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Against Jurisprudence: Preliminary Reflections

Jules L. Coleman  
Yale University

## Introduction

This is something of a loose introduction to a research project that is somewhere between a series of essays and a book. The essays are in various stages of development (displaying radically different levels of completion and coherence). As a group the essays are designed to argue for exploring a different and (I am inclined to think) new approach to jurisprudence, that rejects the traditional project of analytic jurisprudence of searching for and articulating a comprehensive jurisprudential outlook. The central claim of this approach (or better, the claim most important to it) is that it is simply no longer helpful – if indeed it ever was – to treat jurisprudence as a unified subject. (I am torn between the idea that what I am ultimately suggesting is entirely novel, and the view – perhaps the more plausible one – that what I am doing if we ignore the terms in which they couch their claims, which are typically far more ambitious than they deliver on, is

explaining and justifying what legal philosophers have been doing all along. If this is the correct view of what I am up to, then the only novel claim I can make and sustain is the one to modesty which, given the current state of bravado and self aggrandizement that typifies even the most insubstantial scholarship within the legal academy, is probably nothing to sneeze at. I'll take it.

The familiar idea with which I begin is that a philosophical jurisprudence is designed to shed light or illuminate the law by providing an account of its nature: philosophical jurisprudence aims to provide an account of the nature of law. The problems with this ambition are manifold. The least of our worries, really, is the concept of law's nature, which is not to say that the term does not invite some controversy in its own right, suggesting as it might metaphysical essentialism with regard to law. Even if we interpret 'nature' in a metaphysically innocent way (as we ought to), we immediately face the problem of identifying exactly what question we are trying to answer. For the question: what is law, is ambiguous among at least three different kinds of questions, no one of which constitutes the fundamental project of jurisprudence – at least if we are to take our cue from what jurisprudential scholars have taken themselves to be doing.

1. What is law (understood as a system of governance, a way of organizing our affairs by regulating conduct).
2. What is it to be a law (understood as the project of identifying what properties, if any, legal rules share that is intrinsic to them and unique or distinctive).
3. What is the law around here (understood as the content of the law in this or that jurisdiction).

The problem is not just that different jurisprudential views take different of these questions as primary to their inquiry. If Dworkin is right, one important difference between his view and legal positivism amounts to the claim that whereas he thinks that

the third question is central to jurisprudence, he takes positivism to be the view that the third question raises no theoretical questions at all. What the law is around here, is, on his reading of positivism, merely a matter of fact, and not jurisprudential theory. And this view, he claims is deeply mistaken. Indeed, the best way to read Dworkin is that the most illuminating way of approaching the first question is by trying to answer the third.

One problem is that we cannot determine which of these questions is the fundamental problem of jurisprudence. Another is that there is a nontrivial dispute about whether at least one of these is jurisprudential question at all; and answering that question arguably depends on one's jurisprudence. Yet another question concerns the relationship among these three questions. For while Dworkin takes the view that we might well approach an answer to the first of these questions through the third, the tradition in legal positivism arguably is that we should approach the first through an account of the second. To live under law is to live under a system of laws – a legal code. And so we need to determine what makes a rule a law, that is, a potential member of a particular legal code. Positivists on my view typically approach law through laws, and thus take the project of jurisprudence – as we shall soon see – to be characterizing and defending a distinctive account or set of related accounts of the membership conditions for being a law (that is, a kind of authoritative pronouncement) of a legal code. Arguably, not only does Dworkin believe that the best way to approach the first question – what is the nature of law as a form of governance – is through a particular kind of answer to the third – one that emphasizes the practice of interpretation – he thinks (as far as I can tell) that there is nothing of particular philosophical interest to be had by answering the second. The

concern for identifying ‘membership’ conditions is not centrally important to jurisprudence in his account.<sup>1</sup>

Even if we could settle the matter as to the question jurisprudence seeks to answer, we would only be touching the surface as to the problems we face in thinking of jurisprudence as a unified subject. There remains after all the question of how to proceed in answering it. Whereas folks outside of philosophy are inclined to the naïve view that what must be common to philosophical jurisprudence is a shared commitment to a common methodology for approaching the subject – namely, employing the tools and methods of philosophy – it turns out of that jurisprudential theories are divided along methodological lines even more finely, though less explicitly, than they are divided along the lines of the question(s) they take themselves to be answering – and in what relationship to one another. (Perhaps we should long for the days when the only differences we attended to were the differences in the substantive answers they gave. Arguably, the answers given are of less philosophical interest precisely because they are so closely tied to the application of different methods to different questions motivated by entirely different yet often equally legitimate concerns about law and the role it plays in our normative lives).

I want to draw attention to three substantially different and equally important methodological divides. There are others, but these are among the most important in that

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<sup>1</sup> As is sometimes the case, Dworkin’s writings here are misleading because he often chastises the positivists for having an inadequate account of the grounds of law – that is, an inadequate theory of law’s membership conditions. The natural reading of him is that he takes identifying such a theory to be the project of jurisprudence and his claim to be that he has a better account than the positivists do of the grounds of law. And that interpretation is not strictly speaking mistaken. In my view, the better way to read him is this: positivism cannot proceed other than through an account of the grounds of law. The problem is that they have a bad account of the grounds of law. On the other hand my (referring to Dworkin) account of law does not rely on the centrality of the grounds of law, and even if it did, it has a better account of the grounds of law than does positivism.

they each cut across the traditional jurisprudential divides and focusing on these is more than enough to make my overall point on the impact of methodology to substantive jurisprudence.

The first methodological issue concerns whether in analyzing law the distinctive philosophical approach is to analyze the concept *law*. Most commentators (though I am not among them) take Hart's approach to jurisprudence to be the paradigm of adopting conceptual analysis. They take him in *The Concept of Law* to be looking to uncover a set of separately necessary and jointly sufficient conditions for proper application of the concept, *law*. Frankly, Joseph Raz is a better illustration of a jurisprudential theorist who takes the burden of jurisprudence to be uncovering conceptual truths about law.

Famously, Raz argues that the most important conceptual claim is that law itself claims to be a legitimate authority. Some think that restricting the philosophical method to conceptual analysis is a product of an unwarranted allegiance to a particularly contestable formulation of the analytic/synthetic distinction. There is no reason why a philosophical jurisprudence should not take law itself, and not merely the concept of it, as subject to distinctly philosophical analysis.

Even if one restricts the project of jurisprudence to identifying necessary truths about law, it does not follow that one is restricted to an analysis of the concept of law, since not all necessary truths about law must be capable of being read off the concept –so to speak.. Moreover, there is no reason why certain broadly speaking naturalized aspects of law – social scientific facts about law – are not themselves part of the philosophical inquiry and not merely the data of philosophical reflection.

The second major methodological distinction is between those who locate jurisprudence within speculative political philosophy and others like Hart, Raz and myself who view it as an enterprise that is reminiscent of inquiry in the core areas of philosophy. That is to say, asking, what is the nature of law raises no more normative questions of political philosophy than does the question, what is truth, knowledge, meaning or what stuff makes up the fabric of the universe. To be sure, law engages our practical lives in ways that ontology does not (which is not to say that ontology does not engage our practical lives; it does, but differently than law does). Still, it hardly follows that what law is – its nature – depends on first identifying and defending a contestable conception of its value. Legal philosophers falling into the first camp are normative jurists, and they are kind enough to label the rest of us, descriptivists, which they do not offer as a term of endearment.

The rough idea is this: according to normativists, descriptive jurisprudence believes that any account of the nature of law one provides has to be neutral with regard to a range of philosophical questions we might ask about law – for example, whether living under law is desirable or morally good, whether there is a prima facie moral obligation to obey the law, and so on. In contrast, normative theorists hold that the value of law is part of the concept of it, and so to understand what law is one has to begin with a contestable account of its value and identify the relevant and important features of law accordingly: that is, the account we give of what law is should be able to sustain the view that it has the value we attribute to it.

The third methodological divide I want to identify is that between jurisprudence conceived of as ideal theory and as sociological (or practice-based). The difference

should be clear enough even if the labels are less so. Ideal theory in jurisprudence is analogous to ideal theory in political philosophy, the most well known recent instance of which is Rawls' theory of justice. But ideal theory has been a part of legal and political theorizing forever, and should be as familiar to economists as it is to philosophers. To be sure, economists are particularly prickly about ideal theory which they view as arid – certainly in law and perhaps in policy science more broadly. But the objection is misplaced. After all the perfectly competitive market and the fully specified contract are all idealizations asked to play both explanatory and normative roles in economics, rational choice political theory as in the economic analysis of law. It is good to see the imperialistic economic hegemon hoisted upon his own petard (a phrase that one should be allowed to employ no more than once a decade in published work).

One way of pursuing the project of ideal theory in jurisprudence might go something like this. Law is a coercive institution. We also know that one of its distinctive features is that it speaks (metaphorically) in the name of all of us. Thus, it is in the nature of law that it coercively enforces some of us in the name of all of us, thus making each of participants in a practice that, were it not legitimate, would not be something that we – as largely rational, autonomous, moral agents (remember this is a project in ideal theory ) -- could participate in. So we want to know what must be true of law (when it is working as it should – that is, when it is successful as law) in order for rational, autonomous agents to participate in it. Ideal theory sets a standard against which the rationality of participation can be measured.

Interestingly, ideal theory can play an explanatory as well as a normative role. Ideal legal theory can help us understand the **place** of the law – if not its function -- in

our lives. Whereas the standard view among contemporary American lawyers is that there is no difference between private and public law, and even more thoughtful theorists like Dworkin are inclined to the view that the differences between parts of the law are arbitrary (and in a trivial sense they are), ideal Kantian legal theory (as in the work of Arthur Ripstein for example helps us understand the relative places of private and public law – as well as the differences between them.

Many contemporary natural lawyers, including especially those drawn to Kantian political philosophy, for example, Seana Shiffrin and Arthur Ripstein, see jurisprudence in precisely this way. These philosophers of law begin with a general and abstract ideal of law then work their way down to actual legal practices.

The obvious contrast is with those legal philosophers who begin, as I like to say, in the middle, with existing practices. These philosophers do not believe that it is important, and certainly not necessary, to understand law and legal practice by identifying something like its ideal type. They want to understand the practices on the ground so to speak. Legal philosophers as different in their substantive views as Dworkin on the one hand, and me on the other share this practice based approach to theorizing about law.. Dworkin sees the practice as having an essentially aspirational dimension, thus capturing in a way the idea that the ideal theorists want to emphasize, whereas others, like myself, Hart, and Shapiro, are less sanguine that legal practice is best characterized as having an aspirational component. And it is that aspirational component along with the centrality of disagreement in law that for Dworkin grounds the further claim that law is an essentially interpretive activity.

We turn now to yet another methodological distinction that divides practice-based theorists along another dimension.. This is the distinction between the first and third person perspectives and the role that acknowledging the importance of the first person perspective to legal practice plays in theory construction. The first person perspective is sometimes referred to as the hermeneutic perspective. Every practice-based theorist emphasizes the importance of the hermeneutic perspective, but they do not agree on what its importance means to jurisprudence. In saying that legal practice has an essential hermeneutic dimension, theorists intend to draw attention to several features of participant behavior and attitude, the most important of which is that significant legal actors display a reflective and self-conscious attitude towards the practice and towards their participation in it. It is important not to confuse the hermeneutic perspective with what Hart called the internal point of view – a confusion that many theorists have been unable to resist. The internal point of view is a practical attitude toward law and legal rules; it represents a way of engaging with rules (law) in one’s practical reasoning. The hermeneutic perspective is largely a theoretical attitude; it is a form of reflection, a commitment to trying to understand the law and one’s place within it, a way of thinking about, conceptualizing or in some cases, theorizing the law. It is an attitude of understanding and thus a theoretical perspective.

In addition, there is another feature of law that is not well captured by either the concept of the hermeneutic perspective or the internal point of view, though it too has been confused with both. This is the idea that law is partially constituted by what the relevant participants take themselves to be doing: that law has an important intentional element. Take a simple activity like singing a duet together or baking a cake together. In

order that our activity be properly characterized as either our individual intentions have to be directed towards something that we share. Now it is not true that we can only be baking a cake together if we both intend to bake a cake together. There can be other true descriptions of the content of our intentions that will suffice to warrant the attribution to us of baking a cake together. Still our attentions have to be jointly focused and the steps we take individually in pursuit of the joint goal have to be related in certain important ways. So in this sense, the joint activity of singing a duet together or baking a cake together is partially constituted by our attitudes and beliefs about what we are doing. To the extent that law – or better, legal activity – is intentional in this sense, law is constituted by what relevant participants take themselves to be doing. And this too is an important fact about legal practice, but it is not well understood in terms of either the hermeneutic perspective or the internal point of view. It is a feature of law that turns out to be especially important to certain jurisprudential views, like Scott Shapiro's, that emphasize the distinctive sociality of law.

Let's return now to the hermeneutic perspective and to determining what recognizing its importance to legal practice translates into as a matter of theory construction. Legal philosophers have interpreted the implications of the hermeneutic perspective in either of two very different ways. Some, like Hart and myself, take the fact that there is a self-conscious reflective element to legal practice to be a fact that any successful jurisprudential view must accommodate and explain. There is no reason in principle a jurisprudential theory could not itself be a theory constructed from the third person or what Raz usefully calls the 'detached point of view.' This is the view of the legal theorist, not the legal participant; and it is an adequacy condition of any such theory

that it be able to explain the importance of the fact that relevant participants in legal practice engage in the practice in a reflective and self-conscious way. The nature and scope of their self-conscious reflection is itself a matter of dispute, but the essential hermeneutic aspect of the practice is not.

We can contrast this detached or third person approach to the first person or hermeneutic perspective – the view of the matter favored by Hart, Raz and myself to name three people whose views on the matter I normally find persuasive – with a range of very different but related approaches to understanding the importance of the hermeneutic perspective on theory construction. On the weakest and perhaps most plausible alternative to the detached point of view, acknowledging the hermeneutic perspective means that any theory of law can be plausible only if it rings true to important legal actors. A theory of the nature of legal practice that struck a discordant note with relevant legal officials – that did not jibe in important ways with their own reflections on legal practice – would fall short, or would at the least have some explaining to do. Theories can be constructed from the detached or third person point of view but part of the test of their adequacy is how they strike the reflective, self-conscious participant – usually the appellate court judge. The weakest version of this kind of approach then treats the hermeneutic perspective as representing something like a proto-jurisprudential theory of a suitably relevant participant. That theory then serves as something of a standard against which jurisprudential theories are measured in much the same way one suspects that moral judgments are measured against rationally formed intuitions. No more no less.

There have been times in my own work on say, tort law, where I can be seen as endorsing some version of this way of understanding the importance of the hermeneutic perspective. So in contrasting the economic analysis of tort law (or central features of it) with the correct view (or is that the corrective justice view – I sometimes confuse the two) – I have suggested that the economic account is not transparent to the relevant officials in the sense that it does not capture in any straightforward way what judges take themselves to be doing. The economic approach does not capture the structure of practical reasoning that judges see themselves as engaging in nor does it capture the role of legal rules, arguments and the role of pertinent facts in a way that rings true to officials. This is clearly a part of the argument I emphasize against the economic approach to torts in the *Practice of Principle* and it has its roots in my paper, ‘The Structure of Tort Law.’ I have offered any number of (compelling) arguments against the economic analysis of tort law, but this argument from what Jody Kraus refers to as transparency or what I am here referring to as the hermeneutic perspective is not offered as a knockdown (though many others I have offered are). Rather it is an argument designed to impose an explanatory burden on the economic analysis of law.

I would explain that burden as follows. It is not enough that economic analysis predicts outcomes in cases. The reason for that is that the law is not about outcomes. It is about the relationship between authoritative legal texts and outcomes and the reasoning that gets one from texts to outcomes. For the texts make certain facts pertinent and others not. In a typical tort action, the elements of a tort appear to make facts that provide evidence of action, duty, breach, harm and the existence of the right sort of causal connection between breach and harm relevant; at the same time the rules do not appear to

make one's capacity in the future to reduce or distribute risk pertinent. I take it that judges reason as I indicated, and when certain conditions are met – when the elements of a tort are present or evidence of their presence is sufficient for rational acceptance of the claims that they are present – a certain practical inference is said to be warranted: that is, a judgment of liability to a duty of repair. This is the nature of the practice, the structure of practical reasoning, that makes sense from the judges' point of view. (Indeed, it makes sense from the point of view of my students as well; and that's because it is an accurate account of our adjudicatory practices in tort law.)

In contrast, the economic analysis cannot explain why evidence is brought about duty or breach given that the point of tort liability is to impose costs on parties in the best position optimally to reduce risk going forward. Neither of the standard economic responses help. Predicting outcomes accurately is not an account of law, which is not about outcomes as such but the warrant for those outcomes in law. This follows from the very idea that law engages practical reason. Secondly, the claim that evidence drawn from what happened between A and B last month is epistemically helpful in determining whether A or B is in the best position optimally to reduce or spread risk going forward is even less persuasive – and for two reasons. In the first place, there may be all sorts of evidence pertinent to determining which of the parties is the better cost avoider, but the law of torts does not allow it. More to the point given our current interests, judges do not see the evidence brought forward regarding action, duty and breach as merely epistemically connected to the judgment of liability which is grounded instead on the norm of cost-avoidance. They see the evidence as bearing on the grounds or warrant for the practical inference to liability.

So if there is an economic story to be told, I don't say that it has to ring true to the judges' view of what they do; I say that it has to explain why in this case we should not be surprised that the better economic account would not seem immediately obvious to the relevant officials. And it is in this sense that the weaker reading of hermeneutic perspective can be interpreted as playing a certain kind of constraining role on what can count as a good explanation of legal practice. Obviously, though I am a thorough advocate of the detached point of view when it comes to jurisprudential theories about the nature of law as such, I am committed to the value of the weak hermeneutic thesis as a constraint on explanatory theories within particular aspects of legal practice.

There is however a much stronger way of reading the relationship between theory construction in jurisprudence and the hermeneutic perspective. The strongest view is that the correct theory of law is one that is developed from the point of view of a distinctive or important legal actor. The theory of law IS the theory from the point of view of an appropriate legal actor. To understand the nature of law is to see it from the point of view of the appropriately designated legal actor – who, presumably has such a theory or to whom such a theory can be legitimately ascribed. Arguably, Dworkin's jurisprudence adopts the hermeneutic approach in this strong sense. His jurisprudence is a theory of law from the point of view of the (idealized) appellate judge (Hercules). Strangely, Holmes' embarrassingly naïve jurisprudence – as unsophisticated as Dworkin's is sophisticated -- is arguably hermeneutic in precisely the same strong sense: in which Dworkin's: it is a theory of law constructed through the lens of a distinctive insider/participant – the badman.

You might think that we would finally be done with all these methodological distinctions, but if you did you would be wrong. And there is no point in being wrong at this preliminary stage when there are so many places to be wrong that yet remain. So let's move on to what is in many ways the most important distinction we will take up at this preliminary stage in the inquiry. The basic distinction is owed to Mark Greenberg, but I have expanded it and recast it to fit my general concerns.

This is the difference between those jurisprudential theories that take it that to understand law ultimately requires an account of the membership conditions for being part of the law of a jurisdiction, and those that believe that the key idea in jurisprudence is not 'membership conditions' but something else. Those who fall in the first category put a special emphasis on two related ideas – 'the grounds of law,' and 'legally authoritative pronouncements.' Dworkin provides a good illustration of someone who identifies law with the set of principles that best illuminates a particular practice or with a set of coercively enforceable political rights.

Most legal positivists and natural lawyers identify the search for an account of law with the search for membership conditions, or law-making properties, what Dworkin refers to as 'the grounds of law.' I refer to this approach as the law-through-laws approach to jurisprudence. Mark Greenberg refers to it as the 'prism of rules.'

Central to the law-through-laws approach to jurisprudence is the thought that the key to understanding governance by law is to understand what it is to be a law. Much of the critical part of Dworkin's discussion of legal positivism – which he sometimes very misleadingly captures under the title of the Semantic Sting – is designed to establish the inadequacy of the positivist approach to the grounds of law. Part of what makes the

positive part of Dworkin's thesis so interesting and important is that implicitly it rejects the entire the law-through-law-making properties approach to jurisprudence – of which positivism is just one example.<sup>2</sup>

In effect, his idea is that jurisprudence need not approach law from the point of view of identifying what makes a rule part of a community's law. In fact, I take it that his view is that we should treat the legal rules of a community as data points indicating the direction in which we might find the set of principles that display the practice in its best light. The key to understanding a community's law resides in the principles that explain the practice and not in some set of official pronouncements. From a jurisprudential point of view, one role of identifying a community's legal rules is that they constrain the range of possible interpretations of the practice while pointing us to the values that illuminate the practice in its best light.

Most philosophers and ordinary folk think of law in terms of the idea of a legal system. And they think of a legal system as a kind of code of laws or authoritative pronouncements. The question they want to answer is: What are the properties that rules, standards and other pronouncements must have to be part of the code? Those are its law-making properties. And so to think about the nature of law is in the first instance to think about a set of law-making properties.

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<sup>2</sup> For what it's worth, note that in his earlier essays Dworkin hadn't yet developed the view that I am here attributing to him. He was willing to talk about foundational rules in legal systems but denied that they could be social rules. He explicitly argued that the rule of recognition was a normative rule. To that extent, his earliest versions of his thesis also approached law through law-making properties. I view that period as transitional for him – developing his view in terms of his criticisms of positivism. Eventually, he broke from the framework of positivism and developed his own distinctive view which is as much an attack on the entire framework that positivists and natural lawyers share as anything else.

On this picture jurisprudential views differ from one another on the basis of what they take law-making properties to be or how those properties are fixed or determined. Seen in a certain way, all such theories, whatever their particular differences may be, share a fundamental outlook, and that is to understand what law is through the lens of authoritative pronouncements whose content is by and large (along with the content of the rules that resolve disputes among them and order their importance) the content of law. Whereas Dworkin's critical thesis is directed at only one version of this approach to law, his positive thesis poses a challenge and represents an alternative approach to that entire framework.

In fact, Dworkin moves casually between two related but nevertheless different alternatives to the law through law-making properties approach. The first is the set of principles approach that we have been discussing. The second is the right answers approach. The two are connected, but they are not identical. According to the principles approach the aim of jurisprudence is to explain a social practice by seeing it as trying to secure some end or express some value, and then seeing how those values and the principles that embody them are displayed in its history and institutions.

According to the right answers approach, the aim is to identify which acts are permitted, prohibited, authorized or the like. Individuals make claims about what law permits or prohibits: what they are entitled to as a matter of law. To determine who has what rights in her favor, we need to construct a theory of law. That theory will consist in a set of principles, but the reason for looking to uncover them is to adjudicate disputes and settle questions of right – not to explain an entire social practice. In Dworkin's

jurisprudence these alternative are closely connected and both are alternatives to the law-through-laws approach.

One can reject the law through laws approach without claiming that the best way to approach law is by seeking to identify principles that display a legal practice in its best light, or that the point of jurisprudential inquiry is to help us determine right answers to particular disputes.

Mark Greenberg has been developing an account of law rejects the law making properties approach, but which does not share with Dworkin the interpretivist method or the view that law should be identified with the set of principles that best explains an existing legal practice.

As I understand his approach, Greenberg begins by observing that one essential property of law is that when it is working properly – that is, when it succeeds, each obligation it imposes on ordinary folk coincides with a moral obligation with the same content. This is not an aspiration, but an essential feature of law. Necessarily it seeks to demand of individuals precisely what in its absence the law would provide. It is the content of law and its relationship to the demands of morality that defines the framework within which jurisprudence is to proceed. There is no special emphasis on authoritative legal pronouncements or rules, and if identifying such rules is important it will be because of the ways in which – if any-- such rules contribute to the content of the obligations that individuals have.<sup>3</sup>

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<sup>3</sup> Cite

Dworkin and Greenberg share the view that the best way to approach law is through either content or principle, not through legal rules or official pronouncements.<sup>4</sup> The deep contrast is with those theorists who share the methodological commitment of seeking to understand the nature of law through the law making properties that define laws. It is this difference in jurisprudential frameworks, not in substantive jurisprudential views, that is of the first importance – and will remain so for the foreseeable future.

The lesson that I draw from reflecting on these differences is basically that there is little to be gained by treating jurisprudential views as answering the same or similar questions, through the use of the same or similar methods, seeking to illuminate the same or similar aspects of legal practice. At the end of the day, I am inclined to think that we need to approach the subject less ambitiously if more insightfully. But getting from where I have been to where I am now has taken some time, and while I don't want to confuse the order of explanation with the order of (self) discovery, I do want to outline and develop some of the considerations that ultimately ground the larger argument.

Implicit in the overall argument is the view that the traditional distinctions among jurisprudential views are considerably less illuminating than one might otherwise have thought. In fact, I don't find the traditional categories at all helpful. These categories have been built up around a number of distinctions that are similarly unhelpful. In fact, the traditional distinctions are not only misleading, they are likely false. Worse perhaps they are distracting; they draw our attention away from much more helpful ones. As if

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<sup>4</sup> Cites and explanations.

this weren't troubling enough, the fact is that the past twenty five years of jurisprudence has been more about the theories themselves than they have been about the law – the putative subject matter of the theories ☺

My general claims are the following:

- (1) The important distinctions in jurisprudence include but are not limited to the ones I have identified above.
- (2) Some of these distinctions concern how to divide the subject matter of jurisprudence, while others concern different but nevertheless philosophically respectable methods for approaching the subject.
- (3) Many, if not all, of the distinctions I mention cut across the traditional set of entries in the jurisprudential catalog
- (4) The distinctions that are employed to catalog the usual entries cannot in general be sustained – at least many of the most important ones cannot be.
- (5) Even when they can be sustained, they distract us from the distinctions that are more important to understanding law.
- (6) We should abandon not only the traditional jurisprudential categories – legal positivism, natural law theory, legal realism, and so on -- in favor of a new approach to jurisprudence: one that is both more precise and less ambitious on the one hand, and more pragmatic on the other – that is, more sensitive to the

full range of quite different but nevertheless legitimate interests we might have in a wide range of issues in legal practice.

Well that's the overall project. Of course, I cannot defend these claims in a sustained and precise way in any one essay. (That is what I am attempting to do in the book on jurisprudence that I am writing for OUP. We'll see how successful I am there in due course.)

In the next essay, I take up the central claims that are thought to characterize legal positivism and to distinguish it both from natural law theory and Dworkinian interpretivism. These are (1) the separability thesis, and (2) the conventionality thesis, which is itself a version of what I call the social fact thesis. In that essay, I argue that the separability thesis cannot distinguish legal positivism from natural law theory, and that the only versions of the conventionality and social fact thesis that can be sustained are too weak to characterize legal positivism or to distinguish it from Dworkinian interpretivism. I also argue that many of the important distinctions I have outlined above cut across these three views. For example, I argue that both natural lawyers and legal positivists are committed to the centrality of an account of membership conditions to general jurisprudence while Dworkin is largely unimpressed with the importance of the property of being a 'member of a legal code.' In contrast, many natural lawyers approach jurisprudence through ideal theory whereas Dworkin and the positivists are practice-based theorists. I also develop the sense in which many Kantian natural lawyers like Shiffrin and Ripstein share with Dworkin and Perry among others an emphasis on the strong sense of the hermeneutic perspective, no legal positivist that I am aware of is

drawn to a similar approach. The closest is Shapiro who is especially keen on explaining the sociality of law – the sense in which law is a shared collective activity – and so for him what law is is importantly a function of what the relevant parties take themselves to be doing. So their self conceptions of what they are up to play a special role in jurisprudence but it is not the one that the Dworkinians and the Kantians emphasize.

I also argue that the normative/descriptive divide cuts across the positivist/other divide. Dworkinians of all stripes – including Perry as well as Dworkin – are normative jurists but so too are several positivists – including a number of respectable ones: Waldron, Postema, and Tom Campbell to name a few. On the other hand, in addition to a really respectable group of positivists including Austin, Hart, Raz and (my personal favorite – at least since I started psychoanalysis -- Coleman), some natural lawyers, including perhaps Aquinas and Mark Murphy (I don't know about Finnis) are descriptivists.

And this is just the beginning of what I argue for in the next essay. But before ending this one, I would like to conclude by saying something about at least the two major claims that are taken up in the next essay. These concern the Separability Thesis and the Social Fact/Conventionality thesis.

While there is perhaps no thesis more closely associated with legal positivism than the so-called separability thesis, I am inclined to the view that it is no part of legal positivism at all. Some may wonder whether this is too strong a claim to make. What is legal positivism if not the claim that there is no necessary connection between law and morality? The answer is that legal positivism is first and foremost a theory of the conventionality of law-making properties. If the separability thesis is a commitment of

legal positivism, it can only be because it falls out of the conventionality thesis that I have just stated. There is no reason to suppose that it does.

The separability thesis can be understood in at least two different ways. On one understanding, the claim it makes is very likely true, but hardly distinctive of legal positivism. On the alternative other – the more familiar one – it may well be false. Whether or not it is, legal positivism has no business embracing it.

Take the harmless interpretation first: Hart is most often associated with the claim that the existence of a law is one thing, its merits or demerits another. This is just another way of saying that we cannot infer the morality or legitimacy of a rule from its legality. True enough -- but is there a theorist worth taking seriously who would claim otherwise, namely, that legality entails legitimacy? If there is, I don't know who that might be.

On the other hand, if the separability thesis is interpreted as stating a conceptual truth about law or as denying that law could have essential moral properties, it may well be false. I think it is false, and even if isn't false, there is no reason why a positivist should be saddled with it.

There are many reasons for thinking that law might well have some necessary moral properties. Law regulates conduct by offering reasons for action. In doing so it addresses those it governs as agents who have the capacity to act for reasons, thus respecting their agency in ways that at least some other mechanisms for regulating human affairs need not and likely do not. Governing by reasons may be a necessary feature of

law and a morally desirable one as well.<sup>5</sup> If law has necessary moral properties, this is in principle no threat to positivism and there is no reason for a positivist to deny that such relationships between law and morality could exist. All positivists really care about is denying the inference from legality to legitimacy, but so too does everyone else.

Things are more difficult and thus more interesting with respect to the Social Fact/Conventionality Theses. I suggest that identify legal positivism with three basic tenets.<sup>6</sup> These are:

- (1) Legal facts are relative or relational facts; they are facts relative to a particular legal code.
- (2) Legal systems are codes – sets of rules<sup>7</sup> -- membership in which is determined by possession of the relevant law-making properties;
- (3) Law has a fundamentally social foundation, which is to say that the membership conditions or the grounds of law are fixed by social facts.

Let's refer to (3) as the social facts thesis. We shall see in due course that understood in any number of plausible ways the social fact thesis is too weak to distinguish legal positivism from other jurisprudential views with which it is normally contrasted. Let's then distinguish (3) from

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<sup>5</sup> Here is another example. Mark Greenberg has suggested that when law is functioning as it is supposed to, each legal obligation it imposes corresponds to a moral obligation with the same content. He refers to this as the convergence thesis and argues that it is a necessary normative property of law.

<sup>6</sup> My claim is not that these are the only features of positivism or that each tenet is unique to positivism. Certainly relativity of legal facts is not unique to positivism. For different view of the core of legal positivism see John Gardner's *Legal Positivism: 51/2 Myths*.  
Cite

<sup>7</sup> Using the term 'rule' broadly to cover all legally authorized text.

(3a)                   Wherever there is law, law-making properties are determined by social facts in such and such way (where this clause is filled in by each positivist's favored account of the social foundations of the grounds of law.)

We can see how this last clause functions by taking a look at several attempts to explain the social foundations of the grounds of law. Hart's account is the most familiar attempt to explain the social foundations of law. In his view, law exists when there is a rule of recognition that sets out the conditions of legal validity and whose own existence depends on its being practiced from the internal point of view of relevant officials. Hart's account, however, is by no means the only such effort.

Separately and in ignorance of one another's thinking at the time both Jerry Postema and I argued that law-making properties are fixed by a Lewis-like convention.<sup>8</sup> Both of us, I believe, took ourselves to be offering an account of the sense in which the rule of recognition is conventional. That view fell in and out of favor. For my part, it became untenable in the face of Scott Shapiro's objections to it.<sup>9</sup> My subsequent argument in the Practice of Principle that the criteria of legality in a community are fixed by a shared cooperative activity among relevant officials aimed to keep the sensible elements of coordination game approach while sidestepping Shapiro's objections to it.<sup>10</sup> More than anyone else, Andrei Marmor has pressed the claim that law is a conventional social practice. Finally, Scott Shapiro's own view that the foundation of law is a kind of joint

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<sup>8</sup> cite

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planning activity among relevant legal designers is yet another attempt to explain the social foundations of the grounds of law.<sup>11</sup>

Some versions of the social fact thesis advance what is arguably a narrower view: namely, that the grounds of law are fixed conventionally. If we take that to mean that the social foundations of law are a convention, then Postema and my earlier accounts of the rule of recognition as a Lewis-like convention as well as Marmor's claims that the rule of recognition is what he calls a constitutive convention are instances of this narrower version of the social fact thesis. The account in the *Practice of Principle*, Shapiro's account of law and planning and (on my current reading of Hart's position), the rule of recognition are versions of the social fact thesis, but not the conventionality thesis.

We can put the general issue in this way: it is a commonplace that law is a normative social practice. The standard view is that legal positivism does a good job of explaining the sense in which law is a social practice, but is less good at explaining the normativity of law – that is, the connection of law and reason. Legal positivists have worked hard to provide an account of the social foundations of law that also explains the ways in which law engages reason.

There are two different senses of the normativity of law: one concerns the set of reasons that constitute rational constraints that arise within law: the pressures within law for coherence and stability that arise from modeling or thinking about law as jointly intentional activity. No one has done a better job of explaining this aspect of the normativity of law than have Scott Shapiro and Michael Bratman. The trick has been to explain the relationship of law to moral and other reasons, a relationship that is

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<sup>11</sup> cite

presupposed by the very idea of law as consisting in authoritative directives.<sup>12</sup> Postema and my arguments to the effect that the rule of recognition is a coordination convention was designed to bridge the gap by showing how the social foundations of law can provide agents (in this case judges) with reasons for action.

I postpone for yet another essay the question of whether positivism can adequately explain this second sense in which law engages practical reasoning. And that is because it turns out that positivism runs into a variety of difficulties where it thought to be strongest – that is, in explaining the social foundations of law. Our immediate concern is whether legal positivism can withstand objections directed at its strong suit. It is to exploring those questions that we now turn our attention.

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<sup>12</sup> Cite to Raz