I. The Most Famous Debate in Jurisprudence is No More Than A Distraction

Though most law professors are unschooled in the finer points of the central disputes in contemporary jurisprudence, almost all would express confidence in their ability to distinguish legal positivism from natural law theory. They will tell us that natural lawyers assert and legal positivists deny the existence of a necessary connection or relationship between law and morality. Some may know even more: that legal philosophers have coined the phrase ‘the separability thesis’ to express the claim that there is no necessary connection between law and morality: that positivists endorse the separability thesis whereas natural lawyers reject it: that the conventional view is that legal positivism is defined by its commitment to that thesis: and finally that among contemporary positivists there has been no more ardent proponent of the separability thesis than H.L.A. Hart.

Recently, Leslie Green has persuasively argued that Hart meant to endorse the broadest possible interpretation of the separability thesis. As Green notes, Hart meant to deny the existence of any necessary relations – whether titanic or trivial – between law and morality. Green again persuasively argues that there are several necessary relations -- many trivial, others not -- between law and morality. The obvious conclusion of Green’s argument is that if the separability thesis is the central tenet of Hart’s version of legal positivism, Hart’s positivism is unsustainable. More generally, if the separability thesis is central to legal positivism, then perhaps Green, himself a positivist, has unwittingly dealt it a fatal blow to positivism as a general jurisprudential outlook.

1 I am inclined to choose any of the following titles as well:
The Normative Consequences of Legality
The Moral Semantics of Legal Discourse
Welcome as these conclusions may be to positivism’s many critics, the argument for them moves too quickly. In the first place, though Green is right both to attribute to Hart the promiscuous interpretation of the separability thesis and to question its plausibility, the fact is that Hart was primarily interested in a much narrower interpretation of the separability thesis. Hart’s main point was that one cannot infer the legitimacy or moral value of law from its validity. Valid laws can be morally reprehensible as well morally estimable. The concept of an immoral but valid law is not incoherent or contradictory and so this version of the separability thesis strikes most commentators as above reproach; and there is no reason to think that Green himself is inclined to take issue with it. Indeed, as I have noted on several occasions, there is no reason to suppose that natural lawyers would endorse the inference from legality to morality, and so this version of the separability thesis cannot be the source of the disagreement between positivists and natural lawyers.

Secondly, whether a sustainable thesis or not, it is by no means obvious that the separability thesis is at the core of legal positivism. Though Hart may have thoughts so, neither Joseph Raz nor I do. Both Raz and I have identified legal positivism with one or another version of what I have called the ‘social facts thesis.’ Raz’s version of this is what he calls the Sources Thesis: the claim that the identity and content of law is determined by social facts alone – facts about behavior and attitude.²

So understood, the Sources Thesis is consistent not only with downplaying the significance of the Separability Thesis but with rejecting it outright. As Raz correctly argues, it is one thing to say that the content of law is fixed by social facts alone and quite another to draw inferences from this fact about the constitutive elements of law’s content to any claim about law’s moral worth or merit. If true, the claim that the content of law is fixed by social facts alone is compatible both with the law’s necessarily possessing moral properties and its not necessarily possessing moral properties.

² The Sources Thesis is not intended to rule out the role of natural or linguistic facts as potential grounds of the content or identity of law and so it is a bit misleading to characterize it as the claim that only social facts can determine the content or identity of law. The conclusion one is supposed to draw from the Sources Thesis is that moral or evaluative facts cannot contribute to the content or identity of law. Still for convenience and ease of exposition we will follow the conventional understanding and identify the Sources Thesis with the claim that only social facts can contribute to the content and identity of law.
The Sources Thesis is a claim about the constitutive elements of legal content. It makes no claim about what inferences, if any, are warranted by this fact about legal content. Even if moral facts cannot contribute to the content of law, it does not follow that the content of law lacks or is void of necessary moral value. A claim about the determinants of content is one thing; claims about the consequences of legal content are another. Contrary to conventional wisdom, then, the Sources Thesis does not rule out the inference from legality to legitimacy.

This is a surprising and important result. The Sources Thesis is compatible with the inference from legality to legitimacy. This means that if one wants to resist the inference, as nearly every legal theorist does, then one cannot call upon the Sources Thesis to carry the load; an independent argument is required.³ This is not to say that no arguments are forthcoming. The fact that the notion of an immoral, yet valid law is neither incoherent on its face nor self-contradictory is enough to make the case against the validity of the inference.

To this point we have established three non-trivial points. The first and most basic is that at least for the leading positivists of the day, if not for Hart, the Social Facts Thesis and not the Separability Thesis, is the core claim of legal positivism. The second is that the Social Facts Thesis does not entail the Separability Thesis. One can thus be a legal positivist without endorsing the Separability Thesis. This goes against conventional wisdom. There are many versions of the Separability Thesis which are not sustainable, but even the one almost no one takes issue with – namely the one that Hart emphasized in rejecting the inference from legality to legitimacy – is not entailed by any version of the Social Facts Thesis. Therefore, third, the defense of this version of the Separability Thesis relies on the coherence of the concept of an immoral yet valid law and is thus compatible with all manner of natural law theory as well as legal positivism. So not only is the Separability Thesis not central to legal positivism it is not distinctive of it. This too is a surprising result.

Why stop here? As I have argued elsewhere (more than once) there is nothing in positivism that rules out the possibility that there are necessary moral constraints on what it is for a scheme of regulating human affairs to

³ In a way this should have been obvious since natural lawyers do not believe that the content of law is fixed by social facts alone and they too (by and large) want to resist the inference from legality to legitimacy.

⁴ Still, the important point is that the fact (if it is one) that the content of law is fixed by social facts alone is inadequate to defeat the inference; and that alone is reason enough to be skeptical of the separability thesis.
count as governance by law. In other words, it may well be that part of what distinguishes law from other modes of regulating human relationships that it satisfies certain moral requirements. If that is so, and I see no reason to suppose that it cannot be, there is nothing legal positivism need be concerned about. Once one sees that at the core of legal positivism is some or other version of the Social Facts Thesis, then much of the argument between positivists and natural lawyers over the past century and a half – if not longer – has been little more than an unfortunate distraction. Many legal philosophers and commentators have been convinced that the central disputes in jurisprudence surround the Separability Thesis and the debates between natural lawyers and positivists, but they are wrong. The action lies elsewhere.

There is no doubt that what I have suggested so far may strike some as contentious, and that is to be expected. And I do owe the reader a bit more than I have offered so far. I need to cash out my claim that the focus on the separability thesis has been distracting – which I will do immediately below – and to explain how it could be that so many intelligent philosophers and legal theorists have gone so astray – which I will also do immediately thereafter.

It is now common to emphasize the distinction between substantive and methodological jurisprudence. One major divide in methodological jurisprudence is between those who share the view that an account of the nature of law should proceed by nesting the inquiry in substantive political philosophy and those who approach questions about the nature of law, for example, through the lens of the philosophy of action, social science, metaphysics or language.

This distinction in the methodology of jurisprudence between does not track the separability thesis as a claim in substantive jurisprudence. Thus, Dworkin and Perry along with positivists from Bentham to Raz, Waldron and Postema pursue different versions of normative jurisprudence, whereas positivists like Hart, Shapiro and myself, and realists like Leiter, along with natural lawyers like Greenberg, Moore and Stavropoulos adopt a positive jurisprudence. In other words focusing on the separability thesis – which makes a claim in substantive jurisprudence – misleads us when we think

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5 The idea here is that there may be some views about the nature of law that entail that an inquiry into it must proceed from contestable normative premises, but one need not defend a normative jurisprudence on those grounds – as is made evident by the fact that so many substantive positivists from Bentham to Raz to Waldron to Postema all propose a normative methodology of jurisprudence, albeit for very different kinds of reasons.
about the methodology of jurisprudence; and the methodological issues in jurisprudence, like those in philosophy more generally, are often among the most interesting and illuminating.  

A puzzle remains. If the separability thesis is not central to legal positivism or to jurisprudence more generally, why have so many intelligent and thoughtful legal scholars been so preoccupied with it? I am not sure that I can answer that question directly or satisfactorily, but I do believe that there is an important philosophical problem ‘in the neighborhood’ of the separability thesis. The problem is this.

If we treat for a moment the Sources Thesis as the best articulation of what I am calling the Social Facts Thesis, then positivism is essentially the view that the content of law is determined entirely by facts about behavior and attitude: what relevant persons say, believe and do. On the other hand, the law seeks to regulate human affairs by providing reasons for action. It issues in propositions or directives (depending on one’s views) about what one ought to do: what one has reason (conclusive or otherwise) to do: what one is under an obligation to do: what one has a right to demand or a privilege or liberty to do, and so on. We might say in short that the law issues norms or that it constitutes a normative system of some sort. That the law is normative in this way in uncontroversial. What is controversial of course are the details. But we needn’t focus too much on the details just yet in order to identify or characterize the problem. But we can frame the problem in a way that makes it both especially urgent and very much in the neighborhood of the kinds of worries about legal positivism that natural lawyers and others have expressed.

Many legal positivists, including Raz and myself, but notably not Hart, have argued that the law purports to give rise to (content-independent) moral reasons for action (some of which are obligations, rights, and so on). The problem is how can the law whose content is determined by facts about behavior – roughly, what individuals say and do – issue in moral reasons for acting. How can social facts issue in moral requirements, rights, liberties or privileges. The general version of this could be put as: how can social facts issue in reasons for action: most generally one might put it as: how can the social yield the normative?

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6 It is worse than that. So misleading is the focus on the separability thesis that Stephen Perry has termed Hart a ‘methodological positivist’ where positivism once again is taken to mean commitment to the separability thesis: in this case as a matter of the methodology of jurisprudence.
Notice that this really does seem to be the more worrisome problem about legal positivism – the one that historically non legal positivists have been most anxious to press: and it can be framed in the form of a puzzle or a dilemma for the positivist. If the law does figure in practical reasoning as a set of reasons about what we ought morally to do – or more generally about what we ought to do – then the content of law must itself be the sort of thing that can yield or consist in such reasons. It must somehow include moral or evaluative facts somewhere in its content. On the other hand, if the law’s content excludes moral or normative facts, it cannot issue in statements or directives about what we have good reason to do. In that case, what claim could it possibly have on us when we are facing the question, ‘what ought I do?’

Put this way, it looks like positivism has very few options -- or so it seems. One familiar way out is to adopt a positivism of the sort Bentham and Austin advocated. Laws are commands that are not and do not purport to be moral reasons. Laws motivate by the sanctions that are intrinsic to them. Hart demonstrated the problems any such account of law faces and I have argued as well that the very idea of a sanction implies the notion of an authority to administer harm without which a ‘sanction’ is no more than an unjustified and unauthorized imposition of an evil; and so one cannot offer up a theory of law that has ‘sanctions all the way down.’ The sanction/command theory of law comes at too high a price. It fails as a theory of law and basically resolves the dilemma facing the positivist by giving up the most basic claim about law that we need to explain: namely, the fact that law is a normative system – a means of regulating conduct by reasons.

The other familiar approach is to attribute to positivism a rejection of the Humean gap between ‘is’ and ‘ought.’ There is no problem in ‘bridging’ the gap between the content of law being fixed by social facts and law’s issuing in norms or reasons if one can derive ‘ought’ from ‘is.’ Maybe not, but this too is a solution that comes at too high a price, for it works only by committing legal positivism – which is a jurisprudential theory (an account of the nature of law) – to a particular meta-ethics, either a reduction of the normative to the non-normative or to some other way of resisting the claim that there is gap between ‘is’ and ‘ought.’ Whatever ultimately unites Austin, Bentham, Kelsen, Hart, Raz and myself among others as legal positivists, it is surely not some position in meta-ethics. There is little that Hart shares meta-ethically with Raz, for example; Hart is an expressivist and Raz a realist.
To some, this challenge to legal positivism is insurmountable. It is not possible to claim on the one hand that only social facts contribute to the content of the law and on the other that law makes claims about what one has moral or other reason to do. The positivist has to give up one or the other of these claims – or so it seems. This is the true cost of ‘separating law from morality’ or at least it is the cost of doing so if one has a positivist view of the constitutive components of law.

If I am right, this is the real worry, and the fixation of legal theorists with the separability thesis does nothing to help us formulate it or to shed light on it. Having said that, I think that put this way the problem that is being posed for legal positivism is misleading. In what follows, I want to dismantle this objection, formulate it correctly and show how a legal positivist can respond to it. The argument is complex (I think) but hopefully easy enough to follow and altogether convincing.

The central question is not whether social facts can yield norms or moral reasons for action. Rather, the problem is this: how can we square the view that many positivists have that the determinants of legal content are social facts with the claim that legal directives (or propositions of law) are appropriately understood as claims about what we have (moral) reason to do. What we need is a semantic theory not a metaphysical one: an explanation of the appropriateness of describing legal directives morally – of attributing a moral semantics to law. We do not need an account of how social facts make norms or moral reasons. If I am right the standard formulation of the problem facing the positivist may be as misleading as is the separability thesis.

In what follows I argue for the claim that the content of law (fixed by social facts alone) is compatible with truthfully describing legal directives as moral reasons for acting. Central to my argument are several ideas: that of redescribing legal content; that of law as a point of view; and ultimately the idea that to say that law is a point of view is to say that the law makes a claim about what the normative consequences are of taking some directive and attributing legality to it. I do not develop this last point in any detail in this paper (or at least this version of the paper for this discussion), but my ultimate aim is to show how this conception of the law as being a point a view about the normative significance of legality is suggests an entire reformulation or rethinking of the project of jurisprudence. For now I start a bit smaller (and leave it to our discussion to say more about how I think we should rethink the projects of jurisprudence.)

II. Reasons and Legal Content
If the Semantic Sting is the most notorious argument in recent jurisprudential memory, then the argument for the Sources Thesis is the most important. If the Semantic Sting is a sound argument, all legal content must be fixed by constructive interpretation and moral facts necessarily contribute to legal content. If the Semantic Sting is sound law has the content it does in part because of way in which moral facts contribute to it.

If the Sources Thesis is sound, only social facts contribute to legal content; and not only do moral facts not shape the content that the law has: necessarily law has the content that it does in part because moral facts cannot possibly contribute to its content.

In fact, we can distinguish among three different views on the relationship between moral facts and legal content:

1. Necessarily, moral facts contribute to legal content. This is the position Dworkin takes in *Law’s Empire*, but not in *MOR I*. It is also the position of the traditional natural lawyer.

2. Necessarily only social facts contribute to legal content. (Necessarily, moral facts cannot contribute to legal content is my preferred formulation.) This is the implication of the Sources Thesis and is more generally the view of so-called exclusive legal positivists, including, but not just, Raz. Marmor and Shapiro are other prominent exclusive legal positivists.

3. Possibly, moral facts contribute to legal content; if they do, it is in virtue of some social fact about them – i.e. there is a practice among officials that renders moral facts among the determinants of legal content. This is the position I have taken since ‘Negative and Positive Positivism,’ and is one way of articulating the distinctive view of the inclusive legal positivist. My preference is to characterize this position as:

3a. Necessarily, social facts determine the determinants of legal content.
(1) is thought to fall out as a logical consequence of the conjunction of the semantic sting and a particular theory of interpretation. (2) is thought to fall out as a logical consequence of the conjunction of the claim to legitimate authority and a substantive account of what that claim amounts to. If either argument is sound, there simply are no other possible views available as regards the role of moral facts in contributing to the content of law.

In contrast, (to my knowledge) no one who advances (3) or (3a) claims that it follows as a logical consequence either of some essential feature of law (e.g. the claim to authority) or the only proper method of jurisprudence (e.g. constructive interpretation). I am as closely associated with (3a) as anybody, and I have defended it primarily on the grounds that there is logical space for it. In other words, I have argued for (3a) as one would argue for a ‘possibility theorem.’

In defending the view that (3a) represents a genuine alternative view about the relationship of moral and social facts to legal content, I am committed to the view that neither the Semantic Sting nor the Argument for the Sources Thesis are sound. Indeed, I have argued on several occasions that neither Raz’s nor Dworkin (nor anyone else for that matter) succeeds at establishing either (1) or (2) and I have no intention of revisiting those arguments here. I am simply going to proceed as if all three options are on the table as possible accounts of the determinants of legal content and that is because I want to ask a particular question of some importance to jurisprudence: namely, how might we choose among these three options, and we don’t get to ask that question unless all three options are available. 

7 I have never argued that it is the best explanation of actual legal practice though other inclusive legal positivists have advanced that view.

8 Of course, this question does not arise if you think that Dworkin or someone advancing a similar view is right and thus that moral facts necessarily contribute to legal content. In that case, the only question of interest to you is how do moral and social facts come together to fix the content of law. And Dworkin has an answer to that question: through constructive interpretation, and in the case of our legal system, thorough law-as – integrity.

By the same token, if you are convinced by Raz’s argument or by a similar one to the same effect in which case only social facts can contribute to legal content, then my question will be of no interest to you – except perhaps for entertainment value. The only question for you is how do social facts fix the content of the law.

My question is of interest only to those who are unconvinced by the arguments for (1) and (2). It is how might we go about deciding which account of the determinants of legal content is correct? It goes without saying that this is a big question, even if it is an
Here is a strategy we might choose. Let’s see if there is a feature of law that (1) can presumably account for but which neither (2) nor (3a) can? To pursue this strategy we must first look for common ground between (2) and (3a). The latter allows the possibility that there will be legal systems in which only social facts contribute to legal content. Since (3a) holds that only social facts can determine the contributors to legal content, it allows that in some legal systems only social facts can contribute to legal content. In other words, suppose that facts about the behavior and attitudes of judges (as in a Hartian rule of recognition) sets out the determinants of legal content. And now suppose that according to that rule the only texts that can contribute to legal content are those that themselves meet some ‘social test.’ Then it would follow that in such a legal system the content of the law will be fixed by social facts alone. And while this would be contingently so according to (3a) it would be necessarily so according to (2). In either case it would be so!

And that would make both differ from (1) in which it is necessarily so that moral or evaluative facts contribute to legal content in that very same legal system. We can generalize this so that in all actual (if not all possible) legal systems (2) and (3a) are coextensive, and both are in conflict with (1). So now we have a contrast between (1) and the alternatives to it. So now we can ask ourselves this question: is there a feature of law that (1) can account for that neither (2) nor (3a) can?

The challenge is this; can we square the claim that only social facts contribute to legal content with the claim that law is capable of providing content independent moral reasons for acting?9

III. The Moral Semantics of Legal Content

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9. We cannot demand of natural law theories that they explain how the law gives rise to content-independent moral reasons because part of what is distinctive of natural law is the claim that the content is the reason. In effect, many such positions reject the idea that law’s reasons are content independent and so we cannot treat a claim in positivism as a requirement on natural law theory. On the other hand, while it is easy enough to see how a traditional natural lawyer might explain how it is that law’s reasons are moral ones, the case is considerably harder for the Dworkinian interpretivist. I set those worries aside here and simply focus on whether the positivist can meet the challenge, not whether the Dworkinian can.
As already noted, I take the content of law to be a set of directives about what is to be done, who determines what is to be done and who determines whether what is to be done has in fact been done. The claim that the law gives rise to moral reasons for acting can be reformulated as the claim that the content of law calls for a moral semantics: that is, the directives to which the law gives rise should be interpreted as moral requirements or authorizations – as moral reasons.

Why would any positivist endorse the view that the content of law calls for a moral semantics? After all, there are three claims that positivists are committed to that are consistent and presumably adequate to characterize a plausible jurisprudential view. These are: (1) the content of law is a set of directives; (2) only social facts contribute to legal content; and (3) the reason the law provides is independent of its content: that is, it is a reason in virtue of the property of legality/illegality attaching to the proposition that expresses the content.

The typical positivist does not stop here. He holds: (4) that the reason the law provides or claims to provide is a moral reason for acting. The obvious question is why would a positivist add (4) to (1)-(3) – especially when (4) seems problematic in a number of ways.

Some who worry about (4) are primarily worried about whether there are content-independent moral reasons for acting. But this worry is not well founded, for there are plenty of familiar examples of content-independent moral reasons for acting. Promises create content-independent moral reasons for acting. The duty of fair play is a content-independent moral reason for acting. Many of the duties we owe to friends and family arise in virtue of their being our friends and relations and are likewise independent of their content. So the very idea of a content independent moral reason should not cause us to pause.

The real worry seems to be that absent a semantic or metaphysical reductionism, how can the content of law be a moral reason when the only facts that can contribute to its content are social facts. Why take on the problem of trying to meet this challenge if there is nothing urgent about doing so. Why not just resist the idea that the content of law calls for a moral semantics and avoid the problem altogether?

10 It is a further question how it is that the law is a source of content-independent moral reasons, but that is a different question altogether. The point here is simply that there is nothing mysterious in the idea of a content-independent moral reason.
So we have two problems. First we need to understand why positivists are so insistent on the moral semantics claim – in spite of the obvious problems it brings with it? And secondly, if positivists are going to be saddled with the moral semantics claim, how are they to meet the challenge that squaring it with the social facts thesis presents.

Why would a positivist want to endorse the moral semantics claim? The conventional answer is that this is the way we speak about the law – as issuing in reasons that bear on what morally we ought to do. If that is so, and I am prepared to grant that it is, then the positivist who insists on the moral semantics claim does so because he has no choice – at least not if he wants his theory to accommodate rather than call for the revision of ordinary modes of speaking. Of course, he has a choice and it is presumably a pretty good one. Positivism offers up a compelling account of law and that account suggests that we ought to revise the way we speak about law: it issues directives as to what we ought to do and what we have obligations under the law to do, or rights under the law to demand of others. But they are not moral oughts, not moral obligations or rights and so on. Why not simply abandon the moral semantics claim and press the revisionist strategy?

If it comes as something of a surprise that legal positivists are among the most ardent supporters of the moral semantics claim, it should come as 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. In other words, I want to suggest that the moral semantics claim is not a mere accommodation but something of a theoretical requirement on positivism.

One implication of my view is that if positivism cannot square the moral semantics claim with the social facts claim, it cannot retreat to a position in which it abandons its desire to accommodate ordinary language in favor of a posture that calls for revising the way we speak about law’s role in our practical deliberations. On my account the connection between the moral semantics claim and legal positivism is much too close to allow that revisionist strategy. In my account the moral semantics claim is integral to positivism and no mere accommodation it makes to ordinary discourse. If I am right, it is essential that positivism square the moral semantics claim with the claim that only social facts can contribute to legal content.

We posed the challenge to (2) and (3a in the following way. We said in effect that a standard view is that the law purports or claims to give rise to
moral reasons for acting, whereas according to (2) and (3) only social facts can contribute to law’s content. The challenge was to square these two claims. Put that way of course, were positivism unable to square the two claims it would always be open to it to ask us to revisit the status of the claim that law purports to provide moral reasons for acting. If I am right, however, no such option is available, for the positivist not only has to establish the consistency of the two claims in order to render his account a plausible interpretation of legal practice; he has to do so to give an kind of internal coherence and integrity to his own position. And how is he going to do that?

IV. Moral semantics and redescription

The key idea is that the moral semantics claim is not the claim that the content of law is a moral directive. It is a claim about how the content of the law can be 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 and it lacks a moral vector. The moral semantics claim is the view that ‘mail fraud is not to be done’ can be re-described truthfully as ‘mail fraud is morally wrong.’

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.’

There are two important features of Davidson’s now very familiar idea. The first is that there are often many true descriptions of the same

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11 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.
event, some being more apt than others for a given purpose. The second is that there is in every case one description that is always apt: and that is the event described in terms of bodily movements.

Both points bear on the suggestion here. There is always one apt description of the law’s content and that is as a directive as to what is to be done or who is to decide what is to be done or who is to decide whether what is to be done has been done – a description that lacks a moral vector. That formulation of the content of the law is always apt and is in addition completely compatible with the social facts thesis.

The moral semantics thesis thus makes a claim not about the constitutive elements of legal content, but about truthful redescriptions of it. Specifically, it holds that the content of law can truthfully re-described as a moral directive (or authorization as the case may be). Of course, we have to reach the question of what warrants the redescription when it is warranted, and how we are to represent the legal statements so that they can accommodate both the cases in which the redescription is warranted and those in which it is not. But first, let’s return to my claim that the legal positivist cannot really do without the moral semantics claim.

I suggested that the moral semantics claim is not a mere accommodation, but is instead integral to the overall positivist picture of law as a potential source of content-independent reasons for acting. Here’s what I have in mind. We can ask two questions about the content-independence claim. First, how it is that the law can be a source of content-independent moral reasons? Let’s refer to this as the ‘power’ question. What is it about law – what feature essential to law, if any – explains law’s capacity to be a source of content independent moral reasons? We can and do ask similar questions about promises or families or friendships, all of which can be sources of content-independent moral reasons; and the literature is replete with arguments addressing precisely this point. What story can we tell about law?

If the first question is the ‘power’ question, the second is what I will call the ‘mechanism’ question. What is the mechanism by which the law creates content-independent moral reasons for acting? What is the power and how does it operate?

The moral semantics claim is an integral part of the answer to the second of these questions. By attaching the property legality/illegality to a proposition expressing a directive that lacks a moral vector, the law purports to create a moral reason for acting. The mechanism through which it accomplishes this is by warranting a redescription of the content as a moral requirement or authorization.
The irony is *not* that once having established that the reasons the law provides are content-independent, 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.

If I can put this in a somewhat contentious way: remember that I suggested that positivism’s critics want to know how it is that the law can issue moral reasons for acting when the only stuff that goes into making up the law are social facts. What I am saying is that in effect this is not the most helpful way to think about the problem. The question is not whether social facts can (metaphysically speaking) yield moral conclusions or moral facts – e.g. that one has a moral duty to do such and such. Rather it is whether the directive the law issues in can be described ‘moralistically.’ It is about truthfully descriptions of the facts and not really about the nature of the facts themselves. (I am not sure how to make this point or whether this is helpful or crazy 😊)

V. *Understanding Legality as a Property*

We now have the framework in place for squaring the moral semantics claim with the claim that only social facts contribute to legal content. The basic strategy rests on the idea that the content of law is fixed entirely by social facts, and that the content of law is a set of directives lacking a moral vector. The moral semantics claim is not a claim about the determinants of legal content but is instead a claim about warranted descriptions of that content. So in principle there is no problem in squaring the two.

A. Two problems

But we have more work to do, though we cannot do all of it here – at least not in a fully satisfactory way. We still need an explanation of how it is that attaching the property of legality/illegality to a proposition expressing a directive creates a moral reason in the form of an authorization or a requirement with the same content as the directive.

And we need a way of representing mistakes or what, following J.L. Austin, I have previously referred to as misfires. Even if legality has the power to warrant redescriptions sometimes it may fail in its exercise of that power. When it fails, the redescription will not be warranted. The exercise of the power will have misfired. Attaching the property of legality will not
have the desired effect of warranting the redescription. Ultimately of course we will need a substantive account of what goes wrong when in attaching the property of legality/illegality to a directive the law fails to warrant the relevant redescription. But our first task is more modest. It is to give an analysis of legal statements that allows us to represent the possibility of misfires. Later we will need to explain how misfires occur, but the explanation of misfires will derive, I presume, from the explanation of successes. I want to suggest at the end of this essay one way of understanding what it is in or about law that explains why attaching the property of legality/illegality to a directive can be a source of warranted redescriptions of the directive as a moral requirement or authorization with the same content.

For now, however, I am looking for a way to represent the possibility of failure not to explain its incidence. What we are looking for is an analysis of what is thought to happen when we attach the property of legality/illegality to a directive that is consistent with the social facts thesis and provides room for error. Let’s begin by considering an analysis that fails to be consistent with the social facts thesis.

B. Analyzing legal statements

Take the sentence, ‘mail fraud is not to be done.’ What we want to know is what happens when we attach the property legality/illegality to directive expressed by proposition expressed by the sentence ‘mail fraud is not to be done.’ Consider a version of natural law theory according to which mail fraud is not to be done could not itself qualify as a legal norm or requirement unless it were true that mail fraud is morally wrong. In other words, the property of legality/illegality could not attach to the directive at all unless it were already the case that it is wrong to commit mail fraud. Thus, the conditions of legality would be inconsistent with the social facts thesis, since a directive could not count as law unless it already expressed a moral requirement (or something like that).

I should not be read as claiming that this represents the best natural law theory can do. My purpose is illustrative only. I want to show that not every formulation of the moral semantics thesis will be compatible with legal positivism – not every theory of how the property of legality/illegality operates will work equally well.

We come now to a different account, one which is consistent with positivism but which lacks the resources to represent misfires. Again, begin with 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.

The problem with the solution on offer is that it lacks the resources to distinguish successful from unsuccessful exercises of the law’s normative power. It says that whenever law attaches to some content it makes a moral re-description of that content true. And that can’t be right. This is the problem we need to deal with, for even if there is something about law that makes it a potential source of content independent moral reasons for acting, it is not a necessary truth about law that attaching the property of legality to a directive will always succeed. Not every legal directive is a content-independent moral reason for acting, and that means that not every re-description of a directive as a moral requirement (or authorization) with the same content will be warranted – even though in each case, the law is doing the same thing, namely attaching the property of legality/illegality to a directive lacking a moral vector.

How can we represent in our analysis of legal statements the possibility that attaching the property has misfired? Raz’s notion of the law as a point of view on what morality requires strikes me as very helpful in this context. We should understand the sentence ‘mail fraud is illegal’ as expressing the idea that from the law’s point of view there is a moral reason (perhaps a moral obligation) not to commit mail fraud. To flesh this idea out a bit, the thought is that to treat law as a point of view is to treat it as being a theory of what attaching the property of legality to particular propositional content warrants. According to the legal point of view attaching the property law to the directive, mail fraud is not to be done, warrants the re-description of that content as something like, mail fraud is morally wrong. There is now no problem in representing misfires. Sometimes it will be true that attaching the property of legality/illegality in fact warrants the re-description and sometimes it will not. From the law’s point of view, it is always true.

This way of thinking also allows us to capture Raz’s extremely important notion of the detached point of view. Many times when we make assertions about what the law requires we are doing so from a detached point of view: we are in effect reporting what redescriptions from the law’s point of view attaching the property of legality to propositional content warrants. Other times, for example, as legal officials, assertions about what the law requires are made from the law’s point of view. These are not detached reports so much as they are internal statements made from the law’s point of view.
In other words, sentences of the form, “It is the law in C that J” can be interpreted from either the detached or committed points of view. From the detached point of view they are claims that as the law sees it there is a moral duty to J. From the committed point of view they can be interpreted as the claim that there is a moral duty to J. One way of reading Hart’s account of law is that it cannot be ‘detached points of view all the way down.’ There is no law unless there are some officials who take the committed point of view at least with regard to certain legal statements – in particular, those that describe the criteria by which judges are to determine the sources of legal content.