The Architecture of Jurisprudence: Part I

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Abstract: This is the first of three connected essays that will form a short book on jurisprudence the aim of which is to provide a framework within which several of the most pressing issues in jurisprudence can be addressed and progress on them made. There are two major problems that have dogged jurisprudence in the past few decades and which have consequently adversely affected its place in the American legal academy -- if not elsewhere. The American legal academy in particular is decidedly ‘pragmatic.’ Nearly every conventional law journal essay concludes with a set of ‘policy recommendations.’ It matters little how implausible the recommendations are or how unlikely they are ever to be acted upon. And so it is not surprising that one worry voiced about jurisprudence concerns its practical significance: in what ways do theories of the nature of law impact what judges or other significant legal actors do? Frankly this concern is almost always expressed in a way that indicates that it is poorly motivated and that it displays a view about the value of legal theory that in general must be resisted. Jurisprudential views can be important even if they lack the practical policy significance American lawyers crave; and so properly understood, the question is a fair one and by the end of these three essays I hope to have presented a plausible set of responses to it. The second worry is that current jurisprudential debates have stalled and dissolved into largely taxonomological disputes. This concern is not without merit and even those of us who are deeply engaged in jurisprudential disputes must recognize the legitimacy of the worry and acknowledge some responsibility for this unfortunate turn. These essays are designed in part to set the taxonomological disputes aside and to provide a framework within which progress can and likely will be made. I will post these essays on SSRN as I complete ‘acceptable’ if rough drafts of each for the purposes of discussion. The following is the first essay and seeks primarily to clear the deck somewhat by arguing that much of the conventional wisdom of
contemporary jurisprudence must be jettisoned if genuine progress is to be made.

1. Two marks of a mature field of inquiry are that its central problems are typically well formulated and its conventional wisdom is by and large sound. Even in the most mature fields, however, the conventional wisdom can sometimes be misleading and its central problems poorly formulated. Unfortunately, this is the state of affairs in analytic jurisprudence. Progress can be made only if much of the conventional wisdom is displaced and its central questions reformulated. The primary aim of this series of papers is to introduce what I call an ‘architectural framework’ within which many of the enduring concerns of jurisprudence can be identified, their importance explained, and progress on their resolution made.

Though progress in jurisprudence has been stalled resulting in what appears to outsiders and participants alike as a preoccupation with unfruitful taxonomical disputes, not all of the field’s apparent resistance to progress can be attributed to a defective consensus or to a lack of philosophical sophistication. Among the most persistent of these concerns is what I call the problem of ‘law’s place:’ that is, whether law is best understood as continuous with other social practices and forms of social organizations or whether instead it is better understood as continuous with morality. Before attending to either of these more fundamental issues, we must first loosen the grip of the misleading core of conventional wisdom.

In this essay, I set out to clear the decks of two of the most important yet misleading nuggets of conventional wisdom. In The Architecture of Jurisprudence: Part II, I lay out the architecture of jurisprudence, and in Part III, I characterize the problem of ‘law’s place’ and show how this problem is not unique to jurisprudence, but arises in a variety of areas of philosophy from the philosophy of mind to action theory. It is no wonder then that when properly understood, the basic disagreements in jurisprudence have appeared intractable.

2. Though most academic lawyers are unschooled in the finer points of contemporary jurisprudence, nearly all are relatively confident 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 between law and morality: that legal philosophers have coined the phrase ‘the separability thesis’ to express the proposition that there is no necessary connection between law and morality: perhaps even that legal positivism is defined by its commitment to the separability thesis and natural law by its rejection of it; and finally that among positivists there has been no more ardent proponent of the separability thesis than H.L.A. Hart.

Were there a nugget of conventional wisdom that could lay claim to near universal recognition and endorsement it would be that the separability thesis marks the difference between natural law theory and legal positivism. If legal positivism has an essential nature, it is its endorsement of the separability thesis, and if natural law theory has an essential nature it is its rejection of the separability thesis. With so much at stake one would have thought that the separability thesis would be precisely formulated, its claims unambiguous and clearly understood, the arguments on all sides mature and well-developed, and the motivations and intuitions grounding the various positions familiar truisms about law. Unfortunately, nothing could be further from the truth.

It can hardly help matters that at least two prominent legal positivists – Joseph Raz and myself – reject it. Neither of us believes that the claim the separability thesis makes is true, though there are no doubt claims about the relationship between law and morality that positivists want to endorse that are true. Unfortunately, there is no reason to suppose that natural lawyers would reject these claims. More importantly, there is nothing in positivism that implies the separability thesis; positivism is better characterized in other ways. In short, formulated in some quite familiar ways the separability thesis is false; it is not required by legal positivism, distracting at best, and entirely unfit to the task of distinguishing natural law theory from legal positivism. Otherwise there is little to object to.

3. In a recent essay Leslie Green demonstrates that Hart endorsed a particularly broad interpretation of the separability thesis according to which there are no necessary connections between law and morality.\(^1\) Green then identifies several necessary connections between law

\(^1\) cite to Green
and morality – claims that are necessarily true of both law and morality -- some trivial, others not.\(^2\)

To the extent that Hart understood the separability thesis broadly, he was mistaken. To the extent his legal positivism is based on that broad interpretation, it is unsustainable. Moreover, if the promiscuous interpretation is essential to legal positivism more generally, then Green, himself a positivist in otherwise good standing, has perhaps unwittingly dealt it a fatal blow.

Welcome as this conclusion might be to positivism’s (and Hart’s) many critics it is nevertheless premature. Though Green is right to attribute to Hart a promiscuous interpretation of the separability thesis and right to criticize him for it, Hart is most closely associated with a much narrower formulation of it. That formulation is expressed in the oft-repeated remark that ‘the law is one thing its merit or demerit another.’

The claim that ‘the law is one thing its merit or demerit another’ is intended to call attention to the fact that valid laws can be either morally estimable or reprehensible: their moral character in other words not settled by an inquiry into their legal validity.\(^3\) If the validity of a norm does not settle or entail its moral worth, it follows that the moral value of a norm is not necessarily among law’s validity conditions. And if morality is not a necessary condition of legal validity, then, at least in this sense there is no necessary connection between law (validity) and morality (worth or value).

The following propositions are in the conventional view assumed to express the same thought and are treated as expressions of the separability thesis: (a) there is no necessary connection between law and morality; (b) there is no necessary connection between the concepts of law and morality; (c) the morality of a norm is not a necessary condition of its legal validity; (d) the validity of a norm does not settle its moral worth or value; (e) the

\(^2\) Some examples drawn from Green’s article and appropriate cite.

\(^3\) To say that the law is one thing its merit or demerit another does not entail that the two cannot be conceptually or otherwise connected. Two things may differ yet be conceptually or otherwise necessarily connected. It could have been the case that the validity of law is one thing, its merit or demerit another and it yet be true that all valid laws are necessarily morally estimable. Hart’s point would then be best understood as the thought that even if necessarily estimable it is not in virtue of their validity or in virtue necessarily of those features of the rule that ground or explain their validity. So even the narrow formulation needs to be clarified some.
concept of an immoral law is coherent; (f) sentences asserting the existence of immoral laws are not contradictions.

Each of these has been offered as an alternative formulation of the separability thesis, but they are by no means equivalent. It does not follow from the fact (if it is one) that the validity of a norm does not settle its moral worth, that there are no morality conditions on legality – only that the ultimate moral rightness of a norm is not a condition of its validity. Nor would it follow that the concepts of morality and law are not necessarily connected. And more.

We need a formulation of the separability thesis that positivists invariably endorse and which would seem to be beyond reproach. In fact we can identify several formulations that would seem to fit the bill, including: (1) The ultimate rightness of a norm is not a necessary condition of its legality. (2) The sentence that there exists an immoral valid law is not a contradiction (the sentence may be false but it is not a contradiction); (3) The concept of an immoral valid law is coherent.

It is reasonable to suppose that Hart had one or more of these narrow formulations of the separability thesis in mind, all of which seem at first blush at least to be beyond reproach. And so we might agree with Green not only that Hart endorsed a promiscuous interpretation of the separability thesis which is not sustainable, while responding on Hart’s behalf that his focus was on more narrow formulations of it all of which are immune to Green’s general objections. More importantly, any of these narrow formulations will do for legal positivism and so the fact that law and morality may be otherwise necessarily connected in other ways is of no concern -- or so the story goes.

4. Fine. We can identify several plausible formulations of the separability thesis and now we should ask whether so conceived the separability is adequate to distinguish natural law from legal positivism. According to the conventional wisdom the natural lawyer rejects the separability thesis and in this context that would have him asserting all of the following: (1) The rightness of a norm is a necessary condition of its validity; (2) Sentences asserting the existence of immoral laws express contradictions; (3) The concept of an immoral law is incoherent.
The problem is that it is hard to understand why anyone, including natural lawyers, would hold any such views; certainly, without more, one wonders why conventional wisdom is so comfortable saddling natural law with such initially implausible views. Surely history suggests that morally bad laws are not merely conceptually possible, but all too often realized. Sentences asserting the existence of such laws are not only not contradictions; they are true. It would be uncharitable in the extreme to attribute to natural law theory a position that has them committed to denying what history has taught us not only to be true, but whose truth is painfully obvious.

On the other hand, if the natural lawyer can accept these narrow formulations of the separability thesis, then the separability thesis fails to distinguish legal positivism from natural law. In that case, we will have to abandon that nugget of conventional wisdom that holds that the separability is the core of legal positivism and that adherence to it is what distinguishes legal positivism from natural law theory. If undermining the separability thesis were that easy, it would be puzzling in the extreme that the conventional wisdom has endured as long as it has.

5. No doubt natural lawyers have to take a share of the responsibility for the fact that the conventional wisdom has endured. Some like Lon Fuller have insisted that legality entails an ‘internal morality,’ and both classical and modern natural lawyers have more often than not insisted that ‘a bad law is no law at all.’ We can sustain the conventional wisdom by citing claims of this sort made, but in doing so we can hardly be accused of treating the natural law tradition charitably. We would be attributing to them, after all, the rejection much of the sad truths of legal history; and natural lawyers, whatever else one might say about them, are as competent as the next at identifying bad laws when they see them.

To say that necessarily a bad law is no law at all is to say that the concept of an immoral law makes no sense. The problem is that the concept of an immoral law is perfectly coherent or sensible and so the natural lawyer’s claim must be mistaken. Is there a way of saving the natural lawyer’s claim and renderig it insightful if not true? We can take a stab at doing so but emphasizing the distinction between two senses of the claim that a concept makes sense. We can call one the semantic; the other the conceptual.
The phrase ‘immoral law’ makes sense semantically in that we can understand what a speaker who uses it intends to convey by it: namely, a valid law that in spite of its status as law is morally objectionable in ways that call into question the reasons we might otherwise have for complying with it, but in doing so do not call into question its standing as law. Still, the fact that the phrase ‘immoral law’ makes perfect sense semantically does not mean that the concept of an immoral law can be realized. It may well be that the referent of the concept is necessarily empty; there can be no such thing as a law subject to damning moral objection whose standing as law is not thereby brought into question. So we might understand the natural lawyer to be making the claim that the concept of an immoral law is coherent semantically, but not conceptually. Its referent cannot be realized in practice. His is a claim about whether the concept can be realized; not about whether we can make heads or tails of what a speaker intends to convey by it.

Philosophical sophistication to one side, the distinction between the semantic and the conceptual senses of ‘making sense’ does little to advance the natural lawyer’s argument. For if the thought is that the set of immoral valid laws is necessarily empty, it seems plainly false. For surely history teaches us too vividly that there have been more than a few immoral laws; their immorality is, if anything is, the reason for revising, resisting and overturning them. So how can something not realizable in practice be such a familiar part of our lives – and the source of so much misery and injustice? Without more, insisting on the claim that the concept of an immoral law is incoherent is inadequate to render the natural lawyer’s insistence that a bad law is no law at all interesting or insightful. We have to see if we can do better.

6. The better view might be that the natural lawyer is offering proposing a ‘revisionist’ account of the concept of law. So while there are clearly immoral laws in the ordinary sense of the term ‘law,’ the set of immoral valid laws is necessarily empty when law is understood in the proposed way. In fact, it is constitutive of the proposed concept that there simply cannot be immoral instances of it.

Revising a concept is justifiable when the ordinary concept is misleading and confusing and when a case can be made that the revised concept is clarifying, illuminating and otherwise insightful; or when there
are distinctive purposes – often theoretical in nature – for which the ordinary concept is poorly suited. Arguably, we can take the call to revision to rest on the idea that the purposes of jurisprudential inquiry are not well served by the ordinary concept of law and that a more precise or richer concept is needed to capture the concerns of special interest to jurisprudence.

One reason for thinking that the natural lawyer has a revisionist concept of law in mind is the obvious one that if the claims he makes are thought to involve the ordinary notion, they are plainly false. Charity requires that we do what we can to render the claims more plausible than they would otherwise be. A second reason for attributing a revisionist instinct to him is that for the most part the classical natural law tradition restricts law to a category of norms that necessarily binds the conscience. To bind the conscience is to morally obligate and thus to motivate one’s compliance accordingly. ‘Law’ that fails so to bind is law in name only, or law in part but not in whole, or some such notion.

It may be part of our ordinary concept of law that it purport or seek to bind the conscience – that is, to morally obligate – but actually obligating compliance is no part of the ordinary concept as law in the ordinary sense can be misguided or worse. Thus, the only way charitably to make sense of the natural law project is to treat it as working with a revisionist concept of law. In that case, it remains to explain why a revision is called for, what tasks of jurisprudence i better approached with the revised concept in hand, and the like. Here is one plausible suggestion.

‘Law’ is something of a success or an aspirational term; part of its application conditions includes its success conditions. Success for law amounts to binding the conscience; and binding the conscience implies imposing a moral obligation. To understand what law is requires knowing what it achieves when it succeeds. Successful law binds the conscience, that is, morally obligates. Thus, the claim that a bad law is no law at all is perfectly defensible.

We can put the point in a slightly different way by seeing it as motivated by a methodological stance – a claim as to how jurisprudential inquiry should proceed. Of course we seek ultimately to understand all laws – laws that succeed as well as those that fail. But to understand those that fail is to see them as defective in a distinctive way: as less than fully successful instances of the kinds of things that they are. To understand them
then as the kinds of things that they are we need to understand what it would be for them to succeed. Thus we begin by studying the successful case.

To be sure, bad law may well be law in the sense appropriate to ordinary matters of figuring how to get on with one’s life with the least interference from the powers of political coercion and authority. But jurisprudence does not aim to guide ordinary life, but aims instead to understand forms of life or ways of living. Governance by law is a form of life in this sense. And to understand what is distinctive of it, we need to explore what governance by law is like when it meets its aspirations.  

Revision is called for because jurisprudence seeks to understand law as a distinctive scheme of governance; and to understand what is distinctive about it requires we explore it when it succeeds at achieving its goals. Moreover, by focusing on the successful case we illuminate what it is for law to fail, for it to be defective – as law. Not what it is for it to constitute bad or undesirable law but for it to constitute a defective instance of the kind of thing that it is. Or so the argument runs..  

By way of analogy, biologists interested in the nature of the heart, do not proceed by looking to identify a set of properties that all hearts possess. Rather they study the successful heart. Successful hearts pump blood (efficiently) and those that fail to do so are defective. They are defective instances of the kind of thing that they are: hearts. Approaching the study of hearts this way enables us not only to identify what is essential to the nature of hearts; it has explanatory value as well since it allows us to illuminate the important notion of a defective heart.

Instead of seeking to uncover a set of properties that all laws or legal systems share – which is roughly the approach Hart takes to the project of jurisprudence – the natural lawyer invites us to focus on the successful case of law; and his claim is that by doing so we will not be looking to uncover shared properties so much as we will be discovering law’s true nature.

The idea that one should focus on the central case is similar to what we can call ‘first best’ or ‘ideal’ theory, the most familiar example of which in political philosophy is Rawls’, Theory of Justice. The idea is to specify the content of justice under certain ideal or heavily stylized conditions with the thought that doing so will enable us to identify not merely what the essence of distributive justice is, its relationship to other concepts (respect, free and equal persons and so on), but also to set the standard for assessing the demands of justice under less than ideal circumstances. We identify what justice requires of us under our circumstances by reflecting on its demands derived in ideal theory.

I suggest that we associate the natural lawyer’s emphasis on the core case with the methodology of ideal theory rather than with the scientific inquiry into the nature of the heart for the simple reason that it is quite contestable whether law has a function in the sense that hearts do. Law serves many social roles, is capable of achieving many desirable and undesirable ends, has a place in our social life and so on; but it does not follow that it has an essential function in virtue of which we understand its nature, and which in turn plays an important role in explaining its existence and persistence as well as the shape it takes in its mature forms. In fact, most jurisprudence scholars reject the view that law has a distinctive function in this sense, and here Hart’s own words are instructive of the prevailing view: ‘quote’ something like: it is fruitless to attribute a function to law beyond guiding conduct by reasons or some such thing.
7. The charitable interpretation of the natural law position then is that it offers an account of what it takes to be the concept of law that is most suitable for jurisprudential inquiry. The thought is that if we focus on the central case of law then in doing so, we will better understand what law aims to achieve, the difference it seeks to make in our lives, the way in which it holds itself out to those it governs and more. In addition, we will secure a better sense of the evaluative dimensions of the concept of legal validity. To claim that law is valid is to at least provisionally mark it as a successful case of law, and so on.

If one is unmoved by the suggestion that the natural lawyer is offering a revisionist concept of law, another suggestion is that he is calling attention to an ambiguity in the concept of legal validity. He is suggesting, perhaps, that validity is an evaluative and not merely a formal notion – or better that among law’s validity conditions are evaluative ones. To mark a norm as valid law is not merely to describe it in a certain way but also to at least provisionally assess it.

In any case, it is worth noting that even if we allow this reading of the natural law position – as driven by a concern for the proper purposes of jurisprudence – there remains much in the details of the argument with which one can take issue. Let us suppose that the aim of jurisprudence is to focus on the difference in our moral lives that law makes. It hardly follows from this that the only way in which law can and does make a difference in what we have moral reason to do depends on the law succeeding in binding our conscience – that is, in directly conferring moral powers or in imposing moral requirements upon us. Laws that are valid in the ‘merely’ technical sense – may and often do make a difference in moral space. This is surely one of the important insights of Dworkin’s work on interpretivism and is in many ways the focus of Mark Greenberg’s work on how law impacts what he has called the ‘moral profile.’ In other words, we need not suppose that individual ‘laws’ bind or obligate in order to find space for the idea that among the things that are most interesting about law as a form of governance is its capacity for making a difference in what we have moral reason to do and what states or governments have moral authority to do; and so on.  

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6 This means that even if revising the concept of law suitable for jurisprudence to law that binds the conscience will help us illuminate the concept of a defective law, the notion of defective that is of interest to jurisprudence may not be the one that this revision helpfully illuminates. If anything it likely distracts us from it. For the defect we are interested in is the failure for the law to make a difference in
8. Whether this charitable interpretation of the natural law claim can be sustained will not detain us further, for our concern is not with whether we can make heads or tails of either legal positivism or natural law theory, but whether the separability thesis is of any use in our efforts to do so. I think not. We have formulated the separability thesis in a way that makes it invulnerable to Green’s objections to it, but in the course of doing so, we have identified a principle with which there is no reason to suppose the natural lawyer would disagree. At least we cannot charitably take the natural lawyer to be disagreeing with the separability thesis. Instead, he disagrees with the methodology he associates with positivism. The natural lawyer is not analyzing the general concept of law so much as he is offering a distinctive way of approaching jurisprudence and identifying a concept of law suitable for those tasks, the value of which depends upon its payoffs – payoffs I am inclined to believe are not, in any case, forthcoming.

9. The narrow formulation of the separability thesis focuses on the conditions of legal validity for particular putative laws. Some have suggested that the more fruitful way of characterizing the separability thesis is as a claim about the existence conditions of legal systems. Here the idea that a system for regulating behavior cannot count as a legal system unless it complies with certain moral requirements, embodies certain moral principles, secures or promotes certain moral ends or some such thing. Expressing, embodying, promoting, or complying with a set of appropriate moral ideals or ends is a condition of a scheme for regulating behavior to constitute a legal system. Conventional wisdom is that legal positivists deny that satisfying any such constraints is a necessary condition for being a legal system whereas natural lawyers endorse the view that there are moral constraints on the existence of legal governance – though they can and likely do disagree with one another as to the content and nature of those constraints.

10. There is no question that so understood the separability thesis was an important bone of contention among legal theorists in debates that arose after World War II surrounding the issue of whether Nazi
Germany or Vichy France had legal systems. Natural lawyers insist that neither had a legal system while positivists generally characterize both as governed by law: evil law, but law nonetheless. If there is a substantive claim about the relationship between law and morality that is arguably distinctive of natural law theory it is that no system for regulating human behavior through coercive means can count as a legal system if it fails to promote or exhibit certain moral ends or principles.

The problem here is that there is no reason why positivists need object. Of course particular positivists might insist that there are no moral conditions that are constitutive of legal systems, that a form of governance need satisfy no moral conditions in order to count as a legal system. Still, there is nothing in positivism as such that requires them to hold that position. The key for positivists is the possibility of evil legal systems.

Legal systems can exhibit several moral virtues and nevertheless pursue evil ends. This is a point positivists have made in connection with Lon Fuller’s eight cannons of law making, or what he called the internal morality of law. To be sure, most positivists took note of this fact in order to argue that Fuller’s eight cannons did not express moral requirements, but that is the wrong inference to draw. For even if we concede that the eight cannons – or at least that some of them – express moral constraints on the existence of law, the fact is that the morality of law making does not guarantee the morality of law itself. And so the better lesson is that satisfying at least some demands of morality is perfectly compatible with evil legal systems.

Beyond that, there is reason to think that part of what is distinctive of legal systems as modes of governance includes the fact that they address those whose conduct they govern as agents: that is, as having the capacity to act for reasons. Their directives necessarily reflect this form of address and in doing so reflect commitment to certain forms of moral respect. This is my view and I see no reason why legal positivists should feel the need to resist the general thought that part of what is distinctive of law as a mode of governance is the fact that it embodies commitment to a range of moral ideals and values.

As far as the existence conditions of legal systems goes, all the legal positivist need insist on is that they do not preclude the possibility of evil.
And that is a very weak constraint and certainly not strong enough to entail any distinctive or interesting formulation of the separability thesis.

Finally, it is time finally to jettison the conventional wisdom that legal positivism rejects the possibility of a conceptual connection between law and morality. Hart for one claims that law necessarily must possess what he calls a minimal moral content. Raz holds that it is a conceptual truth about law that it claims to be a legitimate authority. Scott Shapiro recently argues that it is part of the concept of law that it aims to solve a certain category of moral problems: and so on. Not only do positivists advance the existence of conceptual connections between law and morality, in more than one case that connection is among the most important features of law.

Positivists are not shy about asserting necessary or conceptual relationships between law and morality and so, to put a not too fine a point on it, it is almost incomprehensible to me that the conventional wisdom persists that the separability thesis is the cornerstone of legal positivism and the tool by which we can distinguish legal positivism from natural law theory. Enough already!7

11. In a moment we will turn to yet another way in which conventional wisdom gets wrong the connection between law and morality. Here the focus will be on the methodology of jurisprudence, that is, the manner in which the central problems of jurisprudence are addressed. Before we turn our attention to that nugget of conventional wisdom, I want to make sure that I have not left the reader with the impression that I do not think there are important differences between natural law and legal positivism. I certainly think that there are important differences, the majority of which I will take up in detail in Part II.

The majority of these differences concern what I think of as the metaphysics or the content of law. And while a detailed discussion of these

7 Like other positivists, I insist on the possibility of evil legal regimes; and for the life of me, I cannot imagine that natural lawyers want to deny that possibility. Again, if we locate a difference worth pursuing it will be about the proper aims of jurisprudence and the methods suitable to securing those aims; and once again it will not be obvious that this methodological difference tracks the distinction between legal positivism and natural law theory. What is very clear is that it will not track the separability thesis.
matters must wait until the second essay in this series, it may be helpful to preview the difference that I think is at the heart of the matter.

The metaphysics of law concerns the nature and content of legal facts. Legal facts are not basic facts. They are facts that obtain in virtue of other facts. These other facts are the constituents of legal facts. The content of law is the set of legal facts and so our question becomes what are the constituents of legal content; or what facts are the metaphysical bases of legal facts?

We can quite helpfully distinguish among the three general jurisprudential views that fall into the natural law/legal positivism divide in terms of the following modal claims:

(a) *Exclusive Legal Positivism*: Necessarily only social facts – facts about behavior and attitudes – fix the content of law. Legal facts are the facts they are in virtue of social facts alone.

(b) *Inclusive Legal Positivism*: Necessarily only social facts determine the determinants of the content of law. The facts that determine legal facts are determined by social facts.

(c) *Natural Law*: Necessarily social and evaluative (including in some cases moral, but also other evaluative facts) fix the content of law. Legal facts are the facts they are in virtue of evaluative or moral facts and social facts.\(^8\)

12. With this tantalizing (I hope) set of distinctions in hand (or more accurately, out of the way), I want to move on to another misleading nugget of conventional wisdom. I have indicated above my view that much of the differences that the separability thesis obscures rather than

\(^8\) It should be clear from these remarks – if anything is – that the key to legal positivism is what I have elsewhere called the ‘social facts’ thesis and not the separability thesis. This has been my view for at least two decades and Raz has held some or other version of this view for even longer than that. It is also true that understood in this way Dworkin’s interpretivism turns out to be a form of natural law theory, in spite of the fact that Dworkin himself is very critical of traditional or classical forms of natural law theory. This is just another reason to resist putting too much emphasis on labels, and a reminder that labels are distracting and no substitute for argument.
illuminates are methodological and not substantive: they involve ways ofapproaching the projects of jurisprudence. Unsurprisingly a consensus hasgrown up in jurisprudence about the proper way to distinguish amongmethodologies appropriate to jurisprudential inquiry; and this consensus ismy target.

The consensus view is that substantive legal positivists are also whatStephen Perry refers to as ‘methodological’ positivists whereas naturallawyers and other non-positivists, notably Dworkinian interpretivists, arenormative jurisprudents. The idea is that substantive and methodologicalviews travel with one another: positivists about the nature of law arepositivists about the methods suitable to jurisprudence; and natural lawyersand other normativists about law are also ‘normativists’ about the methodssuitable to jurisprudential inquiry.

In a sense it is too easy to put the lie to this distinction insofar as thereare a number of (substantive) legal positivists – from Tom Campbell toJeremy Waldron – who defend positivism on normative grounds. That is,they defend something like the view that there is a social test forauthoritative legal sources on the grounds that conceiving of law in this wayhas beneficial practical consequences. Other legal theorists, most notablyLiam Murphy, don’t find substantive jurisprudential inquiry promising at alland are moved to view that the only plausible way to settle on a concept oflaw is to look to the practical consequences of the alternatives on offer.9

Each of these views rejects (sometimes implicitly but often explicitly)the possibility of a successful analytic project in jurisprudence. It cannot be surprising then that a drawn to a methodology that calls for the theorist toapply normative considerations to settle on the content of the concept. I findthese views largely uninteresting, for the general form of skepticism upon

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9 I have to say that jurisprudence makes for strange bedfellows. Two of the more serious jurisprudential skeptics are Liam Murphy and Brian Leiter. Both identify the project of analytic jurisprudence with providing an account of the concept of law, a project that both find hopeless. They respond to the hopelessness of analytic jurisprudence in diametrically opposed ways. From the hopelessness of analytical jurisprudence, Murphy infers that there is no choice but for the concept of law to be determined by political or normative philosophy: the concept of choice is the one that is likely to have the best practical consequences. From its hopelessness, Leiter infers that the concept of law at play is that suitable for various social scientific projects and that the social scientists, and not the philosophers, are best suited to determining its content. Murphy takes the failure of analytic jurisprudence to call for political or practical philosophy, whereas Letier takes it to be a call for naturalism – in this case, social science. I find neither approach plausible as the arguments on offer designed to establish the hopelessness of the analytic project to be far from convincing. More on this in Part II.
which they rest is either too broad – it would apply to all philosophically interesting concepts and not just to the concept of law – or based on inadequate grounds for thinking that it applies to law for example but not to the concept of knowledge, truth, belief or what have you. Clashing conceptions – deep disagreements about law’s fundamental nature – hardly distinguishes jurisprudence from epistemology, semantics or metaphysics. It is, I dare say, a sign of normal philosophical progress, not the impossibility of it.

I am not persuaded by this form of normative jurisprudence. I resist the idea that the projects of analytical jurisprudence are doomed to failure or to stalemate, which in this context amounts to the same thing. The issue need not detain us any longer, since the nugget of conventional wisdom we want to explore now has a narrower scope: it applies to those jurisprudential scholars who believe that the project of analytical jurisprudence can be successfully undertaken – that one can, among other things, identify the core elements of the concept of law, or uncover law’s essential nature.

The question is whether the divide between legal positivists and natural lawyers with respect to the concept of law tracks the distinction between descriptive and normative methodologies of jurisprudence. This question simply does not arise for those who are skeptical about the concept, and so their views are of no further interest to us now.

The conventional view is that the substance and the methodological views track one another. Positivists are descriptivists and natural lawyers are normative methodologists. To evaluate the conventional wisdom, we are going first to have to say something about descriptivism and normativism as methodologies of jurisprudence.

13. It is best if we characterize both positions as broadly as possible as the argument should not depend on which particular version of either descriptive or normative jurisprudence being advanced. The paradigm example of someone adopting a descriptivist methodology is Hart and the paradigm of someone adopting a normative methodology is Dworkin. Hart’s form of descriptive jurisprudence is ‘conceptual analysis’ and Dworkin’s form of normative jurisprudence is ‘interpretivism.’
A rough but ready way of distinguishing descriptive and normative jurisprudence is the following. Those who adopt a normative jurisprudence believe that an account of the nature of law or of the concept of law must be approached through political philosophy: that the major premises in the argument designed to reveal the content of the concept are substantive claims in political morality. Or to put it another way, that the concept of law is a concept of political philosophy and its content can be revealed only by illuminating its relationship to substantive ideas in political morality. The descriptivist insists that one does not approach the question of the nature of law through an inquiry into political morality. To be sure, law is a political significant concept and one that may have practical significance, but we do not uncover its content through addressing first order problems in political morality. Most descriptivists ascribe to one or another form of conceptual analysis, but the key is the rejection of normativist contention that the concept of law can only be analyzed by addressing problems in first order political morality.

In Dworkin’s account, the basic question of political philosophy is something like: what justifies the use of coercive force of all against some? Roughly, what justifies political coercion? Some might be inclined to the view that meeting the demands of justifies coercion and only the demands of justice could justify coercion. This view fails however because there are a number of claims of personal justice that are not justifiably enforceable and the state’s power may be legitimately deployed for reasons other than seeing to it that justice is done.

For Dworkin, the important point is that law is necessarily an answer to the question: what justifies the coercive authority of the state – the collective use of force? Because law is necessarily an answer to this question law must be the sort of thing that could justify the collective use of force. The ‘could’ here is ambiguous between ‘logical possibility’ and ‘plausibly.’ We needn’t resolve the ambiguity at this point. The inference that we can draw in either case is that if law is the sort of thing that must be capable of justifying coercion then we have to approach an account of the nature of law from the perspective of justification. In that sense, an account of the nature of law proceeds from addressing a problem in first order political philosophy. The methodology of jurisprudence is then normative in the relevant sense. So one half of the conventional wisdom seems on track: Dworkin the ‘interpretivist’ is also a proponent of normative jurisprudence in the sense we are focusing on.
The problem with the conventional wisdom is that the leading contemporary legal positivist, Joseph Raz, pursues a strategy of normative jurisprudence. In this regard, he is much closer to Dworkin than he is to Hart. For Dworkin the central legal relationship of importance to jurisprudence is coercion. For Raz, it is authority. For Dworkin, to analyze law is to see it as necessarily an answer to the question, what justifies the collective use of force, that is, political coercion. For Raz, the important conceptual point about law is that it necessarily claims to be a legitimate authority. Whereas for Dworkin an analysis of the nature of law proceeds by understanding that it purports to justify collective force, for Raz, jurisprudence proceeds by recognizing that law must be the sort of thing that could be a legitimate authority. In the one case, the content of the concept of law is partially determined by the theory of justified coercion, in the other it is partially determined by the theory of legitimate authority. In both cases, an account of the nature of law proceeds from premises in substantive first order political morality. 10

The nugget of conventional wisdom that substantive and methodological positivism travel with one another simply cannot be sustained. While it remains true that many of the substantive differences among jurisprudential views turn ultimately on methodological differences, it is not true that by settling on either descriptive or normative jurisprudence we will resolve the dispute between positivists and natural lawyers of all stripes. If the separability does little more than distract us from the core issues of jurisprudence, the methodological dispute between descriptivists and normativists won’t provide the clarity in formulating the underlying issues that we ultimately need to address.

14. The fact that both Raz and Dworkin adopt a normative jurisprudence is interesting in its own right and completes our initial ambition, which is to dispel two of the central nuggets of the conventional wisdom that, to my mind, have stalled, rather than advanced

10 Some might object that Raz does not proceed by addressing first problem a problem in first order political philosophy. His jurisprudence proceeds by offering an account of the concept of legitimate authority, and that is an analytic, not a normative project. The objection fails, however. What Raz offers is a particular substantive theory of legitimate authority – not an account of the concept of legitimate authority. If one wants to hold on to the view that Raz is offering a meta and not a normative political theory, one would have to say that Rawls’, A Theory of Justice, too is not a work in substantive political philosophy; and that just seems ludicrous.
contemporary jurisprudence. We could stop here, but if we did we would miss an opportunity these insights provide to deepen our understanding of fundamental features of the architecture of jurisprudence.

It isn’t just that Raz and Dworkin approach the nature of law by addressing a question in first order political philosophy. Both of them actually see the relationship of law to morality in surprisingly similar ways. Getting a handle on these similarities and the way in which similar starting points leads to radically different substantive theories of law will help us understand better the methodology of jurisprudence and the relationship between methodological and substantive views.

This is all pretty vague so far so let’s make some of these suggestions concrete. We begin by noting that not only does Raz approach jurisprudence through political philosophy, but more importantly, he sees law itself as an institution that can only be understood as itself being carved out by morality from moral space. We don’t for Raz see law and morality as independent institutions, each with its own justification, and ask what is the relationship between them. Rather, we can only understand law in terms of its relationship to morality. To see this, we need to revisit what I take to be Raz’s most persuasive objection to my version of Inclusive Legal Positivism, or what I have called Incorporationism.

The Inclusive Positivist holds that moral principles or reasons can be incorporated into law provided there is a practice of the right sort among relevant officials. Razians, if not Raz himself, have objected to Inclusive Legal Positivism on the grounds that it is incompatible with law’s claim to being a legitimate authority and I have responded to this objection on more than one occasion. Frankly, I have not been persuaded by this objection to ILP, but it is important to note that it is not Raz’s fundamental objection to ILP.

Raz’s objection is based on the simple insight that legal officials are humans. Because they are humans all of the reasons of morality already apply to them. Moral reasons apply to agents as such, whether they are legal actors or not.

If moral reasons already and always apply to humans, then a fortiori they apply to legal actors. If moral reasons therefore already apply to legal actors then it is simply confused to think that law --- through the actions of
relevant officials – is the sort of thing that has the power to make moral principles apply to particular actors. Such a view suggests both that in the absence of the relevant practice moral principles would not apply and that through its silence on the matter the law somehow excludes moral principles or reasons from applying.

The problem with ILP then is that it attributes to law a power that law simply could not possess. Morality always applies to agents and so it is not as it were up to law to determine whether or not it does. It is not optional for law to have morality apply to legal actors. Morality applies – always and wherever the reasons it provides are apt. This may well be a devastating objection to ILP and one that no defender of ILP, including me, has been able successfully to meet.  

15. If morality always applies to agents, then the question is not whether law can incorporate morality, but whether and under what conditions should one act on the basis of the reasons that law provides? Why act for legal reasons in the face of the demands of morality? The answer is straightforward but profoundly illuminating. If morality always applies then one must do what the balance of reasons requires. If one should act for reasons other than those that morality offers it must be because morality counsels or requires it. Only morality can direct one to act for other than moral reasons; and so the question becomes: When does morality so counsel?

The answer is that morality counsels that one act on the basis of other reasons when and only when doing so is likely to lead one better to comply with morality’s requirements. Morality counsels acting for reasons other than those of morality only when doing so is required by morality; and doing so is required by morality when acting on the basis of other, institutional reasons, means that one is likely to do better at meeting morality’s demands. One is likely to succeed in doing so when others who are in a position to issue directives are better able to judge what the balance of moral reasons

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11 As I see it, the right way to think about Dworkin’s claim that law is necessarily an answer to the question of what justifies collective force is to understand that law makes a difference in what is morally required or permissible. The particular focus is on what is morally required or permissible with regard to a particular moral problem – namely the use of force. Still the key idea is that the fundamental domain is that of morality, including especially political morality. The question is always what does morality require or permit; and law matters not just because it is a way of regulating our affairs with one another but also because it impacts this zone of moral space.
requires or better positioned to insure coordinative activity where necessary to insure compliance with morality’s demands. And so on.

I like to put this point by saying that morality carves out areas in the moral landscape where acting directly on the basis of one’s own assessment of the balance of moral reasons is likely to be less successful than would be acting on the basis of the reasons that others provide. The reader familiar with Raz’s general legal and political philosophy will note straight away that these circumstances coincide exactly with those of Raz’s general account of legitimate authority. Moreover, it is now patent why Raz should refer to his account of legitimate authority as the ‘service conception.’ Morality carves out domains of practical authority whose legitimacy it serves. Period.

It is within this network of thoughts that Raz’s positivism emerges. Morality counsels that one act on the basis of the reasons that law provides when law constitutes a legitimate authority. Law constitutes a legitimate authority when and only when acting on its reasons is more likely to lead one to comply with the demands of reasons than would be acting on one’s own assessment of what reason requires. This implies that law is reflects a view about the demands of the balance of reason which coheres with the related view that law necessarily claims to be a legitimate authority and also with the view that law is best seen as a point of view on the demands of morality.

It turns out that for Raz law’s claim to being a legitimate authority might always be false but it cannot be necessarily false. It is the sort of claim that could be true. Law must therefore be the sort of thing the claim to legitimate authority could be true of. For Raz, these considerations entail the view that the content and identity of law must be determined by social facts alone. This is his version of what I call the Social Facts Thesis, and it is this claim and not the separability thesis that is the core of his form of legal positivism. More importantly, legal positivism is for RAz the conclusion of an argument about law and its essential relationship to morality, including the fact that it is morality that carves out a place for law; it is morality that counsels the rationality of law and determines its domain.

Positivism – exclusive legal positivism in particular -- is the conclusion of the argument, not a premise in it. If there is a deep problem with inclusive legal positivism it is not that it is incompatible with law’s
claim to authority. Rather it is that it fails to understand the relationship between law and morality. ILP has it that law can incorporate morality when in fact the better view is that there are circumstances under which morality in a fashion can incorporate law.12

Before turning to Dworkin’s views on the matter, I want to note one other point that will be the focus of my discussion in Part III of The Architecture of Jurisprudence and that is that Raz approaches the inquiry into the law from the point of view of someone who believes or is at least committed to the idea that the best way to illuminate law is to focus on the way it is continuous with morality. The contrast as we shall see is with those who view law as continuous with aspects of our social life – from small group endeavors to large scale social organizations. It will come as no surprise at the end of the day that Raz like Dworkin has very little to say about the ‘social’ dimensions of law. But again, much more on this at a later date

16. Like Raz, Dworkin is not only committed to a normative jurisprudence but to understanding the nature of law through its relationship to morality: in particular to understanding the difference that law makes in moral space. How is then that Dworkin and Raz turn out to have such fundamentally different substantive views about the nature of law?

The answer begins by noting that for Raz, the fundamental legal relationship is that of authority. Law relates to morality by ‘serving’ it through the authority relationship. For that relationship to obtain, there must be something of what I call a ‘firewall’ between the content of law and the demands of morality. If morality enters the content of law, it can do so only by undermining the authority relationship. Authorities can only serve their

12 Morality comes first (analytically speaking or as I like to say ‘in the order of explanation.’). Morality always applies. There are conditions under which it carves out areas in which it does not apply directly. These are the conditions broadly speaking that coincide with practical authorities. The most important among these is law. For law to serve its function, its content cannot be a matter of morality or rely on morality. This is where the positivism comes in: much later in the day as it were.

For law to relate to morality through the relationship of authority so understood there must be something of a firewall between law and morality. And so this is where so-called Exclusive Legal Positivism enters the Razian picture. Frankly this is an incredibly powerful picture overall and I do not mean to say anything in response to it here.
role by shielding those they direct from the sources of their judgments. Scott Shapiro takes laws to be plans and advances in effect the same line of argument about plans. Plans can serve their functions, which in the case of law is to solve moral problems, only by their content being accessible to those whose conduct they direct without requiring plan followers to appeal to the moral considerations and issues that the plans were meant to resolve. This is why both Raz and Shapiro turn out to be positivists. Positivism is a conclusion that follows from premises about the nature of law, and more importantly, about the essential relationship between law and morality.  

I cannot repeat often enough or state strongly enough that the separability thesis has been nothing but a horribly misleading distraction to anyone trying to understand legal positivism. For positivism can only be understood once one understands the essential ways in which on most positivist views law and morality are connected: not how they are separated. Their separation is a consequence of the essential connection between them, and to miss that is to miss the most important feature of legal positivism.

I am sure that at various points it has been important to insist on ways in which law and morality are distinct and separate ways of regulating human affairs. Some, following a rational choice approach to institutions have argued, more or less following Hobbes, have seen law as a response to some set of collective action problems that render morality inadequate as a device for guiding action by reason. And much positivist thought has some roots in this Hobbesian picture.

Still other times positivism is thought to grow out of moral skepticism. Though the status of morality can be called into question, the status of law cannot be. Its existence depends on brute facts; and so where there is no morality to guide conduct, at least there is law. Of course, this way of thinking is hopeless, for normative skepticism renders law as well as morality unavailable. What is left is not law, but governance by sanction and power.

For Dworkin, the essential legal relationship is that of coercion. Law must be understood as providing an answer to the question of what justifies collective force, and in order for law to stand in the relationship to morality it has, the law must be translucent to the underlying moral principles that make the best sense of it. What we need to realize is that if we fully understand these differences between Raz and Dworkin we will see exactly how deep are the philosophical bonds that unite them. And we will understand all this and more only if we rid ourselves once and for all of the conventional wisdom in jurisprudence that continues to be far more distracting than illuminating.
But the key point, and the one that is the lesson of this section of the paper, is that the deepest and in many ways, the richest and most positivistic forms of legal positivism begin by appreciating the ways in which law is conceptual connected to morality, the ways in which it is subservient to it and dependent upon it. Positivism begins not with an insistence on the separation of law and morality, but with the realization of the essential connection between them. The separability thesis not merely obscures this fact; it misses it entirely. By focusing as much as they have on the separability thesis both positivists and their critics have clouded rather than clarified our understanding of law and its place in the normative landscape.

Clarity comes, I have suggested, when we not only abandon the separability thesis but attend more closely to relationship between law and morality that underwrites the most compelling forms of legal positivism. Legal positivism is a view that arises out of accounts of how law and morality are inescapably connected, not from views about how they are distinguishable from one another.