

Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence[†]

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Abstract—In emphasizing the importance of the separability thesis, legal philosophers have inadequately appreciated other philosophically important ways in which law and morality are or might be connected with one another. In this article, I argue that the separability thesis cannot shoulder the philosophical burdens that it has been asked to bear. I then turn to two issues of greater importance to jurisprudence. These are ‘the moral semantics of law’ and ‘the normativity of theory construction in jurisprudence’. The moral semantics claim is that legal content is best understood as *moral* directives about what is to be done and who is to decide what is to be done. The problem is that legal positivists typically hold that only social facts contribute to the content of law, and it is hard to see how a positivist can hold both the social-facts claim and the moral-semantics claim. I argue that not only are the two claims consistent with one another, but that legal positivists must hold some version of the moral semantics claim if they are to make sense of the claim that legal reasons purport to be content-independent moral reasons for acting. In Section 3 of the article, I take up the question of whether theory construction in jurisprudence is normative or descriptive. This is hard to do in part because so little attention has been paid to correctly formulating the issue. I suggest a demanding test for descriptivism; namely, that an adequate analysis of law can be provided entirely in terms of its formal features. I then defend this claim against three arguments designed to show because governance by law is necessarily desirable or valuable that, we cannot characterize law without making reference to those values or to other material features of law. This constitutes a limited but powerful defence of descriptive jurisprudence.

[†] This is such an extensively revised version of the Hart Lecture that I presented at Oxford in May, 2006 that I hesitate to call it my ‘Hart Lecture’. In that lecture, I explored the question whether the fact of theoretical disagreement in law requires that judges have theories of law as a silent partner in adjudication. I am sure there is a path that took me from those remarks to this article, but I cannot imagine that it would be worth the effort to reconstruct it. In any case, along the way I benefited from numerous conversations and from comments on previous drafts of both this article and its distant relatives. I am particularly grateful to Matthew Smith, Gabe Mendlow, Kevin Zaragoza and especially Scott Shapiro.

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Though legal philosophers have focused primarily on the question of whether law and morality are necessarily related, the common sense question is, 'how are law and morality related?' Only some of the ways in which law and morality are related are of potential philosophical significance. Since many, but by no means all, of the most interesting of these will be necessary relations, it is easy to see why the so-called 'separability thesis' has gained such prominence in jurisprudence. There are at least two problems with focusing as much attention as legal philosophers have on the separability thesis. The first is that there is not really 'one' thesis. It can be interpreted narrowly or broadly, and there are a number of different narrow interpretations as well as a number of different broad ones, each of which can be assessed individually. The second problem is that the focus on the 'separability thesis' has proven distracting. Too little attention has been paid to other philosophically important ways in which law and morality might be related to one another.

In Section 1, I discuss two of the most common interpretations of the separability thesis and demonstrate that neither is adequate to the task legal philosophy has set for it. In Sections 2 and 3, I turn my attention to two other ways in which law and morality might be related whose importance to jurisprudence has been under-appreciated. In Section 2, I explore whether legal content calls for a moral semantics.¹ In Section 3, I take up the question of whether and in what ways theory construction in jurisprudence is a matter of moral or political philosophy.

I take up these issues with varying degrees of confidence about my grasp of them, and do so primarily in the spirit of joint exploration. I invite the reader to join me as I try to make my way first over familiar turf in the jurisprudential landscape only to end up in much less well-chartered territory. My aim is less to find a place to live jurisprudentially than it is to survey the territory.

1. *The Separability Thesis Rejected*

One could be excused for thinking that the separability thesis requires no explanation at all since even lawyers and law professors unschooled in jurisprudence can recite the conventional understanding of the distinction between legal positivism and natural law theory in terms of it. Positivists embrace the separability thesis; natural lawyers reject it.²

But there are many different aspects and dimensions of both law and morality, and many potential necessary connections between them. I am not sure which of these legal positivists embrace, and which natural lawyers reject.

¹ Technically speaking the term "semantics" is being used a bit more broadly than is the norm in the philosophy of language. The use is clear and consistent throughout and the liberties I take are minimal.

² Indeed in the eyes of many, there is little more than this warm embrace of the separability thesis that unifies legal positivists with one another. One problem with this view is that neither Joseph Raz nor I accept the separability thesis, and it may be our shared rejection of it that is all that unites us.

I am pretty sure, however, that at least some of the most interesting ones that positivists embrace are ones that natural lawyers need not reject, and equally confident that some of the most important claims about the relationship between law and morality that natural lawyers endorse are ones positivists have no particular reason to reject.

The narrowest formulation of the separability thesis is Hart's: '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'.³ Hart's formulation applies to particular laws, and it claims in effect that morality is not a necessary condition of legality. If we understand 'necessity' in Hart's formulation as logical necessity, then his formulation of the separability thesis is true just in case there is a logically possible world in which morality is not a condition of legality. Immoral laws are not logically impossible, and so Hart's formulation of the separability thesis appears beyond reproach.

If the 'necessity' expressed in Hart's formulation is conceptual, then the separability thesis stands provided expressions like 'morally bad, wrong or unacceptable law' are conceptually coherent, and to the naked ear they clearly are.⁴ To be sure, some natural lawyers hold that immoral laws are not 'genuine' laws, but not normally in any sense of the phrase 'genuine laws' that is inconsistent with positivism. In saying that immoral laws are not genuine laws, sometimes natural lawyers mean to be suggesting a revision in how the concept is used, or offering a stipulation justified on normative grounds. Other times, they are calling attention to the fact that immoral laws fail to fulfill their role or ambition, which, as they see it, is to impose the obligations they purport to. None of these interpretations of the claim that bad laws are not genuine laws is incompatible with what positivists claim in asserting the coherence of immoral laws.

The better explanation of what divides positivists, who assert the coherence of 'bad laws,' and those natural lawyers who suggest that the concept is incoherent is more a matter of methodology than anything else. It is the difference between approaching jurisprudence as a project in ideal theory (as on my view many natural lawyers do) and social theory (as on my view nearly all positivists do). Ideal jurisprudence takes it that the best way to understand law is from the perspective of its successful instantiations. Arguably an analogy is provided by the way biologists think about the human heart. Scientists study the successful heart in order to understand its function in our biological system. Doing so has explanatory and predictive payoffs as well as normative ones in that it helps them understand weak or failing hearts and

³ H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1997), 185–6.

⁴ On the other hand, there is a sense in which we cannot fully evaluate whether the concept of a morally bad or morally unacceptable law is conceptually coherent until we have an account of the concept of law—and providing that account is arguably the task of jurisprudence.

identify the conditions under which hearts are likely to fail. Arguably, jurisprudence should proceed in a similar way—its object being to understand successful law—and in doing so secure similar explanatory and normative benefits.⁵

A broader formulation of the separability thesis makes a claim about the value of governance by law, not about the conditions of legal validity. By ‘governance by law’ we mean a distinctive and systematic mode of regulating human affairs, the nature and contours of which are the subject matter of jurisprudence. In this context, the separability thesis claims that there is no necessary connection between morality and governance by law. Those who reject the separability thesis hold that there are at least some necessary connections between legal governance and morality.

The plausibility of the broad interpretation of the separability thesis obviously turns on what we take the claim that governance by law is necessarily moral to mean, and that suggests that there are going to be a number of different versions of the thesis corresponding to the many possible interpretations of ‘moral’ available to us. If in claiming that law is necessarily moral we mean that legal governance necessarily produces moral goods or serves moral ends or that in each instance its demands conform to the requirements of morality, then the claim that law is necessarily moral may be quite problematic. On the other hand, if the claim that governance by law is necessarily moral in the sense that it exhibits particular moral attributes or embodies moral ideals or principles, then those who reject the separability thesis may be right to do so.

Law regulates human affairs by rules that are reasons for acting. In that sense, governance by law necessarily respects the capacity of those to whom its directives are addressed to act on the basis of reasons. It respects in other words their distinctive human capacity for agency. Moreover, if Raz is right, it is a necessary truth that law claims to be a legitimate authority. This means that it takes the reasons it provides to express what one has good, sometimes compelling moral reason to do. This is important because the law is coercive; it enforces its norms by the threat of imposing an evil on those who fail to comply with its directives. Thus, law not only respects agency but holds that the reasons it offers and those it enforces coercively are moral ones: ones that are justifiably enforceable by coercive means. To be sure, the law can be mistaken about the character and strength of the reasons it offers. Still, even when it fails to live up to its own aspirations, the law likely exhibits a range of moral virtues and embodies a number of moral ideals even necessarily so.

More importantly, there is nothing in legal positivism that requires it to deny that legal governance necessarily exhibits moral virtues. The core idea that Hart

⁵ I must confess that as a positivist I actually have some sympathy for ideal theory in jurisprudence as applied to law—understood as a system of regulating our affairs with one another. I think it is helpful to think about the fittingness of law to our modes of life and social organization.

emphasized, namely, that the law is one thing, its morality another, is designed primarily to call attention to the need to resist the inference from legality to legitimacy—a warning not to infer the legitimacy of laws from their status as laws. The truth of the claim that the law is one thing, its merit another, is perfectly compatible with governance by law entailing at least some morally desirable features or attributes. On the other hand, there is nothing in natural law theory that requires it to embrace the inference from legality to legitimacy.

The conventional wisdom is that the separability thesis distinguishes legal positivism from natural law theory; and that once that distinction is in place other jurisprudential outlooks can be assigned a place on the jurisprudential landscape in relationship to both. Indeed, so strong is the temptation to characterize prevailing views in the context of the legal positivism/natural law divide that many commentators who should know better devote far too much energy trying to determine whether Ronald Dworkin is really a positivist or a natural lawyer—when he is neither.

Neither the narrower nor broader interpretations of the separability thesis can shoulder the burden each has been asked to bear. Natural lawyers need not reject the narrower formulation of the thesis and legal positivists need not embrace the broader one. If it is to remain important to jurisprudence that we hold onto the various labels that populate the current taxonomy, including positivism, natural law, realism, interpretivism and so on—and I am not persuaded that we should—then we are going to have to look elsewhere to determine what is distinctive, first and foremost, of legal positivism. It is not a warm embrace of the separability thesis.⁶

2. *The Moral Semantics of Legal Content*

Wherever there is law there is a set of authoritative (legal) texts. The set of authoritative texts contribute to the content of the law.⁷ Much of jurisprudence has been devoted to constructing theories about how to identify the set of authoritative acts that constitute the legal resources of particular jurisdictions. Hart's rule of recognition is best understood as an attempt to provide an answer to this question.

Considerably less attention has been given to what is arguably the more pressing jurisprudential concern, and that is to provide a theory of how the

⁶ Governance by law involves the regulation of human conduct by a system of norms. The constraints that apply to particular norms need not coincide with or exhaust those that apply to *systems* of norms. Thus, whereas possessing certain moral attributes or properties need not be a criterion of the legality of a *particular norm*, it may be a condition of being a legal system—a system of such norms. So it is one thing to ask what the criteria are for determining the identity and content of law; and another to ask what the criteria for determining the existence of a legal system. This is one reason why the traditional disputes that have been crucial to drawing the terms of the positivism/natural law debate—e.g. whether Vichy France had law—are, by my lights, poorly framed, and basically unhelpful.

⁷ In fact, it is controversial which materials can contribute to the content of law, but I will not address that issue directly in what follows.

sources of law contribute to the content of law.⁸ Arguably, the content of law is a set of directives about what is to be done, who is to decide what is to be done, and whether those directed by law have done what they were charged with doing. Much of the law's importance comes from the role it plays in our practical lives; it is a source of reasons or considerations that bear on our assessments of what we ought to do. Because the content of the law is a set of such directives, one might reasonably think that it is the content of the law that matters to our practical lives. And the content matters because the contents of laws are the reasons for action that the law provides.

A theory of legal content is an account of how legal texts contribute to legal content. Though the conventional view is that legal positivism is defined by the separability thesis, the more accurate view is that legal positivism is defined by its commitment to the social facts thesis.⁹ One familiar formulation of the social facts thesis is what Raz calls the Sources Thesis. According to the Sources Thesis, the identity and content of law is to be determined by social facts alone.

On this view, legal resources are picked out by their social source—something along the lines of what Dworkin used to refer to as 'pedigree'—and more importantly only social facts—facts about behaviour, dispositions and attitudes, for example—can contribute to law's content. Legal facts are social facts.

There is an apparent problem lurking. The suggestion with which we began this section is that the law matters in our practical lives because it is a source of reasons or considerations that bear on what we ought to do. The natural thought is that the content of laws is an expression of the reasons the law provides. The content of law is normative in just this way. That is why the content of law matters and why it is incumbent on jurisprudence to provide a theory of legal content. On the other hand, we have the positivist admonition that only social facts can contribute to the content of law. The problem is to explain how facts about behaviour, dispositions, and attitudes—social facts—can issue in content that is itself normative. How can social facts create reasons?

If we take the question as rhetorical, as really a way of saying that we cannot derive reasons from social facts—and so cannot 'solve' the problem—then we have two strategies available for avoiding it. The first is to embrace the claim that the content of the law is the reason the law provides while rejecting the social facts thesis as incompatible with it. Alternatively, one can embrace the social fact thesis and reject as incompatible the claim that the contents of laws are reasons.¹⁰

⁸ Mark Greenberg's, 'How Facts Make Law' (2004) 10 *Legal Theory* 157–98, is an important exception, as is the bulk of Dworkin's work, especially, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057–109 and *Law's Empire* (Cambridge, MA: Belknap Press, 1986).

⁹ In fact, different versions of legal positivism—in particular inclusive and exclusive legal positivism—are identified by the versions of the social facts thesis to which each is drawn. Joseph Raz is normally associated with exclusive legal positivism and I am regularly identified with inclusive legal positivism.

¹⁰ I adopt neither strategy as will become clear in what follows.

Legal positivists are thought to adopt the latter strategy and in doing so are said to face two burdens. The first is to characterize the content of law as something other than a reason; the second is to locate the source of the normative force of law other than in law's content. The natural solution to the first problem is to claim that legal contents are *directives* lacking a moral vector. To say, for example, that mail fraud is illegal is to say something like mail fraud is not to be done. As to the second problem, if it is not the content of the propositions to which legality/illegality attaches that explains the normative force of law, the natural alternative is to claim that it is the property of legality/illegality itself that is the source of the reason the law provides.

So understood, legal positivism has much more to do with the conjunction of the content-independence of legal reasons and the social facts thesis than it has to do with the separability thesis under any of the formulations of it we considered in Section 1.

A. *Scepticism About Content*¹¹

Suppose that I am considering whether to commit mail fraud. Weighing in favour of mail fraud is the fact that by committing mail fraud I stand to make a quick buck. Weighing against committing mail fraud is the fact that mail fraud is immoral that I might get caught and have to go to prison, and the fact that mail fraud is illegal. The fact that mail fraud is against the law is the legal reason for not committing mail fraud.

What is the connection between legal content and the normative force of legality? The content of law is the proposition that one is not to commit mail fraud. On the argument under consideration, we cannot figure out why the unlawfulness of mail fraud is a reason, what kind of reason it is, and how weighty it is, and so on, without settling how we ought to interpret the claim that mail fraud is not to be done. In particular, we will be left helpless to explain the distinctive kind of reason the law provides unless we interpret the proposition that mail fraud is not to be done as expressing a moral requirement.

This is not obvious, however, for when I act from or deliberate on the basis of the proposition that mail fraud is illegal, the proposition that figures as my reason is a proposition about the law, not a proposition expressed by the law. To see why, consider the fact that the legislature could have achieved the same result—making mail fraud illegal—by expressing two very different propositions. Assuming that the legislature left it to the courts to define 'mail fraud', the relevant statute might have said 'No person shall commit mail fraud' and then specified a penalty, or else it might have said 'No person should commit mail fraud' and then specified a penalty.

¹¹ This example was suggested to me by Gabe Mendlow, and I have pretty much formulated it here as he originally presented it to me. I have no idea whether he himself is convinced by it.

The first version expresses a factual proposition; the second, a normative one; both versions, in their context in the statute books, suffice to render mail fraud illegal. Yet neither proposition figures in my deliberations. If either did, I would be deliberating incorrectly (insofar as I took myself to be deliberating on the basis of legal reasons), for the appropriate legal consideration is not that we should not commit mail fraud; it is that mail fraud is illegal. So why should we (as philosophers) care what the 'status' of these legal 'content' propositions is? The law's content is just a vehicle for making things illegal. Which particular vehicle the law uses does not seem to affect the nature of our legal reasons.

To bolster his point, the sceptic might note that we would have had the very same legal reason—that mail fraud is illegal—if the legislature had formulated the mail fraud statute in the imperative mood ('Do not commit mail fraud!'), in which case the law would not express a proposition at all. Or suppose that the relevant legal authority had used rudimentary gestures (not amounting to linguistic communication) to indicate that mail fraud is illegal. Here the law would not have any 'content' to speak of; there would just be the socially constituted fact that mail fraud is illegal. Yet we would still have the same reason for acting, namely that mail fraud is illegal.

According to the objection on offer what matters is the significance of mail fraud's illegality. What we should be interested in, in other words, is the status of a property—legality/illegality—not the status of a proposition that attributes illegality to an action. And this brings us back to where philosophy of law begins: namely, with a question about the normative significance of legality/illegality. If legal content matters, then it matters minimally. In order to conform our behaviour to the law's directives we have to be able to grasp what it requires of us. The detour through legal content that takes us beyond this very rudimentary content concern seems not to have enlightened us. So the argument goes, and on the face of it, it goes very well indeed.

B. *What Does the Sceptical Argument Show?*

There is an important distinction between (practical) reasons and (practical) reasoning. The claim that the content of law is the reason the law provides is a claim in the realm of reason. The sceptical argument makes a claim about practical reasoning in law. If sound it shows that, when the law figures in our deliberations about what we ought to do, the content of the law does not—at least not in any obvious way. In contrast, the property of legality/illegality does.

What does this evidence about practical reasoning tell us about the nature of legal reasons? One view is that no conclusion about reasons is warranted by any argument about how we reason. We are talking about two different domains and we can draw no inference about the character of the reasons that apply to us from any evidence, however accurate, about how we reason.

To see why this response is inappropriate let us consider a weak conclusion that does seem warranted by the evidence. If the sceptic accurately portrays how the law functions in our deliberations, surely we have something of a puzzle that needs to be addressed. If the content of law is the reason the law provides, why does the content not appear as a reason in well reasoning actors' deliberations about what ought to be done? 'Puzzle' may be too weak to describe the problem. If it were a mere puzzle we might be able to solve it by showing that the problem lies in the fact that we are bad reasoners; or it could be solved by showing why we would be disposed to reason badly in certain circumstances.

The problem runs deeper because the sceptic's argument is designed to provide compelling grounds for thinking that we are deliberating as we should, and in deliberating as we should appear to pay no heed whatsoever to the law's content.¹² If the content is the reason and we are reasoning well, why do we not deliberate on the basis of what is supposed to be the reason that applies to us? To maintain the claim that the contents of laws are the reasons the law provides in the face of this evidence of how people in fact deliberate, one would need to defend some sort of 'error' theory of practical reason—at least with regard to law. And while one can see how Mackie came to the 'error theory' about moral claims, it is much harder to see what would be at work in this context that would be the source of the error.

If there is no plausible error theory in the offing, is not a stronger conclusion warranted: namely, that the reason the law provides is independent of its contents. Why not simply say that the sceptical argument invites, if it does not strictly entail, the conclusion that legal reasons are content-independent in the relevant way, and that it is the fact of legality/illegality that explains the normative force of law?

C. Two Senses of Content-Independence

For all its detail, one might suggest that the sceptical argument remains underspecified. It does not tell us, for example, what the criteria of legality are. We can agree that mail fraud is illegal and agree as well that it is the fact that mail fraud is illegal that figures in my deliberations about whether to engage in it. But we cannot draw any inference about whether the law's reasons are content-independent until we know what the criteria of legality are. For, if the criteria of legality are contentful—if they depend on the content of the norms to which the property of legality/illegality apply—then content does figure in the reasons the law provides, if only indirectly.

We can put this by first marking the difference between content-independence as it applies to reasons and as it applies to criteria of legality. The suggestion on the table is that content-independent reasons require

¹² This is too strong. We must be able to comprehend or grasp the content in order to comply with the law's demands. This is a minimal comprehensibility constraint, and beyond its being satisfied, we pay no heed to content.

that the *criteria of legality* be content-independent as well. If the content of the norm figures as a criterion of legality then we do not have genuinely content-independent reasons for acting. We have instead, to coin a phrase, 'indirect content-dependent' reasons for acting. There is an element of both content-dependence and content-independence in the reason the law provides. The latter attaches to the role that the property of legality/illegality plays; the former attaches to the criteria of legality.

What do we want to say about the putative category of 'indirect content-dependent' reasons for acting? Not much, I suspect. The category is more a curiosity than anything else. It certainly does not pose a serious obstacle to thinking about legal reasons as content-independent.

Is the claim that legal reasons as such are not content-independent moral reasons because they are in fact indirectly content-dependent? If that is the claim, then it could only be true if a certain version of natural law theory were true. It would have to be the case that necessarily legality depends on moral content, for only then can legality attach exclusively to morally required or endorsed actions. At best, we could say that the indirect content-dependence thesis holds of legal reasons if natural law theory happens to hold, not otherwise. The indirect content-independence claim is not a claim about legal reasons as such; it is a claim about legal reasons provided a certain kind of natural law theory holds. Moreover, as we noted in Section 1, it would be that version of natural theory that is least plausible: the one according to which it is not possible that there are immoral laws.

To be sure, legal reasons are sensitive to content as well as to context, but content-independent reasons are always sensitive to content and context. Promises create content-independent reasons, but the reason the promise creates can be qualified, modified or even nullified by content or context. The fact that reasons are content-sensitive does not mean that their source or grounds are a matter of content.

We want to distinguish between the grounds of obligations and their defeating, modifying or qualifying conditions. The two ought not to be confused with one another. So the force of the reason that the fact of legality/illegality creates may be modified by what one is being asked or required to do; and, in some cases, the nature of the content may nullify the reason altogether; but the source of the reason, if not its stringency or scope, remains content-independent.

D. *Content-Independent and Moral Too?*

The prevailing view is that legal reasons are not only content-independent but moral reasons for acting as well. Here's the worry. Legal reasons are content-independent yet moral reasons are typically content-dependent. How can legal reasons be content-independent moral reasons for acting?

The idea of a content-independent moral reason for acting is less mysterious than it might otherwise seem. Many of the moral duties we owe members of our family and our friends are independent of their content. They are obligations that derive from the norms that constitute friendships and family relations—from what we are required by friendship or familial association to do. The entire practice of promising is designed to create moral obligations that result from the act of promising and not from what one has promised to do. Yet other examples of content-independent moral reasons for acting are provided by duties of fair play. So the idea of a content-independent moral reason for acting is not only realizable in principle; it is realized quite often in practice. Law is just another case in which we have content-independent moral reasons for acting.

This line of response is correct of course, even familiar. Still, more needs to be said in order to make the claim that law is or can be a source of content-independent moral reasons fully persuasive. We understand what friendships and families are in part in terms of the kinds of normative relations among friends and between family members that are constitutive of both. To understand either is to understand how it could be a source of moral obligations that are independent of their content.

At the same time, it is a genuine and familiar puzzle among philosophers how the use of certain words and gestures can (when they take the form of a promise) change the normative situation between or among persons. And that puzzle really is best understood as an analog of our worry—namely, what is it about promising that explains it as a source of content-independent moral reasons—not as providing us with a solution to it.

We get no traction on how the law can be a source of content-independent moral reasons for action from either the family case or the promising case. We are not related to one another through law the way we are related to one another in families, nor are we bound to one another by law the way we are by friendship. Laws impose obligations on us whether or not we choose to be bound, but promises do so only because we bind ourselves.

Some might think that we will get a better sense of how the law can be a source of content-independent moral reasons if we focus on duties of fair play. Indeed, some argue that the obligation to obey law is itself to be explained as duties of fair play. In fact, however, looking at duties of fair play to help us understand how the law can be a source of content-independent moral reasons is like looking for love in all the wrong places. Duties of fair play are generally limited in scope and stringency. If there is a duty of fair play to comply with law it is not grounded in law, but is instead contingent upon the compliance of others with law. It is not a duty to obey the law whose ground is the law, but a duty we owe others not to take advantage of their compliance with law. In short, though there is nothing especially problematic about the idea of a content-independent moral reason for acting, we owe an account of how it is that law can be a source of such reasons.

E. *The Moral Semantics of Legal Content*

Much of the argument to this point has been aimed at defending the claim that legal reasons are content-independent moral reasons for acting. The thesis is familiar and warmly embraced by legal positivists. Still, my discussion did end with a cautionary note: namely, that the ultimate persuasiveness of the thesis rests on there being an account of how it is that law can be a source of content-independent moral reasons.

It should come as something of a surprise, then, to learn that among the most ardent supporters of the view that legal content calls for a moral semantics are those very same positivists who insist both that only social facts can contribute to legal content and that the law gives rise to content-independent reasons for acting. Neither claims seems in the slightest friendly to the claim that legal content calls for a moral semantics.

Why? Well in the first place the moral semantics claim is a claim about the content of law, and the point of the argument to this point is that legal reasons are content-independent. Second, to the extent that content matters to the positivist, only social facts can contribute to it. And here we are with the moral semantics claim that appears to suggest that the law must be understood as having a moral content. It just cannot be right that legal positivists would be so insistent on a claim—at least on first reading of it—that seems flatly inconsistent with everything legal positivism holds dear.

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 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.

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 law can be (accurately or truthfully) described. The moral semantics thesis is the view that the content of law can be truthfully *redescribed* 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 redescribed truthfully as ‘mail fraud is morally wrong’.¹³

¹³ 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 ideal that we should think about the moral semantics thesis as a claim about when a certain kind of redescription is warranted. For the seminal articulation of this idea see, Scott Shapiro *Legality* (forthcoming) chapters 7–8. In *Legality*, Shapiro articulates his important account of law as plans—‘The Planning Theory’ and relates law-as-plans to what I am actually calling the ‘moral semantics thesis’.

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 redescriptions of legal content; not a claim about the constitutive elements of legal content. Specifically, it holds that the content of law can truthfully be redescribed 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 what 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 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: (i) what is the mechanism; and (ii) 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 warrants its being redescribed 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.¹⁴

¹⁴ 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.

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 redescribing 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.¹⁵ 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. It fails to assert anything. Its presuppositions are missing and for that reason it ‘misfires’. It attempts to assert but misfires in its attempt. 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?

F. *How Not to Introduce a Moral Semantics of Legal Content*

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 us consider two ways in which 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

¹⁵ 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.

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 neighbourhood 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 pre-existing 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.

G. *Getting Closer*

We now come 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 redescribing 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. One might read Lon Fuller's work on the internal morality of law as 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 redescribing 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 canons. 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 law—it may help us to think about what Fuller was worried about if we see the eight canons—the internal morality of law—as part of an answer to the question: what is the source of the law's 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.¹⁶

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 redescription of that content true. And that cannot 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 redescription 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'.

H. *Law as a Point of View*

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.

¹⁶ 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.

Point (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 redescription 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.

Claim (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 redescribing 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 redescription 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 or that case, indeed it may be mistaken in every 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.¹⁷

3. *In Defence of Descriptive Jurisprudence*

In this section, we turn our attention to theory construction in jurisprudence. A philosophical jurisprudence is an account or theory of the nature of law. Perhaps the most important if not yet fully formed debates in contemporary jurisprudence are methodological. Some of these concern the place of

¹⁷ 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.

conceptual analysis; others explore the extent to which law should be approached as a code or a system of rules; and others still focus on whether jurisprudence should be pursued as a project in ideal theory. All of these raise extremely important issues, and I have some thoughts about many if not all of them. In many cases, my main thought is that the debate needs to be more precisely structured and the issues at stake better clarified. Fortunately for the reader, I have neither the space nor the inclination to pursue any of these debates here.

Instead, I want to focus on yet another way in which law and morality might be related: this time in the context of the methodology of theory construction.

A. Is Jurisprudence Normative or Descriptive?

All theories have a revisionist component and ambition, and if we read 'normative' too broadly we will be hard pressed to find a debate worth having. The first task therefore is to formulate the underlying issues clearly and precisely. We should do so in a way that not only illustrates the stakes, but enables us to appreciate the attractions of both positions.

Let us begin with the following characterizations of descriptive and normative jurisprudence. Descriptive jurisprudence claims that law can be analysed entirely in terms of its formal features. Normative jurisprudence denies this. It claims that any theory of law must make reference to material features of law or to the substantive value of living under law.

It follows that someone who defends descriptive jurisprudence is resisting the charge of those who say that it is impossible adequately to characterize law in terms of its formal features alone, and so the defence of descriptive jurisprudence is best seen as a possibility theorem. In a way, putting the project this way is too weak since those who defend descriptive jurisprudence do so because they advocate it as well; and they advocate it because they believe that there is some value in the kind of understanding of law that emerges. I am reasonably confident that this is the view of the two advocates of a descriptive jurisprudence whose work I know best—Hart and me.

I do not reject the possibility of pursuing a normative jurisprudence however. I think Raz's approach to law embeds his account within a substantive theory of legitimate authority and that account which has the consequence of yielding the Sources Thesis is, to my mind, extremely illuminating of law. In defending descriptive jurisprudence, I should not be read as rejecting normative jurisprudence or underestimating its value. Some of it, like Raz's, is very important, and of general philosophical interest.

On the other hand, someone engaged in normative jurisprudence need not reject the possibility of a descriptive jurisprudence. I have no reason to think that Raz, for example, thinks that trying to characterize law in terms of its formal features—as Hart does—is an impoverished or unilluminating project; and I have

even less reason to believe that he thinks it sets an impossible task for itself. There is no reason why someone pursuing a normative jurisprudence must make it part of his account to reject the very possibility of a descriptive jurisprudence.

One preliminary problem we have in asking whether jurisprudence is normative or descriptive, then, is that we may have no reason for thinking that it cannot be both. So what I want to do is to formulate the dispute narrowly and in doing so focus only on those versions of normative jurisprudence that reject not merely the value of descriptive jurisprudence, but the very possibility of it. My aim is to defend descriptive jurisprudence against the most sophisticated arguments against it. In defending descriptive jurisprudence I hope that I will also give the reader some insight into its value and richness.

B. Battle Lines Being Drawn

Descriptivism holds that an adequate theory of law need not refer to material features of law or to the important values exhibited by law or the desirable effects of living under law. Normative jurisprudence will have none of this. It holds that an adequate theory of law must refer to either the content of law (here and there) and especially to the value of being governed by law.

Normative jurisprudents have a number of different kinds of reasons for thinking that an adequate theory of law must refer to material features of law or to the substantive value of living under law. Two of these are particularly salient for our current purposes. The first of these is suggested by some of the considerations we explored in the previous section of this article. The idea is that one cannot account for the normative force of law other than by reference to the substantive content of the law. Since any adequate account of law must explain the normative force of law, and only the content of law can explain its force, any theory of law would have to refer to material features of law: that is, what the law requires.

One consequence of this line of argument is that it ties the defence of a normative jurisprudence to a particular account of the normative force of law. Defeat that account of the normative force of law and you defeat normative jurisprudence. The second line of argument is more promising and less obviously vulnerable. The thought is that, given the significant value of law, it is impossible to provide a sufficiently rich or robust characterization of law that did not make reference to its value. How can something of such importance and value in our social lives be characterized in a purely formal way?

One way of defending a descriptive jurisprudence would be to reject the underlying substantive claim about law on which the normativist appears to rely. If normative jurisprudence is a consequence of the view that governance by law is morally valuable or attractive, then one way of defending descriptive jurisprudence would involve rejecting the claim that governance by law is especially valuable or desirable.

Others may be inclined to adopt this approach but I would warn against doing so. In any case, it is not a line of argument available to me. After all, in rejecting the separability thesis, I pretty much accepted the central claim of the 'value' view: namely, that being governed by law exhibits a number of moral ideals and expresses allegiance to a number of principles of political morality, including the principle of the rule of law itself.

C. *Two Bad Inferences*

There are two implicit inferences in the arguments as we have outlined them, neither of which can be sustained. One inference appears to be that, in order to defend a normative jurisprudence, one needs to defend first a normative substantive feature of law. In other words, there is no defending a normative methodology absent an underlying normative theory of law. This inference is called into question by the popularity of so-called normative positivism: a positivist theory of law warranted by normative considerations, versions of which are held by reputable legal philosophers including, on my reading anyway, Tom Campbell, Jeremy Waldron, Jerry Postema, and dare I say, Jeremy Bentham. Frankly, I have never been persuaded by this line of argument, in part because it seems unduly pessimistic about the capacity of philosophy to uncover a sufficient number of illuminating and 'defining' necessary truths about law. But my scepticism is of no matter here. Whatever the motivation there is certainly a burgeoning group of normative positivists: those who defend a broadly speaking positivistic conception of law on normative grounds.

The second inference is that one can only defend a descriptive jurisprudence if one has a view about law that it is in some sense morally neutral or that governance by law is not necessarily desirable or valuable. To be sure, many who defend a descriptive jurisprudence do so because they reject the view that law is necessarily valuable or because the content of law is essential to understanding the role of law in the realm of reasons.

Still, just as one can defend a 'positivist' conception of law on normative grounds, the fact that governance by law is necessarily valuable—if true—is perfectly compatible with a descriptivist methodology. That is the claim I defend here. I have no interest in whether there are normative considerations that would favour a positivist conception of law; there may well be, but whether they are there or not it is of no moment to me. I want to defend descriptive jurisprudence and in this context that means establishing the consistency of a descriptivist methodology with the claim that governance by law is necessarily valuable or desirable.

D. *From Criterialism to Interpretivism*

The most important purveyor of normative jurisprudence is Ronald Dworkin. His most well-known argument in favour of normative jurisprudence is the

infamous semantic sting argument presented in *Law's Empire*. The argument is designed not merely to undermine descriptivism, but also to lay the foundation for his own substantive (law-as-integrity) and methodological (interpretivism) theories that occupy the remainder of the book.

According to Dworkin, many if not all of the most influential jurisprudential views take the project of jurisprudence to be semantic. On his reading, they take a jurisprudence to be a theory of the meaning of 'law'. In addition, all such theories adopt a criterialist semantics: that is, they take the semantic content of law to be fixed by widely shared criteria that determine the application conditions of 'law'.

We do Dworkin no favour by holding him to his formulation of the projects of jurisprudence. No theory of law in the past 50 years takes itself to be an account of the meaning of the word 'law'. The theories Dworkin has in mind are better described as efforts to provide an analysis of the concept of law, not the concept-word, 'law'. They take the burden of jurisprudence to be providing an account of the concept of law. The semantic sting is the following argument:

- (1) There are jurisprudential views that take the project of jurisprudence to be determining the semantic content of the concept of law.
- (2) These theories adopt a criterialism about semantic content.
- (3) According to criterialism, the content of a concept is given by a set of widely, nearly universally shared criteria specifying the proper use of the concept.
- (4) Because the content of the concept of law is fixed by shared criteria, meaningful disagreement about the criteria for the proper application of the concept of law is not possible.
- (5) However, meaningful disagreement among lawyers about the criteria of legality in their community is a salient and familiar feature of legal practice. Therefore,
- (6) Criterialism cannot account for this important and common feature of legal practice. Therefore,
- (7) Criterialism fails as a theory of the semantic content of law and therefore
- (8) All jurisprudential views that are criterialist fail as well.

The aim of the semantic sting is to establish that law cannot be a criterial concept. If the content of a criterial concept is given by shared criteria, then such concepts cannot admit of disagreement about what those criteria are. Disagreement about the criteria is incoherent if what makes them the criteria is that they are shared. A salient feature of legal practice for Dworkin is the extent of disagreement about the criteria of law. Therefore, law cannot be a criterial concept. The semantic sting is nested in a disjunctive syllogism designed to establish that law is an interpretive concept.

- (1) Jurisprudential theories are either accounts of the semantic content of the concept of law or else they are interpretive theories.

- (2) The semantic sting demonstrates the inadequacy of semantic theories. Therefore,
- (3) The only potentially adequate theories of law are interpretive.

According to Dworkin a theory of law is a constructive interpretation, not of the concept of law, but of law itself. Constructive interpretations have two dimensions: fit and value. There is a good deal of controversy as to how fit and value operate together (or 'fit' as one might say) but on my reading the best understanding is that in a constructive interpretation one ascribes a value to law and this value helps pick out which features of law are salient and which less so. Those that are picked out by the relevant value must be made to fit with one another and be seen in doing so as an expression of the underlying value attributed to law. It follows from the fact that law is an interpretive concept that the method by which we construct the content of the concept calls for substantive principles of political morality.

Many commentators take 'fit' to be another way of talking about consistency or coherence and in doing so treat Dworkin as having some form of coherentist picture in mind. I take fit to be a much stronger condition than coherence or consistency. By my lights, we can talk about the relative tightness/looseness or extent of fit; and so I am inclined to think of fit in 'inferential' terms in roughly the same way that Quine talks about inferential relations in the 'web of belief'. The greater the scope, richness and strength of the inferential relations among the elements of law, the tighter or stronger the fit will be.

If sound, the argument establishes that jurisprudential inquiry is an exercise in political philosophy and it does so by beginning with premises of a very general sort about the nature of concepts. It does not assume that law is valuable or desirable. Instead it establishes that law is a certain kind of concept: interpretive. And then it offers up a distinctive theory of interpretive concepts that is a form of constructivism. The content of the concept is constructed by attributing a value (in this case) to law; and that value guides us in identifying the salient features of law that figure in and are essential elements of the concept of it.

Even if we set aside the limited menu of options available for understanding concepts (criterial or interpretive), we are left with an argument that plays on a hidden ambiguity and then rests on a simple but profound confusion.

The ambiguity concerns the notion of shared criteria. There is a well-known distinction between individual and community-wide criterialism. Disagreement about the criteria for the proper application of a term is incompatible only with individual criterialism, but no philosopher of language thinks that the criteria of 'law' or the concept to which it refers are shared in the sense of each competent speaker of the language having access to them. Individual criterialism is a plausible account of 'sow', but not of 'law'. If there is any version of criterialism that could be an account of 'law' it would be a community wide

version of it that relies on the division of linguistic labour; and any community-wide criterialism would allow for precisely the sort of disagreement about the criteria for applying the concept that Dworkin claims is inconsistent with criterialism.

Ori Simchen and I have argued elsewhere that there is no version of criterialism that is applicable to 'law'. In other words, the semantic sting is targeted at a form of criterialism that no one believes could be appropriate for terms like 'law', and as the new theory of reference long ago taught us, there is no plausible form of criterialism in the offing anyway.¹⁸

The confusion on which the argument rests is profound. Criterialism is defined in (4) above and the evidence against it is provided in (5). However, (4) and (5) are talking about different criteria. The relevant criteria in (4) are those for the proper application of the concept; the criteria in (5) are those specifying the test of legality in a particular jurisdiction. This is the confusion between the criteria of law (in this or that jurisdiction) i.e. (5) and the criteria of the concept of law or of the term 'law' i.e. (4). Establishing the fact (if it is one) that lawyers often disagree about the grounds or criteria of law in their community has no bearing whatsoever on the question of whether competent speakers of the language (including lawyers) disagree about the criteria for properly applying the concept. To see this simply notice that, if lawyers disagree about what makes something law in their community, then that is perfectly compatible with it being the case that among the criteria of the concept law that people share is the following: whether or not a given norm is part of the law of a jurisdiction is one of the things about which competent lawyers are prone to disagree. That they disagree is one of the criteria for the application of the concept that everyone agrees upon! The evidence that Dworkin brings to bear regarding disagreement in legal practice about the criteria of legality is basically a non-sequitur with regard to the issues at stake in the semantic sting.

The semantic sting seeks to make the case for interpretivism—that is a form of normative jurisprudence—by undermining the descriptivist alternative to it. But the argument fails at every turn. Without citing a single proponent of the view it identifies alternatives to interpretivism as having a semantic project in mind. Again without proper citation it identifies the semantic project with a form of criterialism that no one holds. It then develops an argument that if it applied at all would only apply against the form of criterialism that no one thinks is plausible or applicable. And to top it off, the argument it offers against criterialism is based on citing disagreement about the criteria of legality and not the criteria for properly applying the term or concept of law (or legality). If descriptivism is impossible and must give way to a normative jurisprudence it cannot be because it is otherwise vulnerable to the semantic sting.

¹⁸ For fuller discussions see J. L. Coleman and Ori Simchen, 'Law' (2003) 9 *Legal Theory* 1–41.

E. The Value of Law and the Scope of Disagreements

More conventional arguments for a normative jurisprudence begin with the assumption that I not only do not challenge, but also in fact accept, namely that governance by law is necessarily valuable. The simplest version of this argument takes it that the value of law is sufficiently rich and robust that we could not characterize law without making reference to it. A somewhat more complex version of the argument draws attention to the scope of disagreement about what the value(s) of being governed by law is (are). Here the thought is that any theory of law will be contestable because of the inherently controversial nature of the claim of value it makes. The correct theory of law will necessarily adjudicate among these conflicting claims about the value of law. And only a normative theory can do that.

It may be helpful to illustrate the strategy of argument indirectly, that is, without arguing directly for the claim that law is necessarily valuable in the way the argument on offer claims that it is. Why? Well, for one thing, we may want to motivate the case for a normative jurisprudence by showing how a similar methodology is called for in the case of concepts in the social neighbourhood of law, for example, justice, equality, liberty, and even morality. Certainly those defending a normative jurisprudence find the analogy with these political concepts apt.

Though different theorists might disagree about the specific or precise value of justice, equality or liberty, no one could seriously doubt that all are political values. An account of equality that does not explain the value of equality is, well, not an adequate account of equality. In general, an account of justice, equality or liberty must refer to their value—or so the normativist about political concepts would allege. According to those advocating normative jurisprudence, the same considerations apply in the case of law. An adequate account of the concept of law must proceed by assigning a contestable political value to law or to one of its cognate terms, e.g. ‘the rule of law’, or ‘legality’. The underlying idea is that we cannot provide an adequate account of any essentially evaluative concept in purely formal terms.

We can imagine several lines of response. One might deny that law is an essentially evaluative concept in the way that, for example, justice or equality is. Even if the latter concepts cannot be analysed in terms of their formal properties alone, the same may not be true of law. Second, one can argue that even justice and morality can be analysed in terms of their formal properties. No less an authority on these matters than Kant held precisely that view. Third, one can allow that law is essentially evaluative and show that the best way of explaining is not only the value it has, but also the scope of theoretical disagreement about it is provided by a descriptive and not a normative jurisprudence.

There is in fact something to be said for all three lines of response, but the second and third hold out the greatest philosophical interest; and the third in

particular is the line I want ultimately to press. Let us not dismiss the first line of response too quickly. According to it, we simply deny that the analogy of law with justice, equality or morality is apt. Even if none of the former could be characterized formally that is no reason to think that the same would be true of law.

Someone pursuing this line need not argue that living under law is not valuable; his claim is the more modest one that whether or not legal governance is valuable depends on the particulars of the legal system and the availability of alternative means of regulating human affairs. Being governed by law is sometimes, perhaps, even often, desirable, but it is not necessarily so. Certainly law is not intricately and richly engaged with value in the way that, say, morality is. It is one thing to suggest that morality cannot be characterized in terms of its formal properties alone; another to claim that the same is true of law. The analogy with liberty may be more apt. After all, it is not obvious that liberty is necessarily valuable; and whether it is certainly depends on what we take liberty to be.

If liberty is defined as the absence of constraints or the existence of options or some such thing, then while we can imagine many circumstances under which having liberty is good for those who have it, we can also imagine a number of circumstances under which it is neither necessarily good for those who possess liberty so understood nor for those unable to constrain the exercise of it by them. If we are looking for a political concept that is analogous to law, liberty is more apt than either justice or morality is. An adequate account of liberty must possess the resources necessary to explain why liberty is valuable when it is, but such an account should also possess the resources adequate to explain why it is dangerous when it is. The same is true of law.

Because my entire strategy is to defend a descriptive jurisprudence even on the assumption that law is necessarily valuable or desirable, I see no point in pursuing this line of argument further. The better argument is always to give the opposition the premises they need and show that even armed with all the machinery they claim to need, the conclusion they seek fails to materialize. This brings me to the second line of defence.

The second line of response allows that some normative concepts, such as morality, are richly and intricately related to fundamental and important human values in ways many and varied. It is indeed impossible to separate morality from value. Nevertheless, one can give an adequate account of the concept of morality that makes no reference to contestable evaluative claims, or so philosophers as diverse as Plato, Kant and William Frankena, among others, have argued.

On Frankena's account, to use one of the more recent examples, the concept of morality picks out a set of norms that restrict our behaviour as it pertains to other human beings. (He might have been wrong to restrict the scope of morality to humans, but that is not our concern here.) Moral norms are

categorical in the sense that they apply to a person regardless of how she feels or what she believes. They are universalizable in that they apply in the same way to everyone in relevantly similar circumstances; and they are supreme in the sense that the obligations or duties they impose win out when in conflict with other kinds of obligations or normative claims. We can understand Frankena to be offering an account of the application conditions of the term 'moral',—the conditions that must be satisfied for a norm to count as a moral rule, yet nothing in this account of the concept of morality commits one to endorsing the content of any of the rules that satisfy the application-conditions of the concept.

Alas, for every Plato, Kant, and Frankena, there is an Aristotle or MacIntyre who believe that the ways in which morality is important to our lives is so rich and varied that it possesses no formal features adequate to capture its place in the human experience. Again this line of argument threatens to become more rhetorical than anything else, but I would not want to hang a defence of descriptive jurisprudence on such a controversial foundation. A truly persuasive descriptive jurisprudence still awaits us.

I want to build such a case in three parts. We begin with common ground on which this descriptivist at least and the normativist agree: namely that law is an essentially normative concept, by which I mean that being governed by law necessarily exhibits important moral virtues or expresses important ideals and embodies important political virtues. The first step in my argument is the claim that we need to formulate an adequacy condition on a theory of law as follows: any theory of law must have the resources adequate to explain why being governed by law is necessarily and importantly valuable or desirable.

It does not follow from the fact that an adequate account of law must be able to explain law's value that the value we associate with law must be part of the account. In fact, quite the contrary would seem to be the case. Here's why. Governance by law is valuable. One can argue for the value of governance by law from the point of view of any number of otherwise incompatible political theories: libertarianism, utilitarianism, egalitarianism and so on. The value of being governed by law may differ depending on the political theory. Part of what distinguishes these theories is that they associate different values with governance by law, and the fact that they are likely to identify some different features of law as essential to law having the value that it does.

So we want an account of law that has the resources not only to explain the value of legal governance but one that is thin enough to allow for law to be differentially valuable from the point of view of substantially different kinds of political theories. And that would seem to suggest that the value of law is not internal to our concept of it, but resides instead in the relevant political theories.

This is step 2 of my argument and it is composed of two different but related claims: first, the most persuasive accounts of the concept of law are those most

compatible with the widest range of different political theories all of whom take governance by law to be necessarily valuable. Second, if an adequate account of law must make reference to the values (as opposed to the values being external to the concept and instead part of the relevant political theory), we are going to run into a number of familiar philosophical problems. For example, we will have a hell of a time explaining the possibility of meaningful disagreement using the same concept because there is some reason to think that a utilitarian and a libertarian are not using the same concept of law. Why? Because the theory of the concept on offer in each case attributes a different value to law that shapes the relevant conception. We need a plateau of agreement about the value intrinsic to law. If we do not have that, there is a real question about whether we can have meaningful disagreements. Moreover, it may turn out that only one theorist—the one with the right account of the value of law—is talking about law; other theorists may be saying true or false things but not about law; and so on.

Step 2 expresses what I think of as a meta-principle. If law is valuable it will be diversely valuable depending on the views one has in political philosophy; and so the last thing one would want to do is to tie a contestable value to law in order to explain what law is. Doing so would make it impossible to explain the differing values and importance of law within different political philosophies. What we want in a theory of law is *not* the value that law exhibits, but factors that very different theories can point to that are both essential to law and help us to understand the value law has from the point of view of the relevant theory. Take the idea that law consists in rules for example. This is a feature of law that can figure in a number of different kinds of accounts of the value of law from different philosophical perspectives.

This last remark brings us to the final step in my argument. Step 3 involves explicitly showing how a descriptivist methodology would work. Suppose that we take law to be valuable by which we mean that governance by law is necessarily desirable. What is the connection between this fact about law and the concept of law or the nature of law? The right answer to this question—according to the descriptivist—is this: an explanation of why law is desirable must make reference to at least some of law's essential features. If it is true that law is desirable but we cannot make sense of this by reference to some list of its essential features, then that list is incomplete or we have an inadequate account of what law is. The key point for a descriptivist is that to understand why law is desirable under certain circumstances, we are going to know much more than what we can read off the concept or infer from law's nature. We are going to know more about human beings—their interests, the constitutive elements of their welfare, what they want to accomplish jointly and severally, and so on.

In other words, some set of law's essential features must figure in an account of the value of law. But the value of law itself would not be read off this or any other list of those of law's features that are part of the concept of it. Instead, any account of the value of law must rely on a number of facts about persons,

their projects and goals and so on, none of which are part of the concept of law. We do not determine the content of the concept of law by beginning with an account of the value of law. Rather we explain the value of law in terms of the interplay between features of the concept and facts about persons that are not part of the concept.

4. *Conclusion*

It may be old fashioned to worry about the relationship between law and morality. All the new problems in jurisprudence have to do with objectivity, determinacy, the nature of reference and so on. Much of my most recent work, including especially my article 'Law' with Ori Simchen, would suggest that I too think the days of worrying about the relationship between law and morality are passé. They are only to the extent that the issues focus almost entirely on the separability thesis. There are extremely fresh and important issues about the relationship of law to morality that remain underdeveloped and inadequately appreciated. Some of these—like the question whether law calls for a moral semantics—turn out to shed significant light on some of the oldest problems in jurisprudence—how law creates content-independent moral reasons for acting—as well as some of the most intriguing and relatively new ones—what does it mean to think of law as a point of view. What was once old is new again. That may be as good a characterization of philosophy as I can find.