Dear Participants in the USC Workshop  
The following is a 'drafty' paper -- a term I use intentionally to convey a double meaning: it outlines a large research project and provides the outlines of a full argument; and the argument it provides is full of holes. For those of you interested in the basic thoughts that move this project, please look at my Hart Lecture in the Oxford Journal of Legal Studies. That covers some of the same territory. But I have many things I would like to talk about at the workshop that are only hinted at here and in the OJLS paper. Please excuse the draftiness of the paper, but my aim was to send something far from complete or polished in the hopes that all of you will help me move the project along further or send it to an early grave :-(  

I look forward to the conversation.  

Yours,  
Jules  

Rethinking Legal Positivism  

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Introduction  

Though most law professors are unschooled in the finer points of the central disputes in contemporary jurisprudence, almost all would express confidence in their ability to distinguish legal positivism from natural law theory. These professors will tell us that natural lawyers assert and legal positivists deny the existence of a necessary connection or relationship between law and morality. They may even know that legal philosophers have coined the phrase ‘the separability thesis’ to express the claim that there is no necessary connection between law and morality. Positivists, they will assure us, accept the separability thesis – indeed it is the central tenet of positivism – whereas natural lawyers reject it. And if they are knowledgeable about the history of contemporary jurisprudence they will remind us that there has been no more ardent supporter of the separability thesis than H.L.A. Hart.  

In a recent essay, Leslie Green adds credibility to the conventional view by demonstrating that Hart advanced the broadest possible interpretation of the thesis and in doing so meant to deny the existence of any necessary relations – whether titanic or trivial – between law and morality. Green goes on to argue – persuasively I believe – that there are several necessary relations -- many trivial, others not -between law and morality. If the separability thesis is the central tenet to Hart’s version of legal positivism, then Green has surely landed a fatal blow to it; more
generally, if the separability thesis is central to legal positivism, then perhaps Green has dealt it a fatal blow.

Welcome as these conclusions may be to positivism’s many critics, the argument for them moves too quickly. In the first place, though Green is right both to attribute to Hart the promiscuous interpretation of the separability thesis and to question its plausibility, the fact is that Hart was primarily interested in a much narrower interpretation of the separability thesis. Hart’s main point was that one can not infer the legitimacy or moral value of law from its validity. Valid laws can be morally reprehensible as well morally estimable, and so there is no necessary connection between law (legality or legal validity) and morality (the substantive moral merits of law). So understood, the separability thesis is often expressed as the claim that morality is not a necessary condition of legality. The concept of an immoral valid law is not incoherent or contradictory and so this version of the separability thesis strikes most commentators as above reproach; and there is no reason to think that Green himself is inclined to take issue with it.

More importantly, even if the separability is false, it is dubious whether legal positivism embraces it; certainly, neither Joseph Raz nor I do so. Indeed, we have both explicitly rejected it. Both Raz and I have argued that the central tenet of positivism is some or other version of what I have called the ‘social facts thesis.’ Raz’s version of this is what he calls the Sources Thesis: the claim that the identity and content of law is determined by social facts alone – facts about behavior and attitude. (I think it is somewhat more helpful to characterize the thesis as the claim that necessarily, moral or evaluative facts cannot contribute to the content of law; and that is because there are other kinds of facts – natural or linguistic—that can contribute to the content of law consistent with legal positivism.)

Quite rightly Raz has always argued that it is one thing to say that the content of law is fixed by social facts and quite another to infer from this claim that law cannot have moral value or worth. In other words, it does not follow from the fact that the content of law is fixed by social facts alone that laws cannot possess necessary moral properties. These are two different claims that are not connected logically. Raz is clearly right about this and I have long endorsed this insight. It is consistent with Raz’s claim that we cannot infer the legitimacy of law from its validity and so the narrow interpretation of the separability stands even if being a law entailed possessing certain morally desirable or valuable properties: just not the property of being morally legitimate.

Of course someone who endorses Raz’s general point might be prepared to allow that the moral legitimacy of law could follow necessarily
from the fact of legality. I do not. Such a person would be arguing in effect that even the narrowest version of the separability thesis might be false, but that its falsity raises no problems for positivism because the central claim of the positivist is that the content of law is fixed by social (and natural and linguistic, but not moral facts); and it matters not to positivism whether valid laws are necessarily legitimate. Understood in this way, the separability thesis has no bearing whatsoever on legal positivism.

I do not embrace this strong version of the disentanglement of legal positivism from the separability thesis. I have, however, argued for a somewhat weaker disentanglement. In my view, Raz’s general claim is right. Even if the content of law is fixed by social facts alone, it does not follow that laws cannot possess necessary moral properties. I resist the idea that among those properties could be the moral legitimacy of the law, since the idea of an immoral yet valid law is not incoherent or self-contradictory. In addition, I have argued for the view that even if morality is not a necessary condition of legality, satisfying certain minimal moral requirements can in principle be a necessary condition of law, understood as a scheme of regulating or guiding human conduct. Indeed, there is nothing in legal positivism that precludes the possibility that part of what distinguishes law from other modes of regulating human relationships that it satisfies certain moral requirements. In short, if Raz and I are right, there is not the sort of connection between legal positivism and the separability thesis that virtually everyone assumes. It is easier to understand why the bulk of law professors and academically inclined lawyers persist in identifying legal positivism with the separability thesis than it is to understand why the bulk of legal theorists do – but they do, and if what I have just said is right, it is a mistake to do so. And not a trivial one either.

In my view the narrow reading of the separability thesis (legality does not entail legitimacy) is correct, but alternative and equally plausible ones (e.g. there are no necessary moral constraints on law – understood as a mode of regulating human affairs) are likely false. More importantly, the emphasis that legal philosophers have placed on the separability thesis has been distracting and misleading. It is distracting and misleading because the separability thesis does not and cannot represent the core commitment of legal positivism. As both Raz and I argue, separately and with different understandings of it, the Social Facts Thesis is the core of.¹

¹ But even as regards the relationship of law to morality, the separability thesis is not where the action lies in jurisprudence. It is now common to emphasize the distinction between substantive and methodological jurisprudence. One major divide in methodological jurisprudence is between those who share the view that an account of the nature of law should proceed by nesting the inquiry in substantive
In endorsing the separability thesis Hart was primarily interested in exploring what constraints if any can be imposed on the criteria of legal validity. Much of my own earlier work had a similar focus. I am now inclined to the view that the very idea of legal validity is not so much a feature of legal practice as it is an artifact of particular legal theories – including Hart’s positivism; but not just Hartian positivism. Arguably many natural lawyers and even the Dworkin of “Model of Rules I” worked within a jurisprudential framework that included the concept of legal validity within the toolbox. But the idea of legal validity is inessential to the Dworkin of Law’s Empire. In its place is the notion of ‘legal content.’

For Hart, the early Dworkin and many natural lawyers, the emphasis on legal validity revealed a fundamental interest in the question of which texts are part of a community’s legal resources: which are authoritative or have the status of law: which are binding on the relevant officials: which, if any, are optional. Which sources are ‘in’ and which are ‘out.’ The concern with legal content, however, is different, but it need not be unrelated to concerns about the criteria of legal validity.

We can distinguish among three sorts of questions we might ask about legal content. (1) What is the content of the law? Is the content of law a set of directives, propositions, statements, reasons, facts, duties, commands or what have you? (2) What are the determinants of legal content? Is the content of law determined by social facts alone, by evaluative and social facts, etc? (3) How do the determinants of legal content come together to fix
the content of the law? Is the content of the law fixed by constructive interpretation for example?

To the extent that questions of legal validity matter to jurisprudence – as I conceive it – they arise within the context of one or other way of determining the determinants of legal content. In other words, one might hold the view that only authoritative legal texts can contribute to legal content; and then flesh out the idea of an authoritative legal text in terms of a notion of validity. The notion of ‘contributor to legal content’ or ‘determinant of legal content’ is much broader than that of legal validity, a notion that I see as less a feature of law that needs to be explained as an artifact of a family of theories about law.

In my view, the content of law is a set of directives. We can, in effect following Hart, distinguish among directives about what to do, who is to decide what to do and who is to decide whether what is to be done has been done. As I see it then among the central questions of (substantive as opposed to methodological) jurisprudence are: what ‘stuff’ fixes the content of legal directives? How is the content of legal directives determined?

In the remainder of this essay I want to explore the relationship between two important ideas. The first of these is the social facts thesis – what I take to be the core commitment of legal positivism. The second of these is what we might call the moral semantics thesis: the claim that the content of law can be ‘interpreted morally.’ I will have a good deal more to say about both of these ideas below but the question I want to raise and discuss is whether the positivistic claim that only social facts can contribute to the content of law is compatible with the claim that the content of law can be appropriately characterized as moral directives – that is, as moral directives and empowerments, and the like.

I would also like to show that we can recharacterize a familiar challenge to legal positivism – namely, how can law, which, if the positivists are right, is fixed by social facts alone issue in moral directives or reasons for acting? This challenge can be formulated in a variety of ways but the most general and familiar is this: how can positivism, which holds that legality depends on the form and manner of enactment – on what relevant officials say and do – explain the normativity of law – the fact that laws purport to provide agents with reasons for acting?

But before we get too far ahead of ourselves I want to retrace the modern history of jurisprudence to show how it is that the emphasis in jurisprudence has moved from a concern with the concept of legal validity to the concept of legal content. In my retelling of the story the key figure is
Ronald Dworkin. I make no claim that my history is correct. It is, if you will pardon my expression, an interpretive history.

I. The Interpretive Turn and determinants of legal content

Ronald Dworkin is on record claiming that the argument from the Model of Rules I through *Law’s Empire* and beyond is continuous, and there may well be a sense in which it is. Certainly, looking back over the body of the argument he has developed – both against positivism and in favor of interpretivism – it is natural that he see it as of a piece, a continuous development of the same basic idea. I am not so sure that it is; certainly seeing it this way obscures two fundamental differences between the arguments of MOR I and those of *Law’s Empire*.

In MOR I, moral principles enter the law as binding legal texts, on a par with though different from those texts whose authority as law depends on their source. If we treat the question of what is to count as a binding legal source as a request for ‘validity’ conditions, then we might view the argument of MOR I as claiming that moral principles as well as official pronouncements can be binding legal texts. That implies that entirely source based tests of legal validity are inadequate to capture the full range of binding legal or authoritative texts – especially certain principles (and one should be reminded, policies).³

The argument of MOR I takes place within the framework of the jurisprudence of the day, and the central argument of the paper can be understood as demonstrating that the array of available concepts within the Hartian positivist picture – rules, discretion, rule of recognition, social sources – are inadequate to account for central features of legal practice. In particular, once we countenance moral principles as binding legal sources, we realize that many of the claims positivism makes about law are artifacts or consequences of positivism, not features of law.

If the argument of MOR I suggests that the constellation of concepts and categories within conventional positivism are inadequate to explain central features of law, it is not until *Law’s Empire* that Dworkin reveals to us what is to replace them. Importantly, some of what he has to say is

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³ I am not defending the success of the argument of MOR I. It is well known that I do not think the argument succeeds. My interest here is largely expository. I am trying to trace the move in jurisprudence from concerns about the criteria of legality or legal validity to the centrality of legal content.
surprising given the argument of MOR I. In particular, moral principles figure in Law’s Empire not primarily as binding legal standards on the same level as rules, but as the set of ‘background’ norms that are the law. Authoritative legal acts are in a sense translucent to the set of principles that best explains them. The idea is not to introduce principles as being on a par with rules, but to note that rules matter primarily because they are windows to the principles that are the law. This is the first, but not the most important way in which the argument of MOR I differs from that of Law’s Empire.

The more important difference is what I think of as the shift to an emphasis on legal content. Recall my remark earlier that one way of looking at the emphasis on the notion of legal validity falls out of a more basic concern with the concept of legal content. On this view, the criteria of validity pick out the sources of law – those binding texts and those alone that can contribute to legal content. If we look back to the argument of MOR I from the perspective of the argument of Law’s Empire, we can understand it as claiming that the Hartian positivist picture with its idea of validity criteria set out in a Rule of Recognition leaves us with an inadequate account of binding legal sources. Legal validity is inadequate to capture those texts which can and do in fact contribute to the content of law. And that is because moral principles as well as certain social policies contribute to legal content, but their doing so cannot be explained in virtue of the idea of legal validity and the correlate idea of a rule of recognition in which such criteria are identified.

This is one reason I say that in the argument of MOR I moral principles enter the story on the same level as legal rules: namely, as authoritative texts or sources that can contribute to the content of law. And the argument above is designed to show that moral principles in Law’s Empire enter at a different stage, not as authoritative texts on a par with legal rules, but as an integrated set which are themselves the law, access to which one gets by consulting authoritative texts which are themselves translucent to the principles that best explain them.

The second way in which the argument of LE differs from that of the MOR I is this: whereas in the earlier essay the point of jurisprudence remains to identify the sources of law – the determinants of legal content – the emphasis of the book is to provide an account of the way in which the determinants of legal content actually fix the content of law. More importantly, on that account, the theory by which we pick out the determinants of legal content itself falls out of the theory of how legal content is constructed. Rather than jurisprudence beginning with an account of the determinants of content and proceeding to an account of how those
determinants come to fix the content of law, it begins with a theory of how
the content of law is fixed from which one derives an account of how to
determine what the determinants of legal content are.

The method by which content is fixed is that of constructive
interpretation; and constructive interpretation operates on a presumptive and
revisable set of sources of legal content. The actual sources of content
emerge after the process of constructive interpretation has operated on the
presumptive set of legal sources. That is the second way in which the
argument of the book is not foreshadowed by the arguments of the earlier
important article.

We come now to the most important difference between the two
works. The issue of whether moral facts necessarily contribute to legal
content simply does not arise in the MOR I which is focused on the very
different question of whether moral principles can sometimes figure as
authoritative legal sources. In contrast, one of the two most important
implications of constructive interpretation is that moral or evaluative facts
necessarily contribute to legal content. After all, the first step of a
constructive interpretation requires attributing a value to the legal practice of
a particular jurisdiction. That value, moreover, must be responsive to the
larger project within which constructive interpretation occurs: namely,
within the project of answering an important question in political morality --
what justifies the use of collective force?

One way of reading Dworkin is as advancing the view that law is best
understood as an answer to the question of what justifies the collective use
of force? If we take law to be a putatively plausible answer to this question,
then the content of law must be a directive or right that can justifiably be
enforced by the coercive power of the state. The content of law is
constructed by a method constrained by the requirement that the result it
provides must stand as a putatively plausible answer to a substantive
question in political morality: namely, what justifies the use of collective
force?

I have elsewhere suggested that both Raz and Dworkin – unlike Hart
or myself, for example – approach jurisprudence by addressing a
fundamental problem in substantive political morality. For Dworkin, the

\[^4\] The other important consequence is mentioned above: that the sources of law fall out of
the theory by which the content of law is fixed.
\[^5\] (In contrast, I would say that Hart and I take it to be part of the philosophy of the social
sciences, broadly speaking; and for contrast someone like Shapiro takes it to be part of
social action theory or the theory of social organization – which is closer to what I take
problem is the justification of collective force; for Raz it is the conditions of justified or legitimate authority? Both are committed to the view that the answer one gives to the relevant question in political morality constrains the determinants of legal content and in doing so also impacts the way in which the building blocks fix legal content.

The difference between them is that Dworkin believes that if law is to answer the question it purports to, the texts must be (at least) translucent to the set of principles that would provide the best interpretation of them. Legal texts allow us to see through them to the principles that make the best sense of them. In stark contrast, Raz is committed to the view that in order for the law to be responsive to the conditions of justified or legitimate authority, one cannot see through authoritative texts to the set of moral facts that would provide the warrant for them (if and when they are warranted); access to the reasons vitiates the claim to authority that is essential to law. For Dworkin, legal texts are a window to the reasons that justify them; whereas for Raz they are a wall between agents and reasons that otherwise would apply to them.

II. Reasons and Legal Content

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

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

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

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myself to be doing than it is to what Raz or Dworkin are up to. But this is all speculative of course.)
(1) Necessarily, moral facts contribute to legal content. This is the position Dworkin takes in Law’s Empire, but not in MOR I. It is also the position of the traditional natural lawyer.

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

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

(3a) Necessarily, social facts determine the determinants of legal content.

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

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

6 I have never argued that it is the best explanation of actual legal practice though other inclusive legal positivists have advanced that view
In defending the view that (3a) represents a genuine alternative view about the relationship of moral and social facts to legal content, I am committed to the view that neither the Semantic Sting nor the Argument for the Sources Thesis are sound. Indeed, I have argued on several occasions that neither Raz’s nor Dworkin (nor anyone else for that matter) succeeds at establishing either (1) or (2) and I have no intention of revisiting those arguments here. I am simply going to proceed as if all three options are on the table as possible accounts of the determinants of legal content and that is because I want to ask a particular question of some importance to jurisprudence: namely, how might we choose among these three options, and we don’t get to ask that question unless all three options are available.  

Here is a strategy we might choose. Let’s see if there is a feature of law that (1) can presumably account for but which neither (2) nor (3a) can? To pursue this strategy we must first look for common ground between (2) and (3a). The latter allows the possibility that there will be legal systems in which only social facts contribute to legal content. Since (3a) holds that only social facts can determine the contributors to legal content, it allows that in some legal systems only social facts can contribute to legal content. In other words, suppose that facts about the behavior and attitudes of judges (as in a Hartian rule of recognition) sets out the determinants of legal content. And now suppose that according to that rule the only texts that can contribute to legal content are those that themselves meet some ‘social test.’ Then it would follow that in such a legal system the content of the law will be fixed by social facts alone. And while this would be contingently so

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

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

My question is of interest only to those who are unconvinced by the arguments for (1) and (2). It is how might we go about deciding which account of the determinants of legal content is correct? It goes without saying that this is a big question, even if it is an interesting question only to some of us. Fortunately, we don’t have to give a final answer to this question in order to make some progress on answering it.
according to (3a) it would be necessarily so according to (2). In either case it would be so!

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

III. The Moral Semantics of Legal Content

As already noted, I take the content of law to be a set of directives about what is to be done, who determines what is to be done and who determines whether what is to be done has in fact been done. The claim that the law gives rise to moral reasons for acting can be reformulated as the claim that the content of law calls for a moral semantics: that is, the directives to which the law gives rise should be interpreted as moral requirements or authorizations – as moral reasons.

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

9. We cannot demand of natural law theories that they explain how the law gives rise to content-independent moral reasons because part of what is distinctive of natural law is the claim that the content is the reason. In effect, many such positions reject the idea that law’s reasons are content independent and so we cannot treat a claim in positivism as a requirement on natural law theory. On the other hand, while it is easy enough to see how a traditional natural lawyer might explain how it is that law’s reasons are moral ones, the case is considerably harder for the Dworkinian interpretivist. I set those worries aside here and simply focus on whether the positivist can meet the challenge, not whether the Dworkinian can.
The typical positivist does not stop here. He holds: (4) that the reason the law provides or claims to provide is a moral reason for acting. The obvious question is why would a positivist add (4) to (1)-(3) – especially when (4) seems problematic in a number of ways.

Some who worry about (4) are primarily worried about whether there are content-independent moral reasons for acting. But this worry is not well founded, for there are plenty of familiar examples of content-independent moral reasons for acting. Promises create content-independent moral reasons for acting. The duty of fair play is a content-independent moral reason for acting. Many of the duties we owe to friends and family arise in virtue of their being our friends and relations and are likewise independent of their content. So the very idea of a content independent moral reason should not cause us to pause.9

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

So we have two problems. First we need to understand why positivists are so insistent on the moral semantics claim – in spite of the obvious problems it brings with it? And secondly, if positivists are going to be saddled with the moral semantics claim, how are they go to meet the challenge that squaring it with the social facts thesis presents.

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

9 It is a further question how it is that the law is a source of content-independent moral reasons, but that is a different question altogether. The point here is simply that there is nothing mysterious in the idea of a content-independent moral reason.
are not moral oughts, not moral obligations or rights and so on. Why not simply abandon the moral semantics claim and press the revisionist strategy?

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

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

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

IV. Moral semantics and redescription

The key idea is that the moral semantics claim is not the claim that the content of law is a moral directive. It is a claim about how the content of the law can be truthfully described. The moral semantics thesis is the view that
the content of law can be truthfully re-described as expressing a moral directive or authorization. In claiming that law calls for a moral semantics, the thought is as follows. ‘Mail fraud is illegal’ expresses the directive: ‘mail fraud is not to be done.’ That is the content of the law and it lacks a moral vector. The moral semantics claim is the view that ‘mail fraud is not to be done’ can be re-described truthfully as ‘mail fraud is morally wrong.’

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

There are two important features of Davidson’s now very familiar idea. The first is that there are often many true descriptions of the same event, some being more apt than others for a given purpose. The second is that there is in every case one description that is always apt: and that is the event described in terms of bodily movements.

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

The moral semantics thesis thus makes a claim not about the constitutive elements of legal content, but about truthful redescriptions of it. Specifically, it holds that the content of law can truthfully re-described as a moral directive (or authorization as the case may be). Of course, we have to reach the question of what warrants the redescription when it is warranted, and how we are to represent the legal statements so that they can accommodate both the cases in which the redescription is warranted and

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10 This important insight is owed to Scott Shapiro who also suggested the analogy with Davidson on actions as a way of thinking about the underlying thought. Much of the discussion below has been influenced by Shapiro’s idea that we should think about the moral semantics thesis as a claim about when a certain kind of re-description is warranted. For the original articulation of this idea see, Scott Shapiro, Legality, Chapters 7-8 (forthcoming). In addition, Legality, articulates Shapiro’s distinctive and highly original and important ‘Planning Theory of Law.’ Chapters 7-8 set out the basic building blocks of the theory and explain the relationship of what I am calling the moral semantics claim to the idea of laws as plans.
those in which it is not. But first, let’s return to my claim that the legal positivist cannot really do without the moral semantics claim.

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

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

The moral semantics claim is an integral part of the answer to the second of these questions. By attaching the property legality/illegality to a proposition expressing a directive that lacks a moral vector, the law purports to create a moral reason for acting. The mechanism through which it accomplishes this is by warranting a redescriptions of the content as a moral requirement or authorization.

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

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

V. Understanding Legality as a Property

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

A. Two problems

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

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

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

B. Analyzing legal statements

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

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

We come now to a different account, one which is consistent with positivism but which lacks the resources to represent misfires. Again, begin with the expression, ‘mail fraud is not to be done.’ The idea here is that if there is a legal rule making mail fraud illegal, then that fact alone warrants re-describing the content of the law as (something like) mail fraud is morally prohibited or morally wrong.

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

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

This way of thinking also allows us to capture Raz’s extremely important notion of the detached point of view. Many times when we make assertions about what the law requires we are doing so from a detached point of view: we are in effect reporting what redescriptions from the law’s point of view attaching the property of legality to propositional content warrants. Other times, for example, as legal officials, assertions about what the law requires are made from the law’s point of view. These are not detached reports so much as they are internal statements made from the law’s point of view.

In other words, sentences of the form, “It is the law in C that J” can be interpreted from either the detached or committed points of view. From the detached point of view they are claims that as the law sees it there is a moral duty to J. From the committed point of view they can be interpreted as the claim that there is a moral duty to J. One way of reading Hart’s account of law is that it cannot be ‘detached points of view all the way down.’ There is no law unless there are some officials who take the committed point of view at least with regard to certain legal statements – in particular, those that describe the criteria by which judges are to determine the sources of legal content.