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.

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 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”)
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 as well.

— 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 main point that the law has a moral task to do, and so the central case of law is one in which it is successful; 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 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 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 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.8 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

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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.


8 The framework of the debate was set by Lon Fuller’s challenge to Hart’s claim in Lon L. Fuller, “Positivism and Fidelity to Law—A Response to Professor Hart,” 71 Harvard Law Review 630 (1958). Fuller in effect universalized Radbruch’s claim that “Legal positivism, with its principle that ‘a law is a law,’ has in fact rendered the German legal profession defenseless against statutes that are arbitrary and criminal.” (my emphasis) Quoted in Stanley L. Paulson, “Lon L. Fuller, Gustav Radbruch, and the ‘Positivist’ Thesis,” 13 Law and Philosophy 259, 331 (1994). Hart in turn gave a universal turn to the English experience of “positivism” as recorded by Bentham. Hart’s claim that positivism makes for the best attitudes towards law is taken up by Frederick Schauer, “Positivism as Pariah,” in The Autonomy of Law 31-55. For doubts about the debate conducted in these terms, see Philip Soper, “Choosing a Legal Theory on Moral Grounds,” 4 Social Philosophy and Policy 31.
place (and do misunderstandings count in measuring those effects, or just correct understandings?) 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 (and their criticisms of one another), which is just what happens in survey jurisprudence courses.\(^9\) (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 unorthodox 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 within “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.”)\(^10\) 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.\(^11\) Nothing here will amount to a suggestion that this is incoherent, though I do hope to raise a doubt about this purely formal approach.

Lon Fuller anticipated my theme 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


\(^10\) It has been pointed out that both options are mentioned, with approval, in Martin Luther King’s 1963 “Letter From Birmingham Jail.” See Tamanaha, ibid.


\(^12\) 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.
everyone knows what the second term of the comparison embraces.” 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 unjudged 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. 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 and divine law, but Grotius mostly does not, and you’re bound to loose your audience today if you follow the older tack. Similarly, it is 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 today 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,” 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 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.

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 to eliminate the guiding

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13 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.”

14 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.

15 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.”
question, if not simply to ignore it. 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 apparent indifference to where the borders might lie. 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 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. 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? The answer, it will 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


17 On “points of view,” see, helpfully, Joseph Raz, “The Problem about the Nature of Law” in Ethics in the Public Domain [cite].

18 “Not an accident” leaves open what kind of dependency relations there are here. I’ll say more as I go.

19 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.
3. What matters in this story is just the possible relation between law and morality.\textsuperscript{20}

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).\textsuperscript{21} Kant gives voice to this thought 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 \textit{sui iuris}” (one’s own master), or, again, when he glosses this as “independence from the choice of others.”\textsuperscript{22} These are normative ideas — not how much free reign others leave you, but your normative power to demand the appropriate sort.\textsuperscript{23} The opposite of independence is therefore normative dependence. Slavery is an example, being \textit{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 one who gets to decide what to do with what is mine, and you’re the one who gets to decide what 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 \textit{careful} (as I will argue) in the way I use my own things. 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 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.

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\textsuperscript{20} 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.

\textsuperscript{21} I borrow the language of “in charge of” from Arthur Ripstein, \textit{Private Wrongs} (Harvard University Press, 2015). My account here is indebted to Ripstein. See also his \textit{Force and Freedom} [cite].

\textsuperscript{22} Kant, \textit{MM} 6:238.

\textsuperscript{23} On the difference, cf. Phillip Pettit, \textit{Republicanism} and \textit{Just Freedom} [cite]
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, “You’re not allowed to do that to me” or “You’ve wronged me.” 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 mean 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. 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 nature of the case — require rightful ways of determining what they are, and, indeed, enforcing them. 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 the 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., 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

24 cf, Kant, MM cite.

25 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: ___.
independence, it could perhaps be more clearly put like this: Anything which managed to
spell this out in a public 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.” The legal material would provide much more resistance to
our 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.
(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.
(5) Hey, I’m entitled to compensation for what happened to me.

But such claims do not so much as “state a cause of action” as our lawyers say.

Since my hope is to be as naive as possible, let’s also 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 relation that is legally significant.
For one thing, since “what happened to me” is an independent element in these
complaints, they don’t get into view the law’s categorical distinction between misfeasance
(where the defendant has participated in creating the risk complained of) and nonfeasance
(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 either
what the defendant did, or of what prospective danger created by the defendant made the

26 See Ripstein, Private Wrongs, whose formulation I’m following here.
28 See Fed. Rules Civ Pro 12b6
29 However obscure “causation” may be, philosophers at least agree that it only applies to independent things.
defendant’s conduct wrongful. 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.

Perhaps we can unify the lawyers points in a more succinct and abstract way. Claims of form (i) 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 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 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 lawyers and legal officials recognize it be. I’ll illustrate this by considering one of the two main species of wronging with which tort law is concerned: 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 things, but thereby damages something of the plaintiff’s. It is here that we are referred to the “reasonable person” standard. 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), but by starting from positive law and asking what to make of it.

5. The approach which predominates in today 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

30 In the first of these cases, what happened to the plaintiff 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.

31 I trust that the positivist won’t object to my use of this assumption.
valuable, like being able to drive 55 mph. Tort law is a means of getting this 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.\textsuperscript{32}

The familiar problems of consequentialist “two-level” justifications appear here, but I will suggest that they appear in an acute form.\textsuperscript{33} 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. 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. 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 will suppose that the answer to these difficulties is to think of tort liability as the 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.)\textsuperscript{34}

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 what our lawyers seem to keep a steady grip on. Given the general dialectical climate, it seems little wonder that a passage

\textsuperscript{32} “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.” See Guido Calebresi, The Costs of Accidents. Judge Calebresi’s decisions from the bench notably do not display much evidence of this thinking. For other versions of a loss based account, which sees tort as a public law of accidents, are also Posner (cite) and Kaplow and Shavell (cite).

\textsuperscript{33} The difficulties are well laid out by Weinrib, The Idea of Private Law, chs. 1-2. See also Coleman, Risks and Wrongs; Zipursky [cite]; Stone, “The Significance of Doing the Suffering”

\textsuperscript{34} 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]. Calebresi himself offered his The Cost of Accidents as a neutral framework for raising the question of whether we want tort law.
from Aristotle should seem to light up with significance. (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 evident to the common understanding — is
dialectically threatened; philosophy’s main business is combatting itself.)\textsuperscript{35} Aristotle speaks
of a form of justice which operates transactionally (“the doing and suffering of wrong”),\textsuperscript{16} and he distinguishes this from other justice problems which concern the distribution of
benefits and burdens within some group.\textsuperscript{37} 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.\textsuperscript{38} Philosophy, in these instances, offers something which looks promising
for making sense of tort law, because the concepts invoked 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 others\textsuperscript{39}), how might negligence liability figure in such an account?

The general 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.\textsuperscript{40}
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 setback 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 \textit{must} also work out the specific content of some such distinction:
interferences with you vs. mere changes to the world that are unfavorable to your

\textsuperscript{35} Kant, Critique of Practical Reason and Groundwork (cite).
\textsuperscript{36} Aristotle, Nicomachean Ethics V.
\textsuperscript{37} See Weinrib, The Idea of Private Law, ibid., ch. 3; and Weinrib, “Aristotle’s Forms of Justice”
\textsuperscript{38} Kant, MM 230, ___.
\textsuperscript{39} Intentional just spells out the meaning of use: To use anything is to use it intentionally.
\textsuperscript{40} For such a general typology of the situations treated by private law, cf. Ripstein, ibid (cite).
The reason is easy to see. 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 co-operate with you by entering into a contract.

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, etc.), but there is no other concept that could mediate between our choices. 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.”

What is illuminating here is the way the concept of “care” is located as an aspect of any practical situation, and recognition that what can be foreseen is not something that can be codified. If I am to act at all, I must be careful, adverting to some of the the non-

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41 Cf. Ripstein, Force and Freedom [cite]
42 Ibid., p. ____.
43 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.
45 It is what Heidegger might call an existentielle.
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, 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 considering 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 this 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.” That is because no law-like opinion is possible: and 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 form 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. 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 described by Austin along with the morality of interaction.

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

46 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

47 See Illinois Model Jury Instructions on Negligence

48 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.”
Let's take stock. The law of negligence look very similar to the moral ideas which comprise standards for criticizing it. And, symmetrically, those moral ideas 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) independently of the law. The law comes in, not just to protect the personal and proprietary entitlements of each, 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 a public legal form, and affords procedures for specifying and enforcing them, so that they do not remain sunk in dependence on private will and judgment.) That is how morality, or anyway a part of it, depends on law. Law depends on the morality of interaction 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.

It seems that many necessary connections between law and morality are involved here. But, as was said, “necessary connection” shouldn’t be the question. Concerning the guiding question, I don’t want to say that it 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 a department of the law moved the needle on the guiding question one way or another?

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49 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....”)

50 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. Kant, Critique of Pure Reason [cite] and other citations (James Conant). And that seems true of our topic as well: It would be a misunderstanding to take the point to be that you need two independent ingredients — both law and morality — to bake a legal pie.
8. 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”\(^\text{51}\)) 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.\(^\text{52}\)

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 quite 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 a 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 discernment.\(^\text{53}\) If it turns out that the best merit-revealing explanation of those norms refers to the Independence Account, that is no business of ours. We merely say that any moral materials

\(^{51}\) Indeed, I have drawn from it considerably in my previous sketch.


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 say which part of the tangle is law and which part isn’t.

But there’s also another problem. It seems plausible to think 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 necessity of “entering into a condition in which what is to be recognized as belonging to [each] is determined by law.” 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.

Why is that? Kant’s argument looks strikingly similar to the most far-reaching contemporary arguments for positivism. Both view make reference to the need for public, authoritative ways of settling what is to be done without having to rely on private judgment. 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 assert that Kant is a legal positivist.

I myself would hesitate here. I think these considerations show instead that the alignment of Kant’s views 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 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.

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54 6: 312.

55 Cf. Hegel, Philosophy of Right § 211-12.


9. Here’s what I’m thinking. Kant offers not just a set of ideas about law, but, at the same time, an account of a sub-region of morality, one conceived to be proprietary to law. 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. If “concepts of right” are to have valid 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.

Now my thought is simply that while the positivist could certainly accept this view together with the role he gives to social sources, it would never have seemed interesting — much less revolutionary — to declare, against the background of this view, that law finds its limit just where the social fact sources (or some inferences from them) run out. I emphasize this doesn’t mean it isn’t true, only that it wouldn’t be felt to be the whole story about the nature of law. Indeed, given this view of morality, I think everyone could agree with John Gardner when — after defining legal positivism as the view that legal norms are always source based — 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 other 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.

Like me, I think Gardner 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, need 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 restricting “legal validity” to social sources is, after all, “the whole theory of law’s nature.” But what?

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58 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.

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

60 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.)

61 Cite Gardner.
I said that positivism wouldn't have seemed pregnant with significance given 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, 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 new picture, whether morality calls for the existence of 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 a picture of law. 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. 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 validity conditions of legal norms really is “the whole theory of law's nature after all.” What more would there be to say.

62 Positive law” was, after all a concept invented by natural lawyers, as Finnis suggests. See “Propter Honoris Respectum: On the Incoherence of Legal Positivism,” 75 Notre Dame Law Rev 1597,1601,1606 (2000); also, Finnis, “The Truth in Legal Positivism,” op. cit.

63 At least not apart from the first apple picking.
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 nature.

I speak of a “picture of morality” here because of course I don’t want to say that you need to be a utilitarian to feel that positivism is perhaps the whole truth about the nature of law. Other views could also suffice to forge a purely contingent connection between what is normatively bedrock and law and legal rights. My argument focuses on utilitarianism only because it is the most well known of such views, and because history has, in a sense, already done the work of suggesting it. The positivists were utilitarians, and they did think of law as an instrument in the service of a fully directive and self-standing morality. After Hart, this gets treated as an accident, and the task of legal theory becomes that of saying which social facts do make for law while remaining agnostic about wider normative matters. But, in truth, it will be impossible to explain why Austin’s dictum seemed to be a dividing point in the history of legal theory, if one prescinds 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

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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. I’m not sure if you need to see it as determinate in its requirements. It is possible for example that a view of normativity as comprised essentially of pro-tanto reasons of various weights and forces would be legal positivism-inducing in the same way that, on my argument, utilitarianism is. I’m indebted to conservations with Micha Glaeser in which he has urged this point. In any case, views about morality which meet these constraints are probably common enough even when utilitarianism has been rejected, and there may be only the vaguest idea of them when law is being discussed.
10. The textbook accounts refer not to a new view of morality, but only to the correction of a mistaken view about law: *viz.*, that law comes with a moral filter. I will call this the standard story.65

The standard story says that by confining law to whatever are the relevant social facts, the legal positivists made room for the possibility of bad or iniquitous laws, and hence room 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.66

It's easy to see straight off that a picture of morality is present here. For many have said that there is *this* rule — you don't judicially punish the innocent — and have described this as a “natural law,” but not because the rule is *morally desirable*. A consequentialist talks that way.67 But I want to approach things differently. Suppose Hart is right about what the positivist's were asserting. Then 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. 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 presented as just the Athenian crowd's *view* of things, and it was on those terms that Plato could 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,

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65 The standard story is too ubiquitous to make citations necessary. Just pick, almost at random, any law journal article on legal positivism and you'll read something, echoing Austin, like: “Natural lawyers...collapsed validity and obligation into a single question by asserting that law must pass a moral test to qualify as laws....In contrast, legal positivists maintain that these are separate questions....”. This quotation is from Brian Tamanaha, “The Contemporary Relevance of Legal Positivism,” 32 Australian Journal of Legal Philosophy 2007. After saying this, Tamanaha does go on to qualify it in various ways.

66 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.

67 Others might just speak of punishing the innocent as a paradigm of injustice. See Anscombe, “Modern Moral Philosophy.”
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 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?

A careless remark of Blackstone’s that can seem to give the needed context. But that remark was taken by Austin piecemeal out of a context that contains statements contradicting it, and that involved extraneous political currents. 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 sharper 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. The standard story offer an account of why an account of law merely in terms of social facts struck people as a helpfully new approach. 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? In his lectures, Austin singled it out as the contrasting view, stating that it was “nonsense” and “an abuse of language.”

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69. 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).

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


73 Austin, The Province of Jurisprudence Determined, p. 158.
I follow Finnis here,\textsuperscript{74} though I will put things a little differently. 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 is something familiar, a way of registering a kind of generality. Thus, it makes sense to teach our students that “an invalid contract is not a contract” (i.e., not binding as one) or for a merchant to complain that “impure gold isn’t gold,” or for me to object that “Austin’s argument is no argument at all,” or to answer 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 \textit{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 without first enquiring into whether the contract is valid. That doesn’t negate 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 good law does \underline{not} work on the privative pattern of pure gold, valid contract, sound argument, living and healthy human body, non-paralyzed hand, rational mind, meaningful word, competent doctor, correct calculation, good friend, true judgment, etc.?\textsuperscript{75}

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.\textsuperscript{76} 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 among human beings, quite a few are bound to be neurotic.

So the textbook teaching — combat with the “moral filter theory”\textsuperscript{77} — seems to be a myth. It seems to be the invention of a position called \underline{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 this thesis, I think, to see that all morality-

\textsuperscript{74} See Finnis, ibid.

\textsuperscript{75} I’ve been 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 \textit{Essay on Intention} (Harvard University Press, ).

\textsuperscript{76} See John Finnis, \textit{Natural Law and Natural Right}, op. cit., ch. 12.

\textsuperscript{77} Cf. Hart’s characterization of “the issue between Natural law and Legal Positivism” at \textit{Concept of Law}, op cit. p. 181, and earlier in “Positivism and the Separation of Law and Morals,” op. cit.
involving answers to the guiding question occur only after Hart.)

11. 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 an 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 of 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.

Instead, Austin seems merely to make what the prior tradition called positive law the sole object of his investigation. But 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. And this appears in Austin’s only in the form of the definition which starts things off. How is it, then, that Austin and his successors could have supposed that in presenting positive law as a species of

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.

78 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: ___.

79 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.
human command they were breaking with the prior tradition in some new way? That, as I’ve been saying, is the puzzle.

12. 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 of law and morality in both directions. His point is not just that the law always faces questions from practical reason, but, much more distinctively, that the standards relevant to the criticism the law are themselves fully available independently of the law.

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 anodyne claim that there can be bad laws, what drives Austin is the thought that, as one puts reason-seeking questions to the law, a sharp break must occur: One will have to leave the province of jurisprudence (with its human commands) and enter the different domain of critical morality, where norms bind in virtue of their merits. Austin knows that a sharp break—a change of “province”—must occur because be 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 level. That break is what gives point to the delimitation of law as whatever social facts make for positive 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.

Of course, this is what the utilitarian is committed to. For him, “Do not punish the innocent” (for example) can be no “natural law,” but only a kind of decision taken in advance of all situations. And it should be clearer now why utilitarianism is only an example in my argument. The main assumption needed to motivate positivism is just that law is always external to the normativity of what is normative. That is motivates legal positivism because,

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80 Anscombe’s remarks are relevant here. “Modern Moral Philosophy”
in a sense, that is legal positivism.\textsuperscript{81}

Utilitarianism does, I think, have one feature which make it a particularly perspicuous route to legal positivism. It promises that when you try to make normative sense of the law, you 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 a 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.”\textsuperscript{82} Sidgwick’s point — that justice needs further determination — is of course an earlier tradition’s commonplace. What is new a certain interpretation of this commonplace: \textit{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.”\textsuperscript{83} 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 \textit{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 the domain of law.

\textsuperscript{81} 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 \textit{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 discussions ...of 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.

\textsuperscript{82} See Henry Sidgwick, \textit{The Methods of Ethics}, p. 421. See also ibid., Bk IV, chs. II and III. Mill has a similar idea: John Stuart Mill, \textit{A System of Logic}, Bk VI, ch. XII, sec 7, and Mill, \textit{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, \textit{Fairness Versus Welfare} (Cambridge: Harvard University Press, 2002).

\textsuperscript{83} Sidgwick, p. 421.
Hart and other positivists would of course 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 seems obscure when Hart and others say it, because normative inquiry is off the table.

V. Two kinds of generality

13. In one of the more recent contributions to the guiding question debates, Scott Shapiro defends positivism (of the “morality never determines law” variety), while affirming the distinction between “analytic” and “normative” jurisprudence. “Analytic jurisprudence,” he says, “is not concerned with morality.” If I am right that this distinction is not to be trusted, then morality should make itself felt somewhere in Shapiro’s discussion. It does, in a methodological principle which he lays down:

If 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.

I’ll call this minimalism. If minimalism were a sound principle, it might allow us to argue like this: “The law can be evil. So moral goodness must be one of its contingent features. So it does not belong in a minimal account. To include moral goodness in an account of law is merely to moralize the law.”

But minimalism isn’t in general a sound principle. If it were, we could also argue: “A hand might not be able to grasp anything (i.e., it might be paralyzed). So being able to grasp must be one of its contingent features. So it does not belong in a minimal account.” And now the extreme ethicism of anatomy textbooks must seem strange, for they insist on representing the human body with all its organs and 32 teeth 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 anatomical science is interested in the same thing as Shapiro: viz., what is essential rather than accidental to its object of study. Pathologies and

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84 Scott Shapiro, *Legality* [cite]
missing teeth are mere accidents. Similarly, medical treatments don’t just happen to heal the
body, even though they often fail.  

If minimalism holds good for an account of law, but not for bodies or medicine,
something must explain this contrast. Why wouldn’t the law’s moral aims appear in an
account of its essential nature, in the same way that healing appears in an account of
medicine? The answer lies in a view about morality. We don’t know exactly what this view
is, since analytic method has made it irrelevant. But, by means of its effect, we can see that
it is there.

To show this, I borrow from Anton Ford a distinction between two forms of
generality. The first — “accidental specification,” in Ford’s terminology — is illustrated by
Aristotle’s example of a snub nose. Since all snub noses are noses, but not all noses are snub,
we have here some kind of specification or generality. Here, a narrower species has been
formed by the intersection of two mutually independent qualities: 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 vice versa. Indeed, just as there are noses
which are not concave, so concavity itself has application to many things which are not
noses. When this kind of generality is present, we can always define the species, as Ford
reminds, through an equation: It is the genus plus something, i.e., some independent quality
which differentiates it from other species of the same general kind (e.g., hawk nose, aquiline
nose, nubian nose, etc.).

Not all generality is like this, however. Some types admit of no such equations.
Since all healthy human bodies are bodies, but not all human bodies are healthy, we are again
confronted with a kind generality. But we can’t define a healthy human body as a human
body plus some independently definable thing (health). For we couldn’t identify the human
body at all — and, say, distinguish its fingers from cancerous growths — without an idea of
its health or proper functioning. The healthy human body is just the human body in its

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85 Can we register the possibility of such failure by saying that a doctor merely aims to heal? Of course,
but such an aim would seem to depend on the fact that medicine is, by its nature healing, and doesn’t merely
aim to be, like the crossing of one’s fingers.

86 My discussion closely follows Anton Ford, “Action and Generality” in Ford, ‘Hornsby and Stoutland,
Essays on Anscombe’s Intention (Harvard University Press __). Ford describes more than two forms. The
relation of triangles to geometric figures, or red to colors, or torts to private law, is a kind of categorical
generality, different from the forms I discuss here.

87 See also Michael Thompson in “Apprehending Human Form” and “The Representation of Life” (Ch. 1
of Life and Action, Harvard University press __), which argue that the notion of a creature’s “life form”
mediates any judgments about its characteristics, and supplies an internal normative standard. Implicit in
Thompson’s argument is also the thought that “living” applied to any body also forms an essential species.
essential form, the body considered apart from any accidents. Ford calls this the essential species. Even more obvious examples of such specification would the ones which figured in our discussion of “Lex Injusta…”: “sound reasoning,” “pure gold,” etc. Sound reasoning is just reasoning where nothing goes wrong, as “pure gold” is just gold with nothing added. No equation can solve for Gold + x = Pure Gold.88

For present purposes, it will suffice to mark just two distinctions between these forms of specification. First, while an understanding of an accidental species is naturally approached by starting with its genus and then moving on to some differentiating characteristic, this is reserved in the case of essential specification, for here to apprehend the genus, you must begin with the species, or the thing in its perfect (pure, functional, mature, undiluted, fully developed, un-corrupted, etc.) form. Second, in the later case, the wider genus is 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.

These contrasts are sufficient to raise our question. Our notorious jurisprudential pair — law/ morally good law — is also displays some kind of generality. But which kind? When the law is morally bad, is this sometimes a privation (like a land-bound swan or an incompetent doctor), or is it always a matter of the law’s lacking some independent kind merit? How are we to decide?

I’ll make two remarks about this question, beyond the observation that confusions about forms of generality seem to be pervasive in jurisprudence.

First, if morally defective law is sometimes a privation, then morality is relevant to an account of law’s nature. To describe that nature, positivism in Gardner’s sense (which says only that the validity of legal norms is based only on their sources) would not be enough. This would have to be supplemented by an account of the law’s defect conditions. On the other hand, if morally bad law is always a matter of the law’s 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.89

88 Ford, op. cit., p. ____.

89 Shapiro himself seems ambiguous on this question. See my “Planning Positivism and Planning Natural Law” (cite).
Second, the question about which kind of generality we are facing here is clearly a question about morality, not something “analytically” decidable. For it is not some feature of law (i.e., that it can be morally bad), but rather our ideas about the kind of moral standards relevant to law that determines the answer. The utilitarian, for example, will have no choice but to think of morally good (or bad) law as an accidental specification: the intersection of whatever the relevant law-comprising social facts might be, on the one hand, and the independent property of tending to bring about (or hinder) 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.

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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.