵ Against this background, I think it will be worth recalling two things: First, that the first positivists were *extremely excited* about the new doctrine, and, second, that they had a certain picture of what morality was: they were utilitarians. Was the co-incidence of these two

¹² It makes sense that Austin might prefer not to frame the question in terms of morality: common sense has many confused ideas about it, as every utilitarian has stressed.

¹³ Cf. Will Waluchow, *Inclusive Legal Positivism*, pp. 2-3, n.3, who says that the debate only presupposes that appeal to critical standards "is not totally nonsensical."

¹⁴ Waluchow, *op. cit.*, says: "Legal Theory is in a perplexing state. Traditional boundaries between rival views have been blurred to the point where one wonders just what the issues are whether the protagonists are more often than not arguing at cross purposes." For similar judgments, see, besides Murphy, *ibid.*, Ronald Dworkin, *Justice in Robes*, intro & chs 7-8, esp at 238-40; and James Allen, "A Modest Proposal," (2003) 23 *Oxford J. Legal Stud* 197 at 205. For eliminationism, see Lewis Kornhauser, "Governance Structures, Legal Systems, and the Concept of Law," *Chicago-Kent Law Review* 79: 355-81.

¹⁵ On "points of view," see, helpfully, Joseph Raz, "The Problem about the Nature of Law" in *Ethics in the Public Domain* [cite].

things a coincidence? The analytic way of asking the guiding question sees only an accident here, something for an historian or a biographer to consider, but not a theorist; something in the dim space causes or motives but not of reasons. But I say: this was *no* accident.¹⁶ I might even be so bold as to claim that legal positivism, at its inception, was an idea about morality.

My grounds for this claim will perhaps not be fully clear until Section III, when I illustrate my point using Austin's dictum. Since this endlessly quoted statement seems to say only what everyone knows — that the law can be good or bad — there is, in hindsight, a puzzle about it: Why did it seem to be something significant, much less something exciting and disruptive of a previous tradition?¹⁷ The answer, it will clearly be seen, lies not in what Austin thinks about law, but in his picture of what the law's "merit or demerit" might be. Fitted with that picture, the new turn in legal theory starts to make sense.

I. Tort Law and the Morality of Interaction

3. What matters in this story is just the possible relation between law and morality.¹⁸

The morality of interaction, I will suppose, says that each of us is free, in the sense that no person is in charge of any other (or each is in charge of herself).¹⁹ Kant gives voice to this sentiment when, exporting into metaphysical philosophy a key term from the Roman Law, he glosses the "innate" human right of each" in terms of "the quality of being *sui-iuris*," (one's own master), or, again, when he glosses this as "independence from the choice of others."²⁰ These are normative ideas — not how much free reign others leave you, but your normative power to demand the appropriate sort.²¹ The opposite of independence is therefore normative dependence. Slavery is an extreme example, being *alieni juris*, as the Romans said, under the control of another. But there are many forms of dependence, subjection, subordination or domination that are less extreme. To be independent, or in charge of ourselves, at least this must be true: I'm the

¹⁶ " Not an accident" leaves open what kind of dependency relations there are here. I'll say more as I go.

¹⁷ Austin's colleague at University College, Amos: It has finally freed the law from "the dead hand of morality which still clung to it." Comment on this, as understanding the point.

¹⁸ My interest in the story stems from teaching the law of torts, which involved me in the task of trying to make some sense of it.

¹⁹ I borrow the language of "in charge of" from Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2015)

²⁰ Kant, *MM* 6:238.

²¹ On the difference, cf. Phillip Pettit, *Republicanism and Just Freedom* [cite]

one who gets to decide what to do with what is mine, and you're the one who gets to decide with to do with what is yours, and we each get to decide this without needing — what the slave needs — the leave of others. This obviously means that there are certain ways each of us must forbear, and that we can rightfully be constrained if we do not. For example, I must not use what belongs to you without your consent, and I must also be *careful* (as I will argue) in the way I use my own person and property. Wrongs are transactions inconsistent with this independence.

Don't think that a compelling argument for this is about come your way. Kant himself has none, as I read him, though he explains political authority on the basis of this. He says darkly that the Law or Right is a "postulate incapable of further proof." At the same time, I find that I don't really need a proof of the obligation to forbear in certain basic ways. It feels like an attractive and fairly ecumenical idea. Even those who start political philosophy from very different premises — say the role of authority in making things go well — think this is an important part of what it is for things to go well. At any rate, my argument does not require that you think that the Morality of Interaction is true, only that it is a possible account of what morality, or a part of it, might say. Spelled out in terms of its implications for the law in force, I'll call this the Independence Account.

A familiar point about classical utilitarianism is that the standards it proposes for criticizing any rule are not themselves rule-like, however "utility" is construed. Given this, it is a distinctive feature of the Independence Account that morality and law share a conceptual structure. Indeed, they are presented as mutually dependent on one another, not just as a matter of contingent fact, but in the nature of the case. The morality of interaction is dependent on law because, at least as stated so far, it is abstract and indeterminate. Further determinations are needed to spell out what the normative independence of each requires in various *types* of circumstances, and, after that, in various *circumstances* of each type, down to the *judgments* which actually resolve claims of the form, "Hey, you're not allowed to do that to me" or "You've wronged me by doing such-and-such." This requires positive law.

Why does it require positive law? *First*, it seems unlikely that such matters are only epistemically indeterminate, i.e., that there is a single right judgment whenever a complaint of this form is heard. Some constitutive decisions are needed, a choice of rules or standards from among a range of options which are equally reasonable, or at least equally reasonable before before the choice is made.

And *second*, even if the matter were only a problem in the order of knowing, that wouldn't show we could do without law and leave things up to the private judgement of each.

For then my right to independence from your choices would depend on your good will and judgment, and *vice versa*. So each of us would enjoy such independence only, as it were, by the other's leave, and according to what *seems* right to the other.²² If the actuality of your independence were to depend on my moral acumen, judgement or good will, then your freedom would remain as dependent on my choices as if you had no rights at all. Rights to independence — again in the very nature of the case — require *rightful ways or procedures* of determining what they are, and, indeed, enforcing them.²³ Such determinations couldn't be authoritative if they were made by you or me; this requires a *public* institution entitled to apply and enforce the rules on behalf of everyone. So we should say: It belongs to nature of the morality of private interaction that it cannot be fully spelled out apart from the law, even if somehow it were obvious to everyone how it should be spelled out.

The relation between morality and law proposed here is this: The law *expresses* the morality of interaction in a public (i.e., an authoritative) way, and makes it determinate. Moreover, only the law can do this. Since this is not an empirical claim, awaiting investigation of what other ways there might be of living with others in mutual freedom, it could perhaps be more clearly put like this: Anything which managed to spell this out in a public (i.e., an authoritative) way would be law.

4. Tort law seems fit to be part of the morality of interaction since, after all, the basic form of the plaintiff's complaint is: (1) "The defendant is not allowed to do that to me," or "The defendant wronged me."²⁴ Our local material would provide much more resistance to the philosopher's thesis if the tort plaintiff made any claims like these:

- (2) The defendant is not allowed to do that.
- (2a) The defendant is not allowed to do that, and I'd like collect the bounty the authorities around here are offering for my reporting it.²⁵
- (3) This mustn't be allowed to happen to me.
- (4) The defendant is not allowed to do that AND this mustn't be allowed to happen to me
- (4a) The defendant isn't to allowed to do that IF this happens to me as a result.

²² cf, Kant, MM cite.

²³ I think this is part of leads Kant to say that his Postulate of Public Right — i.e., "you ought to leave the state of nature and proceed with [others] into rightful condition" — can be "explicated analytically from the concept of Right in external relations, in contrast with violence." MM 6: ____.

²⁴ See Ripstein, Private Wrongs.

²⁵ Cf. Richard Posner, "A Theory of Negligence"

(5) Hey, I'm entitled to compensation for what happened to me.

Such claims do not so much as “state a cause of action” in the august words of our Federal Rules of Civil Procedure.²⁶

Since my hope is to be as naive as possible, let's let the lawyer tell us why not.

(2) and (2a) focus merely on the defendant's conduct, but fail to allege that that any right of the plaintiff's was infringed. (3) gets the plaintiff's right into view, but then fails to allege that defendant's breached of a duty. From this point of view, (4) and (4a) are repair jobs. The mere conjunction of “the defendant misbehaved” with “this happened to me” or even “this happened to me *as a result*” falls short with the sort of relation that is legally significant. For one thing, since “what happened to me” as an independent element in these complaints (however obscure “causation” may be, our philosophers at least agree that it only applies to *independent* things)²⁷ doesn't get into view the law's categorical distinction between misfeasance (where the defendant has participated in creating the risk complained of) and non-feasance (where the defendant merely *allows* an independently existing risk to take its course). “What happens to the plaintiff” is legally significant only when it is part of an account of what prospective danger created by the defendant made the defendant's conduct wrongful.²⁸ The problem with (4) is obvious: The tort plaintiff is not approaching the administrator of a compensation scheme as one of its beneficiaries. He does seek a remedy of course, but the ground of the remedy is what the plaintiff's alleges is a wrong.

Let us venture a small, further step to unify the lawyers points in a more succinct and abstract way. Claims of form (1) evidently represent the tort plaintiff's complaint because they use a transitive verb form (x wronged y) to depict a practical nexus which has primacy over the parts that are joined. In “x wrongs y,” x does wrong and y suffers wrong, but the doing and suffering are identifiable only as the poles of a single transactional reality, which can be

²⁶ See Fed. Rules Civ Pro 12b6

²⁷ At least the type of causation engaged by talk of “results.” Aristotle's four *aetia*, or Kant's talk of “a causality of reason” or Thomas's of practical knowledge as the “cause of what it understands” are different matters.

²⁸ Or indeed when it is part of the *very same reality* as the defendant's wrongdoing — i.e., A's walking on B's land is nothing other than B's land being walked on by A —there is no “casual” connection between A and B mentioned here.

described from either direction. Whereas in 2-5, what the defendant does and what happens to the plaintiff purport to be significant items, apart from any such nexus.

Understanding this point of transactional priority (and how deep it in fact runs the native instincts of our lawyers) places constraints on the kind of further sense we can make of tort law, at least if it allow that the law can't be something radically other than what legal officials recognize it be. (I trust that the positivist won't object to my use of this assumption.) I'll illustrate this by considering one of the two species of wronging which tort law is principally concerned with — not the one where the defendant *uses* the plaintiff's body or property (e.g., battery, trespass), but the one where the defendant uses only his *own* body or property, but thereby *damages* something of the plaintiff's. It is here that we are referred to the home-spun wisdom of the "reasonable person" standard, as it gets explained to the lay folks. Reflecting on this will provide an opportunity to enter the Independence Account by a different route: not by reasoning downwards from an abstract precept (independence, non-domination), but by starting from positive law and asking what to make of it.

5. The approach which predominates in our learned academies is both "economic" and "functionalist" in character. Tort law is said to be either a way of (1) favorably redistributing the cost of an accident (that's called "compensation" because re-distribution shifts the loss away from the plaintiff) or of (2) creating incentives for cost effective investment in accident prevention (that's called "deterrence" for obvious reasons). On this teaching, negligence liability is an instrument for making us happier by reducing the overall costs of accidents, counting how the loss is shared also as a species of "cost." Less cost means more for everyone. Here we may speak of negligence liability as part of a law of "accidents," where what is significant about "accidents" (i.e., why they should attract legal attention *at all*) is that they sometimes cause *losses*. Some losses are good, of course, because the thing that brings them about is so valuable, like being to drive up to 55 mph. Tort law is the subtle means of getting cost/benefit calculation right, along with other means like legal regulation and social insurance. The standard for criticizing the legal rules is of course the goal of overall accident cost reduction. As one of our eminent federal judges said: "Apart from the requirements of justice, I take it as axiomatic that the goal of any system of accident law is to reduce the costs of accidents."²⁹

²⁹ This was of course said when he was a professor. His decisions from the bench do not display much evidence of this thinking. See Guido Calabresi, The Costs of Accidents. Influential versions of a loss based account, which sees tort as a public law of accidents, are also Posner and Kaplow and Shavell. You might feel grateful for Calabresi's nod to justice, but no discussion of those "requirements" appears in the pages that follow, except possibly for its role as a source of superstition about what the law should be doing.

All the well documented problems of consequentialist “two-level” justifications appear here, but I will suggest that they appear in an acute form.³⁰ For when the consequentialist tells a story about the advantages of a rule that allows people, say, to bind themselves through promises, he seems at least to be telling a story about the target notion of promissory obligation. At least, I find I can think so. In contrast, it isn’t clear that the costs of accidents theory is about *tort liability* at all, because it isn’t clear that it even has in view the nexus between the parties. What it addresses are the several advantages of penalizing the defendant and granting the plaintiff payment, which is far from the target notion. Thus, while “deterrence,” might explain why someone who fails to take certain precautions is obliged to pay up, it doesn’t, by itself, exhibit why only someone injured by that very failure is entitled to all the proceeds. Similarly, the goodness of “compensation” doesn’t exhibit why this particular defendant should be the one to bear the plaintiff’s loss.

No one, I trust, will suppose that the answer to these difficulties is to think of tort liability as our public pursuit of two independent goals operating simultaneously, one which explains the treatment of the defendant and the other which explains the treatment of the plaintiff.³¹

At the root of the trouble here is the fact that the functionalist’s basic normative category (“loss”) is a monadic one. It takes two people for there to be a wronging, but loss gets its grip one person at a time.

6. Suppose we try to represent still more abstractly still what our lawyers seem to keep a steady grip on, whatever they are told in law school. Given the general dialectical climate, it seems little wonder that a passage from Aristotle should have become lit up with significance.³² (We are moving back to philosophy here, but Kant’s general view is relevant, that philosophy is only called for in “defense,” when morality — which is already fully evident to the common understanding — is dialectically threatened; philosophy’s main business is combatting itself.)

³⁰ For a fuller account of the difficulties, See Weinrib, The Idea of Private Law, chs. 1-2; Coleman, Risks and Wrongs; Zipursky [cite]; Stone, “The Significance of Doing the Suffering”

³¹ Since the pursuit of each goal through liability determinations limits what can be done to achieve the other (compensate only when you can deter, and deter only when you can compensate), and since nothing in even in this mutually thwarting pursuit of different goals either requires or even, by itself, recommends tort law’s correlative treatment of the two parties (where e.g., what the defendant pays is always what the plaintiff *is paid*), the whole thing looks like a hopeless attempt to approximate a target which must rest on some other normative footing. You don’t come close to liability relations, or claim-right relations by adding together their parts. This is, in effect, readily acknowledged and even asserted by other functionalists, who on the basis of the same welfare premises, call for the *abolition* of tort liability. Sugarman [cite]. Calabresi himself offered his The Cost of Accidents as a neutral framework for raising the question of whether we want tort law.

³²

Aristotle speaks of a form of justice which essentially operates transactionally (“the doing and suffering of wrong”),³³ and he distinguishes this from other justice problems which concern the distribution of benefits and burdens within some group.³⁴ Much is obscure here, but it seems impossible not to sense that Aristotle — in speaking of a kind of injustice which has special significance on account of someone’s suffering the *same wrong* (and, further, in conceiving of this as a disturbance of “equality”) was bumping into the practical nexus which Kant calls the “equal freedom” of each.³⁵ Of course, Kant lays stress on “freedom, for his account is shaped, in a way Aristotle’s couldn’t be, by the presence of philosophical voices proclaiming the glories of happiness (as the satisfaction of appetitive desire, not *eudamonia*). But the main point here is just that philosophy, in these instances, offers something which looks promising for making sense of tort law, because the concepts to be applied have the same relational structure as the material to be explained.

Assuming it is not too hard to see how a specification of the morality of interaction would make each legally sovereign over his own person and property (i.e., against intentional uses by others³⁶), how might *negligence liability* figure in such an account?

The thesis is that all rules of tort are a specification of the morality of interaction for *a particular type of situation*. The tort situation, which is different, e.g., than contract (where people have cooperatively exercised powers to alter their normative positions) is one where persons are pursuing their purposes independently of one another. By application of such concepts as “reasonable care” and “reasonable foreseeability,” *negligence* law distinguishes between choices of mine that *are* wrongful because of they way they interference with your equal right to set and pursue your purposes, and those that — notwithstanding the way they setbacks your interests, or change the world unfavorably for your purposes — are within my right.

To see this, notice first if any body of law is to give content to the abstract idea of independence, then it *must* also work out or formulate or decide on the more specific content of *some such* distinction: interferences with you vs. mere changes to the world that are unfavorable

³³ Aristotle, *Nicomachean Ethics* V.

³⁴ See Weinrib, *The Idea of Private Law*, *ibid.*, ch. 3; and Weinrib, “Aristotle’s Forms of Justice”

³⁵ Kant, *MM* 230, ____.

³⁶ Intentional just spells out the meaning of use: To use anything is to use it intentionally.

to your purposes.³⁷ The reason is easy to see. For if you had a right against me to the most favorable context or conditions in which to pursue your purposes, you would be my master. My right to frustrate your purposes by changing the world in unfavorable ways to you is just an incidence of my own independence. The idea is no different in principle from my right not to cooperate with you by entering into a contract.³⁸

All this is *a priori*. But so also is the further specification of *this* abstract distinction in terms of “reasonable care.” The law could have given other names to this (neighborliness, the x-factor, whatever), but there is no other possible concept that could mediate between our choices.³⁹ To see this, a remark of J.L Austin’s is helpful, though it belongs to a different context:

Although we have this notion of my idea of what I’m doing—and indeed we have as a general rule such an idea, as it were a miner’s lamp on our forehead which illuminates always just so far ahead as we go along, it is not to be supposed that there are any *precise rules* about the extent and degree of illumination it sheds. The only general rule is that the illumination is always *limited*, and that in several ways. It will never extend indefinitely far ahead. Of course, all that is to follow, or to be done thereafter is not what I am intending to do, but perhaps consequences or results or effects thereof. Moreover, it does not illuminate *all* of my surroundings. Whatever I am doing is being done and to be done amidst a background of *circumstances* (including of course activities by other agents). This is what necessitates *care*, to ward off impingements, upsets, accidents. Furthermore, the doing of it will involve *incidentally* all kinds of minutiae of, at the least, bodily movements, and often many other things besides. These will be below the level of any intention, *however* detailed (and it need not be of course be detailed at all), that I may have formed.”⁴⁰

What is illuminating here is the way the concept of “care” is located as an aspect of any practical situation,⁴¹ and recognition that what can be foreseen is not something that can be codified. (“Reasonableness” is always the canon where codification is impossible and we are left to

³⁷ My account is indebted to Ripstein, *Force and Freedom* {cite}

³⁸ Ripstein and the last quart of milk example.

³⁹ This account of reasonable care is different from John Gardner’s, who treats as a merely formal device for passing on to a different agent the power to weigh all the reasons which bear on the case and arrive at a binding conclusion. He calls this “buck-passing.” On Gardner’s account the law could have said something else, but prefers to pass the buck for saying anything to another. On my account, there is nothing else the law could say. Cite.

⁴⁰ J. L. Austin, “Three Ways of Spilling Ink” in *Collected Papers* (Oxford University Press, ____) p. 285

⁴¹ It is what Heidegger might call an existentielle.

examples— and, as Anscombe remarked, “it is not a cannon.”)⁴² If I am to act at all, I must be careful, advertent to some of the the non-intentional but foreseeable aspects of what I’m doing, as well as some of the incidents of *how* I’m doing that. But to what degree? Given that “accidents” may concern not just my missing the targets of my own intentions, but the effects on you, “reasonable care under the circumstances” qualifies the degree of care to which others are entitled, essentially through the exclusion of two extremes. On the one hand, I can’t act with indifference to the effects on you, who would become a mere dumping ground for the unintended upshots of what I do. On the other hand, damage to you isn’t decisive for my right to do what I’m doing, i.e., I must be allowed to affect you adversely. “*Reasonable* care” is a place-holder for a judgment concerning the mean,⁴³ as it were: not privileging you or me, not turning one of us into the other’s subordinate. As such, it specifies the *form of judgment* we have been trafficking in all along at a slightly more concrete level. Of course, further specification is still needed. But as long as the legal “fact-finder” can intelligibly be regarded as making a judgment *of that form*, our law accepts the verdict. As some of our jury instructions say: “The law has no opinion about whether the defendant acted with reasonable care or not.”⁴⁴ That is because no law-like opinion is possible: that is where “reasonableness” comes into play. The only notion of correctness applicable to the result of a negligence action is that a judgment of the appropriate was made by the appropriate authority.

A range of mistakes about reasonable care arise from asking what its content might be (or from expecting it to have one), independently of this formally described task of judgment (the non-subordinating co-existence of two choosing agents) through which it comes to be engaged.⁴⁵ On the present account, the three terms which appear in this statement — “*Tort Law* helps constitute *the com-possibility of our choices* on the basis of *reasonable care* —are mutually elucidating, and the statement is an a-priori truth: It can be derived from the features of our being-in-the-world noted by Austin along with the morality of interaction.

⁴² “Modern Moral Philosophy”

⁴³ Compare Aristotle’s sense, where a mean is a negation of each of two opposite ways of missing the mark on a dimension of assessment: e.g., bravery is what is not cowardly and not reckless

⁴⁴ See [Illinois Model Jury Instructions on Negligence](#)

⁴⁵ Richard Posner makes this mistake when he begins his famous article “A Theory of Negligence” by saying that “we lack a theory of negligence,” and then trying to find the content of reasonable care in terms of the incentives for efficiency it creates. I think John Gardner may be making a similar mistake when he describes the standard of the reasonable person as “passing the buck” of considering normative reasons to the fact-finder. This implies that an equivalent to judgments of “reasonable care” would be a weighing of all the reasons that apply to the case, and that the court could articulate this but uses the “reasonable person” to avoid it. On my account, there is nothing more the law could articulate, so there is no “buck passing.”^a

III. Back to the guiding question, and a wrong conclusion to draw from all this.

x. Let's take stock. The law's main doctrines (like negligence) look very similar to the moral ideas which comprise appropriate standards for criticizing them. And, symmetrically, the moral ideas which the law makes effective look very similar to the legal doctrines which give them effect. This was bound to be the case, since law and morality stand here in the relation of determinant and determinable: the very same idea is involved, but at a different level of specification. Further, there is a relation of mutual dependence. Dependence means that something isn't *self-standing*. The morality of interaction doesn't announce self-standing personal and property rights, which could be given determinate application (however inconveniently)⁴⁶ independently of the law. The law comes in, not just to protect the consistent entitlement of each to use one's body and property, but to *constitute* such entitlements. The law does this in the two ways that were mentioned: First, it authoritatively *determines* the content of such rights. Second, it *authoritatively* determines the content of such rights. (I.e., it gives rights, even those that could be fully specified in advance, a public legal form, and affords procedures of specifying, creating and enforcing them. Without this, all determinations of right would remain sunk in forms of dependence on private will and judgment.)

That is how morality, or anyway a part of it, depends on law. Law depends on morality of interaction, only in the sense that that is what law, or a core part of it, is for.

In sum, we might say: Morality without law would be *empty*; law without morality would be *blind*. When Kant used this formula to characterize the relation between concepts and intuitions, he was, I think, endeavoring to describe the relation between a determinable and determinants, not insisting that two independent of self-standing things have to be brought together.⁴⁷ And that is true of our topic as well: It would be a misunderstanding to take the point

⁴⁶ Locke has this picture, and "inconvenient" his word for quality of a state of affairs without public institutions. There are determinate moral rights in the state of nature all right, but that state is very inconvenient given certain known tendencies of human nature such as the tendency of people to be partial to their own case. Kant's account of Right is obviously not like this. Public institutions figure in it not as remedies for inconvenience, but as necessary elements for giving application to concepts of right at all. See e.g., *MM* 312. ("Unless one wants to renounce any concepts of rights....")

⁴⁷ See Kant, *Critique of Pure Reason* [cite] and other citations (James Conant).

to be that you need two independent ingredients — both law *and* morality — to bake a legal pie.⁴⁸

It will be apparent that many *necessary connections* between law and morality are involved here.. But, as was said, “necessary connection” shouldn’t be the question. Let us just say then that things are *more mixed up* than seems usually to be assumed whether *moral* argument is sometimes/always/never required. I don’t want to say that that the guiding question *can’t* a grip here (see below), only that the present material seems not to be the best environment for it, since its not clear here what moral norms one would be contemplating allowing into the law if one answered the question in one way, or excluding from the law if one answered in another. So perhaps I’m now justified in asking: Has this *normative* account of an department of the law moved the needle on the guiding question one way or another?

x. Some people have thought so. In his book, The Idea of Private Law, Ernest Weinrib says that his account of private law (a version of the “independence account”⁴⁹ and which he calls “formalism”) reveals an immanent “legal morality” and thereby show that legal positivism is mistaken:

Formalism is not positivist, because corrective justice and distributive justice are conceptual categories that inform the content of law without themselves being posited by legal authority.⁵⁰

⁴⁸ (An aside: Is one of these poles *mus* prior to the other, either in the order of knowing or the order of being? A familiar image associated with “Natural Law” is that the natural law or morality (Thomas’s “*ius*”) comes first, and then dictates terms which imported more or less well by the “positive law.” My intuition is that, for my account, neither has to be prior. Certainly, no one would ever dreamed of representing morality as a matter of *law*, or thought of their God as giving them, of all things, *laws*, apart from the experience of life with human laws. And, leaving aside the possibility that a sound theology might say that God doesn’t depend on us, only we on him, why not also suppose, that the morality of interaction, as the philosopher explains this to us, is nothing other than an attempt (spurred especially by a response to misunderstandings) to work up into some reflective unity the ideas that are already instinct in practice of the law. (I refer just to the law of persons, property, contract, and status, which comprises the core of all legal systems.) In this way, and given its morality-*constituting* role, the law should be considered a source or exporter of morality, and not just — as discussions of the right version of positivism seem to imply — an importer. On exporting, Cf. Ripstein, Private Wrongs, cite. Such subtleties concerning the relation between the actual and the rational do not, however, concern the present argument.

⁴⁹ The account I have offered is of course indebted to Weinrib, as well as to two works by Arthur Ripstein, Private Wrongs and Force and Freedom.

⁵⁰ Weinrib, *Idea of Private Law*, p. 229.

Weinrib must also be thinking:

Formalism is not positivist, because the Principle of Right informs the content of the law without itself being posited by legal authority.

But I doubt that things can be resolved like this. It misunderstands the guiding question.

First of all, legal positivists have also talked about natural laws. Austin says that the command to maximize happiness is one. Its not as if non-positivists have a monopoly on “natural laws.” The guiding question asks whether such things can ever count as part of *the law in force around here* just by being valid on their merits. If Weinrib’s way of settling this question were correct, then someone else could say: “The legal theory of Austin is not positivist because ‘the greatest sum of happiness’ is a conceptual category that informs the content of law without itself being posited by legal authority”? If non-positivism were the view that there is some moral content in the law, for then no one would be a positivist.

Let’s try something different: “Because the Principle of Right (unlike maximum happiness) isn’t fully *specifiable* apart from the law – i.e., because private law *expresses* this principle (and does not merely “bring it about”) -- we may count the Principle of Right as an official *part* of the law.”

But to this one can already hear the positivist’s rejoinder: “What we do is to lay down a requirement concerning the formal limits of the law: Legal norms are always source-based, not merit-based; they can be identified without recourse to moral reflection.⁵¹ If it turns out that the best merit-revealing explanation of those norms refers to the Principle of Right, that is no business of ours. We merely say that any moral materials disclosed by such an investigation are not, just on that account, to be considered part of the law.”

The forgoing expresses the truth in “analytic jurisprudence.” Its theses are as little vulnerable to the outcome of any normative investigation of the law, as they are to the study of how judges reason. Whatever such investigations reveal, the positivist can tell us which part of the tangle is law and which part isn’t.

But there’s also another problem. It seems plausible to think, given the logic of his account, that Kant himself might have preferred the hard *positivist’s* answer to the guiding question. In describing the obligation of “leaving the state of nature,” Kant speaks of the

⁵¹ Cf. John Gardner, “Legal Positivism: 5 ½ Myths,” 46 *Am. J. Juris.* 199 (2001); Joseph Raz, “Legal Positivism and the Sources of Law” *The Authority of Law*, (Oxford: Oxford University Press), ch. 3.

necessity of “entering into a condition in which what is to be recognized as belonging to [each] is determined by law.”⁵² The emphatic use of “law” in this passage must be read in terms of the restrictive concept that the positivist seeks to elucidate: Provisional property rights become distinctively a matter of *law*, only with the creation of appropriate public institutions.⁵³

Why is that? Kant’s will be strikingly similar to the most far-reaching contemporary arguments for positivism. Both arguments make reference to the need for public, authoritative ways of settling what is to be done without having to rely on private judgment.⁵⁴ If the law were such that discernment of moral truth were needed in order to identify its content, law could not play the role (of replacing private judgment) which Kant needs it to play. Not surprisingly, some commentators have flatly asserted that Kant *is* a legal positivist.⁵⁵

I myself would hesitate here. I think these considerations show instead that the alignment of the Kant’s account with the *de rigueur* classifications of contemporary jurisprudence is not straightforward. And that’s what makes the matter interesting. Weinrib is wrong to think that the truth of positivism is at risk here. But I want to put forward a quite different thesis. It is not the truth, but rather the *interest* of positivism which is affected. By this I mean the conditions of the possibility of getting excited about so drawing the limits of law.

x. Here’s what I’m thinking. Kant offers not just a set of ideas about law, but also, from the beginning, an account of a sub-region of morality, one conceived to be *proprietary* to law.⁵⁶ Otherwise expressed, the Principle of Right is part of the morality of interaction. But it has only one possible employment: to be adjudicated and enforced in public institutions of positive law. Beyond that, it is completely useless and inert. The moral concept of Right lacks “validity,” as Kant says, apart from its expression in such institutions.⁵⁷ If “concepts of right” are to have valid

⁵² 6: 312.

⁵³ Cf. Hegel, *Philosophy of Right* § 211-12.

⁵⁴ Compare Joseph Raz, *The Authority of Law*, op. cit., ch. 3; and Raz, “Authority, Law and Morality” in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1995) ch. 10.

⁵⁵ See Jeremy Waldron, “Kant’s Legal Positivism,” 109 *Harvard Law Review*, 1535 (1996); cf. Alan Ryan, *Property and Political Theory* (Blackwell, 1984) pp. 79-80.

⁵⁶ So much is clear from the very form of the book. See 6: 214, 219-220, 242, 379. The division is exhaustive, and is expressed in the division of the work into two parts: a Doctrine of Right and a Doctrine of Virtue.

⁵⁷ See MM 6: 308N (and passage about the application of concepts of right at MM 6:312).

application, you can't be in a condition where everyone is subject to everyone else's view of how things should go. You need law.⁵⁸

Now my thought is simply that while the positivist could *consistently* accept this view together with the decisive role he gives to social sources, it would never have seemed interesting — much less revolutionary — to declare or insist, against the background of this view that law finds its limit just where the social fact sources (or some immediate inferences from them) run out. I emphasize this doesn't mean it isn't true, only that it wouldn't be felt to be pregnant with significance, to be the whole story about the nature of law. If such a picture of morality were the jurists' common coin, then I think everyone might have agreed with John Gardner when — after confining legal positivism to just the view I have depicted Kant as being congenial to — he adds:

Legal positivism is not a whole theory of law's nature after all. It is a thesis about legal validity, which is compatible with any number of rather theses about law's nature, including the thesis that all valid law is by its nature subject to special moral objectives and imperatives of its own.⁵⁹

Right, I want to say. Like me, Gardner evidently hopes to cure the philosophical obsession with positivism by diminishing a false impression of the things it challenges. He wants to make positivism less *exciting*. But liberation from the fly bottle of the guiding question will, I think, will more than just this re-assurance of how unexciting the positivist's position really is. Gardner's remark contains the right clue: Something must have been operating in the background to create the *impression* that explaining "legal validity" restrictively in terms of social sources *is*, after all, "the whole theory of law's nature." But what?

I said that positivism wouldn't have seemed pregnant against the background of a view of morality as containing ideas proprietary to legal rights. Turning this around, it amounts to saying that what made positivism exciting to people was not so much a new idea about law ("positive law" was, after all a concept invented by natural lawyers), but a new picture of morality: one in which morality has nothing to say, except in a derivative way, about law or legal rights, about whether there are or should be any rights, or about whether governments are needed to specify and secure them. On this astonishing new picture, whether morality calls for the existence of

⁵⁸ This reverses two of the positions in our contemporary debate. Here, law is part of the validity or existence conditions of morality, and necessarily helps determine its content.)

⁵⁹ Cite Gardner.

legal institutions at all becomes a contingent matter, a matter mainly of the efficiency of means to an end.

An analogy may help to rouse us from our familiarity with such an account. Consider apple-picking. Everyone can see that morality doesn't have a doctrine of apple picking. You don't come across this division in any of the great treatises.⁶⁰ This is part of the intuitive idea of morality which any writing about it had better respect. Apple picking is – just as such – morally insignificant. But that is not to say that your picking apples can never be brought before the court of morality, just that morality's jurisdiction over you in such matters arises in virtue of some other description of what you are doing. If your friend badly needs your help, then morality will say that you are heartless and no true friend when it turns out you preferred apple picking over helping him. Or maybe someone is starving, and then morality, under certain conditions, can speak of your having an obligation to pick some apples. Or (another important case) perhaps the law of your territory forbids picking apples. Then if there is anything to be said about why, morally speaking, you should obey such a law (perhaps not obeying it will cause civil unrest), then morality will say that you have an obligation not to pick apples in virtue of that being against the law.

To say that morality has nothing fundamental to say about law is roughly to say that it speaks about it in the way it speaks about apple picking. And if that is so, then the concept of law would extend only to some human goings-on which – like apple picking – are, just *as such*, morally insignificant. If morality speaks about law, this would then be in virtue of some other more, more basic doctrines it has, and some other description of those legal goings-on that brings it under those doctrines.

Moreover, if one's picture of morality makes law, just as such, no more significant than picking apples, then it will seem that an account of the existence or validity conditions of legal norms really *is* “the whole theory of law's nature after all.” What more would there be to say about the law's *nature*? The positivist's answer to the guiding question would be like saying that an apple is the fruit of a deciduous tree in the rose family & etc., or something like that as to its essential nature.

I speak of a “picture of morality” here, because of course I don't want to say that you need to a *utilitarian* to feel that positivism is the truth, and maybe the whole truth, about the nature of law. That would be wrong. Other views could also suffice to forge a purely contingent connection between what is normatively bedrock and law and legal rights, and

⁶⁰ At least not apart from the first apple picking.

thereby also turn law into the moral equivalent apple-picking. For example, I don't think that you need to think of morality as trying to *maximize* anything to get this sort of picture going. I think you do need to see it as self-standing: Its validity and its content cannot depend on law.⁶¹ Pictures of morality which meet these constraints are probably common enough even when utilitarianism has been rejected; and I suspect, though I can't argue for it here, that in the current idea of a sharp division between "analytic" and "normative" inquiries, pictures about morality, or about fundamental normativity haven't really been taken off the table, but (at least compared to Bentham and company) are only operating more vaguely in the background.⁶²

My argument focuses on utilitarianism, then, only because it is the most well known of this class of pictures, and because history has, in a sense, already done the work of suggesting it. The positivists were utilitarians, and they did think thought of law as an instrument in the service of a fully directive and self-standing morality. After Hart, this gets treated as an accident: The task of legal theory becomes that of explaining which social facts *do* make for law⁶³ while remaining agnostic about wider normative matters. But, in fact, it will be impossible explain why Austin's dictum seemed to be a dividing point in legal philosophy, if one prescind from the moral views which induced it.

III. The Significance of Austin's Dictum

The existence of law is one thing; its merit or demerit quite 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.

—Austin, *The Province of Jurisprudence Determined*

6. The textbook accounts refer not to a new view of morality, but only to the correction of a mistaken view about law: viz., that it comes with a moral filter. I call this the standard story.

⁶¹ I'm not sure if you need to see it as determinate in its requirements.

⁶² It is possible for example that a view of normativity as comprised essentially of pro-tanto reasons (or favorings) of various weights and forces would be legal positivism-inducing in the same way that, on my argument, utilitarianism is. I'm indebted to conversations with Micha Glaeser in which he has urged this point.

⁶³ (as Hart showed, the ones nominated for the job by Austin were implausible),

The standard story says that by confining law to whatever are the relevant social facts, the positivists made room for the possibility of bad or iniquitous laws, and hence for their reform. Listen to Hart on the things worth preserving from early positivism:

What both Bentham and Austin were anxious to assert were the following two simple things: first in the absence of an expressed...legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.⁶⁴

It's easy to see that a picture of morality *is* present in this account. Many have said that there is *this* rule — you don't seek the judicial punishment of the innocent — and have described that as a natural law (a paradigm of injustice), but not because the rule is “morally desirable.”⁶⁵ But I want to approach things differently. Suppose Hart is right about what the positivists were asserting. Then surely there is a puzzle: Who, realistically, could this have been news to? A rule of law can violate standards of morality? How could *that* be in question?

We seem to need the context of a different *civilization* than ours to make sense of an “assertion” here, let alone an anxious one. For Greek philosophy becomes conscious of itself partly through an awareness of the way that laws and mores can run the gamut. Socrates' judicial punishment for corrupting the youth and impious acts is clearly presented as just the Athenian crowd's *view* of things. It was only on those terms that Plato could later get going the question of whether Socrates should obey. It seems that this is where philosophy *starts*. It might thus be wondered: Why didn't Bentham just criticize the law, since it was, as he saw, much in need of reform? Why the felt need — as the standard story intimates — to *prepare* the way to criticize it through some new legal-theoretical effort to show that it is *criticizable*?

Well, I infer that someone must have been saying that laws are not the sort of thing you can criticize. But who among *us* was saying this?⁶⁶

⁶⁴ See Hart, “Positivism and Separation of Law and Morals,” op. cit. p.____; Cf. Hart, Concept of Law, op. cit. at 207-208. Hart identifies his own “positivism” with these claims: “Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality....” Ibid. at 181-2.

⁶⁵ Cf. Anscombe, “Modern Moral Philosophy.” Similarly, The morality of interaction doesn't say that my obligation not to use your body is “morally desirable.” Only the consequentialist talks this way.

A careless remark of Blackstone's that can seem to give the needed context.⁶⁷ But that remark was taken by Austin piecemeal out of a context that contains statements contradicting it, and that involved extraneous political currents.⁶⁸ In contrast, when we turn to the main traditions of pre-utilitarian legal theory, we find the possibility of iniquitous laws to be a center of attention, and even one of the motivating concerns. Aquinas' or Kant's discussion of bad laws certainly show a keener sense of the different questions they raise (e.g., the difference between injustice and barbarism, or the differences between the law's morality, its systemic validity, and the likelihood of suffering sanctions) than what we can find in Austin, where everything is reduced to the last of these.⁶⁹ The standard story seeks to offer an account of why an account of law merely in terms of social facts struck people as a helpfully new approach.⁷⁰ The answer can't be that legal iniquity was unknown in the previous tradition.

What about the other famous slogan, *lex injusta non est lex*?⁷¹ In his lectures, Austin singled it out as the contrasting view, stating that it was "nonsense" and "an abuse of language."

I follow Finnis on this matter,⁷² though I will put things a little differently, as my purposes require. Since the slogan begins by referring to "unjust law," it is an odd way for someone to be denying the very possibility of them. Aquinas is evidently making a positive and critical use of the same term, which, far from being an abuse of language, is actually something familiar, a way of registering an ubiquitous kind of *generality*. Thus, there is plentiful sense in teaching our students that "an invalid contract is not a contract" (i.e., not binding as one) or, in a merchant complaining that "impure gold isn't gold," or in my objecting (as I will do in a

^{67.} "[N]o human laws are of any validity, if contrary to [natural law]." William Blackstone, 1 Commentaries on the Laws of England (University of Oxford Press, 1825) p. 41.

^{68.} Contrary to the polemical use which Austin makes of Blackstone in The Province of Jurisprudence, the dominant scholarship finds Blackstone's interest in natural law ideas to be trivial (mere window dressing); some even claim Blackstone as a positivist. See John Finnis, "Blackstone's Theoretical Intentions" 12 Nat. L.F. 163 (1967) (arguing that Blackstone had a definition of municipal law which have satisfied any positivist, but that his interest in natural law themes wasn't trivial).

^{69.} See Kant, The Metaphysics of Morals, 6: 316-337; on Aquinas, see Finnis, Natural Law and Natural Right, op. cit., esp. chs. __. Austin [cite]

⁷⁰ Cf. Hart, Concept of Law 17.

^{71.} But not quite accurately. See Finnis, Natural Law and Natural Right, op. cit., ch. __. Cf. St. Augustine, "De Libera Arbitrio," trans. Robert P Russell, in The Fathers of the Church (Washington: Catholic University of America Press, 1968), Bk. 1, ch. 5.

⁷² See Finnis, *ibid.*

moment) that “Austin’s argument is no argument at all,” or in answering the emotionally coercive point of one’s legal spouse —“I’m *married* to you”— by saying: “You call this a *marriage*? If someone were to protest, we would have plenty of resources. Nor is there any real question, as Austin proposes, of their being two distinct *enquires* here. Sure, if the question is “Is that a contract you brought home from work or is it the poem you’ve been writing,” we can answer “a contract” without first enquiring into whether the thing is valid. That doesn’t change the fact that the questions “whether something is a contract/what makes a contract valid” define the same legal inquiry. The question is: What makes Austin so sure that law does *not* work on the privative pattern, the pattern of pure gold, valid contract, sound argument, living and healthy human body, non-paralyzed hand, rational mind, true God, meaningful word, competent doctor, correct calculation, true love, good friend, successful poem, true judgment, etc.? What makes Austin so sure that *just law* doesn’t belong on this list?⁷³

Just law, for Thomas at any rate, is law in the positive sense, but, like a bad marriage, not what it is supposed to be: “supposed,” as Finnis puts it, in the sense of an internal standard, one which the law claims to satisfy, and which explains our interest in having it in the first place.⁷⁴ So “*Lex injusta...*” was never meant to filter law from moral defects. Rather, it acknowledges that law cannot be so filtered: Among posited laws, bad ones are apt to appear, in something of the way that among arguments, some are bound to be unsound, or in the way that among human beings, quite a few are bound to be neurotic.

So the textbook teaching — the need to combat the “moral filter theory”⁷⁵ -- belongs to the realm of mythology. That idea belongs to the history legal positivism. It is essentially the invention of a position called *non-positivism* in the image of positivism: i.e., an alternative (morality-involving) answer to the question of the validity-conditions of the law in force.

It will confirm my thesis, I think, to see that all morality-involving answers to the guiding

⁷³ I’ve been greatly helped in this paragraph by Anton Ford, “Action and Generality,” the main concern of which is to argue, against the post-Davidsonian program in philosophy of action, that “intentional action” belongs on this list. Ford credits Anscombe with a grasp of this. See “Action and Generality” in Essay on Intention (Harvard University Press,).

⁷⁴ See John Finnis, Natural Law and Natural Right, op. cit., ch. 12. Borrowing a device of Aristotle’s – that of the focal or exemplary case – we needn’t, according to Finnis, choose a “concept of law.” See *ibid.* ch. 1.

⁷⁵ Cf. Hart’s characterization of “the issue between Natural law and Legal Positivism” at Concept of Law, op cit. p. 181, and earlier in “Positivism and the Separation of Law and Morals,” op. cit.

question occur only *after* Hart.⁷⁶

8. One bit of further evidence for the mythological status of the “moral filter theory” is just that Austin presents no argument against this theory, as one would expect if it were a serious historical predecessor to his view. Instead, he begins by defining what he calls law “simply and strictly so-called.” The “province of jurisprudence,” is to be limited according to this definition; it will encompass only things from the right sources, which for him are the commands given by political superiors. It can be seen that the positivist answer to the guiding question *follows* from this definition. Hence, if you tried to read Austin as opposing a “moral filter” view, you will feel that a substantial chapter has been omitted prior to his First Lecture. His restrictive definition of law sounds like it should be the conclusion of an argument, but it isn’t.⁷⁷

Rather, Austin, from the start, makes what the prior tradition called *positive law* the sole object of his investigation. Clearly, *that* can’t make you a positivist in any distinct sense. For the prior tradition always knew that positive law was important, and that notions of systemic validity applied to such law, even if it didn’t go very far in the analysis of such notions. *Positivism* is the thought that law exhausts itself in positive law. That appears in Austin’s work only in the form of the definition which starts things off. How is it, then, that Austin and his successors could have seriously supposed that in presenting positive law as a species of human command they

⁷⁶ In this sense, Ronald Dworkin was positivism’s best friend, since — in giving a a morality-involving answer to the guiding question — he finally gave it someone to argue with. Nothing in this paper should be taken to deny that the guiding question will be significant for someone who is essentially arguing with what Dworkin sometimes wanted to say. I, however, suspect (though I can’t pursue it here) that in the progression of his thought, Dworkin came to realize that setting things up in terms of the *positivists* question (and, in occupying its at-first-only-notional position) — i.e., does *morality* in addition to *social facts* help make propositions of law true? — was a mistake. I’m drawing especially off what Dworkin says in his late work, for example *Justice for Hedgehogs*, p 405: “We have now scrapped the old picture that counts law and morality as two separate systems and then seeks or denies, fruitlessly, interconnections between them. We have replaced this with a one-system picture: we now treat law as a part of political morality. A theory of law treats legal rights, but it is nevertheless a political theory because it seeks a normative answer to a normative political question: Under what conditions do people acquire genuine rights and duties that are enforceable on demand in the way described?” I think this could be a description of the Independence Account, and it could also leave the hard positivists answer to the guiding question in place. See also, Dworkin, *Justice in Robes*, pp. ____.

Radbruch, at least on Hart’s reading of him, might be the one exception to the statement in my text. But that reading may be another invention, as Jay Bernstein argues in his paper [cite]. On Hart’s account, Radbruch, conversion to a “natural law” position seems to consist in nothing more than retaining his old positivism and attaching a moral rider to it — which the model for the positivist’s construction of non-positivism since Austin.

⁷⁷ Finnis is right here. *Natural Law and Natural Rights*, op. cit., p. 4: “Neither Bentham nor Austin advances any reason or justification for the definitions of law and jurisprudence he favors. Each tries to show how the data of legal experience can be explained in terms of those definitions. But the definitions are simply posited at the outset and thereafter taken for granted.” Attempts at conceptual arguments, like Joseph Raz’s argument from the conditions of the possibility of claims to authority, came only later, in response to Dworkin.

were breaking with the prior tradition in some new way? That, as I've been saying, is the puzzle.

9. The solution to the puzzle lies in this. When Austin says "the existence of law is one thing, its merit or demerit quite another," he means to affirm the independence or self-standingness of law and morality *in both directions*. His point is not just that the law always faces questions from practical reason, but, much more significantly and distinctively, that the standards relevant to the criticism the law are themselves fully or determinately available independently of the law. That's the thought in the drivers seat.

Read like this, Austin's dictum is no longer a commonplace. It *does* join issue with "*lex injusta*." For it rejects the thought that law has any critical aspect which could make it, so to speak, its *own* court of appeal. The point may be put like this: Beyond the completely anodyne claim that there can be bad laws, what drives Austin is the thought that, as one pursues the chain of reason-seeking questions, a sharp break must occur: One will have to leave the province of jurisprudence (with its human commands) and enter different domain of critical morality, where norms bind in virtue of their merits. And Austin knows that a sharp break – a change of "province" -- must occur on one ground only: *he is a utilitarian*. The break occurs just insofar as there is nothing *law-like* – nothing that the law interprets or expresses, only something it aims to produce or bring about – as one moves to the fundamental normative levels. That break is what gives point to the delimitation of law as whatever social facts make for *positive* law. It guarantees that positivism will appear to the "complete theory of the nature of law."

There is a sense in which, if nothing of a fundamentally normative kind has *the form of law*, then legal positivism will follow. For another way to express the same point would be to say that any norm which *does* have the form of law could only have been posited. It must be clear that these are commitments of the utilitarian. For him, "Do not punish the innocent," for example, can be no "natural law," as an older tradition called it, but at most, only a kind of decision taken in advance of all situations.⁷⁸ And it should be clear now why utilitarianism is only an example for me, albeit the historically salient one. Someone who prefers to talk of reasons of various weights and forces as what is fundamentally normative, could, I surmise, come to feel the gravitational pull of legal positivism as well, given certain other assumptions. The main assumption would be just that law is always external to the normativity of what is normative.

⁷⁸ Anscombe's remarks are relevant here. "Modern Moral Philosophy"

That is what motivates legal positivism because, in a sense, that *is* legal positivism.⁷⁹

Utilitarianism does, I think, have another notable feature which make it a particularly *perspicuous* route to legal positivism. It promises its adherents that when they try to make normative sense of the law, they will come into contact with something which is even more exacting in its guidance of human activity than any human code itself. That seems to have been no small part of its appeal, both in the 19th century and today. Recall how Sidgwick takes the point that common sense morality “is vague and needs further determination” to establish the “superiority” of utilitarianism, which no longer need depend on “intuition.”⁸⁰ Sidgwick’s point — that justice needs further determination — is of course earlier tradition’s commonplaces. What *is* new a certain interpretation of this commonplace: *viz.*, as revealing a epistemic *gap* in everyday morality, and hence the desirability (or necessity) – Sidgwick again -- of “some further principle for systematizing these exceptions and qualifications,” “a higher principle to decide the issue thus raised.”⁸¹ This makes for a sharp contrast. On earlier views, when you try to make sense of the law, you come only to something much more abstract, such as the nearly empty precept of Justinian to “hurt no one and render everyone his due.” Its not quite empty: What this records is that there is an other who is “due” something, and that’s the *form* of the legal part of morality, on such views. Because normative ascent here just brings an abstract characterization of the form of judgment (or kind of reason) engaged by a concern with justice in particular cases, there is a point to saying that critical discourse about law about takes place at least partly within

⁷⁹ I don’t feel have a good enough grasp on Joseph Raz’s complex and evolving views about reasons, law and authority to know if what I’m saying engages with his views. But I *was* struck very early on by passages in his book Reasons and Norms like this: “Norms always belong to the middle level of practical reasoning...The case for authoritative rules depends on the advantages of the indirect approach, the attempt to maximize conformity with certain reasons (the underlying reasons) not through compliance with them but through compliance with an alternative set of reasons, the rules... This has long been recognized in the discussionsof various forms of rule-utilitarianism.” I’m not sure if this commits Raz to the view I’m describing as one in which law is external to the normativity of what is normative. But I am struck by the way, in a book that proposes to give a purely *formal* account of norms, most of the actual illustrations are consequentialist in nature, as is the language for talking about the advantages of authority (i.e., “indirect” conformity). On the Independence Account, legal authorities do, as Raz says, help us to conform to reasons. But there is also nothing “indirect” about this, because there would be nothing (determinate) to conform to apart from public authority. I say all this very tentatively.

^{80.} See Henry Sidgwick, *The Methods of Ethics*, p. 421. See also *ibid.*, Bk IV, chs. II and III. Mill has a similar idea: John Stuart Mill, *A System of Logic*, Bk VI, ch. XII, sec 7, and Mill, *Utilitarianism*, ch V, pars 26-31. This sets the pattern for many contemporary arguments for the superiority of normative *economic analysis* over traditional justice-orientated accounts, as, e.g., in Kaplow and Shavell’s work, which repeatedly makes heavy weather of the “indemonstrability” of one or another of two conflicting applicative judgments. See Louis Kaplow and Steven Shavell, Fairness Versus Welfare (Cambridge: Harvard University Press, 2002).

⁸¹ Sidgwick, p. 421.

the domain of law.

Hart and other positivists, we know, would strongly resist such formulations: “the old confusions between law and the standards appropriate to criticizing the law.” But where the meaning of that comment would be perfectly clear if Austin said it (real normativity is external to law) it remains obscure when Hart and others say it, because now normative inquiry is off the table.

V. Two kinds of generality

In one of the more recent contributions to the guiding question debates, Scott Shapiro defends positivism (of the “morality never determine law” variety). He also affirms that “analytic jurisprudence...is not concerned with morality.” If I am right, then morality should make itself felt somewhere. I think it does, when Shapiro lays down a methodological principle for analysis:

[I]f it is possible to build a legal system without using certain objects or appealing to certain concepts, then these objects and concepts cannot be necessary ingredients of law.... Because the construction of the hypothetical legal system is supposed to be as economical as possible, the process aims to reveal the minimal core of law, those building blocks that are absolutely needed to establish a legal system and nothing more.³⁵

Such a principle might allow us to argue: “The law can be evil. So moral goodness must be a contingent, not a necessary feature of the law. So it does not belong in a proper account.”

The trouble is that the principle isn’t sound in *general*. If it were, someone could argue: “A hand might not be able to grasp anything, but it is, for all that, a hand. So being able to grasp must a contingent, not a necessary feature of being a hand...” At this point, the extreme idealism of anatomy textbooks must seem strange, for they insist on representing the human body with all its limbs and organs intact, while a sound empiricism would surely reveal that having a body is one thing, having it intact quite another.

The answer of course is that anatomy is interested in just the same thing as Shapiro: what is *essential* rather than accidental to its object of study. Pathologies are accidents.

If Shapiro’s principle holds good for the study of law, there must be something distinctive about the law which makes it so. You see where I’m going: There is nothing distinctive about the law. What determines things here is a view about morality.

To see this, I borrow from Anton Ford a distinction between two forms of generality.⁸² First, the accidental species. Aristotle's example is a snub nose. Since all snub noses are noses but not all noses are snub, we can say that snub nose is *species* of the *genus* nose. It is formed by the intersection of two independently graspable properties – that of being a nose on the one hand, and that of being concave on the other. You don't have to understand what noses are to understand what concavity is, and you don't have to understand what concavity is to grasp what noses are. A feature of this kind of generality is that the genus has explanatory priority over the species: We can define a snub nose as a nose *plus* something, some independently describable thing added to it.

Not all generality is like this, however. All healthy human bodies are bodies, but not all human bodies are healthy. So we can say that healthy human body is *species* of the *genus human* body. But it can't be defined as a human body *plus* some independently definable thing (health). Rather, it is just the human body in its essential form, the body with nothing accidental added. Call this the *essential species*.

For present purposes, it will suffice to observe just two distinctions between these kinds of species. First, the essential species has explanatory priority over its genus. To grasp what kind of thing the genus is, you must begin with the species, the thing in its perfect (pure, functional, mature, undiluted, fully developed, etc.) form. Second, the wider genus may then be derived from the species by some application of the notion of *defect*. A defect is a privation that is different from mere undesirability for some purpose or another. A swan that isn't white may be considered undesirable for showing off the grounds when the guests arrive, but a swan that can't swim? Here the swan's form of life provides an internal standard.

This is sufficient to raise our question. Our favorite jurisprudential pair — law / morally desirable law — is also a *genus/species relation*. But of which kind? When the law goes morally wrong, is this sometimes a privation (like an incompetent doctor), or is it always a matter of the law's lacking some independent kind merit? How are we to decide?

I offer two observations about this question, beyond the fact that I think jurisprudence might ask it.

First, if morally defective law is sometimes a privation, then morality is relevant to a full account of law's nature. What would have to be added to positivism in Gardner's unexciting

⁸² My discussion closely follows Anton Ford, "Action and Generality" in *Essays on Anscombe's Intention*. Ford describes more than two forms. The relation of Triangles to Geometric Figures, or red to colors is a kind of categorical generality, different from the forms I discuss here.

sense (of exclusively source-based norms) is just an account of the law's *defect* conditions, and this, I surmise, is what non-positivism before Hart was up to. On the other hand, if morally bad law is really always a matter of lacking some independent kind of merit (like the aesthetic fiasco of black swans), then we have positivism in an exciting sense, an answer to the question of the nature of law. (Shapiro himself strikes me as ambiguous on this question.)⁸³

Second, and more importantly, the question about which kind of generality we are confronting here is clearly *a question about morality*, and not one that is “analytically” resolvable. For is not some feature of law (i.e., that it can go morally wrong), but rather our ideas about what it is for the law to go morally wrong that determines the answer. The utilitarian will have no choice but to think of morally good or bad law as an *accidental specification*: the intersection of whatever the relevant law-constituting social facts might be, on the one hand, and the *independent* property of tending to bring about the relevant (good-making) state of affairs on the other. Everything in Austin's account, including the inaudibility of what Thomas says, unfolds according to this: the two-way independence, or mutual externality of law and morality. In contrast where the moral aims of law are conceived in terms of *practical laws*, then the idea of good legal order as an essential specification will be heard.

* * *

I'll conclude with two brief points.

First, I said that it can feel like Austin is omitting something prior to his first lecture. It should be clear now what the missing part is. If Austin had *started* his course with his moral views, and spelled out how this motivated the definitions and restrictions in his first lecture, then things would have been clearer. It would have been clear that legal positivism, at least as a complete theory of the nature of law, was a new idea about morality.

Second, I've made no argument about what the standards for criticizing law or even private law are, no argument that the Independence Account is correct and that the positivism-inducing pictures are wrong. What I do hope to have accomplished is to have provided a different way of considering the question, and to have explained my doubts about analytic jurisprudence.

⁸³ See my “Planning Positivism and Planning Natural Law” (cite).