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For Private Circulation Only: This is a very preliminary draft and is not to be
quoted; it is barely adequate to be read. ☺ But that doesn't mean that
everything asserted in it is not true and insightful. It just means it is
sometimes nearly impossible and almost always very difficult to determine
precisely what is being asserted.

The Moral Force of Legal Directives

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The Hart-Fuller exchange energized jurisprudence in the mid-20th century
and has been a focus of sustained philosophical interest for fifty years. That
it energized jurisprudence as much as it did can be attributed in part to the
political climate of the time as well as to the intellectual prowess of the
protagonists. That is has been a focal point of sustained philosophical
interest is a testimony to the enduring quality of the issues and the eloquence
and clarity with which Hart and Fuller formulated them.

Much of the issue between Hart and Fuller concerns the separability
of law and morality. No one denies that law and morality are separate
modes of regulating human affairs. At the same time everyone recognizes
that there are important ways in which law and morality are connected.
Arguably they share some important features in that both address those they
govern as agents capable of acting for reasons and thus both guide conduct
by providing reasons for action. Because both operate in the realm of reason
one way into analyzing the nature of law and morality and their relationship
to one another is by exploring the connection of both with practical reason.
Indeed, one of the most familiar and arguably distinguishing features of
legal positivism is the claim that the law claims to provide content
independent moral reasons for acting.

In addition, morality has a causal impact on the law – perhaps less
frequently than one might hope – but nevertheless through a variety of
causal mechanisms; and the law can change what we have moral reason to
do, though again the mechanisms by which it does are complex and varied.

Jurisprudential theorists recognize these familiar truths about the
relationship between law and morality – that law and morality are distinct,
that both operate in the realm of reason; and that there are likely interesting

causal (and other) mechanisms by which they influence one another -- but they have typically focused on a somewhat narrower set of questions: in particular on whether there are *philosophically* interesting relationships between law and morality.

For the most part this question has taken one of two forms: whether there are necessary connections between law and morality; or whether there are any necessary connections between the concepts of law and morality. The claim that there are no necessary connections between law and morality or between the concepts of law and morality is the so-called 'separability thesis' championed by Hart and attributed to positivists more generally. At least some version of the claim that there are necessary relationships between law and morality or the concepts of law and morality is the view associated with Fuller. Natural law theory more generally rejects the separability thesis. In short, legal positivists endorse the separabilty thesis and natural lawyers reject it.

As we shall see the separability thesis represents just one of many ways in which might formulate the question whether there are philosophically interesting relationships between law and morality. In what follows, therefore, I distinguish among four closely related periods in modern jurisprudence distinguishable from one another in part by how the question about the relationship between law and morality gets formulated and explored. Not all of these are versions of the way in which Hart and Fuller formulated the issues. Indeed, by my lights the two most recent ways in which legal philosophers have explored the relationships between law and morality are by far the most interesting, yet both may well have been unrecognizable to Hart and Fuller as expressing anything like the concerns that so captured them.

I distinguish among these four periods as follows:

(I)   The Separability Thesis. I will treat this as the core concern that comes out of the Hart-Fuller exchange.

(II)   The Model or Rules. This period is defined by Dworkin's important article and the two forms of legal positivism that emerged in response to it: Raz and the exclusive legal positivists on the one hand, and myself and inclusive legal positivists on the other.

(III)   The Interpretive Turn. This period is defined by Dworkin's argument in Law's Empire and the set of issues around the possibility of theoretical disagreement in law.

(IV)   The determinants of legal content. This period is defined by a question more than by a particular article or book. The question, which has been a subtext in the debate all along but which is only now I believe being correctly formulated is this: what are the determinants of legal content and how do those determinants fix the content of law. The question that at bottom we want to explore is whether the claim that law purports to provide content-independent moral reasons for action (and when its claim is true in fact does so) is compatible with the view that only social facts – facts about behavior and attitude—contribute to legal content?

To my mind these last two questions are much more philosophically interesting than either the Hart-Fuller exchange itself or the debate between Dworkin and exclusive and inclusive positivists on the one hand and that between exclusive and inclusive positivists on the other. On the other hand, it is not clear to me that we could have come to see the issues as clearly as we have now had we not as legal philosophers continued to look for a way to get at what was philosophically interesting about the relationship between law and morality, a problem that was brought to our attention most sharply by the Hart Fuller debate. More importantly, the answer I want to defend – namely that we can square the claim that law can give rise to content-independent moral reasons for acting with the claim that only social facts can contribute to legal content – invites us to reconsider Fuller's claims about the internal morality of law in a new light. Indeed, Fuller's claims about the internal morality of law may well support rather than undermine key features of the positivist answer I want to give.

It is true no doubt that many in the legal academy treat jurisprudence as arid and as too philosophical and detached from legal practice and political life. Perhaps the charge is a fair one in general, though even if I am found guilty of it, I fail to recognize the nature of the offence. Fair or not, no one could accuse either Hart or Fuller of engaging in their philosophically rich and important debate in ways that left the reader wondering whether it mattered to the law or the place of law in organizing our affairs. So steeped in the politics of the times was their exchange; yet the philosophy did not suffer from its being sallied by political realities. And for this and much else both deserve enormous credit.

In much of my legal writing – especially on tort law -- I too am concerned to make contact between abstract philosophical theory and actual legal practice – though I have been accused (quite unfairly I might add) of theorizing a tort law that has never really existed or if it did exist, it did so only in my mind. But when it comes to jurisprudence, I fear that my motto is: 'Let's get arid!' Of course I don't mean that, but I do mean that the law is a subject of philosophical interest as well of practical and political interest, and in my hands, it gets a philosophical treatment, and I hope one worthy of it. If abstract analytic philosophical argument about law is for that reason alone 'arid' then to the desert we go.

To jump ahead to my conclusions: I argue that the separability cannot shoulder the jurisprudential weight it has been asked to bear. In spite of what both Hart and Fuller and the majority of commentators ever since have maintained, the separability thesis is inadequate to distinguish legal positivism from natural law theory.

When it comes to the exchange between Dworkin of the Model of Rules and the legal positivists, the positivists clearly get the better of it; as between inclusive and exclusive legal positivists, nothing the exclusive positivists have ever argued for undermines inclusive legal positivism. This is no endorsement of inclusive legal positivism, however. I say this as the person perhaps most often identified with inclusive legal positivism. My point had always been to demonstrate that there are forms of legal positivism that are untouched by some of what had been taken to be the strongest objections to it leveled by Dworkin and others; and so it became important to characterize and defend both the coherence of the position and its claim to being a form of legal positivism: consistent with important features of legal practice and the basic tenets of positivism. Unlike others who have advanced inclusive legal positivism, I have never argued that it provides the best explanation of actual legal practice. Other forms of positivism have to reject the premises of many of the powerful objections to positivism; the entire point of my strategy has been to accept the premises of the objection and still render them ineffective.

As to the interpretive turn, the results are more mixed. Legal positivists (including me), have demonstrated convincingly that Dworkin has mischaracterized them and that the Semantic Sting, which is designed to show that Interpretivism is inescapable, is unsound. Again, positivists (again including me) have explained how theoretical disagreement about the grounds of law is compatible with the basic claims of legal positivism.

What legal positivists have not done is to meet the challenge of interpretivism directly. Interpretivism is an account of how the determinants

of legal content fix law's content. It is at least in part a theory of adjudication. It is more than that however because an account of the determinants of legal content themselves – the grounds of law in Dworkin's phrase – fall out of the theory as well. Even if it is not inevitable, there may be other considerations that support taking the interpretive turn, and the least positivists owe is an alternative overall account of the determinants of legal content and an explanation of how those determinants fix law's content. If we think of such an account as a theory of adjudication, then what positivists have been good at is providing a theory of the grounds of law, and what they have been less good at is providing theories of how the content of law is fixed by those factors that are its determinants. No one should consider Hart's remarks in Chapter 7 of the Concept of Law to constitute a theory of adjudication.

One of the few really important consequences of the debate between the inclusive and exclusive legal positivists has been sharpening the basic tenets of positivism. As we shall see momentarily, though most commentators associate legal positivism with the separability thesis, the fact is that neither Raz nor I accept it. The key claim of legal positivism turns out to be a claim about the role of social facts in determining the identity and content of law. The two schools of thought disagree about how to characterize that role. As I would now put it, inclusive legal positivists claim that only social facts can contribute to the content of law whereas inclusive legal positivists claim that only social facts can determine what facts contribute to legal content (in each jurisdiction).

This means that common to both forms of legal positivism it is not necessary that moral or evaluative facts as Mark Greenberg calls them contribute to legal content. And so we can then articulate the specific challenge presented in Law's Empire as a general challenge. Whatever particular theory of how the determinants of legal content are to fix the content of law, legal positivists of whatever sort must be able to show that legal content can be fixed by social facts alone.

One challenge to this view is to ask whether such content is consistent with other important features of law, in particular law's guidance function: that is its claim to provide reasons for acting. The most demanding way of formulating this challenge is to ask whether if law claims to provide moral reasons for acting whether its claim to doing so could possibly be consistent with the view that only social facts can contribute to legal content.

To me this is the most basic and generalizable challenge to legal positivism, and in the last section of this paper I show how relying on insights drawn from the work of Joseph Raz, Scott Shapiro and myself, that

challenge – on its strongest and most formidable terms – can be met. And so one can see how the current form of the question of whether there are philosophically significant relations between law and morality can be traced back through the prior three formulations of that problem. This is where we want to end up. We begin, however, with the separability thesis.

       I.

Hart formulates the separability thesis as the claim that, "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." [1] Hart endorses the separability thesis, whereas Fuller is thought to reject it. Hart and Fuller are seen as representing the legal positivist and natural law traditions respectively and so the conventional wisdom is that legal positivism is best understood as rejecting what natural lawyers are thought to assert: namely, the existence of necessary relationships between law and morality or between the concepts of law and morality.

      One problem with characterizing legal positivism in this way is that neither Joseph Raz nor I endorse the separability thesis.[2] One problem is that one can read the separability thesis as asserting a claim about constraints on the conditions of legal validity or as making a claim about the existence conditions of legal systems.

      As a claim about the conditions of legal validity, the separability thesis asserts that morality is not necessarily a constraint on legality: that is, a rule can be valid law in a jurisdiction even if it fails to satisfy or replicate the demands of morality. Whether it is depends on the conditions of legality and those conditions need not impose a moral test nor need they be derived from moral facts or principles. There is no contradiction in the sentence 'L is a legal rule and L makes demands that cannot be morally defended.' By the same token, the concept of an immoral law is not incoherent, and so without

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[1] An alternative but similar formulation often attributed to Hart is the claim that whether a rule or norm is valid law is one thing, its merits another.

[2] I hesitate to speak for Raz, and perhaps I should be equally hesitant to speak for myself, but I have no option. Some have thought that my rejection of the separability thesis follows from my inclusive legal positivism – but that is not correct. I will have occasion to discuss inclusive legal positivism in what follows, but that thesis – whatever its ultimate merits may be – is entirely unconnected to the seaparability thesis.

more, there is no reason to suppose that satisfying or replicating the demands of morality is part of the concept of legal validity.

As a claim about the conditions of legal validity, the separability thesis is beyond reproach. Surely this means that legal positivists are right and natural law theory mistaken. That is too quick, for several related reasons. Most importantly, since one cannot help but be impressed by the incontrovertible fact that there are bad but valid laws in all legal systems, it cannot be charitable to interpreting the natural lawyer as committed to denying the obvious. The natural lawyer who rejects the separability thesis as a claim about legal validity must be up to something else.

One possibility is that the term 'valid' in 'valid law' is ambiguous, and that legal positivists and natural lawyers are emphasizing different senses of it. To see the difference, consider the claim about law made by command/sanction theorists. The sanction theorist holds that laws are commands backed by sanctions. To be a law is to be a rule whose content is the conjunction of a command and a sanction for non-compliance with it; nothing is, as it were, capable of being a law otherwise. In that sense, rules that fail to satisfy these structural and content conditions are not 'valid.' The validity of a rule in this sense is independent of its authoritative status in this or that jurisdiction. The more familiar sense of 'valid' is captured by the phrase 'valid inference,' in which case in asking whether a rule is valid one means to call attention to the question of whether it satisfies the criteria of legality as indexed to a particular legal community. So a certain rule may be valid law in say France, but not in the United States which is to say that it satisfies the conditions necessary for being law in France but not in the United States. Since the example assumes that the content of the rules is the same, the term 'validity' must refer to some other feature of them; and that feature is whether the rule meets the criteria of legality operative in the relevant jurisdictions.

It is plausible that positivists are emphasizing the notion of validity that is indexed to political communities, whereas natural lawyers are emphasizing the less familiar and perhaps inapt sense of validity as a claim about the kind of rule that can qualify as the sort that can be a law. [3] Just as rules of thumb or logic cannot be valid laws, rules that fail to meet some or other moral test are not the sorts of guidance rules that can be laws.

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[3] I say 'inapt' because it probably is. The use of 'valid' in this context suggests that we should upon gazing at a three legged chair in a museum ask whether it is a 'valid chair' or whether an 'automobile' that has no seats is a 'valid automobile.'

In that case, natural lawyers and positivists are not really disagreeing with one another in the sense that the separability thesis clarifies. The claim the legal positivist makes is correct in that it is not necessarily true that the criteria of legality operative in particular jurisdictions must impose a moral test of some sort. No natural lawyer needs to object to that claim, however. How could he given the worldly evidence of its truth?

On the other hand, in resisting the positivist position, the natural lawyer's hesitance may be designed to call attention to the thought that one should not be misled into thinking that any norm happening to satisfy the social conditions of legality in this or that community is really law in the full sense; for only laws that replicate or satisfy the demands of morality are genuine or real laws in the full sense: only they are truly valid.

The claim that only rules that replicate or correspond to the demands of morality are 'valid' laws in this less familiar sense is less an account than a stipulation. The claim, however, is in the neighborhood of a slightly different way of understanding what the natural lawyer could be up to that is considerably more plausible. The difference is less about the semantics of 'valid law,' than it is about the methodology of jurisprudence.

True to its philosophical roots, legal positivism takes jurisprudence to be an exercise in non-ideal theory. Arguably, the natural lawyer approaches jurisprudence as a project in ideal theory. The difference between the two is methodological. Both aim to illuminate actual legal practice, the positivist by uncovering the conditions that apply universally or generally in our actual practices, the natural lawyer by studying the ideal case. The ideal case of a heart is one that succeeds at its function, which is to pump blood. To understand hearts requires understanding what they do and how they do it; and one gets a grasp on that not by seeing what all hearts – of varying degrees of success—have in common; but by analyzing how the successful heart works when it works. Similarly, to understand valid law requires that we study successful instances to it: those in which the law serves its function or meets its success conditions (if any). If what makes a law successful is that it imposes the obligations (rights, liberties, etc) it purports to, then to understand law is to understand how it manages doing so when it does.

The underlying thought is that successful law achieves its function, and that its function is to confer moral reasons for acting – some of which are moral obligations – and law can achieve its function when its content replicates or corresponds to the demands of morality.

There is a good deal controversial both in the methodology and its execution. It is an open question whether law has a function, whether its function is to create moral reasons for acting, and most importantly – as we

shall see in the final section of this paper – whether the law can provide moral reasons for acting only if its content replicates or satisfies the demands of morality.

Understood as a claim about the conditions of legal validity, the separability thesis is inadequate to distinguish legal positivism from natural law theory. The claim that legal positivists embrace is probably not the claim that natural lawyers reject. There is no reason for natural lawyers to reject the claim that positivists embrace, and they can do so while insisting upon the value of ideal theory.

The situation shifts only slightly when we turn our attention from the separability thesis as a claim about the conditions of legal validity to it as a claim about the existence conditions of legal systems. There is no question that both legal positivists and natural lawyers have been concerned to identify the existence conditions of legal systems. Hart famously invokes not just the familiar claim that law consists in the union of primary and secondary rules in this context, but also the minimal moral content of law and what he calls the various efficiency conditions for the existence of legal systems.

Arguably, the main worry that natural lawyers have had about legal positivism has been its inability to capture the moral aspects of law as a general mode of governance. This concern shows up in their complaint that positivists are committed to Nazi Germany as being governed by law and Vichy, France being governed by law, and so on. According to the natural lawyer, a putative legal system that failed somehow to provide basic moral goods or whose substantive rules or procedures stand, as an affront to morality would fail to satisfy certain minimal conditions for qualifying as a legal system. We might put this by saying that being responsive to morality in some important way is a necessary condition for the existence of a legal system.

A mode of governance could be responsive to the demands of morality in a number of ways. Its laws could substantially replicate the requirements of morality. It could provide those governed by it with essential moral goods (this is what Hart referred to as the minimal moral content of the law); or law making could proceed in ways that satisfy what Fuller referred to as its 'internal morality': the morality of making and enforcing law. [4]

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[4] (this is one way of interpreting the role of Fuller's internal morality of law within the natural law tradition. I offer another and hopefully more interesting interpretation in the final section of the paper.)

There is nothing in the claim that in order to be a legal system a mode of governance must be responsive to the demands of morality that is incompatible with legal positivism. In addition to both Raz and myself who are on record rejecting the separability thesis, other philosophers of law as diverse as Dworkin and Scott Shapiro – neither of whom are natural lawyers advance even stronger views about the relationship between morality and governance by law. Dworkin argues that political institutions display characteristic political values and that in the case of law the relevant value is integrity. Dworkin is not a positivist, but Shapiro is. And Shapiro holds that it is distinctive of legal systems (if not unique to them) that they pursue moral ends or goals.

To sum up: there are at least two ways of understanding the separability thesis: as a claim about the conditions of legal validity and as a claim about the existence of legal systems. Nothing in legal positivism requires endorsing it as a claim about the existence conditions of legal systems, and nothing in natural law theory requires rejecting it as a claim about the conditions of legal validity insofar as legal validity is understood in its inferential sense. Only in that sense of legal validity does the positivist mean to endorse it.

II.

In the Model of Rules I, Dworkin famously argues that moral principles can themselves be binding legal standards: binding moreover in virtue of their expressing a dimension of justice or fairness, and not in virtue of their having been posited or enacted by someone with the authority to do so. Legal positivism holds that law is enacted or created by those with the authority to do so. Law's have a social source; their legal status depends on the form and manner of their enactment – their pedigree or source – and not on their content. Legal positivism lacks the resources to explain how moral principles can be binding legal texts.

It is easy to see why many commentators have read the argument of MOR I as sufficient to place Dworkin within the natural law tradition. If moral principles are binding legal texts in virtue of their content, then their legality – they're being valid legal standards – depends on the moral reasons they express. The association of Dworkin with the natural law tradition is not warranted by the argument in the Model of Rules, however. For

nowhere does Dworkin claim that satisfying the demands of morality is a necessary condition of legality. Nor does he claim that putative legal systems that fail to include moral principles among its legal texts fail for that reason to be legal systems. He is making a very different point: namely, that in order to understand legal practice in certain jurisdictions we have to treat at least some moral principles as legal texts binding in virtue of their content, not their source. He is not, in other words, claiming that legal validity necessarily calls for a moral test.

It is by now well known that legal positivists pursued two different lines of response to Dworkin's claim about the binding legal status of certain moral principles. It is worth noting in passing perhaps that neither one of these responses was motivated in particular as ways of defending the separability thesis. In part, this is because it is not obvious, as I just noted, that the argument of MOR I pose a threat to the separability thesis. More importantly, however, both responses take the bigger challenge of Dworkin's argument to be some or other version of what Raz calls the Sources Thesis, which I have argued is a particular version of what I have called the Social Facts Thesis.

Common to both responses is Raz's important insight that it is one thing to say that a norm or rule is binding on a judge, and another to say that it is binding because it is an authoritative legal rule of his or her jurisdiction. To say that a rule is binding is to say that it is non-optional, that a judge must apply it where relevant and give it the weight that is appropriate to the context. Norms and rules satisfy this condition that are no part of the law of a particular jurisdiction. In a conflicts case a judge may be required to apply the law of France in a case being heard in a United States court. That does not make the law of France part of the law of the United States. (Note the current dispute about the status of law in other countries on U.S. Constitutional law.)

The Foreign Claims Act requires that in times of war, for example, that the tort law of the jurisdiction in which the tort has been alleged to have occurred – that of the war zone – applies. The Uniform Commercial Code instructs judges to consult customary business practices. That makes such practices non-optional for judges in some circumstances, but it does not make customary business practices part of United States law. That law directs judges to consult practices that are not part of the law. And so on.

This excellent and by now familiar distinction in jurisprudence means that even if one grants Dworkin the premise that some moral principles are binding on judges, one cannot infer that such standards are binding because

they are part of the law of the relevant jurisdiction. This is the significance of the distinction between 'binding' and 'binding law.'

Of course, nothing in Raz's argument to this point implies that moral principles cannot be authoritative legal texts: the gist of his argument so far is that it does not follow from the fact that moral principles are binding on legal officials that they are authoritative legal texts and binding for the reason that they are. The point is to block the inference that Dworkin draws as too quick. I take it that no one – not even Dworkin – resists the soundness of Raz's argument.

Even so, Raz's argument is compatible with moral principles sometimes constituting authoritative legal texts. Without more, the dispute lacks a resolution one way or the other. We come therefore to the second phase of the argument and this is the place at which legal positivists split with one another. Some, following Raz's lead, argue that moral principles cannot be authoritative legal texts, whereas others, including ultimately Hart himself, follow a line of argument that I originally advanced to the effect that what matters to legal positivism is not whether moral principles might sometimes constitute authoritative legal texts, but the grounds of their authority as legal texts.

Those pursuing the former response to Dworkin argue in effect that even if moral principles are sometimes non-optional for judges, it simply cannot be in virtue of their being authoritative legal texts. Those pursuing the latter tack allow that moral principles can be authoritative legal texts, but only if there is the relevant sort of social practice among officials – for example, of the sort Hart referred to as a rule of recognition – which treats them as such. Those falling into the first group are often referred to as exclusive legal positivists and those falling into the second group are often referred to as inclusive legal positivists. The labels are self-explanatory.

Because inclusive legal positivists allow that moral principles can sometimes constitute authoritative legal texts, it is natural to think that the inclusive legal positivist rejects the separability thesis. Indeed, because it is well known that I reject the separability thesis, some are inclined to think that my doing so is a consequence of my commitment to the separability thesis. But this is not correct, and for two reasons. Inclusive legal positivism is consistent with the separability thesis understood as a claim about the conditions of legal validity. That is because the core of inclusive legal positivism is the claim that if and when moral principles are authoritative legal texts it is because they are picked out as such by the relevant practice among officials. In other words, the legality of moral principles depends not on their morality but on some relevant social facts:

that is, facts about the behavior and attitudes of relevant officials. I have already made clear my reasons for rejecting the separability thesis. It is simply not up to the task that jurisprudence has set for it: namely distinguishing legal positivism from natural law theory.

Though the argument in the Model of Rules is not introduced in order to establish that moral principles are necessarily part of the law, the responses of both the inclusive and exclusive positivists to Dworkin's challenge establish, if correct, that moral principles are not *necessarily* part of the law. If Raz's more general argument from authority is right it is a necessary truth that moral principles are not part of the law; and if the inclusive legal positivist is right, if moral principles are part of the law it is contingently and not necessarily so.

Most of the attention has been rightly focused on these features of the argument of the MORI and these two different kinds of responses to it. I want to focus on altogether different features of the difference between the ways in which the inclusive and exclusive legal positivists respond to Dworkin's objection. First, the Razian response proceeds from a claim about *the nature of law*, whereas the inclusive legal positivist response proceeds from a claim about *the nature of legal positivism*. Let me explain.

In a real sense, Raz's argument is not aimed at defending legal positivism. Rather, the argument is aimed at exploring the consequences of the fact (if it is one) that law necessarily claims to be a legitimate authority. According to Raz, law's claim to being a legitimate authority entails that only social facts – facts about behavior and attitude – can contribute to the content of law. If we identify legal positivism with the view that only social facts can contribute to legal content, one consequence of Raz's argument is that legal positivism falls out as a consequence of law's claim to authority (in conjunction with Raz's particular theory of authority). In contrast, the entire point of the inclusive legal positivist strategy of response is to show that legal positivism is compatible with moral principles being binding authoritative texts.

The second point is that if Raz is right the inclusive positivist must be wrong. In other words, if we grant Raz two premises – first that law necessarily claims to be a legitimate authority and second his particular account of authority – the thought is that a certain form of legal positivism will follow. That form of positivism will hold that only social facts can contribute to legal content. If only social facts can contribute to legal content, then inclusive legal positivism must be mistaken because according to it, moral principles can be authoritative legal texts and therefore they can

contribute to legal content – provided some set of social facts (that is the relevant practice among officials) makes it so. And if inclusive legal positivism is mistaken so too must every theory that provides a place for moral principles as being part of the law of a jurisdiction -- from the account implicit in the MOR to full blown natural law theory.

The structure of Raz's argument is roughly this:

1. Law necessarily claims to be a legitimate authority.
2. Although the claim to being a legitimate authority can be false – indeed, can always be false – it cannot be necessarily false.
3. Because the claim to legitimate authority cannot be necessarily false, law must be the sort of thing it could be true of.
4. Authoritative reasons are second order reasons that exclude some of the first order reasons that would otherwise apply to the agent. (First order reasons are 'moral' reasons that provide considerations as to what we ought to do).
5. If in order to identify the law or its content we must appeal to the first order reasons that the law excludes, then we vitiate law's claims to legitimate authority, thus rendering the claim to legitimate authority necessarily false.
6. Therefore, only non-moral facts – i.e. social facts – can contribute to legal content. (Raz labels this the Sources Thesis.)

We can set aside whether it is part of the concept of law that it necessarily claims to be a legitimate authority, and in doing so put to one side the concerns raised about how we are to understand the notion of the law as making or asserting claims of any sort. Instead, we want to focus on other features of Raz's argument: in particular, the set of inferences from the premise that law necessarily claims to be a legitimate authority to the Sources Thesis. There are two key inferences, neither of which is unproblematic.

First, the claim to being a legitimate authority is not just a necessary truth about law, but a claim, even if false, that must be capable of being true. In other words, even if it is false it cannot be necessarily false, for if it is necessarily false then it could not possibly be true. It is important for Raz's argument that even if it is always in fact false, the claim to legitimate authority must be capable of being true of law; and that is because if it can be true of law, then law must be the sort of thing that the claim to being a legitimate authority could be true of. And it is this last point that, along with

Raz's particular account of authority, that is thought to entail the Sources Thesis. Thus, the claim to legitimate authority turns out to impose what we might think of as metaphysical constraints on the nature and content of law.

The worry, or at any rate, the worry that most interests me, is that even if law necessarily claims to be a legitimate authority, there is reason to think that the claim could in fact be necessarily false. To be sure it is a coherent claim and involves no contradiction. Still, if a familiar anarchist position is true, then the claim to legitimate authority would be necessarily false. So the claim to being a legitimate authority could in fact be necessarily false and if it is law does not have to be the kind of thing that it could be true of.

The Razian argument also seems to rely on the thought that if one has to appeal to moral facts (or principles) in order to determine the identity or content of law (as opposed to facts about what some believe or hold to be the relevant moral facts or principles – which is permissible), then doing so vitiates the claim to authority. That is because, authoritative directives are ways of substituting an authority's judgment of what the balance of reasons requires for one's own judgment; and if one has to consult those reasons to determine the identity of the authoritative directive or its content, one is simply vitiating the claim to authority.

Were one required to appeal to those reasons that are the grounds of the authoritative directive and which the directive is designed to exclude, then no doubt doing so would vitiate the claim to authority. However, it does not follow that appealing to any moral facts or principles in order to determine the identity of the law vitiates the claim to authority. And as I have noted on several occasions, the argument does not establish that moral facts or principles cannot contribute to the content of law, only that in determining what the law requires agents cannot appeal to those principles in order to determine what the law requires of them. The claim about the determinants of legal content is a metaphysical claim, whereas the argument from authority appears to involve epistemic claims only.

I do not want to belabor the point here, but it is important to the discussion in the final sections of this paper, and so it bears some emphasis. The inclusive legal positivist should be understood as beginning with a particular characterization of the fundamental claim of legal positivism: and that is that in some sense that needs further elucidation – that I hope to provide below – that only social facts can ultimately fix the determinants of legal content. And he then argues that this tenet is consistent with the claim that moral facts can be legal texts and thus contribute to legal content.

In contrast, the exclusive legal positivist begins with a claim about law – not a claim about legal positivism – and argues from that claim to the conclusion that only social facts can contribute to legal content. Along the way to that conclusion, his argument is supposed to entail that moral principles cannot contribute to legal content.

So one thing should be very clear, which is that although the inclusive and exclusive positivists both share commitment to what I have called, the 'social facts thesis,' they understand it in importantly different ways. In addition, there are two features that all exclusive legal positivists share with one another. The first is that they share roughly the same conception of the social facts thesis, which is in each case different from that of the inclusive legal positivist. The second is that they derive that view of the social facts thesis from a premise about the nature of law, and not a premise that is itself a tenet of legal positivism. For them, the social facts thesis falls out of a general jurisprudential claim.

The differences among them have to do with the nature of that general jurisprudential claim. The most well-known claim is Raz's: that law necessarily claims to be a legitimate authority. In many ways, the most interesting is Scott Shapiro's. Shapiro's claim differs from Raz's in two ways. In the first place it is a claim about law's guidance function generally, and not a claim tied to a particular view about how authority operates in guiding conduct. To be sure, authority is important because it operates in the realm of reason, but it does so in a way that is distinctive and, if Raz is right, largely structural. Second, Shapiro's argument does not rely on the premise that law necessarily claims to be a legitimate authority; it rests instead on the claim that law guides conduct by providing reasons for action. And what makes his argument especially interesting is the claim that one can derive the same strong conclusions that Raz does about the metaphysics of law from this much weaker and thus less controversial premise.

If the exclusive legal positivist is right, moral principles can never be authoritative legal texts; and if the inclusive legal positivist is right, moral principles can be authoritative legal texts, but only if they are so designated by a social practice among officials: that is, by some set of social facts. In either case, the claim that moral principles are necessarily part of the law is never really at issue, and in this way the first serious engagement with the question of how law and morality are related in the period after the Hart/Fuller debate is not best understood as taking up or further developing the issue that appears to have divided Hart and Fuller.

III.

Arguably, however, Dworkin's argument in Law's Empire changed all that. The claim in the MOR I is that moral principles can be binding legal texts. The evidence Dworkin offers for this claim is roughly that judges treat those principles as binding on them. The inclusive legal positivist in effect says that it is a distraction to focus on the claim that such principles are binding legal texts. What counts is the source or ground of the principle's authority as law. If all that Dworkin has to say is that judges treat the principles as binding or non-optional, then this is perfectly compatible with legal positivism: the principle's authority as law depends on relevant social facts – namely, the behavior and attitudes of judges.

I take it that the Dworkinian would and should respond that the fact that judges treat the principles as binding on them is introduced as evidence that they are binding legal authorities; it is not introduced as an account of the grounds of those principles having the status of binding legal texts.

That would be the right response, but it is nevertheless incomplete. The response merely invites the question: if it is not the fact that relevant officials treat the principles as binding, then what is the source of their authority as legal texts? It cannot be their content for that would be inadequate to distinguish those moral principles that are also legal texts from those that are not. I take it that the inclusive legal positivist response to MOR I is really best thought of as presenting precisely this challenge. Whatever the property or characteristic is of those moral principles that renders them legal texts and thus distinguishes them from those moral principles that are not, the only reason that characteristic matters – that is, has the force that it does – is because it is the characteristic that the relevant officials treat in the appropriate way – that is, adopt from the internal point of view – as a distinguishing mark of legality. The mark itself does not have to be some social fact about the principle (as it would be for an exclusive positivist). It merely has to be the case that the mark – whatever it is – is the mark of legality in virtue of some set of relevant social facts – which is on most inclusivist accounts, facts about the behavior and attitude of relevant officials. Certainly, this is the way I have always understood my particular version of inclusive legal positivism: as a challenge to Dworkin.

One way of reading the argument in Law's Empire is in part as a response to this challenge. There are several parts of the response that interact with and complement one another. One part of the response is the rejection of the idea that the source of the legal authority of any text or act can be determined by social facts alone. In the book the argument takes the form of a rejection of semantic criterialism, but the argument is quite general

in its scope and ambition. The thought is that the inclusivist challenge presupposes the possibility of a convention or criteria fixed by convergent behavior and attitude, and that this convention that sets out the pertinent criteria is the source of legal authority. The objection is that such an account is incompatible with the nature and scope of disagreement about what the content of the criteria is. The criterialism or conventionalism that is presupposed by at least certain positivists – primarily in effect those inclusive legal positivists whose primary concern is the source of legality and not the nature of legal content – fails in the face of the problem of disagreement.

That is the critical or negative part of the argument. What remains of course is to find an answer to the question of what determines which acts and texts are legal if it can be neither their content nor their satisfying criteria set forth in a convention? The answer is given by Dworkin's interpretivism, and by his specific application of the interpretive method that he defends – law-as-integrity. The idea should be familiar by now and so I will not go into too much detail about it. The underlying thought is that one begins jurisprudentially with a pre-theoretic and thus revisable set of paradigm 'legal texts' or 'acts' of a political community. One then applies the interpretive method to them and that involves attributing a value first to the activity of being governed by law that allows one to answer an apt question in political morality: namely, what justifies the use of collective force? That value then determines which acts are 'legal' acts and organizes the relevant authoritative acts coherently (the idea of fit). The 'criteria' of legality, or the grounds of law, fall out of the interpretive process. They are not fixed by social facts, but by the conjunction of social and evaluative facts: so to is the content of law.

It is impossible to understate just how different the theory of Law's Empire is from that of the early articles – and how much more important and interesting it is as well. The most important difference for our purposes is that in the MOR I, though objecting to the substance of Hart's positivism, Dworkin was working within the Hartian framework. His main point was that the positivist had too limited and narrow a picture of what could count as an authoritative legal text. The argument was designed to show that moral principles could have the same legal status as more familiar rules.

But the argument of Law's Empire is completely different. Moral principles figure not as binding legal standards on the same level as rules, but as the set of 'background' norms that are the law: that is the set of norms that on the one hand help to answer the question, when is the collective use of force justified, and from which on the other the rights of particular

litigants to decisions in their favor derive. Authoritative legal acts are in a sense transluscent to the set of principles that best explains them.

Whereas the argument of MOR I, if successful, establishes that moral principles sometimes warrant the same legal status as do pedigreed rules, the argument in Law's Empire, if successful, establishes that thinking about which norms are binding legal standards is the wrong way to approach jurisprudence. For all norms that have legal status are important only insofar as they help illuminate the path to the background set of moral principles that are themselves the object of jurisprudential inquiry and discovery.

The principles themselves are important because they along with pertinent social facts – past political actions – are the determinants of legal content. That content is itself fixed by constructive interpretation. And so the project of jurisprudence is the project of determining the grounds of law: that is, those facts that would render claims about the content of law (of a particular jurisdiction) true. The project of jurisprudence is not to determine which norms have legal authority, but to determine the grounds of law: the determinants of legal content and to explain how those determinants of legal content fix law's content.

If determining the determinants of legal content is not **the** project of jurisprudence, it is certainly among the most important of them – and unfortunately, if truth be told, the one about which legal positivists have by and large had the least to say. Let me modify that. Positivism is in my view a theory of the determinants of legal content so in that sense, positivists have had a great deal to say about the grounds of law. What positivists have not had a lot to say about is how it is that the determinants determine or fix the content of law. Positivists have theories of the building blocks of legal content, but too few have detailed construction plans.

In many ways, Hart has had the least to say about the way in which the determinants of law – for him appropriately authorized texts – fix the content of law. Chapter 7 of The Concept of Law is often cited as Hart's theory of adjudication, which would amount to a theory of how rules give rise to the legal content. In fact, however, that chapter falls far short of presenting a theory of adjudication in any sense, and it is a mistake I think to believe that Hart meant for it to be anything beyond suggestive. Its main purpose is to make clear the sense in which rules can be said to have determinate content, and to explain the limits on the scope of that content. It is not an account of how authoritative legal rules determine the content of the law.

I have elsewhere suggested that both Raz and Dworkin – unlike Hart or myself, for example – take jurisprudence to be part of substantive political

morality. (In contrast, I would say that Hart and I take it to be part of the philosophy of the social sciences, broadly speaking; and for contrast someone like Shapiro takes it to be part of social action theory or the theory of social organization – which is closer to what I take myself to be doing than it is to what Raz or Dworkin are up to. But this is all speculative of course.)

Raz takes the problem of political morality of greatest philosophical importance to jurisprudence to be: what are the conditions of justified or legitimate authority? Dworkin has a somewhat different question in mind: what justifies the collective use of force? Both take the answers to their questions to impose constraints on the kind of thing that law can be. In particular, both are committed to the view that the answer one gives to this question in political morality constrains the determinants of legal content and in doing so also impacts the way in which the building blocks fix legal content.

Here is what I mean. Both Raz and Dworkin believe that there are legal texts and that there are moral facts (or principles) that are the alleged grounds or reasons – the warrant as it were – for those texts. The difference between them is that Dworkin believes that if law is to answer the question it purports to be an answer to – what justifies the collective use of force – the texts must be (at least) transluscent to the set of principles that would provide the best interpretation of them. The texts themselves are valuable insofar as they direct us to the principles that make the best sense of them. In stark contrast, Raz is committed to the view that in order for the law to be responsive to the conditions of justified or legitimate authority, one cannot see through authoritative texts to the set of moral facts that would provide the warrant for them (if and when they are warranted); access to the reasons vitiates the claim to authority that is essential to law. For Dworkin texts are a window to the relevant moral facts; for Raz legal texts are a wall between actors and those very same reasons.

To return a bit more directly to the main theme of this paper – which is to explore the ways in which the relationship of law to morality has been formulated philosophically since the Hart-Fuller debate – the point I want to emphasize is that whereas Dworkin's initial formulation in MOR I (and II actually) did not imply that morality is necessarily connected to law, the argument in Law's Empire does.

The argument of that book just is that an account of law is an account of the grounds of law. An account of the grounds of law in turn is an account first of the facts that are the determinants of legal content and secondly of the way in which those determinants fix the content of law. And the

argument of Law's Empire just is that legal content is fixed by constructive interpretation and constructive interpretation just is the application of moral facts to certain pertinent social facts – the relevance of those particular facts as well being determined in part by moral facts. The content of law is thus necessarily fixed in part by moral facts.

It is tempting to characterize this claim as if it were a claim about the conditions of legal validity and in doing so to turn Dworkin into some sort of traditional natural lawyer, but doing so would be a mistake – and for two very different sorts of reasons. In the first place, Dworkin's claim is primarily about legal content, whereas the traditional version of natural law theory makes claims about the authority of the texts that contribute to legal content. Relatedly and much more importantly to my mind, the traditional way of thinking about law – as a kind of code – where the fundamental question in jurisprudence is how to determine membership in the code is precisely what Dworkin is really taking issue with. Indeed, my view is that some of the most basic notions in jurisprudence – those that most inform the way the issues are normally raised, for example, the very concept of legal validity – are in a sense artifacts of well entrenched theories much more so than they are features of law. The traditional view is bound up with these notions, and the real importance of Dworkin's work at some level is that he is taking issue as much with the way in which the debates have been formulated and the way jurisprudence therefore approaches law as he is with any particular substantive view on offer about law.

What are we to make of the argument of Law's Empire which has as its conclusion that moral facts necessarily contribute to legal content? The argument is not vulnerable to Raz's initial point that we cannot infer that moral principles are binding legal authorities from the fact that they are binding on officials because Dworkin is not in fact claiming that moral principles are valid laws. He is in effect simply inviting us not to think about law in that way at all.

Nor is the argument in Law's Empire vulnerable to the response that inclusive legal positivists have made to the argument of MOR I. That argument, which as I have noted, is really a challenge to spell out the 'test' by which moral facts that are legally authoritative are to be distinguished from moral facts that are not that is not itself either conventionalist or entirely content based is met by the theory of constructive interpretation. Cosntructivism 'mixes' both social facts and moral content in a way that is in fact neither conventionalist (and thus ultimately positivist) nor content

based (which would not be able to distinguish among the full set of moral principles).

On the other hand, Raz's more fundamental point is that moral facts cannot determine the identity or content of law without vitiating law's claim to authority. Were that argument sound, one would simply have to reject the argument of Law's Empire whose main thrust is that moral facts necessarily contribute to legal content.

If I am right, Raz's argument is not sound, however. Nor do I think that there is any valid argument in the neighborhood of Raz's to the same effect. In other words, I am not persuaded that there is any necessary truths about law in the offing that would entail the conclusion that moral principles or moral facts more generally cannot contribute to legal content. Let me be clear. I have no proof that there can be no such argument; and if there is a compelling argument, then, as I said before, legal positivism or at least its core claims would fall out of the very nature of law. Pending such an argument however I am inclined to the view that there is nothing about the nature of law or about the role in plays in our lives or practical reasoning that would preclude moral facts from being among the determinants of legal content.

IV

When all the shouting is over, none of the three major positions on the relationship of law to morality is unavailable. These positions are as follows:
    (1) Only social facts can contribute to legal content. This is the position of the exclusive legal positivists like Raz and Shapiro.
    (2) Moral facts necessarily contribute to legal content. This is the position of Law's Empire. It is also the position of the traditional natural lawyer. The difference is perhaps meta-ethical. The moral facts that contribute to legal content are themselves the product of the methodology of constructive interpretation.
    (3) Moral facts can contribute to legal content, though it is not necessary that they do. If they do, moreover, it is in virtue of some social fact about them: typically, the fact judges have a practice according to which such facts are among the determinants of legal content. This is the position of the inclusive legal positivist.

Nothing in the nature of authority or law's guidance function rules out either Dworkin's or the inclusive positivist positions; and nothing Dworkin has argued, I am inclined to think, rules out either of the remaining alternatives as well. These represent three radically different views about the relationship between law and morality. How shall we choose among them? Which is the better view of the matter?

To begin to answer this question, let's start by looking for common ground between (1) and (3). If inclusive legal positivism is correct then in some legal systems it is possible that only social facts will contribute to the content of its law. So for the sake the argument, let's identify legal positivism with the view that only social facts can contribute to legal content.

It is conventional wisdom that positivism so conceived has the resources necessary to explain the institutional nature of law but that it lacks the resources to explain the normative force of legal directives. The problem seems especially challenging because not only is law a normative social practice – that is, one that guides human action through reasons – the standard view is that the law claims that the reasons it provides are moral ones. Legal directives are meant to have a moral force – that is, to provide moral reasons for acting. How can the content of law consist in moral reasons for acting when the only determinants of legal content are social facts?

This, I take it, is the fundamental challenge to legal positivism. Another way of putting the challenge is to ask whether legal positivism's claim that only social facts can contribute to legal content can be squared with the view common to legal positivists that the law governs conduct by offering what it takes to be moral reasons for acting: that legal directives have a moral force. How can one explain the moral force of legal directives consistent with the claim that the only determinants of legal content are social facts? In a recent paper, I referred to the claim that legal directives have a moral force as the view that legal content calls for a moral semantics. And the question I addressed and to which I am calling attention here is: can we square the social facts thesis – the claim that only social facts can be the determinants of legal content – with the view that law calls for a moral semantics.

Before tackling this question just a bit more stage setting is required. We can distinguish between two views about the nature of the reasons that law provides. On one view, the content of the law is the reason that the law provides; on the other view, the reason the law provides is a function of attaching the property of legality to the propositional content of the law. On

the former view, legal reasons depend on the content of the law; on the latter view, legal reasons are independent of the content of the law. The reason the law provides is a function of the fact of legality/illegality and not by the content of the proposition to which the property of legality/illegality attaches.

It is unsurprising that natural lawyers for example would come to think that legal reasons are a subset of moral directives. For them, the property of legality attaches only if the content of the putative directive satisfies or replicates the demands of morality. In that case, the reason the law provides is determined by the content and in order to be law the directive must satisfy the demands of morality: at least on the traditional rendering of the natural lawyer's position.

But legal positivists typically hold that legality is independent of satisfying a moral test. Some legal directives of course satisfy the moral test, but their legality does not depend on their doing so. The reason the law provides is thus independent of the content of the directive, and is instead a consequence of the property of legality itself. And so it must surely come as a surprise that so many legal positivists – notably not Hart –believe that the reasons the law provides when it succeeds in doing so are both moral and independent of the content of the particular directive. Why would positivists of all jurisprudential theorists insist that law's reasons are content-independent moral reasons, or to put it in the terminology of the current dispute – that legal content calls for a moral semantics? Legal positivists are surely the last theorists with which one would associate that view.

If it comes as something of a surprise then that legal positivists are among the most ardent supporters of the moral semantics claim, it should come as a something of a shock that my view is not just that they are right to insist on it, but that the moral semantics claim is absolutely essential to holding together the positivist picture of law as a source of content-independent moral reasons for action. At least that is the claim I intend to defend in what follows. [5]

To do so, I need first to explain more precisely what the moral semantics claim is. The moral semantics thesis is not the claim that the content of law is a moral directive. It is a claim about how the content of the

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[5] To insure that I was able to get this paper in on time, I simply lifted the following argument from my recently published Hart Lecture in the OJLS. In the published version of this paper, I will of course make an independent argument to the same effect. My aim was to let readers see how I think the argument should proceed and to do so in a way that allowed me to get the paper in on time.

law can be (accurately or truthfully) described. The moral semantics thesis is the view that the content of law can be truthfully re-described as expressing a moral directive or authorization. In claiming that law calls for a moral semantics, the thought is as follows. 'Mail fraud is illegal' expresses the directive: 'mail fraud is not to be done.' That is the content of the law. The moral semantics claim is that 'mail fraud is not to be done' can be re-described truthfully as 'mail fraud is morally wrong.'[6]

Donald Davidson's discussion of actions under different descriptions provides a helpful analogy. Davidson famously claims that the same act admits of a number of true descriptions of it. Under certain conditions when I flip the switch, I illuminate the room and perhaps in doing so alert the burglar. Davidson's well-known view is that I have performed only one act that can be variously and truthfully described as 'my flipping the switch,' 'my illuminating the room,' and 'my alerting the burglar.'

The claim that law calls for a moral semantics should be understood along similar lines. It is a claim about truthful descriptions or re-descriptions of legal content; not a claim about the constitutive elements of legal content. Specifically, it holds that the content of law can truthfully re-described as a moral directive (or authorization as the case may be).

Why would a positivist press the moral semantics claim? What's in it for him? The simple answer is that we ordinarily describe the content of law in exactly those terms, as expressing claims about we have moral reason to do. The positivist simply wants to show that the content independence and social facts thesis are compatible with our ordinary ways of talking about legal content. Maybe so, but I am not persuaded. After all, one could take the argument on behalf of the content-independence and social facts theses as grounds for insisting upon a revision of the ways we ordinarily speak about legal content.

The better, if somewhat surprising, answer is that the moral semantics claim is integral to the content-independence claim. We can ask two questions about the content-independence claim. First, how it is that the law

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[6] This important insight is owed to Scott Shapiro who also suggested the analogy with Davidson on actions as a way of thinking about the underlying thought. Much of the discussion below has been influenced by Shapiro's idea that we should think about the moral semantics thesis as a claim about when a certain kind of re-description is warranted. For the original articulation of this idea see, Scott Shapiro, Legality, Chapters 7-8 (forthcoming). In addition, Legality, articulates Shapiro's distinctive and highly original and important 'Planning Theory of Law.' Chapters 7-8 set out the basic building blocks of the theory and explain the relationship of what I am calling the moral semantics claim to the idea of laws as plans.

can be a source of content-independent moral reasons? We can ask a similar question about promises. The second question is a bit harder to formulate. When law creates content-independent moral reasons for acting, how does it achieve that aim? What is the mechanism by which the law creates content-independent moral reasons for acting? We can put these questions slightly differently. Given the truth of the claim that law purports to create content-independent moral reasons for acting: (1) What is the mechanism and (2) how does it operate?

The moral semantics claim is an integral part of the answer to the second of these questions. Whatever the source of the law's power to create content-independent moral reasons for acting may be, when the mechanism is working it does so as follows: it takes a morally free content and allows it to be re-described as a moral requirement or authorization. That true description expresses the proposition that the content proscribed by law is morally wrong or morally prohibited. If this is correct, the fact that exclusive positivists like Raz and Shapiro are among the strongest advocates of the moral semantics claim is no longer surprising or puzzling. In a sense, the positivist cannot really live without the moral semantics claim. [7]

The irony is not that once having established that the reasons the law provides are content-independent moral reasons for acting, some positivists seem intent on undermining themselves by suggesting that legal content calls for a moral semantics. Rather, the real irony is in thinking that one could make intelligible the sense in which law creates content-independent moral reasons for acting in the absence of the moral semantics claim.

Alas, we are far from being out of the woods. If I am right, legal positivists can hardly make due without the moral semantics claim; and that means that we now have to engage the potential problems that accompany commitment to the moral semantics thesis. Even granting that the moral semantics thesis is a claim about re-describing content and not about content itself, we still have to worry about its consistency with the social facts thesis. This turns out to be less of a worry than one might think.

The more pressing problem is the possibility of what I call 'misfire' or mistake.[8] Recall Austin's discussion of the sentence, 'The present king of France is bald.' On Austin's account this sentence is neither true nor false.

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[7] That may be too strong. Hart did not embrace the moral semantics claim, but it is not clear that he believed that the law succeeded in issuing content-independent moral reasons for acting either.

[8] I want to thank Gabe Mendlow for suggesting that the idea I was trying to present was similar in important ways to J.L.Austin's criticism of Russell's discussion of sentences like 'The present king of France is bald,' uttered when there is no King of France.

It fails to assert anything. It presupposes that there is someone who is the current King of France, and at the time the utterance is made, in fact there is no such office and no such person. The sentence fails to assert because its central presupposition does not obtain. So we might say that the sentence attempts to assert but misfires. I want to adopt Austin's notion of a misfire for my purposes. The law has a normative power to create content-independent moral reasons for acting, and when that power operates successfully it achieves its result by warranting a true description of the law's content as a moral directive or authorization. But the law does not always succeed in exercising this power. Sometimes its efforts misfire, and so we face a serious problem. Is the idea at work in the moral semantics claim that legal content can always be truthfully described as expressing a moral requirement? If the answer is yes, then it may be that what we have done is turn legal positivism into a form of natural law theory. If the answer is no, then how are we going to accommodate that fact?

Before we consider how we might bring a moral semantics into legal content consistent with both the social facts thesis and the idea of legal misfirings, let's consider two ways in which we might express the view that legal content calls for a moral semantics that are not compatible with legal positivism.

(1) On this account, the morality of a norm is a condition of its legality.

This is the example of a familiar kind of natural law position in which morality is a necessary condition of legality. Take the following directive: mail fraud is not to be done. According to (1) that directive could not be the content of any legal norm unless the following were true: mail fraud is morally wrong. If mail fraud is morally wrong, then it can be the law that mail fraud is not to be done. If mail fraud is not morally wrong (or something in the neighborhood of that expression is true) then there cannot be a valid law against mail fraud.

It is obvious why this cannot be an acceptable way of bringing a moral semantics to legal content for a positivist. For the status of the norm as law depends not on social facts about it, but relies instead on the relevant moral facts that would render a particular description of it true.

(2) On this account, the law reports, describes or asserts what we already have preexisting moral reasons to do.

If I am puzzled about what morality requires of me, I may ask my wife Mimsie what morality requires of me. I suspect that acting in good faith she will give me her best assessment of the balance of reasons that apply. According to (2) the law operates as Mimsie does. It provides its reading of what the balance of reasons requires. It does not offer a reason of its own making that figures in my deliberations. If anything it plays an epistemic role and we may come to admire its reliability and judgment and so vest it with theoretical authority. But the problem here is not that such a view is inconsistent with legal positivism; rather, it is that this account of law treats it as having no practical role in our lives beyond providing us with grounds for believing that we ought to do such and such.

We come now to a third alternative explanation of the way in which we might explain or accommodate a moral semantics of legal content. This account gets us almost all the way there, but makes it impossible to explain mistakes or misfires. Seeing both how close it comes and how far off it remains will help us see the direction in which we ultimately need to go.

(3) On this account, the fact that the law directs us to act in such and such way makes it the case that the content of the law is correctly describable as a moral requirement (or moral authorization as the case may be).

Take the expression 'mail fraud is not to be done.' The idea here is that if there is a legal rule making mail fraud illegal, then that fact alone warrants re-describing the content of the law as (something like) mail fraud is morally prohibited or morally wrong. This brings us to the two questions we alluded to earlier.

The first is a request to explain what it is about law that makes it a source of moral reasons. It is in this context that one might well revisit Fuller's claims about the internal morality of law. The internal morality of law is aimed at trying to understand how it is that law has the power to change the nature of the reasons we have for acting: to warrant re-describing an ordinary directive as a moral requirement. The underlying thought is that the power to affect the normative character of what is to be done that law has is a function of the norms governing law making. In the

ideal case laws are made only if they are produced having fully satisfied the eight cannons. Fuller treats these as moral requirements on law-making, but that is of course a controversial claim. However one treats them – as substantive moral constraints on the process of law making or as conceptual constraints (on the concept of law)– it may help us to think about what Fuller was worried about if we see the eight cannons – the internal morality of law – as part of an answer to the question: what is the source of the law's normative power to change the normative circumstances by creating content-independent moral reasons for acting. The source of the 'magic' normative power the law possesses is to be found in the fact that laws are made only by following a path set out by a set of moral constraints – the internal morality of law.[9]

The second question is how does the mechanism work to create content-independent moral reasons for acting. My claim has been that the moral semantics claim helps to answer this question. The problem with (3) is that it lacks the resources to distinguish successful from unsuccessful exercises of the law's normative power. For (3) says that whenever law attaches to some content it makes a moral re-description of that content true. And that can't be right.

To be sure, if it is a necessary truth about law that it claims to be a legitimate authority, then we might say that the law necessarily sees itself as always succeeding in warranting a re-description of the relevant content in moral terms. On the other hand, it is not a necessary truth about law that it succeeds even if it is a necessary truth about law that it claims to succeed. In effect we need to be able to maintain the moral semantics claim while leaving room for the possibility of mistake, what we might think of as cases in which the law's attempt to exercise the power to create content-independent moral reasons for action 'misfires.'

Can we accommodate misfires while continuing to embrace the moral semantics claim? That is what the next suggestion is designed to accomplish:

> (4) The law is a point of view about how attaching the property of legality to content makes the moral description of the law's directives correct.

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[9] I have no interest here in evaluating this interpretation of Fuller's claim, nor am I interested at this point in determining whether the internal morality provides a plausible explanation of how law can be a source of content-independent moral reasons. I am merely inviting the reader to pursue this line of argument on her own time.

(3) accommodates the moral semantics claim but not consistently with legal positivism because it has the consequence that every time legality attaches to content it warrants a true re-description of the content as a moral requirement. That is the underlying claim of the natural lawyer, not the positivist. No one in fact should be keen to embrace it for the simple reason that even if the law always purports to create content-independent moral reasons for acting, it does not always succeed.

We need an account of how law operates in the realm of reason that explains the moral semantics claim consistent with cases in which the law misfires in exercising its normative power.

(4) says that we should identify law with a point of view – call it the legal point of view – about how attaching the property legal/illegal to content affects what we have moral reason to do. Take the claim 'mail fraud is illegal.' According to (4), the proper interpretation of this claim is something like the following: 'From the law's point of view by acting in such a way as to make mail fraud illegal the law warrants re-describing mail fraud as morally wrong.' In a sense the law is a point of view about what making certain conduct illegal accomplishes. The legal point of view is in part a theory of how the property of legality operates in the realm of reasons. From the law's point of view, law warrants re-description of legal content as moral directives or authorizations. This is the law's point of view, but the law can be mistaken. Its theory about how the property of legality works may simply be mistaken in this case. And in this way (4) leaves the requisite room for misfirings.

Finally, (4) also allows us to make sense of Raz's famous idea of the detached point of view. When someone asks me what the impact of some conduct being made illegal is I can say something like, 'from the law's point of view what has happened is that one is now morally prohibited from acting.' I can remain entirely non-committal about whether that has in fact occurred. I am reporting what the law takes itself to have done; I am not asserting that what the law is asserting has been done has in fact been done. I am occupying in other words the detached point of view.[10]

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[10] The idea that I have been developing in this section of law as point of view is original as far as I know with Raz. The way of capturing it that I have been presenting is Shapiro's. If I have made a contribution here beyond synthesizing the underlying ideas, it is in showing that the moral semantics claim is not an oddity of their position, but basically essential if the idea of a content-independent moral reason for acting is to be persuasive.