6 Robust Normativity, Morality, and Legal Positivism
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I. Introduction

Lots of possible actions have a determinate legal status, relative to the law of a given jurisdiction. For example, suppose an American citizen is considering whether to pay taxes to the American federal government on the income she has earned this year from teaching physics at a university in California. Is she legally obligated to do so? Or suppose a French citizen is considering killing her neighbors because she doesn't like them. Is she legally permitted to do so? Or suppose a Greek citizen is considering selling her car to a friend in exchange for money. Is she legally empowered to do so? For each of these questions, it is hard to deny that the law of the relevant jurisdiction—e.g., contemporary American law, French law, Greek

law, etc.—yields a determinate answer. (Yes, no, and yes, respectively).[1] Of course, for many possible actions, the law might be silent on the legal status of that action, or at least not yield a determinate answer on it. The important point is that the law isn't silent or indeterminate about *all* questions about the status of all possible actions. Rather, the law—at least the law of many contemporary legal systems (e.g., American law, French law, Greek law, etc.)—*does* take a stand on the legal status of some possible actions, and moreover one that (in at least some of those cases) yields a determinate answer about the legal status of those actions. Indeed, it often takes such stand on a great many such possible actions.

This has something to do with *the law* itself being a certain determinate way in a given jurisdiction, at a given time. Indeed, it might be that *what it is* for the law to be a determinate way in a given jurisdiction is simply for it to be the case that, relative to the law of that jurisdiction, lots of possible actions have a determinate legal status—e.g., the action is permitted, required, etc.

Everything I have said thus far is relatively uncontroversial in contemporary legal philosophy.[2] Things get *much* more controversial when we ask questions about *in virtue of what* the law is what it is (in a given jurisdiction, at a given time). The basic issue here can be glossed as follows. The law being *this* way, rather than *that* way, in a given jurisdiction (at a given time) isn't a metaphysically fundamental fact, for which there is no further explanation. Rather, any time that the law is one way or another in a given jurisdiction, there is a further explanation of that fact. The relevant notion of "explanation" that I want to target here isn't epistemic. Nor is it causal. It is rather *constitutive* or *metaphysical*. Roughly, it is the kind of explanation that is invoked in the following (purported) explanations: (1) a glass is fragile *in virtue of* being disposed to break in such-and-such conditions, (2) an action is morally right *because* it promotes the greatest expected utility among the possible actions, and (3) a movie is funny *in virtue of* our dispositions to respond to it in certain ways, under certain conditions. For my purposes here, I will use the terminology of *ground* to refer to the basic kind of constitutive explanatory relation here, which (roughly) is a kind of asymmetric metaphysical dependence. On my way of proceeding, to say that "X grounds Y" means "X explains Y" (in the constitutive sense of "explain" I want to target here).[3] The basic question on the table concerns the *grounds* of facts about what the law is in a given jurisdiction at a given time (henceforth, *facts about the content of the law*, or, more simply, the *legal facts*).

Some legal philosophers claim that, necessarily, legal facts are ultimately grounded solely in *social facts* (roughly, descriptive facts of the kind that are the purview of the social sciences), and not *moral facts* (roughly, normative and evaluative facts of the kind that are the

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[1] If you want to deny that the law does yield a determinate answer to these *particular* questions (fleshed out in appropriate detail), then I invite you to substitute in your own favorite examples here.

[2] This is not to say that no one would challenge what I have said thus far. For example, some might want to challenge the thesis that the law is *ever* determinate, or at least in any actual legal systems. More radically, some might want to challenge the thesis that the law involves norms (or standards), even in some minimal sense of 'norm'. I will briefly return to this later in the chapter.

[3] For a good overview of the idea of ground, see (Rosen 2010) and (Trogdon 2013). It should be noted that there might in fact be multiple different grounding relations (e.g., "metaphysical" grounding versus "normative" grounding), as argued for by (Fine 2012) and argued against by (Berker 2018). This is one of the many issues about grounding that I am glossing over in this initial setup.

purview of moral and political philosophy). Drawing on one recently influential way of thinking about the positivism/antipositivism dispute in legal philosophy, we can call that thesis *legal positivism*. In turn, we can use the label *legal antipositivism* for the thesis that, necessarily, legal facts are ultimately grounded in both social facts and moral facts.[4] These are competing views not about what law should be, but what about what law *is*. Moreover, they are views about *law*, rather than our *thought and talk* about it.[5]

It is worth emphasizing a few basic points about these formulations of positivism and antipositivism at the start. First, the basic positivist idea is that social facts are relevant *not* because of the obtaining of moral facts. They matter simply because of *what law is*. The parallel point is true for why antipositivists think that moral facts are amongst the grounds of law. (Hence, the use of "necessarily" at the start of the formulation of legal positivism, as with antipositivism). Second, legal positivism does *not* mean that moral facts are never amongst the grounds of legal facts. According to *inclusive* legal positivism, moral facts might be amongst the grounds of legal facts, in some jurisdictions, *because of* the obtaining of contingent social facts. (This is in contrast to *exclusive* legal positivism, which denies that moral facts are ever amongst the grounds of legal facts). The inclusive legal positivist thinks that moral facts *can* be amongst the grounds of the legal facts.[6] But it is still the social facts that "ultimately" matter here, and that have the relevant kind of (relative) explanatory priority.[7] Or at least so the basic thought goes. The use of 'ultimately' in the formulation of legal positivism is meant to make room for this idea of inclusive legal positivism. It does *not* mean that there are no further grounds of the (purportedly) relevant social facts or of the (purportedly) relevant moral facts. At the end of the day, it might well be that using the term 'ultimately' here isn't the best choice. And there are, of course, further issues here to be unpacked about how exactly to understand the nature of inclusive legal positivism. I will return to some of these issues later in the chapter. But, for now, hopefully what I have said is enough to get the basic picture of what positivism and antipositivism are each committed to on the table.

To help get the distinction between positivism and antipositivism in focus, consider the following two different views: (1) necessarily, the legal facts are ultimately grounded solely in descriptive facts about what *shared plans* a group of agents has; and (2) necessarily, the legal facts are ultimately grounded in facts about what best *morally justifies* a set of social practices. The first view (a version of which Scott Shapiro argues for in *Legality*) is an example of a positivist view.[8] The second view (a version of which Ronald Dworkin argues for in *Law's Empire*) is an example of an antipositivist view.[9]

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[4] This way of defining positivism and antipositivism stems from (Greenberg 2006b), (Rosen 2010), (Shapiro 2011), and (Plunkett 2012). There are many other ways in which the dispute has been formulated. For example, see (Gardner 2001) for another influential way of thinking about the dispute. See (Plunkett 2013a) for discussion of how this way of thinking about legal positivism relates to the way I am discussing it here, as an issue about what grounds what.

[5] I take this debate over positivism to be a "metaphysical" debate. But if you don't like the label 'metaphysical' here, you can replace it with 'object-level'. What I want to highlight is this: the issue is about *law* and not about our thought and talk about it.

[6] See (Waluchow 1994) for a helpful overview and defense of inclusive legal positivism.

[7] See (Shapiro 2011, ch. 9).

[8] (Shapiro 2011).

[9] (Dworkin 1986).

There are well-known motivations and arguments on both sides of this debate. For example, positivists often emphasize the fact that there can be morally bad laws, and, indeed, morally bad legal systems as a whole. At the same time, positivists often emphasize that *all* legal facts seem to be directly under human control, in a way that at least many moral facts are not (e.g., the fundamental moral facts). Positivists often claim to be able to better explain these things than antipositivists. On the opposing side of this, antipositivists often point to the normative significance we give to the law in moral and political thought; a significance that seems different than the kind we give to the rules of social organizations that merely happen to have social power. And they also often point to facts about on-the-ground legal argumentation, in which lawyers and judges seem to freely cite moral facts as justifications for legal opinions about what the law is (and not just what it morally should be). Antipositivists often claim to be able to better explain these things than positivists. (Whether or not the above motivations and arguments are *good* ones is, of course, part of the substantive debate in legal philosophy).

It is not clear that the dispute over legal positivism is best understood as a dispute over what grounds what. For example: the core issue might well be about *real definition* (roughly, about what law *is*) or about *essence* (roughly, about what lies in the nature of law).[10] However, for the purposes of this chapter, I want to focus on the debate over positivism, *understood as* a debate about what grounds what. I want to discuss the following question: Once we agree to focus on this issue of grounding, what are some of the important dividing lines, moving parts, and questions we should pay attention to? And how can this help us better understand, and make progress on, the debate over legal positivism?

I break up my discussion in this chapter into two main parts. In the first part, I argue that, in many contexts when discussing "legal positivism", we should shift our focus from *moral* facts to *robustly normative* facts. This is because, in many contexts, this is really what is driving the debate. I understand *robust normativity* to be the most authoritative kind of normativity that we appeal to in our thinking. It is the kind of normativity we (at least prima facie) seem to appeal to when we make claims about what one *really* should do, think, or feel, all-things-considered. This is in contrast to thinner, more formal notions of normativity, such as the normativity involved in the rules of chess or standards of fashion. (I will say more about this distinction below.)

In the second part, I explore another issue about legal positivism and robust normativity. It concerns the kinds of arguments that legal philosophers give for the (purported) truth of legal positivism. The basic issue is whether (purportedly) robustly normative facts are appealed to as premises in those arguments or not. (A closely connected issue that I will discuss is whether (purportedly) normative facts that bear one or more important *connections* to robustly normative facts are appealed to in premises to those arguments.) In some arguments

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[10] For example: perhaps legal positivism is best understood (at least partly) as a thesis about the real definition of law. One proposal here would be this: legal positivism is the thesis that one can give a real definition of law in fully nonmoral terms. Real definition and grounding are arguably closely connected topics. For example: facts about the real definition of X might well entail facts about what grounds certain facts (including, importantly, those that we might think are intuitively labeled as the "X facts"). See Gideon Rosen's discussion of the "Grounding-Definition Link" in (Rosen 2015). But that doesn't mean that debates about real definition *just are* debates over what grounds what. See (Rosen 2015) for further discussion on this point.

for positivism (including, I argue, the best way of developing Scott Shapiro's arguments for positivism in *Legality*), such premises do *not* show up in the argument. But I argue that on some key arguments for positivism (including, perhaps, one of Joseph Raz's main arguments for it), such premises *do* show up in the argument. This dividing line raises a host of interesting questions—including, importantly, about whether such arguments really should be thought of as arguments for *positivism* at all. More generally, I argue that thinking about this dividing line helps us better situate the positivist/antipositivist dispute, better understand the space of views in legal philosophy (both actual and possible positions), and better evaluate those views. Moreover, as I emphasize in the conclusion, thinking about it can also help us better diagnose points of agreement and disagreement in legal philosophy, thereby helping us avoid merely verbal disputes.

II. Morality and Robust Normativity

For many of our purposes, the definitions of 'legal positivism' and 'legal antipositivism' that I started with are sufficient. This in the following respect: these definitions are a helpful way to regiment terminology, for the purposes of given agents, in a given context. Such regimentation can be helpful in a context insofar as it helps philosophers in that context make progress within inquiry, given the questions they care about and given their epistemic aims. However, these definitions do *not* always provide us with the tools we need in legal philosophy, *even if* we want to hold fixed that positivism and antipositivism are theories about the ultimate grounds of legal facts.

The main issue I want to focus on here concerns the appeal to "moral facts". Consider the following debate about morality. Some philosophers accept what Stephen Darwall calls *morality/reasons internalism*.[11] (This thesis is also sometimes called a version of "moral rationalism"). Darwall characterizes morality/reasons internalism as follows: "if S morally ought to do *A,* then necessarily there is reason for S to do *A* consisting either in the fact that S morally ought so to act, or in considerations that ground that fact".[12] The core idea is that the demands of morality are necessarily *reason-providing*. The meaning of 'reason' here is meant to pick out the strongest, most normatively loaded sense of "normative reason" we have. In short, the idea is that morality necessarily provides us with *genuine* normative reasons for action, where these are understood as facts that genuinely *count in favor of* certain actions. Genuine normative reasons do not count in favor of simply what you "morally should" do. Rather, they count in favor of what you *really* should do, *full stop* or *all-things-considered. Morality/reasons externalism* is the denial of morality/reasons internalism. It is the claim that it is a *contingent* matter whether morality provides such normative reasons or not. A morality/reasons externalist might hold that morality provides such normative reasons for some people in the actual world, but not all of them. Or she might even hold that morality provides such normative reasons for *everyone* in the actual world, but not certain agents in other possible worlds. The thought, in rough terms, is that a connection to *genuine* normative reasons for action is

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[11] (Darwall 1997),

[12] (Darwall 1997, 306). For connected discussion, see (Darwall 2017).

not internal to the nature of morality as such, any more than it is internal to other systems of norms (e.g., the standards of etiquette or the rules of basketball).[13]

This debate over morality/reasons internalism suggests the following. Even if we are confident that morality/reasons externalism is false (as many legal philosophers no doubt are), the fact that many philosophers are drawn to morality/reasons externalism helps bring out an important distinction. On the one hand, there is something along the lines of *genuine* normative reasons for action; roughly, things that contribute to whether an agent *really* should perform an action, all-things-considered. On the other hand, there is the idea of a system that is worth calling a "moral" one. These two things might be necessarily linked, in the way that morality/reasons internalism holds. Moreover, it might even be true that this sort of link is metaphysically necessary, given the nature of morality as such. Or perhaps this link is supported in some way at the *conceptual* level, e.g., given truths about the concept MO-RALITY.[14] But, even if morality/reasons internalism is true, it might well be that there are additional features of morality that aren't just about the connection that morality/reasons internalism is concerned with, and that help define what morality as such *is*.

What might those features be? There are *many* different theories on offer in the philosophical literature. Here are a few them worth flagging, to appreciate the range of views on offer. First, maybe morality is distinctive in part because of the *content* of the norms (or values) at issue. For example: perhaps the content of the norms (or values) at issue concern certain kinds of conduct.[15] Second, perhaps morality is distinctive in part because it involves a distinctively impersonal "moral point of view".[16] Third, maybe morality has to do with the purported *grounds* of the norms (or values) at issue; e.g., that these are norms that we could justify to others under certain conditions, or which people, in certain conditions, could not reasonably reject.[17] Fourth, maybe morality purports to provide categorical, mind-independent reasons in a particular way, which helps to (at least partially) set it apart from other normative systems.[18] Fifth, maybe morality involves issues about the warrant of distinctive emotions (such as blame and guilt).[19] Sixth, maybe morality involves distinctive kinds of inter-personal demands, such that it involves *second-personal* reasons of a certain sort.[20]

Morality/reasons externalists can (and often do) also grant that some of these things are necessary features of *morality* as such. Indeed, they might grant that they are truths not just about morality, but also truths about what we (or at least some of us) *mean* when we use the term 'morality' or think thoughts using the concept MORALITY. After all, externalists need

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[13] For some examples of views that accept morality/reasons internalism, see (Korsgaard 1996), (Smith 1994), (Darwall 2006), and (Markovits 2014). For some examples of views that accept morality/reasons externalism, see (Railton 1986), (Boyd 1997), (Foot 1972), and (Brink 1989).

[14] In this chapter, I use small caps to designate concepts. Single quotation marks are used strictly to mention linguistic items. Double quotation marks are used for a variety of tasks including quoting others' words, scare quotes, and mixes of use and mention.

[15] See (Smith 1994), (Jackson 1998), and (Foot 1978) for this kind of proposal.

[16] See (Railton 2003).

[17] See (Scanlon 1998).

[18] See (Williams 1985) and (Finlay 2014).

[19] See (Gibbard 1990).

[20] See (Darwall 2006).

not deny that morality exists, or that it is a distinctive "normative system" (or "normative schema") in some sense.[21] Rather, they just deny something about its intrinsic importance for settling what agents really should do, all-things-considered.[22] The same might be true of someone who thinks that there are normative facts about what agents really should do, but who denies that morality even *contingently* provides us with weighty normative reasons in the actual world. This kind of "moral skeptic" might grant that some of these above things are necessary features of morality as such—as, indeed, many moral skeptics of this sort have (e.g., Nietzsche).[23] The point is just that not everyone interested in "morality" will agree on the idea that it has necessary or even significant normative import for agents like us, in terms of settling what we *really* should do.

In light of this, we then need to ask the following: When we as legal philosophers use the term 'morality' in the context of arguments about *legal positivism*, what really matters most to us? Are we concerned about something along the lines of *real* or *genuine* normative reasons for action (which many, though not all, think morality necessarily provides)? Or are we concerned about some of the other features I glossed above, which many—though, again, not all—think are features of morality? Or are we concerned about both things at once? Here is a conjecture: different legal philosophers involved in the contemporary debate over legal positivism care more about some of these things than others. One reason to take this idea seriously is that people in *general*, including those in *ethics* and *moral philosophy*, seem to have pretty different things in mind when they use the term 'morality', or at least strikingly different theories about morality. These philosophers are not inventing their proposals out of thin air. Each of them draws on important strands of usage of the term 'morality' in our social/historical context, and highlights properties that many closely associate with morality (regardless of whether they take those properties to be *necessary* or *essential* features of it).[24]

To bring this out, consider the following thesis: necessarily, legal facts are ultimately partly grounded in moral facts (in addition to social facts). Without knowing anything more about what moral facts are like, would *all* contemporary legal antipositivists think establishing this thesis would really vindicate their core idea, and see the establishment of it as a victory for their side of the debate over positivism? I suspect that at least many of them would *not*. Similarly, I suspect that many contemporary legal positivists would not see the establishment of this thesis as a defeat for their side of the debate. Rather, I think, many would think the following crucial questions remains: First, are the legal facts ultimately partly grounded in facts about *genuine* normative reasons for action or facts about what agents *really* should do, all-things-considered? Second, even if they are not, are the legal facts ultimately partly grounded in facts that *bear some important connection* to facts about *genuine* normative reasons for action or facts about what agents *really* should do, all-things-considered? The idea

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[21] The idea of "schema" is meant to indicate that the collection of norms might not be fully *systematic* in some ways, and might be tied together in loose ways. For connected discussion of "normative schemas" versus "normative systems", see (Railton 2019).

[22] If morality provided *genuine* normative reasons for action in the sense we have in mind here, then it would follow that it had such import. This is because such reasons necessarily contribute to whether or not an agent *really* should perform an action, all-things-considered.

[23] See (Nietzsche 1887/1994). For connected discussion on this point, see (Williams 1985).

[24] For connected discussion, see (McPherson and Plunkett Forthcoming).

of "some important connection" will need to then be specified in some further way. One possibility here is this: the normative facts under discussion play a major role in grounding the facts about what agents *really* should do, all-things-considered. (And perhaps necessarily so). Putting sociological questions about the current dispositions of current legal philosophers aside, the more important point is this: I think these are crucial questions to ask about the grounds of legal facts.

Should these questions *replace* our original question about the ultimate grounds of legal facts, which was formulated in terms of "moral facts"? Not necessarily. For example, we might care about the relationship between the legal facts and the moral facts *not* because of anything having to do with the (purported) normative significance of moral facts, but rather because of other (purported) similarities between law and morality. For example, consider the following thought: both law and morality seem to regulate a wide swath of human action, both seem to claim some kind of authority not claimed by all systems of norms (or values), and both seem to involve a certain family of concepts— e.g., having to do with rights, duties, and obligations—that (at least prima facie) don't seem to show up across all normative systems (or schemas) in the same way, or to the same extent. These kinds of (purported) similarities suggest that, in many contexts, we might really be *more* interested in the (purported) features of morality that the morality/reasons internalist, the morality/reasons externalist, and the moral skeptic can *agree to*. We might be wondering about whether the law is grounded in moral facts, when morality is understood in *that* sort of way (one that is neutral on core issues about the normative significance of morality as such).

To further this line of thought, consider the following. In some cases, people use the term 'morality' to refer to facts about the conventions and practices of a given community for regulating key parts of conduct, including through cultural attitudes. We might call the target here the *mores* of a given community, or its *conventional morality*. Of course, in other cases (as evidenced in much of the discussion over morality/reasons internalism), it seems quite clear that when people use the term 'morality' they want to refer to something that is distinct from the "conventional morality" of a given society. Rather, they aim to refer to something distinct that can (and *should*) be used to critically assess different "conventional moralities", and to do so because it is normatively privileged in a key way. Most recent legal philosophers use the term 'morality' to refer to this latter thing (which we might call "critical morality"), rather than conventional morality.[25] But this isn't always the case. [26] Moreover, philosophers who work on morality (in the "critical" sense) *disagree* about its relation to mores. Certain kinds of cultural relativists, for example, might draw them *very* closely together.[27] We might well want to know about the relation between law and *mores,* just as much as we want to know about the relation between law and *critical morality* (which, as I have emphasized, might be something that provides genuine normative reasons for action or not).[28] Historically, both of

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[25] For critical discussion here, which brings "conventional" and "critical" morality much closer together than I am presenting things here, see (Woods 2018). For connected discussion, see also (Walden 2017).

[26] See (Hart 1961/2012) for connected discussion about the relevance of this distinction between "conventional" and "critical" morality to general jurisprudence.

[27] See, for example, (Harman 1996). For discussion of possible close connections here, see (Walden 2017).

[28] We might, for example, want to know about how the social facts that ground conventional morality relate to those social facts that ground legal facts.

these are questions that legal philosophers have asked about. And, importantly, both of them are ones that might well be (and I think are) *worth* asking about.

Based on this, I want to make the following methodological suggestion. In many contexts in legal philosophy, we would often do best *not* just to use the term 'morality' but to be *more specific* about which purported feature(s) of morality we care about. In short: Which of the various features that different philosophers associate with "morality" are the ones we want to be focusing on in the context at hand? We would often be best off to focus on those things, and then talk about them *directly*. In many contexts, we might well want to ask whether the legal facts are grounded in the *moral facts,* where, other than specifying that we are talking about facts of "critical morality" and not "conventional morality", we just leave it completely open what exactly the moral facts are like. (Roughly, we just let the chips fall where they may in moral philosophy on this topic.) But we might well have something more specific (purported) feature of morality in mind, based on a particular view about what morality is like: e.g., that morality *necessarily* provides genuine normative reasons for action, or that it provides *categorical* as opposed to *hypothetical* reasons for action, or that its content is *not* grounded in any facts about "conventional morality". If so, we should just talk about *that feature* (or *these features*) directly, and make that the focus of our debate.

With that in mind, let's return to the idea of what an agent *really* should do, all-things-considered. This use of 'really' here is meant to bring in the idea of a distinctive kind of normative authority. What exactly does that idea amount to? It would be great to have an answer to that question. But it is also well beyond the scope of this chapter to attempt anything like a worked-out answer to it. For my purposes here, what I want to do is simply flag a contrast between two kinds of normativity: a contrast that, I claim, is at the core of much of the debate over legal positivism. The contrast is between (A) the most authoritative notion of normativity we have (roughly, the kind we seem to often invoke when we talk about "genuine normative reasons for action" in ethics, or "genuine normative reasons for belief" in epistemology) and (B) the generic idea of a standard that someone (or something) can fail to conform to, and which (in many cases) can thus be used as a guide for behavior and action. Let's put this in terms of a contrast between *robust* normativity (or, equivalently *authoritative* normativity) and *formal* normativity (or, equivalently, *generic* normativity).[29]

At least prima facie, it seems that formal normativity is plentiful in the world. The rules of board games have formal normativity. So do rules of etiquette, and standards of fashion. But most of us think that there is an important difference between failing to conform to standards of fashion and failing to conform to the all-things-considered ethical norms. Those latter norms are meant to be (somehow) more authoritative, *as a normative matter*. We can mark that by saying that they are meant to be *robustly normative*. Robust normativity might, of course, be a chimera in the end: perhaps there is just no such thing, or perhaps we can't even unpack the metaphors here to make sense of it as a coherent concept.[30] These are

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[29] My terminology here draws from (McPherson 2011) and (McPherson 2018). McPherson's distinction here draws from (Copp 2005). For further discussion of this distinction within the philosophy of law (including how it shows up in theories of legal thought and talk, and not just in legal metaphysics), see (Plunkett and Shapiro 2017). See also (McPherson and Plunkett 2017).

[30] For skeptical discussion here, see (Tiffany 2007), (Copp 1997), and (Baker 2018). For some recent defenses, see (McPherson 2018) and (Wodak 2018).

important challenges. For our purposes here, what matters is the broad idea of a contrast between formal and robust normativity, which seems to show up in much of our *thinking* about normativity (even if the contrast can't be vindicated in the end). I take it that this gives us an important contrast to begin to work with, and clear enough in broad outlines for my limited purposes at hand.

With the distinction between robust and formal normativity on the table, let's return to the debate over the grounds of legal facts. It is generally common ground that the law, whatever else it is, involves standards that have *at least* formal normativity (insofar as anything does). Indeed, I find it difficult to make sense of exactly how one could really deny this thesis, without changing the subject from talking about *the law*. After all, whatever else it is, the law seems something that we can act in accordance with (e.g., by *conforming to* or *following* the law) or not (e.g., by *breaking* the law). That entails that the law involves *at least* formal normativity.[31]

A more controversial, and more crucial, dividing line in theories of law isn't about formal normativity. It is about whether the law involves robust normativity in some important way. There are various ways that one might propose that it does. For example, one might think that a parallel of morality/reasons internalism is true (call it "legality-reasons internalism" or "legal rationalism"). That thesis faces obvious important challenges, including, for example, the existence of *many* bad laws in *many* legal systems that agents don't have genuine normative reasons to follow (even if they are in the group of agents the law is meant to apply to).[32] But, for now, we can put discussion about this thesis to the side. For our purposes here, the more important kind of connection to robust normativity concerns the *grounds* of legal facts. Consider here the work of Ronald Dworkin and Mark Greenberg. They think that the facts that ultimately ground legal facts are not just ones worth calling "moral", but facts about *what really is valuable*. This suggests that they think that legal facts are ultimately grounded in robustly normative facts—or at least facts that bear an important, fundamental connection to such facts.[33]

For our purposes here, we can think of the concept of *real normative reasons* (for an action, for a belief, for emotions, etc.) as picking out something that contributes to what you *authoritatively* ought to do. (And, moreover, is picked out *under that description*.) It is thus one of a number of connected notions—including, for example, the idea of *real* value, that

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[31] This is not to say that there aren't possible dissenters on this point. For example, Scott Hershovitz argues that it is a mistake to think that "our legal practices make something—the content of the law" (Hershovitz 2015, 1199). He also argues that it is a mistake to think that "there is a body of "existing law", which encompasses the entire set of legal rights, obligations, privileges, and powers in force in a legal system at a given time". (Hershovitz 2015, 1200). Perhaps then, Hershovitz should count as a dissenter. But, if he is, then I think there is good reason to think he thereby accepts a form of *nihilism* or *error theory* about law. Moreover, it is not clear to me exactly how to unpack Hershovitz's ideas. For instance, some of what Hershovitz writes seems ultimately *not* to be about an *object-level* (or "metaphysical") issue about *law* at all, but rather about a *representational-level* issue about our thought and talk. For example, he writes: "To be clear, I do not object to talking about what the law requires. What I object to is the supposition that there is a single entity called the law to which all such talk refers". (Hershovitz 2015, 1202). If that is right, Herhsovitz's core point might well be a thesis about language and reference, and not about law as such.

[32] For connected discussion about the problems with legality-reasons internalism, see (Enoch 2011).

[33] See (Dworkin 2011) and (Greenberg 2014).

can be seen as part of a connected cluster of ideas involving robust normativity. So, with that in mind, we can put a thought I proposed earlier in a new way, now in terms of the idea of *robust normativity* and not just in terms of the idea of real normative reasons for action. The thought is this. One issue that the positivism/antipositivism debate brings up is whether legal facts are ultimately grounded partly in *robustly normative* facts. Second, on a related front, we can ask whether legal facts are grounded in facts that (even if not robustly normative themselves) bear an important, fundamental connection to such facts; a connection of a sort lacked by many *merely formal* normative facts. (For example, perhaps a connection that is parallel to that suggested by morality/reasons internalism.)[34]

I am inclined to think that, for many of our purposes, in many contexts, we would be best off regimenting our use of the labels 'positivism' and 'antipositivism' to refer to competing views about one of these issues about the grounds of law and robust normativity, thus not using the term 'morality' at all in defining them.[35] But I don't here want to argue at length for that proposal about our use of the labels going forward. Moreover, given the diversity of epistemic aims we have in different contexts, I doubt there is a *single* best way to regiment use here across *all* contexts in legal philosophy where we currently use these labels of 'positivism' and 'antipositivism'.[36] Rather, what matters most to me here is simply that we have clearly identified a range of different issues that matter for discussion about the metaphysics of law.

We can also here note that much of my argument about "morality" above might well also apply to "robust normativity". In other work, McPherson and I have suggested that, in the end, there might not be a single thing that all philosophers are after in discussing "robust" or "authoritative" normativity.[37] Rather, there might be a cluster of different features that we tend to group together, but that are really distinct. Some of these might have to do with the normative import or authority of facts themselves, as I have gestured to above. But on that topic, there might in fact be a range of relevant features here we discuss under the idea of "robust normativity". Other features might have to do with thought and talk (e.g., the kinds of speaker-endorsement that expressivists are likely to take as markers of engaging in robustly normative thought and talk). It is not clear that metaethicists (or metanormative theorists) all target the same thing—or even if they are all talking about something at the object-level rather than the level of thought and talk—when they talk about "normativity", in the robust sense. So, just as with talk about "morality", those of us involved in debates about the metaphysics of law would often do well to be more specific about what exactly we have in mind with "robust normativity", insofar as we in fact have something more specific in mind (which we will often not).

There are further issues we can and should ask about the definitions of 'legal positivism' and 'legal antipositivism' that I started with. Let me here briefly mention a few of them, which interact with my discussion of robust normativity in interesting ways. One important question

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[34] This resonates with Greenberg's own way of thinking about what is really crucial in the positivism/ antipositivism debate. This is suggested by his use of "value facts" and "moral facts" as interchangeable terms for his purposes. See (Greenberg 2006b) and (Greenberg 2006a).

[35] For further discussion of this suggestion, see (Plunkett and Shapiro 2017).

[36] In this regard, I think the case about our use of the term "legal positivism" is on all fours with many terms we use in philosophy.

[37] See (McPherson and Plunkett 2017). For connected discussion, see (Finlay 2019) and (Silk 2019).

is what exactly counts under the heading of "social facts". For example, does it include all descriptive facts, or just some subset of them? And do facts about the meaning of texts, or about mental content count as "descriptive" ones here or not, given that many philosophers accept some version of the claim that "meaning is normative"? Legal philosophers tend to go for a capacious view here, where pretty much anything other than moral facts (or whatever the relevant alternative category here really is—e.g., robustly normative facts) gets put into the bucket of "social facts". That might be the right thing to do in many contexts. But maybe doing so obscures important dividing lines here, which will matter to us in some of our inquiries in legal philosophy.[38] And, in any case, it is not at all clear that this capacious way of using 'social facts' is a helpful way to talk about the facts that we are really concerned with here, whatever those turn out to be. There are various relevant things we could mean by 'social facts' once we aim to get more fine-grained about it. For example, perhaps we are after facts about practices that are specifically *social* in nature, where that is understood as (in some sense) set apart from other descriptive facts (e.g., biological facts, or facts about the meaning of texts).[39] Thus, the question of what counts as a "social fact" might well involve many similar complications to the question of what counts as a "moral fact" that I have discussed above. Thus, in many contexts, we will be best off by being more precise about which purported features of "social facts" we have in mind—e.g., that they are *not* robustly normative facts, or that they somehow are grounded in descriptive facts about the shared behaviors or attitudes of agents, etc.

Another crucial question is what we mean by the phrase 'ultimate grounds'. At the start of this chapter, I briefly discussed what legal philosophers have roughly had in mind here. But there are still different ways of unpacking the core idea. One thing we might want to focus on is this: take the social facts and moral facts, *whatever* turns out to ground each of those things, and then state this is the level at which we start doing this localized part of metaphysics.[40] Or we might have something different in mind, where we are concerned with what facts do or don't show up in a more fundamental explanatory story of the legal facts (where facts about what grounds moral facts and social facts, respectively, will matter a lot).[41] The best way to proceed is not entirely clear.

How we proceed here in terms of our discussion of "ultimate grounds" will intersect with the following thesis: moral facts are fully grounded in social facts. This turns out to be true on certain views in moral philosophy, such as, for example, views that combine the following two theses: (1) Humeanism about normative reasons for action, according to which an agent A's normative reasons for action are fully explained by facts about A's contingent psychological states (e.g., her desires); and (2) the thesis that morality can be explained in terms of

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[38] For example: What if someone thinks that "meaning is normative" not only in the formal sense of "normative", but also in some more robust sense? (See, for example, (Gibbard 2012)). I think such a view is implausible. But, if it were right, it would lead to a view on which certain facts about the content of mental states, or the linguistic content of texts or utterances, might well count as "robustly normative", in a way that would depart from how those facts are normally thought of in the debates over positivism.

[39] For a discussion of the nature of the "social" as such, which suggests something along these lines, see (Haslanger 2016). For connected discussion, see (Epstein 2015).

[40] See (Shapiro 2011).

[41] See (Greenberg 2006b) and (Greenberg 2006a).

reasons for action (e.g., as concerning a subset of those reasons).[42] Suppose the moral facts are fully grounded in social facts, and legal facts are ultimately partly grounded in moral facts. Would that be a victory for positivism, or for antipositivism? One way to go here would be to claim that what the positivist and antipositivist both care about are the social facts *other* than the *specific set* of them that grounds the moral facts (insofar as any do). As I have argued elsewhere, I think that is a good way to go for many of our purposes.[43] But notice how this loops back into my earlier discussion of what we care about when talking about "morality". If the features we are interested in are *not* morality's (purported) ties to robust normativity, perhaps this isn't what we should say here about this possibility of the moral facts being fully grounded in the social facts. Or, more precisely: different philosophers will likely care about different things on this front, depending on what was driving them to engage in the debate over positivism in the first place. Our goal should be to zero in on the issues that are philosophically interesting and significant, and then talk about those issues directly.

If my above thoughts in this section are on the right track, one of the core lessons is this: there are *multiple different* philosophically interesting dividing lines in theories about what grounds the legal facts. For many of our purposes in doing legal philosophy, it might be okay—relative to our epistemic aims at hand—to not worry about all of these dividing lines, and just focus on the very broad dividing line with which I started, when I introduced the initial definitions of 'legal positivism' and 'legal antipositivism'. But for our purposes in many contexts, we will often need to pull these different issues apart, and then focus on the *particular* ones that we think matter most.

III. A Role for Robust Normativity in Arguments for Legal Positivism?

For now, let's suppose that we regiment the term 'legal positivism' to mean the following thesis: necessarily, social facts alone (and not robustly normative facts) ultimately ground the legal facts. I now want to focus on a new issue about legal positivism and robust normativity. The issue is about arguments for legal positivism that appeal to (purported) robustly normative facts, or at least normative facts that bear an important connection to such facts (of a sort lacked by many normative systems). (For example, the kind of connection that morality/reasons internalists claim morality has.)

For many working in legal philosophy, this idea of appealing to robustly normative facts in arguments for legal positivism might seem to suggest a form of *prescriptive* or *normative* legal positivism. The rough idea of prescriptive legal positivism is that that we *should* create a legal system (or legal systems) in which the law is "positivist". This means roughly, that the law (in *the relevant jurisdictions*) is ultimately determined by social facts alone, and not robustly normative facts.[44] Prescriptive legal positivism is a claim *not* about what law is, but rather about what it should be (either in all cases, or in certain specified circumstances). Thus, it is not really about legal positivism at all, in the sense of "legal positivism" I have been using in this chapter. This is because positivism, as I have been discussing it in this chapter, is a descriptive

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[42] For an example of such a view, see (Schroeder 2007).

[43] See (Plunkett 2012).

[44] See, for example, (Campbell 2004).

claim (rather than a normative one) about what, necessarily, in fact grounds the legal facts. It is a descriptive claim about the grounds of law in all possible legal systems. Prescriptive legal positivism is a thesis about a different topic.

The topic that prescriptive legal positivism *is* about interacts in important ways with the debate over legal positivism (as I am understanding that debate here). For example, consider that for prescriptive legal positivism (understood in the way I am understanding it here) to make sense, it must be *possible* for the law (in a given jurisdiction) to be fully determined by social facts alone. If positivism (as I am understanding it in this chapter) is true, then "prescriptive legal positivism" would be an uninteresting claim, since it would be impossible to have law that wasn't ultimately fully determined by social facts alone (and not robustly normative facts). In order to be interesting, prescriptive legal positivism, as I am understanding it here, must therefore rest on a theory of law of (roughly) the following sort: the nature of law is such that it is possible for the law in a given jurisdiction to be ultimately grounded either in a) a combination of social facts and robustly normative facts *or* b) social facts alone (and not robustly normative facts). Thus, the view is also committed to the following claim: facts about the nature of law (or the essence of law) do not determine whether a) or b) is true. This is incompatible with *both* positivism and antipositivism, as I am understanding those theses here, since they are theses about what kind of facts *necessarily* ground legal facts. Moreover, it is in tension with the way I introduced the discussion of legal positivism at the start of the chapter. As I said earlier in the chapter, the basic positivist idea is that social facts are relevant *not* because of the obtaining of robustly normative facts: they matter simply because of *what law is*. This is not to say that we must throw out the idea of "prescriptive legal positivism" as such, only that it will take care to state it in a way that makes it both coherent and interesting, and that it is likely going to assume a controversial view about the nature of law.[45]

But however prescriptive legal positivism is ultimately best formulated (and whatever the view exactly amounts to), it is uncontroversial that it will need centrally to be about a normative topic about what *should* be the case (perhaps authoritatively should, or perhaps from a "moral point of view", or perhaps some other kind of "should" claim). In contrast, legal positivism, as I am considering it here, isn't making a "should" claim of any sort. What I am interested in is the possibility of an argument that appeals to robustly normative facts in defending *positivism* as such (when understood in the way I am understanding it here), rather than the distinct position of prescriptive positivism. Can positivists coherently make such an argument? And, if they can, *should* they?

On this front, I want to turn to Joseph Raz's main argument in favor of exclusive legal positivism. For our purposes here, we can understand that as the thesis that robustly normative facts are never amongst the grounds of legal facts. The argument that I want to discuss, which

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[45] Another important question about prescriptive legal positivism is this. Suppose the prescriptive legal positivist says (as I think she must) that facts about the nature of law (or, similarly, the essence of law) don't settle whether robustly normative facts are part of the "ultimate grounds" or not, or whether it is social facts alone (and not robustly normative facts). We can then ask: Which facts *do* settle this? If the answer is social facts that are contingently tied (in an appropriate way) to the legal jurisdiction in question, then the view appears to rest on a form of *inclusive* legal positivism. If the answer is robustly normative facts, then the view might turn into a form of antipositivism. The answer might, of course, be neither social facts nor robustly normative facts. But then the question remains: Which *other* facts exactly then do the work? For connected discussion, see (Waldron 2001).

Raz gives in *The Authority of Law*, is directed both against inclusive legal positivists *and* leading forms of antipositivism.[46] Thus, in addition to being an argument for exclusive legal positivism, it also functions as an argument for positivism as such (of one form or another). The point that I want to bring out is that Raz makes *substantive* normative claims about the nature of practical authority in order to defend exclusive legal positivism (in a sense of "substantive claim" I will explain later). Or at least this is one straightforward way of unpacking what Raz is up to. Because of this, I will argue, he can be fruitfully read as developing an argument for positivism that appeals to (purportedly) robustly normative facts in the premises of that argument, or at least to facts that bear an important relationship to such facts (of the kind that morality/ reasons internalists hold that moral facts have, for example). If that is right, it is an interesting (and I think underappreciated) feature of Raz's views on positivism. Moreover, it is a feature that might well mean that we should reject the resulting form of positivism—indeed, potentially reject it as not even a form of positivism at all. It might also mean that we should rethink our understanding of where the action really is in debates over positivism, as well the divide between inclusive and exclusive legal positivists. Or at least so I will argue.

Drawing on the conceptual distinctions I have introduced in the first section, we can reconstruct Raz's main argument for exclusive legal positivism in broad outline as follows.[47] According to Raz, having *practical authority* involves having the ability to create genuine obligations in virtue of one's directives. Having this kind of authority is meant to be conceptually distinct from being an *epistemic* authority (as in when one person knows more about a subject matter than another). For X to have practical authority over Y, Raz claims, it will normally be the case that Y would do better at conforming to her genuine reasons for action (that she already has prior to X's commands) by following X's commands, rather than trying to deliberate herself about the issues at hand. This is what Raz calls "the normal justification thesis".[48] This thesis is tied to Raz's "service conception" of authority, according to which the role of practical authorities is to *serve* their subjects. On Raz's view, they should do so by helping subjects better conform to their genuine normative reasons for action, and thus what they *really* should do (where this use of 'really' is meant to invoke the idea of what I am calling "robust" or "authoritative" normativity).[49]

From the normal justification thesis, it follows that, if an agent X in fact *has* practical authority over Y, then Y should not deliberate herself about what she should do, but rather follow the commands directly. This would be the case, for example, if *the law* in fact had practical authority over its subjects. On Raz's view, however, the law often does *not* have such authority—and, in any case, whether it does or not is a separate normative question, not to be settled by this part of Raz's theory. But—and this is the part where Raz begins to

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[46] (Raz 1979/2002).

[47] The argument I sketch below is a reconstruction of the core argument from (Raz 1994). Note that there are other arguments for exclusive legal positivism that Raz gives that I won't be discussing here.

[48] See (Raz 1985). See (Hershovitz 2011) for a helpful overview of Raz's normal justification thesis, and for Raz's views on authority in general.

[49] Note that, as this discussion of Raz underscores, it is important to conceptually keep separate different ways the terms 'authority' and 'authoritative' are used in this paper. In particular, it is important to keep conceptually distinct (1) the idea of "practical authority", in the Razian sense; and (2) the idea of "authoritative normativity", used in McPherson's sense (where this is equivalent to talking about "robust normativity").

links these claims about practical authority to his views on the nature of law—Raz holds it is part of the nature of law that it *claims* such authority. From this, he thinks it follows that the law must be set up in a way as to make having practical authority *possible*. This possibility would be vitiated, he thinks, if the law instructed agents to deliberate directly about the normative issues at hand (in order to figure out what the law is). Rather, he argues, agents must be able to identify the content of the law *without* engaging in all-things-considered practical reasoning about what to do, or about what they *really* should do (where the "really" here is, again, meant to invoke the idea of robust normativity). This is an epistemological constraint, which Raz thinks supports a particular view of the metaphysics of law: namely, he thinks it supports exclusive legal positivism. This is because, Raz argues, the alternative views (inclusive legal positivism and Dworkinian antipositivism), suggest that the law is (at least sometimes) partly grounded in robustly normative facts. And if that is so, Raz reasons, the epistemology of legal reasoning (i.e., figuring out what the law is) would involve agents engaging in normative reasoning about what they really should do. So, Raz concludes, we have an important reason to think that exclusive legal positivism is correct.

We can flesh this argument out with a bit more detail to highlight the aspect of Raz's argument that I want to discuss. The core of Raz's main argument for exclusive legal positivism can be put as follows:

P1) The law claims practical authority.

P2) Insofar as something claims practical authority, it must be capable of having it.

P3) Law must be capable of having practical authority. (From P1 and P2).

P4) A is capable of having practical authority over B only if:

  a) One can identify the content of A's directives without reference to the considerations on which they are based (e.g., without reference to the genuine normative reasons for and against the directive). (This is sometimes called *the identification condition*.)

  b) The directives must represent an agent's view (e.g., agent A's view) about what B should do. (This is sometimes called the *agency condition*.)

P5) Inclusive legal positivism and Dworkinian antipositivism fail to meet the identification condition and the agency condition. (The same arguably holds true of all other leading forms of antipositivism).

C) Therefore, there is an important reason to favor exclusive legal positivism over inclusive legal positivism and antipositivism.

There is also obviously a lot to ask about at each step of the way in the argument I have sketched. (For example: why accept P2?). My goal here, however, is not to evaluate Raz's overall argument. Rather, the key point is about *the broad kind* of argument he gives for P4. Raz's argument for P4 is explicitly based on the service conception of practical authority, and the normal justification thesis in particular. Importantly, the normal justification thesis and the service conception are, I submit, best read as *substantive* ethical/political views about how we *really* should live, and what sort of social/political institutions we *really* should have. The views, in other words, are substantive views about robustly normative topics. If we think there are robustly normative "facts", then it seems fair to say that they are views about such facts.

To see what I mean by this, distinguish between two different projects. On the one hand, consider the following explanatory project. Take the entirety of actual ethical thought and talk, and what (if anything) it is distinctively about (e.g., perhaps such things as ethical obligations, ethical facts, or ethical properties). We can then ask how to explain how actual ethical thought and talk—and what (if anything) it is distinctively about—fit into reality. (By 'reality' I mean, roughly, something along the lines of the following: the totality of what there is and what is the case.) This explanatory project is what we can call the project of "metaethics" or "metaethical inquiry".[50] The aim of this overarching metaethical project isn't to answer ethical questions (although engaging in it might help do so). Rather, it is a descriptive, hermeneutic project aimed at explaining our actual ethical thought and talk, and what (if anything) it is distinctively about.

Contrast the metaethical project with a project that *explicitly* aims at answering ethical questions, either extensional ones (e.g., "am I ethically required to be a vegetarian?") or explanatory ones (e.g., "what explains why ethically right actions are right?"). Or consider a project that aims to illuminate the nature or essence of important ethical phenomena, facts, properties, etc. Consider, for example, projects that aim to explain what *justice* really is, or what *exploitation* really is, or what *promising* really is. Explaining that sort of thing could be done in the service of trying to complete the broader metaethical project—as, indeed, it often is. But, in many cases, philosophers propose such theses *without* thinking they will be a part of the best overall metaethical theory (or follow directly from it), even if the theses place important constraints on which metaethical theory is correct. Moreover, many theses of these kind, when advanced on their own, are ones that could be embedded in radically different more general metaethical views, or accepted by people who explicitly endorse a rival overall metaethical view. For example: the claim that "the essence of justice is that it concerns issues about fairness in cooperation" could be accepted by someone who is an expressivist about thought and talk of this kind (e.g., ethical thought and talk, or ethical/political thought and talk), or someone who is a non-naturalist realist about it, or someone who is a fictionalist about it.

With these distinctions in mind, let's return now to Raz's service conception of authority. This is a contentious view of authority, which explicitly is developed as an alternative to other well-known theories on the topic in (e.g., consent-based views). It is perhaps unsurprising then that Raz aims to establish this view of practical authority *not* by giving a straightforward descriptive or hermeneutic analysis of our actual ethical (or political) thought and talk. Instead, he argues for it based partly on normative arguments about which ethical/political thoughts are *true* or *correct*.

This feature of Raz's argument is somewhat obscured insofar as Raz presents his relevant views on authority as "conceptual" ones. That might suggest a close tie to the explanatory project of metaethics. But in the final part of "Authority and Justification", Raz claims that his "conceptual" work is deeply intertwined with substantive normative work in moral/political philosophy, and is not merely a form of descriptive conceptual analysis.[51] Regardless of Raz's explicit views here, we can also just focus on the following point: the service conception

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[50] I here draw on (McPherson and Plunkett 2017) and (Plunkett and Shapiro 2017).

[51] (Raz 1985).

is best understood (whatever Raz may or may not say) as a substantive normative view that doesn't follow simply from the correct metaethical theory (whatever that turns out to be), or the correct purely descriptive account of our ethical/political concepts. The same holds for the normal justification thesis. If that is right, it seems like that is a good reason to think these are "substantive views" about normative facts here, in a way that is similar to (for example) how Rawls's views about the nature of justice in *A Theory of Justice* are substantive views about normative facts.[52] And, moreover, the relevant normative facts here (in at least Raz's case) are ones that are most straightforwardly read as *robustly* normative. They are not about what we should do from such-and-such point of view, or about what we have reason to do, relative to some system of norms. Rather, they concern what we *really* or *authoritatively* should do, full stop.

If this is right, it suggests that Raz's argument here for exclusive legal positivism appeals to (purportedly) robustly normative facts. It thus, it seems, appeals to *exactly* the kind of facts that the positivist claims are *not* ultimately part of the grounds of the legal facts. At the same time, the conclusion of Raz's argument is about a *descriptive* topic, in the following sense. The conclusion of this argument is something about what we have normative reason to believe. In that sense, the conclusion of the argument is about something normative. But the idea is that we have normative reason to believe a descriptive theory (about the nature of law), rather than a normative theory (e.g., that law *should* be made in such-and-such way).

Whether I have ultimately put forward the right reading of Raz depends on a number of issues here. These issues include how to best read Raz's understanding of the "conceptual" nature of his claims, how much of the service conception Raz really needs to make his argument work, and how to best understand what relation between a given thesis (e.g., the normal justification thesis) and different projects (e.g., the overarching explanatory project of metaethics versus the substantive project of figuring out what one really should do) is relevant in the current context.[53] So I don't want to claim that I have given anything like a knockdown argument here about how to best read Raz. I certainly have not. However, what is important for me in the end is the *kind* of position this reading of Raz suggests, even if it is ultimately not Raz's own position. With this in mind, putting issues about Raz interpretation aside, we can ask the following: What should we make of that kind of argument (wherein one appeals to (purported) robustly normative facts to support the (purported) truth of legal positivism)? In particular: Even if such arguments fail, do they make sense as *possible* arguments for legal positivism that we should take seriously? And what (if anything) can we gain in our understanding about the debate over legal positivism by thinking about such arguments?

A. A Dividing Line within Arguments for Positivism or Antipositivism

The first thing to note is how this kind of argument *differs* from many arguments for positivism or antipositivism. Paying attention to this difference suggests an important dividing

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[52] (Rawls 1971/1999).

[53] For further discussion of this last issue, see (McPherson and Plunkett 2017). We there argue that different such relations are relevant in different contexts.

line within theories that (purport) to support either positivism or antipositivism.[54] It is worth pausing to note that this is not merely a dividing line in *hypothetical* arguments for positivism (or antipositivism), but arguably brings out an important distinction among existing influential arguments in the debate over positivism.

First, consider arguments that *do* appeal to (purported) robustly normative facts in order to argue for the (purported) truth of legal positivism. On the positivist side, we should note that there are different routes by which someone might end up with this sort of argument, other than the Raz-inspired one I have sketched here. Consider here the debate about whether law should be understood as having a specific kind of *function*, or whether it lacks a necessary function and should instead be understood, rather, in terms of the *means* it uses to carry out its ends. Leslie Green has argued (I think correctly) that this is a crucial debate within legal philosophy.[55] Importantly, both kinds of view might yield the claim that robustly normative facts are appealed to as premises in an argument for legal positivism. For example: one might deny that law necessarily has a certain function, but claim (with Raz) that it necessarily *claims* practical authority. This is a view about the *means* that law has for accomplishing its ends. One can then follow the Razian argument for exclusive legal positivism that I sketched above. Alternatively, one might follow John Finnis and think that law should be understood in terms of the "focal case" of law, and that this "focal case" involves the law promoting the common good of a community. Promoting the common good, Finnis claims, is the proper *function* of law, and having the content of law be based in social facts alone (and not robustly normative facts) helps it achieve this function.[56] Insofar as facts about the common good are (or bear an important link to) robustly normative facts, this yields a potentially different way of getting to the idea that robustly normative facts are premises in a good argument for legal positivism.[57]

Let's now turn to arguments for antipositivism that appeal to (purported) robustly normative facts. Consider Ronald Dworkin's view in *Law's Empire*.[58] Dworkin there argues for (roughly) the following antipositivist view: legal facts are, necessarily, ultimately grounded in facts about what would best justify the relevant set of social practices (e.g., people engaging in arguments in courtrooms, legislators writing things down in official documents,

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[54] I say "purport" here because, as I will discuss below, it might be that this kind of argument is ultimately inconsistent with legal positivism as such.

[55] (Green 2010).

[56] See (Finnis 2011) for the main statement of Finnis's view that I am reconstructing here. See also (Finnis 2013).

[57] Two notes here. First, I am not claiming that *any* argument about the proper function of law of this kind is going to yield an argument of this sort—i.e., one that aims to support legal positivism by appeal to robustly normative facts. Rather, I just aim to illustrate the possibility of such argument going in that direction. Second, it should be noted that Finnis doesn't discuss positivism in exactly the same way I am understanding it there, as a thesis about the ultimate grounds of legal facts. But he uses a definition that is quite close, and then endorses legal positivism. For example, he writes that "in relation to the settled positive law, natural law theory . . . shares the principal thesis of contemporary legal positivists, that laws depend for their existence and validity on social facts". (Finnis 2016). As Finnis notes, this is a point about his version of natural law theory that is recognized by many contemporary legal positivists, including (Raz 1980, 213) and (Gardner 2001, 227). It is worth emphasizing, however, that *Finnis's version* of "natural law theory" is just one version of it—and not all versions of "natural law theory" will end up with the same relation to legal positivism.

[58] (Dworkin 1986).

the history of judicial decisions, etc.).[59] This view—the core of his "interpretivism" about law—is *itself* supported, according to Dworkin, by thinking about what would best justify our practices of engaging in a set of relevant social practices of talking about "the law". Dworkin's interpretivism, in other words, operates at two levels, and both levels involve appeal to normative facts about justification—facts that, at least when understood in one way, invoke (or are closely bound up with) the idea of robust normativity. Dworkin's argument for antipositivism thus bears an important similarity to the Raz-inspired argument for positivism that I sketched above: both involve appeal to (purported) robustly normative facts in a similar (and important) place in the argument.

In contrast, consider arguments for positivism or antipositivism that don't appeal to robustly normative facts. Consider here one way of reading Scott Shapiro's argument for legal positivism in *Legality*.[60] Shapiro argues that legal institutions are a particular kind of organization involved in the activity of shared planning. According to Shapiro, this is a fact about a particular kind of institution, which we learn from doing a combination of conceptual analysis of LAW (and related concepts), metaphysical inquiry, and social scientific study of the world we live in, without doing any kind of inquiry into robustly normative facts. Shapiro then argues that laws are the particular plans those institutions have.[61] The relevant plans here aren't plans the legal institution has just for itself, but rather also for ordinary people who aren't involved in the creation, adoption, or enforcement of the plans. (Think here of how an agent A might make plans for what agents B and C will do next week, without B and C having a say about this planning activity). Laws *are* plans on this picture. In general, the facts about what plans an agent has, and what kinds of things conform to them or not, depend on social facts alone, and *not* robustly normative facts. (Or at least so Shapiro argues.) Since laws *are* plans, the same is true of laws. When we talk about "the content of the law", Shapiro claims, this is just one way of talking about what these particular plans are, and relational facts what does or does not conform to them (e.g., whether a possible action is permitted by the relevant plans). Thus, legal positivism is true.[62]

On the antipositivist side, consider Mark Greenberg's arguments for what he calls "the Moral Impact Theory of Law". According to this theory, legal facts are a subset of moral facts: roughly, those that are brought about (in the right way) by the activity of legal institutions.[63] The idea, roughly, is that some moral facts (e.g., that we have a moral obligation

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[59] I here follow the basic reading of Dworkin's view in *Law's Empire* given in (Greenberg 2006b) and (Greenberg 2014). See (Hershovitz 2015) for a way of reading Dworkin that pushes in a different direction, on which the real thrust of Dworkin's view is that we should deny that there are legal facts whose ultimate grounds we should ask about.

[60] (Shapiro 2011).

[61] Shapiro also argues in (Shapiro 2011) that "planlike norms" (including norms of custom) can be laws too, if there are relevant plans to follow them. But this detail doesn't matter for my purposes here.

[62] This is one of way of reconstructing Shapiro's main argument for legal positivism. My reconstruction here parallels my basic reconstruction of Shapiro's views in (Plunkett 2013b) and (Plunkett 2013c). Hershovitz has recently argued in (Hershovitz 2014) that Raz's and Shapiro's arguments for positivism share a deep similarity, which pushes Shapiro's work in a different way, closer to the Razian view I discussed in the last subsection—and possibly also to a form of prescriptive legal positivism. (For connected discussion on this later possibility, see also (Toh 2018)). I leave discussion of the important strands of Shapiro's work that Hershovitz and Toh discuss aside for my purposes here.

[63] See (Greenberg 2014).

not to drive on a given side of the road in X place) are brought about by recognizably "legal" activities, and that those resulting moral facts simply *are* the law. When Greenberg speaks of "moral facts" here, he has in mind robustly normative facts—or at least that is one straightforward way of understanding his view. Unlike Dworkin, Greenberg never appeals to robustly normative facts in arguing for his theory of law. Rather, he argues that his theory is the best way to explain certain social facts, including actual practices of legal argumentation and legal reasoning. Dworkin makes these kinds of arguments too (for example, in considering how to account for the nature and extent of actual legal disagreements).[64] The difference is that Dworkin *also* cites robustly normative facts in arguing for why antipositivism is true. Greenberg does not. Taken at face value, this suggests that Greenberg (unlike Dworkin) does not think that robustly normative facts are part of the best argument for legal antipositivism.

All of this suggests the following: even before we get to *evaluating* the idea of appealing to (purported) robustly normative facts in arguments in favor of positivism or antipositivism, we can appreciate how this idea helps to bring out an important division within arguments in legal philosophy. Moreover, as my examples above underscore, it is a division that (at least appears) to crosscut the divide over positivism and antipositivism.

B. *Evaluating The Raz-inspired Kind of Argument*

With that in mind, let's now turn to evaluating the kind of argument I used Raz to introduce: that is, an argument that brings in premises about robustly normative facts to support the (purported) truth of legal positivism.

First, one thing that is striking about this argument is the particular way it mixes "ought" and "is" claims. Many doubt that you can derive an "ought" *solely* from an "is". It is perhaps even harder to see how the reverse could work: that is, how one could derive an "is" *solely* from an "ought". One way to go is to insist that the Razian is not trying to do so. Instead, one might want to insist that all that is going on is a sort of "wide reflective equilibrium", wherein we try to have all of our different views, on a range of different topics, mesh together into a rationally defensible and justified overall package of views. As part of this, we might insist that claims of all different kinds bear on each other in different ways, such that some of the normative claims we want to hold put pressure on us to accept certain descriptive claims. But it is not at all clear that this picture is correct for the relevant arguments at hand. Thus, if one remains skeptical of a supposedly valid argumentative move from an "ought" to an "is", then there is some pressure to think that claims about what X "is" might be best understood as involving covert "ought" claims of some sort. Consider claims about "exploitation", "democracy", "promising", or "lying". We can think of these as picking out purely sociological kinds—that is, the kinds of things we study for the purposes of sociological inquiry (or related inquiry in the social sciences). But we can (and often do) think of them as picking out important *normative* or *evaluative* kinds—kinds that matter for the purposes of determining or explaining the robustly normative facts. These kinds might well be bound up with "ought" claims in some way (where the "ought" is the "ought" of robust normativity). It is confusing why one might support a claim about what "exploitation is" with normative arguments if

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[64] See (Dworkin 1986).

one thinks of it as a sociological kind. However, it is less confusing (and perhaps not at all) if one thinks of it as a normative/evaluate kind in some way. Perhaps the Raz-inspired view that I sketched above is best understood as involving using the term 'law' to pick out a normative kind in some way. (If not, we should ask: Is Raz trying to derive an "is" from an "ought" in an objectionable way?) If this is the right way to understand Raz, it raises questions about whether the proponent of the Raz-inspired view is in some sense *changing the subject* from what many involved in general jurisprudence thought they were investigating (including, crucially, many positivists).[65] I will return to this thought more below, in the conclusion.

Second, consider that some are drawn to positivism because they believe it will help them secure a fully naturalistic account of legal metaphysics, and also because it fits smoothly into a fully naturalistic account of metaphysics in general.[66] But this result is not obviously secured when positivism is combined with the kind of Raz-inspired argument I just sketched, on which this argument relies on (purported) robustly normative facts. If there isn't some further naturalistic account of *those normative facts*—or else some deflationary (e.g., quasi-realist expressivist) meta-treatment of our talk of "facts" here—then this kind of argument turns out to not be that naturalist-friendly after all. [67] This helps bring out the following: not all motivations for legal positivism sit well with this *kind* of argument for legal positivism, which appeals to robustly normative facts.

Third, we should ask the following. Let's assume that legal positivism is correct. Call the fact *that* legal positivism is true "fact F". If robustly normative facts are relevant to *figuring out* that fact F obtains, *why* would that be? Or, as is in the case of the Raz-inspired argument I have sketched above, *why* would it be that robustly normative facts (about ethics and politics) are used as premises in an argument that has fact F as its conclusion (or, which, relatedly, where the conclusion is that we have normative reason to believe fact F)? One possibility that I want to consider here involves the *grounds* of fact F. In raising this issue, I do *not* mean to suggest that, in all sound arguments, the premises *ground* the fact that the conclusion is correct. But I do think that this is *sometimes* true of the relationship between the facts cited in premises and those facts cited in conclusions in sound arguments. (At least insofar as it makes sense to go in for grounding in metaphysics in the first place). And, importantly, raising it as a possibility here helps bring out what I think is an interesting and underappreciated question in general jurisprudence.

Take the question: What grounds fact F? To be clear: in asking this, I want to use the *same* notion of "ground" that we did in the debate over positivism itself. Thus, we are *not* asking

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[65] For connected concerns, see (Hershovitz 2014).

[66] See, for example, (Hart 1961/2012).

[67] On this front, it is worth noting that Raz endorses a form of *non*-naturalist realism in metaethics. Roughly, he thinks that ethical thought and talk are about real properties and facts in the world—in a straightforward, descriptivist sort of way—but that such properties and facts cannot be explained in fully naturalistic terms. (See (Raz 1999)). There is obviously a further question about what exactly it would take for there to be a suitably "naturalistic" account of these facts. For example, some philosophers see the issue as one about *ground*, whereas others see it as one primarily about *real definition* or *essence*. See (McPherson 2015), (Leary 2017), and (Rosen 2017) for some of the recent discussion on this topic. We can leave these complications aside here. For the core point is just this: *whatever* it takes to be a non-naturalist about robustly normative facts, we can see that it might be possible to hold that position about robustly normative facts while also being a legal positivist.

about an epistemic or causal explanation here. Rather, we are asking about a constitutive explanation of fact F, of the kind that is at the heart of much recent work in metaphysics.

Not everyone will grant that this kind of question is a meaningful one. But, for now, let's suppose that it is. Here, we face a choice: Are robustly normative facts part of the grounds of fact F or not? It might be that positivists should say "no". Indeed, I think many should, given their other commitments, and given the motivations that they cite for positivism in the first place. (On this front: consider what I said above, for example, about wanting to secure naturalism about legal metaphysics, in combination with the fact that non-naturalism is at least a serious going option in metaethics). An interesting question, though, is whether they *need* to say "no", given their commitment to positivism as such. In earlier work, I briefly discussed this idea, and expressed some skepticism about whether such a view is ultimately compatible with legal positivism.[68] But I think I there moved too quickly.

One crucial issue here concerns ground in general. Suppose we want to defend the idea that it is at least possible that robustly normative facts ground the fact that legal positivism is correct. To do so, we might start by saying the following: legal positivism is strictly a view about what grounds the legal facts. Legal positivism need not involve a view about what grounds the fact that it is itself correct, since that latter issue is simply a different issue that doesn't bear directly on the possibility of legal positivism being true or not. To defend this view, one would need to take on some general questions about the grounds of grounding facts. Suppose that the A facts ground the B facts. What, if anything, does that mean in terms of what we should say about this fact itself (that is, the fact that the A facts ground the B facts)? Some philosophers, including Karen Bennett and Louis deRossett, have argued for the following view about this fact (that is, the fact that the A facts ground the B facts): it too is grounded in the A facts.[69] Positivism is a view of the following form: the A facts, and *not* the C facts, ground the B facts. Thus, if the Bennett/deRossett view is right, then positivists *need* to say "no" when asked whether fact F is partly grounded partly in robustly normative facts. For if they say "yes", then this would be in conflict with positivism. Bennett and deRossett's views about grounding here are, not surprisingly, hardly the only views on offer on this topic. For example: Shamik Dasgupta argues that, in many crucial cases, facts about *essence* (e.g., facts about the essence of X) ground the relevant fact here (namely, the fact that the X facts ground the Y facts).[70] But the point here isn't that Bennett and deRossett are correct. It is only that one would need to reject their view, if one wanted to defend the possibility that robustly normative facts ground the fact that legal positivism is correct.

A second issue connects to the question of how to best formulate inclusive legal positivism, and what it means for thinking about the discussion of "ultimate" grounds in formulating the debate over legal positivism. Recall the basic idea of inclusive legal positivism, formulated now in terms of a focus on robustly normative facts (rather than formulated in terms of moral facts, as is more standard). The thesis is this: contingent social facts can *make it the case* that

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[68] See (Plunkett 2012, 177–178). See also section VI, subsection C of (Coleman 2011) for connected discussion that also develops my basic line of worry, and which also extends it in numerous distinct ways.

[69] See (Bennett 2011) and (deRosset 2013).

[70] See (Dasgupta 2014). For a related view, see (Rosen 2015).

robustly normative facts are amongst the grounds of legal facts. In other words: *if* robustly normative facts are amongst the grounds of the legal facts in a given jurisdiction (at a given time), then it is *in virtue of* or *because of* the obtaining of certain contingent social facts. How exactly should this idea be unpacked? It might be that inclusive legal positivism involves the following claim: in legal systems where certain robustly normative facts are amongst the grounds of legal facts, social facts ground the fact that this is so.

If that is the case, then inclusive legal positivism would be structurally parallel to a view that stated the following: in legal systems where certain social facts are amongst the grounds of legal facts, robustly normative facts ground the fact that this is so. Suppose one adopted this latter view and then insisted that robustly normative facts weren't themselves amongst the grounds of the legal facts. Rather, they *only* grounded the fact that such-and-such social facts (as opposed to other social facts) are amongst the grounds of law. It is very tempting to think that such a view should count as a form of antipositivism. And, indeed, if we take inclusive legal positivism to really be a form of positivism, then it seems we should say this. But then we have a worry. Maybe positivism and antipositivism are, after all, not really just about what grounds the legal facts, but *also* at least partly about the facts that ground the fact that the legal facts are grounded in such-and-such facts.[71] Based on this, one might be tempted to the following line: positivism involves the view that, necessarily, robustly normative facts are *neither* amongst the grounds of legal facts *nor* amongst the facts that ground the facts about *which* social facts the legal facts are grounded in.

If that conclusion is right, it raises the stakes for wondering about *why* the Razian argument appeals to robustly normative facts to begin with. Suppose the proponent of the Razian argument makes such an appeal because she thinks that robustly normative facts are amongst the grounds of fact F. Then, if the conclusion above about the nature of legal positivism is correct, it means that it vitiates her ability to have a form of positivism *at all*. This raises the stakes also for the interpretation of Raz. Raz is, after all, standardly taken to be one of the leading positivists of our time. As he puts it: "the positivist social thesis is that what is law and what is not is a matter of social fact".[72] This is a thesis he accepts, and which he takes to be the backbone of his (purportedly) thoroughgoing positivism. If we go down this road for interpreting inclusive legal positivism, this then gives us some good reason to think my interpretation of Raz's argument for legal positivism is wrong. Or perhaps, if the reading of Raz that I sketched earlier is on track, it gives us reason to be worried about whether Raz's view is really one worth thinking of as "positivist" after all—as opposed to, say, a version of prescriptive legal positivism of some sort, or perhaps even an antipositivist position.[73] Since *that* result would be quite surprising indeed (and one which we arguably should want to avoid), this then gives us further reason to think more about what we mean by 'legal positivism', and what we *should* mean by it going forward.

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[71] Thanks to Samuele Chivoli and Stephan Leuenberger for helpful discussion on this point.

[72] (Raz 1979/2002, 37).

[73] This point here connects back to the worries driving my discussion in (Plunkett 2012, 177–178), where I wondered whether Raz's view of law was really a "positivist" one in the end or not. See also connected worries in (Hershovitz 2014).

One thing that might be said here at this juncture is this.[74] I have been discussing two different issues about ground here. First there is the "level 1" issue of what grounds legal facts. Second there is the "level 2" issue of what grounds the fact that legal facts are grounded in such-and-such facts. This second level concerns *why* certain facts are amongst the grounds of legal facts. But perhaps two levels simply isn't enough to help us appreciate the array of existing positions on the table here, and where the important divisions between those positions are. Perhaps the key to understanding the Razian view I have been discussing (and understanding it *as* a form of positivism)—as well as the key to getting some of what we want from the talk of "ultimate" grounds in our formulation of the debate over positivism—is to move to the "third level" issue: namely, the issue of what grounds the facts at the second level above. That is: What grounds the facts that, in turn, ground the fact that the legal facts are grounded in such-and-such facts? We might then be able to distinguish positivism from antipositivism, and distinguish inclusive from exclusive legal positivism, as follows.

At the first level ("what grounds legal facts?"), we can distinguish three positions. The exclusive positivist position is that, necessarily, it is social facts alone, and not robustly normative facts. The inclusive positivist position is that, necessarily, it is social facts and possibly also robustly normative facts. Or perhaps the inclusive legal positivist could even go for a less committal view, where they claim that is entirely contingent what kinds of facts are amongst the grounds here. And, finally, the antipositivist position is that, necessarily, it is social facts and robustly normative facts (or perhaps *just* robustly normative facts).

At the second level ("what grounds the fact that the legal facts are grounded in such-and-such facts?"), we can distinguish two positions. The positivist position is that, necessarily, it is social facts alone, and not robustly normative facts. In contrast, the antipositivist position is that, necessarily, it is social facts and robustly normative facts (or perhaps *just* robustly normative facts).

Finally, at the third level, this is where one might want to say that some of the key different positivist views we have been considering again part ways. Some legal philosophers (perhaps Raz and Dworkin) say that robustly normative facts are amongst the grounds here. Others (perhaps Shapiro and Greenberg) say they are not.

If *that* three-level picture is correct, it would capture the inclusive legal positivist idea that it is *because of* the obtaining of social facts that robustly normative facts are (or are not) amongst the grounds of legal facts. In so doing, it would also help get us (at least some of what) we wanted from talk of "ultimate grounds" in the discussion of legal positivism. Finally, *if* Raz is really best read as denying that robustly normative facts play a role in the second level, but granting that they do in the third level, it would explain the sense in which the Razian view I have discussed in this section is a positivist one, despite convergence with Dworkin (and some other antipositivists) at the third level.

I leave it for future discussion to assess whether this proposed three-level picture is really what we want here—as well as how to interpret Raz. What I hope to have shown is the need to move to *some* kind of multi-tiered picture—involving *at least* two levels—to bring out important connections and differences between different views in the debate over legal positivism. Many of these connections and differences are ones that we will miss if we stay

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[74] Thanks to James Edwards for helpful discussion on what follows in the rest of this section.

focused on simply the issue of positivism versus antipositivism. And many of them are ones that involve issues about robust normativity, rather than (or perhaps in addition to) issues about morality. Or at least so I have argued. [75]

IV. Conclusion

Suppose two legal philosophers agree on legal positivism. But they disagree about whether robustly normative facts figure into the best argument for legal positivism. There appears to be a serious difference between the views of these two philosophers. In fact, it is the kind of difference that should make us wonder whether these people are even offering theories of the *same thing*, or rather talking about different things entirely. One diagnosis of this is as follows. One the one hand, we might think of the term 'law' as picking out something within a normative theory about what we really should do (where the "should" is that of robust normativity). On the other, we might think of it as picking out something within a descriptive *sociological* theory. For example, we sometimes talk about the "rule of law" as an ideal within moral and political philosophy, where this is a kind of moral and political achievement, and where it is assumed that this bears heavily on what we (authoritatively) should do. In contrast, we distinguish "law" from other ways of organizing human behavior, within sociology and anthropology, without this involving any normative endorsement of this way of organizing human behavior. It might well be that for many facts in the first category, robustly normative facts play a role in the "second level" here as follows: they ground the fact that the X facts are grounded in Y facts. (Or, similarly, perhaps robustly normative facts play a role in the "third level" of the sort I discussed in the last section.) However, in contrast, it might be that robustly normative facts play no such role for *sociological* facts. In both cases, for both sociological facts and those in the first category, it might still be that (at least some instances of) facts in that category are fully grounded in social facts.[76]

Suppose one philosopher is making a claim about a fundamentally *normative kind* (where, again, the relevant notion of "normative" is *robustly* normative), and another making a claim about a purely *sociological kind*. If that is right, then both of these philosophers might well be correct in terms of the theses they each advance about the respective thing they are talking about. Such theses might well be the core of the literal content of what each of them says (that is, in terms of the semantics of what they say). This might be true either in terms of what they say about whether or not positivism is true, as well as what they say about what (if anything) grounds the fact that it is true (or false). We might recognize this, and then the appearance of disagreement between these two speakers might start to fade. It might be, for example, that the only reason we thought they were disagreeing (or the speakers themselves thought they were disagreeing) was based on a false presumption of shared literal meaning

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[75] Note that, if we go down this road of exploring "multitiered" views here, there are other options that we might consider than the one I have sketched here. For example, (Epstein 2015) thinks that there are "anchoring" facts that are distinct from facts that ground grounding facts, but that are closely related in terms of the basic explanatory role they play.

[76] This is assuming, for now, that this is consistent with what grounds grounding relations. (Recall my earlier discussion of the views from Bennett and deRosset here that would push against this).

in the case at hand. We might then say that such speakers were engaged in a "merely verbal dispute" of a familiar kind.[77]

However, this need not always be the result. The fact that two speakers both speak truly in terms of what they literally say doesn't mean that there are not further issues between them over which they genuinely disagree. Moreover, as I have argued in other work (including, most importantly, in joint work with Tim Sundell), those disagreements might well be ones those speakers express in the linguistic exchange in question.[78] This is because, in addition to expressing disagreements via the semantics of what we say, we also do so via pragmatic mechanisms—e.g., via implicature or presupposition.[79]

Consider the following. It might be that we are best off using the term 'law' in certain ways when doing sociology, history, and anthropology, and other ways when engaged in normative theorizing about how we (authoritatively) ought to live, or how we (authoritatively) ought to organize our social/political institutions.[80] Suppose that both legal philosophers in our above scenario agree to that. That still doesn't settle *which ways* those are. Thus, as I argue in other recent work, legal philosophers in this sort of situation might disagree about the *normative* issue of which way we *should* use the term 'law' moving forward in the context at hand.[81] Issues about the normative and evaluative assessment of concepts—including, centrally normative issues about which concepts we should use, and which words we should use to express those concepts—are issues in what Alexis Burgess and I call *conceptual ethics*.[82] In the case at hand, one legal philosopher might think, for example, something along the following lines: "the relevant concept we should be using in this context for our inquiry is obviously concept X". Or the legal philosophers in our scenario might disagree about the *descriptive* issue about which context they are actually in. These are further substantive issues, and ones that can often be well worth debating about. Moreover, given the rich pragmatic mechanisms we have for communicating such disagreements (including what Sundell and I, borrowing from Chris Barker, call "metalinguistic" usages of terms) these legal philosophers might in fact actually be expressing such disagreements in their actual linguistic exchanges— but just not through the literal semantic content of what they say.[83] In turn, insofar as legal philosophers disagree about these issues, they will likely be tied to further ones they disagree about as well. In particular, it is rare to find a disagreement in conceptual ethics that is also not tied to some further disagreement about something other than conceptual ethics. For example, there might be a further disagreement about a descriptive issue about the way things are, or a normative one about what agents should do, think, or feel.[84]

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[77] For helpful discussion of the idea of "merely verbal disputes", see (Chalmers 2011) and (Jenkins 2014).

[78] See (Plunkett and Sundell 2013a) and (Plunkett and Sundell 2013b). See also (Plunkett 2015).

[79] In addition to (Plunkett and Sundell 2013a), see also (Finlay 2014), (Khoo and Knobe 2016), and (Thomasson 2016) for other recent work that emphasizes the importance of this fact.

[80] For more on this idea, see (Plunkett 2016). For related discussion, although in an importantly different theoretical framework, see (Dworkin 2006).

[81] See (Plunkett 2016).

[82] See (Burgess and Plunkett 2013a) and (Burgess and Plunkett 2013b).

[83] See (Plunkett and Sundell 2013a) and (Plunkett and Sundell 2013b), drawing on (Barker 2002).

[84] I discuss this at greater length in (Plunkett 2015), (Plunkett and Sundell 2013a), and (Plunkett and Sundell 2013b).

But, crucially, these are issues that might well be ones that the speakers themselves are only implicitly aware of in their actual dispute. Focusing on them, and bringing them into explicit discussion, might well help us make philosophical progress.[85]

Doing so might bring in another, different place where robustly normative facts (including ones about how we should live, and how we should set up our social/political institutions) enter the picture in a serious way. One might argue the following: *which* aspects of reality we should choose to focus our attention on when doing legal philosophy should be determined by how we (authoritatively) ought to live, or how we (authoritatively) ought to set up our social/political institutions. (In other words: considerations of the kind that many in moral and political philosophy are concerned with.) In turn, this might be used as the basis for a claim about how we should be using the term 'law': namely, we should be using it to pick out a feature of social reality that is ethically/politically important (perhaps in addition to it being important for purposes of anthropological/sociological explanation).[86] That view in conceptual ethics doesn't entail anything about what arguments there are for why positivism is true of X (whatever it is), where X is what we should be talking about. The fact that *we should be thinking and talking about the X facts* is different than *the X facts themselves*. The argument for the former might involve robustly normative facts, but without that entailing anything about whether robustly normative facts are amongst the ultimate grounds of the X facts. To see this, consider the following kind of view: we (authoritatively) ought to talk about facts that, necessarily, are ultimately solely grounded in social facts alone. The argument for *why* those facts are solely grounded in social facts need not involve appeal to any robustly normative facts.

Perhaps some arguments about legal positivism really are ultimately best understood as metalinguistic negotiations, where the underlying issue is one in conceptual ethics. And perhaps then the various issues driving the differences in view in conceptual ethics (including, perhaps, issues in ethics and politics *not* about words and concepts) will bring us to shared subject matter where (at least many) positivists and antipositivists disagree. At the same time, it is worth keeping in mind the possibility I mentioned earlier. This is that it might turn out that, for many exchanges between legal philosophers that seem to be explicitly talking about different things (a sociological kind we call "law" versus a normative kind we call "law"), they simply do not have any further disagreement here, once it becomes clear to them that one is talking about a sociological kind, and the other a normative kind. Thinking about different views on what grounds the fact that positivism is true (or antipositivism is true, if it is) can help us here. In particular, it can help us better appreciate whether these are the sorts of issues at play here; and, thus, it can help us better identify which issues need to be addressed in order to help us make progress within legal philosophy.

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[85] I discuss this kind of issue at greater length in (Plunkett 2015) and (Plunkett 2016). For closely connected discussion, see (Chalmers 2011).

[86] For further discussion of this kind of view, see (Plunkett 2016). For connected discussion, see also (Murphy 2008) and (Stoljar 2013). It is worth noting here, that as I discuss in (Plunkett 2016), Hart endorses a version of this kind of view at the end of (Hart 1961/2012).

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